

(2013) 07 DEL CK 0230
In the Delhi High Court
Case No : ITR No. 58 of 1997

Dalmia Cement (Bharat) Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 23-07-2013

Acts Referred:

Haryana Rural Development Fund Act, 1983 — Section 2(h), 3, 4, 4(1)
Income Tax Act, 1961 — Section 216, 32, 32A, 32A(1), 32A(2)

Citation : (2013) 263 CTR 308 : (2013) 357 ITR 419 : (2013) 218 TAXMAN 327

Hon'ble Judges : Badar Durrez Ahmed, Acting C.J.; V.K. Jain, J

Bench : Division Bench

Advocate : Ravi Mehta, for the Appellant; Sanjeev Sabharwal, for the Respondent

Judgement

Badar Durrez Ahmed, Actg. C.J.

1. This income tax reference u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the said Act") raises the following five questions:

(1) Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the payment of additional cess and cess surcharge was not a tax or duty and as such the same was not covered within the provisions of section 43B of the Income Tax Act, 1961?

(2) Whether on the facts and in the circumstances of the case, the Tribunal is justified in holding that the deposits of Rs. 26,10,483/- obtained by the assessee from its non-governmental buyers of cement cannot be treated as a trading receipt and, therefore, is not subject matter of disallowance u/s. 43B of the Income Tax Act?

(3) Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the income treated by the Assessing Officer on account of unclaimed balances/wages/bonus which were written off by the assessee and credited to its Profit and Loss Account cannot be treated as the

income of the assessee company?

(4) Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the assessee company was entitled for deduction on account of Extra Shift Allowance relating to transformers?

(5) Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in deleting the charge of interest u/s. 216 amounting to Rs. 6,11,667/- by observing that the estimates of advance tax filed by the assessee were reasonable and bona fide.

Question Nos. 3 and 4 were not pressed before us by Mr. Sabharwal, appearing on behalf of the revenue on account of the small amounts involved therein. In question No. 3, the amount involved is roughly around Rs. 13,000/- and in question No. 4, the amount is approximately Rs. 8,600/-. Consequently, insofar as question Nos. 3 and 4 are concerned, we return the same unanswered. We are, therefore, left to examine question Nos. 1, 2 and 5.

Re: Question No. 1

2. The facts necessary for examining this question are that the assessee (respondent herein) claimed expenditure of Rs. 1,45,29,207/- in respect of assessment year 1985-86 as accrued liability to pay cess and cess surcharge u/s 115 and 116 respectively of the Tamil Nadu Panchayats Act, 1958. The assessing officer disallowed the said claim by invoking the provisions of Section 43B of the said Act on the ground that the cess and cess surcharge under the Tamil Nadu Panchayats Act, 1958 had not actually been paid by the respondent during the previous year relating to the assessment year 1985-86. The respondent was aggrieved by this inasmuch as according to the respondent, no disallowance could be made u/s 43B(a) of the said Act as the said cess and cess surcharge was neither a tax nor duty. However, the Commissioner of income tax (Appeals) confirmed the disallowance made by the assessing officer. In a further appeal before the Income Tax Appellate Tribunal being ITA No. 2916/Del/90, the said tribunal agreed with the contentions of the respondent/assessee and deleted the disallowance by virtue of an order dated 25.03.1994. The tribunal followed its earlier year's order in respect of assessment year 1984-85 wherein the tribunal had held that although cess was a tax for the purposes of the Constitution of India, it was not a tax within the meaning of Section 43B of the said Act as it stood at the relevant time. The decision of the tribunal in respect of assessment year 1984-85 became the subject matter of an income tax reference u/s 256(1) of the said Act at the instance of the revenue and was part of a batch of references being ITR Nos. 385-388/1992 which were before this Court. During the pendency of the reference in respect of assessment year 1984-85, the revenue, being aggrieved by the tribunal's order in respect of assessment year 1985-86, filed a reference application being RA 462/Del/94 for a reference to the High Court. By an order dated 01.03.1997, the tribunal referred the five questions mentioned earlier to this court, which reference has become ITR No.

58/1997 (i.e., the present reference). During the pendency of the present reference, ITR Nos. 385-388/1992 which included the reference in respect of assessment year 1984-85 was returned unanswered by a Division Bench of this Court on 05.09.2007 inasmuch as the revenue had not filed the paper books although the matter had been pending for 15 years. Therefore, we do not have the benefit of any decision of this Court on this question as the reference in respect of the earlier assessment year (assessment year 1984-85) had been returned unanswered in the circumstances mentioned above.

3. Section 43B of the said Act as it stood in relation to the assessment year 1985-86 reads as under:-

43B. Certain deductions to be only on actual payment.-Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of-

(a) any sum payable by the assessee by way of tax or duty under any law for the time being in force, or

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employee, shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which sum is actually paid by him.

Explanation: For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (a) or clause (b) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1983 or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

4. The said section 43B and, in particular, clause (a) thereof was amended by virtue of the Finance Act, 1988 which came into effect from 01.04.1989. The said section, after amendment, to the extent relevant for our purposes, reads as under:-

43B. Certain deductions to be only on actual payment.- Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of-

(a) Any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or

(b) xxx xxx xxx

(c) xxx xxx xxx

(d) xxx xxx xxx

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which sum is actually paid by him.

(Emphasis added)

5. It will be immediately clear that while Section 43B(a) as it stood prior to the amendment introduced by the Finance Act, 1988 specifically referred to only "tax or duty", after the amendment, the said clause (a) of Section 43B also had specific reference to "cess or fee, by whatever name called" in addition to tax and duty.

6. Mr. Sabharwal appearing on behalf of the revenue made a two-fold submission. He, first of all, submitted that the amendment introduced by the Finance Act, 1988 was clarificatory in nature and, therefore, the provisions of Section 43B(a) as introduced by the said Finance Act, 1988 would be retrospective in operation and would also apply to the assessment year 1985-86. Therefore, according to Mr. Sabharwal, unless and until the cess and cess surcharge under the Tamil Nadu Panchayats Act, 1958 had actually been paid in the relevant year, the respondent would not have been entitled to claim a deduction in respect of an accrued liability to pay such cess and cess surcharge. The second argument of Mr. Sabharwal was that in any event, a cess was a tax and de hors the amendment introduced by the Finance Act, 1988, the provisions of Section 43B(a) which were clearly applicable insofar as a tax was concerned would also apply to a cess. Mr. Sabharwal placed reliance on the Budget Speech of the Finance Minister (1983-84). Section 43B was introduced into the said Act for the first time by virtue of the Finance Act, 1983 with effect from 01.04.1984. In the said Budget Speech of the Finance Minister, the following reason had been given behind the introduction of Section 43B:-

Several cases have come to notice where taxpayers do not discharge their statutory liability such as in respect of excise duty, employer's contribution to provident fund, Employees' State Insurance Scheme, for long period of time. For the purpose of their income tax assessments, they nonetheless claim the liability as deduction even as they take resort to legal action, thus depriving the Government of its dues while enjoying the benefit of non-payment. To curb such practices I propose to provide that irrespective of the method of accounting followed by the taxpayer, a statutory liability will be allowed as a deduction in computing the taxable profits only in the year and to the extent it is actually paid.

