Western Coal Fields Ltd. Vs State of Madhya Pradesh and Others

Miscellaneous Petition No. 2752 of 1985

Court: Madhya Pradesh High Court

Date of Decision: Feb. 23, 1995

Acts Referred:
Constitution of India, 1950 â€" Article 14#Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 â€" Section 7(5)

Citation: (1996) 41 MPLJ 439 : (1996) MPLJ 439

Hon'ble Judges: U.L. Bhat, C.J; M.V. Tamaskar, J

Bench: Division Bench

Advocate: H.S. Shrivastava, for the Appellant; A. Choudhary, General, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

M.V. Tamaskar, J.

The order in this petition shall also govern the disposal of M.P. No. 2557/83, Gwalior Rayon Mfg. and Anr. v. The State of U. P. and Ors., M.P.

No. 3353/84, Chadha Re-rolling Mills v. The Addl. Asstt. Commr. of Sales Tax and Anr., M.P. No. 1179/85, Chadha Re-rolling Mills v. The

Addl. Asstt. Commr. of Sales Tax, M.P. No. 2898/94, Kailash Auto Builders v. The State of M. P., M.P. No. 2276/85, Chadha Re-rolling Mills

v. The Addl. Commr. of Sales Tax, M.P. No. 3458/85, The Tata Iron and Steel Co. v. The State of M. P., M.P. No. 1840/89, Sunil Trading Co.

v. The State of M. P., M.P. No. 704/92, M. P. State Co-operative Marketing Federation Ltd. v. The State of M. P., M.P. No. 696/93, Bharat

Heavy Electricals Ltd. v. The State of M. P., M.P. No. 2409/85, Kamal Dal Mill v. The State of M. P.

The petitioners challenge the validity of Section 7(5) of M. P. Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (Act No. 50/76)

(hereinafter called the Entry Tax Act). In some of the petitions, final orders have been passed while in other notices have been issued for payment

of Entry Tax and in some of the petitions appeals have been preferred against the orders of assessment. The petitioners are engaged in sale and

purchase of various articles as raw materials, entry of which is caused into the local area. The petitioners are manufacturers of finished goods,

which are sold in the local area in which they are manufactured and subsequently sold outside the local area. The petitioners are registered dealers

under the Sales Tax Law of State and Central. The machinery Provisions of the Sales Tax Act are applied for assessment, qualification and

recovery.

The Entry Tax Act was enacted by the State of Madhya Pradesh with the object of levying tax on the goods brought into local area for

consumption, use or sale therein. It came into force from 1-9-1976. Section 3 is the charging section which provides for levying of an entry tax on

the entry of goods in the course of business of a dealer of goods specified in Schedule II into each local area for consumption use or sale therein.

The goods, such as, synthetic, silk fabrics, cotton fabrics, whole pulses, iron, steel etc. are goods mentioned in Schedule II. There are three

categories of goods. The goods in Schedule I are tax free goods. The goods in Schedule II are declared goods (raw material). The goods

specified in Schedule III are in relation to which entry is made for consumption and not for sale. Distinction lies between the items mentioned in

Schedule II and III based on goods brought within the local area, for consumption or use under Schedule II and for sale in Schedule III.

Section 2(b) of the Act defines entry tax as a tax on entry of goods into local area for consumption, use or sale therein and payable in accordance

with the provisions of the Act. Section 2(d) defines local area as meaning the area comprised within the limits of a local authority. Section 2(f)

defines ""local goods"" in relation to a local area as meaning goods of local origin as distinct from goods which enter into that local area. Section

2(aa) defines entry of goods into local area as entry of goods into that local area from any place outside thereof including a place outside the State

for consumption, use or sale therein. Sub-section (2) of Section 2 states that all those expressions other than the expression ''goods'' and ''sale''

which are used but not defined in the Entry Tax Act shall have the some meaning as defined in the Sales Tax Act.

