(2007) 11 MAD CK 0271

Madras High Court

Case No: Writ Petition No''s. 37327, 37328 of 2003 and 29700 of 2004 and W.P.M.P. No. 45301 of 2003

Ruchi Soya Industries Limited		APPELLANT
	Vs	
Commercial Tax Officer and Others		RESPONDENT

Date of Decision: Nov. 14, 2007

Acts Referred:

- Central Sales Tax Act, 1956 - Section 15
- Constitution of India, 1950 - Article 14, 141, 19(1), 301, 303
- Tamil Nadu General Sales Tax (Amendment) Act, 1993 - Section 8
- Tamil Nadu General Sales Tax (Tenth Amendment) Act, 1987 - Section 3
- Tamil Nadu General Sales Tax Act, 1959 - Section 10, 17, 17(1), 17(2), 17(3)

Citation: (2008) 12 VST 546

Hon'ble Judges: K. Raviraja Pandian, J; Chitra Venkataraman, J

Bench: Division Bench

Advocate: C. Natarajan, for N. Inbarajan, for the Appellant; P.S. Raman, Additional Advocate-General for Haji Nazirudeen, Special Government Pleader, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Chitra Venkataraman, J.
W.P. Nos. 37327 and 37328 of 2003 are preferred against the order of the Tamil Nadu Taxation Special Tribunal rejecting the original petitions preferred by the petitioner against the assessment order dated May 29, 2003 for the assessment years 1999-2000 and 2000-01.

2. The petitioner has preferred W.P. No. 29700 of 2004 before this Court for a writ of declaration that the power of the State to levy purchase tax u/s 7A on goods

purchased, the sale of which enjoyed exemption under the notification issued u/s 17 and sent on consignment basis to outside the State otherwise by way of sale u/s 7A(1)(c) of the Tamil Nadu General Sales Tax Act, 1959 is unconstitutional and beyond the legislative competence of the State under entry 54, List II of the Seventh Schedule to the Constitution of India and ultra vires entry 92B of List I of the Seventh Schedule to the Constitution and void as repugnant to Article 14, violative of Article 301 and not saved by Article 304(b) of the Constitution of India. Originally the petitioner preferred O.P. No. 695 of 2003 before the Tamil Nadu Taxation Special Tribunal, challenging the vires of Section 7A(1)(c) of the Tamil Nadu General Sales Tax Act, 1959. It is stated that since the Tribunal was not functioning in its quorum to hear the case, a doubt was raised during the course of hearing before the Tribunal as regards the jurisdiction of the single member to proceed with the case.

3. The petitioner herein is a company engaged in the business of import and domestic purchase and sales of various types of edible oil, i.e., RBD palmolein, soyabean oil and sunflower oil. The purchases were effected from various registered dealers inside the State of Tamil Nadu. From time to time, the oils so purchased were stock transferred by the petitioners to their branches outside the State of Tamil Nadu. The petitioner states that these transactions were rightly entered into the books of account maintained by them in the course of business. The original assessments for the assessment years 1998-99, 1999-2000 and 2000-01 were completed both under the Tamil Nadu General Sales Tax Act, 1959 as well as under the Central Sales Tax Act, 1956. It is stated that the petitioner was served with a notice to revise the assessment on March 24, 2003 with reference to the liability u/s 7A of the Tamil Nadu General Sales Tax Act, 1959. The objection of the petitioner was overruled ultimately, to result in the passing of the assessment order. The petitioner challenged the same before the Tamil Nadu Taxation Special Tribunal.

4. It is stated that the petitioner purchased sunflower oil, soyabean oil and refined RBD palmolein from various registered dealers enjoying the benefit of exemption under G.O. Ms. No. 109 dated April 7,1998, G.O. Ms. No. 36 dated March 1,1999 and G.O. Ms. No. 93 dated June 2, 2000, as amended by G.O. Ms. No. 105 dated June 22, 2000 (with effect from April 1, 1999). G.O. Ms. No. 109 dated April 7, 1998, issued u/s 17(1) of the Tamil Nadu General Sales Tax Act, 1959, granted exemption with effect from March 27, 1998, in respect of tax payable under the Act on the sale of coconut oil, groundnut oil, gingelly oil, sunflower oil and all refined oils including refined palm oil, refined cotton seed oil and refined rice bran oil. G.O. Ms. No. 36 dated March 1, 1999 effective from March 1, 1999 issued u/s 17(3), brought in a variation to G.O. Ms. No. 109 dated April 7, 1998 that the exemption on the tax payable on the sale of coconut oil, groundnut oil, gingelly oil, sunflower oil, cotton seed oil and rice bran oil would apply to any dealer whose total turnover in a year did not exceed Rs. 100 crores. G.O. Ms. No. 93, dated June 2, 2000, issued u/s 17(1), effective from March 1, 1999, exempted the tax payable by the dealer on the sale of coconut oil, gingelly oil, groundnut oil, sunflower oil, cotton seed oil, rice-bran oil and all refined

oils including refined palm oil, refined cotton seed oil and refined rice-bran oil, subject to turnover not exceeding Rs. 300 crores. The said notification G.O. Ms. No. 93 dated June 2, 2000 u/s 17(1) was varied under G.O. Ms. No. 105 dated June 22, 2000 that the exemption was made effective from April 1, 1999 instead of from March 1, 1999. As already noted, the petitioner purchased oil from registered dealers, who had the benefit of exemption under the notifications and hence, the sales effected by them were exempt.

5. The assessing authority took the view that though the petitioner had effected purchases from dealers having the benefit of exemption from payment of tax, yet, as the petitioner had despatched the goods to outside the state by way of consignment sale, in view of Section 7A(1)(c) of the Act, the petitioner had to pay the purchase tax u/s 7A. The assessee objected to the said proposal on the premise that the purpose of the notification was to exempt the dealer on sale of goods and that considering the exemption notification and the object of introduction of Section 7A of the Act, the proceedings issued were totally unsustainable. Quite apart from that, the assessee took the plea that invoking Section 7A of the Act on the despatch of goods from one State to another would be violative of Article 301 and not saved by Article 304(b) of the Constitution of India, since there was no Presidential assent. The assessee contended that in the context of exemption granted, the demand u/s 7A of the Act had the effect of shifting the point of taxation and was wholly unsustainable and alien to the scheme of exemption contemplated u/s 17 of the Act. The assessing authority, however, rejected the objections and passed the orders of assessment. The petitioner challenged the orders by way of original petitions before the Tamil Nadu Taxation Special Tribunal.