7. It can be seen from the above extract that the Finance Minister had specifically referred to statutory liabilities such as excise duty, employer's

contribution to provident fund and employees" state insurance scheme. Reflecting this sentiment, section 43B(a) referred to the statutory liability of a tax or duty, while Section 43B(b) referred to the sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees. It was the contention of Mr. Sabharwal that the purpose behind introduction of Section 43B was to curb the mischief whereby an assessee could claim a deduction in respect of an accrued statutory liability and yet not clear the same, thereby depriving the Government of its dues while enjoying the benefit of non-payment.

8. Mr. Sabharwal then referred to the memorandum explaining the provisions in the Finance Bill, 1988 whereupon the amendment was brought about in Section 43B(a) so as to include "cess" and "fee" specifically. Paragraph 35 of the said memorandum reads as under (to the extent relevant):

Modification of the provisions relating to deduction in respect of certain liabilities

35. Under the existing provisions of section 43B of the income tax Act, deduction for any amount payable by the assessee by way of tax or duty under any law or any sum payable as an employer by way of contribution to any provident fund or superannuation fund is allowed as a deduction in computing the income of that person in the year in which such sum is actually paid by him. The objective behind these provisions is to provide for a tax disincentive by denying deduction in respect of statutory liability or fund money etc. which is not paid in time. The benefit of deduction is thus available only to those persons who do not use Government money for their own purposes.

There has been a legal controversy whether the words "tax" and "duty" cover within their fold certain statutory levies like cess, fees, etc. It has been held by some appellate authorities that such amounts could not be covered under the expressions "tax" or "duty". Such interpretations are against the legislative intent.

Therefore, as a matter of clarification, the Bill provides that cess or fees by whatever name called, which have been imposed by any statutory authority, including a local authority, will also be allowed as a deduction only if these are actually paid.

xxx xxx xxx

The above amendment will take effect from 1st April, 1989, and will, accordingly, apply to assessment year 1989-90 and subsequent years.

9. Placing reliance on the above extract, Mr. Sabharwal submitted that the memorandum itself indicated that "as a matter of clarification", the Finance Bill, 1988 made provision for the fact that cess or fee by whatever name called which had been imposed by any statutory authority, including a local authority, would also be allowed as a deduction "only if these were actually paid. It was therefore contended that the legislative intent behind Section 43B was always to include cess and fee within the fold of tax and duty and this has been clarified by the

amendment brought about in Section 43B(a) by virtue of the Finance Act, 1988. Since the amendment is clarificatory, according to Mr. Sabharwal, the same would apply with retrospective effect and would have to be regarded as if the post amendment position was always the case since the inception when Section 43B was introduced by virtue of the Finance Act, 1983. For this proposition, Mr. Sabharwal had placed reliance on a Calcutta High Court decision in the case of Commissioner of Income Tax Vs. Orient Paper and Industries Ltd., . In that case, the Calcutta High Court held that the amendment to Section 43B(a) whereby the expression, "cess or fee, by whatever name called" was added, was clarificatory and would have retrospective operation and would even apply to the assessment year 1984-85.

10. Mr. Sabharwal then referred to the Supreme Court decision in India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, , in an attempt to demonstrate that cess is equivalent to tax and therefore even though cess had not been specified in Section 43B(a) prior to its amendment with effect from 1.4.1989, it would always have been a part of tax and as such, section 43B as it originally stood would also have reference to cess inasmuch cess was included in tax.

11. Mr. Sabharwal next referred to the Supreme Court decision in H.R.S. Murthy Vs. Collector of Chittoor and Another, and submitted that in that case, the Supreme Court had concluded that land cess was nothing else but a tax on land. Therefore, according to Mr. Sabharwal, cess and tax meant the same thing. The learned counsel for the revenue then referred to the Supreme Court decision in Om Parkash Agarwal and Others Vs. Giri Raj Kishori and Others, . He referred to the said decision to point out that there were three principle characteristics of a tax:-

- (i) It is a compulsory exaction under a statutory power;
- (ii) The imposition is for public purposes without reference to any special benefit to be conferred on the tax payer; and
- (iii) It is part of a common burden and the quantum of imposition is generally dependent upon the capacity to pay of the tax payer.

According to Mr. Sabharwal, the cess in question satisfies all the above three conditions and therefore it has to be regarded as a tax.

12. Finally, Mr. Sabharwal referred to the Supreme Court decision in Allied Motors (P.) Ltd. Vs. Commissioner of Income Tax, Delhi, . He submitted that in that decision the Supreme Court examined Section 43B of the said Act in the context of the introduction of the first proviso thereof by virtue of the Finance Act of 1987. The Supreme Court held the proviso to be of a remedial nature which had been inserted to remedy unintended consequences. In this backdrop, the Supreme Court held that although the proviso had been inserted by virtue of the Finance Act, 1987, it was required to be treated as retrospective in operation, so

that a reasonable interpretation could be given to the section as a whole. Seeking to draw an analogy therefrom, Mr. Sabharwal submitted that the amendment introduced in Section 43B(a) by virtue of the Finance Act, 1988, also ought to be treated as having retrospective operation.

