(2013) 10 TP CK 0004

In the Tripura High Court

Case No : Writ Petition (C) No''s. 443 and 444 of 2012 and 73 of 2013

**Biplab Kumar Ghosh VsUnion of India and Others
L.K. Builders VsState of Tripura and Others**

Date of Decision : 09-10-2013

Acts Referred:

Citation : (2013) 10 TP CK 0004

Hon'ble Judges : Deepak Gupta, C.J;S.C. Das, J

Bench : Division Bench

Advocate : Sudhir Nandrajog, A. Paul, Somik Deb and S. Datta, for the Appellant; A.K. Saraf , P.K. Biswas, Assistant S.G., T.D. Majumder, Government Advocate and K. Roy, for the Respondent

Judgement

Deepak Gupta, C.J.—By means of these petitions, the petitioners have challenged constitutional validity of certain provisions of the Tripura Value Added Tax Act, 2004 ("the TVAT Act") and certain rules framed under the Act. The main ground of challenge is that the said provisions which are applicable in respect of Works contract are beyond the legislative competence of the State of Tripura. It is contended that these provisions of the TVAT Act and the rules are contrary to the constitutional provisions inasmuch as they impose tax on inter-State transfer of goods and also impose tax on goods which are imported from outside India. It is also contended that the Act is not in consonance with the principles laid down by the apex court in

Gannon Dunkerley & Co. v. State of Rajasthan (1993) 88 STC 204 (SC) (1993) 1 SCC 364

. To appreciate the rival contentions of the parties, first it would be appropriate to set out the various constitutional and statutory provisions which are relevant for decision of this case.

2. Article 269 of the Constitution of India deals with taxes levied and collected by the Union but assigned to the States and reads as follows:

269. Taxes levied and collected by the Union but assigned to the States.--(1)

Taxes on the sales or purchase of goods and taxes on the consignment of goods shall be levied and collected by the Government of India but shall be assigned and shall be deemed to have been assigned to the States on or after the 1st day of April, 1996 in the matter provided in clause (2).

Explanation.--For the purposes of this clause,--

(a) the expression ''taxes on the sale or purchase of goods'' shall mean taxes 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;

(b) the expression ''taxes on the consignment of goods'' shall mean taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

(2) The net proceeds in any financial year of any such tax, except insofar as those proceeds represent proceeds attributable to Union territories, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.

(3) Parliament may by law formulate principles for determining when a sale or purchase of, or consignment of, goods takes place in the course of inter-State trade or commerce.

3. By the 46th Amendment to the Constitution of India, clause (29A) was inserted and this defines tax on the sale or purchase of goods. Clause (29A) reads as follows:

(29A) ''tax on the sale or purchase of goods'' includes--

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

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by installments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

4. By virtue of this amendment works contracts were treated to be deemed sale and made exigible to tax.

5. Entries 92, 92A and 92B of the Seventh Schedule (the Union List) are as follows:

92. Taxes on the sale or purchase of newspapers and on advertisements published therein.

92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.

92B. Taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

6. These entries empower the Union Government to levy tax on the sale or purchase of newspapers, advertisements, goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.

7. Entry 54 of List II of the Seventh Schedule (the State List) reads as follows:

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.

8. This entry empowers the State Government to levy tax on the sale or purchase of goods other than newspapers, but is subject to the provisions of entry 92A of List I.

9. Article 286 imposes restrictions on the powers of the State in relation of imposition of tax on the sale or purchase of goods and reads as follows:

Restrictions as to imposition of tax on the sale or purchase of goods.--(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place--

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of,--

(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce; or

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause (b), sub-clause (c) or sub-clause (d) of clause (29A) of article 366 ,

be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.

10. Thus, no State has the power to impose or authorise the imposition of tax on the sale or purchase of goods which takes place outside the State or in the course of import of goods or export of goods into or out of the territories of India. Article 286(2) , like article 269(3) , empowers the Parliament to frame laws to formulate the principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce, outside the State or in the course of import/export.

11. Clause (3) of article 286 of the Constitution of India further curtails the power of the States to impose tax on the sale or purchase of goods. It clearly provides that any State law imposing tax on the sale or purchase of goods which are declared by Parliament by law to be of special importance in inter-State trade or commerce or being taxes involved in the execution of a works contract delivery of goods on hire purchase and tax on the transfer of the right to use of goods for any purpose would be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of tax as Parliament may by law specify.

12. Relevant provisions of the Central Sales Tax (CST) Act:

2. (aa) ''business'' includes--

(i) any trade or commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not, such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern; and

(ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern;

2. (g) ''sale'', with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or deferred payment or for any other valuable consideration and includes,--

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

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) a delivery of goods on hire-purchase or any system of payment by installments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(vi) a supply, by way of, or as part of, any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration,

but does not include a mortgage or hypothecation of or a charge or pledge on goods;

2. (h) ''sale price'' means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in cases where such cost is separately charged:

Provided that in the case of a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract, the sale price of such goods shall be determined in the prescribed manner by making such deduction from the total consideration for the works contract as may be prescribed and such price shall be deemed to be the sale price for the purposes of this clause;

2(j) ''turnover'', used in relation to any dealer liable to tax under this Act means the aggregate of the sale prices received and receivable by him in respect of sales of any goods in the course of inter-State trade or commerce made during any prescribed period and determined in accordance with the provisions of this Act and the rules made thereunder;

(ja) ''works contract'' means a contract for carrying out any work which includes assembling construction, building altering, manufacturing processing, fabricating erection, installation, fitting out, improvement, repair or commissioning of any movable or immovable property.

3. When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce.--A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce, if the sale or purchase--

(a) occasions the movement of goods from one State to another; or

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation 1.--Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purposes of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2.--Where the movement of goods commences and terminates in the same State, it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State.

4. When is a sale or purchase of goods said to take place outside a State.--(1) Subject to the provisions contained in section 3 , when a sale or purchase of goods is determined in accordance with sub-section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

(2) A sale or purchase of goods shall be deemed to take place inside a State, if the goods are within the State--

(a) in the case of specific or ascertained goods, at the time the contract of sale is made; and

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation.

Explanation.--Where there is a single contract of sale or purchase of goods situated at more places than one, the provisions of this sub-section shall apply as if there were separate contracts in respect of the goods at each of such places.

13. The Parliament by law has laid down the parameters as to when a sale or purchase of goods is said to take place outside the State. The section is worded in a negative manner inasmuch as when a sale takes place within a particular State, it shall be deemed to have taken place outside the other States. By section 5 , the Parliament has laid down when a sale or purchase of goods takes place in the course of import or export.

14. Relevant portion of section 15 reads as follows:

15. Restrictions and conditions in regard to tax on sale or purchase of declared goods within a State.--Every sales tax law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely:--

(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed five per cent of the sale or purchase price thereof, (***);

(b) where a tax has been levied under that law in respect of the sale or purchase inside the State of any declared goods and such goods are sold in the course of inter-State trade or commerce, and tax has been paid under this Act in respect of the sale of such goods in the course of inter-State trade or commerce, the tax levied under such law shall be reimbursed to the person making such sale in the course of inter-State trade or commerce in such manner and subject to such conditions as may be provided in any law in force in that State. . .

15. u/s 14 of the CST Act, the Parliament has declared a large number of goods to be of special importance in inter-State trade and commerce. As far as these goods are concerned, no State can levy tax at a rate higher than five per cent (earlier this was four per cent). This is the first restriction laid down by Parliament. The Parliament has also laid down that when a tax is levied under law in respect of sale inside the State in respect of such declared goods and then the goods are sold in the course of inter-State trade and commerce and tax is paid under the CST Act, then the State shall be liable to reimburse the tax to the person making such sale in the course of inter-State trade or commerce.

The relevant provisions of the Tripura Value Added Tax (TVAT) Act, 2004:

16. Section 2(4) , 2(25) , 2(26) , 2(35) , 2(36) and 2(38) read as follows:

2. (4) "Business'' includes:

(a) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce or manufacture, adventure or concern is carried on with a motive to making gain or profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern; and

(b) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern.

2. (25) ''Sale'' with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, and includes--

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

(b) transfer of property in goods (whether as goods or in some other form) involved in execution of a works contract;

(c) delivery of any goods on hire purchase or any other system of payment by installments;

(d) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and purchase of those goods by the person to whom such transfer, delivery or supply is made, but does not include a mortgage, hypothecation, charge or pledge.

2. (26) ''Sale price'' means the amount of valuable consideration received or receivable by a dealer for the sale of any goods less any sum allowed as cash discount, according to the practice normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods or services at the time of or before delivery thereof, excise duty, special excise duty or any other duty or taxes except the tax imposed under this Act and "purchase price" means the amount of valuable consideration paid or payable by a dealer on purchase of taxable goods as mentioned in Schedule VIII.

Explanation 1.--For the purpose of this clause ''sale price'' includes,--

(a) in relation to the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract, such amount as is arrived at by deducting from the amount of valuable consideration paid or payable to a person for the execution of such works contract, the amount representing labour and other charge incurred and profit occurred not in connection with transfer of property in goods for such execution;

(b) in respect to transfer of the right to use any goods for any purpose (whether or not for a specified period), the valuable consideration received or receivable for such transfer.

Explanation 2.--For the purpose of this clause ''purchase price'' includes,--

(a) anything done by the seller with or in respect of the goods at the time of or before delivery thereof, and

(b) containers or other materials for the packing such goods.

2. (35) ''Turnover'' means the aggregate amount for which goods are either purchased or bought or sold or supplied or distributed by a dealer, either directly or through another whether on own account or on account of other, whether for cash or for deferred payment, or other valuable consideration.

Explanation.--(1) The turnover in respect of delivery of goods on hire purchase or on any system of payment by installments shall be the market price of the goods so delivered.

(2) The turnover in respect of the transfer of the right to use any goods shall be the aggregate amount received or receivable by the dealer as consideration for such transfer.

(3) Subject to such conditions and restrictions, if any, as may be prescribed in this behalf,--

(a) the amount for which goods are sold shall include any sum charged for anything done by the dealer in respect of the goods sold at the time of, or before, the delivery thereof;

(b) any cash discount on the price allowed in respect of any sale or any amount refunded in respect of goods returned by customers shall not be included in the turnover; and

(c) where for accommodating a particular customer, a dealer obtains goods from another dealer and immediately disposes of the same to the said customer, the sale in respect of such goods shall be included in the turnover of the latter dealer but not in that of the former.

