

(2006) 04 GAU CK 0071

In the Gauhati High Court

Case No : Writ Petition (C) No's. 1768 of 2000, 5593, 5594 and 8749 of 2001 and 2173 of 2002

Assam Roller Flour Mills Association and Another

APPELLANT

Vs

State of Assam and Another

RESPONDENT

Date of Decision : 05-04-2006

Acts Referred:

Assam General Sales Tax Act, 1993 — Section 12, 2(33), 2(34), 36, 36(1)

Assam General Sales Tax Rules, 1993 — Rule 6A, 6A(1), 6A(2)

Constitution of India, 1950 — Article 13, 265, 276(2), 286

Citation : (2006) 3 GLT 326 : (2006) 148 STC 165

Hon'ble Judges : R.B. Misra, J

Bench : Single Bench

Advocate : A.K. Saraf and G.N. Sahewalla, N. Hawelia, M.L. Gope, D. Baruah, A.K. Goswami and Md. Aslam, for the Appellant; K.N. Chaudhury, Additional Advocate-General and R. Deka, for the Respondent

Judgement

R.B. Misra, J.—In these petitions common prayer has been made declaring Rule 6A(2) of the Assam General Sales Tax Rules, 1993 in short, called "the Rule 1993" to be ultra vires and illegal and for issuance of mandamus or directions to the State respondents not to levy, realise or collect tax on the value of containers, i.e., the exempted goods supplied free of cost to the customers and to stay the operation of "6A(2)" rules in the meantime.

2. The petitioner No. 1 is an association of roller flour mills in Assam, registered under the Societies Registration Act, 1860 and is represented by its General Secretary representing thirty-two flour mills of the North East Region mainly engaged in the business of converting wheat into different wheat products and selling wheat products packed in gunny bags to the customers as the cheapest and convenient mode of transport and no price whatsoever is charged for the said containers, as in such supply the containers are supplied free of cost.

3. The wheat and wheat products are items exempted from payment of sales tax

vide entry 6A of Schedule I attached to the Assam General Sales Tax Act, 1993 (in short, called "the Act 1993"). Earlier tax was intended to be levied on the containers or packing materials by the provision made under Explanation 2 to Section 2(34) of "the Act 1993". Explanation 2 of Sub-clause (34) of Section 2 of the Act 1993 is quoted below:

Explanation 2.-Where any goods are purchased or sold packed in containers or other packing materials of value which is small in comparison with the value of such goods or such packing is essential or customary for the purchase or sale of such goods, then, notwithstanding any agreement to the contrary such containers or other packing materials shall be deemed to have been purchased or sold with such goods and their value, whether charged separately or not, shall be included in the purchase or sale price of such goods and charged to tax at the rate, if any, applicable to such goods.

Earlier the words "and charged to tax at the rate if any, applicable to such goods" were omitted by Assam Act XXII of 1994 with effect from January 6, 1994.

4. This Court in *Bijoy Singh Bimal Kumar v. State of Assam* [1999] 113 STC 436 : [1998] 3 GLR 164 held that in view of Explanation 2 to Section 2(34) of "the Act 1993" if no tax is leviable on the goods then no tax can be levied on the containers in which exempted goods are contained. After the aforesaid judgment, the said Explanation 2 was deleted with effect from June 1, 1999 by Assam Act XV of 1999.

5. By an amendment Assam Act XV of 1999, a new provision was inserted in Section 7 of the Act 1993 with effect from June 1, 1999 itself which reads as under:

7(8) Notwithstanding anything contained in any other provisions of this Act, any dealer dealing in exempted goods, as specified in Schedule I shall also be liable to pay tax on sale value (express or implied) of containers used in selling such exempted goods, to be determined in the manner as may be prescribed.

6. To give effect to the aforesaid provisions of Sub-section (8) of Section 7, "the Rules 1993" was also amended and a new rule namely, "Rule 6A" was inserted by the General Sales Tax (Amendment) Rules, 1999 with effect from January 19, 2000. The said "Rule 6A" reads as under:

6A. Determination of sale price of containers or packing materials used in sale of exempted goods mentioned in Schedule I.

Sale price of containers or packing materials of exempted goods shall be determined in the following manner:

(1) In case where the sale price of containers of exempted goods are separately shown in the books of accounts and such accounts are verifiable, then such sale price shall be determined by the assessing officer on the basis of such books of accounts.

(2) In other cases, where no accounts regarding sale of containers are maintained, or such sales are shown at a price lower than the market price or supply of containers are shown as free of cost, the sale price shall be determined at 1 per cent of the sale value of the exempted goods sold.

7. Following submissions are being made on behalf of the petitioners:

(i) A plain reading of Section 7(8) of "the Act 1993" and "Rule 6A", indicates that the dealers dealing in exempted goods specified in Schedule I have also been made liable (to pay taxes on the sale value of the containers used in selling such exempted goods) and tax is proposed to be levied on the sale value (expressed or implied) of the containers used in selling some exempted goods, which has to be determined in the prescribed manner.

