

(1997) 01 GUJ CK 0040

In the Gujarat High Court

Case No : Special Civil Application No. 2810 of 1995

Apollo Tyres Limited

APPELLANT

Vs

Sales Tax Officer (3)

RESPONDENT

Date of Decision : 20-01-1997

Acts Referred:

Bombay Sales Tax Rules, 1959 — Rule 41, 41A
Central Sales Tax Act, 1956 — Section 8(5)
Constitution of India, 1950 — Article 14, 19(1), 252(1), 265, 286
Gujarat Sales Tax Act, 1969 — Section 15B, 47, 49(2), 49(3)

Citation : (1997) 01 GUJ CK 0040

Hon'ble Judges : Rajesh Balia, J; R.K. Abichandani, J

Bench : Division Bench

Judgement

R.K. Abichandani, J.—The petitioners challenge the order made by the Sales Tax Officer (3), Division IV, Baroda, dated May 20, 1994 at annexure C to the petition to the extent of deduction thereunder of Rs. 4,98,01,531 as the sales tax incentives enjoyed by the petitioner during the assessment period and to the extent of not allowing the petitioner-assessee, as sales tax incentives, the turnover tax to the tune of Rs. 14,88,380 and purchase tax to the tune of Rs. 37,52,821. A direction is sought on the respondent No. 3, the Assistant Commissioner of Sales Tax (Administration) for permanently restraining him from applying the provisions of paragraph 8(iii) of the resolution dated June 16, 1987 and paragraph 13(iii) of entry No. 175 of the notification of exemption issued u/s 49(2) of the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the said Act"). The petitioners have prayed for quashing clause (iii) of paragraph 8 of the resolution dated June 16, 1987 as well as paragraph 13(iii) of entry No. 175 of the notification u/s 49(2) of the said Act as arbitrary, illegal and unconstitutional.

2. At the outset it may be mentioned that during the arguments, the learned counsel for the petitioners confined the reliefs sought to the challenge against the provision of paragraph 8(iii) of the resolution dated June 16, 1987 and paragraph 13(iii) of entry No. 175 of the notification issued u/s 49(2) of the said

Act and the deduction of Rs. 4,98,01,531 in respect of goods transported for sale outside the State as sales tax incentives enjoyed by the petitioner under the order made by the Sales Tax Officer and did not press the challenge in this petition as regards turnover tax and purchase tax on the ground that an appeal was already preferred as regards those items by the petitioners-assessee and that they could be dealt with by the appellate forum.

3. The assessee-petitioner No. 1 is a public limited company having its registered office at Cochin in the State of Kerala. The said company is in the business of manufacturing automobile tyres, tubes and flaps and is a registered dealer under the said Act as well as under the Central Sales Tax Act, 1956, having six depots in the State of Gujarat. According to the petitioners in view of the incentives which were offered it invested large amount for setting up a factory in a backward area of village Limda in Gujarat. There were schemes offering deferred payment incentive under the resolutions dated May 7, 1986 and June 25, 1987 and June 16, 1987 and exemption from payment of sales tax under the notification dated December 23, 1986, for promotion of industries in rural and backward areas and the benefit of these schemes was extended up to March 31, 1993 by the Government resolution dated March 14, 1991. The incentive schemes contemplated grant of cash subsidy, exemption from payment of sales tax and sales tax deferment. The petitioner, being a pioneer unit, claimed benefit of the resolution dated June 25, 1987 which laid down the "Composite Sales Tax Incentive Scheme, 1987 for Pioneer Units". The petitioner-assessee had commenced commercial production from September 16, 1991 and on its application was issued certificate dated March 6, 1992 by the Joint Commissioner of Industries (ID) that the unit was eligible for Composite Sales Tax Incentive Scheme, 1987 introduced by the Government resolution dated June 25, 1987. The said eligibility certificate was a provisional one and a copy thereof is at annexure A/1 to the petition. Thereafter, a certificate dated April 18, 1992 was issued by the Assistant Commissioner of Sales Tax (Administration), Range 4, Vadodara, to the petitioners stating that the certificate was being granted subject to the conditions of the resolution dated June 25, 1987 and subject to the conditions of the Circular bearing No. GSL-343/666/88-89/I(J) dated December 5, 1988. (This circular is to be found in Part IV/39 of the compilation of Notifications u/s 49, Volume II - Resolutions & Public Circulars) which was referred to and relied on by both the sides. In the said certificate which was effective from May 1, 1992 it was specifically stipulated in clause (2) that the transactions of the assessee which related to sales tax exemption under entry 175 of the notification u/s 49(2) of the said Act shall be subject to the conditions of entry 175 and the relevant industry was to abide by the conditions of that entry. As regards the incentives by way of deferment of payment of tax, clause (3) of the certificate clearly provided that the transactions undertaken by the certificate holder relating to deferred payment of tax were subject to the resolution dated June 16, 1987 of the Finance Department and the certificate holder was to abide by those conditions. In clause (11) it was noted that keeping

in view the consent of the unit as per the letter dated April 16, 1992 the certificate was to be effective from May 1, 1992 to September 15, 2005.

4. Incentive for pioneer units were provided under the resolution dated May 7, 1986 by framing a scheme known as "Special Incentive Scheme, 1986" which was to remain in force from April 1, 1986 to March 31, 1991 in respect of the areas mentioned in annexure A to that resolution. Accordingly, the units which fulfilled the criteria of pioneer status and were granted registration by the Industries Commissioner were eligible for the benefit of subsidy and one of the two sales tax incentives of sales tax exemption and sales tax deferment. The pioneer units claiming the incentives under this scheme were not eligible for sales tax incentives under any other scheme. The quantum of sales tax incentives was indicated separately in respect of sales tax exemption and sales tax deferment. Thereafter, a Composite Sales Tax Incentive Scheme, 1987, for Pioneer Units was declared under the resolution dated June 25, 1987. As per the said scheme the eligible pioneer units that availed of benefit either of the sales tax incentives, namely, exemption from sales tax or deferment of sales tax became entitled to the benefits of the composite scheme as mentioned in annexures I and II, provided, they opted for the composite scheme and these benefits were limited to the amount and the period stipulated in column No. (4) of the annexures. As per this composite scheme the goods manufactured out of raw materials, consumable stores, etc., purchased free of tax were to be allowed to enjoy the benefit by way of sales tax exemption or sales tax deferment out of the aggregate ceiling indicated in column (4) of annexures I and II of the said resolution and if the unit reached the admissible limit mentioned in column (4) it would not be, thereafter, eligible for further incentives. Clause (10) of the said resolution, in terms stipulated that the calculation of the sales tax incentives admissible, availed of and rules and procedure to be followed for the same would be decided and prescribed by the Industries Commissioner and the Commissioner of Sales Tax jointly and will be binding on all the beneficiary units. As a corollary to this, the aforesaid circular dated December 5, 1988 was issued providing for the procedure required to be followed in respect of the said Composite Scheme of 1987. As per the quantum of incentives referred to in clause (4) of the said resolution dated June 25, 1987 and which were provided in annexures I and II, it was provided for the pioneer units that the benefits would be limited to 90 per cent of the capital investment and for a period up to 14 years from the date of commencement of the commercial production.

5. The Finance Department of the State Government had in respect of the Sales Tax Incentive Scheme for New Industries, 1986 issued resolution dated June 16, 1987 in context of the sales tax deferment incentives and it was provided that the new industrial units which had started commercial production of goods on or after April 1, 1986 shall be eligible for the benefit under the scheme. As per annexure II of the said resolution the quantum of sales tax deferment for pioneer units was indicated as 90 per cent of the fixed capital investment with a time-limit of 14 years from the date of commencement of commercial production in

respect of the category A of the area. Under clause 8 of the said resolution which is sought to be challenged by the petitioners it was laid down that the limit of deferment shall be arrived at as indicated therein. Accordingly, as per clause 8(iii) an amount calculated at the rate of 4 per cent or the rate applicable under the Gujarat Sales Tax Act, 1969 whichever was lower on the sale price of the goods transported by the new industrial unit to his own place of business or of his agent at any place within India but outside the State of Gujarat for sale there, was to be computed for arriving at the limit of deferment besides the aggregate amount of tax including additional tax that might have become leviable on the sales as well as the aggregate amount of Central sales tax which would have become leviable on inter-State sales. In this context, it may be mentioned that the provisions regarding payment of tax and deferred payment of tax are incorporated in section 47 of the said Act. Under the scheme of deferred payment of tax, the tax which is collected on the sales of the taxable goods is not required to be paid within the time prescribed for its payment but the payment is deferred. This facility was by way of an incentive and it had preceded by the facility of interest free loan for payment of the sales tax collected in respect of taxable sales.

6. Section 49 of the said Act provides for exemption and it is laid down in sub-section (2) of section 49 that "subject to such conditions as it may impose, the State Government may, if it considers it necessary so to do in the public interest by notification in the official gazette, exempt any specified class of sales or of specified sales or of purchases from payment of the whole or any part of the tax payable under the provisions of the Act. Such notification is to be laid before the State Legislature when it is issued as required by sub-section (3) of section 49. Thus, the Legislature has retained its complete control over the exemption notification and all the exemptions which are granted from payment of whole or any part of the tax payable under the Act, would be statutory exemptions even when expressed in such notification. In exercise of these powers, the State Government has from time to time issued several notifications. We are concerned with the notification dated December 23, 1986 by which entry No. 175 along with its annexures was inserted in the original notification. Accordingly, sales by a "specified manufacturer" of goods manufactured by him were exempted from tax as provided by paragraph 13(iii) of entry 175 subject to his fulfilment of the conditions specified in annexure I of this entry. Thus, the exemption from sales tax was subject to the prescribed conditions which were the integral part of the extent and nature of the exemption. One of these conditions which is challenged in the present petition is contained in paragraph 13 of annexure I which provides that for the purpose of arriving at the limit of tax exemption as specified in annexure V (90 per cent of the fixed capital investment for a period of 14 years from the date of starting production), the aggregate of the items enumerated therein will be considered. Accordingly, for arriving at the entitlement limit of tax exemption clause (iii) of paragraph 13 provided that the "aggregate amount of tax at the rate of 4 per cent or the rate applicable under the Gujarat Sales Tax

Act, 1969 whichever is lower on the sale price of the goods transported by the specified manufacturer to his own place of business or to the place of business of his agent at any place within India but outside the State of Gujarat for sales there, shall also be considered". The expression "specified manufacturer" is defined in annexure II for the purpose of the said entry No. 175, inter alia, as a person who establishes the new industry on or after April 1, 1986 but not after March 31, 1991 in any of the designated areas. It is stated that the incentives schemes were extended up to March 31, 1993 and that the petitioner was a pioneer unit who was eligible for this incentive and there is no dispute on this aspect. As noted above under the composite scheme, Composite Sales Tax Incentive Scheme, 1987 framed under the resolution dated June 25, 1987, the pioneer industries units who opted for the composite scheme were entitled to the benefit of the scheme as mentioned in annexures I and II of the resolution limited to the amount and the period mentioned in column (4) thereof. The calculations of the sales tax incentives admissible were to be made as per the procedure decided by the Industries Commissioner and the Commissioner of Sales Tax jointly as contemplated clause (10) of the resolution dated June 25, 1987 and this procedure came to be reflected in the circular dated December 5, 1988 which is also mentioned in the eligibility certificate which was granted to the petitioner. As per paragraph 13 of that circular it was provided that for the purpose of arriving at the limit of tax exemption or deferment as specified in annexure I to the resolution dated June 25, 1987 the aggregate of the following items shall be considered :

(a) Aggregate amount of tax, including additional tax if any which would have become leviable from the eligible unit on the purchase and sales as per the provisions of the Gujarat Sales Tax Act, 1969.

