

(1996) 07 MAD CK 0047

In the Madras High Court

Case No : T.C. (R) Petitions No's. 474 to 478 of 1993 and W.P. No's. 15530 and 15531 of 1995 and W.M.P. No. 24693 of 1995

Chengalvarayan Co-operative Sugar Mills Ltd.

APPELLANT

Vs

State of Tamil Nadu
Thiru Arooran Sugars Ltd. Vs
Assistant Commissioner, Commercial Taxes and others

RESPONDENT

Date of Decision : 24-07-1996

Acts Referred:

Central Sales Tax Act, 1956 — Section 2, 8

Constitution of India, 1950 — Article 14, 226

Income Tax Act, 1961 — Section 43

Tamil Nadu General Sales Tax Act, 1959 — Section 2, 3, 3A, 4, 5

Citation : (1996) 07 MAD CK 0047

Hon'ble Judges : Raju, J;M.S. Janarthanam, J;K.A. Swami, J

Bench : Full Bench

Judgement

Janarthanam, J.—Chengalvarayan Go-operative Sugar Mills Limited, Periyasevalai-607 209 (for short, "CCSM Ltd.") is the petitioner,

while the State of Tamil Nadu represented by the Deputy Commercial Tax Officer, Full Additional Charge, Thirukoilur is the respondent in all

these present tax cases (revisions) - Tax Case Nos. 474 to 478 of 1993. All these tax cases are relatable to the assessment years 1985-86, 1986-

87, 1987-88, 1988-89 and 1989-90.

2. Certain statutory provisions governing the procurement of sugarcane, a raw material for the manufacture of sugar and matters allied thereto,

besides the factual matrix - we rather feel - may be related here, in order to understand and have a fine grasp, with ease and grace, of the

implications of the knotty legal questions - which we may pen down a little later - confronting us for a solution.

3. The Madras Sugar Factories (Control) Act, 1949 (for short, "the MSFC Act") provides for definition of "planting season", by section 2(gg) and crushing season" by section 2(b).

(a) "Planting season", according to section 2(gg) means, in relation to any local area, such period or periods as may from time to time be notified

by the Government in respect of such area.

(b) "Crushing season", according to section 2(b), means the period beginning on 1st November in any year and ending on the 30th June next

following.

4. u/s 9, areas are declared by the Sugarcane Commissioner, as reserved areas for the concerned factory.

(a) u/s 10(1)(a) any cane-grower in a reserved area may offer to sell the sugarcane grown by him in the farm, as prescribed u/s 10(1)(b). The

occupier is required to enter into an agreement for the purchase or sugarcane offered by the grower subject to the proviso to section 10(2). The

occupier may refuse to enter into an agreement, if the maximum consumption of the factory is already secured by the agreement.

(b) u/s 11-A, any grower having less than five (5) acres is not required to offer sugarcane.

5. Rule 11(6-A) of the Madras Sugar Factories (Control) Rules, 1949 (for short, "the MSFC Rules") prescribes the form of offer in Appendix IV-

A and rule 11(7) prescribes the form of agreement in Appendix V. These visualise purchase and sale of sugarcane at prices fixed statutorily.

6. The Sugarcane (Control) Order, 1966 (for short, "the SC Order") by clauses 3 and 5-A prescribes the payment of minimum and additional

prices, which are again determined in accordance with the Schedule to the said order.

7. Reverting to the factual matrix, CCSM Ltd., announced one or more of incentives, such as planting subsidy, chemical subsidy and transport

subsidy to the growers during the relevant assessment years. The incentives so offered includible in the purchase turnover and consequently liable

to tax, were, however, not disclosed either in the monthly return or in the revised statement filed in any of the relevant assessment years. The

Enforcement Wing gathered those particulars and reported the same to the Assessing Officer - Deputy Commercial Tax Officer (FAC) - Full

Additional Charge, Thirukoilur.

8. Based on such particulars, the assessing officer, in the light of the decision of the Sales Tax Appellate Tribunal (Additional Bench), Madras in

Tax Appeals Nos. 1837 and 1838 of 1986 dated August 10, 1987, in the case of Vellore Co-operative Sugar Mills, upholding the levy of sales

tax on subsidies, liable to be taxed at 12 per cent assessed the tax on the escaped turnover relatable to subsidies and also additional sales tax liable

to be levied, besides quantifying the penalty to be levied at a prescribed percentage separately for each of the relevant assessment years.

9. Individual notices relatable to the relevant assessment years were issued to CCSM Ltd., requiring it to show cause as to why tax as respects the

escaped turnover relatable to subsidies and consequent levy of additional sales tax at a prescribed percentage as regards the turnover in excess of

Rs. 10 lakhs and penalty at the minimum prescribed percentage for wilful non-disclosure, as indicated in those notices should not be levied and

collected.

10. CCSM Ltd., in its turn, filed individual objection petitions to the notices so issued. The assessing officer, however, overruled the objection

petitions so filed and passed final orders individually confirming the proposals made in the individual notices relatable to the relevant assessment

years in his proceedings Nos. (1) 202279/85-86 dated January 11, 1991; (2) 612968/86-87 dated January 11, 1991; (3) 612968/87-88 dated

January 3, 1991; (4) 612968/88-89 dated January 10, 1991 and (5) 612968/89-90 dated April 26, 1991.

11. The aggrieved CCSM Ltd., resorted to file five distinct appeals, namely,, Appeal Nos. 256 to 259 and 530 of 1991, before the Appellate

Assistant Commissioner (C.T.), Cuddalore. All the appeals so filed ended in a dismal failure, by a common order dated March 4, 1992.

12. CCSM Ltd., agitated the matter by filing Tax Appeal Nos. 302 to 305 and 364 of 1992 before the Tamil Nadu Salts Tax Appellate Tribunal

(Main Branch), Madras-600 104. All these tax appeals were disposed of by a common order dated December 7, 1992.

13. (a) The Tribunal noticed the contentions, as respects ""planting subsidy"" and ""setts subsidy"" in paragraph 4 of its order, as below :

..... The appellants contend that the planting subsidy and setts subsidy

disallowed by the lower authorities is not proper and the purchase price of the cane has been settled by the judgment of the Madras High Court in [1988] 71 STC 444 (Thiru Arooran Sugars Ltd. v. Deputy Commercial Tax Officer) and the price should be fixed under clause 5-A of the Sugarcane (Control) Order, 1966 and therefore any amount paid over and above the said price fixed by the Sugarcane (Control) Order cannot form part of the purchase price of the sugarcane and what has been paid by way of planting subsidy cannot be correlated to the purchase price of the sugarcane. The appellants admit that the subsidy has been paid to the cane growers and the appellants contend that all amounts paid to the cane-growers will not be the price for the cane and hence the planting subsidy paid to the cane-growers cannot be included in the purchase turnover of sugarcane. The counsel for the appellant pointed out that subsidy has been granted to the cane-growers and as per the order of the Director of Sugar, Madras, subsidy was given per acre for plant crop for subsidising the entire seed cost (Rs. 30,000 two budded setts or 4 1/2 tonnes of cane) for the months of October to January. Subsidising 75 per cent of the seed cost for February to May and subsidising the entire seed cost for the months of June to September and subsidy per acre for rate on crop was given at Rs. 300 for all the three periods mentioned above and hence these subsidy amounts cannot be included in the purchase turnover. He further pointed out that the subsidy is treated as loan and after cane is supplied the loan amount is cancelled and the subsidy for the cost of seeds and subsidy for the rate on crop cannot be included in the taxable turnover. The seeds of the sugarcane is known as "setts". So he pointed out that the subsidies "seeds and setts" are not includible in taxable turnover since the cost of seed is paid to the seed grower. For this, he relies upon the decision in Sakthi Sugars Limited and Others Vs. Deputy Commercial Tax Officer and Others, In this decision, it is stated that :

"Though sugarcane setts beget sugarcane, that by itself does not tantamount to saying that one is equivalent of the other. Their properties and user are different and they are understood by the common man and the commercial community in different and distinct ways. Therefore sugarcane setts are not sugarcane and the sale of sugarcane setts cannot be subject to the levy of sales tax under item 62 of the First Schedule to the Madras

General Sales Tax Act, 1959.

Where the sugar mills advanced monies to the ryots, who supplied sugarcane to them, to enable the ryots to purchase the sugarcane setts from the

owners of the seed plots and this advance was adjusted in the price to be paid by the mills to the ryots for the sugarcane supplied and the ryots

gave promissory notes for the amounts advanced, the mills were only financiers and could not be deemed as dealers in sugarcane setts under the

provisions of the Madras General Sales Tax Act, 1959. As the mills had not purchased the sugarcane setts in a manner known to law, and as is

popularly understood, the transactions involving the sale of sugarcane setts by the farm-growers were not exigible to tax."

Relying upon this decision, he pointed out that the ryot purchased the sugarcane setts from the farm-growers and the sugar mills are not dealers in

so far as sugarcane setts are concerned and they having nothing to do with the purchase price of sugarcane setts and they are only purchasing

grown-up sugarcane and hence planting subsidy and setts subsidy cannot be included in the taxable turnover.

(b) The contentions, as projected above, had been turned down by the Tribunal by stating the rationale in paragraph 44 therein as below :

..... But the latest decision of our High Court in [1992] 86 STC 22 (State of Tamil Nadu v. National Co-operative Sugar Mills Limited) states

that :

"The respondent, a sugar manufacturer, paid certain sums to cane-growers on an acreage basis, as subsidy for early planting, and accounted for

the payment under the head "'cane development expenses'". The Tribunal held that the sums were independently paid, to encourage early cultivation

of sugarcane, and were therefore not related to nor includible as part of the purchase price paid for the sugarcane. On revision petitions filed by the

department :

Held, allowing the petitions, that the early planting subsidy and the early supply of sugarcane were closely linked. While calculating the profits, the

respondent took into account the payments made as early planting subsidy. Moreover, the sums paid were retained by the cane growers, and were

over and above the price fixed by the Government as the price of sugarcane. It was relatable to the supply of sugarcane, and there was an implicit

agreement that the subsidy formed part of the price. The sums paid therefore were to be treated as part of the purchase turnover of sugarcane of

the respondent. The fact that the payment was accounted for as "cane development expenses" did not change the character of the payment."

The above decision clearly states that the subsidy for early planting is includible in the purchase turnover. The planting subsidy and setts subsidy is

given for the growth of the cane. The canes which are grown on the land from the setts (seeds) reached the appellants' mills. So it can be safely

concluded that the payment of planting subsidy and setts subsidy which are for the growth of the cane is linked to the cane purchased by the

appellants. So it cannot be stated that the payment for the seeds were paid to the seed growers only and it is not includible in the purchase

turnover. The amount paid as subsidy is retained by the cane-growers and it is over and above the price fixed by the Government as the price of

sugarcane. So the subsidy paid to the cane-grower relates to the supply of sugarcane. Our High Court has held in [1992] 86 STC 22 (State of

Tamil Nadu v. National Co-operative Sugar Mills Limited) that the subsidy paid relates to supply of sugarcane and the subsidy forms part of the

price and it has to be included in the purchase turnover of sugarcane. Following the above decision we find that the planting subsidy and setts

subsidy form part of purchase price of sugarcane. The lower authorities were perfectly justified in including the planting subsidy and setts subsidy in

the purchase turnover. Hence we see no reason to interfere with the order of the Appellate Assistant Commissioner. The order of the Appellate

Assistant Commissioner (C.T.), Cuddalore, is confirmed.

(c)(i) The contention projected, as relatable to "chemical subsidy" is couched in paragraph 5 therein as below :

5. The appellants contend that the chemical subsidy is not includible in the purchase turnover. The counsel for the appellant pointed out

that the mill supplied fertilisers and recovered the cost from the cane growers and during drought the mill grants subsidy of 50 per cent for fertilisers

and the subsidy granted is not includible in the purchase price. He pointed out that the Director of Sugar has given instructions to the mill owners

stating that during the drought condition 50 kgs. additional dose of muriate of potash can be supplied to the registered cane-growers at 50 per cent

subsidy so as to apply the same to the cane crop prior to the drought setting and this subsidy granted to the cane-grower is not includible in the

purchase turnover. Fertiliser is sold to the cane-grower for the growth of the cane and subsidy is granted by the mill to the cane-growers.

(ii) The contention, as above, had been rejected by the Tribunal in paragraph 5 in the terms as below :

The fact that during the drought condition the mill granted subsidy to the cane-growers cannot form a ground to state that the chemical subsidy is

not includible in the purchase turnover. For the growth of cane, expenditure on fertiliser was incurred. So the entire amount of fertiliser is linked to

the cane purchased by the appellants. The mill would have given subsidy for the cane-growers during drought condition but it does not mean that

chemical subsidy given to the cane-growers is not includible in the purchase turnover. What all the amounts paid for the purchase of fertilisers for

the growth of cane is linked with the cane purchased by the appellants. Hence we are of the view that the chemical subsidy is linked with the

purchase price of the cane and it is includible in the purchase turnover. The order of the Appellate Assistant Commissioner (CT), Cuddalore, is

confirmed.

(d)(i). The bone of contention, which had been taken up as relatable to ""transport subsidy"" is penned down in paragraph 6 therein as below :

The appellants contend that the transport subsidies are not includible in the purchase turnover. The lower authorities have found that the transport

subsidy is includible in the purchase turnover of the cane. The counsel for the appellant argued that transport subsidy charges up to 40 kms. are

includible in the purchase turnover and beyond that limit the transport subsidy charges are paid by the mill to third party lorry owner and hence the

transport subsidy charges is not includible in the purchase turnover. The Director of Sugar has issued Circular in R. C. No. 24920/85 dated

September 12, 1985 stating that the transport charges up to 40 kms. will be borne by the cane-growers and above 40 kms. will be met by the

mills. So the appellant contends that the transport subsidy charges incurred for the supply over and above 40 kms. cannot be treated as pre-

expenses of the purchase of sugarcane and it is not includible in the purchase turnover.

(ii) The contention, as above, had been considered and answered by the Tribunal in paragraphs 7, 8 and 9, as below :

(7) The decision in *The State of Tamil Nadu Vs. The Madurantakam Co-Operative Sugar Mills*, states that :

"the transport charges paid by the assessee to third party lorry owners for transporting the sugarcane to the factory site was not to be included in the taxable turnover of the assessee, but the charges paid by the assessee to the cane-growers themselves to bring the cut sugarcane to the mill site was liable to be included in the turnover of the assessee even though a separate voucher was given to the cane-growers for the transport charges to which they were entitled to."

The sugarcane is taxable at the purchase point. So far as the sugarcane purchase is concerned, the sugar mills, the purchaser, is deemed to be the dealer and the amount for which the goods were bought had to be included in the total turnover. As per section 2(r) of the Tamil Nadu General

Sales Tax Act, 1959 "turnover" means, the aggregate amount for which the goods are bought or sold or delivered or supplied or otherwise

disposed of in any of the ways referred to in clause (n), by a dealer either directly or indirectly. The transport charges paid above 40 kms. do not

reach the cane-grower and these transport charges are paid to third party lorry owners. So the transport charges paid to the lorry owners cannot

be included in the purchase price. The transport charges up to 40 kms. are recovered from the cane suppliers and only the transport charges

exceeding 40 kms. paid by the appellants to the lorry owners are claimed as transport subsidy. These transport charges paid to third party lorry

owners do not form part of the taxable turnover since they are not connected with the pre-purchase expenses.

(8) The learned State Representative pointed out that the transport subsidy is includible in the purchase turnover and the entire transport charges

paid by the mill to the lorry owners is includible in the taxable turnover. For this, he relies on the decision in [1992] 86 STC 17 (Mad.)

(*Perambalur Sugar Mills Ltd. v. State of Tamil Nadu*). In this it is stated that :

"The petitioner-mills purchased sugarcane from sugarcane growers. The purchase price of sugarcane was fixed by a tripartite committee

constituted for this purpose in terms of the Sugarcane (Control) Order. Under the

agreement there was stipulation that the growers were to deliver the sugarcane at the factory of the mills and there was no provision that they could deliver it elsewhere and accept reduced prices. On the question whether transport charges paid by the mills to lorry owners to transport the sugarcane to the factory, in order to assist the growers was includible in the purchase turnover of the mills :

Held, that since under the agreement delivery had to be effected at the doors of the factory, and no deduction was permissible under law towards transport charges incurred by the growers, transport charges paid by the mills to lorry owners to transport the cane to the factory to help the growers was liable to be included in the purchase turnover of sugarcane of the mills."

In the above decision, it is stated that under the agreement delivery had to be effected at the doors of the factory and no deduction was permissible under law towards transport charges incurred by the growers and hence transport charges paid by the mills to lorry owners to transport the cane to the factory to help the growers was liable to be included in the purchase turnover of the sugarcane of the mills.