2. (36) ''Works contract'' means any agreement for carrying out for cash or deferred payment or other valuable consideration--

(i) the construction, fitting out, improvement or repair of any building road, bridge or other immovable property, or

(ii) the installation or repair of any machinery affixed to a building or other immovable property, or

(iii) the overhaul or repair of--

(a) any motor vehicle,

(b) any vessel propelled by internal combustion engine or by any other mechanical means,

(c) any aircraft,

(d) any component or accessory or part of any of the items mentioned in paragraphs (a) to (c) above,

(iv) the altering, ornamenting finishing, improving or otherwise processing or adopting of any goods.

2. (38) ''Zero rating'' means complete removal of tax up to the zero rated stage of production or distribution. No tax is charged on sale and tax credit is given for the tax paid on purchases.

17. Section 3 of the TVAT Act relates to incidence of tax. Section 4 deals with tax on deemed sales and reads as follows:

4. Tax on deemed sales.--(1) Notwithstanding anything contained elsewhere in this Act, any transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall be deemed to be a sale of those goods by the person making the transfer and shall liable to be taxed at the rate specified in the Schedule:

Provided that in respect of any such transfer, only so much value of the goods involved in the works contract which has actually been paid to the dealer during the period, shall be taken into account for determining the turnover for the period.

Explanation.--For the purpose of this section, ''Property in goods'' shall mean the aggregate of the goods for which amounts have been received or receivable by a dealer during such period as valuable consideration, whether or not such amount has been separately shown in the works contract. The amount as received or receivable shall include the value of such goods purchased, manufactured, processed, or procured otherwise by the dealer, and the cost of freight or delivery as may be incurred by such dealer for carrying such goods to the place where these are used in execution of such works contract, but shall not include such portion of the aforesaid amounts as may be prescribed.

(2) Tax on transfer of the right to use any goods--Notwithstanding anything contained elsewhere in this Act, any transfer of the right to use any goods for any purpose (whether or not for a specified period) shall be taxable at the rate as specified in the Schedule.

(3) Deduction of tax at the time of payment.--Every person responsible for paying any sum to any person on account of works contract and right to use any goods for any purpose, shall at the time of credit of such sum to account of the person or at the time of payment thereof in cash or by issue of a cheque or draft or any other mode, deduct such amount towards sales tax (not being more than the total tax payable by the dealer) as may be prescribed.

18. Section 5 deals with levy of tax on sale and reads as follows:

5. Levy of tax on sale.--(1) The tax payable by a dealer u/s 3 shall be levied on his taxable turnover of sales.

(2) Taxable turnover of sales in relation to a dealer liable to pay tax under sub-section (1) of section 3 shall be calculated from the gross turnover of sales during any period which remains after deducting therefrom--

(a) sales of goods declared as exempt from tax in Schedule III;

(b) sales of goods which are shown to the satisfaction of the Commissioner to have taken place--

(i) in the course of inter-State trade or commerce, or

(ii) outside Tripura.

(iii) in the course of the import of the goods into or export of the goods out of the territory of India.

Explanation.--Sections 3 , 4 and 5 of the Central Sales Tax Act, 1956 shall apply for determining whether or not a particular sale or purchase has taken place in the manner indicated in sub-clause (i), sub-clause (ii) or sub-clause (iii).

(c) in case of turnover of sales in relation to works contract, the charges towards labour, services and other like charges and subject to such conditions as may be prescribed:

Provided that in cases where the amount of charges towards labour, services and other like charges in such contract are not ascertainable from the terms and conditions of the contract, the amount of such charges shall be calculated at the prescribed percentage.

(d) such other sales on such conditions and restrictions as may be prescribed.

19. Section 8 reads as follows:

8. Exemptions.--(1) Sale of certain goods as specified in the Schedule III of this Act shall be exempt from tax under this Act subject to conditions and exceptions set out therein.

(2) Sales of certain goods of local importance with little implication on inter-State trade as specified in Schedule IV shall be taxable at the rate zero.

(3) Export of export oriented units and special economic zone would be exempt from tax under this Act.

(4) Supplies between special economic zone and export oriented units would be exempt from tax under this Act.

20. Section 10(1) reads as follows:

10. Input tax credit.--(1) For the purpose of calculating the net tax payable by a registered dealer for any tax period after being registered, an input tax credit as determined under this section shall be allowed to such registered dealer for the tax paid or payable in respect of all taxable purchase of goods as mentioned in Schedule VIE and all taxable sales other than such sales as may be prescribed subject to the following conditions:

(a) Input tax credit on capital goods except those mentioned in negative list in Schedule IV shall be adjusted against tax payable by a dealer over a period not exceeding three years:

Provided that in case of closure of business before the period specified above, no further input tax credit shall be allowed and input tax credit carried forward, if any, shall be forfeited.

(b) In respect of exporting dealers, input tax credit may be spread over a period less than 3 years as may be prescribed.

(c) Input tax credit is to be given only after commencement of sale of taxable goods ''and purchase of taxable goods as mentioned in Schedule VIII''.

(d) In respect of inputs used in taxable goods sent on stock/consignment transfer, tax paid in excess of four per cent or the prevailing rate of CST on such inputs is to be credited.

(e) Tax paid in excess of four per cent on petroleum products used as fuel (other than petrol, aviation turbine fuel and diesel) and other fuels when used as fuel in production of taxable goods or captive power is to be entitled for input credit. However, no input tax credit will be given if petroleum product is used as fuel in motor vehicle.

(f) Input tax credit shall be allowed during the return period. Refund of excess tax credit shall be allowed only after the end of the financial year.

21. Section 41 reads as follows:

Purchase or sales not liable to tax.--(1) Notwithstanding anything contained in this Act, a value added tax shall not be imposed under this Act--

(i) Where such sale or purchase takes place in the course of inter-State trade and commerce; or

(ii) where such sale or purchase takes place in the course of import of goods into the territory of India or export of goods out of the territory of India.

(2) For the purpose of this section, whether a sale or purchase takes place--

(i) outside the State of Tripura; or

(ii) in the course of inter-State trade and commerce; or

(iii) in the course of import of goods into the territory of India or export of goods out of the territory of India

shall be determined in accordance with the provisions of section 3 , section 4 , and section 5 of the Central Sales Tax Act 1956.

22. Rule 7A which has been inserted by amendment and is under challenge in these writ petitions provides that where a contractor does not maintain accounts, a specified percentage shall be deducted towards labour and service charges. The relevant portion of rule 7A reads as follows:

7A--Where accounts maintained by the contractor do not show separately the value of labour and services and amount of profit accrued on such labour and services, or accounts maintained by the dealer are not worthy of credence or if the dealer has not maintained accounts, for the purpose of determining turnover of goods in which transfer of property in goods has taken place, an amount can be deducted towards labour and service charge in contracts described in column 2 of the table given below, at the corresponding rate given in column 3 of the gross amount of contract received or receivable.

23. A number of contentions raised by the parties in the present case are based on the judgment of the apex court delivered in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

. Therefore, before dealing with the rival contentions, it would be pertinent to quote the principles of law laid down by the apex court in the

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

. The apex court held that the value of the goods involved in the execution of the works contract has to be determined by taking into account the value of the entire works contract and deducting therefrom the charges of labour and services and other such expenses. Further, the apex court held that apart from the aforesaid deductions for labour and services, the State could not impose tax on the goods regarding which the Parliament alone was competent to impose the tax. The relevant portion of the judgment of the apex court reads as follows (page 235 in 88 STC):

47. . . . The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover:

(a) labour charges for execution of the works;

(b) amount paid to a sub-contractor for labour and services;

(c) charges for planning, designing and architect''s fees;

(d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;

(e) cost of consumables such as water, electricity, fuel, etc., used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and

(f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;

(g) other similar expenses relatable to supply of labour and services;

(h) profit earned by the contractor to the extent it is relatable to supply of labour and services.

The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor.

48. We may, however, make it clear that apart from the deductions referred to above, it will be necessary to exclude from the value of the works contract the value of the goods which are not taxable in view of sections 3 , 4 and 5 of the Central Sales Tax Act and goods covered by sections 14 and 15 of the Central Sales Tax Act as well as goods which are exempt from tax under the sales tax legislation of the State. The value of goods involved in the execution of a works contract will have to be determined after making these deductions and exclusions from the value of the works contract.

24. The apex court further went on to conclude as follows (pages 237 and 238 in

88 STC):

51. The aforesaid discussion leads to the following conclusions:

(1) In exercise of its legislative power to impose tax on sale or purchase of goods under entry 54 of the State List read with article 366(29A)(b) , the State Legislature, while imposing a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract is not competent to impose a tax on such a transfer (deemed sale) which constitutes a sale in the course of inter-State trade or commerce or a sale outside the State or a sale in the course of import or export.

(2) The provisions of sections 3 , 4 and 5 and sections 14 and 15 of the Central Sales Tax Act, 1956, are applicable to a transfer of property in goods involved in the execution of a works contract covered by article 366(29A)(b) .

(3) While defining the expression ''sale'' in the sales tax legislation it is open to the State Legislature to fix the situs of a deemed sale resulting from a transfer felling within the ambit of article 366(29A)(b) but it is not permissible for the State Legislature to define the expression ''sale'' in a way as to bring within the ambit of the taxing power a sale in the course of inter-State trade or commerce, or a sale outside the State or a sale in the course of import and export.

(4) The tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract falling within the ambit of article 366(29A)(b) is leviable on the goods involved in the execution of a works contract and the value of the goods which are involved in the execution of works contract would constitute the measure for imposition of the tax.

(5) In order to determine the value of the goods which are involved in the execution of a works contract for the purpose of levying the tax referred to in article 366(29A)(b) , it is permissible to take the value of the works contract as the basis and the value of the goods involved in the execution of the works contract can be arrived at by deducting expenses incurred by the contractor for providing labour and other services from the value of the works contract.

(6) The charges for labour and services which are required to be deducted from the value of the works contract would cover (i) labour charges for execution of the works, (ii) amount paid to a subcontractor for labour and services, (iii) charges for obtaining on hire or otherwise machinery and tools used for execution of the works contract, (iv) charges for planning, designing and architect''s fees, and (v) cost of consumables used in the execution of the works contract, (vi) cost of establishment of the contractor to the extent it is relatable to supply of labour and services, (vii) other similar expenses relatable to supply of labour and services, and (viii) profit earned by the contractor to the extent it is relatable to supply of labour and services.