(ii) Sub-rule (2) of Rule 6A provides that where no accounts regarding sale of containers are maintained, or such sales are shown at a price lower than the market price or supply of containers are shown as free of cost, the sale price shall be determined at 1 per cent of the sale value of the exempted goods sold. In other words, Sub-rule (2) of "Rule 6A" has provided for levy of sales tax on the supply of containers even if the same have been supplied free of cost. The aforesaid Sub-rule (2) of Rule 6A therefore goes contrary to and is beyond the scope of Section 7(8) of "the Act 1993" and thereby the said provision of "Rule 6A(2)" is liable to be declared ultra vires and consequently to be struck down.

Section 2(33) is reproduced below for the convenience to understand the meaning of sale:

2(33) "Sale" with all the grammatical variations and cognate expressions means any transfer of property in goods by any person for cash, deferred payment or other valuable consideration, and includes

(i) any transfer otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration ;

(iii) Section 2(33) of "the Act 1993" provides that for a transaction to be a sale there must be a transfer of property in goods by any person for cash, deferred payment or other valuable consideration. In case there is a transfer of property in goods without any valuable consideration the same will not be treated as sale under "the Act 1993". "Rule 6A(2) provides that even in case where the containers are shown to have been supplied free of cost, the sale price shall be determined at 1 per cent at the sale value of the exempted goods. When Section 7(8) of "the Act 1993" has provided for levy of tax on the sale value of the containers expressed or implied, meaning thereby that there must be a sale of the containers either as expressed or implied for levying tax u/s 7(8) of the Act; "Rule 6A(2)" has gone further and provided for levy of tax on the supply of containers even free of cost, which is not a sale as per the definition of "sale" given in Section 2(33) above thereby "Rule 6A(2)" is contrary and inconsistent and beyond the scope of Section 7(8) and thereby the rule-making authority has

surpassed the scope of Section 7(8) as such, the provisions of Rule 6A(2) are illegal and ultra vires.

(iv) Until and unless there is a sale (which can only be when there is a transfer of property in goods for valuable consideration) a tax cannot be levied on the supply and sale value of the containers. Rule 6A(2) had widened the scope of Section 7(8) of the "Act 1993" and has created a legal fiction to the effect that even if the containers are supplied free of cost which is not a sale as per Section 2(33) of the "Act 1993", even then tax will be leviable on the value of containers which has to be determined by taking 1 per cent of the value of the exempted goods.

(v) Rule 6A confers unguided power to executive so much so as Rule 6A(2) is beyond the scope of Section 7(8) of the Act 1993.

(vi) The State Legislature is not competent to levy tax on supply of container free of cost as the supply was not sale and imposition of sales tax is contrary to entry 54 of List II of the Seventh Schedule to the Constitution.

(vii) There could be no intention of State Legislature to levy sales tax on supply of the containers free of cost along with sale of tax-free goods (exempted goods).

(viii) The provisions of Rule 6A(2) have to be construed and interpreted strictly and in case of any ambiguity the benefit has to be given to the assessee or the tax-payer.

8. Learned Counsel for the petitioner has referred and has placed reliance on the following cases:

(i) Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others,

(ii) Agricultural Market Committee Vs. Shalimar Chemical Works Ltd.,

(iii) State of Kerala Vs. K.M. Charia Abdullah and Co.,

(iv) Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others,

(v) Polestar Electronic (Pvt.) Ltd. Vs. Additional Commissioner, Sales Tax and Another,

(vi) Shrimati Tarulata Shyam and Others Vs. Commissioner of Income Tax, West Bengal,

(vii) Murarilal Mahabir Prasad and Others Vs. Shri B.R. Vad and Others,

(viii) The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.,

(ix) Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh [1966] 17 STC 624 (SC).

- (x) Distt. Registrar and Collector, Hyderabad and Another Vs. Canara Bank Etc.,
- (xi) The State of West Bengal Vs. Kesoram Industries Ltd. and Others, .
- (xii) Jamana Flour and Oil Mill (P) Ltd. Vs. State of Bihar,
- (xiii) Dhariwal Bottle Trading Company v. State of Maharashtra [1995] 99 STC 326 (Bom).
- (xiv) State Level Committee and another Vs. M/s. Morgardshammar India Ltd., .
- (xv) Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc.,

9. On behalf of the State respondents Mr. K.N. Chowdhury, learned Additional Advocate-General, has argued that in the backdrop of observations of this Court made in paragraph 13 of [1999] 113 STC 436 of which reads as below:

The Act nowhere specifically provides that the container or packing materials used for selling non-taxable goods shall also be liable for taxation. As stated above, there is no presumption in favour of imposition of tax and there is no room for any intendment.