Sub-sections (1), (2) and (5) of Section 7 of the Entry Tax Act as amended from time to time are reproduced below, as the whole controversy

involves around the same :

Section 7. Registered dealers to issue bill etc. stating that goods sold are local goods :- (1) Every registered dealer who, in the course of his

business, manufactures, produces or grows any goods specified in Schedule II in a local area in such manner that the goods become local goods in

relation to that local area, shall, on the sale of such local goods to any other registered dealer, issue to him a bill, invoice or cash memo specifically

stating in such manner as may be prescribed, that the goods being sold are local goods in relation to such local area and that no entry tax has been

paid on such goods.

(2) Where the goods mentioned in sub-section (1) are purchased and sold in the course of their business by a chain of registered dealers, the

selling registered dealer shall issue a bill or invoice or cash memo, containing the statement referred to in sub-section (1) :

Provided that where the goods are purchased by a registered dealer who effects the entry of such goods into a local area other than the local area

in relation to which such goods are local goods, it shall not be necessary for him to make the statement referred to in sub-section (1).

(5) Where a registered dealer referred to in sub-section (1) or sub-section (2) has, in the course of his business, sold local goods to other

registered dealers and has failed to make the statement referred to in sub-section (1), it shall be presumed that he has facilitated the evasion of

entry tax on the local goods so sold and accordingly he shall be liable to pay penalty equal to one and a half times the amount of entry tax payable

on such goods as if they were not goods of local origin.

Entry tax originally provided a penalty of 1 1/2 times the amount of entry tax payable on the goods. The penalty was increased by Act No. 24/82

which received assent of the President on 14-2-1982 and was published in the M. P. Gazette on 20-10-1982. The penalty was increased to ten

times. The procedure for imposition of penalty is governed by the machinery provisions of M. P. General Sales Tax Act which have been

incorporated by reference. Section 14 provides for assessment of collection of the entry tax. The authorities mentioned in Section 3 have been

invested with powers for assessment, collection and recovery and also for imposition and levy of penalty. The petitioners challenge the validity of

clauses (1) and (5) of Section 7 of the Entry Tax Act.

Though the petitioners do not challenge the legislative competence to enact the law under Entry 52, List II of Seventh Schedule of the Constitution

the validity of incidental and ancillary powers of the State to provide machinery for effectuating purpose of the Act is challenged as arbitrary under

Article 14 of the Constitution on the ground that the levy of penalty is for non-compliance of Section 7(1) and (5) of the Act, even though the

goods may not be liable for any tax under the provisions of Section 3 of the Act. Under the scheme of the Act, goods sold within the local area are

local goods u/s 3(d) of the Entry Tax Act, no liability to pay entry tax arises on the goods manufactured by them. The tax is payable by the

purchaser of the goods from the petitioners on entry of the said goods in the respective local area for consumption, use or sale therein, in the

course of their business as a dealer. The petitioner who are merely manufacturers of goods and sell them as dealers are not liable for assessment on

sale of manufactured goods.

The challenge therefore revolves on the interpretation of Section 7(5) which requires compliance with certain requirements of affixing seal on the

bill, invoice, or cash memo to the effect that the goods are local goods and that no entry tax had been paid. The affixture of the seal fixes the

identity of the goods sold by the manufacturers to the effect that they are local goods in the local area of their manufacture. Non-compliance with

the provisions of Section 7(1) calls for a severe penalty. Section 7(1) casts a burden on the registered dealer, selling goods to comply with the

provisions.

The main submissions of the learned counsel for the petitioners are as under :

(1) (a) That the levy of ten times penalty is confiscatory in nature and as such ultra vires the provisions of the Act and violative of Articles 14 and

19 of the Constitutional provisions, (b) the said power can not be supported by ancillary or incidental powers.

(2) the liability to pay penalty has been fastened without there being any liability to pay tax, as such, it is arbitrary. The penalty can be levied only if

it is found that the non-compliance was for evading the provisions of Act and if there was no liability to pay tax the whole scheme of levying penalty

is arbitrary and liable to be struck down being not authorised by Entry 52, List II of Seventh Schedule.