6. The assessee took the plea that taxable goods could not fall for consideration u/s 7A of the Act. The assessee took the stand that the phrase "in circumstances in which no tax is payable u/s 3 or 4 of the Act, as the case may be", referred only to those circumstances where there was no liability at all under any of the provisions of the Act, that it did not include a case of exemption: it being in relation to the taxable goods, and the point of taxation could not be shifted by reason of the notification to visit with liability u/s 7A. The Taxation Special Tribunal allowed the case of the petitioner as regards the assessment year 1998-99 that the exemption enjoyed by the dealers was a total exemption and that the decision of the Supreme Court reported in [1975] 36 STC 191 State of Tamil Nadu v. M.K. Kandaswami applied to the case. Consequently, the transaction could not be brought u/s 7A(1)(c). It however, rejected the plea of the assessee as regards the assessment years 1999-2000 and 2000-01 that there was no total exemption, it being available to dealer having turnover up to Rs. 300 crores. Rejecting the reliance placed on the decisions reported in Vinod Solvent Extracts (P) Ltd. Vs. The State of Andhra Pradesh, Tungabhadra Industries Ltd., Kurnool Vs. The State of Andhra Pradesh, by the Deputy Commr. of Commercial Tax, Anantapur, and [1995] 98 STC 125 (Mad) Sulochana Cotton Spinning Mills (P) Ltd. v. State of Tamil Nadu, the Special Tribunal

applied the law laid down in The State of Tamil Nadu Vs. M.K. Kandaswami and Others, and confirmed the reassessment. It however deleted the penalty levied. Thus the original petitions for the assessment years 1999-2000 and 2000-01 were rejected by the Tamil Nadu Taxation Special Tribunal. Hence, the present writ petitions.

7. Mr. C. Natarajan, learned Senior Counsel appearing for the petitioner, submitted that given the object of the purchase tax levy u/s 7A, the liability u/s 7A could arise only in those cases not covered by the provisions of Sections 3, 4 and 5. He submitted that going by the language of Sections 3(2), 3(2A) and 4, the phrase "payable" u/s 7A has to be understood to mean chargeability as per Section 3(2), 3(2A), 3(2C) or 4. Hence, going by the language of Section 7A, the transactions that fall for consideration u/s 7A are only such of those cases not falling within the scope of Section 3(2), 3(2C), 3(3) or 4. He submitted that grant of exemption from taxation under the notification issued u/s 17 presupposes liability under these provisions of the Act. Hence, when a sale transaction enjoys exemption from payment of tax under the provisions of tax, then a sale does not fall under the phrase "in circumstances in which no tax is payable". He submitted that such purchases on the exempted turnover cannot be equated with the cases of tax evasion which the Section seeks to cover.

8. Learned Senior Counsel pointed out that the Act and the Schedule fixes the taxable event, the taxable person and the rate of measure. Learned Senior Counsel pointed out that vegetable oil, which is the subject-matter in this case, is taxable at the point of first sale under entry 67, Part B, First Schedule. Under the Government Order issued u/s 17 of the Tamil Nadu General Sales Tax Act, 1959, dealers selling vegetable oil specified therein up to the turnover of Rs. 300 crores are exempted from payment of tax.

9. Section 17 of the Act grant the power to the State to issue notification to exempt or reduce the tax in respect of tax payable under this Act. The exemption or reduction may be with reference to specified goods or class of goods at all points or at specified points or points in the series as well as by successive dealers or by any specified class of persons with regard to the whole or any part of his turnover or on the sale or purchase of any specified classes of goods by specified classes of dealers in regard to the whole or part of that turnover.

10. Learned Senior Counsel submitted that a notification issued u/s 17 of the Act has to be read in consonance with the taxation policy expressed in the Scheme of the Act. The notification u/s 17 of the Act granting exemption cannot be read as having the effect of disturbing or altering the scheme of taxation fixing the taxable point. If the notification has the effect of shifting the event or the charge from what is contemplated in the Schedule under the Act, necessarily this has to be placed before the Legislature for its approval. In short, if the notification has the effect of shifting the point of taxation and the taxable person, then the procedure given u/s 59 of the

Act has to be followed.

11. In the background of the scope of Section 17, learned Senior Counsel 1 submitted that the invoking of Section 7A of the Act in cases where an exemption notification operates would really amount to denying the benefit granted under the provisions of the Act. He further pointed out that under normal circumstances, the local sale effected by the dealer who purchased from a dealer covered by the notification, is not subjected to tax under the Act. Learned Senior Counsel pointed out that the object of Bringing Section 7A of the Act was to check the mischief of tax evasion. If the scheme of Section 7A of the Act is to step in to levy tax in cases covered under the exemption notification, the very purport of the exemption is lost. Hence, any construction as to the scope of Section 7A must necessarily be one to preserve and justify the grant of exemption u/s 17. A notification issued has to fit in with the taxation policy. However, if a notification granting exemption has the effect of shifting the point of taxation to attract Section 7A, the same would be against the Scheme given under the Act. Learned Counsel placed reliance on the decision reported in The Sales Tax Officer, Navgaon, and Another Vs. Timber and Fuel Corporation, and submitted that in the background of the Scheme of the Act, the taxation policy and the object for which Section 7A was introduced, the proceedings taken are totally illegal.

12. Placing reliance on the decisions of the apex court reported in [1975] 36 STC 191 State of Tamil Nadu v. M.K. Kandaswami, Associated Cement Companies Ltd. Vs. State of Bihar and Others, Peekay Re-Rolling Mills (P) Ltd. v. Assistant Commissioner and AIR 1995 400 (SC) , learned Senior Counsel submits that the phrase "in circumstances in which no tax is payable" has to be understood as an absence of liability or charge. Since granting exemption is always with reference to a case of liability or a charge under the Act, the phrase "in circumstances no tax is payable" will not include sales covered under the exemption notifications issued, be it total or conditional, as regards the turnover or as regards the persons or with reference to class of goods.

13. Learned Senior Counsel pointed out that u/s 3(1), tax is payable by a dealer only if and when the total turnover of the year exceeded Rs. 3 lakhs. Referring to the definition of "business" u/s 2(d), "dealer" in Section 2(g) and "turnover" u/s 2(r), he submitted that the Act imposes liability not on all sales and persons dealing in goods but excludes certain turnover from the concept of turnover and thereby, certain persons. A sale by the agriculturist is not included under the definition of "turnover". He submitted that the scheme of Section 7A has to be understood looking at the entire scheme of the Act relating to the chargeability under the Act. Hence, Section 7A must carry a purposive interpretation as not to impose a burden in circumstances where there is a liability under the Act. Section 7A operates only on such of those circumstances that do not fall under the concept of "chargeability" and that "payability" under the provision has to be understood as absence of

chargeability contemplated under the Act.

14. Learned Senior Counsel submitted that the proceeding taken u/s 7A of the Act is the result of the purchase from dealers, who are exempted from payment of tax and linked to the movement outside the State otherwise than by way of sale. He pointed out that as the levy under the Section was on account of the subsequent fact of a movement as identified under the Section, the levy is, in effect and substance, on the consignment of goods otherwise than by way of sale. This has the direct and immediate effect of impeding the trade in the course of inter-State trade and commerce. Consequently, the tax levied u/s 7A(1)(c), in effect, is a restriction on the freedom of trade and hence, violative of Article 301. In the absence of the Presidential assent, Section 7A of the Act is obnoxious to the constitutional prescription under Chapter XIII of the Constitution of India and hence liable to be struck down.

