(1997) 04 KL CK 0002

In the High Court Of Kerala

Case No : W.A. No. 260 of 1996 A etc.

Assistant Commissioner (Assessment) and Another — APPELLANT

Vs

Associated Cement Companies Ltd. — RESPONDENT

Date of Decision : 10-04-1997

Acts Referred:

Central Sales Tax Act, 1956 — Section 8(5)
Constitution of India, 1950 — Article 301, 302, 303, 303(1), 304
Kerala General Sales Tax Act, 1963 — Section 10, 5(2A)

Citation : (1997) 04 KL CK 0002

Hon'ble Judges : U.P. Singh, C.J;S. Sankarasubban, J

Bench : Division Bench

Advocate : Molly Jacob, Government Pleader, for the Appellant; Pathrose Mathai and Mariam Mathai, for the Respondent

Final Decision : Dismissed

Judgement

U.P. Singh, C.J.—These batch of cases are appeals filed by the State against the judgment of the learned Single Judge. By the impugned judgment, the learned Single Judge struck down a portion of S.R.O. 1401/92 issued as G.O.(P) No. 176/92/TD, dated 27th October 1992, produced as Ext. P-1 in O.P. No. 2482/93, as discriminatory and violative of Articles 301 and 304(a) of the Constitution of India. The facts and law being common raised in these cases, W.A. No. 260/96 was treated as the main case and hence the facts are referred to with respect to W.A. No. 260/96.

2. W.A. No. 260/96 was filed against the judgment in O.P. No. 2482/93. Petitioner in the Original Petition is M/s Associated Cement Companies Ltd. It is a public limited Company having its registered office at Bombay and a warehouse cum sales depot at Thalasserry in the State of Kerala and the Company is engaged in the manufacture and sale of cement. For the manufacture of cement, the Petitioner-Company is having factories outside the State of Kerala in different States. Cement manufactured outside the State of Kerala is despatched to the

State of Kerala on consignment and/or by way of branch transfer from the Petitioner''s factories or establishments in other States. Thus the cement brought from outside the State of Kerala is sold within the State of Kerala. Petitioner is a registered dealer under the Kerala General Sales Tax Act and also under the Central Sales Tax Act on the files of the Assistant Commissioner (Assessment) Sales Tax, Special Circle, Kannur.

3. The State of Kerala levied a new tax called ''turnover tax'' by the Kerala Finance Act, 1987. A new Section 5(2A) was incorporated in the Kerala General Sales Tax with effect from 1st July 1987. In accordance with the said provision, tax at the rate of J per cent was imposed on all dealers whose turnover in a year exceeded Rs. 25 lakhs on the turnover of the goods coming under the first or fifth schedule to the Act. Subsequently, as per notification No. G.O.(Ms.) 119/87/TD, dated 2nd December 1987 an exemption was granted from payment of turnover tax to the dealers whose turnover did not exceed Rs. 50 lakhs. By the Kerala Finance Act, 1992, Section 5(2A) was amended. New provisions were introduced as Sub-clause (e) to Clause (i) to Sub-section (2A) of Section 5 of which Sub-clause (g) is relevant. Sub-clause (g) is as follows:

(g) by any dealer not coming under Sub-clauses (a) to (f) of goods coming under the first Schedule or the fifth Schedule whose total turnover in a year exceeds rupees fifty lakhs at the rate of half per cent on the turnover of such goods at all points of sale or purchase as the case may be.

So by virtue of Sub-clause (g) of Section 5(2A)(i) of the Act, the turnover of the goods coming under that category become subject to turnover tax, when the total turnover exceeded Rs. 50 lakhs at the rate of 1/2 per cent on the turnover of such goods at all points of sales or purchase irrespective of whether the turnover relates to taxable sales or purchase.