10. The amendment as indicated above was brought in from June 1, 1999 by inserting Section 7(8) by Assam Act 15 of 1999 and accordingly Assam General Sales Tax (Amendment) Rules, 1999 was given effect to with effect from January 19, 2000. According to Mr. Chowdhury, the test of excessive delegation and power to impose tax has been elaborated by the Supreme Court in R.C. Tobacco Pvt. Ltd. and Another etc. Vs. Union of India (UOI) and Others, . The relevant extract is given as below:

...As far as fiscal legislation is concerned, the limitation is implicit in Article 265 of the Constitution which provides that no tax shall be levied or collected except by authority of law. As was held by this Court in Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another,

If by reason of Article 265 every tax has to be imposed by "law" it would appear to follow that it could only be imposed by a law which is valid by conformity to the criteria laid down in the relevant articles of the Constitution. These are that the law should be (1) within the legislative competence of the Legislature being covered by the legislative entries in Schedule VII of the Constitution ; (2) the law should not be prohibited by any particular provision of the Constitution such as, for example, Articles 276(2), 286, etc., and (3) the law or the relevant portion thereof should not be invalid under Article 13 for repugnancy to those freedoms which are guaranteed by Part III of the Constitution which are relevant to the subject-matter of the law.

11. According to the respondents/State, the State Legislature without any ambiguity has conferred power u/s 7(8) of "the Act 1993" empowering the executive to levy tax on sale value (express or implied) of containers used in selling such exempted goods.

12. In *Jamana Flour and Oil Mill (P) Ltd. Vs. State of Bihar*, the Supreme Court has an occasion to consider the levy of tax on packing material or containers when the wheat product was being sold in gunny bags and price of gunny bags was included in the consolidated rates of price charged by dealer for wheat products under implied agreement of sale of gunny bags then transfer of gunny bags impliedly was treated to be covered by contract of sale of wheat products and different rate of tax on sale turnover of the gunny bags was held to be leviable. The Supreme Court has also noted in paragraph 3 (at page 463 of STC) as extracted hereinbelow:

3. The dealer filed a revision before the Tribunal and contended that the demand of sales tax payable at different rates on the calculated turnover of gunny bags was not at all warranted as no price had been charged for the containers. The Tribunal found:

(1) The dealer transferred the property in the gunny bags, the packing material, to the purchasers for price.

(2) The price of the gunny bags was included in the consolidated rates of price charged by the dealer.

(3) There was an implied agreement for the sale of gunny bags between the dealer and the different purchasers to whom the wheat products were supplied.

(4) The transfer of gunny bags was impliedly covered by the contract of sale with regard to the wheat products".

13. According to Mr. K. N. Chowdhury, Rule 6A(2) clearly provides that sale value of the container may be express or implied, therefore, intention of Legislature is even if sale value of container is not shown separately or shown as free then implied sale value could be determined in the manner prescribed and each and every case has to be scrutinised separately and the assessing officer if has erred in applying the provision of Rule 6A(2) then only the validity of rule could be tested otherwise to say that rule is bad and challenging Rule 6A(2) correctly exclusively is dangerous proposition. The true nature of transaction is to be ascertained in the facts and circumstances of each case and it is also to be determined whether sale of packing material constitutes independent transaction, for that purpose rule may not be declared bad. *Raj Steel and Others Vs. State of A.P. and Another*, and has relied upon the following observations made in paragraphs 6 (page 385 of STC) and 9 (page 387 of STC).

... the issue as to whether the packing material has been sold or merely transferred without: consideration depends on the contract between the parties. The fact that the packing is of insignificant value in relation to the value of the contents may imply that there was no intention to sell the packing, but where any packing material is of significant value it may imply an intention to sell the packing material. In a case where the packing material is an independent commodity and the packing material as well as the contents are sold

independently, the packing material is liable to tax on its own footing. Whether a transaction for sale of packing material is an independent transaction will depend upon several factors, some of them being:

1. The packing material is a commodity having its own identity and is separately classified in the Schedule ;
2. There is no change, chemical or physical, in the packing either at the time of packing or at the time of using the content ;
3. The packing is capable of being reused after the contents have been consumed ;
4. The packing is used for convenience of transport and the quantity of the goods as such is not dependent on packing;
5. The mere fact that the consideration for the packing is merged with the consideration for the product would not make the sale of packing an integrated part of the sale of the product.

...In every case, the assessing authority is obliged to ascertain the true nature and character of the transaction upon a consideration of all the facts and circumstances pertaining to the transaction. That the problem almost always requires factual investigation into the nature and ingredients of the transaction....

14. Reliance has been placed on Premier Breweries Vs. State of Kerala, wherein the Supreme Court has held that when the goods packed are exempted from tax, no tax is leviable on the containers. However, such fluctuation was given in view of the Section 5(5) and Section 5(6) of the Kerala General Sales Tax Act and for this purpose relevant paragraph 5 was referred as below:

Before examining the decisions, it will be useful to refer to the relevant provisions of the Kerala General Sales Tax Act. Tax on sale or purchase of goods has been imposed by Section 5 of the Act. Sub-sections (5) and (6) of Section 5 of the Act provide:

"(5) Notwithstanding anything contained in Sub-section (1) or subsection (2), but subject to Sub-section (6) where goods sold are contained in containers or are packed in any packing materials, the rate of tax and the point of levy applicable to such containers or packing materials, as the case may be, shall, whether the price of the containers or the packing materials is charged separately or not, be the same as those applicable to goods contained or packed, and in determining turnover of the goods, the turnover in respect of the containers or packing materials shall be included therein.

