

**(2010) 01 BOM CK 0121**  
**In the Bombay High Court**  
**Case No : Sale Tax Reference No. 9 of 2002**

Deepmani

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

**Date of Decision :** 21-01-2010

**Acts Referred:**

Bombay Sales Tax Act, 1959 — Section 36(2), 51, 57, 61(1)  
Central Sales Tax Act, 1956 — Section 5, 5(1), 5(2), 5(3)  
Constitution of India, 1950 — Article 286, 286(1)  
Customs Act, 1962 — Section 69  
Income Tax Act, 1961 — Section 80HHC(3)  
Sales of Goods Act, 1930 — Section 19(3), 20, 21, 22, 23

**Citation :** (2011) 38 VST 275

**Hon'ble Judges :** V.C. Daga, J; R.M. Savant, J

**Bench :** Division Bench

**Advocate :** P.C. Joshi, for the Appellant; V.A. Sonpal, `A" Panel Counsel, for the Respondent

## Judgement

V.C. Daga, J.—Heard Mr. Joshi, learned Counsel for the applicant and Mr. Sonpal, learned Counsel for the Respondent.

2. This reference u/s 51 of the Bombay Sales Tax Act, 1959 ("BST Act" for short) is made by the Sales Tax Appellate Tribunal to seek decision of this Court on the following substantial questions of law:

1. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the transactions were not sales in the course of export within the ambit of Section 5 of the Central Sales Tax Act, 1956?

2. str-9.02.sxw 2. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in confirming the penalty levied u/s 36(2)(c) Explanation (1) of the Bombay Sales Tax Act, 1959?

The Facts:

3. The applicant is a dealer registered under the BST Act. The applicant is acting as an authorised dealer to promote and market the products of M/s.R.K. Machine Tools Pvt. Limited, Ludhiana. The Sales Tax Officer (48), 'A' Ward, Unit IV, Mumbai vide his order dated 27th March, 1985 assessed the applicant for the period 1st April, 1983 to 31st March, 1984 levying sales tax under the BST Act on the transaction of sale which, according to the applicant, did not attract sales tax since it occasioned export out of the territory of India.

4. Aggrieved by the aforesaid order of assessment, the applicant preferred first appeal before the Assistant Commissioner (Appeals), Bombay City Division, Bombay, which, according to the applicant, was dismissed without considering the legal contentions raised leading to sale of goods which occasioned export out of country.

5. Aggrieved by the aforesaid order, the applicant preferred second appeal before the Deputy Commissioner (Appeals), Bombay, who was pleased to accept the contention raised by the applicant. However, instead of deciding the 3 str-9.02.sxw appeal by himself, he remanded the appeal to the Assistant Commissioner with direction to decide it in accordance with the directions issued by him treating the transactions of sale as covered by Section 5 of the Central Sales Tax Act, 1956 ("CST Act" for short).

6. The aforesaid order was revised by the Deputy Commissioner of Sales Tax (Admn.) whereunder the assessment order passed by the Sales Tax Officer was restored.

7. Aggrieved by the aforesaid order, passed u/s 57 of the BST Act by the Deputy Commissioner of Sales Tax (Admn.), the applicant invoked appellate jurisdiction of the Maharashtra Sale Tax Tribunal ("Tribunal" for short). None of the contentions raised by the applicant found favour with the Tribunal. It held that the transactions were not covered by Section 5 of the CST Act as such they were sales within the State of Maharashtra liable to be taxed as such. The Tribunal also confirmed the penalty u/s 36(2)(c) read with Explanation1 of the BST Act.

8. Not satisfied with the aforesaid judgment, the applicant prayed for Reference u/s 61(1) of the BST Act. Accordingly, the Tribunal was pleased to refer two questions extracted in the opening part of the judgment to seek opinion of this Court.

Rival Submissions:

9. Mr. Joshi, learned Counsel appearing for the applicant has taken us through the provision of Section 5 of the CST Act, which reads as under:

5. Remission of duty on goods found deficient in quantity.(1) The Central Government may, by rules made under this section, provide for remission of duty of excise leviable on any excisable goods which due to any natural cause are found to be deficient in quantity.