4. Various representations were filed before the Government by the merchant community of the State. While considering such representations, Government thought that it was necessary to restrict the levy of turnover tax on the taxable turnover of the sales on the first sale point of goods received on branch transfer or consignment basis alone. A notification under scction 10 of the Kerala General Sales Tax Act as G.O.(P) 176/92/TD, dated 27th October 1992 Ext. P-1 was published as reads as follows:

G.O.(P) No. 176/92/TD, dated Thiruvananthapuram, 27th October 1992.

S.R.O. No. 1401/92.-In exercise of the powers conferred by Section 10 of the Kerala General Sales Tax Act, 1963 (Act 15 of 1963) the Government of Kerala having considered it necessary in the public interest so to do, hereby make an exemption in respect of the turnover by dealers coming under Sub-clause (g) of Clause (i) Sub-section (2) of Section 5 of the said Act except on that turnover relating to goods received on consignment, and/or branch transfer.

As per Ext. P-1, Government of Kerala made an exemption in respect of the turnover by dealers coming under Sub-clause (g) of Clause (i) Sub-section (2A) of Section 5 of the Kerala General Sales Tax Act except on the turnover relating to goods received on consignment and/or branch transfer. This notification is dated 27th October 1992. The constitutional validity of the above notification was challenged in the Original Petition.

5. According to the Petitioner-the Respondent herein, by denying the exemption from the liability of turnover as envisaged by Section 5(2A) of the Act, the Government has singled out the Respondent and similarly situated persons subjecting them to tax liability as against the dealers manufacturing and selling the same or similar goods within the State of Kerala. There is absolutely no rational basis or intelligible differentia for sueh classification or differentiation of persons like the Petitioner from dealers who produce or manufacture similar goods within the State of Kerala and sell the same within the State of Kerala. Such classification is totally unreasonable and is devoid of any reasonable basis having a rational relation or nexus to the object or purpose of levy of the tax. It was further contended that in denying the exemption to dealers like the Petitioner manufacturing the goods outside the State of Kerala and importing the goods on consignment or by way of branch transfer is violative of Article 301 of the Constitution of India. Such action is in gross violation of Article 304(a) and (b) of the Constitution of India, since the Government have imposed a tax liability on the goods imported from other States while similar goods manufactured and produced in the State of Kerala are not subject to the said liability of turnover tax. The notification was also attacked on the ground that it is totally impermissible by an executive order like Ext. P-1. Hence the original Petitioner prayed for an appropriate writ declaring and striking down that part of Ext. P-1 reading "exception the turnover relating to goods received on consignment and/or branch transfer" as unconstitutional, void and of no effect.

6. On behalf of the Government, the Appellant herein, a counter affidavit has been filed by the Under Secretary to Government, Taxes Department, Thiruvananthapurm in the writ petition. It was submitted that Ext. P-1 notification was neither arbitrary nor discreminatory. Regarding the violation of Articles 301 and 304 of the Constitution of India, it was stated:

The turnover tax imposed on the Petitioner and similar Ors. are levied for the purpose of general revenue. It is neither a compensatory tax nor a measure regulating any trade. It is not a tax on the import of goods imposed at the point of entry. The imposition of the liability to pay the turnover tax does not operate directly or immediately on the free flow of trade or on the free movement of the transport of the goods from outside the State. If it does not affect the free flow of trade and commerce the same will not be hit by Article 301 of the Constitution. The mere fact that there is a difference in the levy of turnover tax in respect of goods locally manufactured and those imported would not amount to hampering of trade within the meaning of Article 301, when the general rate of tax is same for all the goods. Article 304 is an exemption to Article 301 of the

Constitution. Since the impugned notification is not hit by Articles 301 and 303, Article 304 of the Constitution will not come into picture at all.

It is relevant to note that the turnover tax was abolished by the Finance Act, 1993. Ext. P-1 was issued on 27th October 1992. Thus for the period from 27th October 1992 to 31st March 1993, the persons like the Petitioner Respondent were made liable to pay turnover tax, while exempting the major dealers from the purview of the tax.