(9) The above decision is based on the agreement entered into between the cane-grower and the mill and in the above decision, it is stated that

once it is accepted that as per an agreement entered into, the sugarcane growers had agreed to bring the sugarcane and deliver it at the mill or

factory premises in accordance with a date schedule fixed by the mills and there is no clause either in the application for registration or in the

agreement to indicate that the sugarcane growers could deliver the sugarcane at a place other than the mill or factory premises and receive reduced

prices, the charges paid to the sugarcane growers to bring the cut sugarcane to the mill site are liable to be included in the taxable turnover even

though separate voucher is given to which they are entitled to, there is no reason for holding that since transport charges were paid by the assessee

to the third party lorry owners to transport the sugarcane to the factory, it should not be included in the taxable turnover of the assessee. Based on

the agreement it was decided to include the entire transport subsidy charges in the purchase turnover. In the instant case, it is not based on any

such agreement. As per the circular of the Director of Sugar, Madras, the

transport charges up to 40 kms. only are includible in the purchase

turnover and the transport charges up to 40 kms. paid by the appellants to the lorry owners will be borne by the cane-grower themselves and for

the distance beyond 40 kms. it will be met by the mills. The transport charges paid above 40 kms. do not reach the cane-grower and they are paid

to third party lorry owners. So the transport charges paid to third party lorry owners cannot be included in the purchase turnover of the appellant.

The decision in *The State of Tamil Nadu Vs. The Madurantakam Co-Operative Sugar Mills*, directly applies to the instant case and following this

decision we find that the transport subsidy charges paid to third party lorry owners do not form part of purchase turnover since they are not

connected with pre-purchase expenses. Accordingly we hold that the transport subsidy claimed by the appellant is not liable to be included in the

purchase turnover. Accordingly, we allow this claim of transport subsidy.

(e) The Tribunal, however, recorded a finding in paragraph 10 of its order that the levy of penalty is not warranted, on the facts and in the

circumstances of the case and accordingly, the levy of penalty had been deleted.

(f) On the findings, as above, recorded by the Tribunal; all the appeals were partly allowed, as indicated above.

14. The aggrieved CCSM Ltd., resorted to file the present Tax Cases (Revisions) Nos. 474 to 478 of 1993 as respects the disallowed portions of its claims.

15. Thiru Arooran Sugars Ltd., ""Eldrado"", 5th floor, 112, Nungambakkam High Road, Madras-600 034 represented by its General Manager

(Finance), Mr. G. Srinivasan (for short, ""TAS Ltd."" is the petitioner, while the Assistant Commissioner of Commercial Taxes, Central Assessment

Circle IV, Madras 600 006, the Deputy Commissioner (Commercial Taxes), Madras (South) Division, Madras and the State of Tamil Nadu

represented by the Secretary to Government, Department of Commercial Taxes and Religious Endowments, Fort St. George, Madras-600 009

are respectively respondents 1 to 3 in the present writ proceedings - Writ Petitions Nos. 15530 and 15531 of 1995.

16. Writ Petition No. 15530 of 1995 is for the issuance of a writ of mandamus to direct the respondents to forbear from levying or recovering

taxes (on the purchase of sugar by the petitioner) in respect of seed subsidies or

varietal subsidies and such incentives incurred and paid to the cane-growers prior to or collateral to the conclusion of the sugarcane agreement with the said growers or transport concession/subsidy incurred by the petitioner after the transfer of property in sugarcane from the growers to the petitioner relying upon the words ""aggregate"" or ""delivered or supplied"" in section 2(r) and/or explanation (2)(ii) to the said section of the Tamil Nadu General Sales Tax Act, 1959 (Act 1 of 1959 - for short, the TNGST Act").

17. Writ Petition No. 15531 of 1995 is for the issuance of a writ of declaration that the words ""aggregate"", ""or delivered or supplied or otherwise disposed"", ""either directly or through another"", and ""on account of others"" in section 2(r) and explanation (2)(ii) to the said section of TNGST Act are ultra vires entry 54 - List II of the Seventh Schedule to the Constitution of India and consequently, subsidies and expenses incurred by the petitioner or paid to the sugarcane growers, both prior to or collateral to the sugarcane agreement or after the sale and transfer of property in sugarcane from the growers to the petitioners are outside the charging provisions of section 3(2) of the said TNGST Act.

18. The common ground stated for resortment to the writ proceedings is traceable to paragraphs 13 and 15 of the common affidavit filed in each of the writ petitions. The relevant portions of those paragraphs (pp. 15-17) in the said common affidavit are couched in the following terms :

13. The petitioners have specifically pleaded with documents to the effect that the seed subsidy, early planting subsidy, transport subsidy were not includible for the several reasons submitted in the forgoing. In particular details have been furnished to show that the seed and planting subsidy were announced to motivate the growers to enter into agreement for supply of sugarcane, and any incentive to the grower to enter into an agreement cannot be treated as consideration for the sugarcane agreement. Similarly, documents have been marked to show that sugarcane is unconditionally delivered to the transporters appointed by the petitioners at the field so that the expenses thereafter are post purchase in character.

Against the demands raised by the first respondent, appeals were preferred before the Deputy Commissioner, who, having confirmed the same further appeals have been preferred. The petitioners state that they are

challenging the orders passed by the respondents herein while undertaking to withdraw the appeals pending so that the issue may once and for all get decided before this Court which is considering the issue in the revision coming up for hearing as a batch. The petitioners may have the advantage of pleading on all legal and constitutional issues in this substantial writ petition.

It is submitted that the tax demands have been raised on the above incentives indiscriminately apart from imposing maximum penalty for non-

payment of said taxes along with the return. Due to lack of conceptual approach or analysis of the true concept of turnover, these demands have

been raised/confirmed from time to time. Even the Tribunals constituted under the Act are not consistent in their view in their orders passed u/s 36

of the Act. Some of the Tribunal's orders state transport subsidy is not taxable while others say transport subsidy is taxable. The decisions of this

honourable High Court in [1976] 38 STC 238 (State of Tamil Nadu v. Madurantakam Co-operative Sugar Mills) appears to show differently

from [1985] 60 STC 113 (Kallakurichi Co-operative Sugar Mills Limited v. State of Tamil Nadu). This honourable High Court has also rendered

its decision in [1992] 86 STC 17 (Perambular Sugar Mills Ltd. v. State of Tamil Nadu) in the issue.

The petitioners state that they are ready and undertake to withdraw the appeals pending as detailed in para 13 above and this writ petition is filed

only to obtain an official ruling of this honourable Court on matters in which there is conflicting ruling by the several appellate authorities.

The above decisions were rendered in respect of statutory revisions presented under the provisions of the TNGST Act, 1959 and have proceeded

to place too wide a construction on section 2(r) of the Sales Tax Act. The petitioners are advised that for the reasons and grounds enumerated

herein, these demands are ex facie illegal, unconstitutional, and without jurisdiction. The petitioners are advised to approach this honourable High

Court under article 226 of the Constitution of India raising certain constitutional grounds touching on the true construction of entry 54 of the State

List, which will necessarily bear on the definition clauses and the charging provision of the said Sales Tax Act. Accordingly, this writ petition is

presented under article 226 of the Constitution of India.

The petitioners state that by the several assessments and demands made arbitrarily and in violation of the constitutional prescription and mandate and under illegal provisions several demands for taxes and penalties have been raised which are pending in several statutory forums. The petitioner states that unless a binding declaration on the constitutional limits of the State Legislature is pronounced on the true concept of price, on the element which can constitute turnover, it may be futile for the petitioner to obtain any meaningful decision on the issues raised and pending before several forums. Further, the several demands are ex facie unconstitutional violating entry 54 of the State List, article 14 and article 226 of the Constitution of India.

19. TAS Ltd., also filed W.M.P. No. 24693 of 1995 praying for interim injunction restraining the first respondent from proceeding to assess and recover tax on either seed or planting or varietal subsidy or transport concession or subsidy incurred or paid to the cane-growers by treating the same as part of the purchase turnover of sugarcane under the provisions of the TNGST Act pending disposal of Writ Petition No. 15530 of 1995.

20. The timing of the filing of the writ petitions is of signal importance. It appears that the writ petitions had been filed exactly at the time, when the present Tax Cases (Revisions) were listed for hearing before the first Bench, consisting of two of us, namely, the honourable the Chief Justice and Raju, J., which, in turn, admitted them. Learned Additional Government Pleader (Taxes) took notice on behalf of the respondents. Both these writ petitions - Writ Petition Nos. 15530 and 15531 of 1995 - were heard, along with the present tax cases - Tax Case Nos. 474 to 478 of 1993.

21. The first Bench, after hearing the arguments of learned counsel for the petitioner and learned Additional Government Pleader (Taxes) representing the respondents, referred the aforesaid tax cases and the writ petitions to a larger Bench of three honourable Judges, by an order dated November 29, 1995. The rationale for the reference so made is as below (in paragraphs 2, 6 and 7) :

2. In the above writ petitions, the validity of rule 6(c) of the Tamil Nadu General Sales Tax Rules, 1959 is challenged, whereas in the above tax cases, several issues are involved, namely, (a) planting or varietal subsidy; (b) cane seed subsidy to primary/secondary nursery; (c) seed subsidy to

the cane-growers on supplies from commercial nursery; (d) supply of farm inputs at subsidised rate; (e) transport charges; (f) transport subsidy; (g)

development charges to registering third party mills and (h) penalty.

6. In addition to this, regarding the transport subsidy, the learned counsel for the assessee has relied upon *The State of Tamil Nadu Vs. The*

Madurantakam Co-Operative Sugar Mills, and Gwalior Rayon Silk Manufacturing and Weaving Co. Ltd. Vs. The State of Tamil Nadu, , whereas

the learned Additional Government Pleader (Taxes), has relied upon *Kallakurichi Co-Operative Sugar Mills Limited and Another Vs. The State of*

Tamil Nadu, and the Perambalur Sugar Mills Ltd. v. State of Tamil Nadu [1992] 86 STC 17 (Mad.). The correctness of these decisions has also

to be gone into.

7. Hence, we are of the view that it is necessary to settle the legal position by a larger Bench as these questions are recurring questions. In addition

to this in the said writ petitions, the validity of rule 6(c) and the explanation to rule 2(r) of the Tamil Nadu General Sales Tax Rules, 1959 are also

under challenge. The decision in the above writ petitions, would depend upon the decision that would be rendered in the tax cases. Therefore, we

are of the view that these writ petitions should also be referred to a larger Bench along with tax cases.

That is how, these matters are before us now.

22. From the submissions of Mr. C. Natarajan, learned senior counsel representing Mr. N. Inbarajan, learned counsel appearing for the assessees

- CCSM Ltd., and TAS Ltd., and Mrs. Chitra Venkataraman, learned Additional Government Pleader (Taxes), representing the Revenue, the

points, as below, arise for consideration :

(1) Are the provisions of section 2(r) and Explanation (2)(ii) appended thereto of the TNGST Act ultra vires of entry 54 - List II of the Seventh

Schedule to the Constitution of India ?

(2) Is the provision of rule 6(c) of the Tamil Nadu General Sales Tax Rules, 1959 (for short, "TNGST Rules") ultra vires and violative of article 14

of the Constitution of India, when especially the classification, according to the said rule, of "turnover chargeable on sale" and "turnover chargeable

on purchase" cannot at all be stated to have rationale or reasonable nexus to the object to be achieved ?

(3) Is "planting or varietal subsidy" to be treated as consideration for the "sale" and "purchase" of sugarcane ?

(4) Does it make any difference, if such subsidy is disbursed later at the time or after the supply of sugarcane ?

(5) Are expenses incurred by the assessee - sugar mills, up to the supply to commercial nursery and cane subsidy to cane-growers on supplies

from commercial nursery part of sugarcane paid/payable to cane-growers ?

(6) Is supply of farm inputs at subsidised rates to be treated as consideration to the grower for supply of sugarcane ?

(7) Are the transport charges incurred by the sugar mills excludable as not forming part and parcel of the price of the sugarcane sold by the

sugarcane supplier ?

(8) Is transport subsidy includible as consideration for the sale of sugarcane by the grower ?

(9) Are development charges paid to the registering mill by the assesseees-sugar mills, part of sugarcane price paid or payable to the cane growers

?

23. Point No. 1 : This point takes in its fold the question as to whether the provisions of section 2(r) and Explanation (2)(ii) appended thereto of

the TNGST Act are ultra vires entry 54 - List II of the Seventh Schedule to the Constitution of India.

(a) Item 54 of List II of the Seventh Schedule of the Constitution of India reads :

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

92-A. 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.

24. It is beyond any pale of controversy that the State Legislature can enact law levying and imposing a tax on sale or purchase of goods, which

does not take place in the course of inter-State trade and commerce. This does not mean, according to learned Senior Counsel for the assesseees-

mills, that the State Legislature can enlarge the definition of "sale", so as to bring within its ambit of taxation, transactions which could not be "sale

according to the established concept of a "sale" in the laws of contract, or more precisely the Sale of Goods Act, 1930. In other words, he would

say that the word "sale" in entry 54 - List II of the Seventh Schedule and the connected articles in the Constitution of India had been used in the sense in which it is used in section 4 and other relevant provisions of the Sale of Goods Act, 1930.

25. According to the said Act, the essential conditions of a sale are :

1. An agreement for transferring title to the goods :
2. A money consideration for such agreement; and
3. Actual transfer of property in the goods in pursuance of an agreement.

According to the definition, a sale takes place only when the property in the goods is transferred under a contract of sale and it is in that sense, the word "sale" is used in the present entry.

26. The object of the TNGST Act is to levy a general tax on sale or purchase of goods in the State. What could be legitimately brought to tax

under the said Act is the aggregation of the consideration for the transfer of property in goods. Section 2(r) thereof defines "turnover", as the

aggregate amount for which goods are bought or sold or delivered or supplied or otherwise disposed of in any of the ways referred to in clause (n)

by a dealer either directly or through another, or on his own account or on account of others, whether for cash or deferred payment or other

valuable consideration. The words, "amount for which goods are bought or sold" in section 2(r) indicate that it concentrates, on price, being the

money consideration for sale. "Sale" itself is "an agreement for the transfer of property for cash or deferred payment (money consideration). The

words "aggregate amount" do not add to or enlarge the scope of section 2(r), but seek to assist in the computation of tax on the aggregate of

selling prices on sales u/s 2(n). When section 2(n) defines "sale" as transfer of property in goods for cash or deferred payment or other valuable

consideration, the Legislature was only looking to prices under the contract of sale. Section 2(r) refers to "aggregate amount" for which goods are

sold u/s 2(n). In this view, section 2(r), may not be understood as enlarging beyond the aggregation of prices.

27. Explanation (2)(ii) to section 2(r) may not be read in the abstract. It has to be read in the context of section 2(r) and not de hors it. Explanation

(2)(ii) speaks of anything done by the dealer in respect of goods sold at the time of or before delivery. Therefore, unless something is done in

respect of the goods, the explanation has no application. The Revenue may not rely upon explanation (2)(ii), which has no application. It deals with

inclusion with the amount for which goods are sold, any sums charged for anything done by the dealer in respect of the goods sold at the time of or

before delivery thereof. The explanation may be invoked, where goods are taxable of sale and the seller is a dealer.

28. In the present case, the grower has done nothing in respect of sugarcane and he is not a dealer. A construction of section 2(r), which is in

accordance with the constitutional requisites that the State taxes a sale at a percentage of the proceeds of sale, may be preferred rather than a

construction that the State taxes whatever reaches the seller before delivery of the goods sold, whether under a contract of sale or otherwise, as

long as there is an accompanying sale. The latter construction may render the provision ultra vires and has to be avoided.

29. To the submission, as above, we are unable to affix our seal of approval, on facts and law as well. It is not as if such a question never arose for

consideration and the plain fact is that superior courts of jurisdiction happened to consider such a question and express their opinion in a catena of

decisions. A few, among them, we may choose to refer, to bring home the point.

30. In *S. Mariappa Nadar and Others, Partners of the Everest Match Co., Kovilpati Vs. State of Madras*, the assessee, manufacturing matches

and selling the product both inside the State and to dealers outside the State was assessed to sales tax for the year 1957-58 under the Central

Sales Tax Act, 1956 (for short, "the CST Act").

(a) According to the petitioner, when he sells the matches, he invoices only the sale value of the matches, that is to say, he does not include in the

invoice the excise duty which is payable on the goods. He prepares a separate debit note on the buyer for this excise duty and collects that amount

from the buyer. In respect of the turnover, the petitioner returned a net turnover of only Rs. 4,43,000 and odd, representing the sale price of the

matches, exclusive of the excise duty paid by him, and deducting also the freight charges incurred. A sum of Rs. 10,85,300 had been paid by way

of excise duty and collected by the petitioner from the buyers outside the State on foot of separate debit notes referred to. The petitioner

contended before the assessing authority that this amount of excise duty did not

form part of the sale price. But this contention was overruled and the Deputy Commercial Tax Officer assessed the net turnover liable to assessment under the CST Act at Rs. 15,17,631 and the tax payable thereon at Rs. 15,176.