(3) the presumption is not made rebuttable provisions, as such, the provision is ultra vires, as it does not give any discretion to the assessing

authority to reduce or waive the penalty on the ground of absence of mala fide or any vaniel or technical defect.

(4) the contemporaneous exposition of the law by the Commissioner deprives the assessing authorities to impose penalty.

We may also summarise the stand of the State as disclosed in the Return as under :

(A) The history of the legislation indicates :

(a) M. P. Sthaniya Mal Ke Pravesh Par Kar Adhiniyam, 1976 (hereinafter referred to as the "Entry Tax Act") has been enacted by the State

Legislature to levy tax on entry of goods. This tax was introduced after abolition of Octroi levied by the local bodies. The main object behind this is

to lessen the delay in transportation of goods and collect the tax in a more convenient manner.

(b) The levy was first introduced by Ordinance No. 6 of 1976 and to start with it was a multiple levy i.e. every entry in each local area was

taxable. By Act No. 52 of 1976 i.e. the present Act, multiple point tax as provided in the Ordinance was changed to a single point levy. The Act

has been enacted by the State Legislature under Entry 52, List II of Seventh Schedule of the Constitution of India i.e. levy of tax on entry of goods

into local area for consumption, use or sale therein. The scheme of the Entry Tax is that tax on entry of goods is payable only by dealers and in

very special circumstances by persons and individuals.

(c) No separate registration of dealers under Entry Tax Act has been provided but all dealers who are liable to pay tax under the M. P. General

Sales Tax Act are dealers under this Act also and are liable to pay tax on the entry of goods in the local area.

(B) For the purpose of Entry Tax the goods have been divided into three categories :

(a) Goods specified in Schedule I being exempt from payment of tax and are tax free goods.

(b) The goods specified in Schedule II, these are goods which are generally raw material and are declared goods of special importance u/s 14 of

the Central Sales Tax Act. The Tax is payable on these goods on entry into a local area for consumption, use or sale therein.

(c) The goods specified in Schedule III are liable to entry tax when entry is made into local area for consumption or use as raw material, packing

material or incidental goods and not for sale. The main difference between the taxability of goods mentioned in Schedule II and Schedule III is that

Schedule II goods are liable for entry tax when the entry is made for sale also while Schedule III goods are not liable when entry is made for sale.

Goods mentioned in both Schedule II and III are liable when entry is made for consumption or use in a local area. Goods which originate in local

area are not liable to Entry Tax as long as they remain in that local area and when these local goods are sold by manufacturer to another registered

dealer in the same local area no tax is payable by him, such goods remain local goods in the hands of the said registered dealer in relation to that

local area.

Section 2(f) defines local goods in relation to a local area as goods of local origin as distinct from goods which enter in that local area clause 4 of

proviso (1) of Section 3(1) provides that no tax shall be levied in respect of goods specified in Schedule II other than local goods which are

purchased from registered dealers.

(C) In view of the proviso of Section 3(1) of the Act goods imported from outside the State and which enter into any local area and are sold for

consumption, use and sale therein are liable to pay entry tax, if the goods belong to categories mentioned in Schedule II. In case of goods which

are manufactured in any local area the goods become taxable only when they first enter into local area other than the local area of its origin. In

order to trace the goods manufactured in any local area and to ensure that the goods do not escape tax on their subsequent entry into another local

area certain checks and counter-checks have been provided and for the said purpose, the Act provides procedure u/s 7 of the Entry Tax Act.

From 1-5-1976 to 31-8-1976 the levy under the Entry Tax Ordinance was at multiple points and as such it was not necessary to prescribe any

particular procedure to identify the goods but when the levy was changed from multiple point to single point at the first stage of entry, it became

necessary to lay down definite procedure so that the goods may be identified on entering another local area, from the local area of its origin and so

that after having suffered the tax on its first entry in the local area it does not suffer any further tax.