13. In response to the arguments submitted on behalf of the revenue, Mr. Ravi Mehta appearing on behalf of the respondent/assessee submitted that insofar as Section 43B was concerned, the said provision as it stood in respect of the assessment year 1985-86 did not include cess or fee (by whatever name called) and that provision was limited to tax or duty. Secondly, he submitted that while cess may be included in the expression of tax used in a generic and general sense as a part of overall taxation, it is not to be construed as a tax at least for the purpose of Section 43B as it stood at the relevant time. He submitted that it is not at all necessary that a cess should be regarded as a tax. He placed reliance on a Supreme Court decision in the case of *Dewan Chand Builders and Contractors Vs. Union of India (UOI) and Others*, where the Supreme Court recognized the clear distinction between a cess and a tax. Therefore, according to Mr. Mehta, use of the word "tax" in Section 43B(a) does not, ipso facto, include a cess. There is no doubt that "cess" was introduced by virtue of the Finance Act, 1988 with effect from 01.04.1989, but that introduction was only prospective from assessment year 1989-90 onwards and not retrospective. He referred to the Finance Bill, 1988 as also the Board Circular No. 528 dated 16.12.1988 explaining the amendments introduced by the Finance Act, 1988. Mr. Mehta submitted that the decision in *Allied Motors (P) Ltd. (supra)* cannot be applied in the present case because in that case, the introduction of the proviso was remedial in nature, to remedy an unintended consequence and was for the benefit of the assessee. It is in those special circumstances that the said proviso was construed as having retrospective effect. Here, the retrospectivity would work against the assessee and, in any event, the circumstances which existed in *Allied Motors (P) Ltd. (supra)* do not exist in the present case. As regards the decision of the Calcutta High Court in *Orient Paper and Industries Ltd. (supra)*, Mr. Mehta submitted that while that decision is in line with the arguments submitted by the learned counsel for the revenue inasmuch as the Calcutta High Court held that the amendment to Section 43B(a) was retrospective, being clarificatory, the said decision does not bind this Court. Furthermore, several other High Courts have decided to the contrary. For example, the Andhra Pradesh High Court in *Phoolchand Lalith Kumar and Co. Vs. Income Tax Officer*, held that cess was not covered in Section 43B at the relevant time, i.e., 1984-85 and 1985-86. Similarly in *Commissioner of Income Tax Vs. Mansukhlal Prahjibhai and Co.,*, the High Court of Madhya Pradesh held that "fee", which was introduced in Section 43B, would operate only prospectively from the date of the amendment. A similar view was taken by the said High Court of Madhya Pradesh in *Commissioner of Income Tax Vs. Dinesh Kumar Gordhanlal*, The High Court of Rajasthan also, in the case of *Commissioner of Income Tax Vs. Udaipur Distillery Co. Ltd.,*, took the view that since "fee", as distinct from tax or duty, had not

been subjected to the provisions of Section 43B prior to 01.04.1989, the liability incurred on account of bottling fee during the accounting period relating to the assessment year in question would not be subjected to Section 43B of the said Act even if it be assumed that "fee" in its technical sense was a specie of taxation. The Rajasthan High Court also placed reliance on the Andhra Pradesh decision in Srikakollu Subba Rao and Co. and Others Vs. Union of India and Others, wherein the Andhra Pradesh High Court held that market cess was not a tax and that the provisions of Section 43B had no application to market cess. The said decision of the Rajasthan High Court was taken in appeal by the revenue before the Supreme Court. The decision of the Supreme Court is reported as Commissioner of Income Tax, Udaipur Rajasthan Vs. McDowell and Co. Ltd., which affirmed the view taken by the Rajasthan High Court. It would however be pertinent to mention that the revenue had not agitated the issue of retrospectivity before the Supreme Court and therefore the Supreme Court had not considered the same in *Mc Dowell and Company Ltd. (No. 1)* (supra).

14. Mr. Mehta submitted that the decision of the Supreme Court in *India Cement Ltd. (supra)* was not applicable to the present case. According to him, the question in *India Cement Ltd. (supra)* was not whether cess was a tax or not, but whether the levy of cess on royalty was within the competence of the State Legislature. Therefore, according to Mr. Mehta, the decision of the Supreme Court in *India Cement Ltd. (supra)* was clearly on an entirely different context and would not come to the aid of the revenue in the present case.

15. Mr. Mehta also drew our attention to the provisions of the Tamil Nadu Panchayats Act, 1958 and, in particular, to sections 63, 64, 115, 116, 135 and 138 thereof to submit that the cess and cess surcharge under Sections 115 and 116 of that Act were clearly not in the nature of a tax keeping in mind the principle characteristics of a tax as mentioned in *Om Prakash (supra)*.

16. We shall first examine the issue as to whether the amendment introduced by the Finance Act, 1988 in Section 43B(a) of the said Act was clarificatory in nature or not. We have already noticed the argument of the learned counsel for the revenue based on the Budget Speech of the Finance Minister (1983-84) to indicate the purpose behind the introduction of Section 43B by virtue of the Finance Act, 1983. We have also set out the relevant portion of the memorandum explaining the provisions in the Finance Bill, 1988. There is no doubt that in that memorandum the expression used is that "as a matter of clarification" the Bill provides that cess or fee by whatever name called, which have been imposed by any statutory authority including a local authority, would also be allowed as a deduction only if they were actually paid. This would tend to give an impression that the amendment, whereby cess and fees were specifically included in Section 43B(a), was clarificatory in nature. However, that is put to rest by the concluding portion of paragraph 35 of the said memorandum which makes it clear that the amendment would take effect from 01.04.1989 and would accordingly apply to assessment year 1989-90 and subsequent years. Clearly,

the intent was not to make the amendment retrospective. If we examine the "Notes on Clauses" accompanying the Finance Bill, 1988, we find, inter alia, the following notes with regard to clause 12 of the said Finance Bill, 1988 which sought to amend Section 43B of the said Act:-

Clause 12 seeks to amend section 43B of the income tax Act relating to allowability of certain sums only on actual payment.

Sub-clause (i) seeks to substitute existing clause (a) by a new clause so as to extend the scope of the section to cover any cess or fee, by whatever name called, payable by the assessee under any law for the time being in force.

(Underlining added)

17. On going through the above extract, we find that it contains three very important words - "substitute", "new" and "extend". These words indicate that the intention was to substitute the existing clause (a) of Section 43B by a "new" clause with the object of "extending" the scope of the section so as to cover any cess or fee by whatever name called. From this, it can be deduced that the amendment was by way of substitution and in order to extend the scope of the original section which, as it originally stood, did not cover cess or fee. Therefore, this is also an indication, that the amendment introduced in Section 43B(a) so as to extend its application to cess or fee, by whatever name called, was not clarificatory as suggested by the learned counsel for the revenue. The Notes on Clauses also indicated that the amendments would take effect from 01.04.1989 and would accordingly apply in relation to the assessment year 1989-90 and subsequent years. We may also refer to the Board Circular No. 528 dated 16.12.1988 which was issued by the Central Board of Direct Taxes explaining the substance of the provisions relating to direct taxes in the Finance Act, 1988. Here, too, in paragraph 21.4, there is clear indication that the amendments would come into force with effect from 01.04.1989 and would apply in relation to assessment year 1989-90 and subsequent years. The said paragraph 21.4 reads as under:

21.4 These amendments will come into force with effect from 1st April, 1989, and will, accordingly, apply in relation to assessment year 1989-90 and subsequent years.