(b) An appeal was taken to the Commercial Tax Officer, before whom also, it was claimed that the excise duty was paid on behalf of the buyer,

and though it was recovered by a separate debit note, it was entered in a separate ledger and did not form part of the sale consideration. It was

alleged that it was agreed between the buyer and the seller that only the value of the matches was to be paid. It was further contended that since

CST Act has to be administered in the same manner as the Madras General Sales Tax Act, the excise duty paid to the Central Government being

eligible for deduction from the turnover of the dealer under the Madras General Sales Tax Act, a similar relief should be granted in the assessment

under the CST Act as well. These contentions were examined by the Commercial Tax Officer, who came to the conclusion that the method

employed by the petitioner in issuing invoices and debit notes did not alter the true nature of the transaction which was that the consideration for the

sale of the goods included the amount of excise duty paid on the goods. The further contention that excise duty should be exempted from the

turnover was also rejected on the ground that the rules framed under the CST Act did not provide for any such exclusion. It would suffice to

mention that the further appeals to the Tribunal also failed.

(c) The charging section 8 of CST Act makes the dealer liable to tax on his "turnover" and "turnover" is defined in section 2(j) thereof in these

words :

"Turnover" used in relation to any dealer liable to tax under this Act means the aggregate of the sale prices received or 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 the prescribed

manner.

(d) Two, among several contentions raised, relevant for our purpose are :

(1) that the consideration for the sale of matches did not include the excise duty paid by him to the Central Government; and

(2) that the freight charges incurred by him should be excluded from the turnover.

(e) Both the contentions, as above, had been considered in the relevant paragraphs (paragraphs not numbered - at pages 381 to 386), which read

as under :

It has been argued that the sale consideration for the supply of the goods, matches in the present case, does not include the excise duty paid by

the seller to the Government. The goods are excisable commodities and before the manufacturer could deal with them by way of sale, the duty has

to be paid to the Government. What is contended is that the contract between the buyer and the seller - no contract was produced either here or in

the Tribunals below - was that the sale was to be for a stated price which did not include the excise duty and that when the seller paid the excise

duty, he paid it on behalf of the buyer and that part of payment, though subsequently recovered from the buyer, was never intended to be part of

the sale consideration. It is difficult to see how this contention can be accepted. It is not denied by the learned counsel that the buyer would not be

able to take possession of the goods, unless the duty was paid. In the hands of the buyer it is undeniable that the amount of the excise duty is part

of the consideration which he has to pay for obtaining the property in the goods. Even assuming that the seller sold the goods in bond and

authorised the buyer to take possession of the goods which he could obtain possession of only after the payment of excise duty, it does not to our

minds cease to be part of the sale consideration. It is also not denied that the liability to pay excise duty is upon the person who manufactures the

goods not keeps them under bond in the bonded warehouse. The Central Excise and Salt Duties Act casts this liability undoubtedly upon the

manufacturer. The rules thereunder also provide that a manufacturer could keep excisable goods in bond for a maximum period of three years.

Though during this period he is permitted to pay the excise duty on the occasion of the removal of the goods for the warehouse, on the expiry of

the period of three years, he is bound to clear the entirety of the goods and pay the excise duty thereon. This may, no doubt, not be directly

relevant to the question before us. But it is still of interest to note that the liability to pay the excise duty is upon the manufacturer.

Section 2(h) of the Central Sales Tax Act defines sale price to mean "the amount payable to a dealer as consideration for the sale of any goods".

Does the fact that a separate debit note was prepared by the seller for the excise duty paid by him and which was subsequently recovered from the

buyer or even that a separate indication of the amount of excise duty paid in respect of the goods, was noted on the invoice, make any difference ?

Does it mean that these features operate to the extent of saying that the excise duty paid was not part of the sale price ? We have no doubt that the

price was inclusive of the excise duty and that consolidated amount was "payable" to the dealer as consideration for the sale of the goods. In

George Oakes (P.) Ltd. Vs. State of Madras, , the question arose whether the tax collected by a registered dealer under the Madras General

Sales Tax Act was liable to be included in the turnover resulting in the levy of tax on the tax so collected and whether the subsequent Act validating

such assessment was valid. Their Lordships observed in this connection :

"First of all, we do not think that either the principal Act or the impugned Act proceeds on any immutable distinction between sale price and tax

such as learned counsel for the appellants has suggested. The principal Act does not contain any separate definition of sale price. We have already

referred to the definitions of ""sale"" and ""turnover""; those definitions do not show any such distinction. On the contrary, the expression ""turnover

means the aggregate amount for which goods are bought or sold, whether for cash or for deferred payment or other valuable consideration, and

when a sale attracts purchase tax and the tax is passed on to the consumer, what the buyer has to pay for the goods includes the tax as well and

the aggregate amount so paid would fall within the definition of turnover. In Paprika Ltd. v. Board of Trade [1944] 1 All ER 372, Lawrence, J.,

said, ""Whenever a sale attracts purchase tax, that tax presumably affects the price which the seller who is liable to pay the tax demands but it does

not cease to be the price which the buyer has to pay even if the price is expressed as X plus purchase tax"". The same view was again expressed in

Love v. Norman Weight (Builders) Ltd. [1944] 1 All ER 618, when Goddard, L.J., said :

Where an article is taxed, whether by purchase tax, customs duty, or excise duty, the tax becomes part of the price which ordinarily the buyer will

have to pay. The price of an ounce of tobacco is what it is because of the rate of tax, but on a sale there is only one consideration though made up

of cost plus profit plus tax. So, if a seller offers goods for sale, it is for him to quote a price which includes the tax if he desires to pass it on to the

buyer. If the buyer agrees to the price, it is not for him to consider how it is made up or whether the seller has included tax or not.

We think that these observations are apposite even in the context of the provisions of the Acts we are considering now, and there is nothing in

those provisions which would indicate that when the dealer collects any amount by way of tax, that cannot be part of the sale price. So far as the

purchaser is concerned, he pays for the goods what the seller demands, viz., price, even though it may include tax. That is the whole consideration

for the sale and there is no reason why the whole amount paid to the seller by the purchaser should not be treated as the consideration for the sale

and included in the turnover."

Though these observations were made in dealing with the validity of the Madras General Sales Tax (Definition of Turnover and Validation of

Assessments) Act, 1954, enacted by the Madras State Legislature the general principles are fully applicable in the context of the present sale

transactions. It follows that any amount which the buyer is called upon to pay, except such amounts as may be specified in the definition of "sale

price" as being excludable therefrom, must form part of the sale price.

As their Lordships point out, where the seller passes on the tax and the buyer agrees to pay the tax in addition to the price, the tax is really part of

the entire consideration, and the distinction between the two amounts loses all significance, more particularly from the point of view of legislative

competence. Turning now to the definition of "sale price" in the Central Sales Tax Act, it seems to us that any amount, whether it be tax or excise

duty which is payable to the dealer as a consideration for the sale of the goods, makes up the sale price in respect of the transaction. Sale price is

defined to mean "the amount payable to a dealer as consideration for the sale of any goods", less certain normal trade discounts, or such other

sums as are specifically excluded. It should necessarily follow that having regard to the transaction that took place, since it was an integral part of

the agreement that the buyer should be the bearer of the excise duty paid by the

seller, this excise duty certainly does form part of the sale price of the goods. We are therefore unable to accept the contention advanced in this regard.

Our attention has been drawn to a decision of this Court in C.R.P. No. 1874 of 1952. That was a case which arose under the Madras General

Sales Tax Act and the question arose whether the excise duty paid on cured coffee which was the subject-matter of the sale, was deductible.

What happened was that the India Coffee Board which sold the coffee had collected the excise duty from the buyer and paid it to the Central

Government. The department contended that the assessee, the India Coffee Board, had not itself paid the excise duty and that therefore that

amount was not deductible under rule 5(1) of the General Sales Tax (Turnover and Assessment) Rules. The decision of this Court was that

whoever might have paid the excise duty, since the rule excluded the excise duty, if any, paid by the dealer to the Central Government in respect of

the goods sold by him, the fact that the seller had collected it from the purchasers of coffee did not make any difference to the claim. There was the

observation by the learned Judges :

Even so, there will be no case at all for including that amount in the turnover. That could not be a part of the sale price at all.

Reliance has been placed upon this observation by the learned counsel for seeking to establish that the quantum of excise duty did not form part of

the sale price. The question whether excise duty formed part of the sale price or not was not in issue before the learned Judges. Even apart from

that, the decision of the Supreme Court which we have referred to takes the matter beyond the realm of controversy.

In some of these cases, objection is taken to the inclusion of the sales tax in the taxable turnover. What the Supreme Court has laid down in the

above decision has direct application to the sales tax. We may observe further that in so far as the legislative competence is concerned, Parliament

is fully competent by reason of the residuary entry in List I of Schedule VII of the Constitution of India, to bring to tax as part of the turnover, any

amount, be it tax or designated by any other name. Besides the fact that the definition of "sale price" does not exclude the sales tax which, being

payable by the buyer is undoubtedly part of the consideration for the sale of the

goods, the Parliament has undoubted competence to bring to tax as part of the turnover the tax that forms part of the consideration.

Another point that was urged before us was that the freight charges which were incurred by the seller should have been excluded. It does not appear to be denied by the petitioner that when the contract of sale was entered into, it called for the delivery of the goods to the buyer at his place of residence or business and that the price that was quoted was an inclusive one comprising also the freight charges that would be payable. The only occasion when such freight charges can be excluded from the sale price is set out in the definition of the sale price itself, which states that the cost of freight or delivery or the cost of installation in cases where such cost is separately charged shall be deducted from the sale price. It is not in dispute that wherever such freight was separately charged, deduction has been allowed. It seems clear that unless freight had been separately charged to the knowledge of the buyer, the cost of the freight cannot be deducted from the sale price. What we are told is that in some of these cases, after charging an inclusive price in respect of the goods sold, an entry was made at the bottom of the bill giving the number of the railway receipt and other particulars of freight incurred. We are unable to accept the claim that this indication on the bill amounts to a separate charge in respect of the freight. What we understand this expression to mean is that the sale price indicated on the bill should be in respect of the cost of the goods alone and an additional charge should have been indicated in the bill, the total making up the consideration which the buyer was called upon to pay. That would be in keeping with the wording of the definition of sale price and would comply with the requirement that the freight had been charged separately, that is to say, the buyer was informed that the quantum of freight charges was additional to the sale price of the goods and that he had to pay those freight charges. The indication found in the bill, to our minds, is not sufficient to meet the requirement of the provision of law. In the absence, therefore, of a separate charge in respect of the cost of freight, the claim that this amount should be excluded must fail".

31. In *Sun-n-sand Hotel Private Ltd. Vs. The State of Maharashtra*, the assessee ran at Juhu Beach in Bombay a hotel which had both a boarding and a lodging establishment. The customers, who came to the hotel were

informed of the charges they had to pay for lodging with different amenities and boarding according to their taste. They were also informed that they had to pay service charges at ten per cent of the tariff and sales tax at five paise per rupee. The assessee objected to the inclusion of the service charges in its gross turnover on the ground that they did not represent part of the sale price but were recovered from the customers for payment to the employees and for covering partly the breakages.

(a) The Tribunal found that the customers had no option but to pay the service charges, which entirely depended on the food ordered and consumed by them.

(b) The assessee made an application, in the Sales Tax References, for making a reference on three questions, as below :

(1) Whether, on the facts and under the circumstances of the case, the service charges constitute or can be included in "sale price" as defined in section 2(29) of the Bombay Sales Tax Act, 1959 ?

(2) Whether the Tribunal misdirected itself in law in holding (a) the price is what a customer pays, or (b) that because service charges have no independent existence and because they are wedded together with the sale they constitute sale price, and (c) that because the payment is not involuntary or optional, it constitutes the sale price ?

(3) Whether the State Legislature is competent to define "sale price" in section 2(29) of the Bombay Sales Tax Act, 1959, as including "all sums charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof" in view of entry No. 54 in the State List of Schedule VII of the Constitution of India ?

(c) Ultimately, however, the counsel appearing for the assessee agreed that question No. (1) would be the only question, which may be referred to the High Court, and accordingly, that is the only question which is referred to this Court in all these references.

(d) Inasmuch as the third question, which raised the constitutional validity of the provisions of section 2(29) of the Bombay Sales Tax Act, 1959, was raised and could not have been referred by the Tribunal, the assessee has filed Special Civil Application No. 2642 of 1967, principally to challenge the validity of the definition of the term "sale price" in section 2(29) of the said Act. That Special Civil Application is also fixed for hearing

along with these Sales Tax References and was argued, and is being decided therein.

(e) A Division Bench of the Bombay High Court happened to consider such a reference and the constitutional validity of the provisions of section

2(29) of the Bombay Sales Tax Act, 1959 and express in the relevant paragraphs (paragraphs not numbered - pages 511 to 515), which read as

under :

We are unable to accept the contention of the petitioner that what is charged to the customer in the hotel by the assessee inclusive of 10 per cent

by way of service charges is really not the "sale price" for the goods which are offered and consumed by the customer in the establishment. Once it

is found that there is no option to the customer whether to pay or not to pay the service charges at the rate of 10 per cent over and above the tariff,

we find it difficult to dissociate this part of the bill from the total contract which a customer enters into with the assessee when ordering any food. A

specimen of the tariff card, which is presented to the customer as soon as he enters the hotel and which in effect is the agreement between the

customer and the assessee, shows that in all cases service charges of 10 per cent on the tariff plus sales tax at 5 paise per rupee are to be paid by

the customer. It is, therefore, contended on behalf of the department that really there is no difference between the liability so far as the customer is

concerned to pay the amount of sales tax and the amount of service charges at 10 per cent over the tariff; in either case there is no option to the

customer. It cannot be disputed that the amount which is recovered as sales tax from the customer is properly added to the tariff in determining the

sale price of the goods purchased. If sales tax can be properly included in determining the sale price, it is difficult to see why the addition of 10 per

cent of the tariff by way of service charges should be on a different footing, and should not be considered as properly included in determining the

sale price.

The contention of the assessee, that it merely acts as if it were a channel or conduit through which the benefits flow from the collection of this

amount for the purpose of distribution to its employees, cannot be accepted. For one thing there is no direct nexus between the whole body of

employees to whom the benefits go and the customer who is served by an

employee. In the case of a tip, it is a direct payment for satisfactory service rendered by a particular employee who serves the customer. For aught one knows, the customer may not know the number of employees in the establishment, their grades or salaries, and what services they actually render. If the charges were only for the services rendered to the customer, the matter would be on a different footing. Here the services rendered are rendered by the totality of employees in the establishment : some of them may be in the kitchen and some of them may be at other places. In other words, they may be employed in the task with which the customer is not directly concerned at all. It will, therefore, be seen that what is charged as service charges and required to be paid by the customer is in effect an addition to the price which he has to pay and is properly to be considered as sale price of the food ordered by him in that establishment. It is true that the kind of service of a particular establishment may be of a particularly attractive order. The furniture may be good, the servants may be well dressed, there may be an accompaniment of music or a floor-show and many other amenities. But all this goes in determining the tariff at which the catering establishment caters to the needs of its customers, and admittedly is not separately charged for. It may be that the same kind of food served outside, say on the footpath, may be charged much less than when it is ordered and served in a posh establishment like the one which the assessee maintains. But all the same, it is the price of food that the customer has to pay for the luxury or the benefit of having delivered the articles of food in a nice place, in comfort and to the delightful accompaniment of music or such other entertainment. We fail to see, therefore, what difference does it make so far as the customer is concerned, whether the addition to his bill is named as service charges or simply as 10 per cent addition to the tariff. As it is not possible or permissible to separate the two charges as charges merely for the services and when mere services are not available for payment, the Tribunal seems to be right in coming to the conclusion that service charges are inseparably mixed up with the total amount or price that is charged to the customer for the food that is supplied to him. In this connection reference was made to a decision of the Supreme Court in *States of Orissa Vs. Utkal Distributors (P) Ltd.*, . In that case arising

under the Orissa Sales Tax Act, 1947, the assessee was a controlled stock-holder of iron and steel under the Iron and Steel Control Order, 1956.

As such controlled stock-holder, the assessee in that case was not entitled to charge a price higher than that fixed by the Government of India. In

fact under condition No. 4(ii) of the Notification dated 18th October, 1958, it was provided that the customer shall pay to the controlled stock-

holder the Central sales tax incurred by the controlled stock-holder in obtaining the material and also pay such additional Central sales tax, if any,

incurred on the sale to the customer. The question was whether the addition of the sales tax in the bill payable by the customer under the

notification can be properly included in arriving at the sale price of the iron or steel sold by the controlled stock-holder. The court ultimately held

that the Central sales tax paid by the assessee at the time of purchase and realised from the customers under the provisions of the notification did

not form part of the sale price paid by the customers to the assessee, as the valuable consideration for the sale of iron or steel was only the price

fixed by the Government. In other words, the sale price having been fixed by the Government under the statute, anything that was paid over and

above that sale price, which was a controlled price, by way of sales tax could not be properly included in the sale price of the iron and steel which

was a controlled article.