Section 7 as it existed during the period 1-9-1976 to 30-4-1977 laid down that every registered dealer who in the course of business on

manufacture, produces or grows goods specified in Schedule II in a local area in such manner that the goods become local goods in relation to that

local area, shall, on the sale of such local goods to any other registered dealer was required to exchange declarations as provided in sub-section

(3). These forms of declaration are quoted below :

FORM V

DECLARATION

(See Rule 7(1))

I, _____ a dealer holding registration certificate No. _____ under the Sales Tax Act in

_____ local area in _____ circle hereby declares that during the quarter commencing from _____

and ending on _____ I have sold in the local area of _____ goods specified in Schedule II to the Madhya

Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 the particulars of which are given below to __a dealer holding

registration certificate No. _____ under the Sales Tax Act.

I further declare :-

*That the goods sold by me to the aforesaid dealer were manufactured/produced/grown by me in the said local area and were not

purchased/acquired/obtained by me from any other local area and are as such local goods in relation to the local area of....

OR

*That the goods sold by me to the aforesaid dealer are local goods purchased by me from a registered dealer of _____ local area after

issuing a declaration in Form V.

PARTICULARS OF GOODS SOLD ON DECLARATION

S. Date of Description Quantity Value Remarks

No. Sale of goods

Where goods are

identifiable by Trade

Mark, Tax Mark, Brand

Mark or name of the

manufacturer in the

local area such part-

iculars shall be given.

1. 2. 3. 4. 5. 6.

Date_____

Attested.

Signature of the dealer or his authorised agent.

FORM VI

DECLARATION

(See Rule 7(2))

I, _____ a dealer holding registration certificate No. _____ under the Sales Tax Act in

_____ local area in _____ circle hereby declares that during the quarter commencing from _____ and

ending on _____ I have purchased goods specified in Schedule II appended to the Madhya Pradesh Sthaniya Kshetra Me Mal

Ke Pravesh Par Kar Adhiniyam, 1976 the particulars of which are given below from _____ a dealer of the said local area

holding registration certificate No. _____ under the Sales Tax Act and I fully understand that such goods are local goods in

relation to the local area of _____ only.

PARTICULARS OF GOODS PURCHASED AGAINST DECLARATION

S.No. Date of Description Quantity Value Remarks

purchase of goods

Where goods are

identifiable by the Trade

Mark, Tax Mark, Brand

Mark or name of the

manufacturer in the local

area should particulars

shall be given.

1. 2. 3. 4. 5. 6.

Date _____

Signature of the dealer or his authorised agent.

(D) Sub-section (5) of Section 7 provided that when registered dealer referred to in sub-section (1) of Section 7 in the course of his business sold

local goods to other registered dealers and failed to exchange declaration as required in sub-section (1) the presumption was that he has done it to

facilitate the evasion of Entry Tax on local goods so sold, on its entry to the another local area and was liable to pay penalty of an amount equal to

1 1/2 time of the Entry Tax payable.

The declaration was prescribed only with a view to identify the goods manufactured in one local area to deliver it subsequently into another local

area.

(E) The Trading Community approached the State Government. Considering the representations the State Government abolished requirement of

the exchange of declarations as the procedure was cumbersome and in order to simplify the same Section 7 was amended by Act No. 22 of 1977,

with retrospective effect from 1-5-1977.

From 1-5-1977 u/s 7(1), every manufacturer is required to place the stamp or seal of local goods on sale to registered dealer who may be from

the same local area or any other local area. Section 7(1) applies to all manufacturers and all sales made by the manufacturers to all other registered

dealers. Section 7(2) of the Act deals with registered dealers purchasing goods from manufacturers and selling in the same local area to registered

dealer and each of them is required to affix the seal because the goods still remain goods of local origin in their hands, but goods lose their

character as the goods of local origin when the sale is made to registered dealer of another local area. Once the goods have entered in another

local area and are sold to another dealer, the latter dealer is not required to affix the seal or stamp, reason for this being that the goods have

already suffered tax in the hands of the first dealer and are not exigible to tax on its entry in subsequent local area.