(7) To deal with cases where the contractor does not maintain proper accounts or the account books produced by him are not found worthy of credence by the

assessing authority the Legislature may prescribe a formula for deduction of cost of labour and services on the basis of a percentage of the value of the works contract but while doing so it has to be ensured that the amount deductible under such formula does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. It would be permissible for the Legislature to prescribe varying scales for deduction on account of cost of labour and services for various types of works contract.

(8) While fixing the rate of tax it is permissible to fix a uniform rate of tax for the various goods involved in the execution of a works contract which rate may be different from the rates of tax fixed in respect of sales or purchase of those goods as a separate article.

25. We have heard very erudite and learned arguments from Mr. Sudhir Nandrajog, learned senior counsel appearing on behalf of the petitioners, and Dr. A.K. Saraf, learned senior counsel appearing on behalf of the State. Before dealing with the other arguments, it would be pertinent to mention that Dr. Saraf has candidly admitted that the State has no power to impose tax on the inter-State transfer of goods; or to impose tax on sales which amount to import or export outside the country. He, however, submits that if the TVAT Act is read as a whole, then it is obvious that the intention of the State was not to levy any tax which it cannot impose in accordance with the constitutional provisions as interpreted by the apex court from time to time.

26. Since the constitutional validity of the various provisions of the TVAT Act has been challenged mainly on the interpretation given to various sections of the TVAT Act and according to the State, the provisions of the Act are not only in consonance with the constitutional mandate and statutory restrictions laid down by the CST Act, it may at this stage be necessary to refer to certain decisions as to how the taxing statutes should be interpreted.

Interpretation of statutes

27. It is well-settled law that whenever the constitutional validity of an Act is challenged, the court should start with a presumption that the Act is constitutional.

28. In this behalf, reference may be made to the following decisions of the Supreme Court which deal with this aspect of the matter and also with the issue as to how a taxing or economic statute should be interpreted.

29. In

R.K. Garg v. Union of India (1982) 133 ITR 239 (SC) (1981) 4 SCC 675

, the apex court held as follows (pages 254-256 in 133 ITR):

7. Now while considering the Constitutional validity of a statute said to be violative of article 14 , it is necessary to bear in mind certain well established

principles which have been evolved by the courts as rules of guidance in discharge of its constitutional function of judicial review. The first rule is that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the Legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes, J. that the Legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula and this is particularly true in the case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the Legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in

Morey v. Doud (1957) 354 US 457

, where Frankfurter, J. said in his inimitable style:

In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events-self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.

The court must always remember that ''legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry'' that exact wisdom and nice adoption of remedy are not always possible and that ''judgment is largely a prophecy based on meagre and uninterpreted experience''. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and, therefore, it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture v. Central Reig Refining Company 94 Lawyers Edition 381, be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any Legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation, which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The court must, therefore, adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the Legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the Legislature in dealing with complex economic issues.

30. The apex court in

Reserve Bank of India v. Peerless General Finance & Investment Co. Ltd. (1987) 61 Comp Cas 663 (SC) (1987) 1 SCC 424

dealing with the interpretation of statutes held as follows (page 692 in 61 Comp Cas):

33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With those glasses, we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the court construed the expression ''prize chit'' in

Srinivasa''s case (1981) 51 Comp Cas 464 (SC) (1980) 4 SCC 507

, and we find no reason to depart from the court''s construction.

31. These observations have been approved by the apex court in

Iridium India Telecom Ltd. v. Motorola INC. (2005) 2 SCC 145

.

32. Reference may also be made to the judgment of the apex court in

State of Bihar v. Bihar Distillery Ltd. (1997) 2 SCC 453

, wherein the apex court observed as follows:

17.... The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The court should not approach the enactment with a view to pick holes or to search for defects of drafting much less inexactitude of language employed. Indeed, any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the Legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application. . . The court must recognize the fundamental nature and importance of legislative process and accord due regard and deference to it, just as the Legislature and the executive are expected to show due regard and deference to the judiciary. It cannot also be forgotten that our Constitution recognizes and gives effect to the concept of equality between the three wings of the State and the concept of ''checks and balances'' inherent in such scheme.

33. In

Government of Andhra Pradesh v. Smt. P. Laxmi Devi (2008) 4 SCC 720

, the apex court held that when the question of civil liberties and fundamental rights of a citizen are encroached upon, then the court would be strict and not grant much latitude to the Legislature. But in case of economic legislation, the court has more liberal standards and judicial restraint must be observed by the court and greater latitude given to the Legislature while adjudging the constitutionality of such taxing statutes. The court further went on to hold that the court has no expertise in these matters and should not interfere unless the legislation is patently unconstitutional. Reference may be made to the following pertinent observations of the apex court:

46. In our opinion, there is one and only one ground for declaring an Act of the Legislature (or a provision in the Act) to be invalid, and that is if it clearly

violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways, e.g., if a State Legislature makes a law which only Parliament can make under List I to the Seventh Schedule, in which case it will violate article 246(1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope vide

Rt. Rev. Magr. Mark Netto v. Govt. of Kerala : AIR 1979 SC 83 (para 6)

. Also, it is none of the concern of the court whether the legislation in its opinion is wise or unwise.

...

51. In our opinion the Legislature must be given freedom to do experimentations in exercising its powers, provided of course it does not clearly and flagrantly violate its constitutional limits.

...

68. The court must, therefore, make every effort to uphold the constitutional validity of a statute, even if that requires giving the statutory provision a strained meaning, or narrower or wider meaning, than what appears on the face of it. It is only when all efforts to do so fail should the court declare a statute to be unconstitutional.

34. The law is, therefore, well-settled that the court would start with the presumption that the Act is constitutionally valid, if need be certain provisions of the Act can be read down to uphold its validity. However, at the same time if the State Legislature lacks the legislative competence and enacts a law on a subject which it is not entitled to do, this court will have no hesitation in striking down it. If two views are possible, this court can clarify which is the view which should be taken so that the validity of the Act is upheld. We must remember that the legislation has been enacted with a view to levy tax to generate revenue for the State which revenue is to be utilized by the State for its development. Therefore, unless there is no other option left, but to hold the Act unconstitutional, the effort of this court would be to read the provisions in a manner that the Act is held to be constitutional. It is in light of these principles that we now proceed to examine each of the separate arguments raised by the parties.

Whether the State has exceeded its legislative competence:

35. It has been urged by Mr. Sudhir Nandrajog, learned senior counsel appearing

on behalf of the petitioners, that entry 54 of List II empowering the State to levy tax on the sale or purchase of goods is expressly subject to entry 92A and, therefore, the State cannot levy any tax on sale or purchase of goods which takes place in the course of inter-State trade or commerce. He further submits that in view of the provisions of article 269(3) and article 286 of the Constitution of India, the State has no power to impose tax on the sale which takes place outside the State or in the course of inter-State trade or commerce, or in the course of import or export of goods. This legal position is not contested by Dr. Saraf, learned senior counsel for the State.

36. According to the petitioners, the definitions of "business", "sale", "sale price", "turnover" and "works contract" in the TVAT Act is very different from the definitions in the CST Act and it is contended that in terms of the TVAT Act, inter-State sales and sales which amount to import/export have not been excluded and, therefore, the State of Tripura has acted beyond its legislative competence and has imposed tax on the sale of goods taking place during inter-State trade and commerce, etc., and as such, the provisions are unconstitutional. He also submits that goods of special importance in terms of sections 14 and 15 of the CST Act have not been exempted from tax and, therefore, the legislation is constitutionally invalid. Further, it is submitted that section 4 does not provide what deductions and in what manner are permissible, and, therefore, the "turnover" as defined includes goods which are otherwise not taxable by the State Legislature. It is further contended that there is no method at the stage of deducting taxes at source for determining the taxable turnover. According to the petitioners, the scheme of the TVAT Act is such that section 4 starts with a non obstante clause. It is this section which is applicable in the case of works contract and since it starts with a non obstante clause, the State cannot rely upon the other provisions of the Act such as section 41 and read them in section 4 .

37. We shall deal with the specific challenge to each provision separately, but firstly we shall deal with the overall scheme of the Act. The contention of the petitioners is that section 4 alone deals with works contract and a reading of section 4 shows that it does not in any manner exclude those sales which take place outside Tripura or in the course of inter-State trade or commerce, or in the course of import of the goods out of or into the territory of India.

38. It is further contended that section 5(1) and 5(2) are applicable only in cases of normal sales and only section 5(2)(c) is applicable in relation to works contract and, therefore, again there is no provision excluding those sales which are not within the legislative competence of the State.

39. A distinction is sought to be drawn between section 5(2)(a) and (b) and 5(2)(c) on the ground that section 5(2)(a) and (b) are applicable only in cases of normal sales and 5(2)(c) is applicable only in cases of deemed sales. On this basis, it is urged that the State has levied tax on sales which it is not competent to do so. With regard to section 41 , it is urged that this is only a reiteration of

the legal provision, but does not have any concrete effect because in contradistinction to section 5(2)(b) , it is not made applicable specifically to works contract. It is thus contended that section 41 cannot be incorporated either in section 4 or in section 5(2)(c) . It is also submitted that section 41 shall come into operation only at the stage of calculation of tax and that is only an arithmetical exercise. On this basis, it is contended that the entire Act insofar as it relates to imposition of sales tax on works contract is unconstitutional and beyond the legislative competence of the State.

40. On the other hand, Dr. Saraf contends that if the entire Act is read holistically, then every portion of the TVAT Act falls into place. His first submission is that section 41 of the TVAT Act is all-encompassing and provides that no value added tax shall be imposed under the Act where a sale takes place in the course of inter-State trade and commerce or in the course of import of goods into the territory of India or export of goods outside the territory of India. It is submitted that section 41 starts with a non obstante clause and since this is a later provision, it will prevail over the non obstante clause in section 4 . He submits that the intention of the Legislature is clearly set out in section 41 that all transactions referred to in section 41 are taken out of the purview of every other provision of the TVAT Act. He submits that the State has no authority to impose tax in respect on any such transaction and the Legislature being aware of the constitutional provision and the law laid down by the apex court had enacted section 41 in this manner. Therefore, according to him, all such transactions relating to inter-State trade or commerce or import or export of goods or transaction taking place outside the State of Tripura are not covered by the definitions of "sale", "sale price", "turnover", etc., etc.