We do not see how the principle of this decision is of any assistance to the assessee in this case. It is not as if the sale price of food or articles

supplied in the hotel has been statutorily fixed. It is all a matter of agreement between the customers and the assessee; accordingly when the

assessee tells the customer the moment he (the customer) enters the hotel, that for the purposes of goods supplied, the customer will have to pay

not only the tariff rates which are fixed but also over and above it 10 per cent by way of service charges, the sale price quoted must include service

charges. We have already observed that so far as the customer is concerned, he has to note by virtue of the tariff card that he has to pay the tariff

rates plus 10 per cent as service charges plus 5 paise as sales tax per rupee; and all this is part of the contract or agreement between the customer

and the assessee in respect of the price the customer has to pay for the food that is supplied to him. In other words, all this constitutes and goes

into the formulation or fixation of the price for the goods supplied, and, therefore, it must be treated as "sale price" within the meaning of section 2(29) of the Bombay Sales Tax Act, 1959.

More apposite perhaps would be the decision of the Supreme Court in *The Tata Iron and Steel Co., Ltd. Vs. The State of Bihar*, . At pages 284

and 285 their Lordships deal with this question, which was point No. 5, and observe as follows :

"Re : point No. 5. - The argument on this point is that sales tax is an indirect tax on the consumer. The idea is that the seller will pass it on to his

purchasers and collect it from them. If that is the nature of the sales tax then, urges the learned Attorney-General, it cannot be imposed

retrospectively after the sale transaction has been concluded by the passing of title from the seller to the buyer, for it cannot, at that stage, be

passed on to the purchaser. According to him, the seller collects the sales tax from the purchaser on the occasion of the sale. Once that time goes

past, the seller loses the chance of realising it from the purchaser and if it cannot be realised from the purchaser, it cannot be called sales tax. In our

judgment this argument is not sound. From the point of view of the economist and as an economic theory, sales tax may be an indirect tax on the

consumers, but legally it need not be so. Under the 1947 Act the primary liability to pay the sales tax, so far as the State is concerned, is on the

seller. Indeed before the amendment of the 1947 Act by the amending Act the sellers had no authority to collect the sales tax as such from the

purchaser. The seller could undoubtedly have put up the price so as to include the sales tax, which he would have to pay but he could not realise

any sales tax as such from the purchaser. That circumstance could not prevent the sales tax imposed on the seller to be any the less sales tax on the

sale of goods. The circumstance that the 1947 Act, after the amendment, permitted the seller who was a registered dealer to collect the sales tax

as a tax from the purchaser does not do away with the primary liability of the seller to pay the sales tax. This is further made clear by the fact that

the registered dealer need not, if he so pleases or chooses, collect the tax from the purchaser and sometimes by reason of competition with other

registered dealers he may find it profitable to sell his goods and to retain his old customers even at the sacrifice of the sales tax. This also makes it

clear that the sales tax need not be passed on to the purchasers and this fact does not alter the real nature of the tax which, by the express

provisions of the law, is cast upon the seller. The buyer is under no liability to pay sale tax in addition to the agreed sale price unless the contract

specifically provides otherwise. See *Love v. Norman Weight (Builders) Ltd.* [1944] 1 KB 484. If that be the true view of sales tax, then the Bihar

Legislature acting within its own legislative field had the powers of a sovereign Legislature and could make its law prospectively as well as

retrospectively. We do not think that there is any substance in this contention either.....

This principle has been followed in a later decision of the Supreme Court in the case of *George Oakes (P.) Ltd. Vs. State of Madras*, . At page

485 the matter was put concisely in the following observations :

"These observations show that when the seller passes on the tax and the buyer agrees to pay sales tax in addition to the price, the tax is really part

of the entire consideration and the distinction between the two amounts - tax and price - loses all significance from the point of view of legislative

competence"

If we may say so, with respect, in the instant case when the customer agrees to pay what is known as 10 per cent by way of service charges and 5

paise per rupee by way of sales tax, what the customer agrees to pay is the totality of these charges and which must enter in determining what the

sale price paid by the customer is. So far as the customer is concerned, it makes no difference to him that he has in fact to make payment of sales

tax payable by the dealer or that 10 per cent by way of service charges or that the service charges will ultimately be destined for payment to

servants or for the benefit of the employees of the caterer. The fact that part of the amount is utilised towards meeting the obligations of the

employer in providing amenities to the employees, in our opinion, is hardly relevant in determining whether that charge or that extra payment

demanded of the customer is or is not properly liable to be included in determining the sale price. In fact, that is the obligation of the employer vis-

a-vis the employees under the contract or the settlement. Even if nothing were to be paid to the employees, the customer will still be required to

pay 10 per cent over and above by way of service charges. Thus the fact that

part of the amount goes for the benefit of the employees under the agreement between the employer and the employees can hardly be of any relevance in determining the nature of the payment and whether it could be properly included in determining the sale price of the goods supplied.

In view of the conclusion which we have arrived at that the 10 per cent of the service charges charged to the customers are properly included in

the sale price, the objection raised about the constitutional validity of the definition of the expression "sale price" u/s 2(29) of the Bombay Sales

Tax Act, 1959, which is raised in the Special Civil Application, does not survive. If these charges are properly included in the sale price as price of

the goods offered or sold in the hotel, then there is no question of the price being charged for something being done in respect of the goods. As the

answer to the question raised is in the affirmative, in our opinion it is not necessary, nor it has been argued at the Bar, to determine the

constitutional validity of section 2(29) of the Bombay Sales Tax Act on the ground whether the Legislature was competent to impose a tax or some

charge for anything done by a dealer in respect of the goods.

The result is that the references are answered in favour of the department. The assessee will pay costs in each case. The Special Civil Application

No. 2642 of 1967 fails and is also dismissed with costs. Deposit not to be refunded.

32. In *East India Hotels Ltd. v. State of Maharashtra* [1995] 99 STC 197 (Bom), the applicant carried on business as a hotelier and ran a five star

hotel. In the course of its activity as a hotelier, the applicant served food and drinks to its resident and non-resident customers. The applicant

claimed that having regard to the high rates charged by it for food and drinks, it could not be said that they were only for supply of food and drinks

and that therefore, the charges recovered by the applicant for the service of food and drinks should be bifurcated into two parts; 50 per cent being

for supply of food and 50 per cent being for other factors, such as atmosphere and other amenities. The Tribunal rejected the claim and held that

no part of the consideration received by the applicant was for something other than supply of food and drink.

(a) A Division Bench of the Bombay High Court, on a reference, following its decisions earlier rendered in the case of *Sun-N-Sand Hotel Private*

Ltd. [1969] 23 STC 507, held that it was clear from the definition of "sale price" in section 2(29) of the Bombay Sales Tax Act, 1959, that it is the amount payable to a dealer as consideration for the sale of goods. The test is what is the consideration passing from the purchaser to the dealer for the sale of goods. It is immaterial to enquire as to how the amount of consideration is made up. The question what is the net consideration which according to the seller is attributable to the real price of the goods is not relevant. Undisputedly the amount paid by the customer for food and drinks was the price stated in the menu card for supply of such food and drinks. How and why the price was fixed was not the look out of the customer. So far as he was concerned, he had to pay the price specified in the menu card if he wanted to take the food or drink. No option was given to him to buy it at half the price if he intended to carry it home. The applicant was not entitled to claim that half of the sale price or a part of it should only be regarded as sale price for the purposes of section 2(29) of the Act and that the balance amount should be regarded as payment for the comfort and luxury of a five star hotel. The Tribunal was justified in rejecting the contention of the applicant that only fifty per cent of the receipts in respect of the service of food in the various eating rooms of the hotel was liable to tax.

(i) It was further held that the applicant's claim that there were two implied contracts, one for environment and amenities and the other for food was wholly untenable. There was only one contract between the applicant and its customers express - or implied - and that contract was the contract for supply of food and drinks. No part of it was relatable to anything else. Hence the whole of the consideration paid by the customers constituted sale price within the meaning of section 2(29) of the Bombay Sales Tax Act, 1959.

33. It may be expedient in this connection to refer to the decision of the Supreme Court in McDowell and Co. Ltd. Vs. Commercial Tax Officer, , where the question for consideration was whether excise duty on liquor sold by the dealer which was paid directly to the excise authorities by the buyers formed part of the sale price. Ranganath Misra, J. (as his Lordship then was), speaking for the Bench, referred to section 2(s) of the Andhra Pradesh General Sales Tax Act, 1957, which defines "turnover" to mean the total amount set out in the bill of sale (or if there is no bill of

sale, the total amount charged) as consideration for sale or purchase of goods, and observed :

"The definition clearly indicates that the total amount charged as the consideration for the sale is to be taken into account for determining the

turnover. Where a bill of sale is issued (and obviously the bill has to state that total amount charged as consideration), the total amount set out

therein is to be taken into account. In every transaction of sale, there is bound to be a seller at one end and a buyer at the other and transfer of title

in the goods takes place for a consideration."

His Lordship also referred to the earlier decision of the Supreme Court in *Hindusthan Sugar Mills Vs. State of Rajasthan and Others*, and quoted

the following, observations from the said judgment :

"The test is, what is the consideration passing from the purchaser to the dealer for the sale of the goods. It is immaterial to enquire as to how the

amount of consideration is made up, whether it includes excise duty or sales tax or freight. The only relevant question to ask is as to what is the

amount payable by the purchaser to the dealer as consideration for the sale..... "

34. In *D. C. Johar & Sons (P.) Ltd. v. Sales Tax Officer, Ernakulam* [1971] 27 STC 120 (SC), the appellant-company purchased goods in other

States and transported them to its place of business at Ernakulam in the State of Kerala. It claimed exemption under rule 9(1) of the Kerala

General Sales Tax Rules, 1963, of "freight and packing and delivery charges" in respect of which separate bills were made out when selling the

goods at Ernakulam.

(a) Counsel for the appellant relied upon a decision of the Supreme Court in support of his contention that freight and packing and delivery charges

were an admissible deduction [vide : *Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool*, . But in that case the apex Court did

not decide the question as to the true effect of rule 5(1)(g) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, of which the

terms are the same of rule 9(1) of the Kerala Rules. The case was decided against the tax-payer on the ground that no separate bills were made

out by the tax-payer and one of the conditions for the claim was not satisfied.

(b) The apex Court at page 121 stated thus :

There is no substance in the contention raised by counsel for the appellant that in authorising the levy of sales tax on transport charges which

formed a component of the price for which the goods were sold, the State Legislature had trespassed upon the legislative field reserved to the

Centre by List I, entry 89 - the power to levy taxes on railway fares and freights. The tax levied is not a tax on railway freight : it is a tax on

turnover, that is, on the aggregate of sale price received by the dealer in respect of sale of goods. The fact that the price includes the expenditure

incurred by the company for railway freight for transporting the goods from the factory site to its place of business does not make the tax imposed

upon that component a tax on railway-freight.

The appeal fails and is dismissed with costs.

35. From the discussions as above, we are of the view that the provisions of section 2(r) and Explanation (2)(ii) appended thereto of the TNGST

Act are not ultra vires of entry 54 of List II of the Seventh Schedule to the Constitution of India and answer this point accordingly.

36. Point No. 2 : This point hinges upon the question as to whether the provisions of rule 6(c) of the TNGST Rules is ultra vires and violative of

article 14 of the Constitution of India, when especially the classification, according to the said rule, of ""turnover chargeable on sale"" and ""turnover

chargeable on purchase"" cannot at all be stated to have rationale or reasonable nexus to the object sought to be achieved.

(a) Rule 6(c) of the TNGST Rules reads as under :

6. The tax or taxes u/s 3, 3A, 4 or 5 shall be levied on the taxable turnover of the dealer. In determining the taxable turnover, the amounts

specified in the following clauses shall, subject to the conditions specified therein, be deducted from the total turnover of a dealer, -

(a) and (b).....

(c) all amounts falling under the following three heads when specified and charged for by the dealer separately, without including them in the price

of the goods sold -

(i) freight;

(ii)..... (omitted by G.O.P. No. 2022, Rev. dated November 18, 1967);

(iii) charges for delivery;

37. According to learned senior counsel for the assesseees - mills, once the buyer agrees to bear the transport charges, which is directly or

statutorily laid on the purchaser, it will not be part of the consideration due to the seller. The liability for tax on the turnover of purchase

corresponds to the price paid or payable to the cane grower, which can be consideration for sale. The freight borne by the seller or incurred by

purchaser on behalf of seller is part of sale price. In this view, the freight borne by the assesseees-mills (purchasers), as required by the direction of

the Sugarcane Commissioner being an expenditure laid on the assesseees-mills (purchasers) may not be construed as price under the contract of

sale. This will be, on the plain submission, that freight borne by the assesseees-mills (purchasers) is not turnover; nor price at all and is paid by the

purchaser direct to its transport contractor.

(a) Assuming, but without conceding that freight required to be borne by the sugar mills under the directions of the Sugarcane Commissioner is part

of turnover, nevertheless rule 6(c) may provide for exclusion of the price, rule 6 operates as deduction from the total turnover to arrive at taxable

turnover. It provides for deduction of freight charges charged separately. Admittedly, the freight charges have been independently worked out and

not even credited to the grower's account. The freight borne by the mills and which could not be recovered from the grower has to be absorbed

and taken as expenses debited to cane development charges. The freight borne by the mills stands apart from the price of goods spelt out under

SC Order. Rule 6(c)(i) is equally applicable in working out the taxable turnover at the hands of the assesseees-mills (purchasers), who are buying

sugarcane. Rule 6 is not denied of operation merely because the taxable turnover is worked out at the hands of the purchaser and not at the hands

of the seller. If the words "without including them in the price of goods sold" are read as restricted to turnover of selling dealers alone, it may

indicate a distinction, which does not subserve the object of the statute. If the words are read "without including them in the price of the goods

under sale or sold or purchased", it may afford a reasonable classification in the manner of determination of turnover. The object of rule 6(c) is to

confer the benefit on the purchaser by reducing the taxable turnover of the seller. But if the benefit of rule 6(c) is denied, when the assessment is

done at the hands of the purchaser, the consideration advanced to that effect suffers from the vice of unreasonableness and irrationality and is to be

avoided or otherwise, rule 6(c) must be struck down as ultra vires and violative of article 14 of the Constitution of India, inasmuch as the

classification under the said rule of turnover chargeable on ""sale"" and ""turnover chargeable on purchase"" suffers from the vice of not having rationale or reasonable nexus to the object sought to be achieved.

38. This submission, as above, may now fall for consideration in the arena of discussion. Article 14 of the Constitution of India prescribes :

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

The principle of equality does not mean that every law must have universal application for all persons, who are not by nature, attainment or

circumstance in the same position, as the varying needs of different classes of persons often require separate treatment. The principle does not take

away from the State the power of classifying persons for legitimate purposes. Every classification is in some degree likely to produce some

inequality, and mere production of inequality is not enough. Differential treatment does not ""per se"" constitute violation of article 14. It denies equal

protection only when there is no reasonable basis for the differentiation. If a law deals equally with members of a well-defined class, it is not

obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Legislation

enacted for the achievement of a particular object or purpose need not be all-embracing. It is for the Legislature to determine what categories it

would embrace within the scope of legislation and merely because certain categories, which would stand on the same footing, as those, which are

covered by legislation are left out, would not render the legislation, which has been enacted in any manner discriminatory and violative of article 14.

Further, article 14 does not insist that legislative classification should be scientifically perfect or logically complete. The court would not interfere

unless the classification results in pronounced inequality. On the other hand, it would not uphold mini classifications, where the differences between

the classes or categories are inconsequential.

39. The differences, which will warrant a reasonable classification, need not be

great. What is required is that it must be real and substantial and must bear some just and reasonable relation to the object of the legislation. When a law is challenged, as denying equal protection, the question for determination by the court is not whether it has resulted in inequality, but whether there is some difference, which bears a just and reasonable relation to the object of the legislation. Mere differentiation or inequality of treatment or inequality of burden does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary and that it does not rest on any rational basis having regard to the object which the Legislature has in view.

40. Taxation law is no exception to the doctrine of equal protection.

41. The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds. The presumption is enhanced in the case of laws of taxation and laws regulating economic activities as distinguished from laws touching civil rights.