(2) Any rules made under Sub-section (1) may, having regard to the nature of the excisable goods or of processing or of curing thereof, the period of their storage or transit and other relevant considerations, fix the limit or limits of percentage beyond which no such remission shall be allowed:

Provided that different limit or limits of percentage may be fixed for different varieties of the same excisable goods or for different areas or for different seasons.

Mr. Joshi urged that the Tribunal has committed error in treating the subject sale transactions as `local sales" and not `sales in the course of export". He further submits that the delivery of goods had taken place at Airport for being exported out of India. There was no possibility of goods coming back to India since goods were sold to foreign buyers only for being taken out of India. That the sale 5 str-9.02.sxw price was received in foreign currency. Under these circumstances, the goods have crossed customs frontiers as such subject sales ought to have been treated as sales in the course of export. He placed reliance on the judgment of the Apex Court in the case of *The State of Travancore Cochin v. The Bombay Company Ltd.* Alleppey 3 STC 434.

10. Mr. Joshi also placed reliance on the judgment of this Court in the case of *Abdulgafar A. Nadiadwala v. Asst. C.I.T.* (2004) 267 ITR 438 affirmed by the Apex Court in *Commr. of Income Tax-IV, Tamil Nadu Vs. B. Suresh*, contending that the said judgment though deals with the provisions of the Income Tax Act u/s 80HHC and the explanation thereto, however, the said judgment would be applicable to the facts of the present case with full force. He submits that both the enactments i.e. CST Act and the Income Tax Act are parliamentary enactments providing for nonliability of tax by the State Legislature to a person earning foreign exchange arising from export. According to him, both enactments are, therefore, *pari materia* in relation to the same person viz. the exporter.

11. Mr. Joshi submits that for the purposes of applicability of the principle of *pari materia*, it is not necessary that the entire subject matter in the two enactments should be identical before any provisions in one statute can be held to be *pari materia* with similar provisions in the other. In other words, submissions; so long as both the statutes deal with the same subject 6 str-9.02.sxw matter, or form part of the same system, the principle of *pari materia* would be applicable. The Income Tax Act, 1961 provides for certain deductions u/s 80HHC in respect of profits retained for export business whereas the Central Sales Tax Act, 1956 provide for principles to determine the nature of the transaction of sale to be either in the course of interState trade or commerce (Section 3) or in the course of export or import (Section 5). He, thus, submits that both these sections have their origin in the Constitutional embargo engrafted under Article 286 of the Constitution of India on the power of the State Legislature to levy tax on the export or import transactions.

12. Mr. Joshi further highlights that Sub-section (3) of Section 80HHC of the

Income Tax Act provides for the computation of profit from the export business, whether manufactured or otherwise. It also defines the term "export turnover". Explanation (aa) under the said Section 80HHC stipulates that the export out of India will not include a transaction by way of sale or otherwise in a shop etc., which does not involve clearance at any Customs Stations as defined in the Custom Act, 1962. In order to bring home his contention, he submits that the sale in the case in hand was not a sale in the shop. He submits that this Court in the case of Abdulgafar A. Nadiadwala (supra), after considering the meaning of the words "goods" and "merchandise" and the text of the provisions of Section 80HHC and the Explanation thereunder, held that the export proceeds were synonymous to the expression "sale proceeds" and, therefore, the amount received by the Assessee as consideration in the transaction in question was export proceeds and, therefore, was eligible to the deduction provided u/s 80HHC.

13. According to Mr. Joshi, this Court, in the course of its judgment at page 503 of the Report has referred to the provisions of the BST Act and Customs Act for the purpose of determining the meaning of the term "goods". That at page 509 of the Report this Court held that if the goods are taken from India to outside India it amounted to export and the object of Section 80HHC was to grant an incentive to foreign exchange earners. That after referring to the provisions of the Customs Act, this Court referred to the Delhi High Court judgment in the case of Commissioner of Income Tax Vs. Shriram Pistons and Rings Ltd., ; wherein the Delhi High Court referred to the approval by the Company Law Board under the Companies Act that has to be followed by the Income Tax Department which cannot take a contrary view, to the one under the Companies Act.