15. He places reliance on the decisions reported in Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, A.B. Abdul Kadir and Others Vs. State of Kerala, Buxa Dooars Tea Company Ltd. and Others Vs. State of West Bengal and Others, and [1998] 108 STC 539 (Ker) Hallmark Tobacco Co. Limited v. State of Kerala affirmed in State of Kerala and Another Vs. I.T.C. Limited and Others, to contend that the provisions of Section 7A(1)(c) violated Article 304(b) of the Constitution and hence, unconstitutional. Hence, learned Senior Counsel submitted that the provisions of Section 7A is beyond the legislative competence of the State Legislature and liable to be struck down as ultra vires the provisions of the Constitution.

16. Learned Additional Advocate-General appearing for the State countered the arguments by placing reliance on the decision reported in [1975] 36 STC 191 State of Tamil Nadu v. M.K. Kandaswami as well as in Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., and submitted that the contentions as to the interpretation that it is a tax on consignment and violative of Articles 301 and 304(b) were considered at length in the decision of the apex court reported in [1993] 88 STC 98 Hotel Balaji v. State of Andhra Pradesh and M/s. Devi Dass Gopal Krishan Pvt. Ltd., etc. etc., Vs. State of Punjab and another etc. etc., . Apart from interpreting the provisions of Section 7A in the decision reported in [1975] 36 STC 191 State of Tamil Nadu v. M.K. Kandaswami, the apex court affirmed the decision reported in [1972] 30 STC 537 (Ker) Malabar Fruit Products Co. v. Sales Tax Officer, Palai wherein, the contentions taken similar to the one taken herein were rejected. He pointed out that once the constitutionality of these provisions is decided and settled already, the very same issues cannot be reagitated again. Referring to the contention of the petitioner that the purchase tax is really in effect one on the consignment and hence beyond the scope of legislative competence, he submitted that the decision of the Supreme Court reported in [1993] 88 STC 98 Hotel Balaji v. State of Andhra Pradesh had already considered the identical contention and rejected the same. The decision referred to above covers the entire gamut of the argument both on the

interpretation front as well as on the plea invoking Article 304(b) of the Constitution of India. He submitted that to bring the case under Article 301 of the Constitution of India, the assessee should prove that the tax was really a restriction of the trade. The decision reported in Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., has answered the challenge that the levy is not on the consignment but it is on the purchase. He pointed out that the Supreme Court has clearly held that the purchase tax operates only in cases of conditional exemption.

17. He submitted that Section 7A of the Act was introduced to see that the State is not denied of its revenue at least at one stage. The Scheme of Section 17 of the Act is to exempt persons or goods either conditionally or totally. By granting such an exemption, the Scheme of the Act or the policy of the legislation is in no way tinkered with. Within the framework and the policy of the taxation, powers u/s 17 of the Act are exercised by the State. When the State issues a general exemption, the chargeability u/s 7A also does not get attracted. As interpreted in the decision reported in [1975] 36 STC 191 State of Tamil Nadu v. M.K. Kandaswami the apex court considered the impact of exemption notification to hold that in case of total exemption, the levy under the Act was not attracted. However, in cases of partial exemption as''provided for u/s 17(2), the exemption not being total and in specified circumstances only, and the goods no longer available for taxation thereafter, under the stated circumstances, the charge u/s 7A is activated so that there is no leakage of the revenue due to the State. Referring to the contention that invoking Section 7A in cases covered under the notification u/s 17 would result in a shift in the taxation policy, which could only be done u/s 59, he pointed out that the power given u/s 17 and the one u/s 59 operate on different fields. When a notification u/s 17 is issued to grant exemption or to reduce the tax payable under the Act, there is no interference with the point of sale given under the Schedule to the Act. The power u/s 17 operates within the taxation policy of the State. However, where the State seeks to amend the Schedule to change or vary, add, delete any of the Schedules, then the same is only by virtue of Section 59 and there only the procedure u/s 59 needs to be observed. The purport and the scope of the operation of these two sections are totally different and distinct. Consequently, an exemption granted u/s 17 with reference to the tax payable under the Act cannot be construed as shifting the point of taxation merely by reason of the transaction attracting Section 7A. The provisions give no scope for such understanding. He relied on the decision reported in Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., which was again applied in M/s. Devi Dass Gopal Krishan Pvt. Ltd., etc. etc., Vs. State of Punjab and another etc. etc., and pointed out that Section 59 is similar to Section 39 of the Punjab General Sales Tax Act. He referred to the decision of the Supreme Court in Civil Appeal Nos. 159 and 2875 of 2001 dated March 20, 2007 and pointed out that the provisions of Sections 59 and 17 have to be read in the context of the scheme of the Act. As such, there is no tinkering of the Schedule or the legislative policy while issuing notification u/s 17 of the Act. He submitted that in the wake of the decision

of the Supreme Court settling the law, the prayer of the writ petitioner has to be rejected.

18. In reply, learned Senior Counsel for the petitioner submitted that Section 7A of the Act applies to cases where there was no liability declared under law. Referring to the language under the provisions relating to Sections 3(2), 3(3) and 4 of the Act, he submitted that Section 7A of the Act can be activated only in cases where there was no payability, meaning thereby where there is no liability at all. He pointed out that the expression "payable" u/s 7A of the Act has to be understood as qualifying "liable". He submitted that the decision reported in Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., or for that matter, the decision reported in M/s. Devi Dass Gopal Krishan Pvt. Ltd., etc. etc., Vs. State of Punjab and another etc. etc., , does not cover the points raised in this case. He referred to the decision reported in Arnit Das Vs. State of Bihar, that issues which are not decided can always be re-agitated. He submitted that the direct impediment on the flow of trade by reason of such a levy u/s 7A has to be kept in mind while considering the plea under Articles 301 and 304(a), (b) and (c). The statute has given a conscious exemption u/s 17 of the Act, which means that what it has intended by way of an exemption cannot be taken away by imposing a lev}'' u/s 7A of the Act on the purchases from those who are exempted from tax. In the circumstances, the liability, as such, is unconstitutional as offensive of Article 14 of the Constitution of India. He, therefore, prayed for setting aside the order of the Tribunal, thereby to hold that Section 7A(1)(c) is offensive of Articles 301 and 304 (a), (b) and (c) of the Constitution of India.
19. Heard the learned Counsel for both sides.

