(1986) 03 KAR CK 0043

Karnataka High Court

Case No: S.T.R.P. No"s. 46 to 51 of 1981

The Cashew Corporation of India Ltd.		APPELLANT
	Vs	
The State of Karnataka		RESPONDENT

Date of Decision: March 3, 1986

Acts Referred:

- Central Sales Tax Act, 1956 - Section 2 (ab), 3, 5 (2)
- Karnataka Sales Tax Act, 1957 - Section 23, 5 (2)

Citation: (1987) ILR (Kar) 1803 : (1986) 63 STC 90

Hon'ble Judges: R.S. Mahendra, J; K.S. Puttaswamy, J

Bench: Division Bench

Advocate: K. Srinivasan, H.R. Rao and R.V. Prasad, for the Appellant; S. Rajendra Babu, Government Advocate, for the Respondent

Judgement

Mahendra, J.
These revision petitions u/s 23 of the Karnataka Sales Tax Act, 1957 (KST Act), are by the Cashew Corporation of India Limited (Corporation) and are directed against the common order dated 31st March, 1981, of the Karnataka Appellate Tribunal, Bangalore (Tribunal), in S.T. Appeals Nos. 185 to 190 of 1978.

2. The Corporation is a subsidiary of the State Trading Corporation owned by the Government of India. The Corporation came to be constituted in August, 1970, and has its registered office at Cochin in Kerala State. The Corporation is a registered dealer under the Sales Tax Act of that State but is not a registered dealer under the KST Act of Karnataka State. The Corporation imports cashew from East African countries under licences issued by the Controller of Imports and Exports and allots the imported cashew to actual users for being proceeded and for export of certain percentage of the raw cashew so allotted. One of the conditions of the import licence granted to the Corporation

is that it should remain as the owner of the cashew imported under the licence up to the time of clearance through customs. Prior to the coming into existence of the Corporation in the year 1970, the users of raw cashew were themselves importing raw cashew from East African countries. The Corporation ascertains the requirements of the users, takes letters of acceptance from them and thereafter places orders for the supply of cashew with the foreign exporters. Separate bills of entry are drawn, each lot is separately marked and after the ship arrives at the Mangalore Harbour, the Corporation given letter of authority to the captain of the ship authorising the delivery of the goods earmarked to the allottees. The letters of authority are sent through banks and the allottees receive the same after making payments. The allottees pay customs duty, etc., on behalf of the Corporation and take delivery of the goods.

3. The Commercial Tax Officer, II Circle, Mangalore (CTO), issued notices dated 8th December, 1975, calling upon the Corporation to file returns and to show cause as to why the Corporation should not be assessed to tax as a non-resident dealer for the years 1970-71 to 1975-76. The Corporation in their reply pointed out that "all the sales of imported raw cashew" to the allottees in Mangalore were made on the high seas and in the course of import and no sales having taken place within the State of Karnataka, the Corporation is not liable to pay any sales tax. The Corporation also urged in the alternative that even if the sales are effected by transferring documents of title after the ship entered the territorial waters, even then such a sale was before the goods are removed from the customs station and therefore the sale is in the course of import relying on section 2(ab) of the CST Act.

4. The assessing authority overruled the objections and passed orders subjecting the sales to tax under the KST Act. The Deputy Commissioner of Commercial Taxes (Appeals), Mangalore Division, Mangalore, by his order made on 31st October, 1978, dismissed the appeals of the Corporation. The Karnataka Appellate Tribunal, Bangalore, having dismissed the second appeals, the Corporation has filed these revision petitions.

5. Sri K. Srinivasan, learned counsel, argued for the Corporation and Sri S. Rajendra Babu, learned Government Advocate, argued for the revenue.

6. Sri Srinivasan made the following three submissions for our consideration :

(1) The sales were effected by the Corporation in favour of the allottees by transferring documents even before the goods were cleared by the customs authorities, the sales were therefore before the goods crossed the "customs frontiers of India" as defined in section 2(ab) of the CST Act and therefore the sales were in the course of import.

(2) The Corporation only acted as the agent of the allottees and therefore the import was by the allottees and not the Corporation.

(3) The goods being unascertained and future goods, sales were complete by appropriation to the contract of sale with the allottees even before the goods were

shipped and the sales therefore do not attract the provisions of the KST Act.