When the manufacturer sells local goods to the other registered dealer in the same local area or the other registered dealer sells the same in the

same local area the question of levy of entry tax does not arise.

Along with affixation of seal it was necessary to furnish the statement of sale of local goods made by him to other dealers to such authority in such

form and in such time as may be prescribed and every such dealer was also required to maintain separate account of the purchase and sale of

goods effected by him in the same local area to which the goods are local goods. The statement was to be submitted in the following proforma :-

Statement showing particulars of local goods to registered dealers for the

period from to

S. Name of Address R.C. Description Date of Quantity Sale Remarks

No. the regis- No. of goods sale price

tered dealer to

whom sold

1 2 3 4 5 6 7 8 9

Date:

Place: Signature of the dealer or his authorised agent.

R.C. No.

(F) This procedure continued from 1-5-1977 to 30-9-1978. Further representations were by dealers made and Section 7 was further amended

from 1-10-1978. Sub-section (3) of Section 7 now lays down that every registered dealer referred to in sub-sections (1) and (2) shall maintain a

separate account of purchases and consumption, use or sale of local goods and separate bill books and invoices for the sale of local goods

effected by him in the same local area in relation to which the goods are local goods. The requirement of furnishing statement of sale of local goods

made by the dealers to other dealers and to such authority in such form within the time prescribed has been deleted. After the amendment of

Section 7 the only method of identifying the goods of local origin provided is by affixation of seal on the bill or sale stating that the goods are of

local origin and entry tax has been paid. Thus, if the seals are not affixed, not only the identity of goods is not established but also there is evasion

of tax and if both selling and purchasing dealer do not adhere to the procedure prescribed the scheme of the Act becomes unworkable and the

very purpose for which the Act is enacted is frustrated. The Court should construe the provisions strictly in order to ensure that the charge created

by the Act is given full effect. To ensure that the liability caused upon the selling dealer to affix the seal is discharged by him, a penal provision has

been made for its breach. When a provision is made for tax there is always ancillary provision for its" collection, recovery and to check evasion of

tax, imposition of penalty is one of the modes to enforce the compliance of Act.

10A. That return further states that Act No. 50 of 1976 was enacted under Entry 52, List II of Seventh Schedule. A perusal of the scheme of the

Act will disclose that tax is levied at the entry of goods into a local area and is a single point tax. It is also a definite and ascertainable point and

authorities know clearly the point at which the tax is to be levied. It is also admitted that the machinery provisions of the Sales Tax Act are made

applicable by reference. The power of Legislature to enact a law with reference to a topic enstrued to it being unqualified, subject only to any

limitation imposed by the Constitution in the exercise of such power, it would be competent for the Legislature to enact a law providing for the

taking event which can be spelled out from the charging section. There is a close and direct connection between the transaction, purchase of raw

materials and manufacture of the same and sale of the same to another dealer who intends to cause the entry of the said goods in another local

area. If the goods have already borne entry tax, there is no question of payment of entry tax on the said goods as it is only a single point tax and for

which a declaration has to be made. Power to legislate on a specified topic includes power to legislate in respect of matters which may fairly and

reasonably be said to be comprehended therein. A taxing entry, therefore, empowers the legislature to legislate on matters ancillary or incidental

including provisions for preventing evasion of tax. It is inherent that the Court while interpreting the provisions of a taxing statute has to give effect

to its manifest purposes having a full view of it and adopt a common sense approach to effectuate the charge created. The manner of effectuating

the charge may be either by providing a penalty for failure to. do something or raise a presumption under certain set of circumstances provided in

the statute which may be irrebuttable or conclusive. The presumption is drawn on the failure to comply with certain provisions. The provisions in

regard to presumption may be in the nature of rule of evidence.