(b) Aggregate amount of Central sales tax which would have become leviable on the inter-State sales as per the provisions of the Central Sales Tax Act, 1956.

(c) Aggregate amount of tax at the rate of 4 per cent or the rate applicable under the Gujarat Sales Tax Act, 1969 whichever is lower, on the sale price of the goods transported by the eligible unit to its own place of business or to the place of business of its agent at any place within India but outside the State of Gujarat for sale there.

(d) Aggregate amount of tax exemption availed of up to the date of option mentioned in para 4 above.

(e) Aggregate amount of tax, including additional tax payable under the Gujarat Sales Tax Act, 1969 and the Central Sales Tax Act, 1956 and retained as deferment up to the date of option referred to above.

(f) Amount equivalent to interest-free sales tax loan granted under IMED GR dated February 5, 1983 and August 19, 1983.

7. In the said circular dated December 5, 1988, it was mentioned in paragraph 8

that so far as the transactions covered by the sales tax exemption were concerned, the eligible unit shall be governed by the conditions laid down in entries 118 and 175 of the notification issued u/s 49(2) of the said Act. In paragraph 9 thereof it was provided that so far as the transactions covered by sales tax deferment scheme were concerned, the eligible units shall be governed by the conditions laid down in the Finance Department's Resolutions dated March 18, 1982 and June 16, 1987. Both the provisions, namely, the conditions contained in the notification u/s 49(2) and the conditions governing the sales tax deferment incentive contained in the resolution dated June 16, 1987 were also mentioned in the eligibility certificate given to the petitioners on April 18, 1992 in paragraphs 2 and 3 thereof wherein it was specifically stated that the petitioner was required to abide by those conditions. The petitioner has challenged the condition which enabled the department to compute the aggregate amount of tax at the rate of 4 per cent or the rate applicable under the said Act whichever is lower on the sale price of the goods transported by the new industrial unit to his own place of business or his agent at any place within India but outside the State of Gujarat for sales there while working out the entitlement limit for the incentives.

8. The learned counsel appearing for the petitioners contended that in respect of the goods which were transported by the petitioners out of its manufactured goods to a place outside the State for being sold there, no sales took place within the State of Gujarat, and therefore, there was no liability to pay any tax in respect thereof under the said Act. It was submitted that these were also not sales of the nature of inter-State trade or commerce and no liability to pay Central sales tax arose in respect of these goods. It was submitted that sales outside the State effected by the petitioners could therefore not have been considered for the purpose of computing the exemption limit as is sought to be done under the aforesaid conditions. It was submitted that the State has no legislative competence to impose sales tax in respect of goods which were transported out of the State and sold there by the petitioners and by computing the rate of 4 per cent or any lower rate on the sales of such goods for the purpose of arriving at the limit of the incentives, the State was virtually treating those sales as "deemed sales" within the State and adjusting the tax payable thereon towards the incentive limits. It was contended that by making the said provision it was assumed that the petitioner-assessee was liable to pay Central sales tax on the sales effected outside the State and that it is deemed to have enjoyed sales tax exemption and deferment to the extent of the Central sales tax payable by it. In support of this argument the learned counsel placed reliance on the decision of the Bombay High Court in the case of Varun Polymol Organics Ltd. v. State of Maharashtra reported in [1995] 97 STC 55 Bom and submitted that the ratio of that decision was squarely applicable to the present case. It was submitted that what was done in Maharashtra by treating such sales as "deemed sale in that State in the inter-State trade and commerce", was being done impliedly in Gujarat. Referring to the affidavit-in-reply of the State, more

particularly to paragraph 15 thereof, it was submitted that the fact that the State had in the affidavit-in-reply taken up the contention that the said condition was prescribed to ensure that it would receive an amount equivalent to tax it would have levied had the goods been sold in the State in the course of inter-State trade or commerce, goes to show that the sales outside the State were treated as if they were deemed sales in the course of inter-State trade and commerce. It was contended that the impugned provisions were therefore violative of article 286 of the Constitution of India and section 87 of the said Act and that the condition imposed was arbitrary and unreasonable and violative of the fundamental right of the petitioner under article 14 and article 19(1)(g) of the Constitution.

9. The learned Additional Advocate-General appearing for the respondents submitted that by imposing the impugned condition no sales tax was levied on the sales that were effected outside the State. It was submitted that exemption from liability to pay tax or any other incentive could not have been claimed as a matter of right and it was open for the State Government to prescribe the limits of the exemption by imposing such conditions. It was submitted that by the impugned condition it was implied that the sales will be effected in Gujarat for the purpose of incentive limits and if the sales were effected outside Gujarat then the minimum revenue loss, that occurred to the State by virtue thereof, was to be adjusted towards the eligibility limit of the incentives. This was done by accelerating the limit as provided in the said condition, the effect of which was to deprive the specified manufacturer that much benefit of exemption. Such a condition can never be said to be imposition of tax and it was only in effect and reality denial of exemption to the extent of revenue loss resulting from the sales effected by such manufacturer outside the State. It was also submitted that the petitioners had accepted these conditions which were incorporated also in his eligibility certificate and therefore while enjoying the benefit of exemption it was not open for the petitioners to discard an important condition which went into fixing the entitlement limit of the incentives. It was therefore submitted that the petitioner was not a fit person to be entrusted with the writ of this Court.

10. Granting of exemption from payment of sales tax or any other incentives such as deferment of payment of tax cannot be claimed as a matter of right and such matter would involve policy consideration by the concerned Government. The State Government is empowered u/s 49(2) to impose conditions while granting exemption from payment of the whole or any part of the tax payable under the Act and the entire exercise is done keeping in view the public interest involved. One of the considerations while granting exemption from payment of tax would be its effect on the revenue of the State. In order to see that a proper balance of conflicting interests is maintained it would be open for the State Government to devise a policy which takes into account the extent of revenue loss that would be caused to the State. Fixing of an eligibility limit for such incentives would imply that the exemption would cease to exist on reaching the limit and that no absolute exemption from payment of tax or for the purpose of

other incentives such as deferment of tax was intended. The notification of exemption which is required to be laid before the State Legislature would make the conditions of exemption statutory. Undoubtedly, in that exercise the State Legislature cannot transgress its constitutional limits but within those limits the State Government has ample power to prescribe appropriate conditions while granting exemption from payment of tax.

11. Under the exemption entry No. 175, a "specified manufacturer" is, by clause (1) granted exemption in respect of purchase of raw materials, processing materials, consumable stores or packing materials from a person who is not a registered dealer, in respect of the whole of the purchase tax u/s 15 of the Act if the goods are used by the specified manufacturer as raw material, etc., in the manufacture of the goods in the industrial unit for sale within the State of Gujarat or outside the State of Gujarat or as a packing material in packing of the goods so manufactured and if the specified manufacturer fulfils the conditions specified in annexure I to the said resolution. "specified manufacturer" is granted exemption in respect of sale of raw materials, processing materials, consumable stores or packing materials by a registered dealer to him as provided in clause (2) of entry 175 to the extent to which the amounts of sales tax exceeded 1/4th of 1 per cent and to the extent to which the amount of Gujarat sales tax exceeded 1/4th of 1 per cent if he furnishes to the selling dealer a certificate in form 20 declaring, inter alia, that the goods were required for use by him within the State of Gujarat as raw materials, processing materials or consumable stores in the manufacture of goods for sale within the State of Gujarat or outside the State of Gujarat or as packing materials, and if the specified manufacturer fulfils the conditions of annexure I. The "specified manufacturer" is by clause (3) of entry 175 granted exemption of the whole tax on sales by him of goods manufactured by him, if he does not give any certificate in form 40 to any dealer purchasing such goods from him and incorporates a declaration in the bill or invoice or cash memo issued by him in respect of sales of such goods, to the effect that the sale is exempt from tax under sub-entry (3) of entry 175 and that the buyer including any subsequent buyer of the goods would not be entitled to claim any drawback, set-off or refund under the Act or Rules in respect of purchase of the goods and shall not give any certificate in form 40 to any subsequent purchaser and further if the specified manufacturer fulfils the conditions of annexure I. Under sub-entry (4) (since deleted with effect from April 1, 1991) the exemption was granted of the whole of the purchase tax u/s 15B of the Act in respect of purchase of prohibited goods other than declared goods for use in the manufacture of taxable goods and such manufactured goods are despatched to his own place of business or his agent's place of business situate outside the State but within India by the specified manufacturer, if the goods are used by him in the manufacture of the goods in the industrial unit and such manufactured goods are despatched to his own place or to his agent's place of business situate outside the State but within India and again on his fulfilling the conditions specified in annexure I.

12. It will thus be seen that in respect of the sub-entries (1) to (4) of entry 175 the conditions specified in annexure I would apply. The requirements laid down in annexure I contemplate establishing of new industry in the designated areas, application for eligibility certificate and obtaining such certificate and other conditions. One of the conditions of annexure I which is contained in para 2 was that the "specified manufacturer" should exercise his option for exemption under this entry 175 instead of entry 118. It was also a condition under para 3 to obtain the eligibility certificate. As noted above, the petitioners' eligibility certificate clearly incorporated in it that the terms and conditions of exemption and deferment incentives were binding on the petitioner and that it would oblige by them.

13. The provisions of annexure I, subject to which the exemption was granted, relevant for the purpose of this matter are contained in clauses (10), (11), and (13) of the said annexure. Under clause (10) specified manufacturer is eligible for exemption from the tax to the extent of the monetary limit specified in annexure V. The quantum and period of exemption provided in respect of the new industry like the petitioner was 90 per cent of fixed capital investment with a time of a period of 14 years from the date of production. Under clause (11) it is provided that when the limit of tax exemption specified in annexure V exceeds, then the subsequent purchases and sales of the specified manufacturer shall cease to be exempt against a declaration provided under this entry.