7. The learned Single Judge held that by Ext. P-1 notification goods manufactured and sold with the State of Kerala were exempted from turnover tax, while the goods which were imported from outside the State and sold within the State through branch or consignment were subject to turnover tax. This was held to be violation of Articles 301 and 304 of the Constitution of India and hence the learned Single Judge quashed that portion of Ext. P-1 notification reading "except on the turnover relating to goods received on consignment and/or branch transfer".

8. Learned Government Pleader who appeared for the Appellants contended that u/s 10 of the Kerala General Sales Tax Act, the Government has got power to give exemption with regard to payment of tax or to reduce the rate of tax in public interest. This power exercised u/s 10 of the Kerala General Sales Tax Act could not be said to be discriminatory, because always when the power of exemption is exercised, it creates discrimination with regard to a class of people. She further contended that in this case, there was representation from the local manufacturers and the Government after taking into consideration their economic position, decided to issue notification u/s 10 of the Kerala General Sales Tax Act. It was further submitted that the exemption was given not only to local manufactures, but also to the manufacturers outside the State. But those who effected sale through branch transfer or through consignment were taken out of this class, since according to the Government, the impugned tax did not have any adverse effect on such class of Assessees. The further submission of the learned Government Pleader was that the exemption of turnover tax did not affect the free commerce and intercourse.

9. Sri M. Pathros Mathai, learned Counsel for the Respondent, very forcefully attacked the impugned notification as discriminatory. He submitted that the judgment of the learned Single Judge was correct in holding that Ext. P-1 notification was violative of Articles 301 and 304 of the Constitution of India. He submitted that the effect of Ext. P-1 notification was that goods manufactured outside and brought to the State of Kerala suffered turnover tax while goods manufactured and sold within the State were completely exempted from the turnover tax. This was in total viloation of Article 304(a) of the Constitution of India. The learned Counsel cited a number of decisions of the Supreme Court in support of his argument.

10. The constitutional validity of Section 5(2A) of the Kerala General Sales Tax

Act was considered by a Division Bench of this Court in the decision reported in Das Agencies v. State of Kerala 1987 (2) KLT 989. This Court upheld the validity of the imposition of the turnover tax. Regarding the character of the turnover tax, this Court relied on the decision of the Supreme Court in S. Kodar Vs. State of Kerala, and held as follows:

the additional tax is in reality a tax on the aggregate of sales effected by a dealer during a year and is in substance and effect an enhancement in the rate of sales tax when the turnover of a dealer exceeds Rs. 10 lakhs a year. The mere facts that the dealer is not able to pass on the tax to the customer is not a ground to invalidate the legislation as the primary liability for payment of tax is on the dealer himself.

The additional tax was a tax upon sales of goods and not upon the income of a dealer. Thus, the turnover tax was also a tax on the sale of goods.

11. The notification issued by the Government is said to be in violation of Articles 301 and 304 of the Constitution of India. We shall now refer to the same. Article 301 of the Constitution of India states as follows:

301. Freedom of trade, commerce and intercourse.-Subject to the other provisions of this part, trade, commerce and intercourse throughout the territory of india shall be free.

Article 304 of the Constitution of India states as follows:

304. Restrictions on trade, commerce and intercourse among States.-Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law-

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

Thus, Article 301 of the Constitution declares that subject to the provisions of Part XIII, trade, commerce and intercourse throughout the territory of India shall be free. Exception is however provided in favour of Parliament by Article 302 of the Constitution of India, which reads thus:

302. Power of Parliament to impose restrictions on trade, commerce and intercourse.-Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and Anr. or within any part of

the territory of India as may be required in the public interest.

Article 303(1) of the Constitution of India does notempower the Parliament to discriminate between States, while Clause (2) of Article 303 enables the Parliament authorising the making of any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. Under Article 304 of the Constitution of India, the Legislature of a State may by way of law, impose on goods imported from other States or the Union territory any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced. In fact it is a provision prohibiting discrimination against imported goods.