41. He further submits that "dealer" has been defined u/s 2(8) of the TVAT Act and includes a person engaged in business of transfer of property in goods involved in the execution of works contract. Therefore, a person engaged in a works contract is a "dealer". He, therefore, submits that section 3 is applicable in respect of such dealer also. According to him, section 4 is specifically applicable only to works contract and, therefore, the "non obstante" clause has been used in the beginning. His submission is that section 5 is applicable to all dealers including those dealers who are engaged in works contract. It is submitted that section 5(2)(a) and (b) relate to deductions in respect of sale of goods exempted from tax in Schedule III and sale of goods covered by sections 3 , 4 and 5 of the CST Act. He, therefore, submits that the deductions provided in clauses (a) and (b) are applicable to all sales including deemed sales which take place during the execution of works contract. It is contended that clause (c) of sub-section (2) of section 5 is applicable only in case of works contract and provides for an additional deduction in respect of labour services and other like charges. According to him, if his submission is accepted, then the whole Act becomes a viable and constitutional legislation.

42. As far as the scheme of the Act is concerned, we are of the considered view

that section 41 of the Act which starts with a non obstante clause shall permeate into each and every provision of the Act. The Legislature must be expected to be aware of its limitations and, therefore, enacted a non obstante clause that no value added tax would be imposed under the Act where any sale or purchase takes place in the course of inter-State trade or commerce or in the course of import of goods into the territory of India or export of goods outside the territory of India. Section 41(2) makes the matter further clear because it clearly lays down that the issue whether a sale took place outside the State of Tripura or in the course of inter-State trade and commerce or in the course of import or export has to be determined in accordance with sections 3 , 4 and 5 of the CST Act, 1956. Section 41 is in two parts. The first part lays down that notwithstanding anything else having been stated in the rest of the Act, no tax would be imposed under the Act on certain sales. In sub-section (2), it has further been clarified that the provisions of sections 3 , 4 and 5 of the CST Act would come into play to decide the issue as to where and how the sale has taken place. These matters shall be determined in accordance with the Central Act. It is thus clear that the Legislature was aware of the limitations imposed upon it by the constitutional provisions as well as the provisions of the Central Sales Tax Act. The Legislature thereafter took a conscious decision to have one section which would override all other provisions of the Act. If the plea of the petitioners is to be accepted, then in the definitions of "sale", "sale price", "turnover", "taxable turnover", etc., etc., these conditions should have been specifically mentioned at each and every stage. That would have made the legislation prolix and ungainly. It is thus obvious to us that section 41 has overriding effect.

43. No doubt, section 4 also starts with a non obstante clause. Section 4 only deals with taxes on deemed sales and it has been urged on behalf of the petitioners that since this is a specific section dealing with deemed sales, the non obstante clause in section 4(1) will prevail over the non obstante clause in section 41 . We are unable to accept such argument. As already held by us above, the effort of the court should not be at nitpicking, but there should be a conscious effort to uphold the validity of the Act. In our considered view, the non obstante clause in section 4 is relatable to other sections of the Act and is used in contradistinction to normal sales. The purpose of section 4(1) is to make execution of works contract, deemed sales in spite of other provisions in the Act. On the other hand, section 41 clearly lays down that no value added tax can be imposed under the TVAT Act in respect of certain sales or purchase which are beyond the legislative competence of the State. This provision will apply to all sales whether normal or deemed. When the two provisions are read together and harmonized, it is more than obvious to us that section 41 will prevail over section 4(1) .

44. Once we read the provisions of section 41 into each and every provision of the Act, order and sense is brought into each and every provision of the Act. It has been contended that if this contention is accepted, then the provisions of section 5(2)(b) are otiose and unnecessary. On first blush, this argument seems

attractive because if section 41 is to permeate through each and every section, then what was the need of bringing in section 5(2)(b) . Here also we are of the view that the State legislative being aware of its limitations while levying tax on sales again by way of abundant precaution repeated what sales were not to be included in the taxable turnover. Section 41 deals with sales not liable to tax and section 5(2)(b) only provides that such sales would not be included while calculating the taxable turnover of the dealer. According to us, there is no merit in the contention of the petitioners in this regard.

45. Section 2(8) of the TVAT Act defines "dealer" and includes a host of persons in the list of dealers. u/s 2(8)(i) , a person engaged in a works contract is also a dealer.

46. Section 3 provides that every dealer whose taxable turnover exceeds the taxable limit or who is a registered dealer should pay tax. This section is obviously applicable to every dealer including a dealer engaged in works contract. Section 4 levies tax specifically on deemed sales and is applicable only in the case of works contract. It has no application to normal sales. The dispute is with regard to section 5 . Section 5(1) provides that the tax payable by a dealer u/s 3 shall be levied on its taxable turnover of sales. According to us, "dealer" will include all types of "dealers" defined in section 2(8) including a dealer engaged in works contract. Section 5(2) provides that while calculating the taxable turnover of sales in relation to a dealer, certain sales shall be exempted including the sales which are beyond the legislative competence of the State. We are in agreement with the contention raised by Dr. Saraf that sub-section (2) of section 5 is applicable to all types of dealers and all types of sales including works contracts. However, clause (c) of sub-section (2) is only applicable to works contract and provides for deductions for labour services and other like charges in case of turnover of transfer of property in goods relating to works contract.

47. One of the main contentions raised on behalf of the petitioners is that section 4 is a complete code in itself dealing with works contracts. It is contended that since it starts with a non obstante clause, works contract are covered only u/s 4 and not under any other sections. It is submitted that since section 4 is a complete code, the provisions of section 5(1) and 5(2)(a) and (b) cannot apply to works contract. We are unable to accept this contention. Section 4(1) only provides that notwithstanding anything contained elsewhere in the Act, transfer of property in goods involved in the execution of works contract shall be deemed to be sale of goods and liable to tax. At this stage, we are not concerned with the proviso because that is only for the purpose of accounting. The Explanation to section 4(1) defines property in goods and provides that it shall be the aggregate of the goods received or receivable by the dealer for valuable consideration. This does not, in our opinion, define "turnover", but only defines what is property in goods.

48. The transfer of any right to use any goods has also been made taxable when

such transfer takes place in respect of a works contract. Sub-section (3) of section 4 provides that the person making payment to the dealer executing the works contract shall deduct from the payment such amount towards sales tax not being more than the total tax payable by the dealer.

49. Section 4 makes works contract taxable and has defined various aspects of a works contract. Section 4(3) provides for deduction of tax at source. The tax is, however, payable in terms of section 5 and the taxable turnover has to be calculated in terms of section 5 . No doubt, the provisions of section 4 will have to be taken into consideration while calculating the taxable turnover, but the calculation of the taxable turnover has to be in terms of section 5(2)(a) and (b) like in case of all sales including deemed sales. There is a further safeguard in respect of works contract and section 5(2)(c) allows more deductions in terms of the judgment of the apex court in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

. We are, therefore, of the view that if the entire Act is read as a whole, then it is more than apparent that the Legislature has, in fact, been extra careful that it does not impose tax on any sales not falling within its jurisdiction and thus, it has excluded those sales both u/s 5(2) and u/s 41 .

50. Therefore, we in our considered view, taking a holistic approach, the provisions of the Tripura Value Added Tax Act are within the legislative competence of the State.

51. We shall now deal with the individual arguments relating to each separate provision of the Act.

Whether imposition of tax under the TVAT Act is in violation of sections 14 and 15 of the CST Act:

52. Section 14 of the CST Act declares certain goods to be of special importance in inter-State trade or commerce. Section 15 of the CST Act provides that every sales tax law of a State insofar as it authorizes or imposes tax on the sale and purchase of declared goods should comply with certain conditions. The first condition is that the tax leviable under the State law should not be more than five per cent (earlier four per cent). Section 15(b) provides that where a tax has been levied under the State law on any declared goods and later such goods are sold in the purchase of inter-State trade or commerce and tax is paid under the CST Act for the inter-State transaction, then the dealer shall be entitled to get the amount of tax paid under the State law reimbursed.

53. It has been urged on behalf of the petitioners that in

Gannon Dunkerley & Co. v. State of Rajasthan (1993) 88 STC 204 (SC) (1993) 1 SCC 364

, it has been clearly laid down that the State is not entitled to levy tax on the exempted goods including those mentioned in sections 14 and 15 of the CST

Act. Reference in this behalf has been made to para 48 of the judgment in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

which reads as follows (page 235 in 88 STC):

48. We may, however, make it clear that apart from the deductions referred to above, it will be necessary to exclude from the value of the works contract the value of the goods which are not taxable in view of sections 3 , 4 and 5 of the Central Sales Tax Act and goods covered by sections 14 and 15 of the Central Sales Tax Act as well as goods which are exempt from tax under the sales tax legislation of the State. The value of goods involved in the execution of a works contract will have to be determined after making these deductions and exclusions from the value of the works contract.

54. It is contended that the apex court has laid down that the State is not entitled to levy tax on the value of the goods which are not taxable under sections 3 , 4 and 5 of the CST Act or goods covered by sections 14 and 15 of the CST Act as well as goods which are exempt from tax under the State legislation. Relying upon these observations, it is urged that the Supreme Court has clearly held that transaction falling within the ambit of sections 14 and 15 of the CST Act are to be deducted while calculating the value of the transfer of property in goods in a works contract under the TVAT Act and since the State law does not provide for such exemption, it is violative and against the scheme of the Central Act and, therefore, liable to be struck down. This argument may seem attractive when para 48 of the judgment in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

is read in isolation. However, before coming to

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

, we may make reference to the judgment of the apex court in

Builders Association of India v. Union of India (1989) 73 STC 370 (SC) (1989) 2 SCC 645

. This is a Constitution Bench judgment of the apex court wherein the apex court upheld the constitutionality of the 46th Amendment permitting the State to levy sales tax on the transfer of property in goods involved in the execution of a works contract. In para 30, the apex court held as follows (page 394 in 73 STC):

30.... The restrictions and conditions contained in section 15 of the Central Sales Tax Act, 1956, on the power of the States to levy tax on the sale of declared goods apply equally and fully to transfer of property in goods under works contracts, even as they apply to ordinary sales. Therefore, if there is a transfer of property in declared goods--for example steel products--in the process of execution of works contract, the State can levy tax only at four per cent and only at one stage.

...

