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INDIRECT TAXES LAW—II
(SALES TAX)

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I INTRODUCTION

DURING THE year under survey there was a rich crop of judicial pronouncements from the Supreme Court as also from the high courts, in the area of sales tax law. The important and the significant ones are surveyed under the heads (a) Liability; (b) Assessment; (c) Judgments under the Central Sales Tax Act, 1956; and (d) Judgments having bearing on the Constitution of India.

II LIABILITY

The question of law for adjudication before the Supreme Court in *Indian Oil Corporation Ltd.* v. *State of Assam & Ors.*[1] was whether or not the appellant was liable to pay sales tax on the enhanced sales price i.e., if the resale price of a dealer exceeded 40% of the purchase price, without any adjustment of the amount of tax already paid by the appellant. This question of law arose, because, under section 8(1)(a) of the Assam General Sales Tax Act, 1993, tax was levied in respect of goods specified in schedule II at the first point of sale within the state. If the resale price of a dealer of such goods exceeded 40% of the purchase price the resale was deemed to be at the first point of sale in the state in view of explanation 1 to section 8(1)(a) read with rule 12 of the Assam General Sales Tax Rules, 1993. The appellant purchased various petroleum products, which were specified in schedule II. In view of the resolution of the Government of India dated 16.12.1977, the appellant had to sell those products at prices fixed by the central government and the price so fixed included a surcharge to be collected from the buyers which had to be deposited in the "Oil Pool Account". The department treated the appellant's sale as the deemed first sale since the difference between the purchase price and selling price including the surcharge exceeded 40%. The department also did not allow any adjustment of the sales tax paid by the appellant to its sellers. On a writ petition the appellant claimed (i) that the

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1 (2007) 5 VST 1 (SC).

difference between the purchase price and the sale price in its hands was much less than 40% if the surcharge were not included in the sale price; and (ii) that the department was bound to give an adjustment to the sales tax paid by it to the sellers.

It was held by the Supreme Court that a conjoint reading of section 8(1) of the Act and explanations 1 and 2 leads to the conclusion that the second point of sale was shifted as the first point of sale if the resale price of a dealer exceeded 40% of the purchase price. Admittedly in this case the resale price exceeded 40% of the purchase price. It was further held that, however, the scheme of the Act, particularly section 8(1) did not envisage double taxation in the same state. Since the appellant had paid sales tax on the purchase of petroleum products, sales tax would be leviable only on the difference between the purchase price and the entire sale price. Directing the appellant to pay the sales tax on the entire amount would amount to double taxation.

It may be recalled that a constitution bench of the Supreme Court in the case of *Sunrise Associates* v. *Govt. of NCT of Delhi*[2] overruled prospectively, the earlier judgment of the apex court in *H. Anraj* v. *Govt. of Tamil Nadu*[3] which held that the lottery tickets were goods and liable to sales tax. The decision of the Supreme Court is not the same as enactment of a statute. A decision of the Supreme Court does not make the law, but merely explains it and puts in proper perspective the true position and effect of the law. The true position of law so declared exists from the very date of making the law and not from the date of declaration by the Supreme Court. When a legislature enacts a statute, it creates rights and obligations and, therefore, its operation can be prospective or retrospective depending upon the provisions of the statute. But when the Supreme Court gives a decision declaring the law, it does not create rights and obligations, but merely identifies and declares the pre-existing rights or obligations and declares the true or correct position of law. Following this judgment of the Supreme Court, the Madras High Court has, in *Priya Lotteries* v. *Deputy CTO, Chennai*,[4] allowed a writ petition and set-aside the impugned assessment order wherein sales of lottery tickets were made exigible to tax. Though the assessment order had been passed on the basis that the lottery tickets are goods whose sales are liable to be taxed, no amount had been collected from the petitioner towards tax.

As is well known, in the context of sales tax law, the same commodity at different stages could be treated as commercially different article.[5] In *A.Hajee Abdul Shukoor & Co.* v. *State of Madras*,[6] the Supreme Court held that 'hides and skins in the untanned condition are undoubtedly different as

2 (2006) 5 JT SC 168.
3 (1986) 61 STC 165 (SC).
4 (2007) 5 VST 425 (Mad).
5 *Sri Siddhi Vinayaka Coconut & Co.* v. *State of Andhra Pradesh*, AIR 1974 SC 1111.
6 AIR 1964 SC 1729.

articles of merchandise than tanned hides and skins' and pointed out that 'the fact that certain articles are mentioned under the same heading in a statute or the Constitution does not mean that they all constitute one commodity. Again, the Supreme Court in *Jagannath* v. *U.O.I.*[7] held that tobacco in the whole leaf and tobacco in the broken leaf were two different articles. In conformity with this principle, the apex court in *Kumar Motors* v. *CST, U.P.*[8] held as under: -

> In terms of form III-A of the U.P. Sales Tax Rules, 1948, a purchasing dealer would be exempt from payment of purchase tax only in the event the terms and conditions therefor are satisfied. The necessary condition for obtaining such exemption is that the dealer must sell the commodity he purchases in the same form and condition. The requirement of law, thus, is that goods once sold to a registered dealer must be sold in the same form and condition in which it was purchased. Where the assessee purchases chassis of an auto rickshaw and mounts the body on the chassis with the help of nuts and bolts and sells the auto rickshaw, he would be selling a product which is different in condition from the chassis or the body. The assessee would be liable to purchase tax under sub-section (a) of section 3-AAAA of the U.P. Sales Tax Act, 1948, and cannot claim exemption from purchase tax on the chassis or body as the terms and conditions laid down in form III-A are not satisfied.

An interesting question of law before the Supreme Court in *Federal Bank Ltd. & Ors.* v. *State of Kerala & Ors.*[9] was whether a bank, in respect of its transactions of sales of pledged goods, to recover its loans, is a dealer under the Kerala General Sales Tax Act, 1963. The court held in the affirmative observing that when a bank sells the pledged ornaments it does not act as an agent of the borrower even under the Banking Regulation Act, 1949. As pledgee the bank acting under section 176 of the Contract Act, 1872, has a right to sell the goods. That sale is not as agent but is in exercise of the statutory power under 1949 Act. The decision of the Kerala High Court in *Federal Bank Ltd.* v. *State of Kerala*[10] was affirmed. The position would however, be different, if the definition of 'dealer' in the statute takes banks within its ambit from a specified date and, in that case, the transactions of the banks prior to that date would not be liable to pay sales tax.[11]

7 AIR 1962 SC 148.
8 (2007) 4 SCC 140.
9 (2007) 4 SCC 188.
10 (2004) 134 STC 377.
11 *Government of Andhra Pradesh & Anr.* v. *Corporation Bank,* (2007) 6 VST 755 (SC).

It is settled law[12] that the registered office and branch office(s) of a company is one legal entity as they do not possess separate juridical entities. Following this principle, the Supreme Court in *State of Haryana & Ors.* v. *Nipha Exports Pvt. Ltd.*[13] has held that where the goods are purchased by a branch office in one state and sent to the head office in another state from where they are sold in the course of export to a foreign buyer the movement of the goods from the state in which the branch office is situated to the state where the head office is situated was occasioned in the course of export outside India and there could be no sale between the branch office and the head office. Accordingly, the purchases made by the branch office in its state would be immune from the levy of purchase/sales tax.[14]

Again, before the Supreme Court in *ICI India Ltd. and Anr.* v. *State of Orissa and Ors.*[15] the point of law for adjudication was whether a dealer who purchases raw material on concessional rate of tax against a declaration for manufacture of goods for sale in the state, would be entitled to the concessional rate leviable under the statute, if the dealer after manufacture of the goods does not sell the manufactured goods in the state but transfers the goods to its branch offices outside the states. The Supreme Court answered this question of law affirming the view taken by the high court, that the use of the expression "within the State of Orissa" in the fifth proviso to section 5(1) made it clear that the materials purchased must be used for manufacture of goods in the state for sale. The manufactured product, "bulk premix", had not been sold by the appellant but had been transferred to other branches of the appellant situated inside as well outside the state. The "transfer" clearly fell within the expression "any other purpose" in the fifth proviso to section 5(1). As the goods had not been sold but had been transferred there was a violation of the terms of the declaration and the appellant was rightly held liable to pay the differential sales tax on the raw materials purchased at the concessional rate.

Before the Kerala High Court in *State of Kerala* v. *K.P. Padmanabha Pada Nair & Sons*[16] an interesting point of law was whether or not the dealer was liable to pay tax on the goods which were taxable at the point of last purchase in the state. In this case the goods were not sold but were lost from the custody of the dealer and not available for resale. The court held that once the goods are lost from the custody of the dealer, they are not available for resale by the dealer and acquire the quality of last purchase. Tax was leviable on the respondent-dealer as the goods, namely, rubber, were taxable at the point of last purchase in the state.

12 *English Electric Company of India Ltd.* v. *Dy. CTO*; *Sahney Steel and Press Works Ltd. & Anr.* v. *CTO & Ors.*, (1976) 4 SCC 460.
13 (2007) 8 VST 466 (SC).
14. *Ibid*.
15 (2007) 8 SCC 629.
16 (2007) 9 VST 480.