7. Sri S. Rajendra Babu submitted that the transfer of documents was after the ship crossed the customs frontiers within the meaning of this expression prior to the amendment, the Corporation was not an agent of the allottees, there were two transactions one by the Corporation with the foreign suppliers and the other by the Corporation with the allottees and the importer was the Corporation and there was no appropriation as claimed, the sales were within the State and therefore taxable.

8. The CST Act of 1956 was enacted, as is clear from the preamble, to formulate principles for determining when a sale or purchase of goods taken place in the course of inter-State trade or commerce or outside a State or in the course of import into or export from India, to provide for the levy, collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce and specify the restrictions and conditions to which State laws imposing taxes on the sale or purchase of such goods of special importance shall be subject. Section 2(ab) of the CST Act defines the "customs frontiers of India" and the expression means crossing the limits of the area of a customs station in which imported goods or export goods are ordinarily kept before clearing by customs authorities.

Explanation. - For the purposes of this clause, "customs station" and "customs authorities" shall have the same meanings as in the Customs Act, 1962 (52 of 1962). Sub-section (ab) of section 2 was inserted by section 2(a) of the CST (Amendment) Act, 1976, with effect from 7th September, 1976.

9. Chapter II of the CST Act deals with the formulation of principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import or export. In this Chapter we have 5 sections. Section 3 lays down the principles for determining when a sale or purchase of goods can be said to take place in the course of inter-State trade or commerce. Section 4 lays down the principles for determining when a sale or purchase of goods can be said to take place outside a State and section 5 lays down the principles for determining when a sale or purchase of goods can be said to take place in the course of export of the goods out of India or can be said to take place in the course of import of goods into India.

10. Section 5 which is relevant for our purpose reads thus :

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

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such

import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

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

This section lays down and defines when a sale or purchase of goods is said to take place in the course of import and export so as to attract the constitutional inhibitions. The term "the customs frontiers of India" came to be defined by introducing sub-section (ab) (of section 2(a) of the Central Sales Tax (Amendment) Act, 1976, with effect from 7th September, 1976. Prior to introduction of sub-section (ab) this term "customs frontiers of India" was not defined in the CST Act.

11. The meaning of the expression "customs frontiers of India" in section 5 of the CST Act, prior to the introduction of section 2(ab) came up for consideration before the Supreme Court in The State of Madras Vs. Davar and Co. etc.,

In this case the ships carrying the goods in question were all in the respective harbours in the State of Madras when the sales were effected by the assessees by transfer of documents of title to the buyers. The question for consideration before the court was whether the sales were effected before the ships crossed the customs frontiers of India and therefore the sales were in the course of import. The Supreme Court held that the expression "customs frontiers" in section 5(2) of the CST Act, did not mean "customs barrier" and it had to be construed in accordance with Notification No. SRO 1683 dated 6th August, 1955, issued by the Central Government u/s 3-A of the Sea Customs Act, 1878, read with the proclamation of the President of India dated 22nd March, 1956, and therefore "customs frontiers" means the boundaries of the territory, including territorial waters of India and the sales were effected long after the goods had crossed the customs frontiers of India; they were not effected in the course of import.

12. Sri Srinivasan, learned counsel for the petitioner, argued that there was an ambiguity as to the meaning of the expression "customs frontiers of India" in section 5 of the CST Act, and the Supreme Court therefore explained the meaning of the said expression "customs frontiers of India" in The State of Madras Vs. Davar and Co. etc., but now that the legislature has explained or clarified the meaning of this expression there is no ambiguity as to the meaning of this expression and therefore the decision in The State of Madras Vs. Davar and Co. etc., is of no assistance. According to him, this amendment being only declaratory or explanatory is retroactive and the meaning of this expression "customs frontiers of India" should always be understood according to the declaration made in section 2(ab) of the CST Act. In support of his submission he relied on the ruling of the Supreme Court in Thiru Manickam and Co. Vs. The State of Tamil Nadu,

13. The question for consideration before the Supreme Court in Thiru Manickam and Co. Vs. The State of Tamil Nadu, was whether the appellant was entitled to claim refund of sales tax paid under the State Act in respect of the yarn sold by it in the course of inter-State trade in accordance with section 15(b) of the Central Act [prior to its amendment by the Central Sales Tax (Amendment) Act (61 of 1972)] and the proviso to section 4 of the State Act read with rule 23 of the Tamil Nadu General Sales Tax Rules, 1959.