20. Before going into the various contentions raised herein, the provisions of 20 Section 7A of the Act, as are relevant and as they stood at the material point of time relevant to the assessment years 1999-2000 and 2000-2001, need to be noted:

7A. Levy of purchase tax.--(1) Subject to the provisions of Sub-section (1) of Section 3, every dealer who in the course of his business purchases from a registered dealer or from any other person, any goods the sale or purchase of which is liable to tax under this Act in circumstances in which no tax is payable u/s 3 or 4, as the case may be, not being a circumstance in which goods liable to tax under Sub-Section (2) of Section 3 or Section 4, were purchased at a point other than the taxable point specified in the First, the Fifth, the Eleventh or the Second Schedule respectively, and either,-

(a) consumes or uses such goods in or for the manufacture of other goods for sale or otherwise; or

(B) disposes of such goods in any manner other than by way of sale in the State; or

(c) despatches or carries them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce,

shall pay tax on the turnover relating to the purchase as aforesaid at the rate mentioned in Sections 3 or 4, as the case may be.

21. Section 7A was inserted into the statute book under the Tamil Nadu General Sales Tax (Amendment) Act of 1970 with effect from November 27, 1969.

22. The provision u/s 7A underwent amendments periodically from what was considered originally in the decision reported in [1975] 36 STC 191 State of Tamil Nadu v. M.K. Kandaswami. The provision as it stood originally is as follows (at page 195):

7A. Levy of purchase tax.-(1) Every dealer who in the course of his business, purchases from a registered dealer or from any other person, any goods the sale or purchase of which is liable to tax under this Act in circumstances in which no tax is payable unde: 4 or 5, as the case may be, and either,-

(a) consumes such goods in the manufacture of other sale or otherwise; or

(b) disposes of such goods in any manner other than sale in the State; or

(c) despatches them to a place outside the State except result of sale or purchase in the course of inter-State trade or shall pay tax on the turnover relating to the purchase afore rate mentioned in Sections 3 4, or 5, as the case may be, whatever the quantum of such turnover in a year.

23. With effect from January 1, 1987, under Act 78 of 1986, in Sub-section (1) for the expression "no tax is payable u/s 3, 4 or 5, as the case may be, and either", the expression "no tax is payable u/s 3, 4 or 5, as the case may be not being a circumstance in which goods I under Sub-section (2) of Section 3 or Section 4, were purchased other than the taxable point specified in the First or the Second Schedule and either," were substituted. 1986-page 296 Statutes (Central Nadu) Tamil Nadu Act and Ordinances, 1986. In Section 7A(1)(a) the word "consumes", the words "or uses" were inserted by Section 3, of the Tamil Nadu General Sales Tax (Tenth Amendment) Act (78 of 1896) with effect from 1987.

24. In 1993, by Section 8 of the Tamil Nadu General Sales Tax Amendment Act 25 of 1993, with effect from March 12, 19 words "every dealer" in Sub-section (1), the words "subject to the of Sub-section (1) of Section 3 every dealer" were substituted. In for the words "despatches them", the words "despatches or ca, were substituted. In the concluding portion of sub-section the "whatever the quantum of such turnover in a year" was Omitted proviso to Sub-section (1) was omitted. It may be noted that the amendments made however does not affect the interpretation gi1 constitutionality of the provision as decided by the apex court under the various decisions.

25. Section 7A of the Tamil Nadu General Sales Tax Act, 1959, came up for consideration more than once before the Supreme Court on the interpretation of

Section 7A, the earliest of the decisions is the one [1975] 36 STC 191 State of Tamil Nadu v. M.K. Kandaswami therein included cases relating to purchase of agricultural on agriculturists, as the purchase of gingelly seeds from agriculturists and crushing of the seeds into oil, the case of butter purchased from the householders and then converted into ghee and case of castor seeds purchased from unregistered dealers under bought notes and thereafter crushed into oil. In substance, these cases covered instances where the purchases were from non-dealers, purchases from unregistered dealers, purchases from persons whose turnover were not falling within the definition of "turnover" and purchases from persons, who did not fall within the definition of "dealers". Hence, in none of these cases, being of the circumstances stated under the Act, viz., sellers being agriculturists, house holders and non-dealers, tax was payable by them on these sales. The result was, even though the goods were liable to be taxed, the sales took place in circumstances in which no tax was payable at the point at which tax was levied under the Act. After the purchase, the transaction of the dealers covered cases of (a) transport on consignment basis otherwise than by way of sale to outside the State for sale or (b) consuming them in the manufacture of other goods for sale or (c) disposed of otherwise than by way of sale. The Supreme Court held that after the purchase, if the goods are not available in the State for subsequent taxation, the purchasers are liable to be taxed u/s 7A.

26. Applying the decision reported in Ganesh Prasad Dixit Vs. Commissioner of Sales Tax, Madhya Pradesh, , the apex court held that Section 7A of the Tamil Nadu General Sales Tax Act is based on Section 7 of the Madhya Pradesh General Sales Tax Act. It held "Although the language of these two provisions is not completely identical, yet their substance and object are the same". Instead of the longish phrase, "the goods, the sale or purchase of which is liable to tax under this Act" employed in Section 7A of the Madras Act, Section 7 of the Madhya Pradesh Act conveys the very connotation by using the convenient, terse expression "taxable goods".

27. Referring to the scope of the expression in Section 7A "goods, the sale or 2 purchase of which is liable to tax under the Act", the apex court held as follows (at page 201 of 36 STC):

''Goods'', the sale or purchase of which is liable to tax under this Act in Section 7A(1) means ''taxable goods'', that is, the kind of goods, the sale of which by a particular person or dealer may not be taxable in the hands of the seller but the purchase of the same by a dealer in the course of his business may subsequently become taxable. We have pointed out and it needs to be emphasised again that Section 7A itself is a charging Section. It creates a liability against a dealer on his purchase turnover with regard to goods, the sale or purchase of which though generally liable to tax under the Act have not, due to the circumstances of particular sales, suffered tax u/s 3, 4 or 5, and which after the purchase, have been dealt by him in any of the

modes indicated in Clauses (a), (b) and (c) of Section 7A(1).

28. The apex court held that by implication, the phrase "in circumstances in which no tax is payable" referred to circumstances of particular sales not suffering tax.

29. It excluded the goods which are totally exempt from tax at all points u/s 8 or Section 17(1). Rejecting the contention of the petitioner that Section 7A of the Act would operate only in cases of total non-liability, the Supreme Court held that the phrase "goods, the sale or purchase of which is liable to tax under this Act" and the phrase "in circumstance in which no tax is payable" u/s 3, 4 or 5, as the case may be, are not mutually exclusive and "the existence of one does not necessarily negate the other." The Supreme Court held "that Section 7A is at once a charging as well as a remedial provision. Its main object is to plug leakage and prevent evasion of tax.