12. The Supreme Court had the occasion to deal with the question whether a levy was violative of the provisions which guaranteed freedom of trade and intercourse through out the territory of India. Firm Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another, is a case arising under the Madras General Sales Tax Act. Under the relevant provisions of the Act, the tanned hides or skins imported from outside the State of Madras and sold within the State were subject to a higher rate of tax than the tax imposed on hides or skins tanned and sold within the State. Further, hides or skins imported from outside the State after purchase in their raw condition and then tanned inside the State were also subject to a higher rate of tax than hides or skins purchased in the raw condition in the State and tanned within the State. The distinction was attacked as violative of Articles 301 and 304(a) of the Constitution of India. It was urged in that case that the sales tax does not come within the purview of Article 304(a) of the Constitution of India as it is not a tax on the imported goods at the point of entry. Dealing with this contention, relying on the earlier decisions in Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, and The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, , the Supreme Court held as follows:

It is therefore now well settled that taxing laws can be restrictions on trade, commerce and intercourse, if they hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulatory measures, sales tax, of the kind under consideration here, cannot be said to be a measure regulating any trade or a compensatory tax levied for the use of trading facilities. Sales tax, which has the effect of discriminating between goods of on State and goods of Anr. , may affect the free follow of trade and it will then offend against Article 301 and will be valid only if it comes within the terms of Article 304(a).

Article 304(a) enables the Legislature of a State to make laws affecting trade, commerce and intercourse. It enables the impostiion of taxes on goods from other States if similar goods in the State are subjected to similar taxes, so as not to discriminate between the goods manufactured or produced in that State and the goods which are imported from other States. This means that the effect of the sales tax on tanned hides or skins imported from outside is that the latter becomes subject to a higher tax by the application of the proviso to Sub-rule (2) of Rule 16 of the Rules, then the tax is discriminatory and unconsitutional and must be struck down.

12. We do not agree with the contentions of the Respondents. The contention that Article 304(a) is attracted only when the impose is at the border, i.e., when the goods enter the State on crossing the border of the State, is not sound. Article 304(a) allows the Legislature of a State to impose taxes on goods imported from other States and does not support the contention that the imposition must be at the point of entry only.

It was further urged in that case that to consider discrimination between the imported goods and goods produced or manufactured in the State, circumstances and situations at the taxable point must be similar and that the circumstances of hides or skins tanned within the State and on which tax had been paid earlier at the time of their purchase in the raw condition is sufficient to cosider such hides or skins to be different from the hides or skins which had been tanned out side the State. The Court rejected the contention and held that the mere circumstance of a tax having been paid on the sale of such hides or skins in their raw condition does not justify their forming goods of a different kind. Thus imposition of the rate of tax was held to be discriminatory.

13. In H. Anraj Vs. Government of Tamil Nadu, this question arose for consideration. There the question that had to be considered by the Supreme Court and which is relevant to the facts of this case was that the lottery tickets belonging to the State of Tamil Nadu were sold without passing on the sales tax while this exemption was not available for the lottery tickets issued by the other States. The notification in that case was as follows:

The Government accordingly direct that all the Tamil Nadu raffle tickets shall be sold at their respective face values only which will includes sales tax, surcharge and additional surcharge as applicable and that no agent or seller of the raffle tickets shall collect the tax, etc., over the face value or increase the face value on any account.