14. Clause No. (13) of annexure I of entry 175 which contained the impugned condition (iii) reads as under :

"13. For the purpose of arriving at the limit of tax exemption as specified in annexure V, the aggregate of following shall be considered :

(i) aggregate amount of tax including additional tax, if any, which would have become leviable from the specified manufacturer on purchases and sales as per sub-entries (1), (2), (3) and (4);

(ii) aggregate amount of Central sales tax which would have become leviable on inter-State sale made under Government Notification No. (GN-99) CST-1086/S.8(5)(69)-TH, dated December 23, 1986, issued under sub-section (5) of section 8 of the Central Sales Tax Act, 1956;

(iii) aggregate amount of tax at the rate of 4 per cent or the rate applicable under the Gujarat Sales Tax Act, 1969 whichever is lower on the sale price of the goods transported the specified manufacturer to his own place of business or to the place of business of his agent at any place within India but outside the State of Gujarat for sale there; and

(iv) the aggregate amount of tax leviable u/s 15B of the Gujarat Sales Tax Act, 1969.

15. Clause 13 thus lays down the method of computing the entitlement limit of tax exemption. Under clause (i) thereof the aggregate amount of tax leviable

from the specified manufacturer on purchase and sales as per all the sub-entries (1), (2), (3) and (4) noted above of entry 175 is to be computed. Under clause (2), the aggregate amount of Central sales tax which would have become leviable on inter-State sales made under the notification issued u/s 8(5) of the Central Sales Tax Act, 1956, is also to be computed. Under the disputed clause (iii) the aggregate amount of tax at the rate of 4 per cent or the rate applicable under the said Act whichever is lower on the sale price of the goods transported by the specified manufacturer to his own place of business or to the place of business of his agent at any place within India but outside the State of Gujarat for sale there, is also to be computed. Finally, the aggregate amount of tax leviable u/s 15B of the Act is also required to be taken into account under clause (iv). Thus the purpose underlying clause (iii) of paragraph 13 is clearly, to devise a way of working out the entitlement limit of tax exemption. The impugned clause (iii) of paragraph 13 does not purport to impose any tax on the goods which are sold outside the State by the specified manufacturer. In fact, sales outside the State are not prohibited, but, there is a condition implied in clause (iii) that if the sales are to be effected outside the State then the revenue loss that would be caused at the minimum level will have to be computed for arriving at the entitlement limit. Though clause (10) of annexure I of entry 175 prescribes the eligibility limit for exemption, it is clause (13) which provides the manner in which the limit of tax exemption is to be worked out. Therefore, the method prescribed by clause (13) including the impugned condition was an integral part of ascertaining the limit of exemption to which the assessee was entitled to. The method of arriving at the limit of the exemption by computing the revenue loss which could be occasioned by virtue of sales effected outside the State can hardly be termed as an imposition of tax or treating such sales as deemed sales within the State. No tax is charged in respect of the transported goods, by the said condition, but, only the exemption limit stands reduced to the extent of the minimum revenue loss on the sale price of the goods transferred out of the State for sale there. The exemption, is in other words, denied to the extent of loss of revenue at the minimum scale in respect of the goods transported for sale outside the State. The exemption from sales tax obviously was intended for the sales that could be taxed under the Act. By providing that for reaching the upper limit of quantum of exemption the minimum tax that could have become payable if the goods transported and sold out of the State through the branches of the assessee were sold as taxable goods, there is necessarily laid down an implied condition for the exemption limit that to claim the benefit of exemption all the sales effected will be taxable sales and if before the upper limit is reached the sales are diverted out of the State, the tax loss of the State in respect thereof at its minimum level will be computed for the purpose of arriving at the upper limit of exemption. It is therefore obvious that the exemption limit was fixed on a clear understanding that the upper limit was relevant only if all the sales effected up to the reaching of that limit were taxable sales. In other words, the upper limit was to be effectively reduced by reaching it faster on the footing that it was availed of in respect of the diverted sales. This

was relevant in the context of the fact that the exemption ceased on reaching the upper limit in respect of the sales covered by the Act. The benefit of incentives such as exemption or deferment implied that the sales were taxable and the benefit was intended on a condition that the sales up to upper limit will be such as were relatable to the exemption from payment of tax or deferment of tax collected. If such manufacturer chooses to sell all his goods outside the State in respect of which revenue loss to the State reaches the upper limit, no benefit of incentives was intended and the manufacturer was to be treated as having availed of the upper limit of such incentives. If the exemption limit is, in effect, reduced in this manner when sales are diverted outside the State that cannot be described as an irrational or arbitrary act on the part of the State. As noted above, the factor of revenue loss to the State while granting exemption is an important factor to be borne in mind while laying down the policy and when conditions are imposed while granting exemption they constitute integral part of the exemption and delimit its extent as prescribed therein. The State is free to impose a condition that for earning exemption from payment of tax, the sale must take place within the State and that if the goods are sold outside the State the entitlement to the benefit of incentives will stand reduced to the extent of the revenue loss caused by such diversion. This result is achieved by computing the revenue loss at its minimum rate towards the upper eligibility limit of the incentives. The provision contained in the said condition of clause (iii) of para 13 can, therefore, never be treated as imposition of sales tax in an indirect manner on the goods which are sold outside the State. There is no tax payable in the State on sales which are effected outside the State and it is only denial of exemption from payment of tax on the sale price of the goods which are diverted for sale outside the State. Such denial of exemption can never be treated as an indirect levy of sales tax. It only means that if you sell the goods manufactured by you in this State, outside the State the exemption limit will be treated to have been exhausted by you to that extent, meaning thereby that if the sales are effected outside the State the exemption limit will be denied to that extent by treating it as having been already exhausted and not available for local sales. This is achieved by accelerating the reaching of the upper limit of exemption. The purpose obviously is to prevent the revenue loss to the State because if the upper limit is reached, the exemption would cease to operate and all the sales thereafter within the State would be taxable. Such condition of exemption imposed for the purpose aforesaid would not at all affect the non-liability of the transaction, effected outside the State, to levy or imposition of sales tax by virtue of the provisions of article 286 of the Constitution and the corresponding provisions of section 87 enacted in the Act. The aforesaid condition which is challenged by the petitioners was a part of the exemption and the exemption was granted only to the extent warranted by the condition by which the entitlement limit was to be worked out. It was an exemption hedged by the conditions including the impugned condition, If such an important condition as the impugned condition is removed, that would have the effect of enlarging the scope of exemption which obviously this Court cannot do. Therefore, there is no

scope of severing the condition from the exemption granted subject to that condition. It is therefore clear that the condition of clause (iii) of paragraph 13 of annexure I to entry 175 and similar condition contained in clause 8(iii) in the resolution dated June 16, 1987 relating to incentive of deferment, do not amount to imposition of any sales tax directly or indirectly in respect of the sales effected outside the State and there is no violation of article 286 of the Constitution or article 14 or 19(1)(g) thereof. The contention raised on behalf of the petitioners cannot, therefore, be accepted.

16. Much reliance was placed on behalf of the petitioners on the decision of the Bombay High Court in *Varun Polymol Organics Ltd. v. State of Maharashtra* [1995] 97 STC 55 BomIn that matter the High Court was considering the validity of clause 2.11 of "1983 Package Scheme of Incentives" which was introduced by the Government of Maharashtra. Under that scheme by way of sales tax incentive, exemption from payment of tax was to be given to the eligible units and clause 2.11 of the scheme provided for "notional sales tax liability". Accordingly, notional sales tax liability was defined so as to mean "the sales tax/general sales tax/purchase tax that would have been payable on the purchase of raw materials and sales tax/general sales tax payable on the sales of finished products of the eligible unit under local sales tax law but for an exemption, computed at the maximum rates specified under the local sales tax law as applicable from time to time". For the purpose of this clause, it was provided, that sales made on consignment basis within the State of Maharashtra or branch transfers within the State of Maharashtra was also to be deemed to be "sales made within the State exigible to tax". It was further provided in clause 2.11(b) that the notional sales tax liability would also mean tax payable under the Central Sales Tax Act, 1956, on the sales of finished products of the eligible unit made in course of inter-State trade or commerce computed at the rate of tax applicable to such sales as if these were made against the certificate in form C on the basis that the sales are exigible to tax under the said Act. It was simultaneously provided that for the purpose of this clause, transfer/transfers on consignment basis outside the State of Maharashtra shall be deemed to be "sale in the course of inter-State trade or commerce". This deeming provision of clause 2.11 was impugned on the ground that the State Legislature has no legislative competence to levy tax on sales or purchase of goods unless the transaction amounts to sale or purchase within the framework of entry 54 of List II of the Seventh Schedule to the Constitution read with the wider definition of the expression "sale or purchase of goods" provided by sub-clause (29A) of article 366 of the Constitution of India and that mere transfer of stocks from one branch to another within the State or outside the State can never constitute sale. It was contended that the State Legislature and neither legislative nor executive competence to treat the "branch transfer" of goods as deemed sales and there was no power to treat the consignment of goods as deemed sales or to levy consignment tax thereon. It was also contended that the impugned portion of the package scheme was contrary to the notification of exemption which was issued

by the State Government u/s 41(1) of the Maharashtra Act and it was inconsistent with the constitutional scheme and beyond the jurisdiction of the State Government besides being arbitrary and irrational and that it amounted to a fraud on the Constitution. The High Court after referring to the provisions of article 286 of the Constitution which provided that no law of State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase took place outside the State or in the course of import of the goods into India or export of the goods out of the territory of India, the provisions of the legislative entries and other constitutional provisions as also the provisions of the Bombay Sales Tax Act, 1959, came to the conclusion that the branch transfers or consignment of goods could not have been treated as "deemed sales" as if exigible to sales tax, even as a measure of computation of sales tax incentives availed of by the eligible unit nor for the purpose of computation of "national sales tax liability" as purported to be done by the impugned provisions. It was held that the impugned provision of the 1983 scheme were in conflict with the conditions of the exemptions stipulated by entry 136 of the Schedule forming part of relevant exemption notification and it was therefore void. It will thus be noted that in *Varun Polymol Organic Ltd. v. State of Maharashtra* [1995] 97 STC 55 (Bom) the impugned provisions administratively framed the scheme of 1983 of Package Incentives Scheme were held to be inconsistent with the exemption notification which was issued u/s 41(1) of the Bombay Sales Tax Act, 1959 similar to the provisions of section 49(2) of the Gujarat Sales Tax Act, 1969. In the present case, the notification of exemption itself provides the said condition and it will be noted that in paragraph 23 where the court has summarised its conclusions, it was, in terms observed that "if the exemption notification issued u/s 41(1) of the Act provided only for partial exemption from tax or prescribes lawful condition appended thereto, that would be a different matter". In the present case, there is not conflict between any administrative scheme and the statutory notification issued u/s 49(2) of the Act and since the provisions are made under entry 175 of imposing statutory conditions while granting exemption which had the effect of providing only an exemption as regulated by the conditions, the decision in *Varun Polymol Organics Ltd.*'s case [1995] 97 STC 55 (Bom) can hardly assist the petitioners. It will also be noted that in that case branch transfers and consignment of goods were for the purpose of computation of notional sales tax liability considered as deemed sales. There is no such provision made in the impugned condition which only provided that while computing the eligibility limit of exemption, the revenue loss at its minimum level caused due to sales diverted outside the State would be computed for reaching the limit and as we have held above that would not amount to any indirect levy of sales tax in respect of the goods transported for sale outside the State. If *Varun Polymol Organics Ltd. v. State of Maharashtra* [1995] 97 STC 52 (Bom) is read so as to lay down any ratio contrary to the said proposition, it would be difficult to accept the same.