14. The Supreme Court, after analysing section 15 of the CST Act, section 4 of the State Act and rule 23 of the Rules framed under the State Act, held that the appellant was entitled for refund of the amount of sales tax levied under the State Act, in respect of the goods sold by it in the course of inter-State trade and the amendment made to clause (b) of section 15 of the Central Act by Act 61 of 1972 can be taken as an exposition by the legislature itself of its intent contained in the earlier provision. As a result of the amendment the legislature has clarified what was implicit in the provisions as they existed earlier. The court further held that an amendment which is by way of clarification of an earlier ambiguous provision can be a useful aid in construing the earlier provision event though such an amendment is not given retrospective effect.

15. Let us therefore examine whether there was any ambiguity in the meaning of the expression "customs frontiers of India" used in section 5(2) of of the CST Act. As pointed out by the Supreme Court in The State of Madras Vs. Davar and Co. etc., the President of India has issued a proclamation dated 22nd March, 1956, and that contains a declaration as to the extent of territorial waters of India and the Central Government in exercise of the powers conferred by section 3-A of the Sea Customs Act, 1878, in supersession of the earlier notification dated 1st April, 1950, has defined the "customs frontiers of India" as the boundaries of the territory, including territorial waters of India. When the CST Act was enacted Parliament was aware of the notifications referred to above and the meaning of the expression "customs frontiers of India" and in its wisdom thought it unnecessary to define this expression over again in the Act. The meaning of this expression was clear and not ambiguous or doubtful. By the amendment, namely, by introducing section 2(ab) the Parliament has given a new and a restricted meaning to the expression "customs frontiers of India" and has brought about a distinct change in the meaning of this expression. The amendment is therefore not a clarificatory or a declaratory amendment. This amendment which has brought about a distinct change and given a restricted meaning to the expression "customs frontiers of India" can only be prospective and not retrospective unless the amending Act itself makes it retrospective or retroactive. That apart the goods sold after they crossed the "customs frontiers of India" had suffered the liability to tax and the revenue had a right to collect the same. This liability to pay tax already incurred or the right to collect tax vested in the State under the KST Act is not affected by the amending provisions unless the Parliament in unambiguous terms makes the provision retrospective and takes away the rights vested in or the liabilities incurred by the parties. Section 2(ab) inserted by the amending Act -

Act 103 of 1976, which has given a new and restricted meaning to the expression "customs frontiers of India" is only prospective and is therefore of no assistance in construing the meaning of the said expression prior to the amendment. Thiru Manickam and Co. Vs. The State of Tamil Nadu, is distinguishable and is of no assistance to the petitioner. We are supported in this view by a decision of the Madras High Court in Minerals and Metals Trading Corporation Ltd. v. State of Tamil Nadu [1983] 52 STC 85.

16. Let us next examine whether the sales by the Corporation to the allottees were in the course of import and therefore exempt u/s 5(2) of the CST Act.

17. One of the conditions subject to which the import licences were issued to the Corporation is that the Corporation should remain the owner of the cashew imported under the licence up to the time of clearance through the customs. The Corporation ascertains the requirements of allottees, takes letters of acceptance from them and only thereafter places orders with the foreign suppliers. As desired by the Corporation separate bills are drawn, each lot is separately marked and the allottees collect the goods on the authority of letters given by the Corporation and on payments of customs duty, etc., made on behalf of the Corporation. The relative documents are in the name of the Corporation. The order for the supply of cashew is placed by the Corporation with the foreign suppliers. The contract to supply is only between the Corporation and the foreign suppliers and the allottees are not parties to that contract. The goods are insured by the Corporation. The allotment of cashew is not by the suppliers, but by the Corporation. The foreign suppliers have no claim against the allottees and similarly the allottees have no claim against the suppliers. The right of the allottees is only against the Corporation. The privity of contract is only between the Corporation and the foreign suppliers and not between the allottees and the foreign suppliers. These facts according to Mr. Srinivasan clearly establish that the cause of movement of goods from the foreign country is the contract between the allottees and the Corporation. While according to Sri Rajendra Babu these facts clearly establish that it is the contract between the Corporation and the foreign suppliers and not the contract between the Corporation and the allottees that is the immediate cause of the import of cashew.