(6) Where the sale or purchases of goods contained in any containers or packed in any packing materials is exempt from tax, then, the sale or purchase of such containers or packing materials shall also be exempt from tax."

15. The relevant observations made in Premier Breweries Vs. State of Kerala, are

extracted hereinbelow:

The underlying idea behind Section 5(5) and (6) of the Kerala General Sales Tax Act is that packed goods are to be taxed as composite unit. In calculating the turnover of the goods, the turnover of the containers will have to be included. The appropriate rate of tax will be the rate payable on the goods. It will not make any difference, if the containers are shown to have been sold and charged separately. When the goods are exempted from tax, no tax is leviable on the containers. This will be the position even when the goods and the containers are sold and charged separately. Therefore, if bottled beer is sold in containers, the tax payable on beer will be the appropriate rate of tax payable on the turnover calculated in the manner stated herein above. It has not been found by any of the authorities who heard the case that the cartons were specially provided for protection of the bottles and bottled beer usually was not delivered in cartons even in cases of bulk sales. The argument based on secondary packing is misconceived.

16. According to Mr. Chowdhury, learned Additional Advocate-General, in none of the present group of writ petitions assessment order has been challenged as the sales tax or the assessing authorities have to arrive at a definite finding on the crucial and important question whether the packing materials were subject of the agreement of sale between the assessee and its customers as the same was a pure question of fact depending upon the nature of goods sold and the nature of the packing materials and the purpose for which the said materials were used. Relying upon [1966] 17 STC 624 (SC) (Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh), it has been urged that this Court cannot appreciate the validity and applicability of Rule 6A(2) unless the assessment order is challenged separately. In Hyderabad Deccan Cigarette Factory [1966] 17 STC 624 (SC), by a notification issued by the Andhra Pradesh State Government, sales or purchases of tobacco and all its products were exempted from sales tax. The department sought to assess the appellant, a manufacturer of and dealer in cigarettes, on the turnover in respect of packing materials consisting of cardboard and deal wood. The appellant contended that there was no sale of the packing materials as it sold only cigarette at Rs. 8.50 per thousand without charging extra for packing materials and that the price was the same to whatever place they were sent. It was not disputed that there was no express contract of sale of the packing materials.

17. While remanding the matter the Supreme Court has observed as below:

(i) Whether there was an agreement to sell the packing materials was a pure question of fact and that question could not be decided on fictions or surmises. The burden lay upon the Commercial Tax Officer to prove that a turnover was liable to tax and he could ask the assessee to produce relevant material. If the assessee did not produce the same, he could draw adverse inferences against the assessee ; but he had to decide the crucial question whether the packing materials were the subject of the agreement of sale, express or implied. To

ascertain these facts he could rely upon oral statements, accounts and other documents, personal inquiry and other relevant circumstances such as the nature and purpose of the packing materials used ;

(ii) in order to constitute a sale it was necessary that there should be an agreement between the parties for the purpose of transferring title to goods, that it should be supported by money consideration and that as a result of the transaction property should actually pass in the goods. Unless all these elements were present there could be no sale ;

(iii) what the sales tax authorities had to do was to ask and answer the question whether the parties, having regard to the circumstances of the case, intended to sell or buy the packing materials or whether the subject-matter of the contracts of sale was only cigarettes, and packing materials did not form part of the bargain at all, but were used by the sellers as a convenient and cheap vehicle of transport. It might be that for the purpose of excise duty the packing materials were not separated from the cigarettes, but that could not possibly preclude the sales tax authorities from taxing the packing materials if they were the subject-matter of the agreements to sell.

18. As argued by according to the State in view of the decision of the Supreme Court in *The State of Orissa Vs. Sudhansu Sekhar Misra and Others*, it is the decision of the assessing authority which shall be material to test the validity of Rule 6A(2) as observed below in *The State of Orissa Vs. Sudhansu Sekhar Misra and Others*,

A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it.

19. However, Mr. G. N. Sahewalla, learned Senior Counsel appearing in the Writ Petition (C) No. 2173 of 2002 has emphatically controverted the above by saying that assessment order has specifically been challenged in the said continuous writ petition. Therefore, the contention for and on behalf of the State that the assessment order has not been challenged has become redundant.

20. In *Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others*, the question came regarding validity of Regulation levying development fees in reference to Section 91(1)(a) and Section 119(2)(c) of the Gujarat Town Planning and Urban Development Act, 1976 where necessity had arisen to augment the revenue for development work and to create fund otherwise by way of rents, loans or advances and as imposition of fee as an incidental or an ancillary to carry on the purpose for which the development authority was constituted under the Town Planning Act. Contention of the development authority was rejected by the Supreme Court with observations as given as below:

The imposition of development fee by framing the impugned Regulations was

wholly unauthorised and as such illegal and void. In a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. Whenever there is compulsory exaction of any money, there should be specific provision for the same and there is no room for intendment. Nothing is to be read and nothing is to be implied and one should look fairly to the language used. The delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of excise or fiscal power.