17. In context of this case it would be profitable to refer to the ratio of the case

in *Godrej & Boyce Mfg. Co. Pvt. Ltd. v. Commissioner of Sales Tax* reported in [1992] 87 STC 186 Bom wherein the Supreme Court was concerned with the aspect of reduction of set-off of 1 per cent of the sale price of goods despatched by the manufacturing dealer to his branches or agent outside the State under clause (iii) of the proviso to Explanation to rule 41 of the Bombay Sales Tax Rules, 1959. In that case the appellant was engaged in manufacture of various products and during the concerned assessment years it had purchased raw material, packing material and containers both within the State of Maharashtra as well as outside. In support of the raw material, etc., purchased from registered dealers it had paid purchase tax to them and as regards raw material purchased from unregistered dealers it was liable and did pay the purchase tax directly to the Government. The goods manufactured by the appellant were liable to sales tax when sold within the State. Rules 41 and 41A which were framed by the Government in exercise of its rule-making power u/s 74 of the Bombay Act provided for set-off of purchase tax paid by the manufacturing dealer on such raw material, packing material, etc., as against sales tax payable on the sale of goods manufactured by him. Under proviso to rule 41 it was, inter alia, laid down that where such despatch of goods has been made by the manufacturer to his own place business or to his agent outside the State but within India the amount of drawback, set-off or refund as the case may be, shall be reduced by 1 per cent of the sale price of the goods so despatched. Therefore, to the extent of one per cent of the sale proceeds of the goods despatched set-off was not to be given. Similar was the provision of clause (y) of rule 41A. In this context, a contention was raised that the deduction of one per cent of the sale proceeds of the goods despatched for sale outside the State, in effect, amounted to taxing the raw materials purchased outside the State or to taxing the sale of finished goods effected outside the State of Maharashtra. The Supreme Court negating this contention held that the State of Maharashtra gets the tax only in respect of purchase made by the appellant within the State. So far as the sales tax leviable on the sale of goods manufactured by the appellant was concerned, the State of Maharashtra could levy and collect such tax only in respect of sales effected within the State of Maharashtra. In law, apart from these rules 41 and 41A, the appellant had no legal right to claim set-off of the purchase tax paid by him on his purchase within the State from sales tax payable by him on the sales of goods manufactured by him. It was only by virtue of these rules that he was entitled to such set-off. It was held that this was really a concession and an indulgence. Then comes the material portion which reads as under :

"More particularly, where the manufactured goods are not sold within the State of Maharashtra but are despatched to out-State branches and agents and sold there, no sales tax can be or is levied by the State of Maharashtra. The State of Maharashtra gets nothing in respect of such sales effected outside the State. In respect of such sales, the rule-making authority could well have denied the benefit of set-off. But it chose to be generous and has extended the said benefit to such out-State sales as well, subject, however to deduction of one per cent of

the sale price of such goods sent out of the State and sold there. We fail to understand how a valid grievance can be made in respect of such deduction when the very extension of the benefit of set-off is itself a boon or a concession. It was open to the rule-making authority to provide for a small abridgement or curtailment while extending a concession. Viewed from this angle, the argument that providing for such deduction amounts to levy of tax either on purchase of raw material effected outside the State or on sales of manufactured goods effected outside the State of Maharashtra appears to be beside the point and is unacceptable."

18. Thus, denial of set-off in context of the goods which were consigned out of the State for sale there was clearly held as not amounting to any imposition of tax but amounting only to curtailment of the concession or benefit which was extended. In the instant case, as noted above, the units had no right to claim exemption or other incentives. The conditional exemption and the deferment incentive were given only by way of concession. The impugned condition, as held above, only amounted to denial of such concession to the extent of the sales which were effected outside the State by computing the minimum revenue loss resulting thereby towards the upper limit of the incentives so that reaching that limit was accelerated and there was no revenue loss to the State, because, on the limit being crossed the exemption ceased.

19. The learned counsel for the petitioners submitted that in the affidavit-in-reply which was binding on the State, there was an averment in paragraph 15 to the effect that "when the sales were effected outside State the State was deprived of its revenue and therefore a condition was prescribed which would enable the State to ensure that it would receive an amount equivalent to tax it would have levied, had the goods been sold in the State in the course of inter-State trade or commerce". The particular averment reproduced above cannot be relied on by the petitioners taking it out of context and keeping away other contentions raised in the affidavit-in-reply. In the affidavit-in-reply, it is in terms mentioned in paragraph 13 that no tax was levied on the sales effected by the petitioner-company through its branches outside the State of Gujarat. Again in paragraph 15(A) it is reiterated that when a dealer transfers the goods manufactured or produced in the State to his branch outside the State, there was no sale and the provisions of section 87 of the Act were not attracted. It is further stated that the rationale underlying the impugned provision was that the State of Gujarat which granted exemption by way of sales tax incentives for the purpose of development of backward areas and consequential fillip to its trade and commerce should not be altogether and substantially deprived of its revenue and that when a dealer entitled to sales tax incentives, sells the goods in the State or in the course of inter-State trade or commerce the State earns revenue by way of tax. It is also submitted that the question of doing something indirectly which cannot be done directly does not arise in the instant case. It was, thus, clearly the case of the State Government, in the affidavit-in-reply, that the impugned conditions were imposed while granting exemption to see that there was no revenue loss caused

to the State because by computing the minimum revenue that it would have earned on the goods if they were sold within the State for working out the limit of exemption, all that was done was to accelerate the reach of that limit by virtually denying the manufacturer the benefit to the extent of the revenue loss caused in respect of the sales effected outside the State so that on reaching the upper limit the exemption ceases and normal revenue accrues in respect of the sales effected thereafter. Apart from this, it is a settled legal position that it is for the court to interpret the intention of the Legislature and the validity of the legislative provisions cannot be judged merely by affidavits filed by the State [see : Sri Srinivasa Theatre and Others Vs. Government of Tamil Nadu and Others, . Therefore, the petitioners cannot base their case on some mistake that might have committed in one sentence of the affidavit-in-reply in paragraph 15 which uses the expression to the effect that the State would receive an amount equivalent to tax. The State Government had more than one place declared that it never intended to impose any tax on the goods which are sold outside the State. All that the State did was to insist that for the purpose of availing of the eligibility limit of incentives the sales will have to be effected in Gujarat. That was the real effect of the impugned condition.

20. As noted above, the petitioner No. 1 was given eligibility certificate dated April 18, 1992 in respect of the Composite Sales Tax Incentive Scheme with a clear stipulation in paragraph 2 and 3 that the transactions which related to the sales tax exemption under entry 175 of the notification issued u/s 49(2) of the said Act undertaken by the certificate holder were subject to the conditions of that entry and that it had to abide by the said conditions and further that the transactions undertaken in relation to the deferred payment of tax would be subject to the resolution dated June 16, 1987 which contained similar conditions. The petitioner No. 1 took advantage of exemption granted on these terms incorporated in the certificate. These conditions were integral part of the incentives granted which was only a concession or boon. The petitioner-assessee having availed of the benefits on the basis of these stipulations and having bound itself to these stipulations is now trying to wriggle out of them. As held above, these conditions are just and proper and there is no element of arbitrariness in them. These conditions are part of the policy of the State Government formulated for providing conditional exemption from sales tax or deferment of payment of tax. Therefore, having utilised the eligibility certificate containing these conditions, it is not open now to the petitioner No. 1 to contend that they are not binding. The petitioner No. 1 is therefore not a fit person in whose favour jurisdiction can be exercised by this Court by way of a discretionary remedy.

21. Under the above circumstances, the petitioners failed in their challenge against the impugned conditions of para 13(iii) of entry 175 of the notification u/s 49(2) of the said Act and para 8(iii) of the resolution dated June 16, 1987 and their challenge against the impugned order at annexure C to the extent of deduction thereunder of the amount of Rs. 4,98,01,531 as sales tax incentives treated as enjoyed by the petitioners during the concerned assessment period

therefore also fails. The petition is therefore rejected. Rule is discharged with no order as to costs.

Rajesh Balia, J.

22. Through this petition the petitioners challenge the legislative competence of the State Legislature to make a provision like sub-para (iii) of para 13 of annexure I appended to entry 175 in the Schedule appended to the notification of the Finance Department dated April 29, 1970 issued in exercise of powers conferred by sub-section (2) of section 49 of the Gujarat Sales Tax Act, 1969. Section 49(2) empowers State Government to grant exemptions from sales tax on such conditions as it may deem fit to any person or class of person or to any goods or class of goods. Like provision in sub-para (iii) of para 8 of the Government resolution dated June 16, 1987 providing deferment of payment of sales tax is also challenged on the ground that the executive power of the State does not travel beyond the legislative competence of the State Legislature in the field. Like exemption/concessions were also extended to liabilities under the Central Sales Tax Act.

23. In order to appreciate the controversy, it would be apposite to notice the salient features of the entry 175 as well as resolution dated June 16, 1987, and notice salutary provisions of the Constitution and the main features of the Gujarat Sales Tax Act. Entry 54 of the State List in the Seventh Schedule of the Constitution is the field for State in the matter of legislation imposing tax on sales or purchase of goods other than newspapers, subject to entry 92A of the Union List, entry 92A of the Union List reserves the legislative field for imposing tax on sale or purchase of goods other than newspapers where such sale or purchase takes place in the course of inter-State trade or commerce for Parliament. Article 265 inhibits levy and collection of any tax without authority of law. Article 286 prohibits the State from imposing or authorising an imposition of tax on sale or purchases of goods when such sales or purchase take place outside the State, or in the course of import of goods into India or export of goods out of the territory of India. Clause (2) of article 286 also provides that it is for Parliament to make law formulating principles for determining when a sale or purchase of goods takes place in any of the ways mentioned above in clause (1). These are contours of the legislative field of the State Legislature in the matter of levy and collection of tax on sales or purchase of goods other than those covered by entry 92A in the Schedule I and the newspapers. The levy and collection of tax or for that matter authorisation of imposition of tax on sales or purchase of goods in the course of inter-State trade or commerce or which has taken place outside the State concerned or which have taken place in the course of import of goods into India and export of goods out of the territory of India is beyond the province of the State legislative or its executive authority. It would also not admit of any doubt that any sales or purchase which has actually taken place in the course of inter-State trade or commerce or outside the State or in the course of import of goods into India or export of goods out of the territory of

India by applying the principles for determination of these questions in accordance with the provisions made by Parliament, namely, under the Central Sales Tax Act, the State cannot provide for levy or imposition be creating legal fiction contrary to it.