The arrangement under the notification was that the raffle department of the Government of Tamil Nadu pays the tax to the commercial taxes department of the Government of Tamil Nadu and the tax is not passed on to the purchaser; in other words, effectively exemption from payment of sales tax is granted to the purchaser. In substance, lottery tickets issued by the Government of Tamil Nadu do not suffer any tax while on the other hand the lottery tickets issued by other Governments and sold within the State of Tamil Tadu are subject to tax. The net result was that sale of lottery tickets of other Governments within the State was at a great disadvantage as compared to the sale of Tamil Nadu Government lottery tickets inasmuch as a Tamil Nadu Government lottery ticket of the face value of Rs. 1 would be available to the purchaser at Rs. 1 but a lottery ticket of any other Government of the face value of Rs. 1 will have to be purchased by the purchaser at Rs. 1.20. This was challenged as violative of Article 301 read with Article 304(a) of the Constitution. Relying on the earlier decisions of the Supreme Court, Tulzapurkar, J. speaking for the Court held:

These aspects cannot obliterate the glaring fact that because of the notification imported goods are at a disadvantage as compared to indigenous goods, both being of identical type. The real question is whether the direct and immediate result of the impugned notification is to impose an unfavourable and discriminatory tax burden on the imported goods (here lottery tickets of other States) when they are sold within the State of Tamil Nadu as against indigenous goods (Tamil Nadu Government lottery tickets) when these are sold within the State from the point of view of the purchaser and this question has to be considered from the normal business or commercial point of view and indisputably if the question is so considered the impugned notification will have to be regarded as directly and immediately hampering free flow of trade, commerce and intercourse. Discriminatory treatment in the matter of levying the sales tax on imported lottery tickets which are similar to the one issued by the State Government so as to hamper free flow of trade, commerce and intercourse is write large on the face of the impugned notification and in my view the same is clearly violative of Article 301 read with Article 304(a), of the Constitution.

14. In Weston Electroniks and Another Vs. State of Maharashtra and Another, the Supreme Court invalidated the notification issued under the Bombay Sales Tax Act whereby the sales tax on the turnover of the electronics goods manufactured within the State of Maharashtra had been levied at 4 per cent only while the sales tax on similar goods imported from outside the State including such goods manufactured was at 15 per cent. In Weston Electroniks and Anr Vs. State of Gujarat and Ors, the question that came up for consideration before the Supreme Court was a notification issued u/s 7 of the Gujarat Sales Tax Act by which the rate of sales tax in respect of television sets imported from outside the State was reduced from 15 per cent to 10 per cent, while for goods manufactured within the State, the sales tax was reduced to 1 percent. This was challenged as violative of Articles 301, and 304 of the Constitution. Chief Justice Pathak, speaking for the Court held that the imposition of different rates of tax was discriminatory and violative of Articles 301 and 304 of the Constitution and placed reliance on the decisions rendered in the case of Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another, and H. Anraj Vs. Government of Tamil Nadu, .

15. In the case of West Bengal Hosiery Association v. State of Bihar 71 S.T.C. 298 by a notification under the Bihar Sales Tax Act, the sales tax at the rate of 5 per cent ad valorem was imposed on all hosiery goods sold within the State of Bihar. But subsequently, by a notification, the hosiery goods manufactured by hosiery industries in Bihar were exempted from the levy of sales tax for a period of five years. The Supreme Court considered this question and held that the

notification exempting hosiery goods manufactured in Bihar was discriminatory and it was struck down. Regarding Articles 301 and 304(a), the Court said:

A plain reading of these articles would show that it is not open to any State to levy any tax on goods imported from other States or Union territories so as to discriminate between goods so imported and goods manufactured and produced in that State subject to the limitations contained in Clause (b). In the present case, Clause (b) has no application whatsoever because the exemption granted to the sales of hosiery goods manufactured in the State of Bihar has not been granted by any law passed by the Legistature of the State of Bihar but by a notification. We find that the contention urged on behalf of the Petitioners has been accepted in several decisions of this Court.