30. A reading of the various decisions of the Supreme Court on the question of purchase tax show that every aspect projected in this case has been considered right from Ganesh Prasad Dixit Vs. Commissioner of Sales Tax, Madhya Pradesh, [1972] 30 STC 537 (Ker) (Malabar Fruit Products Co. v. Sales Tax Officer, Palai [1975] 36 STC 191 State of Tamil Nadu v. M.K. Kandaszuami Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., M/s. Devi Dass Gopal Krishan Pvt. Ltd., etc. etc., Vs. State of Punjab and another etc. etc., [1995] 96 STC 344 (SC) Jagatjit Sugar Mills v. State of Punjab and there is hardly any justification in the contentions of the learned Counsel appearing for the assessee.

31. Learned Counsel for the assessee placed reliance on the decision of the Supreme Court reported in Arnit Das Vs. State of Bihar, and submitted that questions not consciously decided can be reagitated and hence the objection by the State could not be sustained. Referring to the phrase "in circumstance in which no tax is payable", learned Counsel placed an interpretation that the same has to be read as one relating to a non-liability. Learned Counsel pointed out that Section 7A can operate only in cases where there is no liability. Learned Counsel submitted that the provisions of Section 7A was introduced as an anti-tax evasion measure. An exempted sale, by no logic, carries with it the stamping of tax evasion to fit in with the purpose for which the provision was introduced and hence, when once the sale is an exempted sale, the invoking of a provision like Section 7A would nullify the exercise of a power given u/s 17. Learned Counsel for the petitioner reasons that the terms of exemption cannot shift the tax policy declared, to tax the sale of vegetable oil at the point of first sale. The notification cannot be construed to disturb the determination of the policy under the Act. Hence, any understanding of the effect of the exemption notification has to be in consonance with the scheme of taxation. If the effect results in a shift in the point of taxation, then the proper course would be to follow the procedure u/s 59. In the absence of the same, the resort to Section 7A is bad.

32. We do not find any reason to accept this line of thought. Section 7A does not give any room for such course of interpretation. Sections 3, 4 and 7A are independent charging Sections. As already noted, Section 7A comes into play where the purchase of goods liable to tax does not suffer tax in the circumstances, but are dealt with in the manner stated therein. It is no doubt true that a second sale of tax suffered goods enjoys the second sale exemption. He may sell the goods inside the State again or sell the same as inter-State sale or despatch them to outside the State as consignment or branch transfer. Any manner of dealing with tax suffered sales as prescribed u/s 7A like disposal of the goods otherwise than by way of sale or using them in the manufacture, or despatch does not attract the provisions of the Act. The reason being that goods which normally have been taxed at some point do not get taxed again. The policy of law is to tax every transaction of sale either at the point of sale or at the point of purchase. Exemption is granted either partially or in absolute. Where the seller is not taxed, the purchaser is taxed. By the same reasoning, when the seller is taxed, the purchaser is not taxed. As already seen there may be several contingencies wherein no such first sale liable to tax is assessed and that goods are no longer available either because they cease to exist or be available for further consideration attracting tax. In such contingencies, if the selling dealer cannot be taxed, the purchasing dealer is taxed by levy of purchase tax. The Supreme Court in the decision reported in Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., held that the postponement does not convert what is avowedly a purchase tax to a consignment tax or tax on consumption. In so taxing, the question of shifting the point of taxation also does not take place. It is relevant to note that even in the case of local sales, where the first sale has not suffered tax, the same are brought under the net of taxation by reason of the second proviso to Section 3(2).
33. Section 3(2) as it stood at the material point of time under consideration:

Section 3(2)--Subject to the provisions of Sub-section (1), in the case of goods mentioned in the First Schedule, the tax under this Act shall be payable by a dealer, at the rate and at the point specified therein on the turnover in each year relating to such goods:

Provided that all spare parts, components and accessories of such goods shall also be taxed at the same rate as that of the goods if such spare parts, components and accessories are not specifically enumerated in the First Schedule and made liable to tax under that Schedule:

Provided further that in the case of goods mentioned in the First Schedule which are taxable at the point of first sale, the tax under this Act shall be payable by the first or earliest of the successive dealers in the State who is liable to tax under this Section.

34. It may be seen that the second proviso was inserted under Act 38 of 1996 with effect from July 17 1996 103 STC 187. A reading of the proviso shows that the policy of taxation is that in the case of goods mentioned in the First Schedule taxable at

the point of first sale, the tax shall be payable at least once either by the first seller or by the second earliest of the successive dealers who is liable to tax under the Section. The liability, although is on the first sale, in the given circumstances, the payability is shifted to the earliest of the successive dealers. The proviso in this section does not shift the liability, but the payability alone. This only shows that given the object of taxation, subject to the availability of the goods for taxation and the provisions of the Act, the transactions are taxed so that the State does not suffer on any account of leakage. The emphasis is on compliance of the charge by payment of tax due under the provisions of the Act. In this connection, the decision reported in Associated Cement Companies Ltd. Vs. State of Bihar and Others, needs to be noticed. The facts in Associated Cement Companies Ltd. Vs. State of Bihar and Others, relate to a case where the assessee was granted exemption pursuant to an incentive granted to the new units under the industrial policy of the State of Bihar with reference to additional incremental production for the period April 1,1998 to March 31, 2007. The assessee paid entry tax on goods imported under the Bihar Tax on Entry of goods into Local Areas for Consumption, Use or Sale Therein Act, 1993. The Revenue called upon the assessee to pay the sales tax without adjustment on the entry tax paid. The said proceedings were challenged before the High Court. The same was dismissed. A further appeal was preferred before the Supreme Court. Reversing the decision of the High Court, the apex court held that the liability to pay tax under the charging provision is different from the quantification of tax payable on a compensation. Liability to pay tax and actual payment of tax are conceptually different. The apex court held that merely because the assessee was exempted from payment of tax, it could not be said that there was no liability under the Act. The assessee was liable to pay tax under the Entry Tax Act. Consequently, the assessee was entitled to reduction to the extent of tax paid under the Entry Tax Act while working out the tax payable under the General Sales Tax Act. The apex court pointed out to the notification granting the reduction and held that granting of exemption arises only when there is a liability. Exigibility to tax is not the same as liability to pay tax. The former depends on charge created by the statute and the latter on computation in accordance with the provisions of the statute and Framed there under, if any. Liability to pay tax and actual payment of tax are conceptually different. The apex court held that the notices issued were not sustainable. The Supreme Court held that "exigibility to tax is not the same as liability to pay tax. The former depends on charge created by the statute and the latter on computation in accordance with the provisions of the statute and rules framed thereunder, if any. Liability to pay tax and actual payment of tax are conceptually different". The decision of the apex court brings out clearly that the liability to pay tax and the concept of actual payment of tax are conceptually different.

35. In the decision reported in [2007] 6 VST 541 (SC) at 557 Peekay Re-Rolling Mills (P) Ltd. v. Assistant Commissioner, following the decision reported in Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., ,

the Supreme Court pointed out that "levy and collection are not synonyms, that collection of tax is not a necessary facet of a levy". The Supreme Court held that "exemption can operate when there had been a valid levy: for, if there was no levy at all, there would be nothing exempt". "Despite an exemption, the liability to tax remains unaffected, only the subsequent requirement of payment of tax to fulfil the liability is done away with.