Having dealt with the scheme of the Act we may now consider the submission made by the learned counsel that the provisions of section are

arbitrary inasmuch as they lay down a very heavy penalty of one and half times to ten times for non-compliance with the provisions of Section 7(5)

while penalty of only 1 1/2 times is leviable in respect of persons who cause entry of goods.

The first ground of attack is that the penalty is confiscatory in nature being one and half times to ten times the amount of tax due. The said penalty is

based on the ultimate tax that may be paid by the purchasing dealer. For avoidance of tax by the purchasing dealer on causing entry of goods in a

local area, penalty is only 1 1/2 times. In this view of the matter it is submitted that the provisions cannot be held to be merely incidental or ancillary

for effectuating the charge created but are in fact confiscatory in nature, more so, when no tax liability arises. The petitioners relied on the judgment

of the Supreme Court in K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, . According to the petitioners, the literal construction of

the section leads to absurdity, unjust result and the penalty is disproportionate to the mischief to be avoided. According to them the provision leads

to anomalous results. The Legislature could not by invoking ancillary powers for incidental purpose levy penalty for something when nothing is due

as tax. The Supreme Court has held in the said judgment as under :

It is well settled rule of interpretation that the Court should as far as possible avoid that construction which attributes irrationality to the Legislature.

Besides, under Entry 82 in List I of Seventh Schedule to the Constitution, which deals with ''Taxes on income other than agricultural income'' and

under which the I. T. Act, 1961 has been enacted. Parliament cannot choose to tax as income an item which in no rational sense can be regarded

as a citizen''s income or even receipt. Sub-section (2) would, therefore, on the construction of the revenue, go outside the legislative power of

Parliament and it would not be possible to justify it even as an incidental or ancillary provision or a provision intended to prevent evasion of tax.

Shri H. S. Shrivastava further relied on C.B. Gautam Vs. Union of India and Others, . In the said judgment, it is held thus :

The conclusion that the provisions of Chapter XX-C are to be resorted to only where there is significant undervaluation of the immovable

property to be sold in the agreement of the sale with a view to evade tax finds support from the decision of this Court in the case of K.P. Varghese

Vs. Income Tax Officer, Ernakulam and Another, . Section 52 in the Income Tax Act, 1961, which has now been deleted came up for

consideration before a Bench comprising two learned Judges of this Court. Very briefly put, that section provided that where a person acquired a

capital asset from an assessee connected with him and the Income Tax Officer had reason to believe that the transfer was effected with a view to

avoid or reduce the liability of the assessee u/s 45 to the tax on capital gains and with that object the transfer of the capital asset was being made at

an undervalue of not less than 15 percent; for the purposes of taxing the assessee, the full value of the consideration was taken to be its fair market

value on the date of the transfer. It was pointed out by the Bench that sub- section (1) of Section 52 did not deal with income to be accrued or to

be received, which in fact never accrued and was never received. The onus of establishing that the conditions of taxability are fulfilled is always on

the Revenue.

Shri Shrivastava also relied on 20 STC 453 (supra). It was held thus :

''We have already indicated that in a large majority of cases covered by the Act the tax is payable at the point of first sale in the State. But under

clause (a) of the second proviso the tax is ordered to be recovered even before the sale, in addition to the penalty not exceeding Rs. 1000/- or

double the amount of tax recoverable whichever is greater. Therefore, clause (a) of the second proviso is clearly repugnant to the general scheme

of the Act which in the majority of cases provides for recovery of tax at the point of first sale in the State. In view of this repugnancy one or other

of these two provisions must fall. Clearly it is clause (a) in the proviso which under the circumstances must fall, for we cannot hold that the entire

Act must fall because of this inconsistency with respect to recovery of tax under clause (a) of the second proviso event occurs in the large majority

of cases which would be covered by the Act, we are therefore, of the opinion that clause (a) of the second proviso being repugnant to the entire

scheme of the Act, in so far as it provides for recovery of tax even before the first sale in the State, which is the point of time in a large majority of

cases for recovery of tax, must fall on the ground of repugnancy.