42. A legislation is not to be struck down, as discretionary, if any state of facts may reasonably be conceived to justify it. In order to sustain the presumption of constitutionality, the court may take into consideration matters of common knowledge, matters of common report, the history of times and may assume every state of facts, which can be conceived as existing at the time of legislation. But, where the statute shows on the face of it that the Legislature made no attempt at all to make a classification, but singled out a particular individual or class without having any difference peculiar to that individual or class, the presumption of unreasonableness in favour of the Legislature is instantly rebutted and the person challenging the statute cannot be called upon to adduce further or external evidence to discharge his onus. In such a case, the presumption of constitutionality is of no avail and the court is bound to invalidate the statute as violating the guarantee of equal protection.

43. In the backdrop and setting of the axiomatic principles, as evolved by the

courts of superior jurisdiction, we may now endeavour to decide the constitutional vires or otherwise of rule 6(c) of the TNGST Rules.

44. Since the definition of "turnover" in section 2(r) of the TNGST Act takes in the aggregate amount for which goods are bought or sold, "freight and "charges for delivery" will have to be necessarily taken into consideration for ascertaining the "total turnover". However, in determining the taxable turnover", by virtue of operation of rule 6(c), "freight" and "charges for delivery", will have to be excluded. The primordial requisite for such exclusion, as prescribed by the said rule, is that "freight" and "charges for delivery" have to be specified and charged for by the dealer separately without including them in the price of goods sold. It is of paramount importance to note that rule 6 speaks of a "dealer" entitled to certain deductions from the total turnover in the process of determining taxable turnover, subject to certain conditions specified therein. There is no express or explicit mention therein as to whether the expression "dealer" is referable to which kind of dealer - selling dealer or purchasing dealer or both. Notwithstanding the absence of any such express or explicit mention as to the applicability of the rule to the kind of dealers, there is, however, indications in the said rule, that it is applicable only to "selling dealer". The indication is traceable to the words "specified and charged for by the dealer separately without including them in the price of goods sold". This sort of a distinction, learned counsel for the assessee-mills would say, does not subserve the object of the statute. According to him, if the words are read as, "without including them in the price of goods under sale, or sold, purchased", it may afford a reasonable classification in the matter of determination of turnover. The object of rule 6(c), according to him is to confer the benefit on the purchaser by reducing the taxable turnover of the seller. But, if the benefit of rule 6(c) is denied, when the assessment is done at the hands of the purchaser, the construction advanced to that effect, he would say, suffers from the vice of unreasonableness and irrationality and is to be avoided.

45. Learned senior counsel for the assessee-mills, while projecting such a submission - we rather feel - has lost sight of the difference in the concept of "sale" and "purchase" and such a difference at times necessitates different criteria being reckoned for the purpose of determining the

sale price"" and ""purchase price"". The incidence of tax under the TNGST Act may be either, at the point of ""sale"" or at the point of ""purchase"". As

already stated, rule 6(c) permits the selling dealer to deduct ""freight"" and ""charges for delivery"" from the total turnover in the process of determining

the taxable turnover, exigible to tax at a prescribed percentage, subject to the fulfilment of certain conditions specified therein. The object of such

deductions is writ large on the face of the said rule in conferring the benefits on the purchaser-consumer of reduced cost of the price of the goods,

by reducing the taxable turnover of the seller. It is to be taken note of here that the sugarcane, which is the raw material utilised by the

manufacturers-sugar mills gets attracted to tax at purchase point. The manufacturers sugar mills can, by no stretch of imagination, be equated with

purchasers-consumers of goods of day-to-day use. The manufacturers-sugar mills, taking into consideration the market fluctuations due to stiff

competition, may or may not add the cost of tax paid on the purchase of sugarcane in the end produce, namely, sugar and in such eventuality, their

profit margin in the sale of sugar may get reduced, while the consumers of sugar may have the benefit of the reduction of cost in the sale price of

sugar. Both of them, as such, stand apart and there is nothing common between them, in the sense of having been placed at similar situation. Such

being the case, it cannot at all be stated that if the benefit of rule 6(c) is denied, when the assessment is done at the hands of the purchasers-sugar

mills, the construction advanced to that effect suffers from the vice of unreasonableness and irrationality and is to be avoided. To put it positively,

there is some difference, which bears a just and reasonable relation to the object of legislation in making such a classification giving differential

treatment as respects exclusion to be made from the total turnover in the process of determination of that total turnover exigible to tax.

46. Akin to the provision contained in rule 6(c)(i) of the TNGST, Rules, Madhya Pradesh General Sales Tax Act, 1958 incorporated provisions in

clauses (ii) and (iv) of section 2(kk), giving the benefit of exclusion of ""transport costs"" and ""forwarding and handling charges"" in the computation of

the taxable turnover. The constitutional vires of such a provision was challenged before the Madhya Pradesh High Court in the case of Jiwajirao

Sugar Company Limited v. State of Madhya Pradesh [1995] 96 STC 13.

(a) In that case, the petitioner was a company incorporated under the Indian Companies Act, 1956. He owned a sugar factory in Mandsaur

district. Sugarcane Was purchased from cultivators. The petitioner was a registered dealer under the Madhya Pradesh General Sales Tax Act,

1958 (for short, "the MPGST Act"). Purchase of sugarcane is taxable u/s 7 thereof on the basis of "purchase price". "Purchase price" is defined in

section 2(kk) thereof. The petitioner's contention was that clauses (ii) and (iv) of section 2(kk) of the MPGST Act are ultra vires. On behalf of the

respondents, return had been filed.

(b) The only contention urged by learned counsel for the petitioner therein was based on the ground of lack of legislative competence in the State

Legislature to incorporate the subject-matter of the impugned clauses in the definition of "purchase price" and treating the same as part of

purchase price".

(c) Section 4 of the MPGST Act deals with incidence of taxation. Every dealer whose turnover during the year exceeds the limits specified in sub-

section (5) of section 4 shall be liable to pay tax under the said Act on his taxable turnover in respect of sales or supplies of goods effected in

Madhya Pradesh. Section 6 deals with levy of sales tax. Section 7 deals with levy of purchase tax. Every dealer, who in the course of his business,

purchases any goods specified in Schedule II from a registered dealer in circumstances in which no tax under sub-section (1) of section 6 is

payable by that registered dealer on the sale price of goods or from any other person, shall be liable to pay tax on the purchase price of goods, if

after such purchase, the goods are not sold either within the State or in the course of inter-State trade or commerce, but are sold or disposed of

otherwise or used or consumed in the manufacture or processing of other goods or used or consumed otherwise. Sugarcane is included in

Schedule II. The petitioner, a registered dealer, purchased sugarcane from cultivators who were not required to pay sales tax on the sale price of

sugarcane. The, petitioner consumed sugarcane in the manufacture of Sugar. The petitioner was liable to pay purchase tax on the purchase price of

the sugarcane so purchased.

(d) Section 2(c) of the MPGST Act defines "sale price" as meaning the amount payable to a dealer as valuable consideration for the sale of any

goods less any sum allowed as cash discount according to ordinary trade practice, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before delivery thereof other than the cost of freight or delivery or the cost of installation when such cost is separately charged.

(e) ""Purchase price"" is defined in section 2(kk) as follows :

(kk) "Purchase price" shall comprise of -

(i) the amount payable by a dealer as valuable consideration for the purchase of goods "simpliciter" :

Provided that where goods are purchased together with the packing material or container, then notwithstanding anything contained in this Act, the

purchase price of such goods shall be inclusive of the price or cost or value of such packing material or container, whether such price or cost or

value is paid separately or not, as if such packing material or container were the parts of the goods purchased;

(ii) transport costs, if any;

(iii) trade commission, if any, by whatever name called;

(iv) forwarding and handling charges, if any;

(v) insurance charges, if any;

(vi) local taxes, if any;

(vii) excise duty, if any, leviable under the Central Excises and Salt Act, 1944 (No. 1 of 1944);

(viii) cost of packing, if any; and

(ix) any other charges or costs other than those specified above, if incurred or paid in respect of goods so purchased.

Explanation. - For the purpose of this clause "transport cost" includes such expenses as are incurred by the dealer on transportation of goods after

taking delivery from the seller.

(f) The contention of learned counsel for the petitioner therein that there is distinction in defining ""sale price"" and ""purchase price"" that is, by

specifically providing the cost of transport, which was separately charged, will not becomes part of sale price is getting reflected in paragraph 7 (at

page 16), which is couched in the following terms :

7. Learned counsel for the petitioner contended that the sugarcane factory can operate only if sugarcane is available and the purchase is made

from the cultivators either at the factory gate or at purchase centres. If the purchase is made at the factory gate, the cultivators meet the expenses

and costs up to the factory gate. If the purchase is made at the purchase centre, the transportation and handling charges are met by the purchaser

and in such a contingency, since these expenses are met after the purchase is effected, they cannot be included as part of the purchase price.

Learned counsel also referred to the part of the definition of "sale price" in section 2(o) which "excludes cost of freight or delivery when such cost

is separately charged" and contended that such exclusion is not available in the definition of "purchase price. According to the learned counsel, this

amounts to discrimination.

(g) A Division Bench of the Madhya Pradesh High Court considered such a contention and ultimately expressed that clauses (ii) and (iv) of section

2(kk) of the MPGST Act were not beyond the legislative competency of the State and the scintillating discussion for arriving at such a conclusion is

penned down in paragraphs 11 to 15 (pages 18 to 21), which read as under :

11. "Purchase price" as defined in section 2(kk) of the Act includes not merely the consideration of the purchase, but also certain costs or

expenses. They are transport costs, trade commission, forwarding and handling charges, insurance charges, local taxes, excise duty, cost of

packing, etc. An analysis of these clauses would indicate that these are elements which would be added to the consideration paid for the purchase

to arrive at the cost price in the hands of the purchaser. The parties may enter into contract distributing burden of costs, either adding it to the

consideration or refraining from so doing; the Legislature has attempted to cut the Gordian knot by stipulating that such costs should be added to

the consideration of the purchase in order to arrive at the "purchase price". There is nothing in legislative entry 54 of List II which creates specific

restriction on the power of the State Legislature in defining "purchase price". On the other hand, as indicated by the Supreme Court, a legislative

entry does not merely enunciate powers, but specifies the field of legislation and the widest import and significance should be attached to it.

Undoubtedly, the Legislature has the power to enact law levying and imposing

purchase tax and for that purpose, specify the components which will go to make up the purchase price for which tax has to be levied. Price undoubtedly is something which the purchaser pays to the seller. It can also include costs incurred in the process of purchase. But this does not necessarily mean that every part of the price goes to the pocket of the seller; for he himself may meet expenses either of transport or of commission or handling, or payment of enumerated tax, in order to effect sale and realise purchase price. The various items of costs or expenses incorporated in the definition relate to matters which are intimately connected with the transaction of purchase and the purpose for which the purchase is effected, namely, manufacture or consumption by the purchaser. It cannot be said that transport charges or handling charges are so unconnected with the transaction of purchase or the purpose for which purchase is effected that they could be regarded as falling outside the ambit of "purchase price". It is not as if in the guise of defining purchase price, the Legislature has sought to incorporate in it some factors which are totally unconnected with the transaction of purchase or purpose for which purchase is effected. State Legislature is certainly within its competence in defining or enumerating factors which contribute to the assessment or determination of the purchase price. We are not able to agree that in stipulating that transport charges or forwarding or handling charges are to be treated as part of the purchase price, the State Legislature went beyond its legislative competence. We are also not satisfied that any unconstitutional discrimination has been shown in defining "sale price" and "purchase price", i.e., by specifically providing that cost of transportation which is separately charged, will not become part of sale price. The difference in the concept of sale and purchase at times necessitates different criteria being reckoned for the purpose of determining sale price and purchase price.

12. Deductions for the amount of freight may be allowed only when it is related to the sales of dealers, i.e., if it is freight outward. No deduction is allowed in respect of freight inward or in respect of bringing the purchased goods. The State Legislature is competent to provide for inclusion of a particular item as part of purchase price with a view to tax turnover, that is to say, the definition being inclusive, it will form part of the purchase price. The Supreme Court had occasion to decide legislative competence in

respect of definition of "sale price" in D. C. Johar & Sons (P) Ltd. v.

Sales Tax Officer, Ernakulam [1971] 27 STC 120, wherein it was stated thus :

"There is no substance in the contention raised by counsel for the appellant that in authorising the levy of sales tax on transport charges which

formed a component of the price for which the goods were sold, the State Legislature had trespassed upon the legislative field reserved to the

Centre by List I, entry 89 - the power to levy taxes on railway fares and freights. The tax levied is not a tax on railway freight; it is a tax on

turnover, that is, on the aggregate of sale price received by the dealer in respect of sale of goods. The fact that the price includes the expenditure

incurred by the company for railway freight for transporting the goods from the factory site to its place of business does not make the tax imposed

upon that component a tax on railway freight.

13. In the same way, the Legislature could define "purchase price" as including transport cost and handling charge. The entry, as already

mentioned above, is wide enough to include all facets and items of cost as part of the purchase price. In Dyer Meakin Breweries Ltd. Vs. State of

Kerala, the company had claimed the amount expended by it towards freight and handling charges of the goods from the factories to the

warehouse at Ernakulam to be excluded from taxable turnover. Rule 9(f) of the Kerala General Sales Tax Rules, 1963 provides as under :

"In determining the taxable turnover, the amount specified in the following clauses shall, subject to the conditions specified therein, be deducted

from the total turnover of the dealer.....

(f) all amounts falling under the following two heads, when specified and charged for by the dealer separately, without including them in the price of

goods sold;

(i) freight;

(ii) charges for packing and delivery".

The Supreme Court held as under :

It is common ground that the sale of the liquor took place in Ernakulam. The company arranges to transport liquor for sale from the factories to its

warehouse at Ernakulam. It was not brought for any individual customer. All the expenditure incurred is prior to the sale and was evidently a

component of the price for which the goods were sold. It is true that separate bills were made out for the price of the goods ex-factory and for

"freight and handling charges". But, in our judgment, the Tribunal was right in holding that the exemption under clause (f) of rule 9 applies when the

freight and charges for packing and delivery are found to be incidental to the sale and when they are specified and charged for by the dealer

separately and expenditure incurred for freight and packing and delivery charges prior to the sale and for transporting the goods from the factories

to the warehouse of the company is not admissible under rule 9(f). Rule 9(f) seeks to exclude only those charges which are incurred by the dealer

either expressly or by necessary implication for and on behalf of the purchaser after the sale when the dealer undertakes to transport the goods and

to deliver the same or where the expenditure is incurred as an incident of sale. It is not intended to exclude from the taxable turnover any

component of the price, expenditure incurred by the dealer which he had to incur before sale and to make the goods available to the intending

customer at the place of sale.

14. Similarly in *Hindusthan Sugar Mills Vs. State of Rajasthan and Others*, the Supreme Court held as under :

"Under the first part of the definition of ""sale price"" in section 2(p) of the Rajasthan Act, the expression meant the amount payable to a dealer as

consideration for the sale of any goods and, therefore, the concept of real price or actual price retainable by the dealer is irrelevant. The test is,

what is the consideration passing from the purchaser to the dealer for the sale of the goods. It is immaterial to enquire as to how the amount of

consideration is made up, whether it includes excise duty or sales tax or freight. The only relevant question to be considered is as to what is the

amount payable by the purchaser to the dealer as consideration for the sale and not as to what is the net consideration retainable by the dealer.

The exclusion clause in the second part of the definition of ""sale price"" can be availed of by the assessee only if the State seeks to rely on the

inclusive clause for the purpose of bringing a particular amount within the definition of ""sale price"". But if the State is able to show that the particular

amount falls within the first part of the definition and is, therefore, part of the ""sale price"", the exclusion clause cannot avail the assessee to take the

amount out of the definition of "sale price". The exclusion clause is not intended to apply to a case where the cost of freight is part of the price, but the dealer chooses to split up the price and claim the amount of freight as a separate item in the invoice. Where the cost of freight is part of the price, it would fall within the first part of the definition and to such a case, the exclusion clause in the second part has no application."

Therefore, it depends on the nature of the provisions under the Act. The definitions of "sale price" and "purchase price" may differ in their content depending on the intention of the Legislature to include or exclude a particular item from sale price or purchase price.

15. Hence we are not satisfied that incorporation of clauses (ii) and (iv) of section 2(kk) of the Act was beyond the legislative competence of the State. Petition fails and is hereby dismissed, but without costs. Security deposit, if any, be refunded to the petitioner.

We respectfully agree to share the view of the Division Bench of the Madhya Pradesh High Court, as stated above.

47. For the reasons, as above, we are of the view that the provisions of rule 6(c) of the TNGST Rules is intra vires and not violative of article 14 of the Constitution of India, and answer this point accordingly.