24. Section 3 of the Gujarat Sales Tax Act, 1969 provides for levy of tax on all sales or purchases of goods made during the year, preceding year within which the specified day falls, or the year commencing on the first day of the year within which the specified date falls, i.e., to say "annual levy" of tax is the important feature of the tax on sale or purchase of the goods. Section 2(28) defines the "sale" to mean a sale of goods made within the State for cash or deferred payment or other valuable consideration. The year has been defined to mean u/s 2(37) in relation to a dealer who maintains a regular books of accounts by reference to which the accounts are maintained by him and in any other cases a financial year. Likewise, levy of purchase tax has also been made u/s 15, 15A, 15B on certain purchase of specified goods which include purchase tax on raw processing raw materials, or consumable stores used in manufacture of goods within the State. Chapter V deals with the machinery of determining the tax liability and other provisions to make the levy effective. Section 40 casts an obligation on every dealer to furnish declarations and returns of such period on such dates before such authorities as may be prescribed. Section 41 enjoins assessment of amount of tax due from a dealer separately for each year during which he is liable to pay tax. In certain circumstances of an application being made by a dealer to that effect assessment of tax due from registered dealer can be for a period exceeding one year. Section 47 deals with the manner of payment of tax and deferred payment of tax which, inter alia, provides in certain circumstances where an assessee is enjoying the benefits of incentives by way of deferment of sales tax or purchase tax by virtue of eligibility certificate granted by the Commissioner of Industries, Gujarat State or any other officer authorised by him in this behalf to be deemed payment of tax in terms of section 47. Section 49 by itself exempts certain class of sales, purchases from tax payable under the provisions of the Act and sub-section (2) of section 49 enables the State Government, if it is necessary to do so, by publishing any notification and subject to such conditions as it may impose, exempt specified class of sales or specified sale or purchase wholly or part of the tax payable under the provisions of the Act. Sub-section (3) of section 49 provides the manner in which issuance of notification and its publication. The exemption envisaged under sub-section (2) of section 49 is to be effective of expiry of thirty days from its having been before Legislative Assembly after its publication with or without modification as may be made by Legislative Assembly, making it, beyond doubt that the notification granting exemption is of legislative character.

25. From the aforesaid provisions it can be said that levy under the Act is on the sales or purchase of goods made within the State. The levy is on the annual turnover of purchase or sales which is taxable under the Act. The returns for sale or purchase carried out during the year which are subject to tax are required to

be furnished annually and the amount of tax due from a dealer is also required to be processed for each year separately. Section 47 read with section 49 also makes it clear that the Act also envisages independent of any exemption that may be granted from payment of tax altogether or partial, it also envisages deferment of the payment of sales tax which is payable under the Act on specified dates to a later time under incentive scheme of the State. What is envisaged in section 49 is exemption from payment of tax and what is envisaged under incentive scheme for deferment is not exemption but mere deferment of payment of tax to a later date than when it is due.

26. Entry No. 175 inserted by notification dated December 23, 1986 in exercise of its power u/s 49(2) provided certain exemptions. In the first instance, it provided for exemption from payment of purchase tax to a "specified manufacturer" in respect of purchase of raw materials, consumable stores or packing materials from a person who is not a registered dealer, which is otherwise chargeable to tax u/s 15 of the Act, the exemption is subject to condition that such purchased goods are used in manufacture of goods in the industrial unit, whether such goods are sold within State or outside State or in the packing of goods so manufactured.

27. Secondly, sales made by a registered dealer of raw materials, processing materials, consumable stores or packing material to a specified manufacturer if the specified manufacturer furnishes to the selling dealer a certificate in form No. 20, inter alia, declaring that the goods are required for use within the State of Gujarat as raw materials, processing materials or consumable stores in the manufacture of goods for sale within the State of Gujarat or outside the State of Gujarat or as packing materials in the packing of the goods so manufactured. It inherently meant that such sales by a registered dealer is exigible to sales tax within the State of Gujarat. The exemption is to the extent of the amount of tax payable on such sales exceeded 1/4th per cent.

28. Thirdly, the sales by a specified manufacturer of goods manufactured by him if the specified manufacturer does not give any certificate in form No. 40 prescribed in the Gujarat Sales Tax Rules, 1970 to any dealer purchasing such goods from him and declare in the bill/invoice that the sale is exempt from tax under sub-entry (3) of entry No. 175 in the Schedule and that the buyer including any subsequent buyer purchasing such goods does not claim any drawback or set-off or refund under any of the provisions of the Gujarat Sales Tax Act, 1969 or Rules made thereunder in respect of such purchases made by him, extent of exemption is full.

29. Lastly, on purchases of prohibited goods other than declared goods for use in the manufacture of taxable goods and such manufactured goods are despatched to his own place of business or to his agent's place of business situated outside the State but within India - whole of the purchase tax payable on purchases were made non-payable by the assessee. The last clause envisaged that in that case the entire sale of the manufactured goods shall be made out of State. In other

words for availing exemption under sub-entry (4), there ought to be no future sales of such goods within the State attracting Gujarat sales tax. This last sub-entry was deleted with effect from March 19, 1991.

30. Apart from the details enumerated above, one condition in column No. 4 against each sub-entry 175 inhibits the exemption subject to the conditions specified in annexure I.

31. One may notice that but for the reference to annexure I the exemption envisaged u/s 175 is from the payment of tax leviable under the Act for indefinite amount of tax. As noticed above, the tax is levied annually the exemption under entry 175 has reference to tax leviable and payable during the year concerned. Since the entry itself does not specify the period during which the exemption is to continue, the exemption is to continue year after year unless withdrawn, subject of course to other conditions.

32. The conditions envisaged under annexure I are : (1) that the specified manufacturer has established new industry in the designated areas; (2) the specified manufacturer has applied before the appropriate authority within the specified time in writing manifesting the exercise of his option for exemption under entry 175 instead of entry 118 and instead of the benefit admissible under the scheme of sale tax deferment as specified in para 6 of the Government of Gujarat; Industries, Mines and Energy Department Resolution dated May 6, 1986 and also exercising an option for exemption under entry 175 or entry 118 by a specified manufacturer of a new industry in process; (3) that the specified manufacturer has obtained an eligibility certificate from the Industries Commissioner or any other authority authorised in this behalf and on obtaining the eligibility certificate disclosing the fact that the new industry has been commissioned on or after April 1, 1986 but before March 31, 1991, which date has been extended admittedly, and on securing such eligibility certificate has applied for exemption certificate to the Commissioner of Industry; (4) that the specified manufacturer has actually used the goods within the State of Gujarat as raw materials, processing materials or consumable stores in the manufacture of any goods for sale within the State of Gujarat or outside the State of Gujarat or as packing materials in the packing of the goods so manufactured. These are the conditions which a dealer must fulfil before he claims exemption envisaged in paras 1 to 4 of the annexure I referred to above. Para 5 provides that in case the specified manufacturer contravenes any of the conditions or any of the provisions of the Act or the Rules made thereunder, the exemption certificate issued to him by the Commissioner under this entry is liable to be cancelled or suspended. In case of suspension, the amount of tax payable in respect of the purchases and sales made during the period of suspension shall be deducted from the total amount of tax exemption and also the period of suspension shall be deducted from the total period during which the exemption is to be availed. Under paras 6, 7, 8 and 9 a specified manufacturer is denied certain other benefits which are available to a dealer under various provisions of the Gujarat Sales Tax Act and

Rules made thereunder and these provisions are not to be availed of by him if he is to avail for the exemption under entry 175, i.e., to say once the specified manufacturer has opted to avail the benefit under entry 175, he is not entitled to certain drawbacks or deductions from taxable turnover permissible under sections 12 and 13 or under any other entries of the notification issued under sub-section (2) of section 49 of the Act.

33. The genesis of contention arises with reading paras 10 to 13 of annexure I. Para 10 tells of monetary limit up to which a specified manufacturer is eligible for exemption from tax. Monetary limit is specified in annexure IV. Annexure V which specified the limits up to which maximum exemption can be availed also provides the extent of period during which exemptions in respect of various categories of areas specified in annexure IV and in respect of pioneer new industries can be availed. In part 3 of the annexure V a Pioneer Industry in specified category A is eligible up to 90 per cent of its fixed capital investment as exemption from tax and such exemption can be availed of for a period of 14 years from the date of commencement of the commercial production, during which the exemption to the said monetary limit is to be availed of. The monetary limit in respect of Pioneers Industries situated in areas specified in category B is 75 per cent of its foxed investment or Rs. 2.5 crores, whichever is less, and the period over which this exemption from tax can be availed of is 12 years from the date of commencement of commercial production. It may be noticed in the case of Pioneer Industries eligible for exemption under category A there is no alternative upper limit fixed except 90 per cent of the capital investment. Having prescribed the maximum monetary limit up to which a specified manufacturer is exempt from payment of tax and also fixed the period within which such exemption from payment can be availed of, it is clarified in para 11 that on reaching the monetary limit of exemption the subsequent purchase and sale of the specified manufacturer shall cease to be exempt against a declaration provided under this entry that is to say once the maximum monetary limit to which the specified manufacturer is eligible for exemption has been reached by availing the exemption notwithstanding that the period for availing such exemption has still not expired, the dealer shall not be entitled for further exemption with reference to sub-items of entry 175 alone. Likewise it is clear that if the period, during which eligibility to exemption from tax up to the specified monetary limit exists, expires before the monetary limit of exemption can be fully availed of by the person concerned, no further exemption can be claimed to unutilised monetary limits. Para 12 prohibits specified manufacturer from benefit of purchasing goods without payment of tax either u/s 12 or 13 of the Act or under any of the entries in the notification issued u/s 49(2) of the Act, that is to say, he is not entitled to avail of the benefit of purchase of goods without payment of tax either by way of purchase or sales tax as the case may be depending on the exigency whether the goods are being purchased from registered or unregistered or unregistered dealer, of such purchases are liable to such benefits u/s 12 or 13 of the Act or entries under notification issued u/s 49(2) of the Act. Para 13 of annexure I, sub-

para (iii) of which is the bone of contention reads as under :

"Para 13 - For the purpose of arriving at the limit of tax exemption as specified in annexure V, the aggregate of the following shall be considered :

(i) aggregate amount of tax including additional tax, if any, which would have become leviable from the specified manufacturer on purchases and sales as per sub-entries (1), (2), (3) and (4);

(ii) aggregate amount of Central sales tax which would have become leviable on inter-State sales made under Government Notification No. (GN-99) CST-1086/S. 8(5)(69)-TH, dated December 23, 1986, issued under sub-section (5) of section 8 of the Central Sales Tax Act, 1956;