The Revenue submits that the provision is for identifying the goods sold by the petitioner/manufacturers in the course of various transactions and in

the garb of local goods or some other goods, are being despatched. Prescribing the method for identifying the goods and consequential penalty for

non-compliance effectuates the charging section under the Act and it cannot be said to be arbitrary or confiscatory. True that for making the

evasion of tax impossible or difficult, a heavy penalty can be levied, but if in fact there is no evasion of tax would the penalty be justified? When

goods other than of local origin are sold which have not borne tax, the entry of such goods is liable for tax, the dealer would be able to evade tax in

the name of goods of local origin. Yet the question that arise for consideration is Whether under the supposition that some other goods are being

sold as goods of local origin some inquiry would be necessary. Prescribing a penalty at flat rate of ten times, without discretion to reduce it, is

confiscatory and cannot be in any way be justified as ancillary or incidental. In this view of the matter, the contention of the learned counsel for the

petitioners is accepted and the provision of penalty of ten times for non-compliance with the provisions of Section 7(5) is held to be confiscatory.

In 20 STC 455 (supra) the purpose of enacting incidental power has been indicated and the said powers should be exercised within limits. In the

instant case, the penalty is levied for some act which does not really exist i.e. evasion of tax. Unless there is evasion of tax. there is no question of

any penalty.

Yet another way of looking at the provisions is whether the legislature has provided a machinery to levy a penalty having a reasonable and

proximate connection between the transaction of sale and entry of goods in another local area with a view to evade tax. If that circumstance does

not exist, the penalty cannot be levied on a purported likelihood of evasion of tax. The amount of penalty can also not be equal to the value of the

goods or have unreasonable proportion with the tax evaded. A reference may be made to State of Haryana and Ors. v. Santlal and Anr. 1993 91

STC 321, it has been held thus :

There can be no doubt that the State Legislature would be entitled to impose sale tax upon a person who carries on the business of selling goods

and who has in the customary course of business authority to sell goods belonging to the principal. A clearing or forwarding agent, ''dalal'' or

person transporting goods does not carry on the business of selling goods, and does not have, in the customary course of his business, authority to

sell goods belonging to the dealer whose goods he books or receives. As we have already stated, there has to be a reasonable and proximate

connection between the transaction of sale and the clearing or forwarding agent, ''dalal'' or person transporting goods before the State Legislature

can, in exercise of the power to levy sales tax, enact legislation concerning him. We are not satisfied that there is such close and direct connection

between the transaction of sale of goods by a dealer and the clearing or forwarding agent or ''dalal'' who books or receives such goods or a

person who transports such goods within the meaning of the said Section 38.

A reference may also be made to Govind Saran Ganga Saran v. Commissioner of Sales Tax 1985 60 STC 1. It is held thus :

The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which

prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to

pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing

the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any

uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity.

Under the entry tax, there is no uncertainty regarding the stage at which tax is leviable. It is leviable once and if the goods have borne tax in the

hands of any dealer then subsequent dealer is not required to pay any tax on the same. Thus, no penalty can be levied for non-compliance under

the guise of an imaginary evasion of tax.

In R.S. Joshi, STO v. Ajit Mills Ltd. 1978 VKN (2) 65, the Supreme Court held that the doctrine of incidental or ancillary powers cannot

overreach the charging provision and provide for penalty which cannot be levied on a true interpretation of the provision. While considering the

terms ""forfeiture"" and ""penalty"" the Supreme Court observed that when tax is not due, the legislature cannot provide for forfeiture. The submission

made by the learned counsel is that the levy of penalty at ten times on transaction which is not liable for tax is confiscatory in the nature and as such

ultra vires the provisions of the Act and violative of Article 14 of the Constitution, nor can it be supported under ancillary or incidental power.