55. It is thus obvious that the Constitution Bench held that the State could levy tax up to four per cent as was then provided for under law. Even in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364 in para 41

, the apex court held as follows (page 231 in 88 STC):

41. ... So also it is not permissible for the State Legislature to impose a tax on goods declared to be of special importance in inter-State trade or commerce u/s 14 of the Central Sales Tax Act except in accordance with the restrictions and conditions contained in section 15 of the Central Sales Tax Act.

56. In para 51 of the

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

while giving its conclusions, the apex court in conclusion No. (2) only gave the following directions (page 237 in 88 STC):

51. (1) . . .

(2) The provisions of sections 3 , 4 and 5 and sections 14 and 15 of the Central Sales Tax Act, 1956, are applicable to a transfer of property in goods involved in the execution of a works contract covered by article 366(29A)(b) .

57. It is thus obvious that the apex court held that the State had the power to levy sales tax on goods declared to be of special importance in inter-State trade or commerce u/s 14 of the CST Act if the tax levied does not exceed the limit laid down in section 15 of the CST Act. Para 48 of the judgment has to be read in the context of para 41 and in the context of the observation made by the Constitution Bench in

Builders Association''s case (1989) 73 STC 370 (SC) (1989) 2 SCC 645

. It is well-settled law that judgments are not to be interpreted or construed like statutes. The words in a judgment must be read and understood in the context in which they have been issued and one stray word or phrase cannot be read in isolation. In this behalf, reference may be made to the judgment of the apex court in

Som Mittal v. Government of Karnataka (2008) 3 SCC 574

.

58. A bare reading of the provisions of the CST Act clearly shows that sections 14 and 15 of the CST Act do not prohibit the State from imposing tax on goods declared to be of special importance in inter-State trade or commerce. Therefore, the State can levy the tax, but the tax shall not be above five per cent (earlier four per cent). In the TVAT Act, Schedule II of the Act deals with goods taxable at five per cent. Prior to May 4, 2011, the rate was four per cent. Entry 35

provides that declared goods as specified in section 14 of the CST Act, 1956 will be taxed at five per cent. Therefore, this is in consonance with the provisions of the CST Act and we see no conflict whatsoever.

Whether the definitions of "sale", "sale price" and "turnover" under sections 2(25) , 2(26) and 2(35) under the TVAT Act do not exclude sales which have taken place outside Tripura and is, therefore, illegal.

59. In view of the detailed discussion made in respect of the constitutional validity of the Act, it is apparent that section 41 has to be read into each and every definition. Section 41(2)(i) of the TVAT Act specifically excludes sales which have taken place outside Tripura and, therefore, on this ground the definition of "sale" cannot be held to be invalid. Not only section 41 , but section 5(2) also excludes sales which have taken place outside Tripura and, therefore, there is no merit in this contention. The similar contention with regard to the constitutional validity of sale price (section 2(26)) and turnover (section 2(35)) are without any merit because the State legislation has taken care to ensure that it has not levied tax on those sales which it was not competent to do so.

Whether the definitions of "sale", "sale price" and "turnover" are ultra vires inasmuch as they do not exclude labour and services and other charges.

60. The contention of the petitioners is that the definition of the aforesaid provisions read with sections 4 and 5 of the Act indicate that the State has not excluded from the ambit of these definitions, the cost of labour, services and other charges and, therefore, the same is violative of article 366(29A) of the Constitution of India and liable to be struck down.

61. As far as sale price is concerned, the definition of "sale" itself provides that in respect of transfer of property in goods involved in execution of a works contract, the value of the sale price shall be calculated by deducting from the amount of valuable consideration paid or payable, the amount representing labour and other charges incurred and profit occurred not in connection with transfer of property in goods for execution of such works contract. Thus, the definition itself excludes labour and other charges. Section 5(2)(c) which is specifically applicable to works contract specially provides that charges towards labour, services and other like charges shall be deducted from the gross turnover while calculating the taxable turnover. Tax is to be imposed on the taxable turnover. No tax is leviable on the sale price, but only on the taxable turnover and the same is in consonance with the judgment in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

. Here it would be pertinent to mention that in paragraphs 45 and 47 of

Gannon Dunkerley''s (1993) 88 STC 204 (SC) (1993) 1 SCC 364

judgment, the apex court held as follows (pages 233 and 234 in 88 STC):

45. . . . We are, however, unable to agree with the contention urged on behalf of

the contractors that the value of such goods for levying the tax can be assessed only on the basis of the cost of acquisition of the goods by the contractor. Since the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works and not the cost of acquisition of the goods by the contractor

...

...

47.... The charges mentioned in item No. (vi) cannot however, be excluded. The position of a contractor in relation to a transfer of property in goods in the execution of a works contract is not different from that of a dealer in goods who is liable to pay sales tax on the sale price charged by him from the customer for the goods sold. The said price includes the cost of bringing the goods to the place of sale. Similarly, for the purpose of ascertaining the value of goods which are involved in the execution of a works contract for the purpose of imposition of tax, the cost of transportation of the goods to the place of works has to be taken as part of the value of the said goods. . .

62. It has been urged on behalf of the petitioners that the definition of "sale price" in the TVAT Act conflicts with the definition of "sale price" in the CST Act inasmuch as under the Central Act, the cost of freight, cost of delivery and cost of installation is specifically excluded where it is separately charged, whereas under the TVAT Act these are included. It has also been urged that under the TVAT Act "sale price" includes the service components such as, freight as well as excise duty, special excise duty and other duties on taxes and, therefore, the inclusion of the service components in the sale price is in conflict with para 47 of the

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

. Similarly, inclusion of trade discount, according to the petitioners, is contrary to law. It has also been urged that levy of tax which can be statutorily passed on does not form part of the sale consideration. Reference has been made by the petitioners to the judgment of the apex court in

Anand Swarup Mahesh Kumar v. Commissioner of Sales Tax (1980) 46 STC 477 (SC) (1980) 4 SCC 451

. We are not at all impressed with this argument because the judgment referred to is in relation to market fees and not in relation to sales tax. We are also of the view that these are the matters which do not go into the constitutionality of the legislation and if there is some item which is not amenable to tax, it is for the dealer to satisfy the assessing authority that no tax is payable on the sale. While deciding the constitutionality of the provisions, we cannot don the role of the assessing officer and whether a certain article is to be included or not to be included in the sale price, taxable turnover is to be decided by the assessing officer.

63. It has been urged by Sri Nandrajog that section 2(26)(a) of the TVAT Act which defines "sale price" in respect of transfer of property in goods in works contract only provides for deduction of the amount representing labour and other charges incurred and profit occurred not in connection with transfer of property in goods. He submits that the charging section 4 does not provide for deduction and the manner of deduction and, therefore, the definition is violative of the judgment in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

which clearly lays down what are the deductions to be allowed in the case of works contract. It would be pertinent to mention here that in the opening portion of the judgment we have culled out the portions of paragraphs 47 and 51 of the judgment in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

and the apex court itself has used the words "labour and services" and has also held that labour and services would cover the cost of various items at (a) to (h) in para 47. If we read section 2(26)(a) , section 4 and section 5(2)(c) together, then it is obvious that when the tax is to be levied on the taxable turnover in relation to works contract, the charges towards labour, services and other like charges are to be excluded subject to conditions which may be prescribed. If the provisions are read together, it is obvious that the Legislature was aware of the judgment and, therefore, inserted a clause that charges towards labour, services and other like charges would be deducted. Labour, services and other like charges would mean the charges as specifically detailed in

Gannon Dunkerley''s judgment (1993) 88 STC 204 (SC) (1993) 1 SCC 364

where also the apex court only used the phrase "labour and services", but went on to hold that this would cover as many as 8 (eight) different heads, such as, labour charges for execution of the works; amount paid to a sub-contractor for labour and services; charges for planning, designing and architect''s fees; hiring or other charges paid for service of machinery and tools used in the works contract; cost of consumables used in the execution of works contract the property in which was not transferred; cost of establishment of the contractor relatable to the supply of labour and services; other similar expenses relatable to Supply of labour and services and profit earned by the contractor to the extent it is relatable to supply of labour and services. Each and every eventuality cannot be set out in the Act and it is for the assessing officer to see in each case whether an item is to be excluded or deducted. While testing the constitutional validity, we have to only see whether the provisions are in consonance with the Constitution. The judgment in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

laid down the guidelines which should be followed. The Act is in consonance with the guidelines and it is too much to expect that each and every exclusion has to be mentioned in the Act. We may make it clear that the assessing officer while deciding what are the expenses falling under the head of labour, services and other charges which have to be excluded will have to follow the law laid down by the apex court in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

.

64. The judgment of the Orissa High Court in

Larsen & Toubro Limited v. State of Orissa (2012) 48 VST 435 (Ori)

is distinguishable inasmuch as the Orissa Act provided that amount charged towards labour, services and other like charges, if not ascertainable from the terms and conditions of the contract or the books of account maintained, would be calculated at the prescribed rate and while determining the taxable turnover, it was provided that the expenses would be determined at the rate specified in the appendix. The Orissa High Court held that the law in the field of taxation must be clear and, therefore, issued the following directions (page 442 in 48 VST):

17. Therefore, absence of provisions for various deductions in section 11(2)(c) and rule 6(e) in line with the judgment of the honourable Supreme Court in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

certainly creates uncertainty, so far levy of tax on works contract is concerned. To avoid such uncertainty, the State Government is directed to amend rule 6(e) to bring in line with judgment of the honourable Supreme Court in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

vis-a-vis section 11(2)(c) of the OVAT Act. Till such amendment is made to rule 6(e) of the OVAT Rules, the Commissioner of Sales Tax is directed to issue suitable instructions to all the taxing authorities to allow various deductions from the gross turnover to arrive at the taxable turnover in respect of works contract in terms of decision of the honourable Supreme Court in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

.

65. The Orissa High Court did not strike down the Rules, but only directed the State Government to amend the Rules and further ordered that till such amendment was made, the deductions would be in line with the judgment of the apex court in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

.

66. As held by us above, the Act and the Rules cannot be expected to list each and every deduction which is permissible. Therefore, we only propose to issue a direction that the assessing officer must allow all deductions which flow from the judgment in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

. The Rules need not be amended.

No methodology in determining the taxable turnover at the stage of deduction u/s 4(3) :

67. According to the learned counsel for the petitioners when deduction is to be made u/s 4(3) of the TVAT Act, the person who has awarded the contract has to make the deduction, but such deduction cannot exceed the total tax payable by the dealer (contractor). It is urged that there are no guidelines for the person awarding the contract as to how the deduction or the payment should be made. On the other hand, Dr. Saraf contends that the guideline is implicit in section 4(3) inasmuch as the amount to be deducted cannot exceed the taxable turnover. He submits that it is for the dealer to submit the documents to the person who is making payment as to which deductions are to be made. The person making the payment should accept the deductions as claimed by the dealer at their face value and thereafter make the deductions.