21. In *Agricultural Market Committee Vs. Shalimar Chemical Works Ltd.*, the State Government was authorised to make subsidiary rules and was to work within the scope of its authority and was not to widen or move beyond the scope of Act. The relevant paragraphs, are extracted as below:

25. In *Avinder Singh and Others Vs. State of Punjab and Others*, , Krishna Iyer, J., laid down the following tests for valid delegation of legislative power. These are:

- (1) the Legislature cannot efface itself;
- (2) it cannot delegate the plenary or the essential legislative function ;
- (3) even if there be delegation, Parliamentary control over delegated legislation should be a living continuity as a constitutional necessity.

It was further observed as under:

... while what constitutes an essential feature cannot be delineated in detail it certainly cannot include a change of policy. The Legislature is the master of legislative policy and if the delegate is free to switch policy it may be usurpation of legislative power itself.

"26. The principle which, therefore, emerges out is that the essential legislative function consists of the determination of the legislative policy and the Legislature cannot abdicate essential legislative function in favour of another. Power to make subsidiary legislation may be entrusted by the Legislature to another body of its choice but the Legislature should, before delegating, enunciate either expressly or by implication, the policy and the principles for the guidance of the delegates. These principles also apply to taxing statutes. The effect of these principles is that the delegate which has been authorised to make subsidiary Rules and Regulations has to work within the scope of its authority and cannot widen or constrict the scope of the Act or the policy laid down thereunder. It cannot, in the garb of making Rules, legislate on the field covered by the Act and has to restrict itself to the mode of implementation of the policy and purpose of the Act.

27. Applying the above principles to the instant case, it will be seen that the market fee can be levied under the Act only on the sales and purchase of notified agricultural produce within the notified area. Explanation 1 to Section 12 creates

a legal fiction and provides that if any notified agricultural produce is taken out of a notified market area, it shall be presumed to have been purchased or sold within such area. The presumption is a rebuttable presumption and can be shown to be not correct. The policy in enacting this provision is only to cover such transactions of sale and purchase for which direct evidence may not be available. Since a notified agricultural produce can be sold only within the notified market area, and, that too, by a trader having a licence issued to him by the Committee, it is obvious that if such commodity is moved out of the notified area, it would mean either that it has been sold or purchased. Otherwise, there would be no occasion to move such commodity out of the notified market area. The legal fiction was thus limited to the "moving" of the commodity from within the market area to a place outside the market area.

22. In *State of Kerala Vs. K.M. Charia Abdullah and Co.*, , it was observed by the Supreme Court as below:

Power to frame rules is conferred by the Act upon the State Government and that power may be exercised within the strict limits of the authority conferred. If, in making a rule, the State transcends its authority, the rule will be invalid, for statutory rules made in exercise of delegated authority are valid and binding only if made within the limits of the authority conferred.

23. In *Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others*, the scope of framing rules within rule-making power conferred on the State Government under the provision of the Act or statute was under test and where the following observations were made by the Supreme Court which are necessary to quote.

... In our opinion, this approach made by the High Court was not correct or proper because the question whether a particular piece of delegated legislation-whether a rule or regulation or other type of statutory instrument-is in excess of the power of subordinate legislation conferred on the delegate has to be determined with reference only to the specific provisions contained in the relevant statute conferring the power to make the rule, regulation, etc., and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. It would be wholly wrong for the court to substitute its own opinion for that of the Legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act and to sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the regulation-making body and declare a regulation to be ultra vires merely on the ground that, in the view of the court, the impugned provisions will not help to serve the object and purpose of the Act. So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations. It is exclusively within the province of the Legislature and its delegate to

determine, as a matter of policy, how the provisions of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the statute. Though this legal position is well-established by a long series of decisions of this Court we have considered it necessary to reiterate it in view of the manifestly erroneous approach made by the High Court to the consideration of the question as to whether the impugned Clause (3) of Regulation 104 is ultra vires." (para 14)

"The constitutionality of the impugned regulations has to be adjudged only by a three-fold test, namely, (1) whether the provisions of such regulations fall within the scope and ambit of the power conferred by the statute on the delegate ; (2) whether the rules/regulations framed by the delegate are to any extent inconsistent with the provisions of the parent enactment and lastly (3) whether they infringe any of the fundamental rights or other restrictions or limitations imposed by the Constitution. We have already held that the High Court was in error in holding that the provisions of Clause (3) of Regulation 104 do not serve the purpose of carrying into effect the provisions of the Act and are ultra vires on the ground of their being in excess of the regulation-making power conferred by Section 36. The writ petitioners had no case before the High Court that the impugned clauses of the regulations were liable to be invalidated on the application of second and third tests. Besides the contention that the impugned regulations were ultra vires the power conferred u/s 36(1), the only other point urged was that they were in the nature of bye-laws and were liable to be struck down on the ground of unreasonableness.