(iii) aggregate amount of tax at the rate of 4 per cent or the rate applicable under the Gujarat Sales Tax Act, 1969 whichever is lower on the sale price of the goods transported the specified manufacturer to his own place of business or to the place of business of his agent at any place within India but outside the State of Gujarat for sale there;

(iv) the aggregate amount of tax leviable u/s 15B of the Gujarat Sales Tax Act, 1969. The aforesaid entry 175 concerns the exemption from tax leviable under the Act. Since deferment of payment of tax, as the name suggests, neither gives exemption from the liability to tax nor absolves the assessee from payment of tax but merely postpone the payment of tax payable by the assessee, obviously would not be governed by the provisions of section 49 of the Act. It finds in separate Government Resolution dated June 16, 1987, material for our purpose which, inter alia states that with a view to securing balanced development of industries in the State through acceleration of the pace of industrial development of the less developed areas of the State and prompting growth of industries away from cities, it has evolved sales tax incentives scheme for industries, 1986 and special incentives for pioneer units, 1986 by Government Resolution dated May 6, 1986 and May 7, 1986 respectively which envisaged amongst others sales tax exemption incentives and sales tax deferment incentives. It is also stated that so far as the scheme of sales tax exemption incentives is concerned, it is embodied in the notification dated December 23, 1986 issued u/s 49(2) of the Gujarat Sales Tax Act which is in form of entry 175 referred to hereinabove. Regarding deferment incentives, apart from incorporating like conditions which were referred to in entry 175 it also included certain additional requirements, namely, that it shall not be permitted to avail of the benefit of furnishing consolidated declarations or returns in respect of different places of business falling under the jurisdiction of different Sales Tax Officers and that if the new industrial unit discontinues the commercial production at any time for a period exceeding 12 months within the duration of sales tax deferment; or discontinues its business or transfers his new industrial unit in whole at any time within the duration of the benefit under the scheme, he shall cease to get the benefit of the scheme forthwith and entire amount of tax payment of which has been deferred until

such cessation of the scheme shall be paid by such person into the Government treasury within a period of 60 days from the cessation of the scheme to him. The relevant provisions regarding grant under the scheme are sub-paras 3, 6 and 8 which are reproduced as under :

"(3) Subject to the availability of limits mentioned in annexure I and annexure II referred to the eligible industrial units will be entitled to postpone the payment of the tax payable by them only on the sales of the finished products, both under the Gujarat Sales Tax Act, 1969 as also under the Central Sales Tax Act, 1956 up to the period in columns 4 and 7 of annexure I and column 3 of annexure II. On the expiry of the said period the amount of tax on the sales, the payment of which has been postponed, will be paid by such units into the Government treasury by six equal annual instalments. Accordingly, the first such instalment shall be paid within a period of sixty days from the end of the accounting year, during which the aforesaid period expires and thereafter, each of the remaining five instalments shall be paid within a period of sixty days from the end of the respective accounting year. No interest will be charged on the amounts so deferred.

.....

(6) The benefit underlying this scheme shall cease to continue in the case of a new industry being in the areas specified in columns 2 to 7 of the table below, as soon as the aggregate of amounts of tax which would have become payable by the new industrial unit, but for the availability of the benefit under this scheme, during the period commencing on or from 1st April, 1986 or as the case may be, the date of commissioning the new industry and ending at the end of the period specified in columns 4 and 7 to annexure I and column 3 to annexure II, become equal to the amount specified in columns 5 and 6 to annexure I and column 2 to annexure II.

.....

(8) The limit of deferment shall be arrived as under :

(i) aggregate amount of tax including additional if any, which have become leviable on the sales;

(ii) aggregate amount of Central sales tax which would have become leviable on inter-State sales made under Government Notification No. (GN-99) CST 1086/S. 8(5)(69)-TH dated December 23, 1986 issued under sub-section (5) of section 8 of the Central Sales Tax Act, 1956; and

(iii) aggregate amount of tax at the rate of 4 per cent or the rate applicable under the Gujarat Sales Tax Act, 1969 whichever is lower on the sale price of the goods transported by the new industrial unit to his own place of business or to the place of business of his agent at any place within India but outside the State of Gujarat for sale there."

The maximum quantum and time-limit as specified in annexure II of the Schedule are the same as under entry 175 read with its annexures referred to above.

34. It is not in dispute that the petitioner is a pioneer unit established in area falling in category A and fulfils all other conditions for availing the benefit of exemption under entry 175 or benefit under the deferment scheme dated June 16, 1987. According to the salient features referred to above, the monetary quantum to which it could avail tax exemption or deferment benefit is 90 per cent of its fixed capital investment which has been ultimately quantified at Rs. 45 crores and that this exemption is to be availed of by the petitioner-company within a period of 14 years from the date of commencement of its commercial production which according to the eligibility certificate is September 16, 1991, that is to say he has to avail the benefit of exemption/deferment up to Rs. 45 crores during the period commencing from September 16, 1991 and ending on September 15, 2005. It may be noticed that originally it was required that a prospective entrepreneur could opt to take benefit of only one benefit, either he could opt for exemption from tax or for deferment of payment of tax in respect of monetary limit prescribed in the respective schemes, resolution dated June 25, 1987 amended Pioneer Unit Incentive Scheme, 1987 referred to above by making it the Composite Sales Tax Incentive Scheme, 1987 permitting the beneficiary to opt simultaneously for benefits under both for the entire monetary limit during the period of the operation of the scheme that is to say in respect of monetary limit up to which he was entitled to one he could either opt exemption from payment or could opt for deferment scheme or for both by exercising his options as per his choice aggregate of which not to exceed the monetary limit. However, this does not alter the basic condition of availing of the benefits under the two schemes while they were operating separately and independently.

35. It has been the contention of the petitioners that the quantum of tax exemption having been fixed at Rs. 45 crores in his case and period during which he could avail of that exemption or other benefits also having been fixed, the only question thereafter which remains to be worked out was to compute the quantum of benefit availed by him during this period so as to give effect to the provisions of the scheme that as soon as he crosses the monetary limit to which he is entitled to, he starts making payment in respect of further taxable transaction carried on by him. This exercise entails only one determination namely, to assess the tax liability ex hypothesi which has been fixed in respect of assessee as per the relevant Sales Tax Act and the method of determination of reaching of the monetary limit is to be made through assessment of tax. Since this exercise necessarily relates to determination of tax payable by the assessee through assessment, any criteria for such assessment which is beyond the legislative competence of the State Legislature could not have been provided for in the scheme either under the statutory notification u/s 49(2) or through administrative action by way of resolutions referred to above. Since under article 286 the State is not authorised to impose tax on sales or purchase outside the

State, the factor which has to be determined in accordance with the Central Sales Tax Act, a law made by the Parliament, the State Government could not have prescribed by providing sub-para (iii) of para 13 in annexure I appended to entry 175 or sub-para (iii) of para 8 of resolution dated June 16, 1987 which are identical in terms and amounts to imposition of tax indirectly. On this premises, it is contended that entry 175 or resolution dated June 16, 1987 should be given effect without considering the said unauthorised levy.

36. On the other hand the learned counsel for the Revenue urged that in the matter of grant of exemption, in fact, no consideration for imposition of tax arises. Liability to tax exists is the premise on which the foundation of exemption is laid. In exemption there is no element of imposition. It is really working out the extent of benefit of exemption granted from tax liability. To what extent this benefit should be given is a matter of policy decision in that regard. Making of such policy decision and working out the exemption do not raise any issue about the applicability of article 286 of the Constitution. It was also submitted that even if the impugned part is held to be invalid then it will invalidate the notification and resolution in its entirety inasmuch as it is essential ingredient of the scheme and therefore in the event of petitioners challenge is successful, he is not entitled to any relief.

37. In reiterating his contention, learned counsel for the petitioner on the question of legislative competence urged that even if two interpretations are possible of a beneficial provision, one which favours the assessee must be accepted and in case the provisions referred to above are held to be ultra vires, the same are severable from the rest of the provision inasmuch as even in the absence of impugned provision, the workability of the scheme, without any additions, alterations or amendments, is not affected.

38. Before proceeding with the analysis of this controversy I may refer to the opinion of Lord Dunedin in *Whitney v. Commissioners of Inland Revenue* [1926] AC 37 which has found its approval by the courts in India in *Chatturam v. Commissioner of Income Tax* [1947] 15 ITR 302 ; AIR 1947 FC 32 and *A.V. Fernandez Vs. The State of Kerala*, , that there are three stages of imposition of a tax. There is the declaration of liability that is the part of the statute which determines what person, in respect of what property are liable. Next there is the assessment. Liability does not depend on assessment. That ex hypothesi, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the method of recovery if the person taxed does not voluntarily pay.

39. When one speaks of claiming a benefit or exemption from payment of tax, it could have two shades. First the claim may be that there is no charge to levy, that is to say, there is no liability imposed at all or to say a transaction is not subject to imposition of tax at all. Yet another aspect of this claim may be referable to that though the transaction is subject to charge or to say as per declaration of law it is subject to tax, but by certain other provisions the liability

to tax is diluted, either wholly or in part. Keeping this distinction in mind, if we examine the controversy raised in the present case, one thing that stands out is that the claim to which the petitioners plead entitlement is of latter category, namely, that benefit of tax exemption or deferment of any payment of taxes is in respect of certain transaction where ex hypothesi there existed liability to tax before the scheme can be operated or before the scheme of exemption can be invoked. The contention is not in the field of imposition of sales tax to which the liability of petitioners exist and determined ex-hypothesi and from which it claims exemption either from payment or by postponing of payment. There is no dispute about legislative competence of such imposition. It is nobody's case that but for the operation of tax exemption under notification u/s 49(2) or under the deferment benefit scheme any liability of tax de hors the legislative competence of the State is imposed nor that by operation of the exemption in question including the impugned provisions at any point of time the petitioner would be required to pay more taxes than what he would be required to pay without exemptions. As there is declaration of liability ex hypothesi by a competent Legislature and there is no increase in that liability by the impugned provision at no stage of the operation of scheme during the period of its continuance, the petitioner or subject of exemption, is required to pay anything more than such liability.