18. We have also taken note of the fact that the High Courts of Andhra Pradesh, Madhya Pradesh and Rajasthan have all taken the view that the amendment introduced in Section 43B(a) by virtue of the Finance Act, 1988 would be prospective in operation and would not apply to assessment years prior to the assessment year 1989-90. Those decisions have been rendered in Phoolchand Lalith Kumar and Co. (supra) Mansukhlal Prahjibhai and Co. (supra), Dinesh Kumar Gordhanlal (supra) and Udaipur Distillery Co. Ltd. (supra). In this backdrop, we respectfully disagree with the view taken by the Calcutta High Court in Orient Paper and Industries Ltd. (supra) to the effect that the said amendment was clarificatory and was, therefore, retrospective in operation.

19. We also make it clear that we agree with the submissions made by Mr. Mehta with regard to the Supreme Court decision in *Allied Motors (P) Ltd.* (supra). That decision was rendered in entirely different circumstances where the introduction of the proviso was regarded as a remedial measure in aid of the assessee. This is certainly not the case here and therefore the revenue would not be able to derive any benefit from the ratio of the decision in *Allied Motors (P) Ltd.* (supra).

20. This takes us to the consideration of the issue as to whether cess is the same thing as a tax and that even though the word "cess" was not used in Section 43B(a) as it originally stood, it always included cess inasmuch as tax was covered in the said provision. We find ourselves in agreement with the submission made by Mr. Mehta that the decision of the Supreme Court in *India Cement Ltd.* (supra) would not be of any help to the revenue inasmuch as the issue there was entirely different. The focus in that decision was not on whether a cess was a tax or not but whether levy of cess on royalty was within the competence of the State Legislature. We also feel that the considerations with regard to cess in that case were in the context of legislative competence of the State Legislature to levy the cess on royalty which, by virtue of an explanation to Section 115 of the Tamil Nadu Panchayats Act, 1958, were said to be included in the meaning of land revenue. In that case, it was not in dispute that the cess which the Madras Village Panchayat Act proposes to levy was nothing but an "additional tax" and originally it was levied only on land revenue, and that apparently land revenue would fall within the scope of Entry 49 of List II in Schedule VII to the Constitution. The Supreme Court however held that it could not be doubted that royalty which was a levy or tax on the extracted mineral was not a tax or levy on land alone and that if cess was charged on the royalty, it could not be said to be a levy or tax on land and therefore, it could not be upheld as imposed in exercise of jurisdiction under Entry 49 List II by the State Legislature. The Court held that the legislature went beyond its jurisdiction under Entry 49 List II and therefore the levy was clearly without the authority of law.

21. These observations whereby there is some indication that cess has been equated with tax have been sought to be relied upon by Mr. Sabharwal. However, we reiterate that the Supreme Court was not exactly concerned with the question of whether a cess was a tax or not, in all cases. It was generally concerned with the concept of cess as a part of taxation. We must also keep in mind that the Supreme Court was interpreting the Constitution as distinct from interpreting a provision of a statute. That there is a different approach in interpreting the Constitution and while interpreting a provision of an Act, is recognized by the Supreme Court in *India Cement Ltd.* (supra) itself. The Supreme Court made the following observations in this context:

Courts of law are enjoined to gather the meaning of the Constitution from the language used and although one should interpret the words of the Constitution on the same principles of interpretation as one applies to ordinary law, these very principles of interpretation compel one to take into account the nature and

scope of the Act which requires interpretation. It has to be remembered that it is a constitution that requires interpretation. Constitution is the mechanism under which laws are to be made and not merely an Act which declares what the law is to be. See the observations of Justice Higgins in *Attorney-General for the State of New South Wales v. Brewery Employees Union of New South Wales* [1908] 6 CLR 469 at 611-12).

In *In re Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938* [1939] FCR 18, Chief Justice Gwyer of the Federal Court of India relied on the observations of Lord Wright in *James v. Commonwealth of Australia* [1936] AC 578 and observed that a Constitution must not be construed in any narrow or pedantic sense, and that construction most beneficial to the widest possible amplitude of its powers, must be adopted. The learned Chief Justice emphasised that a broad and liberal spirit should inspire those whose duty it is to interpret the Constitution, but they are not free to stretch or pervert the language of the enactment in the interest of any legal or constitutional theory, or even for the purposes of supplying omissions or correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law, but it may rightly reflect that a Constitution of a country is a living and organic thing, which, of all instruments, has the greatest claim to be construed - "it is better than it should live rather than that it should perish".

22. So, even if in a particular case, while interpreting the Constitution, the Supreme Court may have regarded cess to be generally a part of taxation, it does not mean that cess would be part of a tax when the said word i.e., "tax" is used in an Act such as the Income Tax Act which needs to be construed strictly. For this reason also, we feel that the Supreme Court decision in *India Cement Ltd.* (supra) would not be of any use to the revenue.

23. In *Dewan Chand Builders and Contractors* (supra), the Supreme Court considered the concepts of cess, tax and fee in the backdrop of the provisions of the Building and Other Construction Workers' Welfare Cess Act, 1996. The Supreme Court was considering the core issue as to whether the cess levied under the scheme of the said Cess Act was a fee or a tax. In that context, the Supreme Court examined the concept of a tax and fee in the following manner:

25. The question whether a particular statutory impost is a "tax" or "fee" has arisen as a challenge in several cases before this Court, which in turn necessitated the demarcation between the concepts of "cess", "tax" and "fee". The characteristics of a fee, as distinct from tax, were explained as early as in *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, (generally referred to as "Shirur Mutt case"). The ratio of this decision has been consistently followed as a locus classicus in subsequent decisions dealing with the concept of "fee" and "tax".

26. The Constitution Bench of this Court in *The Hingir-rampur Coal Co. Ltd. and*

Others Vs. The State of Orissa and Others, was faced with the challenge to the constitutional validity of the Orissa Mining Areas Development Fund Act, 1952, levying cess on the petitioner's colliery. The Bench explained different features of a "tax", a "fee" and "cess" in the following passage: (The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others, , AIR p. 464, para 9)

9.... The neat and terse definition of "tax" which has been given by Latham, C.J., in *Matthews v. Chicory Mktg. Board* [(1938) 60 CLR 263 (Aust)] is often cited as a classic on this subject. "A tax", said Latham, C.J., "is a compulsory exaction of money by public authority for public purposes enforceable by law, and is not payment for services rendered". In bringing out the essential features of a tax this definition also assists in distinguishing a tax from a fee. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of fee is not intended to be, and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied.