24. In *Polestar Electronic (Pvt.) Ltd. Vs. Additional Commissioner, Sales Tax and Another*, , the Supreme Court has held that while interpreting tax statutes regard must be had to the strict letter of the law and not merely to the spirit of the statute and the benefit of ambiguity must go to the taxpayer. The relevant observations made by the Supreme Court in the case are given below:

... It is now well-settled that when the court is construing a statutory enactment, the intention of the Legislature should be gathered from the language used by it and it is not permissible to the court to speculate about the legislative intent....

If the language of a statute is clear and explicit, effect must be given to it, for in such a case the words best declare the intention of the law-giver.... It is only from the language of the statute that the intention of the Legislature must be gathered, for the Legislature means no more and no less than what it says. It is not permissible to the court to speculate as to what the Legislature must have intended and then to twist or bend the language of the statute to make it accord with the presumed intention of the Legislature....

It is a well-settled rule of interpretation that in construing a taxing statute "one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law". The oft-quoted words of Rowlett, J., in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64, lay down the correct rule of interpretation in case of a fiscal statute : "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used". It is a rule firmly established that "the words of a taxing Act must never be stretched against a taxpayer". If the Legislature has failed to clarify its meaning by use of appropriate language, the benefit must go to the tax-payer. Even if there is any doubt as to interpretation, it must be resolved in favour of the subject...."

25. In *Shrimati Tarulata Shyam and Others Vs. Commissioner of Income Tax, West Bengal*, the Supreme Court has held that there is no equity about the tax, and hardship is irrelevant factor in such interpretation.

26. In *Murarilal Mahabir Prasad and Others Vs. Shri B.R. Vad and Others*, the Supreme Court has observed as below:

... In interpreting a fiscal statute the court cannot proceed to make good the deficiencies, if any, in the statute : it shall interpret the statute as it stands and in case of doubt, it shall interpret it in a manner favourable to the taxpayer. The language of a taxing Act cannot be strained in order to hold a subject liable to tax.

"The oft-cited phrase means that there is no equity about a tax in the sense that a provision by which a tax is imposed has to be construed strictly, regardless of the hardship that such a construction may cause either to the treasury or to the taxpayer. If the subject falls squarely within the letter of law he must be taxed, howsoever inequitable the consequences may appear to the judicial mind. Such a rule is limited to the charging provisions of the taxing statute and not to the provisions which prescribe the machinery for the computation of tax.

27. In *Gannon Dunkerley* [1958] 9 STC 353, while dealing with the imposition of tax in reference to the building contract and supply of material under the Madras General Sales Tax Act, the Supreme Court has observed as below:

In order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale. Thus, if merely title to the goods passes but not as a result of any contract between the parties, express or implied, there is no sale. So also if the consideration for the transfer is not money but other valuable consideration, it may then be exchange or barter but not a sale. And if under the contract of sale, title to the goods has

not passed, then there is an agreement to sell and not a completed sale. Moreover under the law there cannot be an agreement relating to one kind of property and a sale as regards another. There must be an agreement between the parties for the sale of the very goods in which eventually property passes.

28. In *Dhariwal Bottle Trading Company* [1995] 99 STC 326, the Bombay High Court has an occasion to deal with the implied sale of packing materials and has observed as below:

An implied sale of packing materials cannot be inferred in all cases, but only in cases where the special facts and circumstances justify such an inference. It is necessary in most cases to pack goods in some material or container for the purpose of transportation, handling, etc., but the seller neither intends to sell nor the purchaser to purchase the packing material. The packing material is used merely as a cheap or convenient mode of transport. No sale of the packing material would be involved in such cases. The fact that the seller had procured the packing materials for a price, or that the value of the containers must have been taken into account while fixing the price of the goods packed therein, or that the used packing material, even as waste product, would have some value howsoever insignificant it might be, is not relevant for deciding whether there is an implied sale of containers or packing materials. Equally irrelevant is the fact that the goods could have been packed in some other material which might be cheaper than the material used, because that is a decision which can be taken only by the manufacturer or the seller, keeping in view the convenience of handling, carriage, preservation, etc., of the goods packed therein and the relative merits and demerits of the different types of packing materials.

The only cases where sale of containers or packing material can be implied are cases, where considering the extraordinary nature of the container used by the dealer, it can be said that one of the considerations in the mind of the purchaser could have been to get the special container by paying extra consideration for the product packed therein. An implied sale can be inferred only where the container is of such an exceptional type and of unusually high value which, in the ordinary course of business, is not used for packing the goods In question. In these cases alone an agreement to pay extra price for the container may be implicit, which may justify an inference of implied sale of the container or packing material.