Before the Allahabad High Court in *Commissioner of Trade Tax* v. *S/s Laxmi Vanaspati and Oil Company, Varanasi*,[17] again, an interesting point of law was whether the landlord and owner of the building in which the office of a dealer was housed could be fastened with liability of tax due against a company because the landlord/owner of the building had permitted the use of his telephone number on its letter pad and also introduced the company to the trade tax department while obtaining the registration certificate under the UP Trade Tax Act, 1948. The plea of the revenue was that the landlord / owner of the building constituted 'association of persons'. The court held in the negative observing, 'Association of persons' has not been defined under the U.P. Trade Tax Act. However, the said phrase has been the subject mater of consideration by the apex court under the Income Tax Act. In the case of *G. Murugesan and Brothers* v. *Commissioner of Income Tax* the apex court[18] has held that expression "association of person" is not a term of art. This court in the case of *Rana and Company* v. *Commissioner of Sales Tax*,[19] has held that for forming 'association of persons' the members of the association must join together for the purpose of producing an income. An 'association of persons' can be formed only when two or more individuals voluntarily combine together for a certain purpose. In other words, there should be sharing of two or more individuals to achieve a particular object with reference to sharing of profit and loss. The findings, as recorded by the assessing authority even if taken as such, do not lead to the conclusion that one of the members joined the association with a common object. At the most, he happened to be landlorad of the proprietor of the said concern and he introduced the proprietor of the said concern to the trade tax department. These facts are short of requirement to hold a person as a member of 'association of persons'.

III ASSESSMENT

Works contract

The scope of the term works contract had been widened by the Supreme Court in *K. Raheja Development Corporation* v. *State of Karnataka*,[20] wherein, the court held:

> (i) that under section 2(1)(v-i.) of the Karnataka Sales Tax Act the definition of "works contract" was very wide and was not restricted to a "work contract" as commonly understood, viz., a contract to do some work on behalf of someone else. It also included "any agreement for carrying out either for cash or for deferred payment or for any other valuable consideration, the building and

17 (2007) UPTC 1461. (All).
18 (1973) 88 ITR.
19 (2004) UPTC 228.
20 (2005) 141 STC 298 (SC).

construction of any moveable or immovable property. The definition took within its ambit any type of agreement wherein the construction of a building took place either for cash or deferred payment or valuable consideration;

(ii) that, therefore, even if the appellant was owner to the extent that it had entered into agreement to carry out construction activity on behalf of someone else for cash, deferred payment or other valuable consideration, it would be carrying out a works contract and would become liable to pay turnover tax on the transfer of goods involved in such works contract. Further, there was no distinction under the Karnataka Sales Tax Act, between construction of residential flats and construction of commercial units, and a works contract within the meaning of the term in that Act could also be for construction of commercial units. For the purpose of considering whether the agreement amounted to works contract or not the provisions of the Karnataka Ownership Flat (Regulation of Promotion of Construction, Sales Management and Transfer) Act, 1974 would have no relevance;

(iii) that the appellant was undertaking to build for the prospective purchaser on payment of price in various instalments set out in the agreement. Though the appellant was not the owner it claimed a lien on the property and it had the right to terminate the agreement and to dispose of the unit if a breach was committed by the purchaser. Merely because such a clause was included in the agreement, the agreement did not cease to be a works contract within the meaning of the term in the Act. So long as there was no termination the construction was for and on behalf of the purchaser and, therefore, the agreement remained a "works contract" within the meaning of the term as defined in the Act. So long as the agreement was entered into before the construction was complete, it would be a works contract; and

(iv) that, however, if the agreement was entered into after the flat or unit was already constructed, there would be no works contract.

During the year under survey, a case of similar nature, *Assotech Reality Pvt. Ltd.* v. *State of Uttar Pradesh & Anr.*[21] was adjudicated upon by the Allahabad High Court wherein the apex court judgment was explained and distinguished, holding that in the case before the high court the allottees did not get any right in the apartments until a sale deed was executed and registered. The result was that the petitioner himself continued to remain the owner of the apartment as also the construction thereon. The allotment letters to the intending purchasers of flats did not give any right, title and interest to the allottees even though full payment had been received by the

21 (2007) 8 VST 738 (All).

petitioner. In other words, the construction undertaken by the petitioner could not be said to have been done by the petitioner for and on behalf of the prospective allottees/purchasers who had advanced the money towards the construction of the flats. In short, the notices issued by the revenue contemplating to levy sales tax on the basis of *K. Raheja, Development Corporation* were held to be without jurisdiction and were set aside. This judgment has, however, been set aside by the Supreme Court[22] with the following directions:

> In our view thorough adjudication was required in this case. Writ petition filed by the appellant against the Order of Assessment was not maintainable. The appellant ought to have filed statutory Appeal against the assessment order. What was the nature of the right conferred on the allottees of the flat, what was the consideration for payment of installments, whether construction by the appellant was on its own account or for the allottees etc.. These questions were not capable of being decided in a writ petition.
> In the circumstances we set aside the impugned order with liberty to the appellant-assessee to move in appeal before the Appellate Authority....

The Supreme Court had, in *State of Kerala* v. *Builders Association of India*,[23] held that the method of composition in lieu of the normal method of assessment of tax in the case of contractors, engaged in the execution of works contracts, evolved in the statute, is convenient, hassle free and a simple method of assessment, as, by opting the composition method, the contractor saves himself the bother of book-keeping, assessment, appeals and all that it means. Under the composition method, it is not necessary to enquire and determine the extent or value of the goods which have been transferred in the course of the execution of the works contracts, the rate applicable to them and so on. This alternative method is optional and having once opted for composition method, a contractor cannot complain and cannot be heard to question the validity of such a method. Following this judgment, the Karnataka High Court has, in *T.H. Venkate Gowda* v. *Commissioner, Commercial Taxes*,[24] held that the dealer having once opted for composition scheme in lieu of normal assessment, was not entitled to claim that a portion of his turnover was exempt.[25]

Before the Madhya Pradesh High Court (full bench) in the case of *Jaiprakash Associates Ltd.* v. *State of Madhya Pradesh & Ors.*[26] the

22 Order Dated 03-12-2007 in CC Nos. 11480 – 11481 (unreported).
23 (1997) 2 SCC 183.
24 (2007) 5 VST 553 (Kar).
25 For a similar holding, see *Abdul Majeed* v. *State of Kera*, (20070 6 VST 417 (Ker).
26 (2007) 6 VST 1 (MP) (FB).

question for adjudication was whether or not section 35(1) of the Madhya Pradesh Commercial Tax Act, 1994 was within the competence of the state legislature. This section provided that in case of a works contract of the value exceeding one lac rupees which involves sale of any goods in the course of execution thereof by the contractor, a deduction at the rate of two per cent on the value of such works contract is to be made. There is no provision in section 35(1) of the Act for exclusion of sales outside the State of Madhya Pradesh, sales in the course of inter-state trade and commerce, sales in the course of export and import of goods. The opening words in section 35(1) of the Act further state that "notwithstanding anything contained in any other provision of this Act", the deduction has to be made at the rate of two per cent of the value of works contract. The high court, following the earlier three judgments of the Supreme Court, namely, *Steel Authority of India Ltd.* v. *State of Orissa*;[27] *Nathpa Jhakri Jt. Venture* v. *State of Himachal Pradesh*[28] and *Rapti Commission Agency* v. *State of U.P.*[29] held that the provision was *ultra vires* the Constitution of India.

The same ratio has been adopted by this high court in *Jaihind Projects Ltd.* v. *State of Madhya Pradesh & Ors.*[30] in regard to the corresponding provisions of section 26(2) of the Madhya Pradesh Value Added Tax Act, 2002 (prior to amendment by Madhya Pradesh Value Added Tax (Amendment) Act, 2007).

It will be recalled that the Supreme Court, had, in its classic judgment in *Gannon Dunkerley & Co.* v. *State of Rajasthan*,[31] *inter-alia*, given guidelines for computation of the taxable turnover in a works contract that is what has to be deducted from the gross value of the contract, in the following words:

> The value of the goods involved in the execution of a works contract will have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and service which would cover: (a) labour charges for execution of the works; (b) amount paid to a sub-contractor for labour and services; (c) charges for planning, designing and architect's fees; (d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract; (e) cost of consumables such as water, electricity, fuel, etc., used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; (f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services; (g) other similar expenses relatable

27 (2000) 3 SCC 200.
28 (2000) 3 SCC 319.
29 (2006) 6 SCC 522.
30 (2008) 8 VST 1 (MP).
31 (1993) 1 SCC 364.

> to supply of labour and services; (h) profit earned by the contractor to the extent it is relatable to supply of labour and services. The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor.

The same principles have been reiterated by the apex court in *State of Jharkhand & Ors.* v. *Voltas Ltd*.[32]

Sale

The 'deemed sale' of 'transfer of the right to use goods' within the meaning of article 366(29-A)(d) of the Constitution of India as included under the term 'sale' of every State Sales Tax/VAT Act, and the Central Sales Tax Act, 1956 is a judicially well ploughed subject, by a catena of judgments of the Supreme Court[33] as also of the high courts.[34]

The quintessence of the ingredients of the 'transfer of the right to use goods' have been crystallised by the Supreme Court in *BSNL* case in the following words:

> To constitute a transaction for the transfer of the right to use the goods the transaction must have the following attributes:
> (a) there must be goods available for delivery;
> (b) There must be a consensus ad idem as to the identity of the goods;
> (c) The transferee should have a legal right to use the goods – consequently all legal consequences of such use including any permissions or licences required therefor should be available to the transferee;
> (d) For the period during which the transferee has such legal right, it has to be to exclusion to the transferor – this is the necessary concomitant of the plain language of the statue, viz., a 'transfer of the right to use' and not merely a licence to use the goods;
> (e) Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to others.