48. Point Nos. 3 to 9 : These points revolve on various subsidies, such as, planting subsidy, varietal subsidy, subsidy to commercial nursery, subsidy to farm inputs at subsidised rates, transport subsidy, development charges paid to the registering mill by the assesseees-sugar mills for the diverted cane and the effect of disbursal of subsidy prior to or subsequent to the entering of contract of sale, besides transport charges, initially incurred by the growers and subsequently reimbursed by the assesseees-mills or the brunt of burden of transport charges from the field of the growers by the assesseees-mills. The revenue treated all the subsidies as consideration for the contract of sale. This sort of a treatment by the Revenue found favour with the taxing authorities up to the level of the Sales Tax Appellate Tribunal. This, learned Senior Counsel for the assesseees-mills would say, is a clear misconception, both on facts as well as on law. According to him, sugarcane planting incentive is offered and accepted in order to persuade the grower to go in for sugarcane cultivation, besides particular variety of cane to be planted in a month. The

provisions of the TNGST Act do not require the grower in the command area to pay sales tax on the sale of sugarcane. The law does not oblige

him to plant in a particular month or a particular variety. Therefore, the incentives, when offered and accepted constitute an independent, though

collateral, agreement with its own promises and consideration. The promisor is the sugar mill and the promisee is the cane-grower. The

consideration furnished by the grower is the planting of a particular variety of sugarcane in a month in return for the promises of the sugar mill to

pay the incentive. This by itself has the attributes of an independent contract, distinct and different from the contract entered into by the grower u/s

10(2) of the MSFC Act. Under the sugarcane agreement, the cane-grower is not entitled to the planting or variety subsidy; nor the grower can

demand the same under the sugarcane agreement. Thus, there are two different contracts. The first one is to induce the contract of sale. The

breach of one contract does not constitute the breach of the other.

The law, as such, recognises the existence of preliminary or collateral contract, which has an independent existence. For making such a legal

submission, the said learned Senior Counsel for the assessee-mills, would say, that he drew inspiration from certain passages from Cheshire,

Fifoot and Furmston's Law of Contract, Eleventh Edition, and Benjamin's Sale of Goods, Third Edition. We may now refer to those passages :

The role of the Judges in thus constructing a contract was accepted and explained in 1913 by Lord Moulton. [Heilbut, Symons & Co. v.

Buckleton [1913] AC 30. See Greig 87 LQR 179].

"It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. ""If

you will make such and such a contract I will give you one hundred pounds"", is in every sense of the word a complete legal contract. It is collateral

to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status

of a contract."

The use of the title "Collateral contracts" to designate such creatures is thus sanctioned by high authority and, indeed, had been known to the law

for the previous fifty years. [Lindley v. Lacey (1864) 17 CBNS 578 : and Erskine v. Adeane (1873) 8 Ch. App. 756. See Wedderburn (1959)

CLJ 58. It may be added that the case of *Collen v. Wright* (1857) 8 E & B 647, seems to offer an early example of a "collateral contract"; pages

484-485, below. *Carlill v. Carbolic Smoke Ball Co.* [1892] 2 QB 484; on appeal [1893] 1 QB 256, above is another example of a collateral

contract between manufacturer and consumer where the consumer bought the goods from a retailer relying upon the manufacturer's

advertisements. In that area such a finding is unusual; *Lambert v. Lewis* [1982] AC 225 : [1980] 1 All. ER 978. See also *Esso Petroleum Ltd. v.*

Customs and Excise Comrs. [1976] 1 All. ER 117 : [1976] 1 WLR 1, discussed more fully at pages 113-114 below].

The name is not, perhaps, altogether fortunate. The word "collateral" suggests something that stands side by side with the main contract, springing

out of it and fortifying it. But, as will be seen from the examples that follow, the purpose of the device usually is to enforce a promise given prior to

the main contract and but for which this main contract would not have been made. It is often though not always, rather a preliminary than a

collateral contract. But it would be pedantic to quarrel with the name if the invention itself is salutary and successful. Its value has been attested by

a number of cases.

(Vide : Pages 63-64 of *Cheshire, Fifoot and Furmston's Law of Contract*, Eleventh Edition).

(b) "Contractual promises separate from the main contract (collateral contracts). Sometimes it may seem appropriate to treat a statement as

containing a promise; but there may still be difficulty in regarding it as part of the main contract, whether because it is clearly prior [See *Miller v.*

Cannon Hill Estates Ltd. [1931] 2 KB 113; *Coffey v. Dickson* [1960] NZLR 1155, *Wells (Merstham) Ltd. v. Buckland Sand & Silica Ltd.*

[1965] 2 QB 170 (where no specific contract was in view)] or otherwise external to the contract, or contrary to the terms of the contract, or

because the contract is reduced to writing. [As to which see material cited ante. & 722 n. 37]. In such situations it may sometimes be possible to

interpret the promise as part of a separate or collateral contract, often called a "collateral warranty". Where the main contract is not yet concluded

when the collateral promise is made, consideration will be provided by entering into the main contract, [See *Heilbut, Symons & Co. v. Buckleton*

[1913] AC 30] though when the main contract is already binding there may be more difficulty in finding consideration. [See *Roscorla v. Thomas*

[1842] 3 QB 234 (Warranty given after sale unenforceable)]. *Couchman v. Hill* [[1947] KB 554 See also *Harling v. Eddy* [1951] 2 KB 739 (but

see post & 750, for another explanation of these cases). *Webster v. Higgin* [1948] 2 All. ER 127. *City and Westminster Properties (1934) Ltd. v.*

Mudd [1959] Ch. 129, *Mendelssohn v. Normand Ltd.* [1970] 1 QB 177. But Cf : *Lough v. Moran Motors Pty. Ltd.* [1962] QSR 466 (car :

Prior warranty inconsistent with later 30-day warranty); *Donovan v. Northelea v. Farms Ltd.* [1976] 1 NZLR 180. See *Mclauchian the Parol*

Evidence Rule (1976) Chap 6 et seq.] can be explained as involving such a contract. A heifer was auctioned, and the printed conditions of sale

excluded warranties. The plaintiff asked whether the heifer was "unserved", saying that he would not bid if she was not. He was held entitled to sue

for breach of collateral warranty when it proved, contrary to the assertion made, that she was in calf; the exclusion of warranties, being part of the

main contract, was inapplicable. In the leading case of *Heilbat, Symons & Co. v. Buckleton*, [[1913] AC 30, see in general *Wedderburn* (1959)

CLJ 58], it was said that "such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore

viewed with suspicion by the law. They must be proved strictly." However, Lord Denning, M.R. has more recently suggested that "much of what

was said in that case is entirely out of date [*J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd.* [1976] 1 WLR 1078, see also *Esso*

Petroleum Co. Ltd. v. Mardon [1978] QB 801; *Howard Marine and Dredging Co. Ltd. v. A. Ogden & Sons (Excavations) Ltd.* [1978] QB 574.

The judgment of Lord Moulton is plainly influenced by the importance that the ""House should maintain in its full integrity the principle that a person

is not liable in damages for an innocent misrepresentation no matter in what way or under what form the attack is made"". See page 51. Such a

principle is no longer valid. Dicta from it were however cited with approval by Lord Dilhorne in *Independent Broadcasting Authority v. EMI*

Electronics Ltd. (1980) 14 BLR 1] and it is certainly true that contractual, as well as tortious liability on statements has of recent years been much

more readily accepted. This manifests itself in two principal ways. First, promises are more readily inferred from statements, as in *Esso Petroleum*

Co. Ltd. v. Mardon [Supra. But compare the Howard Marine case supra, where no warranty was found; also Lambert v. Lewis [1982] AC 225

(affd. on other grounds ibid 271) (no warranty in promotional literature)] where a pre-contractual statement as to the likely throughput of a petrol

station was held to involve, as an alternative to liability in tort, a promise that the forecast had been made with reasonable care and skill (though not

a promise that such an amount of petrol would actually be sold). In construing such contracts, careful attention must be paid to the exact content of

the promise, as the case itself shows. [Cf Wells (Merstham) Ltd. v. Buckland Sand and Silica Ltd. [1965] 2 QB 170 (warranty of analysis of sand

absolute)]. Secondly, the apparent inconsistency of such a contract with a written main contract may be regarded as less significant than might have

been the case previously. Sometimes this is achieved without adopting the device of the collateral contract, by simply saying that the main contract

is not reduced to writing but partly written and partly oral. [As in J. Evans & Sons (Portsmouth) Ltd. v. Andrea Merzario Ltd. supra per Roskill,

L.J. Quickmaid Rental Services Ltd. v. Reece (1970) 114 S.J. 372; A. M. Bisley & Co. Ltd. v. Thompson [1982] 2 NZLR 696. See also Esso

Petroleum Co. Ltd. v. Mardon supra. See McLauchian, 3. Dalhousie L. Rev. 136 (1976). The Parol Evidence Rule (Wellington, 1976), Chap. 8;

Law Com. No. 154 Comnd. 9700 (1986)].

(Vide paragraph 726 of Benjamin's Sale of Goods, Third Edition)

49. It is further submitted that the subsidy due on the agreement cannot be consideration for the contract of sale. In cases, where subsidy is

payable, where the cane-grower is further required to effect supply of sugarcane under the sale agreement concluded under MSFC Act, the

subsidy offered is still to secure an offer and to conclude an agreement and its performance. The subsidy paid is still under the collateral contract,

which may be related to the contract of sale formed thereby but not part of it. The subsidy under the collateral contract cannot be priced, since it is

consideration of a contract of sale, which is still to be secured.

50. This sort of a submission, as projected by learned Senior Counsel for the assessee-mills, of course, wears a look of tenability. But, a deeper

probe if made, into the fact-situation, in the process of giving a legal fitment therefor, the utter untenability taking shelter thereunder gets exposed,

as rightly pointed out by learned Additional Government Pleader (Taxes).

51. Regarding the agreement, two types of agreements are there. One is a composite agreement, as in the case of private sugar mills like TAS

Ltd., and another pertaining to co-operative sugar mills, like CCSM Ltd., in a circular from the Sugarcane Commissioner specifying certain

subsidies. The question to be considered is not one of whether subsidy agreement is collateral one or the other. The question is, is subsidy, part of

the sale consideration to fall within the definition of "turnover" u/s 2(r) of the TNGST Act. The question of consideration has to be approached, not

from the point of view of common law principles, which are aimed at defining and regulating the rights of the parties inter se; but from fiscal

concept; for the purpose of arriving at the basis of chargeability. Whatever be the treatment as regards the rights of the parties to a collateral

contract vis-a-vis main contract, for the purpose of computing turnover, one is guided purely by the definition under the sales tax enactment.

Special concepts under the fiscal enactment are to be understood in the context in which they are introduced in the statute.

52. The concept of turnover has to be analysed from the totality of circumstances leading to the transfer of property in goods. It is common ground

that,

(1) there is an agreement for the sale and purchase of sugarcane;

(2) agreement creates monopoly and a bond focussing only the individuals for whom the exclusive supply is assured; and

(3) whether it be one single agreement or more than one, the only purpose and object as also the intention that runs through is the supply of

sugarcane by the grower to the sugar mills.

The cost of supply of sugarcane, which is the outcome of the totality of the circumstances is the basis for the computation of the turnover.

Therefore, irrespective of whether the circumstances are expressed in one agreement or more than one, so long as the agreements are with

reference to a single transaction, all must be read and interpreted together and they have the legal effect for all purposes, as if they are one

document. Therefore, a composite contract of the nature intended to be carried through as a whole, we are not to consider individually each step

as a separate isolated step, but must be looked at cumulatively to arrive at the

conclusion.

53. The concept of turnover under the TNGST Act is much wider in scope than what is normally a common law understanding of a sale price.

Turnover is the sum total of all consideration for which goods are bought or sold including any sum charged for anything done by the dealer, in

respect of the goods at the time of or before delivery thereof. The definition is specific enough to include a certain sum and also excludes certain

other sum, but for which, the same would be part of consideration to fall under the definition of ""turnover"".

54. The concept of ""transaction"", ""turnover"" and ""price"" had been interpreted by superior courts of jurisdiction in catena of decisions and some of them may now fall for consideration.

(a) In *S. Chattanatha Karayalar v. Central Bank of India Ltd.* (1965) 35 Comp. Cas 610 (SC) : AIR 1965 SC 1856, the appellant was one of the

three executants, including a company, of a promissory note for Rs. 4 lakhs issued for obtaining financial accommodation for the company, the

executants holding themselves liable thereon jointly and severally. This note was sent to the respondent-bank, along with a letter, styled letter of

continuity, of the same date, stating that the promissory note was given to the bank as security for repayment of the ultimate balance or sum

remaining unpaid on the overdraft. This letter was also signed by the appellant. On the same day, the company as ""borrower"" executed in favour of

the bank, a deed of hypothecation of its stock of goods for securing a demand cash credit. On the basis of these three documents the bank opened

an overdraft account in the name of the company. A suit was brought by the bank for recovery of the sum of Rs. 2.86,292 being the amount due

on the overdraft account.

(i) The Supreme Court in such a situation, held that there was one integrated transaction constituted by the three documents and the legal effect

was to confer on the appellant the status of a surety and not of a co-obligant and that if a transaction is contained in more than one document

between the same parties, they must be read and interpreted together and they have the same legal effect for all purposes as if they are one

document.

(b) In *Srinivasa Timber Depot v. Deputy Commercial Tax Officer* [1966] 23 STC

158 (Mad.) (former case), the question that came up for

consideration was as to whether what is described as "lot cooly charges" paid on a percentage basis by the customers to different assessee's form

part of the turnover chargeable to sales tax.

(i) The Revenue sought to sustain the addition of "lot cooly charges" in the turnover on two grounds :

(1) That the definition of "turnover" itself will include "lot cooly charges" for so far as the purchaser is concerned, he has no option but to pay the

lot cooly charges" and the total amount which he is compelled to pay as price for the goods purchased by him includes the "lot cooly charges" and

lot cooly charges" is part of the amount charged by the dealer and paid by the customer at the time of the sale; and

(2) that even otherwise "lot cooly charges" will fall within the second limb in explanation (2)(ii) to section 2(r) the TNGST Act.

As regards the first ground, this Court held that though "lot cooly charges" had been paid by the customers along with the price for the goods, they

have been shown separately in the bills. As regards the second ground based on explanation 2(ii) to section 2(r), this Court expressed :

In our opinion the explanation cannot be read in the abstract. Its context is with reference to the sale and turnover as defined. It is now well-

settled that the expression "sale of goods" in the State legislative entry bears the same meaning and scope as it has been understood in the

legislative practice of this country since the enactment of the Sale of Goods Act. The object of the Madras General Sales Tax Act is to levy a

general tax on the sale or purchase of goods in the State. It is clear, therefore, that what could legitimately be brought to tax under the Act is the

aggregation of the consideration for the transfer of property in the goods. Obviously, it should follow that service charges cannot be equated to

consideration for transfer of property in the goods. In the explanation referred to, if understood in the context, as it should be, any sums charged

for anything done by the dealer in respect of the goods" can only relate to something done by the dealer in respect of the goods which involves

transfer of property in the goods and for consideration. The further condition is that something should have been done in respect of the goods at

the time of or before the delivery of the goods. So what is chargeable to tax is

not any sum charged at the time of or before the delivery of, the goods, but any sum charged for transfer of property in the goods, involved in anything done by the dealer in respect of the goods at the time specified by the explanation. The explanation read in the abstract is, of course, of wide scope and may possibly take in any sum charged for anything done by the dealer in respect of the goods whether or not it involved also transfer of property in the goods. But, as we said, the fact that it is an explanation to the definition of "turnover" and the "turnover" is but the aggregate amount of the consideration of sales shows that it has to be read in the context and not de hors it.

(c) In *The State of Madras Vs. Srinivasa Timber Depot and Others*, (latter case), the Revenue urged that the former case (*Srinivasa Timber Depot*

[1966] 23 STC 158 (Mad.) requires reconsideration in view of the decision of the Supreme Court in *Dyer Meakin Breweries Ltd. Vs. State of*

Kerala, . The prayer of the Revenue for reconsideration as above, faced dismal failure, in the sense of affirming the earlier view of this Court.

(d) In *P.C. Joseph and Sons Vs. State of Kerala*, the revision petitioner was a firm of timber dealers. They purchased logs of timber and sell

timber as well as sawn timber and scantling. For the year 1974-75, they were assessed to tax on their turnover. Prior to assessment a dispute

arose in regard to two items. Logs of timber purchased by the assessee were being sawn in the premises of the seller since there is a saw mill also

there and according to the assessee besides the value of the timber sawing charges are also paid. The assessee purchases logs and sells such logs

to customers some of whom may require the service of sawing. Whether the turnover of timber must include such sawing charges also was the

main question. Such charges, as seen from the bills, came to a sum of Rs. 33,529.80.

(i) The assessing authority issued a pre-assessment notice proposing to tax sawing charges shown in the bill also as part of the turnover. The other

claim concerned the purchase tax leviable on the purchases of timber by the assessee, corresponding to sales of scantlings and sawn timber. The

logs used for that purpose would be treated as consumed and therefore in respect of purchases of logs tax u/s 5A would be leviable.