It was held by the Supreme Court that in the facts, that admittedly the agreements between the applicant-dealer and its purchasers, were only for sale of empty bottles, and there was no express contract for sale of the gunny bags in which they were supplied. From the purchase orders and the statements contained in the certificates and letters furnished by the purchasers, it was clear that the subject-matter of the agreements of sale between the parties was empty bottles, and not the gunny bags in which they were packed and which, obviously, were used as a convenient and cheap means of transport, because without packing the bottles in some containers, it was difficult to carry them from one

place to another. The purchasers did not intend to purchase the gunny bags also, and no implied sale of gunny bags could be inferred.

29. In the case of *Distt. Registrar and Collector, Hyderabad and Another Vs. Canara Bank Etc.*, , also, the Supreme Court has observed that fiscal statutes are to be construed strictly. There is no scope of equity or judiciousness if the letter of law is clear and unambiguous. The benefit of any ambiguity or conflict in different provisions of statute shall go to the subject.

30. In *State Level Committee and another Vs. M/s. Morgardshammar India Ltd.*, , the interpretation of exemption provision in taxing statute was indicated to be construed strictly.

31. In *The State of West Bengal Vs. Kesoram Industries Ltd. and Others*, , the Supreme Court has observed that the power to tax must be express and the taxing statutes are to be interpreted strictly. The relevant paragraphs (pages 358-359 of RC) are given as below:

104. There is nothing like an implied power to tax. The source of power which does not specifically speak of taxation cannot be so interpreted by expanding its width as to include therein the power to tax by implication or by necessary inference.

"... There is no such thing as taxation by implication. The burden is always upon the taxing authority to point to the act of assembly which authorises the imposition of the tax claimed."

"105. Justice G.P. Singh in *Principles of Statutory Interpretation* (Eight Edition, 2001) while dealing with general principles of strict construction of taxation statutes, states : "A taxing statute is to be strictly construed. The well-established rule in the familiar words of Lord Wensleydale, reaffirmed by Lord Halsbury and Lord Simonds, means : "The subject is not to be taxed without clear words for that purpose ; and also that every Act of Parliament must be read according to the natural construction of its words". In a classic passage Lord Cairns stated the principle thus : "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute". Viscount Simon quoted with approval a passage from Rowlatt, J., expressing the principle in the following words : "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used"."

106. The judicial opinion of binding authority flowing from several pronouncements of this Court has settled these principles : (i) in interpreting a taxing statute, equitable considerations are entirely out of place. Taxing statutes cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed ; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency ; (ii) before taxing any person it must be shown that he falls within the ambit of the charging section by clear words used in the section ; and (iii) if the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject. There is nothing unjust in the taxpayer escaping if the letter of the law fails to catch him on account of Legislature's failure to express itself clearly.

107. Power to tax is not an incidental power. According to Seervai, although legislative power includes all incidental and subsidiary power, the power to impose a tax is not such a power under our Constitution. It is for this reason that it was held that the power to legislate in respect of inter-State trade and commerce (entry 42, List I, Schedule VII) did not carry with it the power to tax the sale of goods in inter-State trade and commerce before the insertion of entry 92-A in List I and such power belonged to the States under entry 54 in List II. Entry 97 in List I also militated against the contention that the power to tax is an incidental power under our Constitution.

32. In *Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc.*, , it was held by the Supreme Court that the tax by rule or regulation cannot be imposed unless specially authorised by the State. It was observed in *Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc.*, as follows:

No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. A rule-making authority has no plenary power. It has to act within the limits of the power granted to it.

33. I have heard the learned Counsel for the parties and I have perused the documents. I find that in one of the above group of writ petitions the assessment order passed by the assessing authority is under challenge. However, in that reference it is sufficient to say that when alternative efficacious remedy is available under the provisions of "the Act 1993" then this Court shall not function as an appellate authority in respect of the assessment order, however, in reference to such challenge of assessment order the validity of "Rule 6A(2)" may be analysed. It is well-settled that no tax can be levied except by authority of law and liability to pay sales tax is available under charging section provided in the relevant "Act" only. While dealing with the charging section there is no question of intendment or equity. Unless charge is created by a specific provision of the statute the taxpayer cannot be taxed on an ambiguous provision in view of the

observations made in *Champaklal Sohanlal Vs. J.H. Shah*, Sales Tax Officer, Enforcement Branch, Ahmedabad, There is a difference between chargeability and quantification. Though a tax cannot be realised without its being quantified yet non-specification of the rates does not efface the liability under the charging section. The liability and enforceability have to be distinguished in view of the observations in *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, . The first stage in imposition of tax is declaration of liability and that is the part of the statute which determines what persons in respect of what property are liable to tax in view of *M. Abramai Vs. Commissioner of Sales Tax and Others*,

34. Section 7(8) of "Act 1993" has empowered the State Government to prescribe liability of payment of tax on such dealers who are dealing in exempted goods as specified in Schedule I of "Act 1993" and to impose tax on the sale value of containers used in selling such exempted goods. The sale has to be understood as provided in Section 2(33) and sale price has to be understood as provided in Section 2(34). The sale value of containers used in selling exempted goods may be express or implied and for that purpose the Legislature has empowered enough the State Government to determine and to prescribe the manner of levying tax on such sale value. Regarding determination of sale price of containers or packing materials used in sale or supply of exempted goods, there appears to be no controversy in reference to the applicability of Rule 6A(1) more specifically, when sale price of containers of exempted goods are separately shown in the books of account. But the real exercise has to be made in determining the sale price in respect of the transaction or in respect of the cases which are reflected or contemplated under Rule 6A(2) of "Rules 1993".