14. Mr. Joshi further submits that after interpreting the meaning of the term "goods" this Court at page 513 referred to the definitions under the Sale of Goods Act, Trade and Merchandise Marks Act and Indian Contract Act. That this Court further referred to the Supreme Court judgment in the case of Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur, for finding out the meaning of the term "moveable property" and the Copy Right Act, 8 str-9.02.sxw 1957 in regard to the signals transmitted from satellite. He, thus, submits that two wings of the Government cannot take two different views of the same transaction. The two wings referred to in the judgment in Abdulgafar A. Nadiadwala (supra) are Customs Department and Income Tax Department which are part of the same Ministry.

15. Mr. Joshi further urged that this Court at page 516 in the case of Abdulgafar A. Nadiadwala (supra) also observed that when the article or goods are physically exported, they must have been the subject of customs clearance. Following the principle that no material or things or goods can cross the customs borders unless they go through the gamut of custom clearance. As in the case of the present applicant, in that case also the Revenue could not dispute the factual position. He submits that in the case in hand, the first Appellate Authority on two

occasions specifically referred to the particulars mentioned in the cash memos issued in due course of business. To examine that aspect of the matter, this Court had directed the Respondent to produce in the Court the record of the assessment proceedings along with the record of the First Appellate Authority. On the last occasion, the Respondent has informed this Court that the records were not traceable. In view of the above factual position, and in view of the findings of fact on record by the First Appellate Authority on two occasions, this Court should decide the Reference on the basis of the said findings of fact not disputed by the Respondent.

16. Mr. Joshi reverting back to the judgment of this Court in the case of Abdulgafar A. Nadiadwala (*supra*), submits that this Court has observed, on the basis of the view taken by the Allahabad High Court, that if it is to be treated as export out of India the transaction should involve clearance at customs station. If the goods were required to be cleared by the customs, either by the purchaser or the seller, it would be considered as export out of India, for the purpose of eligibility of deduction u/s 80HHC. The aforesaid judgment of this Court in the case of Abdulgafar A. Nadiadwala having been affirmed by the Supreme Court in the case of C.I.T. v. B. Suresh (*supra*), which also considered the SLP filed by the Union of India against the judgment of this Court, this Court is bound by the said judgment.

17. Mr. Joshi submits that factual scenario in the case in hand is the same and that the cases decided in relation to the interpretation of Section 80HHC vis-à-vis the transaction of sale to the foreign tourists at the counter against foreign exchange as consideration would apply with full force. According to him, it is on record that the goods selected by the foreign going foreign tourists moved from the shop of the Assessee to the International Airport since goods were delivered for onward journey by the applicant to such tourists while they were checking in for their foreign going flights, from where 10 str-9.02.sxw goods cannot come back nor can goods come out of the airport. Each such foreign buyer obtained custom clearance for the items so delivered by the applicants, and then boarded the plane.

18. Mr. Joshi submits that it is well settled that when the words have acquired a particular meaning flowing from the authoritative construction given by the superior Courts, then they are presumed to have been used by the Legislature in the same sense that was assigned to by the Courts. Reliance is placed on *Kesheji Ravji v. C.I.T.* 183 ITR 1 SC; *Faridabad Complex Administration Vs. Yadu etc.*, ; and *Smt. Sunanda Devi Singhania Vs. Commissioner of Wealth Tax*, . The relevant extracts of pages 71 and 72 from the Publication Maxwell on the Interpretation of Statutes 12th Edition is produced on record to show that the construction that have been placed on the statutes having similar scope can be referred to in case the Parliament uses the same language that was used in another Act of Parliament referring to the same subject.