18. In K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes, the assessee entered into a contract of sale with DGS & D for the supply of axle-box bodies manufactured by its principal at Belgium and the goods were to be inspected by the buyer in Belgium but under the contract of sale, goods were liable to be rejected after a further inspection by the buyer in India. It was in pursuance of this contract that the goods were imported into the country and supplied to the buyer at Perambur and Mysore. It appears that the only sale was the sale of DGS & D in India by the assessee as agent of the manufactures in Belgium. The term as to inspection and rejection of goods on their arrival in India indicated that there was no completed sale in Belgium under the contract. On these facts the court held that the movement of goods to India was occasioned by the contract of sale between Khosla and Co. and the DGS & D, and as the movement of goods is the result of a covenant or incidental to the contract of sale, it is quite immaterial

that the actual sale took place after the import was over.

19. In Deputy Commissioner of Agricultural Income Tax and Sales Tax, Ernakulam Vs. Indian Explosives Ltd., the assessee placed orders with the foreign suppliers for the supply of goods giving the name of the local purchasers, their licence numbers and the import was on the basis of the actual users" import licence and a letter of authority given by the Chief Controller of Imports and Exports authorising the local purchasers to permit the assessee to import the goods, to open letter of credit and make remittances of foreign exchange against the said licence. One of the conditions in the import licence was that the goods imported will be the property of the licence holder at the time of clearance through the customs. There was therefore an integral connection between the sale to the local purchasers and the assessee. The movement of the goods from a foreign country was in pursuance of a pre-existing contract of sale between the assessee and the local purchaser. The import of the goods by the assessee was for and on behalf of the local purchaser. On these facts the Supreme Court held that the sales effected by the assessee were in the course of import. In this case the Supreme Court followed K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes, and Binani Bros. (P) Ltd. Vs. Union of India (UOI) and Others,

20. But the cases before us are distinguishable both on facts and the questions that arose for consideration in K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes, and Deputy Commissioner of Agricultural Income Tax and Sales Tax, Ernakulam Vs. Indian Explosives Ltd., . The licence in these cases before us was issued in the name of the Corporation with an express condition that the Corporation should be the owner of the goods imported under the licence up to the time of clearance through customs. The allottees were not entering with any agreement for the supply of goods with the foreign suppliers. The Corporation was not acting as an agent of the allottees in importing cashew from foreign countries. The Corporation imported cashew for effecting the sales in favour of the allottees. The foreign suppliers did not enter into any contract with the allottees for the supply of cashew. The sale by the foreign suppliers to the Corporation and the sale by the Corporation to the allottees were distinct and separate contracts. There was no privity of contract between the foreign suppliers and the allottees who had no right to reject the goods after inspection. There was no integral connection with the sale to the allottees and the import by the Corporation and the movement of the goods from the foreign countries was occasioned by the contract of purchase with the foreign suppliers by the Corporation and not by the contract of sale by the Corporation with the allottees. K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes, and Deputy Commissioner of Agricultural Income Tax and Sales Tax, Ernakulam Vs. Indian Explosives Ltd., are therefore distinguishable and are of no assistance to the Corporation.

21. The question whether an assessee was not liable to be taxed by virtue of article 286(1)(b) or article 286(2) of the Constitution came up for consideration before the Supreme Court (sic) in Dhanalakshmi Mills Limited v. State of Madras [1960] 11 STC 306. The assessed in this case, a spinning mill at Tirupur in the Madras State, was

assessed to tax under rule 4-A(iv) on its purchases of cotton which had been imported from Africa by certain Bombay dealer. The assessee intimated its requirement to the Bombay dealers, who placed orders with the suppliers in Africa and directed the shipments from Africa Ports to Cochin. The assessee, in the meantime, obtained the necessary transport licence. The shipping documents were in the name of the Bombay dealers who sent them to their clearing agents at Port Cochin. The clearing agents presented the shipping documents, cleared the goods through the customs, despatched the goods by rail to assessee at Tirupur and sent the railway receipts. The question was whether the assessee was not liable to be taxed by virtue of the provisions of either article 286(1)(b) or article 286(2) of the Constitution. The court held that the purchase of cotton by the assessee was after the cotton had been imported into India by the Bombay dealers and after the cotton had crossed the customs frontiers and they were therefore not entitled to the exemption under article 286(1)(b) and that the purchases satisfied both the requirements of the explanation to article 286(1)(b).