35. By plain reading of "Rule 6A(2)" it appears that in following three conditions sale price shall have to be determined at one per cent of the sale value of the exempted goods.

(i) Where no accounts regarding sale of containers are maintained by the assessee, or,

(ii) When assessee has shown its sale price lower than the market price, or,

(iii) Supply of containers are shown as free of cost.

36. In all the above three conditions question arises for determining the real sale value of containers or packing materials used in sale or supply of exempted goods when clear position has not been indicated by dealer-assessee, then there is scope of making best judgment assessment by the assessing officer. All the above three conditions are of one pattern or of one category where the books of account may be scrutinised. When proper disclosures about the true turnover or transaction in respect of the containers or packing materials used in sale or supply of exempted goods has not been made it would be obvious that books of account regarding sale of containers are suspicious and the assessing authority cannot avail the occasion to scrutinise, or analyse the books of account but to

make best judgment assessment at his own wisdom. So is the case when true sale price has not been disclosed, rather price lower than the market price of containers or packing materials has been shown. The State Government has also contemplated a third condition to determine sale value of containers or packing materials when the dealer has tactfully indicated to have supplied the container by showing it free of cost, thereby, suppressing the true position in respect of rate or sale or supply of container by showing the sale or supply as free of cost. The true nature of supply or sale of packing materials or containers shall not be altered by merely showing the same as free of cost. Mentioning such supply to have been made free of cost shall also not immunize such transaction from scrutiny or take such sale or supply out of the purview of best judgment assessment in case such transaction is traced out to be real sale. The State Government has wisely put the word "supply" in place of "sale" in reference to the containers being shown as free of cost in condition No. (iii) above. However, a suspicion may be created in case real sale or supply was made but the dealer has claimed that the containers were supplied free of cost. In such condition also like the other two conditions (i) and (ii) above, namely, when no accounts regarding sale of containers are maintained or sale of containers are shown at lower rate than the market price then scope is open to the assessing authority, to approach for a best judgment assessment to determine the real sale price taking one per cent of the sale value of the exempted goods sold. In my respectful consideration the State Government has not been empowered to determine sale price of containers at one per cent sale value of the exempted goods even if the sale or supply of containers were not actually made within the meaning of Section 2(33) and 2(34) of "Act 1993", meaning thereby, if the supply or sale of containers were made free of cost without consideration or without entering into agreement then the sale price cannot be determined at one per cent taking the sale value of exempted goods. So, if the dealer has shown supply or sale of containers free of cost then the State Government or its officials or the assessing authority including the appellate authority or the assessing officer in reference to "Rule 6A(2)" may make an inquiry, scrutinise, analyse the transaction or the entries in the books of account for finding real nature of sale or supply of containers and if it is found there is no supply or sale of containers then sale price of containers cannot be determined at one per cent of sale value of the exempted goods.

37. Therefore, in the light of the law laid down by the Supreme Court in 20th Century Finance Corpn. Ltd. and Another Vs. State of Maharashtra, the provision of "Rule 6A(2)" has to be read properly and not in consonance with the submissions of the petitioner that in all cases if the containers are disclosed to have been sold or supplied free of cost even then the sale price shall not be determined at one per cent of the sale value of the exempted sold goods. The proper reading of the provision of "Rule 6A(2)" shall be in all the three conditions that the sale price of containers shall be determined at one per cent of the sale value of the exempted goods sold, when there is real supply or sale of

containers, in reference to some consideration in context of some agreement or contract and for such sale or supply if no accounts regarding supply of containers are maintained or lower price than the market price has been shown or incorrect disclosure for supply or sale of containers has been shown as free of cost then sale price shall be determined at one per cent of sale value of exempted goods. The condition No. (iii) is neither separate nor distinct but only after the adopting course of best judgment assessment in condition No. (iii) also like other two conditions (i) and (ii) above, the determination of sale price of containers or packing materials used in sale of exempted goods shall be made at one per cent of the sale value of the exempted goods sold.

38. Therefore, I do not find that the State Government has exceeded the scope of the empowerment provided u/s 7(8) of the "Act 1993" and in view of the above observations the framing of "Rule 6A(2)" is within the legislative competence and is said to have been made within the parameters and scope of Section 7(8) and well within the meaning and in consonance with the legislative competence and power delegated to the State Government.

39. In view of the above observations, the writ petitions stands disposed of. There shall be no order as to cost.