19. Mr. Joshi also pressed into service the latest 12th Edition of 2010 of yet

another publication on "Principles of Statutory Interpretation" by Justice G.P. Singh (at p. 298); wherein the principle of *pari materia* and the application of other statutes" interpretation are discussed. The learned Author while concluding the topic has observed (at p. 302) that the application of uniformity has been applied for the purpose of avoiding any apparent contradiction between the series of statutes dealing with 11 str-9.02.sxw the same subject and permitted the raising of a presumption in the absence of any contrary intention specified in the Act and the same meaning had to be given while interpreting the later statute.

20. According to Mr. Joshi, the same view was taken by this Court in the case of *Leuko Plast (India) Ltd v. state of Goa and Ors.* (1988) 71 STC 180. That the said principle was also followed by the Apex court in the case of *Commissioner of Central Excise Coimbatore and Others Vs. Jawahar Mills Ltd. and Others*, . In that case the Apex court relied upon the decision under Income Tax and Sales Tax while interpreting the rule under the central excise Act.

21. On the above premise, Mr. Joshi prayed that all the transactions of the applicant to foreign going foreign tourists against the payment in US Dollars or other foreign currency should be treated as transactions of exports, especially, when the goods selected by the foreign going foreign tourists moved from the shop in Colaba to the International Airport and were personally handed over to the tourists concerned while they were checking in at the counter in departure lounge as such subject sales are squarely covered by the first limb of Section 5(1) of the CST Act, 1956. He, thus, submits that the Reference needs to be answered in favour of the applicant.

Per contra:

22. Per contra, Mr. Sonpal, learned Counsel for the RespondentState submits that the transaction in question can at the most be said to be sale for export and not sale in the course of export. That the sale has taken place in India under a reasonable belief that the purchaser will take it out of country. Taking out of country is after the sale is completed in India. According to him, agreement of sale is entered into in India. Delivery was agreed to be given in India before the customs area at International Airport. Money is received in India and the seller had no control over the goods once the goods are delivered before the customs area before checking in, as such the sale of goods was in India and delivery thereof was also in India. According to Mr. Sonpal, it hardly matters whether the delivery was given at counter or outside the customs area at Airport. In both cases, the chances of goods coming back in India from where the same is delivered could not be ruled out. The sale is complete when payment is received and goods delivered outside customs area or station where movement of goods is not controlled by any authorities.

23. According to Mr. Sonpal, by delivery of goods at Air Port does not ipso facto prove that the goods have reached foreign destination. All that can be said is

that the goods have been delivered to the foreigner in India. The delivery at Air Port is for ensuring safe delivery and not to ensure its export.

24. Mr. Sonpal submits that prior to 1st January, 1997, it was compulsory for every exporter to obtain an exporters' code number from the Reserve Bank of India before engaging in export. The Customs Authorities could not have allowed to export goods from India unless a valid IEC( Importer Exporter code number) number is held. There are no averments that the Assessee dealer was holding registration or IEC number. According to him u/s 69 of the Customs Act the goods can only be exported under the shipping bill or a bill of export. No such document is brought on record by the Petitioners.

25. Mr. Sonpal urged that the sale was complete in all respect before the goods were taken to Airport. That there is no link between the sale and the export of the goods. Therefore, it can not be assumed that the sales were in course of export. It is not possible to say that the sale was not complete unless goods were exported. That the sale was complete before the goods have begun to travel foreign destination. There was no link between sale and export. Sale stood concluded independent of export obligation.

26. In the submission of Mr. Sonpal, the sales tax is payable on sale of goods. The sale is transfer of property in goods from one person to another for consideration. Essential element is transfer of property. Rules for transfer of property are contained in Chapter III of the Sale of Goods Act, 1930. As per Sub-section (3) of Section 20 unless contrary intention appears, the rules contained in Section 20 - 24 are applicable for ascertaining the intention of the parties as to the time at which the property in goods is to pass to the buyer. Admittedly, in the present case, according to Mr. Sonpal, there is no contract to the contrary to indicate when the goods would pass to the buyer as such, according to Section 20 read with Section 19(3), where there is an unconditional contract for sale in respect of specific goods, the property in goods passes to the buyer when the contract is made, if the goods are in a deliverable state and it is immaterial whether the time of payment of the price or the time of delivery of the goods or both are postponed. Admittedly, the goods were in a deliverable state and the payment was made before delivery of goods as such unequivocal conclusion can be drawn that the sale was complete in a shop. In other words, the sale having been completed prior to export, the sale is exigible to local sales tax. Reliance is placed on the judgment of this Court in case of Narang Hotels and Resorts Pvt. Ltd., Bombay v. State of Maharashtra (2004) 135 STC 289 in support of the submission made. Mr. Sonpal, thus, urged that the Reference may, accordingly, be answered in favour of the Revenue and against the Assessee.