36. The apex court, in that case, was concerned about an exemption granted 36 on the sale of declared goods. The dealer therein purchased steel ingots from dealers who were exempted under a notification issued u/s 10 from payment of tax. Since the dealer used the steel ingots as raw materials to produce bars and rods, they were visited with liability u/s 5A purchase tax under the Kerala General Sales Tax Act. The apex court held that when certain goods were subjected to single stage tax condition, and the stage identified for the levy was exempted, subsequent sales could not be taxed by the authorities despite exemption. Dealing with the question as to whether the tax sought to be levied u/s 5A would amount to tax at second stage and the same would violate Section 15 of the Central Sales Tax Act, 1956, the apex court referred to the decision in the case of Shanmuga Traders and Others Vs. State of T.N. and Others, and held that there is no difference in the situation between the two cases. Both cases involved the condition of first stage tax fixed at the point of first sale. The apex court following the decision reported in Pine Chemicals Ltd. and Others Vs. Assessing Authority and Others, and Kannan and Company Vs. The State of Tamil Nadu, applied the decision reported in Shanmuga Traders and Others Vs. State of T.N. and Others, that the exemption u/s 10 did not negate the liability to tax u/s 5 of the State Act and that any subsequent levy would fall foul of the conditions in Section 15 of the Central Sales Tax Act. In this context, the apex court rejected the stand of the State to levy purchase tax. As seen, the decision relied on by the assessee pertains to the case of declared goods subject to the provisions of Section 15 of the Central Sales Tax Act. It is not denied by the learned Counsel for the petitioner that the exemption notification given was a conditional one and not an absolute one. It is also equally not denied by the learned Counsel that exemption notification works where there is a liability.

37. In the decision reported in Vasu General Traders Vs. State of Tamil Nadu, , while considering the claim of exemption by a second seller, this Court had an occasion to deal with the contention that by reason of an exemption, the point of levy could not be shifted. This Court negatived the plea by holding that the exemption granted was only a specific exemption and that exemption was limited to sales effected by manufacture of handmade goods. If the exemption is in relation to a particular sale, this would not be available to other subsequent sale. Exemption in relation to a particular sale would not cover other subsequent sales. Taxing statute has to operate in respect of other sales and the petitioner''s sale would become taxable being the first taxable sale inside the State. The law declared by this Court in [1987] 66 STC 358 Vasu General Traders v. State of Tamil Nadu now finds an expression in

the form of Section 3(2) second proviso in respect of local sales of goods enjoying conditional exemption. Hence, the contention of the petitioner based on the second sale exemption on goods falling under the First Schedule cannot be accepted for, the second proviso to Sub-section (2) of Section 3 steps in, in instances where the exemption is not total, but only conditional.

38. In the context of the second proviso to Section 3(2), an exemption not being one of general nature, the Act makes the second or the earliest of the successive dealers to pay the tax on the sale effected by him. If that be so, the plea based on Section 59 that the notification u/s 17 have the effect of a shift in the policy of taxation loses its significance. In any event, in the face of the decisions referred to above on the aspect of liability and payability, we do not accept the contention of the counsel that the effect of the notification has the result of altering the tax policy. Considering the decision of the Supreme Court reported in [1975] 36 STC 191 State of Tamil Nadu v. M.K. Kandaswami on the phrase "sale or purchase of which is liable to tax" and that of the Supreme Court reported in [1993] 88 STC 98 Hotel Balaji v. State of Andhra Pradesh we do not accept the plea that the notification touches on the policy of taxation and hence, the provision is bad. We hold that by levying tax u/s 7A in cases of conditional exemption, there is no shift in the policy of taxation.

39. While dealing with the issue raised based on Articles 301 and 304(b) that the levy is in effect one on consignment and beyond the legislative competence of the State under entry 54, List II of the Seventh Schedule to the Constitution of India and hence ultra vires entry 92B of List I of the Seventh Schedule to the Constitution and void as repugnant to Article 14, violative of Article 301 and not saved by Article 304(b) of the Constitution of India, as rightly submitted by the learned Additional Advocate-General, the Supreme Court considered the same in the decision reported in Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., . The apex court once again applied the decision reported in [1975] 36 STC 191 State of Tamil Nadu v. M.K. Kandaswami and [1972] 30 STC 537 (Ker) Malabar Fruit Products Co. v. Sales Tax Officer Palai in the decision reported in Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., and rejected the contention of the assessee to hold that the levy was not one on consignment.

40. The decision reported in Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., relates to the challenge made on the validity of the provisions of the Andhra Pradesh General Sales Tax Act, 1957 the Gujarat General Sales Tax Act and the U.P. General Sales Tax Act, on the strength of the decision rendered by the apex court in the case of Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, . The assessees therein contended that the purchase tax levied was, in truth and effect, a consignment tax and hence, outside the competence of the State Legislature. In the case of purchase tax levy where the goods are consumed or used in the manufacture of other goods, the assessee contended that the levy was, in

reality, in the nature of excise duty or use tax. The apex court rejected such a plea and held that "...The validity of the levy cannot depend upon what a particular dealer or person chooses to do with the goods." (at page 128). The apex court further held that "...The fact that in a given case, the purchased goods are consigned by the purchaser to his own depots or agents outside the State makes no difference to the nature and character of the tax. By doing so, he cannot escape even a one-time tax upon the goods purchased, which is the policy of the Legislature. The tax was directed towards ensuring levy of tax at least on one transaction of sale of the goods and not towards taxing the consignment of goods purchased or the products manufactured out of them."

41. Referring to the provisions of the Andhra Pradesh General Sales Tax Act, 1957 relating to purchase tax u/s 6A and the provision of Section 9 empowering the Government to exempt either the sale of certain goods or sale by certain persons either wholly or partly, the apex court held that in the light of the specific Scheme of Section 9, the conditional exemption at the point of sale by particular category of persons could not be construed as operating to exempt purchase tax u/s 6A.

42. Referring to the sound policy underlying the provisions of purchase tax, the apex court held "merely because the levy attaches on the happening or non-happening of a subsequent event, the nature and character of the levy does not change". The apex court held that that the Scheme of the Act is to tax at a point to ensure that the goods do not escape tax in the State altogether and the liability is attracted in respect of goods, which are liable to tax.