The above guidelines have been followed by the Gauhati High Court in its two judgments in *H.L.S. Asia Ltd.* v. *State of Assam & Ors.*;[35] *Peerless Shipping and Oil Field Services Ltd. & Anr.* v. *State of Assam & Ors*.[36]

32 (2007) 7 VST 317.
33 *20th Century Finance Corporation Ltd.* v. *State of Maharashtra*, (2000) 119 STC 182 (SC)
34 *Aggarwal Brothers* v. *State of Haryana & Anr*, (1999) 9 SCC 182; *State of Andhra Pradesh* v. *Rashtriya Ispat Nigam Ltd.,* (2002) JT 2 (SC) 493; *Bharat Sanchar Nigam Ltd.* v. *UOI,* (2006) 3 SCC 1 (para-97); *Rashtriya Ispat Nigam Ltd.* v. *CTO, Andhra Pradesh,* (1990) 77 STC 182; *State of Tripura* v. *Tripura Bus Syndicate* (2001) 122 STC 175 (Gau.).
35 (2007) 8 VST 314 (Gau).
36 (2007) 8 VST 330 (Gau).

A constitution bench of the Supreme Court in *20th Century Finance Corporation Ltd.* v. *State of Maharashtra*[37] explained this concept of the 'transfer of the right to use goods' in the following words:

> The State cannot levy a tax on the transfer of the right to use goods on the basis that one of the events in the chain of events has taken place within the State. The delivery of goods may be one of the elements of transfer of the right to use, but that would not be the condition precedent for a contract of transfer of the right to use goods. Where a party has entered into a formal contract and the goods are available for delivery irrespective of the place where they are located, the situs of such sale would be where the property in the goods passes, namely, where the contract is entered into. Clause (29A) of article 366 cannot be read as implying that the tax under sub-clause (d) is to be imposed not on the transfer of the right to use goods but on the delivery of the goods for use. In the case of sub-clause (d) the goods are not required to be left with the transferee; all that is required is that there is a transfer of the right to use goods. On a plain construction of sub-clause (d) of clause (29A) the taxable event is the transfer of the right to use goods regardless of when or whether the goods are delivered for use. Given that the locus of the deemed sale is the place where the right to use the goods is transferred, where the goods are when the right to use them is transferred is of no relevance to the locus of the deemed sale. Also of no relevance to the deemed sale is where the goods are delivered for use pursuant to the transfer of the right to use them, though it may be that in the case of an oral or implied transfer of the right to use goods it is effective by the delivery of the goods. Where the goods are in existence, the taxable event on the transfer of the right to use goods occurs when a contract is executed between the lessor and the lessee and the situs of the sale of such a deemed sale would be the place where the contract in respect thereof is executed.

Applying the principle enunciated in the above judgment, the Kerala High Court in *First Leasing Company of India Ltd.* v. *State of Kerala*,[38] held that the lease agreements executed by the petitioner were in respect of leasing of equipments which were not in existence at that time or at least not purchased or possessed by the petitioner and therefore the lease agreements were for leasing of future goods to be acquired by the lessors. Consequently, the lease transactions pursuant to lease agreements executed by the petitioner without acquiring the goods to be leased out, operate only on delivery of the goods to the lessee. It was, accordingly, held that such lease agreements operate only on delivery of goods.

37 See, *supra* note 33.
38 (2007) 6 VST 805 (Ker).

Before the Supreme Court in *State of Orissa and Anr.* v. *Asiatic Gases Ltd*.,[39] an interesting point of law for adjudication by the court was whether retention charges of cylinders containing medical oxygen and industrial gases, recovered from the customers for retention of cylinders beyond a specified date, come within the ambit of the term 'transfer of the right to use goods'. The court held that medical oxygen or industrial gases could not be sold without containers. The property in those goods could not pass to the customers without the containers. Therefore, the containers constituted an integral part of the medical oxygen and industrial gas. Section 2(g)(iv) of the Orissa Sales Tax Act, provided that 'sale' shall mean any transfer of property in goods and included the transfer of the right to use such goods. The tax sought to be levied on such retention charges was on the transfer of the right to use goods for consideration and the levy was proper.

It is well settled in law[40] 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 goods, which presupposes capacity to contract, that it must 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.

Before the Kerala High Court in *State Bank of India* v. *State of Kerala*,[41] an important point of law for adjudication was as to when a sale takes place. The brief facts of the case were that the invoice for the sale of bullion though made in the subsequent year after fixation of price but the delivery of the goods, that is, bullion was effected to the exporters in the preceding year. The petitioner contended that the sale in question took place in the subsequent year when the invoice was issued after fixation of the price. However, the court dismissed the revision petition of the petitioner holding that by delivery of goods against receipt of substantial payment, the bank had in fact effected "sale" as defined under section 2(xxi) of the Kerala General Sales Tax Act, 1963. In fact, the purchasers were exporters and on taking delivery of the goods from the petitioners, the exporters were free to manufacture ornaments from the bullion purchased and could export/sell the same. Therefore, delivery of goods was pursuant to contract of sale and all what was left was only finalization of price and raising of final invoice. Since the sale took place on delivery of goods under terms of contract, the transaction was rightly assessed in the year in which delivery was given.

It has been held in a catena of judgments of the Supreme Court,[42] that when the material is supplied by the contractee to the contractor for the purpose of performing the contract only, and the value of such quantity of

39 (2007) 7 VST 531 (SC).

40 *State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd*., AIR 1958 SC 560.

41 (2007) 7 VST 621 (Ker).

42 *Hindustan Steel Ltd*. v. *State of Orissa*, AIR 1970 SC 253; *N.M. Goyal and Co*. v. *Sales Tax Officer,* AIR 1989 SC 285; *Rashtriay Ispat Nigam Ltd*. v. *State of Andhra Pradesh,* (1998) 8 SCC 439; and *Karya Palak Engineer, CPWD* v. *Rajasthan Taxation Board*, (2004) 136 STC 641 (SC).

materials and stores so supplied was specified at a rate and got set off or deducted from any sum due or to become due to the contractor, the said transaction satisfied the definition of 'sale' as there is transfer of property in goods in such transactions. The same principle has been followed by the Uttranchal High Court in *Tanakpur Jal Vidyut Pariyojna* v. *Commissioner, Trade Tax*[43] and held that supply of cement and steel by the corporation at agreed cost and deduction from monthly running bills at specified rate was sale under the Act.

Assessment

The Supreme Court in *Girdhari Lal NanneLal* v. *Sales Tax Commissioner*[44] had held that the approach which may be permissible for imposing liability for payment of income-tax in respect of the unexplained acquisition of money may not hold good in a sales tax case. For the purpose of income-tax it may in appropriate cases be permissible to treat unexplained acquisition of money by the assessee to be the assessee's income from undisclosed sources and assess him as such. As against that, for the purpose of levy of sales tax it would be necessary not only to show that the source of money has not been explained but also to show the existence of some material to indicate that the acquisition of money by the assessee has resulted from transactions liable to sales tax and not from other sources. Following this judgment, the Punjab & Haryana High Court in *New Mehtab, Radio Ludhiana* v. *State of Punjab and Ors.*,[45] likewise, held that surrender of unexplained acquisition of money by the petitioner before the income-tax authorities could not be the sole basis for assessment under the Sales Tax Act. The question whether acquisition of money by the petitioner had resulted from transactions liable to sale tax would have to be examined.

The Madras High Court in Amutha Metals[46] had to examine the validity of an assessment made and it came to the conclusion that admittedly, the petitioner had given objections to the pre-revision notice. The objections had to be considered by the assessing officer on their own merits. The assessment orders had been passed without considering the objections and by taking note of the proposal of the enforcement officers. Therefore, the orders of assessment had to be set aside and the assessing officer directed to consider each one of the objections raised by the petitioners and give reasons.

Again, before this very high court in *Vishal Agencies* v. *CTO, Madurai & Ors.*,[47] the question for consideration was whether or not the dealer was entitled to have copies of the seized records. It held if that the copies of the seized records are furnished to the dealers prior to the production and

43 (2007) 5 VST 65 (Uttra).
44 AIR 1977 SC 298.
45 (2007) 8 VST 472 (P & H).
46 *Amutha Metals* v. *C T O, Chennai*. (2007) 9 VST 478 (Mad).
47 (2007) 10 VST 123 (Mad).

checking of accounts, the dealers might account for the incriminating documents in their accounts and place them before the authorities as if the entries corresponding to the documents were already made and incorporated in the books of account, which have been maintained in the regular course of business. In order to avoid this sort of manipulation, as and when the dealer applies for copies of seized records, it is obligatory on the part of the dealer to produce the accounts before the authorities and have them checked with the seized records and thereafter obtain copies of the seized records.

Best judgment assessment

This is a judicially well ploughed subject but paradoxically best judgment assessments made are, by and large, seldom in conformity with the principles enunciated. It is, therefore, necessary to first note down a few such settled principles of 'best judgment assessment'. These are as under:

The Supreme Court in *Raghubar Mandal Harihar Mandal* v. *The State of Bihar*,[48] following its earlier judgment in *Dhakeswari Cotton Mills Ltd.* v. *CIT*,[49] the Court held that in making an assessment u/s 10(2)(b) the Sales Tax Officer is not fettered by technical rules of evidence and pleadings and he is entitled to act on material which may not be accepted as evidence in a Court of law, but he is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment....

In *State of Orissa* v. *Maharaja Shri B.P. Singh Deo*[50] the court held, "that the mere fact that the materials placed by the assessee were unreliable did not empower the Assistant Collector to make an arbitrary order of enhancement. The power to levy assessment on the basis of best judgment was not an arbitrary power, the assessment had to be based on relevant material."

Again the apex Court in *State of Kerala* v. *C. Velukutty*[51] observed that "The limits of the power are implicit in the expression "best of his judgment". Judgment is a faculty to decide matters with wisdom truly and legally. Judgment does not depend upon the arbitrary caprice of a judge, but on settled and invariable principles of justice. Though there is an element of guess work in a best judgment assessment, it shall not be a wild one, but shall have a reasonable nexus to the available material and the circumstances of each case...."