22. In Binani Bros. (P) Ltd. Vs. Union of India (UOI) and Others, , the petitioner was a supplier to the Director General of Supplies and Disposals (DGS & D). The petitioner obtained import licences to supply non-ferrous metals. The Government agreed to pay to the petitioner sales tax under the Central Sales Tax Act or the West Bengal Sales Tax Act, whichever was applicable in terms of the contract. After the decision of the Supreme Court in K.G. Khosla and Co. Vs. Deputy Commissioner of Commercial Taxes, the revenue authorities issued an order directing that sales tax should not be allowed in respect of supply of stores which have been imported against import licences for supplies under contracts placed by the DGS & D. On the basis of that direction the Government deducted in respect of sales tax certain sums of money which had been paid as sales tax in respect of supplies already made. The Supreme Court after discussing the Travancore-Cochin"s cases [1952] 3 STC 434 and [1953] 4 STC 205 (SC), the Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others, and the Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another, held "that there was no obligation under the contract on the part of the DGS & D to procure import licences for the petitioner. It was the obligation of the petitioner to obtain the import licence. Even if the contracts envisaged the import of goods and their supply to the Director General of Supplies and Disposals from out of the goods imported, it did not follow that the movement of the goods in the course of import was occasioned by the contracts of sale between the petitioner and the Director General of Supplies and Disposals".

23. In Serajuddin and Others Vs. The State of Orissa, the question for consideration before the Supreme Court was whether the argument between the appellants and the State Trading Corporation was in the course of export and therefore immune from liability to the CST Act. In this case before the Supreme Court the appellant claimed that the sales of the mineral ore by him to the corporation were sales in the course of export and were therefore exempt from tax u/s 5(1) of the CST Act. The Orissa High Court held that

the sales were liable to tax. On appeal the Supreme Court Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others, Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another, and Binani Bros. (P) Ltd. Vs. Union of India (UOI) and Others, the principal decisions on the interpretation of section 5(1) of the CST Act, and held that all the relevant documents were in the name of the corporation and the corporation alone had agreed to sell the goods. The circumstances that the appellant sold the goods to the corporation to facilitate the performance of the contract between the corporation and the foreign buyer did not make the contract between the appellant and the corporation the immediate cause of export. The immediate cause of movement of the goods was the contract between the corporation and the foreign buyer. These was no privity of contract between the appellant and the foreign buyer. The appellant was under no obligation to the foreign buyer. The rights of the appellant were against the corporation. Similarly the obligation to the appellant were with the corporation. The foreign buyer could not claim any right against the appellant nor did the appellant have any obligation to the foreign buyer. All acts done by the appellant were in performance of the appellant''s obligation under the contract with the corporation and not in performance of the obligations of the corporation to the foreign buyer. There was no relationship of principal and agent between the appellant and the corporation and their relationship was that of two principals. The movement of the goods in the course of export began when the corporation shipped the goods and the fact that the export could be made only through the corporation did not make the appellant the exporter. The Supreme Court therefore held that the sales by the appellant to the corporation were not sales in the course of export and therefore exigible to tax.

24. In Batliboi & Company Pvt. Ltd. v. State of Maharashtra (Bombay) [1981] 47 STC 321 also, a similar question came up for consideration on these facts : The assessee, a private limited company holding an import licence, entered into a contract with K to sell a double column vertical turning and boring mill manufactured in a foreign country. Prior to this contract, the assessee had already placed an order for the same machine with the foreign manufactures. In their letter to K, the assessee had stated that the machine was under offer to the defence department and that they could sell the machine to K provided the defence department released the same. The assessee had also accepted a stipulation in the purchase order by K that the property in the machine offered by it should stand transferred to K as soon as the machine was ready-packed in creates for shipment from the foreign country. After the machine arrived in Bombay the assessee cleared the shipment and sent the machine by rail to K in Kirloskarwadi. The question was whether the transaction was a sale liable to tax under the Bombay Sales Tax Act, 1959. The court held that the import of the machine from the foreign country was not occasioned by the sale by the assessee in favour of K and there was no integral link between the two transaction. All the events which go to constitute a sale had taken place within the State of Maharashtra. The sale was therefore a sale within the State of Maharashtra and the assessee was liable to pay sales tax on it under the provisions of the Bombay Sales Tax Act, 1959.