68. Whenever tax is deducted at source, some sort of calculation has to be done by the person liable to deduct the tax. In case, the dealer places material before the person making the payment claiming deductions, then the person making the payment should give the dealer benefit of such deductions and would not be liable to any penalty, criminal or otherwise, if later the deduction claimed by the dealer is found to be false. The dealer would, however, in such a case be liable to both civil and criminal liability under law. Therefore, it cannot be said that there is no procedure or method prescribed and the contention is rejected.

69. It is also contended on behalf of the petitioners that no guideline has been laid down as to how this tax is to be deducted and, therefore, the provision is illegal.

70. On the other hand, Dr. Saraf, learned counsel for the State, contends that the guidelines are contained in the section itself inasmuch as section 4(3) clearly provides that tax to be deducted shall not be more than the total tax payable by the dealer. He further submits that since it is the Legislature which has laid down this guideline, the executive is bound to follow the same and this cannot be said to be excessive delegation of powers. He has relied upon the judgment of the apex court in

Consumer Action Group v. State of T.N. (2000) 7 SCC 425

, wherein the apex court held as follows:

18. The catena of decisions referred to above concludes unwaveringly in spite of a very wide power being conferred on the delegatee that such a section would still not be ultra vires, if guidelines could be gathered from the preamble, objects and reasons and other provisions of the Acts and Rules. In testing the validity of such provision, the courts have to discover, whether there is any legislative policy, purpose of the statute or indication of any clear will through its various provisions. If there be any, then this by itself would be a guiding factor to be exercised by the delegatee. In other words, then it cannot be held that such a power is unbridled or uncanalised. The exercise of power of such delegatee is controlled through such policy. The fast-changing scenario of economic, social order with scientific development spawns innumerable situations which the Legislature possibly could not foresee, so the delegatee is entrusted with power to meet such exigencies within the inbuilt check or guidance and in the present case to be within the declared policy. So the delegatee has to exercise its powers within this controlled path to subserve the policy and to achieve the objectives of the Act. . .

71. We are in agreement with Dr. Saraf that the outer-limit of the tax to be deducted has been clearly laid down the guidelines which are contained in the section itself and, therefore, this is not a case of excessive delegation or lack of guidelines.

72. Rule 7 as amended on August 1, 2012, clearly prescribes that deduction shall be at the rate of eight per cent per annum. Earlier the rule did not prescribe a rate, but left it open to the Government to notify the rates from time to time. The defect if any, has, therefore, been rectified by the State itself. Furthermore, even under the Act, a clear guideline was laid down that deduction would not be over and above the total tax payable. There-fore, the upper limit of deduction was clearly indicated.

Whether freight is covered in the cost of goods:

73. It has been urged on behalf of the petitioners that unlike the Central Act, the TVAT Act does not exclude the cost of freight and delivery and, therefore, it is against the judgment of the apex court in

Gannon Dunker-ley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

. By including the cost of freight and delivery, the State is imposing taxes on that value which it is not entitled to do so. In this behalf reference may be made to the following portion of the judgment in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364 (pages 232 and 233 in 88 STC)

:

45. . . . We are, however, unable to agree with the contention urged on behalf of

the contractors that the value of such goods for levying the tax can be assessed only on the basis of the cost of acquisition of the goods by the contractor. Since the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works and not the cost of acquisition of the goods by the contractor. We are also unable to accept the contention urged on behalf of the States that in addition to the value of the goods involved in the execution of the works contract the cost of incorporation of the goods in the works can be included in the measure for levy of tax. Incorporation of the goods in the works forms part of the contract relating to work and labour which is distinct from the contract for transfer of property in goods and, therefore, the cost of incorporation of the goods in the works cannot be made a part of the measure for levy of tax contemplated by article 366(29A)(b) .

74. In para 46, the apex court dealt with the arguments raised by the counsel for the contractors and argument No. (vi) was that transportation charges for transport of goods to the place of works should be excluded. The apex court repelled this contention in para 47 of the said judgment and held as follows (page 234 in 88 STC):

47.... The charges mentioned in item No. (vi) cannot, however, be excluded. The position of a contractor in relation to a transfer of property in goods in the execution of a works contract is not different from that of a dealer in goods who is liable to pay sales tax on the sale price charged by him from the customer for the goods sold. The said price includes the cost of bringing the goods to the place of sale. Similarly, for the purpose of ascertaining the value of goods which are involved in the execution of a works contract for the purpose of imposition of tax, the cost of transportation of the goods to the place of works has to be taken as part of the value of the said goods. . .

75. The apex court has specifically permitted freight to be included in the cost of the transfer of property in goods. Merely because the Central Government in its legislation has excluded freight would not make the State legislation unconstitutional. No limitation or restriction has been laid by the Parliament in respect of the States in this behalf.

Whether definition of "turnover" is illegal:

76. In respect of section 2(35) , "turnover", it is contended that the definition of "turnover" means the aggregate amount for which goods are either purchased or brought and includes all sales including those which are not taxable by the State. As held by us above, section 41 will have to be read into every definition and, therefore, this contention is without merit. Even otherwise, the tax is being levied on the taxable turnover and in case of works contract, the "taxable

turnover" is defined in section 5(2) and section 5(2)(c) specifically excludes the charges towards labour, services and other like charges. The definition of "turnover" in section 2(35) does not provide for the manner of determination of the transfer of property in goods involved in the execution of a works contract. However, section 4(1) lays down that transfer of property in goods involved in a works contract shall be a deemed sale and liable to tax at the rate specified in the Schedule. The proviso to section 4 lays down the manner of determining the turnover in respect of transfer of property in goods involved in execution of a works contract. It is contended on behalf of the State that since section 2(35) does not specifically provide for the manner of determination of turnover in respect of transfer of property in goods involved in a works contract, the proviso to section 4(1) was incorporated which specifically deals with works contract and provides what are the matters which have to be included or excluded while determining the value of the transfer of goods involved in the execution of a works contract. However, what is to be taxed is provided for in section 5(2)(c) and since section 5(2)(c) is totally in consonance with the provisions of the Constitution, the Central Act as well as the judgment in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

, the contention of the petitioners cannot be accepted. The judgment of the Karnataka High Court in

Shetty Leasing (India) Ltd. v. Union of India (1996) 100 STC 533 (Karn.)

is not at all applicable to the facts of the present case. In that case, the court was concerned with the definition of "total turnover" without there being any provision like section 5(2)(c) or section 41 . As such, this judgment is not applicable.

Whether the provisions of section 5(2)(c) of the TVAT Act suffer from the vice of excessive delegation:

77. It is contended on behalf of the petitioners that since the expression "other charges" in section 5(2)(c) has not been defined, the Legislature has delegated its powers to the executive and even worse to the assessing officer and as such, section 5(2)(c) should be struck down. Reliance has been placed on the judgment of the Patna High Court in

Larsen & Toubro Ltd. v. State of Bihar (2004) 134 STC 354 (Pat)

. In that case, the Patna High Court was dealing with the phrase "taxable turnover" and the definition reads as follows (pages 368 and 369 in 134 STC):

19.... According to section 21(1) , the taxable turnover of a dealer shall be that part of his gross turnover which remains after deduction therefrom--

(a)(i) in case of the works contract the amount of labour and any other charges in the manner and to the extent prescribed.

78. Thereafter, the Patna High Court held that since the State had excluded the amount of labour and any other charges in the manner and to the extent prescribed, it should have laid down the guidelines in this behalf. Rule 13A of the Bihar Sales Tax Rules provided that in case the dealer fails to produce accounts or the deductions are unreliable, then deduction would be made on a fixed percentage basis laid down in rule 13A. The Patna High Court held that rule 13A did not define "other charges" and when the Act lays down that the charges can be deducted in the manner and to the extent prescribed, the Rules should have made specific provision for this. Reliance has also been placed on the judgment of the apex court in

State of Jharkhand v. Voltas Ltd., East Singhbhum (2007) 7 VST 317 (SC) (2007) 9 RC 358 (2007) 9 SCC 266

, wherein the judgment of the Patna High Court with regard to the interpretation to rule 13A was upheld.

79. As far as the decision of the Patna High Court in

Larsen & Toubro''s case (2004) 134 STC 354 (Pat)

, is concerned, there is a clear distinction between the TVAT Act and the Bihar Finance Act. Section 21 of the Bihar Finance Act provided for deduction of labour and other charges in the manner and to the extent to be prescribed. Rule 13A was framed to give effect to section 21 and this also did not provide the manner and extent, and therefore, the Patna High Court and later, the apex court held the provision to be invalid.

80. In

Devi Dass Gopal Krishnan v. State of Punjab : AIR 1967 SC 1895 (1967) 20 STC 430 (SC)

, the apex court held that the legislative power cannot be effaced in favour of another agency either in whole or in part beyond the permissible limits of delegation where an arbitrary power is conferred on the executive by the Legislature, then the same must be struck down. This judgment has no application in the present case since the guideline is contained in the Act itself and there is no excessive delegation.

81. The apex court in

Delhi Race Club Ltd. v. Union of India (2012) 347 ITR 593 (SC) (2012) 8 SCC 680 (2012) 53 VST 1 (SC) (2012) 16 GSTR 1 (SC)

, after discussing the entire law held as follows (para 20, page 12 in 53 VST):

30. From the conspectus of the views on the question of nature and extent of delegation of legislative functions by the Legislature, two broad principles emerge, viz. (i) that delegation of non-essential legislative function of fixation of rate of imposts is a necessity to meet the multifarious demands of a welfare

State, but while delegating such a function laying down of a clear legislative policy is pre-requisite, and (ii) while delegating the power of fixation of rate of tax, there must be in existence, inter alia, some guidance, control, safeguards and checks in the concerned Act. It is manifest that the question of application of the second principle will not arise unless the impost is a tax. Therefore, as long as the legislative policy is defined in clear terms, which provides guidance to the delegate, such delegation of a non-essential legislative function is permissible. Hence, besides the general principle that while delegating a legislative function, there should be a clear legislative policy, these judgments, which were vociferously relied upon before us, will have no bearing unless the levy involved is tax.