27. It was further held that: *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, , AIR pp. 465-66, para 13)

13. ... It is true that when the legislature levies a fee for rendering specific services to a specified area or to a specified class of persons or trade or business, in the last analysis such services may indirectly form part of services to the public in general. If the special service rendered is distinctly and primarily meant for the benefit of a specified class or area the fact that in benefiting the specified class or area the State as a whole may ultimately and indirectly be benefited would not detract from the character of the levy as a fee. Where, however, the specific service is indistinguishable from public service, and in essence is directly a part of it, different considerations may arise. In such a case it is necessary to enquire what is the primary object of the levy and the essential purpose which it is intended to achieve. Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is the true test in determining the character of the levy.

28. On the basis of the above considerations, this Court in *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, , examined the scheme of the Act impugned in that case in depth and opined that the primary

and the principal object of the Act was to develop the mineral areas in the State and to assist in providing more efficient and extended exploitation of its mineral wealth. The cess levied did not become a part of the consolidated fund and was not subject to an appropriation in that behalf. It went into a special fund earmarked for carrying out the purpose of the Act and thus, its existence established a correlation between the cess and the purpose for which it was levied, satisfying the element of quid pro quo in the scheme. These features of the Act impressed upon the levy the character of a "fee" as distinct from a "tax".

29. Recently in *The State of West Bengal Vs. Kesoram Industries Ltd. and Others*, the Constitution Bench of this Court was faced with a challenge to the constitutional validity of the levy of cesses on coal-bearing lands, tea plantation lands and on removal of brick earth. Relying on the decision in *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, , speaking for the majority, R.C. Lahoti, J. (as His Lordship then was), explained the distinction between the terms "tax" and "fee" in the following words: (*The State of West Bengal Vs. Kesoram Industries Ltd. and Others*, , SCC p. 332, para 146)

146. ... The term cess is commonly employed to connote a tax with a purpose or a tax allocated to a particular thing. However, it also means an assessment or levy. Depending on the context and purpose of levy, cess may not be a tax; it may be a fee or fee as well. It is not necessary that the services rendered from out of the fee collected should be directly in proportion with the amount of fee collected. It is equally not necessary that the services rendered by the fee collected should remain confined to the person from whom the fee has been collected. Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged.

30. In the light of the tests laid down in *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, and followed in *The State of West Bengal Vs. Kesoram Industries Ltd. and Others*, , it is manifest that the true test to determine the character of a levy, delineating "tax" from "fee" is the primary object of the levy and the essential purpose intended to be achieved."

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35. Viewed from this perspective, the inevitable conclusion is that in the instant case there does exist a reasonable nexus between the payer of the cess and the services rendered for that industry and therefore, the said levy cannot be assailed on the ground that being in the nature of a "tax", it was beyond the legislative competence of Parliament.

24. We must also keep in mind the decision of the Supreme Court in *Om Prakash Agarwal (supra)* where the three principle characteristics of tax, as recognized in *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, have been set out in the following manner:

- (i) that it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law;
- (ii) that it is an imposition made for public purposes without reference to any special benefit to be conferred on the payer of the tax; and
- (iii) that it is a part of the common burden, the quantum of imposition upon the taxpayer depending generally upon the capacity of the taxpayer to pay.

25. The Supreme Court in *Om Prakash Agarwal* (supra) held that the cess u/s 3 of the Haryana Rural Development Fund Act, 1983 fell within the description of a tax because it fulfilled those characteristics. In this context, the Supreme Court observed as under:

As mentioned earlier, a cess collected u/s 3 of the Act is no doubt required to be credited to the Fund constituted u/s 4(1) of the Act. The Fund, however, vests in the State Government and not in the municipality or a marketing committee or any other local authority having limited functions specified in the enactment under which it is constituted. The State Government is entitled under sub-section (5) of section 4 of the Act to spend the cess credited to the Fund in the rural areas, in connection with the development of roads, hospitals, means of communication, water supply, sanitation facilities and for the welfare of agricultural labour or for any other scheme approved by the State Government for the development of the rural areas. This sub-section authorises the State Government to spend the money credited to the Fund virtually on any object which the State Government considers to be the development of rural areas. The definition of the expression "rural area" in section 2(h) of the Act which is extracted above is as vague as it can be. It means an area the population of which does not exceed 20,000 persons. It need not necessarily be a local area as it is ordinarily understood. Ordinarily, a local area means a municipal corporation, a town municipality, a panchayat, a notified area, a sanitary board, etc. Any geographical area the population of which does not exceed 20,000 persons can be conveniently brought within the scope of section 2(h) of the Act. If it is understood that way, even urban areas can be divided into areas with population not exceeding 20,000 and labelled as rural areas. Even if we exclude from the scope of the expression "rural area", a town or a city having a population exceeding 20,000 persons, the area in which the amount credited to the Fund can be spent is almost 90 percent of the total area of the State of Haryana. The amount may be spent on any purpose which the State Government considers to be a purpose intended for the development of the rural areas. There is no specification in the Act that the amount or a substantial part of the amount collected by way of cess u/s 3 of the Act will be spent on any public purpose within the market area where the dealer is carrying on his business. The purposes over which the Fund can be spent are the same purposes on which any amount collected by way of tax is spent by any State and there is nothing which is done specially to benefit the dealer. When any amount is spent from the Fund, the interest of the dealers is not at all kept in view even generally. There is no

other restriction imposed on the manner in which the Fund can be spent. The cess, therefore, partakes of the character of a part of the common burden which has to be levied and collected only as a tax. A dealer who pays the cess under the Act may as one of the members of the general public derive some benefit from the expenditure of the Fund incurred by the State Government. The benefit so derived by him is merely incidental to the fact that he happens to be a person residing in the State of Haryana. It is not the same as the benefit which a dealer in a market area would derive by the expenditure of its funds by a marketing committee or as the benefit which a person living in a town or a city would derive by the expenditure incurred by the municipality concerned. The fact that the Fund is created under the Act is a mere cloak to cover the true character of the levy in question. There is practically no difference between the Consolidated Fund which vests in the State and the Fund which also vests in the State. Amounts credited to the Consolidated Fund and the amounts credited to the Fund can both be spent practically on any public purpose almost throughout the State. In such a situation, it is difficult to hold that there exists any correlation between the amount paid by way of cess under the Act and the services rendered to the person from whom it is collected. The impost in these cases lacks the essential qualification of a fee, namely, "that it is absolutely necessary that the levy of fees should, on the face of the legislative provision, be correlated to the expenses incurred by Government in rendering services." (*The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*,). In fact, there is no correlation at all.