25. Sri Srinivasan argued that the Corporation acted only as an agent of the allottees and entering into contract with foreign dealers, the obtaining of the import licences, etc., are all done on behalf of the allottees and therefore the importers actually are the allottees and not the Corporation and therefore liability to pay tax does not arise at all.

26. In Serajuddin and Others Vs. The State of Orissa, the Supreme Court after referring the earlier decision on this question, has observed that the system of canalisation of exports and imports to the State Trading Corporation is constitutionally valid. The board reasons for the system of canalisation are control of foreign exchange and prevention of abuse of foreign exchange and held that there was no relationship of principal and agent between the appellant and the corporation and the relationship between them is that of two principals and there is no aspect whatsoever of principal and agency. It therefore follows that the corporation acts on its own and not as an agent of the allottees and the relationship between the corporation and the allottees is that of two principals and not that of principal and agent. In Minerals and Metals Trading Corporation''s case [1983] 52 STC 85 on which reliance was placed, the corporation is held to have played the part of an agent because there was nothing to show that the corporation placed orders on their own account. The allottees had the quota licences. Yen credit had been allocated to them. The goods were imported according to the specifications of the allottees. Consignment were marked to each of them distinctly and separately under separate shipping documents. The facts of this case are distinguishable and of no assistance to Sri Srinivasan.

27. The goods in question - Sri Srinivasan submitted being unascertained future goods - were appropriated by the Corporation to the contract of sale with the allottees, the sale was complete even before the goods were shipped and no sale having taken place within the State, the provisions of the KST Act are not attracted. According to him, the drawing of separate bills, in favour of the allottees, the marking of goods separately to the allottees establish appropriation of goods to the contract of sale outside the State and therefore the State has no competence to levy tax even though payments are made and delivery is taken within the State. It is his further case that the appropriation need not be unconditional and transfer of title has no relevant. He placed reliance on explanation (3) to section 2(t) of the KST Act and section 23 of the Sale of Goods Act, 1930, and the decision of the Delhi High Court in Indian Wood Products Company Ltd. v. Sales Tax Officer [1968] 21 STC 437.

28. Section 2(t) of the KST Act in so far as is relevant for our purpose reads :

""Sale'' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge.

Explanation (1) .....

Explanation (2) .....

Explanation (3) .....

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

Section 23 of the Sale of Goods Act in so far as is relevant for our purpose reads :

"23. (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2) ....."

Explanation (3) to section 2(t) of the KST Act read with section 23 of the Sale of Goods Act provides that sale or purchase of unascertained or future goods shall be deemed to have taken place at the time when such goods are unconditionally appropriated to the contract of sale or purchase either by the seller or purchaser with the assent of the other either before or after such appropriation. Section 4 of the CST Act is almost similar to explanation (3) to section 2(t) of the KST Act.

29. In the Indian Woods Products'' case [1968] 21 STC 437 the Delhi High Court has held "that where goods are unascertained the place where the sale is effected will have to be determined u/s 4(2)(b) of the CST Act depending upon the location of the goods at the time of appropriation and the appropriation connotes setting apart of specific goods and the appropriation need not be unconditional appropriation". But the Madras High Court in Larsen and Toubro Ltd., Madras-2 v. Joint Commercial Tax Officer [1967] 20 STC 150 relied on by Sri Rajendra Babu, has held that the appropriation must be final in so far as the seller or buyer as the case may be who makes the appropriation. The Supreme Court in Carona Sahu Co. Ltd. Vs. State Maharashtra, has observed "the law is well-established that in the case of contract for sale of unascertained goods the property does not pass to the purchaser unless there is unconditional appropriation of the goods in a deliverable state to the contract".