The Punjab & Haryana High Court has also in *S. Sant Singh* v. *The Assessing Authority, Amritsar, and Ors*.[52] observed that "it has been well-settled by their Lordships of the Supreme court that even for the purposes

48 AIR 1957 SC 810.
49 (1955) 26 ITR 775 (SC).
50. (1970) 76 ITR 690 (SC).
51 (1966) 17 STC 465 (SC).
52 (1971) 28 STC 567-569 (P & H).

of making a best judgment assessment the material and the basis of that assessment should be disclosed to the assessee who should be afforded an opportunity to rebut the same, if he can."

In *Melton India* v. *Commissioner of Trade & Taxes, U.P.*[53] the facts were that the appellate tribunal had rejected the books of the assessee on the grounds that (i) during the years larger consumption of electricity was shown as against lesser production; (ii) labour expenses were the same; (iii) books showing payment of wages to workers and separate accounts for job work done were not produced; (iv) there was no verification of raw material, etc., and the turnover was estimated on the basis of consumption of electricity. The high court dismissed the assessee's application for revision. On appeal to the Supreme Court, it was held, affirming the decision of the high court, that the findings of the tribunal regarding non-maintenance of proper accounts and suppression of production and turnover were findings of facts which could not be interfered with unless there was an error of law. Excessive power consumption, *prima-facie*, established assessee's intention to suppress production and the turnover.

Before the Allahabad High Court in *Vivek Coal Depot* v. *Commissioner, Trade & Tax, U.P., Lucknow*,[54] best judgment assessment was made because the dealer did not maintain cash book and ledger and in the purchase vouchers complete names and addresses were not mentioned and that therefore, the purchases were not verified. The tribunal also formed that delivery order for 38 tonnes of coal was issued to the petitioner dealer but it was claimed that it was not lifted but no evidence was adduced. On appeal, the high court held, that merely because cash book and ledger had not been maintained, the books of account could not be rejected if the dealer maintained other books of account and from such books of account, purchases and sales could be verified. The tribunal was directed to examine whether the purchases and sales were verifiable from other books of account. It was further directed that the tribunal might also consider the explanation of the petitioner dealer in respect of the various objections raised by the assessing authority and decide the appeal afresh.

The Uttaranchal High Court in *Commissioner, Sales-tax, U.P.* v. *Ratan Lal Sah and Sons*[55] modified a best judgment assessment holding that there was no evidence on record on the basis of which it could be said that India-made foreign liquor was being imported into the state by the respondent. Although the manufacturer of this foreign liquor had its unit within the State of U.P., the latter part of section 12-A of the Act, raises a rebuttable presumption and once a dealer has led all primary evidence or placed all relevant facts before the assessing authority under the law he has discharged

53 (2007) 2 SCC 705.
54 (2007) 6 VST 84 (All).
55 (2007) 8 VST 37 (Uttara).

the burden of proof that lay on him. Since the respondent claimed that it was not an import made by him, he had to establish that he had purchased that liquor directly from the manufacturer which was not possible because he was not the holder of F.L.2. Once it was found that the dealer had concealed purchases it might be presumed that he might have done so on other occasions also during the year and in such estimate guess-work could not be avoided but the guess-work should reveal some nexus between the turnover disclosed and the turnover determined. The turnover disclosed in the instant case was taken as Rs. 48,000. The tribunal having recorded the finding of fact that there was no other evidence on the basis of which it could be said that the respondent had indulged in such activities on other occasions also during the year, it would be sufficient to determine the tax liability on the amount of Rs. 50,000. The order passed by the sales tax tribunal was thus held to be justified.

Before the Gauhati High Court in *MD Kalim* v. *State of Assam & Ors.*,[56] the question of law for determination was whether the *ex-parte* best judgment assessment made against the petitioner was valid. The high court dismissed the petition and held that in a situation where the petitioner failed to file his returns it was open to the assessing officer to proceed and complete that assessment according to his best judgment. The aforesaid course of action authorised under the provisions of section 17(5) of the Assam General Sales Tax Act, 1993 was adopted by the assessing officer. In doing so, the assessing officer relied on the report of the inspector of taxes which would indicate that it was submitted on the basis of materials collected from the inter-state check-post. In such circumstances the assessment made could not be faulted and the same was affirmed.

Re-assessment

Law is well settled that re-opening of an assessment already finalised is not permissible on mere change of opinion. This principle has been reiterated by the Supreme Court in *Binani Industries Ltd.* v. *Assistant Commissioner, C.T., Bangalore & Ors*.[57]

It may be recalled that the Supreme Court had, in *State of Andhra Pradesh* v. *M. Ramakishtaiah & Co.*,[58] held that when there was inordinate delay in serving the copy of the *ex parte* reassessment order and the demand notice for which there was no explanation for the inordinate delay, there was a valid presumption that the *ex parte* reassessment order passed, was hit by the limitation bar. Referring to this judgment, the West Bengal Taxation Tribunal in *Umedhbai & Co. & Anr.* v. *C.C.T. West Bengal & Ors.*[59] held, allowing the application, that the direction to make fresh assessment was

56 (2007) 8 VST 689 (Gau).
57 (2007) 6 VST 783 (SC).
58 (1994) 93 STC 406 (SC).
59 (2007) 9 VST 450 (WBTT).

given by the assistant commissioner to the C.T.O. on 20.8.1987 and it should have been completed within four years. A copy of the reassessment order dated 19.8.1991, just one day before the period of limitation expired, and, demand notice, were served on the petitioner on 21.10.1994, i.e., after three years and that too, at the request of the petitioner. The delay in service of the copy of the order and notice of demand without explanation would give rise to the presumption that the *ex parte* order of reassessment alleged to have been passed on 19.8.1991 had been passed beyond the time prescribed under the West Bengal Sales Tax Act, 1994. Accordingly, the order was liable to be set aside.

Before the Allahabad High Court in *Shyam Lal Kamlesh Kumar* v. *Commissioner of Trade Tax, U.P.*[60] the facts were that the petitioner carried on business in foodgrains, oil seed, etc. On the basis of information received from *mandi samiti* that he was issued 90 gate passes, 59 of which alone were verified during the assessment proceeding, proceedings for reassessment were initiated against him. The petitioner was asked to produce the *satti bahi* and stock register, issued by the *mandi samiti* but instead the stock register and *satti bahi* as required by the SMI department were produced. The assessing authority treated the transactions relating to the 31 gate passes as suppressed transaction and estimated the turnover both under the U.P. Trade Tax Act, as well as under the Central Sales Tax Act, 1956. Appeals filed to the deputy commissioner and the appellate tribunal were dismissed. The high court, however, held, that it is a settled principle of law that under section 21 of the Act the burden lies upon the revenue to prove its case. Since it was the case of the assessing authority that the information had been received from the *mandi samiti* relating to the transactions under the 31 gate passes alleged to have been issued to the petitioner, in the case of denial by the petitioner the burden lay upon the revenue authority to prove the authenticity of the information, which could be done by confronting the petitioner with the documents relating to the mandi samiti which had not been done. In the circumstances, the case was remanded with the direction to the assessing authority to make further inquiry in the matter.

The same high court in *Jain Coal Traders* v. *Commissioner Trade Tax, U.P.*[61] quashed the impugned order of reassessment as according to the court the notice of reassessment was not served on the petitioner in accordance with law. It may be recalled that a full bench of this very high court in *Laxmi Narain Anand Prakash* v. *CST*[62] had held that a notice of reassessment under section 21 of the Act, on the dealer is a condition precedent for a valid reassessment proceeding.

60 (2007) 9 VST 608 (All).
61 (2007) 10 VST 694 (All).
62 (1980) 46 STC 71.

Check-post provisions

In every fiscal statute, there are adequate provisions to check tax evasion also. The observations of the apex court in *Commissioner of Commercial Taxes* v. *Ramkishan Shrikishan Jhaver*[63] are pertinent in this context:

> While making a law under any entry in the Schedule to the Constitution it is competent to the Legislature to make all such incidental and ancillary provisions as may be necessary to effectuate the law; particularly, in the case of a taxing statute, it is open to the Legislature to enact provisions which would check evasion of tax. It is under this power to check evasion that provision for search and seizure is made in many taxing statutes. The Legislature has therefore power to provide for search and seizure in connection with taxation laws in order that evasion may be checked.

On this subject a judgment of the Supreme Court in *Guljag Industries* v. *Commercial Tax Officer*[64] in the context of Rajasthan Sales Tax Law, may first be noticed. In this case the declarations accompanying the goods were blank though signed by the assessee were in the Court has held:

> There is dichotomy between contravention of section 78(2) of the Rajasthan Sales Tax Act, 1994, which invites strict civil liability on the assessee and the evasion of tax. When a statement of import/ export is not filed before the assessing officer it results in evasion of tax. However, when goods in movement are carried without declaration Form No. 18A/18C then strict liability comes in, in the form of section 78(5). Breach of section 78(2) imposes strict liability under section 78(5) because goods in movement cannot be carried without Form 18A/18C.
>
> The object behind enacting section 78(5) is to emphasise loss of revenue and to provide a remedy for such loss. It is not the object of that section to punish the offender for having committed an economic offence and deter him from committing such offences. The penalty imposed under section 78(5) is a civil liability. Wilful consignment is not an essential ingredient for attracting civil liability as in the case of prosecution.
>
> Section 78(2) is a mandatory provision. If declaration Form 18A/ 18C does not support goods in movement because it is left blank, section 78(5) provides for imposition of monetary penalty for non-compliance. Default or failure to comply with section 78(2) is the failure or default of a statutory civil obligation and proceedings under section 78(5) are neither criminal nor quasi-criminal in nature. The penalty is for statutory offence. Therefore, there is no

63 (1967) 20 STC 453 (SC).
64 (2007) 9 VST 1 (SC).