16. Video Electronics Pvt. Ltd. and Another and Weston Electronics Ltd. and Another Vs. State of Punjab and Another, was a case where the Supreme Court upheld the notification which exempted certain goods manufactured in the State from payment of sales tax for a certain period. The State of Uttar Pradesh had issued two notifications, u/s 4A of the U.P. Sales Tax Act and u/s 8(5) of the Central Sale Tax Act exempting new units of manufacturers as defined in the Act in respect of the various goods for different periods ranging from 3 to 7 years as the case may be, from payment of any sales tax. The notification dated 26th December, 1985, stated, inter alia:

The Governor is pleased to direct that in respect of anys goods manufactured in an industrial unit, which is a new unit as defined in the aforesaid Act of 1948, established in the areas mentioned in column 2 of the Table given below, the date of starting production whereof falls on or after tbe first day of October, 1982, but not later than 31st March, 1990, no tax under the aforesaid Act of 1956 shall be payable by the manufacturer thereof on the turnover of sales on such goods for the period specified in column 3 against each, which shall be reckoned from the date of first sale if such sale taxes place not later than 6 months from the date of starting production subject to certain conditions mentioned.

The Supreme Court considered this contention in the light of Articles 301 and 304(a) of the Constitution of India and also the earlier decisions of the Court and finally held as follows:

The granting of exemption from tax by a State to a special class for a limited period on specific conditions, while maintaining the general rate of tax on goods manufactured by all the producers in the State who do not fall within the exempted category at par with the rate applicable to imported goods, does not interfere with the freedom of trade and commerce by Article 301.

If the power of granting exemption from tax is exorcised in a colourable manner intentionally or purposely to create unfavourable bias by proscribing a general lower rate on locally manufactured goods either in the shape of general exemption to locally manufactured goods or in the shape of a lower rate of tax, such an exercise would be struck down by the Courts.

17. The matter again came up for consideration before the Supreme Court in the case of Shree Mahavir Oil Mills and Another Vs. State of Jammu & Kashmir and Others, . In that case, the State of Jammu and Kashmir, with a view to protect the local edible oil industry, issued a notification u/s 5 of the Jammu and Kashmir General Sales Tax Act that the goods manufactured by a dealer operating as a small scale industrial unit in the State and registered with Director of Industries and Commerce, Handicrafts or Handloom Development, subject to the conditions specified shall be exempted from payment of tax to the extent and for the period specified in the Schudule. All the units manufacturing edible oil in the Statr are small scale industrial units. The exemption was total and the period of exemption was five years, which was later extended by Anr. five years. The result of the orders was that while until December, 1993/May, 1994, the manufactures of edible oil in other States were obliged to pay sales tax on the sales effected by them at the rate of 4 per cent the local manufacturers were totally exempted therefrom. In December, 1993/May 1994, the rate of tax was raised from 4 per cent to 8 per cent. With the raising of the rate of sales tax to 8 per cent the outside manufactures were obliged to pay at 8 per cent, while the local manufacturers were exempted fully. Certain outside manufacturers approached the Jammu and Kashmir High Court by way of writ petitions. The writ petitions were dismissed by a learned Single Judge and that decision was affirmed by the Division Bench. Against the said decision an appeal was filed before the Supreme Court. The High Court had placed reliance on the decision rendered in the case of Video Electronics Pvt. Ltd. and Another and Weston Electronics Ltd. and Another Vs. State of Punjab and Another, to uphold the exemption granted to the local manufacturers. The entire gamut of decisions right from H. Anraj Vs. Government of Tamil Nadu, upto Video Electronics Pvt. Ltd. and Another and Weston Electronics Ltd. and Another Vs. State of Punjab and Another, were considered by the Supreme Court and Jeevan Reddy, J. speaking for the Court distinguished the decision in the case of Video Electronics Pvt. Ltd. and Another and Weston Electronics Ltd. and Another Vs. State of Punjab and Another, as follows:

All the above observations were made to justify (1) grant of incentives and subsidies and (2) exemption granted to new industries, of a specified type and for a short period. They were not meant to nor can they be read as justifying a blanket exemption to all small-scale industries in the State irrespective of their date of establishment... The limited exception created in Video Electronics Pvt. Ltd. and Another and Weston Electronics Ltd. and Another Vs. State of Punjab and Another, does not help the State herein for the reason that exemption concerned herein is neither confined to "new industries", nor is circumscribed by other conditions of the nature stipulated in the Utter Pradesh notification. It is not possible to to go on extending the limited exception created in the said judgment, by stages, which would have the effect of robbing the salutary principle underlying Part XIII of its substance... Suffice it to say that the limited exception carved out therein cannot be widened or expanded to cover cases of a different kind. It must be held that the total exemption granted in favour of small-scale industries in Jammu and Kashmir producing edible oil is not sustainable in law.

Regarding the ratio of the decisions of the Supreme Court under Article 304(a) of the Constitution of India, the Court observed:

Now, what is the ratio of the decisions of this Court so far as Clause (a) of Article 304 is concerned? In our opinion, it is this: the States are certainly free to exercise the power to levy taxes on goods imported from other States/Union territories but this freedom, or power, shall not be so exercised as to bring about a discrimination between the imported goods and the similar goods manufactured or produced in that State. The clause deals only with discrimination by means of taxation; it prohibits it. The prohibition cannot be extended beyond the power of taxation. It means in the immediate context that States are free to encourage and promote the establishment and growth of industries within their States by all such means as they think proper but they cannot, in that process, subject the goods imported from other States to a discriminatory rate of taxation, i.e., a higher rate of sales tax vis-a-vis similar goods manufactured/produced within that State and sold within that State. Prohibition is against discriminatory taxation by the States. It matters not how this discrimination is brought about. A limited exception hci s no doubt been carved out in Video Electronics Pvt. Ltd. and Another and Weston Electronics Ltd. and Another Vs. State of Punjab and Another, , but, as indicated hereinbefore, that exception cannot be enlarged lest it eat up the main provision. So far as the present case is concerned, it does not fall within the limited exception aforesaid it fals within the ratio of Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another, and the other cases following it. It must be held that by exempting unconditionally the edible oil produced within the State of Jammu and Kashmir altogether from sales tax, even if it is for a period often years, while subjecting the edible oil produced in other States to sales tax at eight per cent, the State of Jammu and Kashmir has brought about discrimination by taxation prohibited by Article 304(a) of the Constitution.

18. It is in the light of the above decision that the validity of Ext. P-1 notification has to be judged. Turnover tax is sales tax. As per Section 5(2A) of the Kerala General Sales Tax Act all dealers who have turnover of more than Rs. 50 lakhs a year and dealing with the goods mentioned therein, are liable to pay a turnover tax at\\per cent. By Ext. P-1 notification all the dealers excepting dealers trading through branch/consignment were exempted from the levy of turnover tax. Thus the local manufacturers were free to sell their goods within the State of Kerala while goods imported from outside Kerala and sold in Kerala through branch transfer and/or consignment were liable to pay turnover tax. The exemption in favour of local manufacturers was total. It was not for a limited period or limited to certain dealers as was the notification in the Video Electronics Pvt. Ltd. and

Another and Weston Electronics Ltd. and Another Vs. State of Punjab and Another, . Thus, in our view, the learned Single Judge was correct in holding that Ext. P-1 notification had brought about discrimination of taxation prohibited by Article 304(a) of the Constitution of India. In the above view of the matter, we are not considering the question whether by an executive order, tax can be imposed on imported goods.

19. Before the conclusion of the arguments, it was brought to our notice that the Government had issued Anr. notification G.O.(Ms.) No. 38/93/TD, dated 9th March 3993 by which Ext. P-1 notification was given retrospective effect from the 1st day of April, 1992. But that notification itself stated that any turnover tax paid shall not be refunded. Thus, if tax had been collected from the Petitioner-Respondent before Ext. P-1 notification, they shall not be entitled to refund of the same.

In the result, the appeals are dismissed but without any order as to costs.