30. The decision of the Delhi High Court in Indian Wood Products'' case [1968] 21 STC 437 that the appropriation need not be an unconditional appropriation is opposed to the language of section 23 of the Sale of Goods Act. It is clear from the decision of the Supreme Court in Carona Sahu Co. Ltd. Vs. State Maharashtra, and the decision of the Madras High Court in Larsen and Toubro Ltd."s case [1967] 20 STC 150 that appropriation is required to be an unconditional appropriation. Sri Rajendra Babu is

therefore right in his submission that the appropriation must be unconditional and final and it must not be possible to divert the goods.

31. In this case even assuming that separate bill of entry was drawn and each lot was separately marked there is no material to show that there was appropriation by the Corporation to the contract of sale with the allottees before the goods were shipped and the appropriation if any was final. The Corporation has not placed any material to establish the appropriation. On the other hand, the argument addressed on behalf of the Corporation was that the appropriation need not be final. Even assuming there was appropriation according to the Corporation it was not a final "appropriation". If that is so, it is obvious there is no appropriation in law. There is, therefore, no substance in the contention urged on behalf of the Corporation that there was appropriation of the goods to the contract even before the goods were shipped by the foreign suppliers.

32. Section 3 lays down the principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce. Section 4 lays down the principles for determining when a sale or purchase of goods takes place outside a State and section 5 lays down the principles for determining when a sale or purchase takes place in the course of import or export. In these cases we are concerned with a case of import of goods and therefore the principles enunciated by the Supreme Court in interpreting section 5 that are to be applied in determining whether the sales by the Corporation to the allottees are in the course of import.

33. The Corporation entered into contract with the foreign suppliers for importing cashew. The import licence was issued to the Corporation and the Corporation continued to be the owner till the goods were cleared from the customs house. All the documents were in the name of the Corporation. Though the Corporation imported cashew for selling it to the allottees, these sales do not occasion the import. These was no privity of contract between the foreign suppliers and the allottees. The privity of contract was only between the foreign suppliers and the Corporation. There were two independent transactions - one between the Corporation and the foreign suppliers and the other between the Corporation and the allottees. The allottees were under no contractual obligation to the foreign suppliers and the foreign suppliers cannot claim any rights against the allottees. It may be an import for sale but not an import occasioned by such sale. It is the sale by the foreign suppliers to the Corporation that has occasioned the import. A person importing and a person exporting are necessary elements and the course of import is between them. The introduction of the Corporation dealing independently with the exporters and the purchasers, breaks the link between the two and there are two sales, one by the exporter to the Corporation and the second by the Corporation to the purchasers. The first sale is in the course of import because the import commences because of that sale. The second sale to the purchasers is not in the course of import because the import has already commenced with the sale to the Corporation. Therefore the only sale which caused the import is the sale by the foreign suppliers to the Corporation and not the sale by the Corporation to the allottees. The fact that the import was made for selling the imported

cashew to the allottees for complying with the existing contract with them will not make the import itself having been caused by the contract entered into by the Corporation with the allottees. The Supreme Court in Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another, has held that there must be a single sale which itself causes the export and that there is no room for two or more sales in the course of export. There is no reason in principle to distinguish the cases of import from the cases of export. The principle enunciated by the Supreme Court in Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another, equally applies to these cases before us which relate to cases of import.

34. Applying the principles enunciated by the Supreme Court in Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another, Binani Bros. (P) Ltd. Vs. Union of India (UOI) and Others, and Serajuddin and Others Vs. The State of Orissa, to the facts of these cases before us we hold that the sale by the Corporation to the allottees is not a sale in the course of import but is a sale at Mangalore Harbour and is therefore not saved by section 5(2) of the KST Act. The Corporation continued to be the owner of the goods till they were cleared from the Customs House at Mangalore Harbour on payment by the allottees and the Corporation was not acting as the agent of the allottees. There was no appropriation of cashew to the contract of sale in favour of the allottees before they were shipped to India. Sales in favour of the allottees has taken place at Mangalore Harbour within the State of Karnataka. The provisions of the KST Act are attracted and the State has the competence to levy tax. The order of the Tribunal upholding the orders of the first appellate and the assessing authority do not suffer from any error of law justifying our interference u/s 23 of the KST Act.

35. In the result, and for the foregoing reasons these revision petitions are dismissed there being no order as to costs.

36. Petitions dismissed.