> question of intention or mens rea as the same is excluded from the category of essential elements for imposing the penalty. Penalty under section 78(5) is attached as soon as there is contravention of statutory obligations. Intention of the parties committing such violation is wholly irrelevant.
>
> Declaration in form 18A/18C has to be given even in respect of goods in the movement of inter-State sales. It is for contravention of section 78(2) that penalty is attracted under section 78(5). Whether the goods are put in movement under local sales, imports, exports or inter-State transactions, they are goods in movement, and, therefore, they have to be supported by the requisite declaration. It is not open to the assessee to contravene and say that the goods were exempt. Without disclosing the nature of the transaction it cannot be said that the transaction was exempt.

The court distinguished its earlier judgment in *State of Rajasthan* v. *D.P. Metals*[65] observing that in the present case the court was not concerned with false or forged documents/declaration. In the instant case the goods in movement were carried with the blank declaration form 18A/18C which was duly signed by the assessee and for this reason the court held, that the goods in movement were carried without the prescribed declaration.

The court also distinguished its earlier judgment in *Sodhi transport Co.* v. *State of U.P.*[66] and observed that, in that case the constitutional validity of section 28(b) of the said Act was in question. It was held that since section 28(b) created rebuttable presumption as regards the proof of a set of circumstances, the effect of such a provision was to shift the burden of proof to the assessee who was given an opportunity to displace the presumption by leading evidence. Hence, this judgment has also no relevance in the present case.

The Supreme Court in *Assistant Commissioner, Anti-Evasion, Commercial Taxes, Bharatpur* v. *Amtek India Ltd.*[67] has, *inter-alia*, observed "It is unfortunate that in a large number of cases, orders, totally bereft of rationality are being passed. They do not in any manner serve public interest, much less the interest of Revenue."

The Punjab & Haryana High Court in *Xcell Automation* v. *Government of Punjab and Anr.*,[68] has, considering that the orders passed by the check-post officers are normally not according to law, tendered the following advice:

> The exercise of power at the check-post, to be valid, should have reasonable nexus with the attempt at evasion. Straight-jacket

65 (2002) 1 SCC 279.
66 (1986) 62 STC 381 (SC).
67 (2007) 6 VST 242.
68 (2007) 5 VST 308 (P & H).

> approach is not called for and each instance of exercise of power has to be seen in the light of individual facts. Neither exercise of power can be restricted, wherever required for checking attempt at evasion nor can be extended to areas where there was no attempt at evasion. Where relevant documents are duly produced but a bona-fide plea against taxability is raised and there is neither mis-declaration nor concealment, exercise of power of imposing penalty at the check-post on the ground of attempt at evasion may not be called for."
>
> The Court further observed that "in the case of the petitioner, contention raised by him that the cast iron castings carried by it were not "cast iron" liable to tax at the first stage, could not be held to be requiring no adjudication or frivolous or mala fide. It is not relevant as to what is the interpretation finally taken on this subject. The petitioner having not concealed any information, and having placed reliance on the judgments of the Supreme Court in Bengal Iron Corporation Vs. CTO[69] and Vasantham Foundry Vs. UOI,[70] the matter did require serious consideration, and adjudication by the check-post officer was not called for. In such a situation invocation of jurisdiction for imposing penalty on the allegation of attempt at evasion was not permissible.

The West Bengal Taxation Tribunal in *Ajay Kumar Gupta & Anr.* v. *CTO, Durgapur & Ors.*[71] after examining the case of alleged evasion on the part of applicant, held, allowing the application, that admittedly the challan, cash memo and the document showing the quantity, weight, value and description of the goods were produced before the respondent when the vehicle was intercepted. Neither the provisions of section 73 nor rule 214C warranted demand of stock register and other documents as a legal ground for seizure of the goods under transportation. Therefore, the seizure of the goods was bad and liable to be set aside.

Before the same tribunal, in *Sri Subir Dass Gupta* v. *ACCT, Howrah & Ors.*,[72] the petitioner was transporting 72 rolls of HDPE fabrics and 105 bags of multifilament yarn in a vehicle from Bihar to Orissa using West Bengal as the corridor. When the truck was on its way to its destination to Orissa and reached the district of Howrah, the assistant commissioner of commercial taxes intercepted the vehicle, asked the driver to produce all the documents, then detained the vehicle and issued notice of demand imposing penalty of Rs. 1,54,135. The taxation tribunal held that as HDPE fabric was not liable to payment of tax, the amount of penalty imposed taking into account the value thereof was bad in law and, accordingly, the imposition of

69 (1993) 90 STC 47.
70 (1995) 99 STC 87.
71 (2007) 8 VST 631 (WBTT).
72 (2007) 9 VST 606 (WBTT).

penalty was set aside. Regarding imposition of penalty on the multifilament yarn, the matter was remanded to the assistant commissioner of commercial taxes.

The Allahabad High Court in *Commissioner of Sales-tax, U.P.* v. *Prakash Tubes Ltd.*,[73] in the context of check-post provisions under the U.P. Trade Tax Act, 1948 and the Rules framed there-under, held:

> [T]hat a perusal of the provisions of section 15(1)(o) and section 28-A of the Act and rule 87 and rule 83(4) of the U.P. Trade Tax Rules, 1948 reveals that if the goods are to be taken from outside the State of U.P. to some other State through the State of U.P. the dealer is required to produce form No. 34 at the time of inspection in U.P. The respondent had some goods of Delhi Headquarters so the respondent loaded both the goods in the truck and found it convenient to bring the goods to Kashipur via Delhi. At the inspection the respondent produced form No. 34 for taking the goods to Delhi from Indore through U.P. and form No. 31 for importing the goods from Delhi to Kashipur. There was no violation of any rule or section 28-A. The first Appellate authority as well as the Tribunal were justified in holding that the respondent had valid documents and there was no violation of section 28-A and the respondent was not liable to pay the penalty as imposed.

Before the Karnataka High Court in *State of Karnataka & Anr.* v. *Century Automoblies*,[74] the person-in-charge of the vehicle was carrying ten brand new motor cycles. The bill of sale and the delivery note obtained from the prescribed authority in respect of the goods which were transported were available but the same were not accompanying the goods. Even the document relied on was not produced for inspection before the check-post authorities as required under the Act. When the noncompliance of the statutory provisions was pointed out the person-in-charge of the vehicle did not dispute it and the penalty was also paid without any protest. Therefore, it was clear that there was a contravention of the statutory provision, admission of non-compliance of the statutory provisions and consequent admission of liability to pay the penalty. In the light of these undisputed facts, it was held that the tribunal was not justified in interfering with the order-imposing penalty.

Natural justice

Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage

73 (2007) 8 VST 151 (All); see also *Radha Ballabh Satish Chandra* v. *Commissioner of Sales Tax, UP,* (2007) 7 VST 555 (All).

74 (2007) 10 VST 41 (Karn).

of justice. Natural justice is an inseparable ingredient of fairness and reasonableness. It is even said that the principles of natural justice must be read into unoccupied interstices of the statute, unless there is a clear mandate to the contrary.[75] It is an implied requirement of the principles of natural justice that before imposing a penalty, notices are required to be both issued and served upon the assessee to enable it to defend itself in the penalty proceedings.[76] It is trite that the imposition of any penalty has adverse civil consequences and has to be preceded by the affording of an opportunity of being heard to the assessee. Only then can the assessee urge factors relevant to the question of penalty independent of the explanations offered during the assessment proceedings. It affords a chance to the assessee to show why penalty should be either waived altogether or should be less than what is proposed by the department. The dictum that when an authority takes a decision which may have civil consequences and affects the rights of a person, a prior opportunity of hearing is a *sine-qua-non*.[77] The same is the view expressed by the Orissa High Court in *Ramkumar Jaigopal* v. *Assistant Commissioner of Sales-tax, Sambalpur*.[78]

Before the Supreme Court in *Commissioner of Central Excise, Bangalore* v. *Brindavan Beverages (P) Ltd. & Ors*.,[79] the appellant revenue contended that two brothers were directors in all the companies whose brand names the respondent was using and since the said companies could not have availed the benefits, they had created dummy concerns to avail the benefits.

Opposing the appeal, the respondents submitted that there was no material on record to show that the respondents had any role to play in such matters as alleged by the revenue. Even the show-cause notice did not refer to any particular material to come to such a conclusion.

Dismissing the appeals, the Supreme Court held that in the show-cause notice there was nothing specific as to the role of the respondents, if any. The arrangements as alleged have not been shown to be within the knowledge or at the behest or with the connivance of the respondents. Independent arrangements were entered into by the respondents with the franchiser.

There is no allegation that the respondents were parties to any arrangement. The show-cause notice is the foundation on which the department has to build up its case. If the allegations in the show-cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show-cause notice. In the

75 *Suresh Chandra Nanhorya* v. *Rajendra Rajak and Ors*., (2006) 7 SCC 800-801 (paras – 8 & 11).

76 *Shyam Gopal Charitable Trust* v. *Director of Income-tax (Exemption)*, (2007) 290 ITR 99 (Delhi).

77 *State of Maharaashtra* v. *Public Concern for Govt. Trust & Ors*., (2007) 3 SCC 587-591 (para-39).

78 (2007) 7 VST 613 (Ori).

79 (2007) 5 SCC 388.

instant case, the appellant has tried to highlight the alleged connection between the various concerns. That was not sufficient to proceed against the respondents.