43. The Supreme Court pointed out that the principle behind the levy under purchase tax and which would secure the interest of the State are that the goods purchased are not available for taxation inside the State and that by reason of one of the contingencies, the State is not to lose its revenue. The levy created by the provision is one on the purchase of materials within the State, which is dealt with in any one of the manners specified therein. Touching on the policy behind such a levy, the Supreme Court held that it is no doubt true that the levy materialises only when the purchase of goods is dealt with in any one of the manners specified therein. The Supreme Court, in the decision reported in [1993] 88 STC 98 hotel Balaji v. State of Andhra Pradesh, held that "...The tax was directed towards ensuring levy of tax at least on one transaction of sale of the goods and not towards taxing the consignment of goods purchased or the products manufactured out of them." The apex court further referred to the observations of the learned single judge in the decision reported in [1972] 30 STC 537 (Ker) Malabar Fruit Products Co. v. Sales Tax Officer, Palai, which was approved in the decision of the Supreme Court reported in [1975] 36 STC 191 State of Tamil Nadu v. M.K. Kandaswami to hold that the tax imposed by Section 6A could not be described either as use tax, consumption or consignment tax. The levy was perfectly warranted by entry 54 of List II of the Seventh Schedule to the Constitution. The apex court further referred to the

exemption notification and the definition "dealer" and the Explanation appended thereto, as well as Section 9 relating to the power of the State to notify the exemption and the reduction of tax payable, and held that the exemption was a qualified one and that the exemption at the point of sale by a particular category of persons could not be construed as operating to exempt the purchase tax u/s 6A as well, much less in all cases. Ultimately, the apex court held that one can determine the last purchase or sale point in the State only when one knows that no purchase took place within the State thereafter. If there is a subsequent purchase within the State, the purchase in question ceases to be the last purchase. In those circumstances, the purchasing dealer is taxed. If the seller is not or cannot be taxed, the purchasing dealer of such goods is taxed. The apex court held that "It would, therefore, be clear that the real object of the Clauses (i) to (iii) in the section is not to levy a consumption tax, use tax or consignment tax but only to point out that thereby the purchasing dealer converts himself into the last purchaser in the State of such goods. The goods cease to exist or cease to be available in the State for sale or purchase attracting tax. In these circumstances, the purchasing dealer of such goods is taxed, if the seller is not or cannot be taxed." On that score, one cannot characterise the same as a tax on consignment. The fact that the levy materialises and is postponed does not convert what is in essence a purchase tax on goods to a consignment tax. Thus, the apex court rejected the challenge to the said provisions based on entry 54, List II of the Seventh Schedule to the Constitution of India.

44. The subsequent decision rendered by the Supreme Court reported in M/s. Devi Dass Gopal Krishan Pvt. Ltd., etc. etc., Vs. State of Punjab and another etc. etc., reaffirms the view expressed in the decision reported in Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., . There, the apex court referred to the challenge to the provisions of the Tamil Nadu General Sales Tax Act, 1959. The Supreme Court held that there was no reason to differ from the decision reported in [1993] 88 STC 98 Hotel Balaji v. State of Andhra Pradesh and that the contentions raised as to the constitutionality of the provisions based on entry 54 of List II of the Seventh Schedule to the Constitution of India were rejected by the apex court.

45. Learned Counsel appearing for the petitioner referred to the decision of 45 the apex court reported in Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, in support of his contention that the object of Article 301 is to allow free flow of trade and commerce and intercourse throughout the territory of India. The apex court held that the tax laws are not outside the scope of Part XIII. Article 304(b) empowers the State Legislature to impose reasonable restrictions on the freedom of trade with other States or within its territory. Taxes which directly and immediately restrict the trade would fall within the purview of Article 301. Consequently, where any imposition has the effect of impeding the free trade and commerce, then it must pass the test prescribed under Article 304(b). Learned Senior Counsel appearing for the petitioner referred to the decision reported in Buxa Dooars Tea Company Ltd. and Others Vs. State of West Bengal and Others, and submitted that if the levy is

dependent on a happening of an event, namely, the consignment, it has the effect of a direct and immediate restriction on the flow of trade and commerce and hit by Article 304(b). In the face of these decisions, learned Senior Counsel submits that the issue raised by the assessee herein is fully covered by the decision of the apex court, the contentions merit to be accepted.

46. It may be noted that in the decision reported in [1972] 30 STC 537 (Ker) Malabar Fruit Products Co. v. Sales Tax Officer, Palai, approved by the Supreme Court in [1975] 36 STC 191 State of Tamil Nadu v. M.K. Kandaswami, the contentions as raised herein were considered and ultimately, the court rejected the case of the assessee on the ground of violation of Article 301. Dealing with the challenge made by placing reliance on Articles 301 and 304 of the Constitution of India that the provision of purchase tax was restrictive of freedom of trade, in the decision reported in [1972] 30 STC 537 (Ker) Malabar Fruit Products Co. v. Sales Tax Officer, Palai, the learned single judge held that the taxation under the Scheme of purchase tax did not aim at any restriction to the physical movement and hence, was not discriminatory. Referring to the Supreme Court decision reported in Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another, , the learned judge held that the taxation provision such as the one challenged did not impose any restriction to the physical movement. Pointing out that in all cases narrated therein there was no scope for the State by getting revenue in regard to such goods after they were sold and had been dealt with in the manner specified therein, the High Court referred to the decision of the Supreme Court reported in Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, and Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another, and held that "taxation provisions such as the one impugned here do not impose any such restriction to the physical movement of the goods. The provision in Section 5A does not also discriminate between the goods imported and the goods of indigenous origin. Therefore, there is no scope for the plea that Section 5A operates in infringement of Article 301 of the Constitution."

47. Further, in the decision reported in Buxa Dooars Tea Company Ltd. and Others Vs. State of West Bengal and Others, , while considering the plea based on Articles 301 and 304(b), following the decisions in Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, and [1963] 14 STC 355 Firm A.T.B. Mehtab Majid & Co. v. State of Madras, the apex court held that in order to determine the true nature of the legislation, the reality whatsoever of the legislation must be taken into account to ascertain the essential substance of it. The apex court further held that the statutory provisions need to be looked at as a whole to find out whether in reality the tax has a restriction on movement of goods in inter-State trade and commerce. Considering the declaration by the Supreme Court reported in [1993] 88 STC 98 Hotel Balaji v. State of Andhra Pradesh as well as the decision reported in [1975] 36 STC 191 State of Tamil Nadu v. M.K. Kandaswami as to the nature of levy which had been elaborately discussed earlier, we do not find that there is any justification in accepting the plea of the assessee based on the decisions referred to above. In fact,

in the decision reported in Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, , the apex court held that when a dispute arises as to the legislative competence of a Legislature, the pith and substance of the legislation has to be looked at to determine the true nature and character of the legislation in question. The provisions cannot be read in vacuum. Having regard to the general scheme of the provisions, in the light of the interpretation placed and the understanding of the Scheme of Section 7A and the constitutionality of the provisions, we do not find any justification to accept the plea of the assessee in these cases. The decisions relied on by the assessee in support of his plea, in fact, have considered at length all the issues that arise herein and rejected the same and hence, we do not find that there exists any issue not covered in any of the decisions.