(ii) There is a dispute as to the quantum of purchases which had to be treated as

taxable u/s 5A. According to the department, in the absence of any evidence showing sales of timber as such, the entire purchase turnover of Rs. 54,269.40 was to be treated as taxable u/s 5A. According to the assessee as clarified before the appellate authority by a statement filed by him such turnover was only a sum of Rs. 3,950.60, for, it was urged before the appellate authority that only timber worth Rs. 3,950.60 had been sawn and sold as scantlings.

(iii) To the pre-assessment notice the assessee filed a reply. He contended specifically that sawing charges were realised under separate contracts subsequent to the sales of logs and therefore they were not part of the turnover. The assessee disputed liability to tax u/s 5A on the entire turnover of the purchase of logs.

(iv) The assessing authority did not accept the contention of the assessee that sawing charges should not be included in the turnover. Of course, the plea of the assessee that sawing work was done under contracts entered into subsequent to the sales was not discredited by the assessing authority nor was the truth of such a case disputed. On the other hand, the assessing authority seems to think that even if that be so, since the work of sawing had necessarily to be done before delivery, going by explanation (2) to the definition of "turnover" in the Kerala General Sales Tax Act such charges also would fall within the scope of "turnover". On the question of turnover taxable u/s 5A the assessing authority took the view that the entire turnover of purchases was assessable.

(v) The appellate authority accepted the case of the assessee. He found that the sawing of timber had nothing to do with the turnover of the assessee and thus the whole of the sawing charges had to be excluded. He also accepted the statement of the assessee as to the quantum of timber used for converting into scantlings and sawn timber sold as such and on that basis reduced the turnover liable to tax u/s 5A to the sum of Rs. 3,950.60.

(vi) The Appellate Tribunal, before whom the matter was taken up in revision by the department, accepted the contention of the department.

Adopting the reasoning of the Sales Tax Officer it found that the sawing work was done on the logs before delivery and for that reason the charges of sawing would fall within the definition of "turnover".

(vii) In such a situation, what a Division Bench of the Kerala High Court has stated is getting reflected in paragraphs 4 and 5 (at pages 565-567),

which read as under :

4. The main question concerned the plea that charges realised by a dealer towards the work of sawing on the logs which are the subject of the

sale should also be part of the turnover since the sawing work is done prior to delivery. Before we go into the question we must notice that the

assessee had categorically and unequivocally stated in his objection to the pre-assessment notice that the contract of sawing was subsequent to the

sale and therefore sawing charges were not liable to be taxed. Neither the assessing authority nor the appellate authority doubted the truth of this

case, let alone enquire into the truth. The question of enquiry would arise only if the assessing authority was not prepared to accept such a case.

The authority has assumed that the case was true but has examined the liability to tax nevertheless. The assessing authority has expressed the view

that since the sawing operations were prior to delivery the charges for such sawing would become part of the turnover. This is the argument

repeated by the Tribunal. We are called upon to examine the correctness of this approach.

5. Turnover is defined in section 2(xxvii) thus :

""Turnover"" means the aggregate amount for which goods are either bought or sold, or supplied or distributed, by a dealer, either directly or

through another, on his own account or on account of others, whether for cash or for deferred payment or other valuable consideration, provided

that the proceeds of the sale by a person of agricultural or horticultural produce, grown by himself or grown on any land in which he has an interest,

whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover.

Explanation (1). - ""Agricultural or horticultural produce"", shall not include -

(i) such produce as has been subjected to any physical, chemical or other process for being made fit for consumption, save mere cleaning, grading,

sorting, drying or dehusking;

(ii) tea, coffee, rubber, cardamom or timber.

Explanation (2). - Subject to such conditions are restrictions, if any, as may be prescribed in this behalf, -

(i) the amount for which goods are sold shall include any sums charged for anything done by the dealer in respect of the goods sold at the time of,

or before, the delivery thereof;

(ii) any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers

shall not be included in the turnover; and

(iii) 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."

Turnover is evidently the aggregate amount for which goods are either bought or sold. This aggregate amount would include anything done by a

dealer in respect of the goods sold, at the time of or before the delivery thereof as mentioned in clause (i) of explanation (2). No doubt read by

itself the words "sums charged for anything done by the dealer in respect of the goods sold" are quite wide in their amplitude. But the explanation

does not stand by itself. It is an explanation to the definition and therefore it has to be read in the context of the definition of the term "turnover".

What the aggregate includes is what is indicated by the main part of the definition. The aggregate is necessarily the amount for which the goods are

either bought or sold. It is the sale price. What would not be part of the consideration would not be within the scope of clause (i) of explanation

(2). When the contract of sale contemplates that the vendor shall do certain acts in relation to the goods before delivery, the charges for such

services would necessarily form part of the price unless it be that parties specifically agree that it need not be so. All such charges would be

brought within the scope of consideration for the sale, the aggregate amount referred to in the definition of "turnover". If there is an independent

contract to pay for services and that contract is executed the amount payable under such contract for services will not be part of the sale

consideration. The charges for services to be rendered under the agreement of sale either expressly or otherwise would fall within clause (i) of

explanation (2). Reference in the said part of the explanation to "any sums charged for anything done" must be understood as anything done in

relation to the transfer of property in the goods, and not independent of it. The

view we have expressed here is consistent with the view expressed

by the High Court of Madras in *Srinivasa Timber Depot v. Deputy Commercial Tax Officer, Choolai Division, Madras-29* [1969] 23 STC 158.

The Sales Tax Appellate Tribunal has evidently lost sight of the import of that decision. It has attempted to apply literally the words "charged for

anything done before delivery" without noticing the real purport of the explanation. There was no scope for assessing the charges for sawing

included in the bills. The assessee must succeed in relation to the turnover of Rs. 33,529.80.

(e) In *Hiranyakeshi Sahakari Sakkare Karkhane Niyamit Vs. The State of Karnataka*, the assessee had paid certain amount to the sugarcane

suppliers as ""khodki charges"", for the purpose of keeping the land on which sugarcane had been planted in good condition. It was held that the

khodki charges"" had been in fact paid as part of the consideration for the sugarcane supplied to the assessee by the growers. It was therefore

included in the taxable turnover of the assessee. The Kerala High Court went on to say that the point of time at which such payment was made or

the purpose for which the amount had been used by the grower would be immaterial as long as the payment was made in lieu of the sugarcane

supplied by grower to the assessee. A similar view was taken in respect of transport charges and harvesting charges in *Pandavapura Sahakara*

Sakkare Kharkhane (P) Limited Vs. State of Mysore,

(f) In *State of Tamil Nadu v. National Co-operative Sugar Mills Limited* [1992] 86 STC 22 (Mad.), the respondent, a sugar manufacturer, paid

certain sums to cane-growers on an acreage basis, as subsidy for early planting, and accounted for the payment under the head ""cane development

expenses"". The Tribunal held that the sums were independently paid, to encourage early cultivation of sugarcane, and were therefore not related to

nor includible as part of the purchase price paid for the sugarcane.

(i) On revision petitions filed by the department a Division Bench of this Court allowing the petitions, held that the early planting subsidy and the

early supply of sugarcane were closely linked. While calculating the profits, the respondent took into account the payments made as early planting

subsidy. Moreover, the sums paid were retained by the cane growers, and were over and above the price fixed by the Government as the price of

sugarcane. It was relatable to the supply of sugarcane, and there was an implicit agreement that the subsidy formed part of the price. The sums

paid therefore were to be treated as part of the purchase turnover of sugarcane of the respondent. The fact that the payment was accounted for as

cane development expenses"" did not change the character of the payment.

(g) In Commissioner of Income Tax, Hyderabad Vs. M/s. P.J. Chemicals Ltd., the question that came up for consideration was as to whether the

grant of subsidy by Government as incentive for setting up industries in backward areas is not liable to be deducted in computing the actual cost of

assets for the purpose of calculation of depreciation, etc., u/s 43(1) of the Income Tax Act, 1961. The apex Court in answering the question said :

Where Government subsidy is intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries, the

specified percentage of the fixed capital cost, which is the basis for determining the subsidy, being only a measure adopted under the scheme to

quantify the financial aid, is not a payment, directly or indirectly, to meet any portion of the "actual cost". The expression "actual cost" in section

43(1) of the Income Tax Act, 1961, needs to be interpreted liberally. Such a subsidy does not partake of the incidents which attract the conditions

for its deductibility from "actual cost". The amount of subsidy is not to be deducted from the "actual cost" u/s 43(1) for the purpose of calculation

of depreciation, etc.

(h) In Central Wines, Hyderabad Vs. Special Commercial Tax Officer, , the question that came to be canvassed was whether the amount

collected by the seller from the buyer which comprised of two components the actual sale price and the sales tax is part of the ""turnover"" and

comes within the expression ""any other sum charged by the dealer whatever be the description, name or object thereof", occurring in the definition

of section 2(s) of the Andhra Pradesh General Sales Tax Act, 1957 (for short, ""APGST Act"").

(i) In the former case, it is shown expressly as sales tax and in the latter case, it is shown in the form of debit notes. But, in both the cases, it is

collected by the seller from the buyer at the time of sale or rather as a condition of sale.

(ii) The apex Court in answering the question said :

Sales tax charged by a dealer as "tax" in his bill to the purchaser but shown separately is part of the "turnover" within the meaning of the definition

of "turnover" in section 2(s) of the A.P. General Sales Tax Act, 1957. The sales tax component of the sale price charged by the dealer to the

purchaser is not collected by him as an agent of the State. Even if, therefore, the bill or the voucher issued to the purchaser indicates the amount of

sales tax separately what is collected by the dealer from the purchaser is not tax but is merely a part of the sale price charged by the dealer to be

purchaser. So far as the statute is concerned it does not cast any obligation on the purchaser of the goods to pay any tax and therefore what is

collected by the dealer from the purchaser by way of consideration for passing the property in the goods to the purchaser is the price charged by

him and not tax collected by him from the purchaser. The amount of money which goes from the pocket of the purchaser to the pocket of the

dealer as a condition or consideration for the passing of the property in the goods is thus the sale price and not the tax. It is the amount, but for the

payment of which, the dealer would not transmit his title to the goods in favour of the purchaser, and not any amount paid by the purchaser

towards any tax liability incurred by him on making the purchase of the goods. Nothing turns on whether the bill or voucher issued to the purchaser

is so made out to show that the sales tax is charged separately. The consideration obtained by the dealer from the purchaser would be in the eye of

the law be the sale price regardless of what nomenclature is given to a part of the price charged by him.

Includibility of sales tax charged by the dealer from the purchaser turns on the question whether or not the tax is recoverable from the purchaser

under a statutory obligation.

Even where the sales tax is not included in the bill but is collected simultaneously and kept in a suspense account by the dealer, the amount

collected would be part of the "turnover" as defined in section 2(s). The amount includible in the turnover on a true interpretation of section 2(s)

cannot become excludable merely by reason of the accountancy device adopted by the dealer concerned.

(i) In *State of Tamil Nadu v. Alkali and Chemical Corporation of India Ltd.* [1994] 92 STC 597 (Mad.), the question that arose was as to

whether a dealer is entitled to have discount or rebate excludible from the taxable turnover, even where the case does not strictly fall u/s 2(h) of the Central Sales Tax Act, 1956.

This Court answered the question and said (at page 599) :

..... The concept of "sale price" u/s 2(h) of the Act and the concept of "turnover" in section 2(j) are distinct and separate. Generally, cash

discount is allowed when the purchaser makes payment promptly or within the period of credit allowed. What is contemplated by section 2(j) is

the net amount which is entered in the books of the parties as the amount realisable and, therefore, any rebate which formed an integral part of the

agreement or contract and is allowed in accordance with the regular business practice has to be adjusted in the sales tax assessment when it varies

the price payable in respect of the goods. Under the Central Sales Tax Act, 1956, it is the sale price which ultimately enters into the computation

of the turnover which has to be taken as the consideration for which the goods are sold by the assessee. This being the position, it becomes

obvious that an assessee is entitled to have the rebate excluded from the taxable turnover under the Central Sales Tax Act, 1956, even where the

case does not strictly fall u/s 2(h) in the sense that the rebate was not given as cash discount but was otherwise allowed in accordance with the

regular business practice and formed an integral part of the agreement or contract between the assessee and the buyer and did not vary the price

payable by the buyer to the extent thereof.

(j) In Cauvery Sugars and Chemicals Ltd. and Others Vs. The Joint Commercial Tax Officer and Another, , the cess on sugarcane levied on an

assessee - a sugar manufacturer, u/s 14(1) of the MSFC Act, 1949, is in discharge of its own statutory liability and on its own account and,

therefore, cannot form part of the assessee's purchase turnover of sugarcane under the TNGST Act, 1959. The cess paid is not taken into

account in fixing the price u/s 12(1) of the MSFC Act. The grower-seller has neither any liability for the cess nor is it paid on his behalf. It is paid

by the purchaser on his own liability and not on behalf of the seller. The payment of the cess u/s 14 read with the relevant rule is unconnected with

the transaction of purchase and the price fixed u/s 12(1). The price per tonne of sugarcane at the start of the year was Rs. 85 and in the course of

the year it was reduced to Rs. 80 with effect from a certain date. The assessee having paid at the rate of Rs. 85 made debit entries against the

relative producers for the difference in price. In such a situation, it was held therein that the difference in price arising out of the reduction of the

purchase price was an allowable deduction from the taxable turnover and that the levy of a cess u/s 14(1) of the MSFC Act, as amended by the

Madras Act 1 of 1962 on sugarcane brought into any "local area" specified in a notification for consumption, use or sale therein is valid.

(k) In *The State of Tamil Nadu Vs. The Madurantakam Co-Operative Sugar Mills*, , the question that came up for consideration was as to

whether the transportation charges paid by the mill to (i) third party - lorry owners, and (ii) can-growers, but shown separately in vouchers are

allowable deductions under rule 6(c) of TNGST Rules. This Court considered the scope and amplitude of rule 6(c)(i) at the relevant paragraph

(paragraph number not mentioned - at page 241) and observed :

..... On a careful reading of the provision, we are of the view that rule 6(c) would apply only to a selling dealer who is liable to pay tax on

his sales turnover and not to a purchasing dealer who is to include his purchase turnover in his assessments. Though the word "dealer" by itself

might include a purchasing dealer the words "specified and charged for by the dealer separately without including them in the price of the goods

sold" show that the clause deals with a selling dealer showing the price and the freight separately in his invoice. The freight paid by a purchasing

dealer could not be said to have been specified and charged for by him separately and the amount paid by him could not also be said to be the

price of the goods sold. Thus, the manner in which the purchaser had shown the amount in his accounts or vouchers were given by him to the seller

is immaterial. Vouchers are only receipts. But, it is the manner in which the seller has prepared the invoice or charged for the price that is relevant

for the applicability of rule 6(c). The mere fact that there is evidence to show that the purchaser and the seller agreed for a particular price and it

was the responsibility of the purchaser to take the goods at the place of the seller does not by itself enable the purchaser to deduct the transport

charges from the taxable turnover. Normally the freight paid to the seller forms part of the price itself. The agreement between the seller and the

purchaser might contemplate a price for the goods and a particular amount for transporting charges, for delivery of the goods at the purchaser's

destination. Even when such an agreement is there, unless the or seller shows the freight charges separately, he would have to include the transport

charges as part of the price in the taxable turnover. Thus, how the invoice was prepared by the seller is relevant for the purpose of considering

whether the freight charges are to be included in the taxable turnover or not. Since the purchaser is not the person who prepares the invoice, rule

6(c) could not apply to the purchaser.

(i) After making the above observation, the court ultimately held that the transport charges paid by the assessee to third party lorry owners for

transporting the sugarcane to the factory site was not to be included in the taxable turnover of the assessee, but the charges paid by the assessee to

the cane-growers themselves to bring the cut sugarcane to the mills site was liable to be included in the turnover of the assessee even though a

separate voucher was given to the cane-growers for the transport charges to which they were entitled to.

(1) In Kallakurichi Co-Operative Sugar Mills Limited and Another Vs. The State of Tamil Nadu, , the assessee-co-operative sugar mills,

purchased sugarcane from the growers for the purpose of manufacturing sugar therefrom. The assessee entered into agreements for the supply of

sugarcane with sugarcane growers. One of the terms in the agreement was that the sugarcane grower should deliver the sugarcane at the mill or

factory premises for the price fixed by the Government. Some of the growers, who had so contracted to supply sugarcane grown by them, had

transport facilities, while many others did not command such facilities. In such cases where the sugarcane grower did not have transport facilities,

the assessees sent lorries to the sugarcane growers and brought the sugarcane to the mills or the factories. In all such cases, the assessees

deducted the transport charges from the statutory price payable to the sugarcane growers in respect of sugarcane supplied by them. The assessees

claimed exemption from the purchase turnover of the transport charges so deducted by the assessees from out of the amounts payable to the

sugarcane growers computed in accordance with the price fixed by the Government. The assessing authority as well as the appellate authority held

that the assesseees were not entitled to reduce the cane price fixed by the Government statutorily by deducting the amounts incurred by the mills or factories for making transport arrangements for the sugarcane growers. The appeals preferred by the assesseees to the Tribunal were dismissed.