It is trite that the principles of natural justice are not rigid but flexible according to the facts and circumstances of a case. It is equally true that the principle of natural justice is not an unruly horse. When the facts are admitted no further enquiry is required to be done. In *State of Kerala* v. *K.T. Shaduli Yusuff*,[80] PN Bhagwati, J (as be then was), while laying down the applicability of the principles of the natural justice in fiscal statute, has observed that "...rule which requires an opportunity to be heard to be given to a person likely to be affected by a decision is also, like the genus of which it is a species, not an inflexible rule having a fixed connotation. It has a variable content depending on the nature of the inquiry, the framework of the law under which it is held, the constitution of the authority holding the inquiry, the nature and character of the rights affected and the consequences flowing from the decision. It is, therefore, not possible to say that in every case the rule of audi alteram partem requires that a particular specified procedure is to be followed. It may be that in a given case the rule of audi alteram partem may import a requirement that witnesses whose statements are sought to be relied upon by the authority holding the inquiry should be permitted to be cross-examined by the party affected while in some other case it may not. The procedure required to be adopted for giving an opportunity a person to be heard must necessarily depend on the facts and circumstances of each case."

The quintessence of the principles of natural justice, as discussed above, is that the affected person must be given a reasonable opportunity of being heard. What is reasonable opportunity of being heard is no longer *res-integra*.[81]

IV JUDGMENTS UNDER THE CENTRAL SALES TAX ACT, 1956

Deemed sale in the course of export

It may be recalled that prior to the passing of the Central Sales Tax (Amendment) Act, 1976, by which sub-section (3) was added to section 5 of the Central Sales Tax Act, 1956 w.e.f. 01.04.1976, the Supreme Court had, in *Coffee Board, Bangalore* v. *JT. CTO*[82] and *Mohd. Serajuddin* v. *State of Orissa*,[83] held that the expression "in the course of export", within the meaning of article 286(1)(b) of the Constitution of India, envisaged only one

80 (1977) 39 STC 478–482 (SC).

81 AIR 1958 SC 300; *Kant Lal Babu Lal & Bros.* v. *H.C. Patel,* AIR 1968 SC 445; *Anand Issardas Motiani* v. *Virji Raid,* AIR 1984 (Bom.) 39-45 (para – 17); and *M Appukutty* v. *STO Kozhikode,* (1966) 17 STC 380 at 387 (Ker).

82 AIR 1971 SC 870.

83 AIR 1975 SC 1564.

sale and that one sale could be only between the parties between whom there was privity of contract. In other words, the first sale between the Indian supplier to the Indian exporter would be sale for export and liable to tax and the second sale between the Indian exporter and the foreign buyer between whom there is privity of contract, would be a sale in the course of export exempt from the levy of sales-tax. These judgments left an adverse impact on the export trade of the country; and, with a view to alleviate this adverse effect on the export trade, section 5 of the Central Sales Tax Act, was amended by adding sub-section (3) therein which reads as under:

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

This sub-section was adjudicated upon by the Supreme Court in *Consolidated Coffee Ltd.* v. *Coffee Board, Bangalore*,[84] wherein it was, *inter-alia*, held:

> Section 5(3) has been enacted to extend the exemption from tax liability under the Act not to any kind of penultimate sale but only to such penultimate sale as satisfies the two conditions specified therein, namely, (a) that such penultimate sale must take place (i.e., become complete) after the agreement or order under which the goods are to be exported and (b) it must be for the purpose of complying with such agreement or order and it is only then that such penultimate sale is deemed to be a sale in the course of export.
> 'The agreement' occurring in the phrase 'the agreement or order for or in relation to such export' in section 5(3) means or refers to the agreement with a foreign buyer and not an agreement or any agreement with a local party containing the covenant to export. Therefore, the obligation to export arising from an agreement or order with a foreign buyer alone would constitute the penultimate sale a sale in the course of export to claim the exemption under section 5(3).

During the year under survey, before the Kerala High Court in *Gupta Enterprises* v. *CTO, Munnar & Ors*.[85] the brief facts of the case were that the petitioner engaged in the export of sandalwood participated in forest

84 AIR 1980 SC 1468. See also, *Vijaya Laxmi Carhen Co.* v. *DCTO*, (1996) 100 STC 571 (SC).
85 (2007) 10 VST 680 (Ker).

auctions held by the Kerala Forest Department and successfully bid but claimed exemption under section 5(3) of the CST Act when called upon to pay the sales tax due under the state Act, along with the consideration but it was rejected. In writ petitions for a direction to release the goods without collecting sales tax on furnishing documents in support of the claim of exemption, the court, following the Supreme Court judgment in *Sterling Foods* v. *State of Karnataka*,[86] and, declaring the earlier judgment of the apex court in *'Consolidated Coffee Ltd*.' to be *per incuriam*, held as under:

> A plain reading of section 5(3) of the Central Sales Tax Act, 1956 makes it clear that in order to attract the applicability of that provision it is necessary that the goods which are purchased by an assessee for the purpose of complying with the agreement or order for or in relation to export, must be the same goods which are exported out of the territory of India. The words "those goods" in this sub-section are clearly referable to "any goods" mentioned in the preceding part of the sub-section and it is therefore obvious that the goods purchased by the assessee and the goods exported by him must be the same. If in commercial parlance and according to what is understood in the trade by the dealer and the consumer, the goods retain their original character and identity, they do not become a new distinct commodity and section 5(3) of the CST Act would be attracted. As a necessary corollary, it has to be held that where, original character and identity of the goods involved in the penultimate sale under-goes a change or transformation in character and identity in commercial parlance, section 5(3) of the CST Act does not apply....

The court fortified its view observing that in cases where the questions involved were as to the appropriate entry into which paricular goods may fall, under the different sales tax and other fiscal laws, it has been held by the apex court that sales tax law is intended to tax sale or supply of different commercial commodities and as soon as a separate commercial commodity comes into existence or emerges from the production or manufacture, it becomes a separately taxable entity of goods for the purpose of sales tax.[87] In the instant case, the court noticed that sandalwood in the form of billets, roots, etc. purchased by the petitioner were not capable of being exported in terms of exim policy and export licence issued to petitioner. These goods had to be converted into chips of description covered by export licence.

86 (10\986) 3 SCC 469.

87 Reliance for this view was placed on *State of AP* v. *Modern Proteins Ltd*; (1994) Suppl. 2 SCC 496; *Ganesh Trading co.* v. *State of Haryana:* (1974) 3 SCC 620*; State of Karnataka* v. *B. Radhurana Shelly;* (1981) 2 SCC 564; *Rajasthan Roller Flour Mills Asson.* v. *State of Rajasthan;* (1994) Suppl. 1 SCC 413; *Hindustan Aluminium Corpn. Ltd.* v. *State of Uttar Pradesh;* 103 (1981) 3 SCC 578.

Hence, it was held that the petitioner was not entitled to exemption under section 5(3) of the CST Act.

Inter-state sale

This subject is judicially well ploughed by a catena of judgments of the Supreme Court and the various high courts. This subject, inspite of ample guidelines, has led the parties, more often than not, to litigation. The subject of inter-state sale can be studied under the following heads: (i) Whether the disputed sale is an inter-state sale or an intra-state sale; (ii) whether the disputed sale is covered by section 3(a) or 3(b) of the CST Act; (iii) whether the disputed sale is inter-state sale or stock transfer; and (iv) whether the disputed sale is inter-state sale or goods sent to a branch office/an agent on consignment basis.

Section 3 of the CST Act reads as under:

> 3. When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce –
>
> A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase –
>
> (a) occasions the movement of goods from one State to another; or
>
> (b) is effected by a transfer of documents of title to the goods during their movement from one State to another.
>
> *Explanation 1* – Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.
>
> *Explanation 2* – Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State.

The Supreme Court in *State of Orissa & Anr.* v. *K.B. Saha and Sons Industries Pvt. Ltd. & Ors.*[88] had to adjudicate on whether the ingredients of an inter-state sale were fulfilled. The brief facts of the case were that the respondent-company, which had its registered office in West Bengal, carried on business in tobacco and *kendu* leaves and prepared *bidis* in its factory in West Bengal. Trade in *kendu* leaves was a monpoly in the Orissa State and the transactions were carried on by the state corporation. The corporation invited tenders from purchasers registered with it for sale of processed and

88 (2007) 7 VST 214 (SC).

phal kendu leaves for the year 2000-01. Under the Orissa *Kendu* Leaves (Control of Trade) Rules, 1962, *kendu* leaves purchased could be transported to another state only under a permit to be issued in this behalf. The company, which was a registered purchaser, entered into an agreement with the corporation. After the sale of the *kendu* leaves and payment of the sale value, lifting orders were issued to the divisional manager. The order issued by the divisional manager to give delivery indicated that the goods were to travel from a place in Orissa to a place in West Bengal. Thereafter the forest officer issued transport permit in the prescribed form on the basis of which the company transported the *kendu* leaves to its place of business in West Bengal. That permit also noted their destination.

Referring to its earlier judgments[89] the court held, affirming the decision of the high court, (i) that in order that a sale might be considered to be one in the course of inter-state trade what was important was that the movement of goods and the sale must be inseparably connected. It was not necessary that there had to be an existent contract of sale incorporating an express or implied provision regarding inter-state movement of goods. Though mere knowledge about the ultimate destination was not sufficient, the cumulative effect of the factual scenario had to be considered. The court further held that clause 3.13 of the agreement between the corporation and the company clearly recognised the possibility of a tenderer making purchase for the purpose of export outside India. If the sale was intended to be a local sale the question of effecting purchase for the purpose of export did not arise. A sale once finalised in favour of a tenderer could not be transferred subsequently to any other person. In the tender document there was a clear indication that the principal place of business and additional place of business of the company were all outside the State of Orissa. The way bill of transport also indicated that the consignment of goods was dispatched from outside the State of West Bengal. In the certificate issued by the income-tax department under section 206C of the Income-tax Act, 1961, authorising the corporation not to collect income-tax at source it was certified that the company would be utilising the *kendu* leaves for the purpose of manufacture and not for trade. The cumulative effect of these facts on record was that the sale to the company was in the course of inter-state trade.