40. To have a look at the scheme of exemption in question concerning determination of eligible monetary limit of exemption, working out the availing of exemption limit during the entire operating period of exemption for the claimants vis-a-vis the provisions of the Act. We have noticed that the Sales Tax Act imposes liability on annual turnover and the liability to assessment is also at the close of the year on such annual turnover. As against this the limit to which the exemption from payment of tax or deferment of the payment of tax can be availed of is spread over for a period of 14 years. Obviously, the fixation of limit under the notification or scheme is not determination of tax liability ex hypothesi on the basis of any taxing statute but is a monetary limit up to which on determination of tax annually, a person can claim exemption from payment of that liability for that year, because of the provisions referred to above and all other conditions having been fulfilled. The assessment is integral part of provision for imposition of tax each year by determination of taxable turnover and determination of tax liability that arisen on such turnover in accordance with the provisions of the Act. However, since the provisions of entry 175 and the deferment which provides exemption or deferment of such liability every year subject of availability of eligible limit of exemption for that year and also conditions the exemptions up to a maximum time-limit whether exemption is availed up to that period or not is a further fact is also required to be determined periodically, i.e., at the close of every year as to what is the remainder of the limit to which the beneficiary is entitled to avail of the benefits for the next year. This clearly envisages two stages of determination. Firstly, tax liability incurred during the year from which the assessee claims exemption or deferment which

undoubtedly relates to the tax determination in accordance with law, namely, Gujarat Sales Tax Act or Central Sales Tax Act as the case may be and no part of such computation can include anything which is not taxable under the law. However, when this part is over, the question remains to be determined is what is the starting point of monetary limit and the balance period for availing further or outstanding exemption. At this stage a question may arise whether other consideration can enter into for fixing the balance of the limit for the remainder of the period by providing additional adjustments and whether such provision has any relation to the question of imposition or levy of tax under the Act in the matter of such adjustments.

41. Reading of paras 10, 11 and 13 of the annexure I read with annexure V leads me to the above conclusion. I am unable to accept the contention of the learned counsel for the petitioner that the monetary limit fixed in annexure V in para 10 that is under the notifications or under the resolution dated June 16, 1987 the tax liability of the assessee has been determined and such liability having been determined he has acquired a vested right not to pay any part of it until expiry of the period of operation of exemption further. Liability to tax can be determined only under the Act and that is annual. Exemption is also to be applied each year qua such liability. There cannot be a pre-emptory exemption from tax which has yet to be determined, in succeeding years nor the tax liability which may arise in succeeding year. The nature of monetary limit for eligible exemption fixed in annexure V cannot be said to be a tax liability fixed under the Act. There cannot be any hesitation in reaching further conclusion that adjustment of available eligible limit for considering exemption in each succeeding year is a fresh exercise and does not involve issue of imposition of tax at all, so as to invite consideration of operation of article 286.

42. However, since the learned counsel strenuously urged that this is the limit of the tax exemption which one can avail of that is to be treated as tax liability of the assessee in respect of which he is availing exemptions, this issue may be examined in details. As noted above, the law authorises the State Legislature to impose tax on sales and purchase of goods, the limitation which curtails the length and width of this legislative field are contained in entry 54 itself coupled with article 286. Beyond that there is no curtailment in the field of legislative competence of the State Legislature.

43. No provision has been pointed out to us under the Sales Tax Act which authorises imposition of tax outside the State of Gujarat. On the contrary, as noticed above, the State Legislature has imposed tax on the turnover which takes place during one year at the rate specified by the State by notification from time to time and the determination of that liability is also annual. Therefore, at the time of determination of the limit of exemption which a person can avail of in future cannot be considered to be an imposition of tax and exemption therefrom. The imposition and exemption is relatable only to the sales and purchases of the year with which the dealer is concerned. Prior to that neither there is incidence of

tax not there is levy and therefore the question of assessment of such tax does not arise. In that view the amount fixed under annexure V or under sub-para (iii) of para 8 of resolution dated June 16, 1987 has only reference to the total amount to which exemption can be claimed or deferment can be availed of by a specified manufacturer in respect of tax liable to be imposed in each year and therefore in each year the available limit to which he could avail of the exemption from the tax liability or deferment of payment of tax liability that is arising in respect of that year has to be determined annually. If that is so, then no further difficulty arises when at the close of the year there has to be determination of tax liability for that year in respect of which the assessee's benefit has to be considered. That exemption or benefit is available to the extent the eligible limit is available prior to that time or to say available at the commencement of year. Once the liability to tax for the year concerned is determined and it is dealt with according to existing eligible monetary limit comes the question of after availing the exemption what is the eligible limit left for availing tax benefit in future. Thus there is also to be determination of available limits of time and monetary both at the close of the year for future.

44. Viewed from that light while at the inception maximum eligible limit has been prescribed, under sub-para (iii) of para 13 of annexure I or sub-para (iii) of para 8 which are identical in terms, prescribe the mode of determining eligible limit at the close of each year which can be availed during succeeding year. As a matter of fact, the two sub-paras (i) and (ii) of the respective paragraphs refer to deduction of tax liability for that year either under the Gujarat Sales Tax Act or Central Sales Tax Act in respect of which exemption is to be availed and sub-para 3 refers to after availing the exemption for that year what is the monetary limit which remains to be operated for next year by adjusting it with reference to a fixed percentage of the sale price of goods sold outside the State.

45. At this stage neither the question of invoking the principle of liberal or beneficial interpretation of beneficial provision nor looking at the field of legislative competence really arise for consideration. In fact, the principle of literal construction or liberal interpretation of such scheme would arise only in the circumstances to be stated hereinafter. A question may arise that in a particular year a person has taxable sales as well as turnover of sales which has taken place outside the State. Aggregating all the three result in exceeding the limit and the question may arise whether the assessee is required to pay tax amount in excess of limit or is not entitled to defer the payment of tax amount which but for inclusion of the amount of 4 per cent on the turnover made outside the State would not have been required to pay. Literally speaking the answer may be yes. However, that "will result in denying the available exemption or levy of tax on sales or purchase outside State, violating inhibitions of article 286. Here comes the role of interpretation of rules. It is trite to say that law which imposes a tax or for that matter burdens the subject must be strictly construed. Unless a subject strictly comes within the four corner of law such law, he cannot be subjected to such burden. Even when it is possible reasonably to have two

views the court would lean in favour of such interpretation which favours the subject. Once a levy is lawfully imposed, any exception made thereto has also to be strictly construed to the extent opening the aperture for exception. Reason being every exemption of tax which is otherwise payable, results in transmission of burden of one over to other to make good the deficiency in public revenue. That is to say no exemption can be granted unless the citizen comes strictly within its ambit strictly to avoid his burden and ambiguity in opening of entry to exemption goes in favour of levy. However, once a person strictly falls within the area of exemption, the scheme must be interpreted to give its full play for the benefit which it confers.

46. The principle stems from the distinction between a tax and concession. While a citizen has a right not to be subjected to any imposition of tax without authority of law, envisaged under article 265, once that right is subjected to a valid imposition by law, concession therefrom is not a right vested in him. In *International Cotton Corpn. (P) Ltd. Ors. Vs. Commercial Tax Officer, Hubli, and Others*, the Supreme Court spelt out the principle when it said repelling the challenge to an exemption on the anvil of article 14 "a concession is not a matter of right. Where the Legislature taking into consideration the hardships caused to a certain set of tax-payers gives them a certain concession it does not mean that that action is bad as another set of tax-payers similarly situated may not have been given a similar concession. It would not be proper to strike down the provision of law giving concession to the former on the ground that the latter are not given such concession".

47. Keeping in view the above principles our answer to the poser is that at commencement of the year the monetary limit and the remainder of the period are the factors determinate as discussed above. Firstly the tax payable for the year at close of the year has to be determined and to be dealt with for exemption available during that year. Time of availing exemption or benefit of deferment is the close of the year. First step is the availing of the benefit of the tax exemption or tax deferment which is directly referable to the tax liability, so determined for the year. If after the availing of that benefit of tax exemption or deferment, there remains a balance, the further question would arise for further continuing benefit in the succeeding year and it is only at this stage the question of adjustment against that limit further by 4 per cent of the turnover made outside the State can arise. If the limit has been exhausted by the availing of the exemption of that year's tax liability determined under the provisions of the Act the question of determining the limit for the future would not arise and the condition that on exceeding monetary limit, exemption under entry 175 shall cease to have effect would come into operation springing to life liability on the part of the assessee to pay tax thenceforth. In my opinion, therefore, at no stage the question about imposition of tax exceeding the one fixed under Act really arises and no issue about the legislative competence really arises on the entire reading of the exemption notification as well as the Government resolution.

48. It may be pointed out that this distinction between the imposition of liability and legislative Act in working out the ancillaries or the matter incidental thereto has been pointed out in the case of *A.V. Fernandez Vs. The State of Kerala*, . It was a case relating to Travancore-Cochin General Sales Tax Act which was pre-Constitution law. It has originally included the transaction which has taken place outside the State in the total taxable turnover. After commencement of the Constitution in terms with article 286, which prohibited the competence of State to impose tax on the sales and purchase which has taken place outside the State, section 26 was inserted in the Act incorporating the provisions of article 286 excluding the liability to tax on transactions inhibited by article 286 without amending the other provisions of the Act, which, inter alia, included the definition of turnover. The definition of turnover remained unaffected by the amendment. The resultant position was that for the purpose of rendering a dealer liable for registration limit of turnover continued to include the sales and purchase which had taken place out of the State. The court explained the position thus :

".....Sales or purchases in respect of which there is no liability to tax imposed by the statute cannot at all be included in the calculation of turnover for the purpose of assessment and the exact sum which the dealer is liable to pay must be ascertained without any reference whatever to the same.

There is a broad distinction between the provisions contained in the statute in regard to the exemptions of tax or refund or rebate of tax on the one hand and in regard to the non-liability to tax or non-imposition of tax on the other. In the former case, but for the provisions as regards the exemptions or refund or rebate of tax, the sales or purchases would have to be included in the gross turnover of the dealer because they are prima facie liable to tax and the only thing which the dealer is entitled to in respect thereof is the deduction from the gross turnover in order to arrive at the net turnover on which the tax can be imposed. In the latter case, the sales or purchases are exempted from taxation altogether. The Legislature cannot enact a law imposing or authorising the imposition of a tax thereupon and they are not liable to any such imposition of tax. If they are thus not liable to tax, no tax can be levied or imposed on them and they do not come within the purview of the Act at all. The very fact of their non-liability to tax is sufficient to exclude them from the calculation of the gross turnover as well as the net turnover on which sales tax can be levied or imposed."

The court further said :

"This position is not at all affected by the provisions with regard to registration and submissions of returns of the sales tax by the dealers under the Act. The Legislature, in spite of its disability in the matter of the imposition of sales tax by virtue of the provisions of article 286 of the Constitution, may for the purpose of the registration of a dealer and submission of the returns of sales tax include these transactions in the dealer's turnover. Such inclusion, however, for the purposes aforesaid would not affect the non-liability of these transactions to levy or imposition of sales tax by virtue of the provisions of article 286 of the

Constitution and the corresponding provision enacted in the Act.

49. In my opinion these principles govern the controversy before us also. As noticed above that but for the notification and resolution referred to above the petitioner was liable to pay tax only in respect of his transaction which have taken place within the State in accordance with the Gujarat Sales Tax Act; and under Central Sales Tax Act in respect of the transaction which had taken place in the course of inter-State trade and commerce. That liability has remained unaffected. Neither the said liability has been increased nor the said liability has been decreased by the impugned notification. Once that liability is fixed only thereafter the question of carving out the benefits therefrom arises. In carving out the extent of benefit under the scheme or notification under which the benefit is claimed, provisions for working out the limits of exemption has to be read as well which are as much part of the computation of the exemption truncating the tax liability. It is nothing more or nothing less. It is always a matter of policy decision, expressed in the notification/resolutions, as to extent to which exemption from general law has been offered to a citizen.