48. The apex court, in [1975] 36 STC 191 State of Tamil Nadu v. M.K. Kandaswami, considered the decision of the Kerala High Court reported in [1972] 30 STC 537 (Ker) Malabar Fruit Products Co. v. Sales Tax Officer, Palai and Yusuf Shabeer and Others Vs. State of Kerala and Others, relating to the Kerala General Sales Tax Act, 1963 which are in pari materia with Section 7A of the Tamil Nadu General Sales Tax Act, 1959 and approved of the view of the Kerala High Court reported in Yusuf Shabeer and Others Vs. State of Kerala and Others, and [1972] 30 STC 537 (Ker) (Malabar Fruit Products Co. v. Sale-Tax Officer, Palai) both on the constitutionality of the provisions and the interpretation placed therein.

49. In the context of the interpretation put on the provision, including the issue on its validity, it is no longer available for an assessee to contend that the levy is not attracted in case where anterior sale enjoys an exemption.

50. Learned Senior Counsel pointed out that these decisions were concerned only on the interpretation and not on the constitutionality. We do not agree with the submission. A reading of the decisions of the Supreme Court reported in [1993] 88 STC 98 Hotel Balaji v. State of Andhra Pradesh, M/s. Devi Dass Gopal Krishan Pvt. Ltd., etc. etc., Vs. State of Punjab and another etc. etc., and [1995] 96 STC 344 (SC) Jagatjit Sugar Mills v. State of Punjab, leaves no room for entertaining any such doubt.

51. Taxation, as such, is not an infringement of the freedom guaranteed by Article 301. Yet, it is settled law that tax laws are not outside the purview of Part XIII of the Constitution. In the decision reported in Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, as well as the decision reported in The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, , the Supreme Court held that in determining whether a tax directly offends Article 301, the movement of the goods which are the subject of the trade has to be borne in mind. If the tax is imposed solely on the basis that the goods are carried or transported, then it is to be held that the tax directly affects the freedom of trade as contemplated by Article 301, and hence offensive of Article 301. However, where the levy is not discriminatory or restrictive or having a direct and immediate restriction on the

trade and intercourse, on a mere inconsequential indirect remote impediment, the levy cannot be struck down under Article 301. The flow of trade and commerce depends upon a variety of factors like location, availability of market, materials and other infrastructural facilities." In the circumstances, we do not find any basis to sustain this objection that the levy is restrictive of the trade and commerce. As to the contention based on Article 304(b), unless and until the petitioner is able to show that the provisions of Article 301 or 303 are offended, the question of invoking Article 304(b) does not arise. In the light of the decisions of the apex court on the constitutionality of the provisions, the contentions of the petitioner cannot be upheld and the same is rejected.

52. We have already seen that the apex court held "that Section 7A is at once a charging as well as a remedial provision. Its main object is to plug leakage and prevent evasion of tax". The Supreme Court pointed out in the decision reported in [1975] 36 STC 191 State of Tamil Nadu v. M.K. Kandaswami that the principle behind the levy under purchase tax is that if the goods purchased are not available for taxation inside the State and that by reason of one of the contingencies, the State is likely to lose its revenue, the interest of the State needs to be secured. The levy created by the provision is one on purchase of materials within the State, which is dealt with in any one of the manners specified therein.

53. The apex court held that "the policy of the Legislature is not to tax the same goods twice over. The fact in a given case, the purchased goods are consigned by the purchaser to his own depots or agents outside the State makes no difference to the nature and character of the tax. By doing so, he cannot escape even the one-time tax upon the goods purchased, which is the policy of the Legislature. The tax was directed towards ensuring levy of tax at least on one transaction of sale of the goods and not towards taxing the consignment of goods purchased or the products manufactured out of them". The charge u/s 7A need not be necessary to check exemption but certainly it is pointing at the loophole caused by the circumstances stated u/s 7A. If the goods are not available in the State for subsequent taxation by reason of the circumstances mentioned in Section 7A(1)(a), (b), (c), then the purchaser is made liable u/s 7A.

54. Learned Counsel for the petitioner referred to the decision reported in Arnit Das Vs. State of Bihar, in support of his plea that the issues which are not decided can always be re-agitated. Quite apart from the fact that the issues raised herein are no different from what had been already decided, the apex court considered this line of contention in the decision reported in T. Govindaraja Mudaliar Vs. The State of Tamil Nadu and Others, . The case therein related to the validity of Chapter IVA of the Motor Vehicles Act, 1939. The contention of the petitioner therein was that the question regarding the validity of Chapter IVA on the ground of infringement of Article 19(1)(f) was not raised in the earlier writ petitions and hence, re-agitated the same. The apex court rejected such a contention by holding that the binding effect

of a decision did not depend upon whether a particular argument was considered therein or not. Referring to the decision reported in Mohd. Ayub Khan Vs. Commissioner of Police, Madras and Another, , the apex court held that "even if certain aspects of a question were not brought to the notice of the court, it would decline to enter upon re-examination of the question since the decision had been followed in other cases". The apex court also referred to the decision reported in Smt. Somavanti and Others Vs. The State of Punjab and Others, and quoted a passage from the said decision, which may usefully be extracted as follows:

The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided.

55. In the light of the decision of the Supreme Court referred to above and considering the fact that every aspect of the contentions raised herein are already considered by the Supreme Court in the decision referred to above, we do not find any justification to accept the plea of the petitioner.

56. As far as the reliance placed on the decision reported in Arnit Das Vs. State of Bihar, is concerned, the apex court held that a decision not on conscious consideration of an issue cannot be taken as a law declared to have a binding effect, as contemplated under Article 141. The apex court held "that which has escaped the judgment is not the ratio decidendi". When a particular question of law was not consciously determined, the decision will not stand in the way of the court considering the same. As already seen, the decisions relied on by the petitioner as well as by the State, have considered the questions in a detailed manner and as such, by no stretch of an argument could it be said that the law declared therein could be stated as one not on a conscious consideration of the disputes raised as to have the binding effect.

57. The decision of the Supreme Court reported in Arnit Das Vs. State of Bihar, in fact, support the case of the respondent that the issues considered both on the interpretation aspect as well as on the constitutionality cannot be reagitated in a different form, when once the court has applied its mind to every aspect of the issues raised therein.

58. Having regard to the said view expressed in the decisions referred to above, which have been consistently followed, we do not find any justification to accept the plea of the assessee. Consequently, W.P. No. 29700 of 2004 challenging the provision fails.

As regards the merits of the individual orders of assessment levying tax, it is open to the assessee to challenge the same by preferring an appeal under the provisions of the Tamil Nadu General Sales Tax Act, 1959, within a period of 30 days from the date of receipt of a copy of this order. Consequently, the writ petitions in W.P. Nos. 37327 and 37328 of 2003 stand dismissed. Consequently, W.P.M.P. No. 45301 of 2003 is

also dismissed. No costs.