The Punjab & Haryana High Court in *Osaw Agro Industries Pvt. Ltd.* v. *State of Punjab & Ors*.[90] had to adjudicate a similar dispute whether or not the disputed sale was an inter-state sale. The brief facts of the case were that

89 *Balabhagas Hulashchand* v. *State of Orissa*; (1976) 2 SCC 44; *Cement Marketing Co. of India (Private) Ltd.* v. *State of Mysore*; (1963) 14 STC 175 (SC); *CST* v. *Bakhtawar Lal Kailash Chand Arhti*; (1992) 2 SCC 750; *K.G. Khosla & Co. (P.) Ltd.* v. *DY. Commissioner of Commercial Taxes*; (1966) 17 STC 473; *Oil India Ltd.* v. *Superintendent of Taxes* (1975) 1 SCC 733.

90 (2007) 9 VST 393 (P&H); see also *Steel Authority of India* v. *State of Haryana,* (2007) 10 VST 49 (P&H).

the petitioner, a delaer registered under the Haryana Value Added Tax Act, 2003, had its factory at Ambala and was engaged in the business of manufacture and trading of seed cleaning and grading machines. The petitioner sent a quotation to the Punjab Agriculture University with regard to supply of a specific gravity separator mentioning the price of the product to be F.O.R. destination. The university accepted the price quoted by the petitioner and asked for supply of the machine. The petitioner sold the machine to the university and paid central sales tax at four per cent on the basis that the sale was an inter-state transaction. When the truck loaded with goods reached the Punjab check-post, the goods and the truck were detained and notice was issued alleging that since the petitioner was not registered under the Punjab Value Added Tax Act, 2005 it had violated section 21(1) thereof, rejecting the petitioner's explanation that it was an inter-state sale, that the petitioner was a registered dealer in Haryana and the Punjab Agriculture University had not purchased the goods for trading and that therefore there was no violation of section 21(1) of the Punjab Act.

On a writ petition being filed, the court first reiterated the ingredients of an inter-state sale, observing that an inter-state sale must fulfil three essential ingredients: (i) there must be a contract of sale, incorporating a stipulation, express or implied, regarding inter-state movement of goods; (ii) the goods must actually move from one state to another, pursuant to such contract of sale, the sale being the proximate cause of movement; and (iii) such movement of goods must be from one state to another state where the sale concludes. It follows as a necessary corollary of these principles that a movement of goods which takes place independently of a contract of sale would not fall within the meaning of an inter-state sale.

It was accordingly held, allowing the writ petition, that the first ingredient that the contract of sale must have a stipulation regarding movement of goods was evident from the letter of acceptance sent by the Punjab Agriculture University that the payment for the machine shall be made on delivery of equipment in the Department of Food Science and Engineering, Punjab Agriculture University and from the invoice showing the movement of goods from Ambala to Punjab Agriculture University. The petitioner had added sales tax at four per cent treating the sale as inter-state sale. The second ingredient was evident in that the goods had moved from the State of Haryana to the State of Punjab in pursuance of the contract of sale as evidenced by the letter of acceptance. The third element was also fulfilled because the sale had been concluded in the State of Punjab at Ludhiana in pursuance of the movement of goods from Haryana. Accordingly, all the ingredients of inter-state sale stood fulfilled.

The Kerala High Court in *P.U. Usha* v. *State of Kerala*[91] had to adjudicate whether the disputed sale was an inter-state sale under section 3(b) of the CST Act. The court crystallised section 3(b) and held that this

91 (2007) 5 VST 484 (Ker).

provision along with section 6(2) of the CST Act makes it clear that the transfer of document of title to goods must be during their movement from one state to another and not after. The delivery has to be taken when the movement of goods terminates at its destination. Explanation 1 to section 3(b) does not permit the dealer to expand the movement of goods beyond the time of physical landing of goods. In the case of the petitioner the goods reached the destination in March, 1990 and the sales were effected and delivery taken long after the goods had reached the destination. Therefore, the sales effected by the petitioner were not inter-state sales.

Before the Allahabad High Court in *Commissioner of Trade Tax, U.P.* v. *Puttan Dal Mill*[92] the point for adjudication was whether the disputed sales were inter-state sales or the goods had been sent to the branch office/ agent on consignment within the meaning of section 6-A of the CST Act. The respondent-dealer, carrying on the business of food grains and pulses, during the assessment year 1983-84, claimed to have despatched goods worth Rs. 535171/- outside the State of U.P. to the consignment agent for sale but produced neither form F nor any evidence to prove that the dispatch was not in the course of inter-state sale. Accordingly, the assessing authority levied tax treating it as inter-state sale. The tribunal, however, accepted the plea of the dealer that the goods were despatched to the consignment agent for sale. On a revision petition it was held, that under section 6-A of the Central Sales Tax Act, 1956 the burden lies upon the dealer to prove that the movement of the goods was not in pursuance of prior contract of sale in the course of inter-state trade. Admittedly, during the year under consideration, the dealer had despatched goods worth Rs. 535171/- in respect of which no evidence had been adduced in appeal or before the tribunal. In the circumstances, the order of the tribunal accepting the claim of the dealer that the goods had been despatched for sale on consignment basis without any evidence was liable to be set aside.

The Supreme Court in *I.D.L. Chemical Ltd.* v. *State of Orissa*[93] had to adjudicate on whether the despatch of explosives from manufacturing unit in Orissa to collieries of Coal India outside the state through centralised order from Coal India was stock transfer under section 6-A or inter-state sale under section 3(a) of the CST Act. The brief facts of the case were that the appellant, a manufacturer of detonators and accessories, regularly supplied its products to government undertakings such as Coal India Ltd. Coal India Ltd. placed order with the appellant for supply of explosives, detonators, accessories, etc., for its collieries inside and outside the State of Orissa with a stipulation that delivery should be made against indents placed by the collieries. It was held, that the nature of indent and the modalities were agreed, the quantity of the goods to be supplied to various collieries at fixed price was firm, the insurance and freight was to be borne by Coal India and

92 (2007) 7 VST 238 (All).
93 (2007) 10 VST 644 (SC).

98 per cent of the payment was to be made by the collieries of Coal India. From these facts it was clear that this was a purchase order issued by the apex body, Coal India, by fixing the price and the quantities to be purchased by its collieries. The whole movement of the goods from the factory at Rourkela was triggered in pursuance of the order dated 24.9.1976. There was no independent contract by the subsidiaries of Coal India with the appellant. This was no transfer of stock in trade to various branches. The movement of the goods was triggered from Rourkela and they were essentially meant to be sold to the subsidiaries of the Coal India. The transaction amounted to inter-state sale. It was also observed that the authorities were to go into the factual aspects and find out the quantity of the goods sent to undertakings other than the subsidiaries of Coal India and assess tax on the supplies which were made to the subsidiaries of Coal India as inter-state sale.

V JUDGMENTS HAVING BEARING ON THE CONSTITUTION OF INDIA

Article 226/judicial review

Much judicial thought has been expended by the Supreme Court to crystallise the scope of this article. Except for a period when article 226 was amended by the Constitution (42nd Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the high court to grant relief under article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the high court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the high court without availing the alternative remedy provided, the it should ensure that he has made out a strong case or that there exists good grounds to invoke the extraordinary jurisdiction. The Supreme Court in *Union of India* v. *Kirloskar Pneumatic Company*[94] observed that the scope of articles 226 and 227 is to effectuate the law and to enforce the rule of law and to ensure that authorities and organs of the state act in accordance with law. It cannot be invoked for directing the authorities to act contrary to law.

Regarding the scope of 'Judicial Review' the Supreme Court in *Reliance Airport Developers (P) Ltd.* v. *Airports Authority of India*,[95] *inter-alia*, held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that

94 (1996) 84 ELT 401 (SC); (2003) 6 SCC 545-562 (para-43).
95 (2006) 10 SCC 1.

regulates his decision-making power and he must give effect to it otherwise it may result in illegality.

During the year under survey, a large number of judgments have been reported wherein the writ petitions have either been allowed or dismissed. Following is the table of some such judgments wherein the principle followed in taking the decision, is also briefly indicated:

(i) Judgments where the writ petitions were held maintainable:

S.no	Name of the parties	Gist of the decision of the Court
1.	*Ponni Sago Factory* v. *Dy. CTO, Salem & Ors.*[96]	This was a case of best judgment assessment. Though alternative remedy under the statute was available, yet writ petition was entertained because the impugned proceedings were erroneous and directly against the law declared by the two division Benches of the High Court.
2.	*M.M. Enterprises* v. *CTO, Chennai*[97]	Writ petition entertained because impugned assessment order was passed in breach of principles of natural justice.
3.	*Pooja Agro Foods* v. *CTO (FAC), Avinash*[98]	Writ petition was entertained because impugned assessment order was passed without considering objections to pre assessment notice.
4.	*Malayala Manorama Company Ltd.* v. *Asst. Commissioner, CT, Kottayam & Anr.*[99]	Writ petition was entertained because the petition raised a purely legal issue.
5.	*SDCM, Southern Railway* v. *IO, Comml. Taxes*[100]	The writ petition was entertained because the commercial taxes department had no power of superintendence over railway officials and it was held that railway administration was not bound by the instructions of the commercial taxes department.

96 (2007) 5 VST 223 (Mad).
97 (2007) 5 VST 392 (Mad).
98 (2007) 5 VST 525 (Mad).
99 (2007) 8 VST 604 (Kera).
100 (2007) 8 VST 434 (Kera).