82. As far as the TVAT Act is concerned, section 5(2)(c) permits deduction of labour, services and other like charges subject to such conditions as may be prescribed. As discussed hereinafter, the prescription is not necessary since the words "may be prescribed" have been used. This will mean that under the TVAT Act, the dealer just has to satisfy the assessing officer that the deductions are permissible in accordance with the judgment laid down in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

and nothing further has to be done. Therefore, we find no merit in the contention that section 5(2)(c) suffers from the vice of excessive delegation.

Whether section 7 of the TVAT Act is illegal:

83. It is contended on behalf of the petitioners that whereas section 7 of the TVAT Act lays down that the value added tax payable by a dealer shall be levied on its taxable turnover at such rate which is specified in Schedules II(a), II(b), II(c), VI, VII and VIII no such provision is made in respect of transfer of property in connection with a works contract. At this juncture, it would be pertinent to mention that Schedule II(a) is the list of goods taxable at five per cent Schedule II(b) is the list of goods taxable at 13.5 per cent. Schedule II(c) is the list of goods taxable at two per cent, Schedule II(d) is the list of goods kept outside VAT, Schedule III deals with exempted goods, Schedule IV deals with negative list of items of capital goods for input-tax credit, Schedule V deals with tax invoices, credit notes and debit notes, Schedule VI is the list of goods taxable at five per cent, Schedule VII is the list of IT products taxable at five per cent and Schedule VIII is the list of other goods taxable at five per cent. All the Schedules which levy tax have been included in section 7 . Section 7 also applies to all dealers including dealers engaged in works contract. Therefore, the rate of tax has to be on the taxable turnover of the transfer of property in goods which has taken place during the works contract. Therefore, there is no merit in this submission.

Whether there can be any deduction without Rules being framed:

84. It is contended on behalf of the petitioners that though section 4(1) provides

that tax can be levied on transfer of property in goods involved in the execution of a works contract, in the Explanation it is mentioned that the amount received or receivable shall include the value of such goods purchased, manufactured, processed, or procured otherwise by the dealer, and the cost of freight or delivery as may be incurred by such dealer for carrying such goods to the place where these are used in execution of such works contract, but shall not include such portion of the aforesaid amounts as may be prescribed. It is contended that till Rules are framed, how can the deduction be worked out and again it is submitted that this also amounts to excessive delegation as no guidelines have been laid down for the provisions to be made in the Rules. Similarly in respect of section 4(3) , it is submitted that since no rule has been framed, no deduction of tax at the time of payment is to be made and there are no guidelines in this behalf.

85. There is no manner of doubt that Explanation to section 4(1) provides that the cost of freight or delivery shall be included in the price of goods unless otherwise prescribed. However, as far as section 4(3) is concerned, the words "as may be prescribed" are relatable to the sales tax which is prescribed in the Schedule by the Legislature itself. As far as Explanation to section 4(1) and section 5(2)(c) wherein the words "as may be prescribed" are used, it would be pertinent to mention that there is a difference between the words "as may be prescribed" and the words "as prescribed". When the Legislature knowing uses of the words "as may be prescribed", it is only permitting the prescription of certain things, but is not making the prescription of these things necessary before the imposition of tax.

86. The apex court in

Orissa State (Prevention & Control of Pollution) Board v. Orient Paper Mills (2003) 10 SCC 421

was dealing with a similar provision where the words used were "as may be prescribed". The apex court discussed this issue in the following manner:

12. Section 19 says ''. . . such manner as may be prescribed'' and not ''in the manner prescribed'' or ''. . . in the prescribed manner''. The expression used leaves some lever or play in the working of the provision. We would like to lay emphasis on the use of the word ''as'' which is significant. The manner is dependent upon ''as'' may be prescribed, if it is not prescribed, there is no manner available such as to be followed. The meaning of the word ''as'' has been indicated in ''Concise Oxford English Dictionary, 10th Edition, 2002'' amongst others to mean as follows:

Used in comparisons to refer to the extent or degree of something; used to indicate by comparison the way that something happens; during the time of being.

(emphasis Here italicised supplied).

In Words and Phrases, Permanent Edition, 1969, Fourth Edition, in general amongst others, at page 514, its meaning has been indicated as follows:

"As" means "to the extent", "in the manner" and "when"; and may be employed to indicate a combination of time with extent or manner. Moore v. Coates Dc Mun App 40 A2d 68, 70.

(emphasis Here italicised supplied)

It is further indicated to mean importing a contingency and at page 520, it is indicated as follows:

When, importing a contingency, a devise to certain children "as" they arrive at the age of 21 means "when" they arrive at such age.

(emphasis Here italicised supplied)

Further, we find that at page 549, the phrase ''as may be prescribed'' has been indicated to mean as follows:

''The phrase "as may be prescribed", in constitutional amendment authorizing certain cities to adopt or amend their charters, subject to such limitations as may be prescribed by Legislature, means that future legislation, as well as that existing when city first takes out or amends charter may limit its action''-- Vemon''s Ann. St. Const. Article 11 , $ 5. Dry v. Davidson Tex Civ. App., 115 S.W. 2d 659, 691.

(emphasis Here italicised supplied)

In ''Law Lexicon'' by P. Ramanatha Aiyar, 2nd Edition, reprint 2000 at page 147, it is indicated as under:

Used as an adverb, etc., means like, similar to, of the same kind, in the same manner, in the manner in which. It may also have the meaning of because, since, or it being the case that; in the character or under the name of with significance of in degree; to that extent; so far (Black''s Law Dictionary).

(emphasis Here italicised supplied)

In one of the cases decided by this court, to be referred later in this judgment, ''as may be prescribed'' has been held to mean ''if any''. It is thus clear that such expression leaves the scope for some play for the workability of the provision under the law. The meaning of the word ''as'' takes colour in context with which it is used and the manner of its use as prefix or suffix, etc. There is no rigidity about it and it may have the meaning of a situation of being in existence during a particular time or contingent, and so on and so forth. That is to say, something to happen in a manner, if such a manner is in being or exists, if it does not, it may not happen in that manner. Therefore, the reading of the provision under consideration makes it clear that manner of declaration is to be followed ''as may be prescribed'', i.e., ''if any'' prescribed.

13. Thus, in case manner is not prescribed under the rules, there is no obligation or requirement to follow any, except whatever the provision itself provides, viz., section 19 in the instant case which is also complete in itself even without any manner being prescribed as indicated shortly before to read the provision omitting this part ''in such manner as may be prescribed''. Merely by absence of rules, the State would not be divested of its powers to notify in the Official Gazette any area declaring it to be an air pollution control area. In case, however, the rules have been framed prescribing the manner, undoubtedly, the declaration must be in accordance with such rules.

. . .

20. We feel that so far as the point relating to the meaning of the word ''may'' used u/s 19 of the Act is concerned, it is not relevant for resolving the controversy we are concerned with. Once the manner is prescribed under the rules undoubtedly, the declaration of the area has to be only in accordance with the manner prescribed but absence of rules will not render the Act inoperative. The power vested u/s 19 of the Act, would still be exercisable as provided under the provision, i.e., by declaring an area as air pollution control area by publication of notification in the Official Gazette. Non-framing of rules does not curtail the power of the State Government to declare any area as air pollution control area by means of a notification published in the Official Gazette. The part of the provision ''in such manner as may be prescribed'' would spring into operation only after such manner is prescribed by framing the rules u/s 54(2)(k) of the Act. . .

21. In view of the discussion held above, in our view it would not be correct to say that simply because the rules have not been framed prescribing the manner it would render the Act inoperative. . .

87. Therefore, the mandate of the Act is that the Rules will apply if framed. If no Rules are framed, the assessee is entitled to all deductions on account of labour, services and other charges and does not have to fulfill any conditions in this regard. Once he proves that the expenses are related to labour, services and other charges as explained in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

, then the assessee shall be entitled to the deductions and will not have to fulfill any other conditions. However, now one condition has been imposed under rule 7A that in case the contractor does not maintain books of accounts, then the deductions shall be at a fixed rate.

Whether it is necessary to specify a specific rate in respect of levy of tax on transfer of property in goods involved in a works contract:

88. This argument need not detain us for much time since this matter has already been set at rest by the apex court in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

wherein the apex court held that it would be permissible for the State Legislature to tax all goods involved in the execution of a works contract at a uniform rate which may be different from the rate applicable to individual goods. However, this does not mean that there is any legal requirement that there should be a uniform rate. This contention has already been rejected by the Agartala Bench of the Gauhati High Court in

Sri Pradip Paul v. State of Tripura (2011) 41 VST 386 (Gau) (2011) 5 GLR 814

.

Whether rule 7A is invalid:

89. It is lastly contended that rule 7A inserted on August 1, 2012 is invalid and even if it is valid, it cannot be given retrospective effect. In this behalf, reliance has been placed on the judgment of the apex court in

Securities and Exchange Board of India v. Ajay Agarwal (2010) 155 Comp Cas 1 (SC) (2010) 3 SCC 765)

, wherein the apex court held as follows (paras 15 and 16, page 7 in 155 Comp Cas):

12. It is well known that the substantive laws to be applied for determination of tax liability must be the law which is in force in the relevant assessment year.

It is well-settled that law to be applied for assessment is the one which is extant in the assessment year unless there is an amendment which is made retrospective either expressly or by necessary implication. . .

90. It is contended that the rule overrides the Act. As far as the contention that rule 7A is invalid is concerned, the same has to be rejected because in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

, the apex court in para 49 held as follows (pages 235 and 236 in 88 STC):

49.... We find merit in this submission. In cases where the contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence it would, in our view, be permissible for the State Legislature to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. . .

91. Therefore, if a contractor does not maintain proper accounts or his accounts are not found worthy of credence, the assessing officer is now being issued guidelines as to what percentage of deduction he has to provide. Therefore, the

contention that rule 7A is invalid is rejected.

Whether rule 7A shall operate retrospectively:

92. It has been contended by Dr. Saraf that rule 7A is a procedural rule and is only a machinery provision providing the manner in which the tax is to be quantified. Therefore, according to him, it can be retrospective. There is no manner of doubt that procedural laws can apply retrospectively, but when even procedural laws affect the civil rights of the parties, they cannot be treated to be retrospective unless specifically made so. We have a grave doubt whether rule 7A is only a procedural rule. No doubt, it does not lay down rate of tax, but it lays down the maximum rate of deduction which an assessee is entitled to and this affects the civil rights of the assessee inasmuch as the amount of tax payable by him may increase or decrease on account of the deductions allowed/ disallowed. Therefore, the rule cannot be said to be wholly procedural. Assuming that the rule is procedural, then also in our opinion it cannot be given retrospective effect because a party who was not aware that he was bound to maintain accounts to claim deductions is now being told that the assessee cannot get deduction beyond a certain percentage. This rule, therefore, cannot be made retrospective.