Issue:

27. The core question involved in the present case is: whether the sale of goods was voluntary constituting sale in the course of export within the meaning of Section 5(1) of the Central Sales Tax Act, 1963?

Consideration:

28. Having heard rival parties, the issue in question is no more *res integra*. The same can be answered on the basis of various reported judgments of the Apex Court as well as of this Court.

29. The decisions of the Apex Court dealing with this question are to be found in the reported judgment of this Court in the case of *Narang Hotels and Resorts Pvt. Ltd. v. State of Maharashtra* (2004) 135 STC 289; wherein this Court had an occasion to deal with a similar question relating to supply of eatables and goods for consumption on board during the period during which aircraft is foreign going aircraft. Few of them are being referred herein.

30. In *Burmah Shell Oil Storage and Distributing Co. of India, Ltd. and Another Vs. The Commercial Tax Officer and Others*, , the Apex Court observed:

While all exports involve a taking out of the country, all goods taken out of the country cannot be said to be exported. The test is that the goods must have a foreign destination where they can be said to be imported. It matters not that there is no valuable consideration from the receiver at the destination end. If the goods are exported and there is sale or purchase in the course of that export and the sale or purchase occasions the export to a foreign destination, the exemption is earned. Purchases made by philanthropists of goods in the course of export to foreign countries to alleviate distress there, may still be exempted, even though the sending of the goods was not a commercial venture but a charitable one. The crucial fact is the sending of the goods to a foreign destination where they would be received as imports.

31. In the case of *State of Kerala v. Cochin Coal Company Ltd.*, the Apex Court held that the concept of export in Article 286(1)(b) of the Constitution postulates the existence of two termini as those between which the goods are intended to move or between which they are intended to be transported, and not a mere movement of goods out of the country without any intention of their being landed in specie in some foreign port.

32. The principal decision of the Apex Court on interpretation of Section 5(1) of the CST Act are *Ben Gorm Nilgiri Plantations Company, Coonoor and Others Vs. Sales Tax Officer, Special Circle, Ernakulam and Others*, , *Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another*, ; the recent decision in *Binani Bros. (P) Ltd. Vs. Union of India (UOI) and Others*, and *Serajuddin and Others Vs. The State of Orissa*, .

33. In the *Ben Gorm Nilgiri Plantations* case (*supra*) the Appellants were sellers of tea and their 17 str-9.02.sxw purchasers were local agents of foreign buyers. The sales were by public auction. The Apex Court held that a transaction of sale which is a preliminary to export of the commodity sold could be regarded as a sale for export, but not necessarily be regarded as one in the course of export, unless the sale occasions export. On facts, the Apex Court found that the sales

by the Appellants were intended to be complete without the export and as such it could not be said that the sales had occasioned export. The sales were held for export and not in the course of export.

34. In the *Coffee Board, Bangalore Vs. Joint Commercial Tax Officer, Madras and Another*, the Apex Court held that the phrase "SALE IN THE COURSE OF EXPORT" authorises not only a sale and an actual export but that the sale must be a part and parcel of the export. The word "occasion" in the context of sale or purchase was held to mean cause for export or to be the immediate cause of export. In this case, the phrase "SALE IN THE COURSE OF EXPORT" was held to comprise of three ingredients. Firstly, there must be a sale. Secondly, the goods must actually be exported. Thirdly, the sale must be a part and parcel of the export. It was held that the same meaning must obviously be given to the phrase "in the course of export" or to the phrase "occasions the export".