50. The way extent of benefit can be abridged, we may refer to the decision of the Supreme Court in the case of Godrej and Boyce Mfg. Co. Pvt. Ltd. and others Vs. Commissioner of Sales Tax and others, etc. etc., where the court held that when the very extension of benefit of set-off is itself a boon or concession, it is open to the rule-making authority to provide for the small abridgement or curtailment, while extending concession. Therefore, to say that having laid down the limits of exemption in annexure V it was not open to the legislature or its delegate or the State Government in exercise of executive power extending the benefits to provide methodology by which such curtailment of tax liability is further truncated.

51. In this connection, we may also refer to the observation of the Lord Chancellor in case of Pryce v. The Directors 7 C. of the Mon Mouthshire Canal and Railway Companies reported in [1879] AC 197. The distinction between right to give payment and moderate and limit a right to payment which otherwise might exist without limit. He said :

"The cases which have decided that taxing Acts are to be constructed with strictness, and that no payment is to be exacted from the subject which is not clearly and unequivocally required by Act of Parliament to be made, probably meant little more than this, that, inasmuch as there was not any a priori liability in a subject to pay any particular tax, nor any antecedent relationship between the tax payer and the taxing authority, no reasoning founded upon any supposed relationship of the tax payer and the taxing authority could be brought to bear upon the contraction of the Act, and therefore the tax payer had a right to stand upon a literal construction of the words used, whatever might be the consequence. I cannot think that this principle applies, to any considerable extent, where the payment spoken of in the Act of Parliament is a payment to be made in return for services rendered, and above all in a case where Parliament

does not step in to give the right to payment, but rather to moderate and limit a right to payment which otherwise might exist without limit, or at all events with only such limits as would be placed upon it by a quantum meruit assessment."

52. It may be noticed that the Privy Council has drawn a distinction between the payment towards tax liability and moderation or adjustment towards payment which is to be made towards a liability which otherwise might exist without limit. It has been seen above, that the liability to pay tax which must exist before one can ask about exemption is an existence in its full extent but for the operation of the scheme. Once that liability is fixed only the question that remained germane is moderation in discharge of that liability either by exempting a person from making any payment towards it altogether or by discharging of that liability by set-off from the other payments made by him or by some other method evolved by the scheme of such moderation. Any exemption or benefit granted after the liability is fixed must necessarily imply applications of the principle of moderating and limiting the right to pay in the discharge of that liability which is otherwise to be discharged in full. The principle too supports the conclusion to which we have reached above that once the liability is fixed the question of exploring about to what extent the liability has to be discharged under the scheme and that the liability not in full but in particular, the question would not be relevant to us whether the authority granting such moderation in discharge of the liability had competence to provide so instead of discharging in full.

53. In this connection it may also be noticed that monetary limit fixed under the provisions in consideration fixes eligible monetary limit for exemption and not the limit of exemption itself. In other words, the limit has reference to maximum amount up to which exemption can be claimed does not prescribe for a vested right in the dealer to claim full amount in all circumstances. Conditions and manner has been also prescribed, existence of which may result in availing benefit to full extent. On non-fulfilment of any of such provision may result when the claimant may not be able to avail the opportunity of benefit to fullest. The extent of actual benefit within eligible limit depends on many variable circumstances which also include situs of sales of goods manufactured by the specified manufacturer.

54. In view of the conclusion reached above, it is not necessary to examine the question of severability. However, it appears to me that the doctrine of severability is not available in the case of scheme with which we are presently dealing, which deals with only one subject or only one category of subject. Since the matter has been argued at great length, we propose to deal with it on assuming that impugned para (iii), if it were to be held ultra vires what would be its effect on the scheme.

55. In *R.M.D. Chamarbaugwalla Vs. The Union of India (UOI)*, the court was examining the constitutional validity of Prize Competitions Act of 1955 enacted by Parliament. The subject on which the Act was enacted fell in State List of Seventh Schedule, exclusively reserved for legislative filed of the State

Legislature. At the request of the States of Andhra Pradesh, Bombay, Madras, Orissa, Uttar Pradesh, Hyderabad, Madhya Bharat, Patiala and East Punjab States Union (PEPSU) and Saurashtra under article 252(1) of the Constitution. The authorisation was with regard to control and regulation of prize puzzle competitions and other matters consequential and incidental thereto. The question that arose was whether such Act has brought within its sphere of operation competition in which success depended on a substantial degree of skill and if so, whether it was also requested by the respective States requiring the Parliament to legislate in the field covered by the State List. The court first came to the conclusion that enactment by the Parliament in the field reserved for States cannot be beyond the scope of the resolutions made u/s 252(1) requiring the Parliament to make law on the subject. It examined the question of severability by assuming that the prize competition as defined in the Act included those games in which success depends to a substantial degree on skill as well as those in which it does not so depend and taking out the former class of case from the purview of subject with reference to which the Parliament was required to make law. Contention raised was that the invalidity being attached as to want of legislative competence the doctrine of severability would not apply and it would apply only where the statute is partially void for some other reason. The court repelled the first contention by holding when a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid. It is immaterial for the purpose of this rule whether the invalidity of the statute arises by reason of its subject-matter being outside the competence of the Legislature or by reason of it contravening other constitutional prohibitions. In determining whether the invalid part of the statute is severable from the rest, the court summarised the principle as follows :

"That being the position in law, it is now necessary to consider whether the impugned provisions are severable in their application to competitions of a gambling character, assuming of course that the definition of "prize competition" in section 2(d) is wide enough to include also competitions involving skill to a substantial degree. It will be useful for the determination of this question to refer to certain rules of construction laid down by the American Courts, where the question of severability has been the subject of consideration in numerous authorities. They may be summarised as follows :

1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the Legislature that is the determining factor. The test to be applied is whether the Legislative would have enacted the valid part if it had known that the rest of the statute was invalid. Vide Corpus Juris Secundum, Vol. 82, p. 156; Sutherland on Statutory Construction, Vol. 2, pp. 176-177.
2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so

distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. Vide Cooley's Constitutional Limitations, Vol. 1, at pp. 360-361; Crawford on Statutory Construction, pp. 217-218.

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. Vide Crawford on Statutory Construction, pp. 218-219.

4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the Legislature, then also it will be rejected in its entirety.

5. The separability of the valid and invalid provision of a statute does not depend on whether the law is enacted in the same section or different section; (vide Cooley's Constitutional Limitations, Vol. 1, pp. 361-362); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein.

6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alteration and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. Vide Sutherland on Statutory Construction, Vol. 2, p. 194.

7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. Vide Sutherland on Statutory Construction, Vol. 2, pp. 177-178."

56. So far as the test that on severing the impugned provision, the remainder could be implemented without making alterations and modifications, there is no difficulty. However, it can only be in the realm of guess work whether without the impugned provision the notification or resolution would have at all been issued. It may be seen that in all prior exemptions of the like nature a provision like this was not there. Therefore, it must be held that the insertion of para (iii) was a deliberate Act on the part of the concerned authority and it is difficult to say that whether at that given point of time the scheme or notification would have come at all or in what form, without such clause. So also principles evolved by the apex Court indicate that where the provisions which are valid and are distinct and separate from those which are invalid but the provision forms the part of a single scheme which is intended to operate as a whole, then also the invalidation of a severable part results in the failure of the whole scheme, clearly applies to the notification or the resolution before us. The determination of monetary limit and exemptions to what extent can be availed of during what period and how

computation of such benefit is to be carried out is part of the whole scheme. The fact that even without operating para 3 would leave the scheme to be workable albeit to greater benefit of tax payer cannot make that part a severable part of the scheme in the sense that it could be severed for the purpose of sustaining validity. Moreover, it may be noticed that the doctrine of severance would arise in a case where the alleged separate part deals with the distinct and separate category from the one which remains to be dealt with by the remainder. Unless the statute which deals with different categories of subjects it cannot be possible to apply the doctrine of severability notwithstanding the fact that the invalid part is distinct and separate from those which are not affected by invalidity and the remainder itself may form a complete code. Therefore, in our opinion, doctrine of severability cannot be applied to the present schemes so as to sustain the balance of the scheme after invalidating the impugned part.

57. The principles governing doctrine of severability have been reiterated by the Supreme Court in *Godrej and Boyce Mfg. Co. Pvt. Ltd. and others Vs. Commissioner of Sales Tax and others, etc. etc.,* .

58. The learned counsel for the petitioners strongly relied on the decision in the case of *Varun Polymol Organics Ltd. v. State of Maharashtra* reported in [1995] 97 STC 55 (Bom) in support of its submission that the question for interpretation that the relevant clause in the Bombay Sales Tax Act amounted to imposition of tax on sales made outside the State proceeded from a provision which provided for computation of notional sales tax liability. The relevant clauses which were under consideration read as under :

"For the purpose of the above clause, sales made on consignment basis within the State of Maharashtra or branch transfers within the State of Maharashtra shall also be deemed to be "sales made within the State exigible to tax".

.....

For the purposes of the above clause, branch transfers/transfers on consignment basis outside the State of Maharashtra shall be deemed to be "sale in the course of inter-State trade or commerce".

59. The court was of the opinion that under the above clauses sale made on consignments basis within State of Maharashtra or mere branch transfers within the State or branch transfers and consignments of goods outside State of Maharashtra for sale outside State of Maharashtra were made nationally exigible to tax, which was not otherwise within the legislative competence of State Legislature impinging upon article 286 and beyond legislative competence. Prima facie it appears that the decision of the Bombay High Court has proceeded on literal construction of the aforesaid provision which provided in no uncertain terms that the sales made outside the State to be deemed to be sales made within the State exigible to tax and thereby bringing such sales within its tax net though under article 286 such sales could not have been subjected to State tax laws. Obviously we are not concerned with such a provision which even literally

interpreted would lead to such result which directly stare in the face of article 286. The interpretation of rules under Bombay Act is of little help for interpreting the entry 175 or resolution dated June 16, 1987 with which we are concerned.

60. Likewise the applicability of doctrine of severability as noticed above would depend upon the fact the impugned statute deals with which category of subjects and part of which could be left out while remainder would be governed by that part of the statute does not affect by invalidity. From the report it is not ascertainable whether any such situation was there or not. Therefore, the principle laid down in Varun Polymol's case [1995] 97 STC 55 (Bom) cannot be of much assistance in determining the controversy that has been raised before us in light of the provisions with which we are concerned.

61. For the reasons aforesaid I would dismiss the petition with no order as to costs.

R.K. Abichandani, J.

62. For the reasons stated in our judgments, the petition is rejected. Rule is discharged with no order as to costs.

63. Petition dismissed.