26. But, in the present case, the cess and cess surcharge do not fall within the characteristics of a tax. As pointed out in *Dewan Chand Builders and Contractors* (supra), in the case of a cess there exists a reasonable nexus between the payer of a cess and the services rendered. In *Dewan Chand Builders and Contractors* (supra), the Supreme Court had relied on *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, wherein it was recognized that there was really no generic difference between a tax and a fee inasmuch as both are compulsory exactions of money by public authority. However, where a tax was imposed for public purposes and need not be supported by any consideration of service rendered in return, a fee was levied essentially for services rendered and as such there was an element of quid pro quo between the person who pays the fee and the public authority which imposes it. It was further observed in *Hingir Rampur Coal Co. Ltd.* (supra) that if specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area and is a condition precedent for the said services or in return for them, cess is levied against the said area or the said class of persons or trade or business, the cess is distinguishable from a tax and is described as a fee. Furthermore, tax recovered by a public authority invariably goes into the consolidated fund which is ultimately utilized for all public purposes whereas a cess levied by way of a fee is not intended to be and does not become a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied. It is

important to notice that in *Dewan Chand Builders and Contractors (supra)*, the Supreme Court relied upon the test laid down in *Hingir Rampur Coal Co. Ltd. (supra)* which was followed in *The State of West Bengal Vs. Kesoram Industries Ltd. and Others*, wherein the Supreme Court observed that the term "cess" was commonly employed to connote "a tax with a purpose" or "a tax allocated to a particular thing". In that very decision, the Supreme Court recognized the fact that depending on the context and purpose of levy, a cess may not be a tax.

27. Keeping these tests in mind, if we examine the provisions of the Tamil Nadu Panchayats Act, 1958, it will immediately become clear that the cess u/s 115 of the Tamil Nadu Panchayats Act, 1958 and the cess surcharge u/s 116 thereof cannot be regarded as a tax. Section 63 spells out the duty of the Panchayat to provide for certain matters. It stipulates that it shall be the duty of a Panchayat within the limits of its funds, to make reasonable provision for carrying out the requirement of the village or town in respect of the matters specified therein. Section 64 enables the Panchayat to make provisions, as it thinks fit, for carrying out the requirements of the village or town in respect of the matters specified in that section. u/s 115 of the Tamil Nadu Panchayats Act, 1958, a local cess is to be levied in every panchayat development block at the rate of 45 naye paise on every rupee of land revenue payable to the Government in respect of any land for every fasli. Sub-section (4) of Section 115 spells out the manner in which the proceeds of the local cess so collected in every panchayat development block are to be credited. The said sub-section (4) reads as under:

(4) (a) Out of the proceeds of the local cess so collected in every panchayat development block, a sum representing four-ninths of the proceeds shall be credited to the Panchayat Union (Education) Fund.

(b) Out of the proceeds of the local cess collected in every panchayat town in a panchayat development block, a sum representing two-ninths of the said proceeds shall be credited to the town panchayat fund.

(c) Out of the balance of the proceeds of the local cess collected in the panchayat development block, such percentage as the panchayat union council may fix shall be credited to the village panchayat fund, and the percentage shall be fixed so as to secure as nearly as may be that the total income derived by all the village panchayats in the panchayat union does not fall short of an amount calculated at 20 naye Paisa for each individual of the village population in the panchayat union.

(d) The balance of the proceeds of the local cess collected in the panchayat development block shall be credited to the funds of the panchayat union council.

28. From the above it is apparent that the proceeds of the local cess are to be credited in distinct shares to the Panchayat Union (Education) Fund, the Town Panchayat Fund, the Village Panchayat Fund and the Panchayat Union Council Fund. It is apparent that the cess collected under the said Tamil Nadu Panchayats Act, 1958 does not become part of the consolidated fund but becomes part of the special funds under the Tamil Nadu Panchayats Act, 1958. Thus, an essential

feature of a tax is nonexistent in the case of a cess and cess surcharge under the Tamil Nadu Panchayats Act, 1958.

29. Section 135 describes the Panchayat Union (General) Fund and it stipulates that the said fund shall, inter alia, include such part of the local cess collected in the panchayat development block as remains after crediting to the Panchayat Union (Education) Fund, the Town Panchayat Fund and the Village Panchayat Fund u/s 115. It also includes the local cess surcharge collected in the panchayat development block u/s 116. Similar provisions are made with regard to the Panchayat Union (Education) Fund u/s 136 and of the Town Panchayat and Village Panchayat Funds u/s 137 of the Tamil Nadu Panchayats Act, 1958. The expenditure is governed, inter alia, by Section 138 out of the monies received by the Panchayat Union Council, the Village Panchayat or the Town Panchayat. The expenditure from the Panchayat Fund and the Panchayat Union Fund is to be defrayed in the manner indicated in Section 139 of the Tamil Nadu Panchayats Act, 1958. In other words, none of the trappings of a tax as explained in *Hingir Rampur Coal Co. Ltd. (supra)*, *Kesoram Industries Ltd. (supra)* and *Dewan Chand Builders and Contractors (supra)* existed in the present case. Therefore we are unable to agree with the submission of learned counsel for the revenue that the cess u/s 115 and cess surcharge u/s 116 of the Tamil Nadu Panchayats Act, 1958 could be regarded as a tax for the purposes of Section 43B. That being the case, the claim of expenditure on the basis of accrued liability to pay cess and cess surcharge under the Tamil Nadu Panchayats Act, 1958 could not be disallowed by the revenue authorities by invoking Section 43B of the said Act as it was applicable to the assessment year 1985-86. Therefore, question No. 1 is answered in the affirmative, in favour of the respondent/assessee and against the revenue.