93. Having said so, once we have held that the Act and the Rules are valid, it is for the assessee to prove what deductions he is entitled to. We would expect that an assessee would normally be maintaining books of account because these are necessary in the ordinary course of trade and business. No dealer engaged in a works contract can be expected to carry out his business in a proper manner without maintaining books of account. There are various laws such as labour laws, provident fund laws, and employees insurance scheme laws which statutorily require maintenance of some sort of accounts relating to payments made to labourer. Similarly, the income tax laws also require the assessee to maintain accounts if his turnover is above a certain limit. In those cases, the assessing officer would be justified in drawing an adverse inference against the assessee if the assessee does not produce the books of account. However, in case of small contractors who are not statutorily required to maintain accounts, the assessing officer may have to be more liberal. Therefore, we are clearly of the view that in all cases prior to August 1, 2012, the assessment cannot be made on the basis of rule 7A, but shall have to be made on the basis of best judgment assessment by the assessing officer keeping in view the well established principles of making best assessment.

Whether all permissible deductions must be spelt out in the Act and the Rules:

94. Mr. Somik Deb, learned counsel for some of the petitioners, has further contended that the Act and the Rules must incorporate and clearly spell out all the deductions which are the contractors entitled to in accordance with the judgment of the apex court in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

. We are not at all impressed with this argument. We fail to understand how the constitutional validity of a legislation can be challenged on this basis. In

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

, the apex court held that for the imposition of tax on the transfer of property in goods involved in a works contract to be legal and valid, certain deductions on account of expenses on labour and other charges shall have to be deducted while determining the taxable turnover of the dealer. The apex court also gave examples of what could be those charges. That list is illustrative and not exhaustive. The TVAT Act uses the phrase "labour, services and other charges" and this is a matter to be considered by the assessing officer as to whether the deduction claimed falls within the scope and ambit of the illustrations and examples given in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

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95. It is also urged that since the provisions of the TVAT Act are similar to the Rajasthan Sales Tax Act which was the subject-matter of

Gannon Dunkerley''s (1993) 88 STC 204 (SC) (1993) 1 SCC 364

judgment, the TVAT Act should be held to be invalid. This argument has been made only for the purpose of rejection since in the TVAT Act, section 5(2)(b) and section 41 are specific provisions which make it clear that the State shall not impose tax on the transfer of property in goods involved in a works contract taking place during the course of inter-State trade or commerce, import or export inside or outside the territory of India or on any sale taking place outside Tripura.

Zero rating:

96. The petitioners contend that in terms of section 8(2) of the Act, the sale of certain goods of local importance as specified in Schedule IV are taxable at zero rate and these include civil structures and building materials used in construction activity. On this basis, it is contended that no tax is leviable on works contract relating to construction of buildings. This matter does not relate to the constitutionality of the legislation, but the only question is whether in view of section 8(2) , no tax is leviable on works contract relating to construction works. This is not a matter which has to be gone into in these writ petitions. The assessee shall be at liberty to raise this issue before the assessing officer and we are not passing any orders on this aspect.

Suppression of facts:

97. On behalf of the State, it has been strongly contended that the petitioner is guilty of suppression of material facts and abuse of the process of the court. According to the State, the petitioner in W.P. (C). No. 73 of 2013 did not disclose

material facts to the court when he obtained the stay order in C.M. Application on March 22, 2013 inasmuch as he suppressed the fact that he had earlier filed other writ petitions in respect of the same or similar case. In the present writ petition, the petitioner has challenged memorandum dated June 25/30, 2005 authorizing collection of VAT at four per cent from the gross sale of a dealer engaged in works contract. The petitioner has also challenged the Notification dated September 21, 2011 whereby the rate was enhanced to six per cent. He has also challenged the notification dated November 16, 2011 levying enhanced rate of deduction at six per cent on pending contracts. The petitioner has lastly challenged the notification dated August 1, 2012 levying enhanced rate of VAT at eight per cent. The grounds of challenge have already been set out above. The petitioner has also challenged the orders of assessment and notices of demand and obtained a stay order on March 22, 2013. According to the State, the writ petitioner suppressed the fact that he had filed W.P. (C). No. 452 of 2011 wherein he had pleaded that since he is a dealer registered under the TVAT Act, he was not a service provider. In that writ petition, it was also pleaded that since the writ petitioner was paying VAT on gross value in respect of works contract, he was not liable to pay service tax. It is alleged that in the writ petition, according to the petitioner, he is not liable to pay VAT on the gross value of the contract, but claims certain deductions. It would be pertinent to mention that in the earlier writ petition, the petitioner had annexed with his petition documents to show that VAT was being deducted at the flat rate of four per cent from his bills.

98. On the other hand, according to Sri Nandrajog, learned senior counsel for the petitioner, the matter relating to the service tax was a totally different matter and had no connection with the value added tax case and, therefore, the petitioner did not make reference to the same. It is submitted that reference was made to all other litigations except one case. It would be also pertinent to mention that the petitioners during the course of the writ petition have filed another application being C.M. Application 275 of 2013 whereby they have sought to mention that they have also filed W.P. (C). No. 458 of 2010, W.P. (C). No. 452 of 2011 and W.P. (C). No. 121 of 2012. It is contended that non-mention of presentation of the said writ petitions was bona fide and not deliberate. In W.P. (C). No. 458 of 2010, the writ petitioner had prayed for quashing the orders of deduction of sales tax at source under the Tripura Sales Tax Act. He, however, admits that reference in the writ petition has also made to the provisions under the TVAT Act and Rules made thereunder. In W.P. (C). No. 452 of 2011 what was under challenge was the liability of the petitioner to pay service tax and there was no challenge to the TVAT Act and Rules and he had only stated facts and nothing more. This petition has also been decided by us along with this writ petition. We may make it clear that as far as the constitutional validity is concerned, since a number of petitions are being decided, we are entertaining the petition of all the petitioners regardless of the fact whether there is suppression of facts or not. We may, however, make it clear that every litigant

should approach this court with clean hands. No litigant should try to overreach the court. It would be apposite to refer to the judgment of the apex court in

Kishore Samrite v. State of Uttar Pradesh (2013) 2 SCC 398

, wherein the apex court dealt with this matter in details and after discussing the entire law on the subject, the apex court held as follows:

36. The party not approaching the court with clean hands would be liable to be non-suited and such party, who has also succeeded in polluting the stream of justice by making patently false statements, cannot claim relief, especially under article 136 of the Constitution. While approaching the court, a litigant must state correct facts and come with clean hands. Where such statement of facts is based on some information, the source of such information must also be disclosed. Totally misconceived petition amounts to abuse of the process of the court and such a litigant is not required to be dealt with lightly, as a petition containing misleading and inaccurate statement if filed, to achieve an ulterior purpose amounts to abuse of process of the court. A litigant is bound to make ''full and true disclosure of facts''. (Refer:

Tilokchand Motichand v. H.B. Munshi (1969) 1 SCC 110

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A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam (2012) 6 SCC 430

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Chandra Shashi v. Anil Kumar Verma (1995) 1 SCC 421

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Abhyudya Sanstha v. Union of India (2011) 6 SCC 145

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State of Madhya Pradesh v. Narmada Bachao Andolan (2011) 7 SCC 639

,

Kalyaneshwari v. Union of India (2011) 3 SCC 287

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37. The person seeking equity must do equity. It is not just the clean hands, but also clean mind, clean heart and clean objective that are the equi-fundamentals of judicious litigation. The legal maxim ''jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem'', which means that it is a law of nature that one should not be enriched by the loss or injury to another, is the percept for courts. Wide jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also

necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands.

38. No litigant can play hide and seek'' with the courts or adopt ''pick and choose''. True facts ought to be disclosed as the court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. In such cases, the court is duty-bound to discharge rule nisi and such applicant is required to be dealt with for contempt of court for abusing the process of the court.

K.D. Sharma v. Steel Authority of India Ltd. (2008) 12 SCC 481

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99. The petitioner in the present case is obviously a big contractor. The petitioner has been approaching the court time and again filing one petition after another. That is his legal right and he is entitled to file a writ petition every time he is aggrieved by any action of the State. At the same time, the writ petitioner must at every stage disclose the pendency of each and every petition which has even the remotest bearing of the case. He cannot himself choose what facts to state and what not to state. If the petitioner does so, he takes the risk of falling foul of the court. In the other connected matters, the stay orders were vacated because a Division Bench of this court found that there was non-disclosure of material facts. In the present case, we are not non-suiting the petitioner since we are dealing with the constitutional validity of the legislation, but we are definitely of the view that the petitioner should have been more careful and the facts which he now seeks to bring in by way of amendment should have been stated in the writ petition itself. This would have avoided any unnecessary controversy. Therefore, we propose to burden him with exemplary costs.

100. In view of the above discussion, we find no merit in the contention of the petitioners that the provisions of the TVAT Act or the Rules are in any way invalid or unconstitutional. The same are legal and valid as held by us above. The only directions which we would like to issue are that the assessing officer while considering the value of the transfer of property in goods in a works contract and while calculating the taxable turnover must allow all deductions which flow from the judgment in

Gannon Dunkerley''s case (1993) 88 STC 204 (SC) (1993) 1 SCC 364

and that rule 7A of the TVAT Rules shall be prospective in nature and will not have retrospective effect. However, as clarified by us in the judgment, this does not mean that the contractor is not required to produce any accounts. If he fails to produce any accounts or the accounts produced by him are not worthy of credence, then the assessing officer shall be entitled to make assessment of the deductions to which the dealer is entitled to on best judgment basis.

101. The petitioner in W.P. (C). No. 73 of 2013 shall pay costs of Rs. 1,00,000 (rupees one lakh) only for suppressing facts while obtaining the stay order. These costs shall be paid to the High Court Mediation Centre, High Court of Tripura, Agartala within 8 (eight) weeks from today.

102. We place on record our appreciation for the valuable assistance rendered to this court by M/s. Sudhir Nandrajog and Dr. Ashok Kr. Sarai senior advocates. The writ petitions are disposed of in the aforesaid terms.