(ii) Judgments where the writ petitions were held not maintainable:

S.no	Name of the parties	Gist of the decision of the Court
1.	*Uma Bricks Industries* v. *State of Tripura & Ors.*[111]	In this case the best judgment assessment order was passed and it was held, that the dealer as a person aggrieved had to avail of the remedy available under the Act.
2.	*State of Tamil Nadu* v. *Shree Jagam Spinning Mills & Anr.*[102]	Writ petition held not maintainable as the same was filed after a delay of about 1627 days and the affidavit was bereft of details regarding the cause for the delay in filing the petition.
3.	*Smt. B.S. Varada* v. *DY. Commission, CT, Mangalore & Anr.*[103]	The petitioner filed an appeal with delay of more than 180 days for which there was power with the appellate authority to condone. The writ petition was therefore dismissed with the following observations: "Writs are meant for issue of directions in situations where the statutory authority or the Tribunal acts in contravention of the statutory provisions or exercises the powers in an arbitrary or exotic manner. The prerogative writs are issued under article 226 of the Constitution of India and in the supervisory jurisdiction under article 227, to ensure that the authorities act within the bounds as provided in law and do not transgress such limits. If the functioning of a tribunal or an authority is in conformity with law, it is not the function of the court to exercise the supervisory jurisdiction under article 227 of the Constitution of India, to pass orders either to quash such action or order by issue of a writ of certiorari nor does a writ of mandamus lie to compel the statutory authority or the Tribunal to

101 (2007) 5 VST 567 (Gau).
102 (2007) 5 VST 630 (Mad).
103 (2007) 6 VST 519 (Karn).

		act in a manner contrary to law or as provided under the statue itself.
4.	*Ashoka Creations (P) Ltd.* v. *Asst. Commissioner, CT*[104]	Writ petition dismissed as the same was filed against a show cause notice. It will be recalled that the Supreme Court had in its judgment in *GKN Driveshafts (India) Ltd.* v. *Income-tax Officer & Ors*[105] held that when a notice under section 148 of the Income-tax Act, 1961, is issued, the proper course of action for the noticee is to file the return and, if he so desires, to seek reasons for issuing the notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order.
5.	*Electric House* v. *State of Tripura & Ors.*[106]	Writ petition not entertained because the petitioner had not properly maintained the books of account, which the petitioner was to maintain. The court could not exercise its jurisdiction as an appellate authority to test the validity of the impugned order.

Legislative competence

Before the Supreme Court in *Co-operative Company Ltd.* v. *Commissioner of Trade Tax, U.P.*[107] the question of law for adjudication was whether charges levied by dealer towards country liquor sold in bottles could be treated as bottles sold and reflected as P.P. caps, seals and filling. The court observed that containers of the principal commodity which is the subject-matter of the contract of sale may have to be taken into consideration for the purpose of arriving at the total turnover for the purpose of sales tax, but even for that purpose there has to be an element of *ad idem* of mind between the purchaser and the seller. If by reason of express contract or

104 (2007) 6 VST 356 (Karn).
105 (2003) 259 ITR 19 (SC).
106 (2007) 7 VST 93 (Gau).
107 (2007) 7 VST 174 (SC).

implied contract the containers are sold, indisputably the same would be exigible to tax; but, in the absence of such a contract, sales tax would not be leviable on the containers. It was accordingly held, setting aside a judgment of the high court and remanding the matter, that in the absence of any stipulation made in the contract of sale for the purpose of levy of sales tax or otherwise the department had to arrive at a finding as to whether there was an implied condition of transfer of the bottles and the burden of proof thereof was on the department. The question whether there was an implied contract for the sale of bottles and any amount separately charged therefore was required to be determined on the relevant material placed by the parties.

The Delhi High Court in *Silk and Textiles Mercantile Traders Association etc.* v. *Govt. of NCT of Delhi & Ors.*,[108] had to adjudicate about the legislative competence of the Govt. of NCT of Delhi for issuing three notifications bearing Nos. (i) F.4(i)/99-Fin(g)(i)/2593 dated March 31, 1999; (ii) F.4(52)/909/Fin(g)/(i) dated January 15, 2000 and (iii) F.4(75)/99-Fin(g)/2089 dated March 31, 2000, regarding the taxability of silk fabrics when the same were also subject to additional excise duty under the Additional Duties of Excise (Goods of Special Importance) Act, 1957. The court upheld the issue of the above three notifications following judgments of the Supreme Court in *State of Kerala* v. *Attesee*[109] and *State of Bihar* v. *Bihar Chamber of Commerce,*[110] with the following observations:

> From April 29, 1961 till May 11, 1968 "silk fabrics" featured as "goods of special importance" (declared goods) in section 14 of the Central Sales Tax Act, 1956. During this period, by virtue of the restriction in section 15(a) of the 1956 Act, the local sales tax on silk fabrics in the States including Delhi could not be higher than four per cent. The Additional Duties of Excise (Goods of Special Importance) Act, 1957 was enacted with a view to compensating the States for the loss of revenue on account of the restriction on their powers to levy local sales tax on declared goods higher than four per cent (which was the maximum permissible Central sales tax in relation to such goods). In other words declared goods within the meaning of section 14 of the 1956 Act would be amenable to the levy of 1957 Act and the ensuing revenue collected would be shared between the States on an agreed revenue sharing basis as spelt out in the Second Schedule to the 1957 Act. Silk fabrics continued to figure in the Schedule to the 1957 Act from 1961 onwards but the rate of duty under the 1957 Act was "nil" with effect from March 1, 1965, States were not in fact being compensated with the revenue

108 (2007) 6 VST 444 (Del). For a similar decision see, *All Tripura Zarda & Panmasala Merchants Assn.* v. *State of Tripura*, (2007) 7 VST 240 (Gau).

109 AIR 1989 SC 222.

110 (1996) 9 SCC 136.

> collected as additional duty of excise on "silk fabrics". Acknowledging this anomaly, the Finance Act, 1968 removed "silk fabrics" from the purview of section 14 of the 1956 Act with effect from May 11, 1968. This was done to enable States to levy local sales tax on silk fabrics at a rate higher than four per cent, however, "silk fabrics" continued to feature in the First Schedule to the 1957 Act with "nil" rate of duty. This, however, did not mean that the legislative assembly of the National Capital Territory of Delhi could not make a law levying local sales tax on such goods. All that it meant was that if the National Capital Territory of Delhi chose to levy sales tax on silk fabrics in any financial year, then, subject to the Central Government directing otherwise, the National Capital Territory of Delhi might stand to lose its share of 1957 Act for that financial year.
>
> The underlying scheme of the 1957 Act is that the States that are made to forgo the higher rate of local sales tax vis-à-vis declared goods by virtue of section 15 of the 1956 Act should be compensated through the 1957 Act in respect of such "declared goods". If, however, the States are unable to recover any duty whatsoever as additional duty of excise under the 1957 Act, there would be no justification for retention of the said goods in section 14 of the 1956 Act. Therefore, the intention of the Parliament in deleting the "silk fabrics" from the purview of the 1956 Act is clear. It was with a view to permitting States to levy local sales tax on the said goods without the fetter of section 15 of the 1956 Act. That fetter cannot be deemed to continue by the mere fact that the goods figure in the 1957 Act even if they are subject to "nil" duty.

Before the Kerala High Court in *Fantacy Sales Corporation* v. *Sales tax Inspector, Walayar & Ors.*,[111] an interesting point of law was the legislative competency of the delegated legislation to demand advance tax in respect of notified goods before the date for payment, which goods are evasion prone, with a view to arrest evasion of tax. The writ petitioner assailed the validity of section 47(16A) of the Kerala Value Added Tax Act, 2003 and Circulars Nos. 50 of 2006 and 53 of 2006 dated 18.12.2006 and 21.12.2006 respectively, issued by the Commissioner, in exercise of his powers under clause (c) of sub-section (2) of section 3 read with section 47(16A) of the Act. Section 47(16A) of the Kerala VAT Act, 2003, reads as under: -

> **47.** Procedure for inspection of goods in transit...
>
> (16A) Notwithstanding any-thing contained in this Act or the rules made there under, the Commissioner may where he deems it

111 (2007) 7 VST 323 (Ker).

> necessary to prevent any evasion of tax, direct that the tax in respect of the sale of any evasion prone commodities, as may be specified by him, shall be paid before the date prescribed for its payment under this Act.

It was held, "that it is well-settled that the State Legislature while providing for levy of impost, has power to provide for incidental matters, including measures for prevention of evasion of tax. In the case of evasion-prone goods it is difficult to trace the goods and in some cases the dealer also after they cross the border. If evasion of tax is to be prevented it can be done only by demanding tax in advance before the occurrence of the taxable event. Therefore advance collection of tax is made. The tax payable in advance has to be computed based on the "saleable value" of the goods. The taxable event is the sale and the actual tax will be assessed only after the sale takes place and that too based on sale price. Enactment of provisions to avoid evasion of tax is constitutionally valid and thus the interpretation given to sub-section (16A) of section 47 that it authorizes collection of tax in advance before the taxable event, i.e., sale of goods takes place, will not make it unconstitutional. When the statute authorizes the issuance of such circulars, there is nothing illegal in circulars dated December 18, 2006 and December 21, 2006."

After discussing the scheme of the Act, it was further held "That demanding tax in advance cannot be said to be an action, infringing the fundamental rights under article 19(1)(g) of the Constitution of India. Demand and collection of tax may cause some inconvenience. But, they cannot be described as violation of any fundamental right. This applies to the challenge based on article 301 and also on the ground of lack of competence of the State to tax inter-State movement of goods. By demanding tax in advance, the State does not impose or levy any tax, which it is not competent to levy. It is only a measure to prevent evasion of tax, which the State is legitimately entitled to collect. It is not an attempt to tax inter-State sale. The free-flow of goods is also not prevented by demanding tax in advance. Some inconvenience caused at the check-post cannot be described as violating the rights under article 301 of the Constitution of India. If such a contention is accepted, all the check-posts should be abolished, so as to provide unhindered movement of goods. Such a right cannot be claimed under article 301."