Re: Question No. 2

30. The respondent/assessee had in the previous year pertaining to the assessment year 1985-86, collected a sum of Rs. 26,10,483/- by way of deposits from non-governmental buyers of cement towards possible levy of sales tax on packing and freight charges. The assessing officer treated the said amount of Rs. 26,10,483/- as a trading receipt and held that no deduction u/s 43B was allowable to the assessee inasmuch as the said amount had not been paid to the Government as tax. The assessing officer therefore added the said amount to the assessable income of the respondent/assessee. The Commissioner of Income Tax (Appeals) confirmed the assessing officer's order in treating the said sum as a trading receipt at the hands of the respondent/assessee. The Income Tax Appellate Tribunal however deleted the said addition by holding that the said deposits amounting to Rs. 26,10,483/- could not be treated as a trading receipt and therefore could not have been included in the assessable income of the respondent/assessee. The tribunal had placed reliance on the decision of the Supreme Court in the case of *State of Mysore and Another Vs. Mysore Spinning and Manufacturing Co. Ltd. and Others*, as also on the decision of a Single Judge

of the Madras High Court in the assessee's own case- Dalmia Cement (Bharat) Limited Vs. Deputy Commercial Tax Officer, Lalgudi and Another, . The tribunal distinguished the cases cited on behalf of the revenue, namely, (i) Chowringhee Sales Bureau (P) Ltd. Vs. Commissioner of Income Tax , West Bengal, ; and (ii) Sinclair Murray and Co. (P) Ltd. Vs. The Commissioner of Income Tax, Calcutta, .

31. The respondent manufactured and marketed cement under the provisions of the Cement Control Order, 1982 under which prices were fixed. A retention price for freight was permitted under the Order of F.O.R. destination sales and the manufacturer was also permitted to include packing charges, excise duty, etc. in the price. The impact of the Cement Control Order, 1982 on the scheme of exclusion provided under Rule 6(c) of the Tamil Nadu General Sales Tax Rules, 1959 had been a matter of continuous controversy. The question whether sales tax could be levied on packing charges and freight was pending decision of the Supreme Court in the case of State of Tamil Nadu v. Ramco Cement Distribution Company (P) Ltd.: (Civil Appeal Nos. 5306-5336/1985 and other connected matters). Since the question had not been determined finally, the respondent informed its non-governmental buyers that they were compelled to provide for sales tax liability on freight and packing charges and thereby collected a deposit for this purpose from the said buyers. During the relevant previous year, the respondent collected security deposit of Rs. 9,58,967/- and Rs. 16,51,516/- towards possible levy of sales tax on freight and packing charges respectively. These amounts were included in the balance sheet of the company as security deposits to cover the possible levy of sales tax on freight element and packing charges in cement sale. It also needs to be pointed out that each invoice of the respondent in respect of its cement sales carried the following footnote:

Security deposit towards possible levy of sales tax on packing charges and freight refundable in the event of the levy of sales tax on packing charges and freight being ultimately held to be not justified.

32. The said contingency deposit collected on a refundable basis was separately ledgerised in the buyers' accounts and the buyers were treated as depositors. The understanding between the respondent/assessee and its buyers was that in case the levy was upheld by the Supreme Court, the deposits would be paid to the Government. On the other hand, if the levy was not upheld by the Supreme Court, the respondent/assessee was under the contractual liability to refund the same to the buyers/depositors. It was therefore the case of the respondent/assessee that the deposits were obtained bona fide with a view to cover the liability to sales tax on packing charges and freight. Furthermore, such deposits could not be considered to be trading receipts or collections by way of sales tax. But, the assessing officer treated the same as a trading receipt and made the addition. The Commissioner of Income Tax (Appeals), as mentioned above, confirmed the addition made by the assessing officer by applying the decisions of the Supreme Court in Chowringhee Sales Bureau P. Ltd. (supra) and Sinclair Murray and Co. Pvt. Ltd. (supra). The tribunal, as pointed out above, set aside

the said decision of the Commissioner of Income Tax (Appeals) and held that the deposits could not be regarded as the trading receipts of the respondent/assessee. On facts, the tribunal concluded that the contingency deposits were collected on refundable basis and were also separately ledgerised in the respondent's account and the buyers were treated as depositors. Consequently, the tribunal held that when the amounts are credited in the separate accounts of the buyers and held as deposits and the parties are treated as depositors, the money was collected on the express understanding of payment to Government or refund to the buyers in case the levy was upheld or not upheld by the Supreme Court. The respondent/assessee clearly held the said monies as a mere custodian. It did not become part of the trading receipt of the respondent/assessee nor could it be regarded as a collection by way of tax. The tribunal had placed reliance on the assessee's own case decided by the Madras High Court in *Dalmia Cement (Bharat) Ltd. (supra)*. Reliance was also placed on the Supreme Court decision in the case of *Mysore Spinning and Manufacturing Co. Ltd. (supra)*. The decision of the Supreme Court in *Chowringhee Sales Bureau P. Ltd. (supra)* and *Sinclair Murray and Co. Pvt. Ltd. (supra)* which had been referred to on behalf of the revenue were held to be distinguishable on facts.

33. Before us, Mr. Sabharwal appearing on behalf of the revenue once again placed reliance on the decisions in *Chowringhee Sales Bureau P. Ltd. (supra)* and *Sinclair Murray and Co. Pvt. Ltd. (supra)* as also on the decision of the Kerala High Court in *Commissioner of Income Tax Vs. United Cardamom Auctioners*, On the other hand, Mr. Ravi Mehta appearing on behalf of the respondent placed strong reliance on the Constitution Bench decision of the Supreme Court in the case of *Mysore Spinning and Manufacturing Co. Ltd. (supra)*. He also referred to *Dalmia Cement (Bharat) Ltd. (supra)* and *Siddheshwar Sahakari Sakhar Karkhana Ltd. Vs. Commissioner of Income Tax , Kolhapur and Others, .*

34. In *Chowringhee Sales Bureau P. Ltd. (supra)*, the appellant company was a dealer in furniture and also acted as an auctioneer. In respect of sales effected by the assessee as auctioneer, it realized a sum of Rs. 32,986/- as sales tax in the year in question. The said amount was credited separately in its account books under the head "sales tax collection account". The appellant company did not pay the amount of sales tax to the actual owner of the goods nor did it deposit the amount so realized by it as income tax in the State exchequer because it took the position that the statutory provision creating that liability upon it was not valid. The appellant also did not refund the amount to the persons from whom it had been collected. Importantly, in the cash memos issued by the appellant company to the purchasers in the auction sales, the appellant company was shown as the seller. In this backdrop, the Supreme Court held that the sum of Rs. 32,986/- realized as "sales tax" by the appellant company in its character as an auctioneer formed part of the trading or business receipts. The Supreme Court further held that the fact that the appellant credited the amount received "as sales tax" under the head "sales tax collection account" did not make any material difference as the Court observed that it is the true nature and quality of

the receipt and not the head under which it is entered in the account books that would prove decisive. If a receipt is a trading receipt, the fact that it is not so shown in the account books of the assessee would not prevent the assessing authority from treating it as a trading receipt. It was also held that the appellant company would, however, be entitled to claim a deduction of the amount as and when it paid it to the State Government. What is important to note from the above decision is that the money that was collected by Chowringhee Sales Bureau to the extent of Rs. 32,986/- was realized by it "as sales tax". It is in this backdrop that the Supreme Court held that the said sum was part of the trading or business receipts of Chowringhee Sales Bureau.