The assesseees thereafter preferred revisions.

(i) The argument of learned counsel for the assesseees-petitioners is getting reflected in paragraph 3 (at page 116) as below :

Before this Court, the learned counsel for the petitioners maintained the same stand taken up by the sugar mills or factories before the authorities

below and contended that instead of delivery of sugarcane being effected by the growers at the sugar mill or factory, they agreed to deliver the

sugarcane in their fields in modification of the contract earlier entered into and on such delivery the property in the sugarcane passed to the

petitioners and the transport charges incurred by the petitioners would readily be in the nature of post-purchase expenses and therefore, such

amounts will not form part of the purchase price. In support of this, reliance was placed by the learned counsel for the petitioners on the decisions

in *The State of Tamil Nadu Vs. The Madurantakam Co-Operative Sugar Mills*, , *Gwalior Rayon Silk Manufacturing and Weaving Co. Ltd. Vs.*

The State of Tamil Nadu, , *Hyderabad Asbestos Cement Products Ltd. Vs. State of Andhra Pradesh*, , *Hindusthan Sugar Mills Vs. State of*

Rajasthan and Others, and *The Co-Operative Sugars Limited Vs. The State of Tamil Nadu*, .

(ii) The submission of the Revenue is referred to in the same paragraph, thereafter, which reads as under :

On the other hand, the learned Additional Government Pleader submitted that there was no alteration or modification of the contract entered into

between the petitioners and the sugarcane growers and the situs of the delivery continued to the mill or the factory site so that the transport charges

paid by the petitioners on behalf of the sugarcane growers could not be deducted from the price for sugarcane fixed by the Government in

accordance with the Sugarcane (Control) Order and therefore, no deduction as claimed by the petitioners is admissible.

(iii) A delightful discussion entered into by this Court in paragraphs 4 and 5 therein (at pages 116-118) is reflected as below :

4. It is necessary to advert to the mode of fixation of sugarcane price and the terms of the contract entered into between the mills or factories and the sugarcane growers. Under clause (3) of the Sugarcane (Control) Order, every year the Central Government fixes a statutory price payable by every sugar mill or factory as purchase price for supply of cane by the cane growers. Often times, as a result of representations made and discussions held between the representatives of the mills or factories, the growers and the State Government, some additional amount is also paid to the sugarcane growers as fixed by the Government. Normally, the sugarcane growers deliver the sugarcane at the mill or factory, either in their own vehicles or in the vehicles belonging to others and in such cases, the full statutory price is made available to the sugarcane growers. However, a majority of the sugarcane growers do not command transport facilities and they transport sugarcane in the lorries arranged by the mills or factories and in those cases, the transport charges are paid by the mills and deducted from the amount payable to the sugarcane growers. The petitioners claimed that those amounts representing transport charges should be reduced from the purchase price as arrived at by computing it with reference to the statutory fixation and the balance alone should be treated as the purchase turnover liable to tax. How far such a claim is justified has to be seen.

5. The specimen forms of application for registration of the grower of sugarcane with the mills or factories and the agreement entered into between the mills and the sugarcane grower have been made available in this case and referred to by the Tribunal in the course of its order. Even in the application for registration of the sugarcane grower with the mills or factories, the sugarcane grower had specifically agreed to deliver sugarcane in the mill or factory premises. In the case of the petitioner in T.C. Nos. 579 to 581 of 1978, an alternative is also provided that the sugarcane grower will bring the sugarcane in his own lorry or he will send the sugarcane in lorries engaged by the sugar mills with the further undertaking that the sugarcane grower will deliver the sugarcane in the mill and get paid the minimum statutory price fixed by the Government. In the agreements also, the sugarcane grower had agreed to bring the sugarcane and deliver it at the mill or factory premises in accordance with a date schedule fixed

by the mills. There is no clause either in the application for registration or in the agreements to indicate that the sugarcane growers could deliver the sugarcane at a place other than the mill or factory premises and receive reduced prices. The provisions in the application for registration and also the agreement thus clearly establish that the sugarcane grower is responsible for the delivery of the sugarcane in the mill premises. It is true that the mills or factories maintain a fleet of lorries at their disposal and send such lorries to the growers for facilitating delivery. But there is nothing to indicate that there was any departure from the terms of the contract relating to delivery. The sending of lorries by the mills or factories was only to help or facilitate the sugarcane growers to engage and load the lorries at appropriate times in order that the quality of the sugarcane may not deteriorate and also to ensure a steady inflow of sugarcane into the mills or factories depending upon their crushing schedule. There is nothing to show that the sugarcane growers sold the sugarcane and the petitioners purchased it in the fields as claimed by them. Indeed, it is seen from the contract lorry allotment register produced before the Tribunal that the lorry was allotted to a sugarcane grower on his indent about his requirement and thereafter, the sugarcane grower took the required number of lorries from the fleet available with the mills and then arranged for the transport of the sugarcane to the mills or factories. After delivery of the sugarcane in the mill or factory, an invoice for the full amount of the statutory price payable to the sugarcane grower was prepared by the mills or factories and from out of that, the transport charges and other advances were deducted. It is thus seen that the contractual obligation of the sugarcane grower for delivering the sugarcane at the mill or factory premises had not been departed from or varied even in practice. The method adopted for transporting sugarcane had been devised only to enable the sugarcane growers to arrange for the speedy transport of sugarcane to the mills, as otherwise, they would be obliged to be on the look out for stray lorries outside. In that view, the mills or the factories have merely helped or assisted the sugarcane growers by keeping certain lorries at their disposal and providing them to the sugarcane growers and recovering the transport charges from the sugarcane growers at the time of the payment of purchase price for the sugarcane. It has earlier been pointed out that there is no provision in the contract for the payment of any reduced amount other than

the statutory price. The billing practice also accords with the contract and the actual practice regarding transport. It is seen that in respect of supplies effected by a sugarcane grower, the bill is prepared for the gross amount of the purchase price in accordance with the statutory price fixed by the Government. Any additional sugarcane price allowed to the sugarcane grower is subsequently given credit to separately. From the price of sugarcane so arrived at, lorry charges, share money, recovery of loan (principal and interest, etc.) are deducted and the net amount payable is arrived at. The bill is passed for the gross amount and the net amount. This also indicates that at all times, the mills or the factories recognised only the statutory price as the purchase price of sugarcane and the transport or other charges have been regarded as amounts payable by the sugarcane grower, but initially paid by the mill and later recovered from the price payable to the sugarcane grower. On these materials, the contention on behalf of the petitioners that there has been a variation or modification of the contract entered into between the mills or factories and the sugarcane growers pursuant to which delivery was taken at the fields, cannot be accepted. Equally, the transport charges paid for initially by the petitioners and subsequently deducted cannot be treated as post-purchase expenses so as to enable the petitioners to claim the benefit of a deduction from the turnover.

(iv) On the basis of the discussions as above, the conclusions of the court are couched in paragraph 6 (at page 118) in the following terms :

6. Thus on a careful consideration of the facts and circumstances of these cases, we are of the view that the petitioners cannot claim to exclude the transport charges from their assessable turnover. We do not therefore consider it necessary to advert to the decisions relied on by the petitioners.

The authorities below were therefore quite correct in their conclusions and no interference is called for. Consequently, these tax revision cases are dismissed. There will be, however, no order as to costs.

(m) In *Perambalur Sugar Mills Ltd. v. State of Tamil Nadu* [1992] 86 STC 17 (Mad.), the petitioner-mills purchased sugarcane from sugarcane

growers. The purchase price of sugarcane was fixed by a tripartite committee constituted for this purpose in terms of the Sugarcane (Control)

Order. Under the agreement, there was stipulation that the growers were to

deliver the sugarcane at the factory of the mills and there was no provision that they would deliver it elsewhere and accept reduced prices.

(i) On the question as to whether transport charges paid by the mills to lorry owners to transport the sugarcane to the factory, in order to assist the growers was includible in the purchase turnover of the mills, following the decision in Kallakurichi Co-Operative Sugar Mills Limited and Another

Vs. The State of Tamil Nadu, , this Court held that since under the agreement delivery had to be effected at the doors of the factory, and no

deduction was permissible under law towards transport charges incurred by the growers, transport charges paid by the mills to lorry owners to

transport the cane to the factory to help the growers was liable to be included in the purchase turnover of sugarcane of the mills.

55. Though the decision in The State of Tamil Nadu Vs. The Madurantakam Co-Operative Sugar Mills, had been explained in the later decision in

Perambalur Sugar Mills Ltd. [1992] 86 STC 17 (Mad.) while following the decision in Kallakurichi Co-Operative Sugar Mills Limited and

Another Vs. The State of Tamil Nadu, yet, there seems to be an apparent conflict as respects the deduction relatable to transport charges paid by

the mills to lorry owners to transport the cane to the factory to help the growers. Such a conflict of opinion requires to be resolved so as to relieve

the confounding confusions prevailing among the assessing authorities as to which of these two decisions they have to take into consideration in

deciding the question relatable to transport charges paid to third party contractors-lorry owners by the mills for transporting the cane from the field

of the grower to the factory site. We are of the view that the rationale or reasonings given in the decision in Kallakurichi Co-Operative Sugar Mills

Limited and Another Vs. The State of Tamil Nadu, , to which we find none to add - in arriving at the conclusion reached therein, reflects the real

legal position and therefore, we hold that the view expressed in The State of Tamil Nadu Vs. The Madurantakam Co-Operative Sugar Mills, shall

stand overruled and be no longer a good law.

56. Worthy it is to quote at this juncture, the weighty observations of Chinnappa Reddy, J., on the topic of tax avoidance in McDowell and Co.

Ltd. Vs. Commercial Tax Officer, and they are in the following terms :

The financial needs of the welfare State, if backed by the law have to be

respected and met. There is behind taxation laws as much moral sanction as is behind any other welfare legislation and it is a pretence to say that avoidance of taxation is not unethical and that it stands on no less a moral plane than honest payment of taxation. The proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax and whether the transaction is such that the judicial process may accord its approval to it. It is neither fair nor desirable to expect the Legislature to intervene and take care of every device and scheme to avoid taxation. It is up to the court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of "emerging" techniques of interpretation to expose the devices for what they really are and to refuse to give judicial benediction.

57. The recent decision of the Supreme Court of India reported in *State of T.N. and Others Vs. Kothari Sugars and Chemicals Ltd. and Others*, also supports the view we have taken in the cases before us. Though it was held by the Supreme Court in the above referred to decision that for the purpose of purchase tax, the only significant amount is the aggregate of the minimum price fixed under clause 3 and the additional cane price fixed under clause 5-A it also categorically declared it to be so only "unless a higher price is paid to the grower by agreement between the purchaser and the grower". While advertng to the contention of the State that the higher price inclusive of the excess amount included in the advance paid on State advice must be deemed to have been paid by an agreement between the grower and the purchaser and, therefore, the entire amount would be the price of sugarcane, their Lordships of the Supreme Court held therein that, "This is a question of fact in each case. It is true that if in a given case it is found as a fact on the basis of evidence that the purchaser had agreed with the grower to pay the higher price described as "advance" including the amount in excess of the additional price fixed under clause 5A then in that case the entire amount would be the price of sugarcane". While advertng to the decisions of the Karnataka High Court

reported in [1973] 32 STC 104 (Pandavapura Sahakara Sakkare Kharkhane (P.) Limited v. State of Mysore) and [1994] 93 STC 561 (Tungabhadra Sugar Works Ltd. v. State of Karnataka) the apex Court approved the view taken by the Karnataka High Court on the basis of the nature of the contract in those cases as necessitating and justifying the entire amount paid being treated as price of the sugarcane supplied since the statute does not prohibit any agreement between the grower and the purchaser for the payment of a higher price for the sugarcane by the purchaser. Dealing with the decision in Tungabhadra Sugar Works Limited case [1994] 93 STC 561, of the Karnataka High Court, it was declared that if the entire amount paid could be treated as the price of the sugarcane supplied by virtue of the agreement between the grower and the purchaser, there could be no impediment, for treatment the entire amount paid by the purchaser as a price of sugarcane supplied, the condition prerequisite being that it must be found proved as a fact that the higher price including the excess amount was paid as the price of sugarcane under an agreement between the grower and the purchaser irrespective of a lower amount being fixed as the aggregate of the price fixation under clauses 3 and 5A of the Control Order. Since in the Tungabhadra case [1994] 93 STC 561, there was no such clear finding recorded, in the view of their Lordships of the Supreme Court, the matter required to be remitted to the High Court for a fresh decision.

So far as the facts and circumstances of the cases before us are concerned, the Tribunal has meticulously adverted to the terms of the contract and the particulars available from the papers filed before us, in the light of which detailed submissions were made by learned counsel on either side at the time of hearing, go to show that the extra payments made under the various headings or categories which are in dispute in these cases are directly relatable to the supply of sugarcane and that there were ample material implicit in the agreement itself to show that the various subsidies or the excess payments formed the aggregate or sum total at the sale price actually received by the supplier of the sugarcane for the supplies effected to the mills under the various agreements which formed the basis for the simple transaction of the supply of sugarcane by the grower to the sugar mills.

58. From the catena of decisions, referred to as above, what emerges is that if subsidy - whatever name or nomenclature it may assume and whether paid or payable prior to or subsequent to the entering into contract of sale - is linked to the supply of sugarcane, such subsidy and expenses incurred for the transportation of the sugarcane to the factory site - whether incurred by the grower initially and paid by the sugar mills subsequently or incurred by the sugar mills and shown separately in the invoices - by adopting whatever procedure reflecting those amounts in the accounts - shall form part of the price includible in the purchase turnover as such transportation alone makes the passing of property in the sugarcane sold by the grower to the assessee-mills complete. For the reasons as above, point Nos. 3 to 9 are answered in favour of the Revenue and against the assesseees-sugar mills.

59. Pertinent it is to recapitulate at this juncture that the Tribunal in the present Tax Case Nos. 474 to 478 of 1993, following the ratio in The State of Tamil Nadu Vs. The Madurantakam Co-Operative Sugar Mills, recorded a finding that the transport subsidy charges paid by the assesseees-sugar mills to third party lorry owners do not form part of purchase turnover, since they are not connected with pre-purchase expenses and consequently, the claim, as respects the transport subsidy made by the assesseees-sugar mills was allowed. It cannot be said that the Revenue is not aggrieved by such an order. But, nonetheless, it did not opt to file any revision. The fact that the revenue filed no such revision is of no consequence, on the facts and in the circumstances of the case. Pertinent further it is to mention at this juncture that Mr. C. Natarajan, learned Senior Counsel, appears for the petitioner, in the tax cases and the petitioner in the writ petitions. As already stated, the writ petitions had been filed in a comprehensive fashion canvassing many a question, inclusive of the transport subsidy, besides drawing attention of this Court to the conflicting views of this Court in that regard, exactly at the time when the tax cases were listed for hearing, of course, with the laudable object of settling various questions, obviously with a request for the reference of the tax cases and the writ petitions to a larger Bench for an authoritative pronouncement, which in fact, is made as anticipated. Elaborate arguments of learned Senior Counsel appearing for the petitioners in tax cases and

learned Additional Government Pleader (Taxes) were heard on all questions, inclusive of the question respecting ""transport subsidy"". Such being

the case it cannot be stated that any prejudice could be or had been caused to the petitioners in the present tax cases in reopening the question

relatable to the ""transport subsidy"" in respect of which the Tribunal passed an order favourable to the petitioners herein, notwithstanding the fact

that no revision had been filed by the Revenue aggrieved by such an order of the Tribunal. In the light of the view that we have taken, the decision

in The State of Tamil Nadu Vs. The Madurantakam Co-Operative Sugar Mills, , is no longer a good law and it is accordingly overruled. The

correct legal position is reflected by the decision in Kallakurichi Co-Operative Sugar Mills Limited and Another Vs. The State of Tamil Nadu, the

finding of the Tribunal in its common order in respect of the present Tax Case Nos. 474 to 478 relatable to ""transport subsidy"" requires to be set

aside and the same is accordingly set aside.

60. For the reasons as above Tax Case Nos. 474 to 478 of 1993 shall stand dismissed. However, as stated above, the transport subsidy is set

aside.

61. Both Writ Petition Nos. 15530 and 15531 of 1995 are dismissed. Consequently W.M.P. No. 24693 of 1995 is also dismissed.

62. There shall, however, be no order as to costs in all these tax cases and the writ proceedings.

63. Tax cases and writ petitions dismissed.