Yet another submission is that liability to pay penalty has been fastened without there being any liability to pay tax which is not authorised by Entry

52, List II of Seventh Schedule. On this question, the competence of the State Legislature to enact an ancillary provision for effectuating the charge

cannot be doubted but the provision operates outside the scope of entry, inasmuch as, it provides for a penalty which is not otherwise justified. If

there be no evasion of tax, there cannot be question of penalty. If there is evasion of tax on goods in respect of other than local goods, there should

be a provision for checking such an evasion which is not the purpose of this Act i.e. the Entry Tax Act. If no tax on entry is evaded, the provision

cannot be supported. Therefore, the ground of attack is also sustained.

The third ground of attack is based on the argument that the presumption made is- not rebuttable nor does it give any discretion to the authority to

reduce the penalty and such enactment is arbitrary. A reference may be made to Sodhi Transport Company v. State of U.P. 1986 62 STC 381

wherein rebuttable presumption was incorporated u/s 28-B of the U. P. Sales Tax Act, 1948 read with rules the validity of which has been

sustained as a machinery provision on the ground that when assessee makes declaration that the goods are for the purpose of carrying them

outside the State should actually take them outside the State. If he violates the provision o by not delivering the transit pass at the exit check post,

he commits a breach and the provision is meant to prevent evasion of tax. In these circumstances, it may be presumed that he had sold the goods

within the State. No such rebuttable presumption has been incorporated in the present case. In the instant case, the presumption as contained in

Section 11 does not give any latitude to the taxing authorities. It was held thus :

A statutory provision which creates a rebuttable presumption as regards the proof of a set of circumstances which would make a transaction liable

to tax with the object of preventing evasion of the tax cannot be considered as conferring on the authority concerned the power to levy a tax which

the legislature cannot otherwise levy. A rebuttable presumption which is clearly a rule of evidence has the effect of shifting the burden of proof and

it is hard to see how it is unconstitutional when the person concerned has the opportunity to displace the presumption by leading evidence.

Furthermore, there may be a breach which is merely venial and for such a breach the Act must confer jurisdiction on the authorities to determine

the extent of liability and extent of penalty to be levied. It is not that on every breach penalty is to be levied, at the maximum. The Supreme Court

had occasion to consider the aspect in Hindustan Steel Limited v. State of Orissa 20 STC 211 and other cases and set aside the plea raised. A

reference may also be made to 45 STC 197 and Hindustan Steel Ltd. Vs. State of Orissa, .

Having considered all aspects of the matter, we find that Section 7(5) do not lay down any rule for rebutting the presumption and hence the

provision is arbitrary and ultra vires.

The last submission made by the learned counsel for the petitioners was that the Commissioner issued instructions and circulars, considered as

contemporaneous exposition of law by the Commissioner and the same should have been accepted by the assessing authority. In view of our

decision as indicated above, it is unnecessary to consider this aspect. It cannot be doubted that contemporaneous exposition of law is taken into

consideration to construe the meaning of a provision.

The learned Advocate General appearing for the respondents submitted that the provisions should be read down. However, this is not permissible

as the scheme of the Act does not confer jurisdiction on the authorities to reduce the penalty. He relied on R.S. Joshi, Sales Tax Officer, Gujarat

and Others Vs. Ajit Mills Limited and Another, for the proposition. As pointed out by the Supreme Court, reading down is permissible if such an

intention can be spelled out from the provisions of the Act. We may refer to C.B. Gautam Vs. Union of India and Others, . It is held thus :

We agree that in order to save a statute or a part thereof from being struck down it can be suitably read down. But such reading down is not

permissible - where it is negatived by the express language of the statute. Reading down is not permissible in such a manner as would fly in the face

of the express terms of the statutory provisions.

In view of the specific provisions of the Act, there is no scope for reading down the provision. The provisions of Section 7(5) are declared ultra

vires.

We dispose of all the petitions by deciding the constitutional validity and leaving the ancillary questions to be decided by the assessing authorities or

appellate authorities, as the case may be.