35. The decision in Chowringhee Sales Bureau P. Ltd. (supra) was followed and applied in Sinclair Murray and Co. Pvt. Ltd. (supra). In that case, during the relevant year, the appellant company had sold jute in Orissa to certain mills for being used in Andhra Pradesh and "charged sales tax" under a separate head in the bill as "sales tax: buyer's account.....to be paid to the Orissa Government". The sales tax was however not paid to the Orissa Government on the ground that the sales were inter-state sales. The Income Tax Appellate Tribunal held that where a dealer collected sales tax u/s 9B(3) of the Orissa Sales Tax Act, 1947, as it then stood, the amount of tax did not form part of the sale price and the dealer did not acquire any beneficial interest therein and that the sum of Rs. 7,14,398/- collected by the appellant did not form part of its total income. However, the Calcutta High Court, on a reference, held that the sales tax collected was part of the trading receipt and was to be included in the appellant's total income. The Supreme Court, in Sinclair Murray and Co. Pvt. Ltd. (supra), affirmed the decision of the High Court and held that the amount collected by the appellant company "as sales tax" constituted its trading receipt and had to be included in its total income. It further held that if and when the appellant company paid the amount collected to the State Government or refunded any part thereof to the purchaser, the appellant would be entitled to claim deduction of the sum so paid or refunded. In Sinclair Murray and Co. Pvt. Ltd. (supra), the Supreme Court also referred to the Constitution Bench decision in George Oakes (P.) Ltd. Vs. State of Madras, and referred to the following observations therein:

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.

36. It is important, once again, to notice the expression used in the above extract. It has specific reference to the dealer collecting any amount "by way of tax". It is obvious that when a dealer collects an amount by way of tax, it is part

of the sale price. Therefore, that amount would have to be included in the turnover.

37. But the facts of the present case are different. Here, the deposits that were received by the respondent/assessee were neither collected "as sales tax" nor were they collected "by way of tax". They were simple deposits towards possible levy of sales tax on packing charges and freight. The footnote of each invoice specifically mentioned that the security deposit towards possible levy of sales tax on packing charges and freight was refundable in the event of the levy of sales tax on packing charges and freight being ultimately held to be not justified.

38. This takes us to consider the decision of a Constitution Bench of the Supreme Court in Mysore Spinning and Manufacturing Co. Ltd. (*supra*). In the context of the provisions of Section 11 of the Mysore Sales Tax Act, 1948, the question arose whether amounts received from purchasers by a registered dealer merely as deposits to be refunded to purchasers if the sales were held not liable to tax could be regarded as "collection by way of tax". In that case, the assessee, a registered dealer, received certain amounts from its constituents merely by way of deposits on the express understanding or undertaking that the monies would be refunded to the constituents if the assessee was held not liable to include the relevant sales in its taxable turnover. The assessee held the amounts as a mere custodian. The Supreme Court held that the fact that fiscal control of the said amounts passed from the depositors to the assessee did not render the receipt a "collection by way of tax" of any amount in the context of Section 11(2) of the Mysore Sales Tax Act, 1948. The Supreme Court, *inter alia*, held as under:-

...We have already set out the questions referred, which would clearly indicate that the amounts were received by the Cement Marketing Co. and by the Mysore Spinning and Manufacturing Co. and the Minerva Mills Ltd. only as "a deposit" to cover a possible contingency of these companies being held liable to pay the tax. That this was the real nature of the transaction was never in dispute. Indeed even the Commissioner of Sales Tax in making the reference in the three cases made it clear that the amounts were received by the companies on the definite understanding and condition that they were to be held only "as deposits" to be refunded when the company in question was held not liable to include the relevant sales in its taxable turnover. The construction on which the Sales Tax Authorities proceeded was that the Act made no difference between one type of receipt and another, and that any receipt of money by a dealer from the purchaser was a "collection by way of tax" within s. 11(2) of the Act, provided it had some relation to sales tax, and that it mattered not that the receipt was merely a deposit by the payer carried to suspense account, the amount being received on the express undertaking and definite condition that the same would be refunded in the event of the dealer being held not liable to sales tax on the transaction in regard to which the "deposit" was made. We are unable to agree in this construction of the expression "collection" occurring in s. 11(2) of the Act. Where an amount is received merely by way of deposit, on the express

understanding or undertaking as in these cases, the company held the money as a mere custodian, and on the fulfilment of the condition became a trustee for the depositor. It is sufficient to state that when once the tax authorities determined that the proceeds of the sales in question were not within the taxable turnover of the company, the beneficial ownership became vested in the depositors and the company ceased to have any right to continue to hold the moneys. The fact that the physical control of the moneys passed from the "depositor" to the "dealer" did not render the receipt a "collection" within s. 11(2) of the Act.

39. From the above, it is apparent that a deposit of the kind in the present case cannot be regarded as either a collection "by way of tax" or "as sales tax". That being the position, the said deposits, to the extent of Rs. 26,10,483/-, cannot be treated as trading receipts. The tribunal has correctly held that the decision of the Supreme Court in Mysore Spinning and Manufacturing Co. Ltd. (supra) would be applicable and those in Chowringhee Sales Bureau P. Ltd. (supra) and Sinclair Murray and Co. Pvt. Ltd. (supra) are distinguishable and not applicable to the facts of the present case. Consequently, question No. 2 is answered in the affirmative, in favour of the assessee and against the revenue.

Re: Question No. 5

40. Insofar as this question is concerned, we feel that, truly speaking, no question of law as such arises for our consideration. The only issue before the tribunal was whether the estimate of advance tax submitted by the assessee was genuine and bona fide and whether the explanations tendered by the assessee with regard to the estimate of advance tax were reasonable or not. The tribunal has come to the conclusion that the estimate furnished by the assessee was reasonable and bona fide and therefore no interest u/s 216 could be charged. We are of the views that the finding returned by the tribunal was one of fact and no question of law, as such, arises for our consideration. Consequently, we refrain from answering this question and return the same unanswered.

Conclusion

In view of the foregoing discussion, question Nos. 3, 4 and 5 are returned unanswered. Question Nos. 1 and 2 are answered in the affirmative in favour of the assessee and against the revenue. The reference stands answered accordingly.