35. In the case of *Serajuddin and Others Vs. The State of Orissa*, the Apex Court held that the expression "in the course" implies not only a period of 18 str-9.02.sxw time during which the movement of goods is in progress but postulates a connected relationship. SALE IN THE COURSE OF EXPORT out of the territory of India means sale taking place not only during the activities directed to the end of exportation of the goods out of the country but also as part of or connected with such activities. It was further held that the sale which is to be regarded as exempt is a sale which causes the export or is the immediate cause of the export. To establish export a person exporting and a person importing are necessary elements and the course of export is between them. The Constitution Bench also observed that sale or purchase in the course of import as envisaged by Section 5(2) of the CST Act which is a *pari materia* provision and is almost a mirror image of the provision of Section 5(1) dealing with converse type of case and relied upon another Constitution Bench judgment in the case of *Binani Bros. (P) Ltd. Vs. Union of India (UOI) and Others*, .

36. In *State of Travancore Cochin v. The Bombay Co. Ltd.* AIR 1952 SC 366 the first Travancore Cochin case the Respondents claimed exemption from assessment in respect of sales effected by them to foreign buyers on CIF or FOB terms on the ground that such sales took place in the course of the export of the goods out of the territory of India within the meaning of Article 286(1)(b) of the Constitution. In this case the contracts were directly between the Respondents and their foreign buyers. Therefore, the Court held that the sales which occasioned 19 str-9.02.sxw the export in each case fell within the scope of the exemption under Article 286(1) of the Constitution.

37. In *K.G. Khosla and Co Pvt Ltd v. Dy. Commissioner of Commercial Taxes* 1966 17 STC 473, it was established that there was no possibility of diversion of the goods by the Assessee for any other purpose as such it was held that sale took place in the course of import of goods u/s 5(2) of the CST Act and exempted from tax.

38. In the case of *Ferro Alloys Corporation Ltd. v. Union of India* (1999) 112 STC 570, the Apex Court while reversing the judgment of the High Court held that the sales were not in the course of export. In that case, the price of the goods was in US cents, the destination was a foreign port, Richco was required to arrange a certificate pertaining to the discharge of the charge chrome at the discharging port, the final settlement of the price was to be based on the weight determined either at the port of discharge or at the works of the ultimate buyer and the analysis mentioned in the certificate. The issue was whether the charge chrome fell below the specifications could only be determined by the assay carried out at the port of discharge. Title to the charge chrome passed to Richco only when the goods were found to have met the contractual specification, which was abroad. Therefore, the Charge Chrome Agreements were the contracts of sales of charge chrome and not the Offtake Agreement. The sales of charge chrome under the charge chrome agreements were held 20 str-9.02.sxw as sales to Richco abroad and that the export of the charge chrome had occasioned virtue of by the charge chrome agreements. The sales were, thus, held to be in the course of export within the meaning of Section 5(3) of the CST Act.

39. This Court had also occasion to consider the question relating to concept of "export out of India" and "export turnover" in relation to Section 80HHC of the Income Tax Act.

40. Mr. Joshi, learned Counsel for the applicant Assessee has placed heavy reliance on the judgment of this Court in the case of *Abdulgafar A. Nadiadwala Vs. Assistant Commissioner of Income Tax and Others*, to contend that the transaction of sale in the course of export within the meaning of Section 5(1) of the CST Act. As against this, Mr. Sonpal, learned Counsel appearing for the Revenue urged that the reliance on the said judgment is misplaced in view of the fact that the judgment of this Court in case *Abdulgafar A. Nadiadwala* (supra) is purely based on the provisions of the Income Tax Act, 1961 and the concepts of "sale in the course of export" and "export out of India" are altogether different to one another. To what extent the provisions of the Income Tax Act can be pressed into service to interpret the provisions of the sales tax legislations is also another question sought to be debated by both the advocates with considerable force.

41. Mr. Joshi contends that the concept of export contemplated u/s 80HHC of the Income Tax Act and Section 5 of the CST Act is *pari materia* as such they can certainly be looked into and assistance can be taken from the legislation falling in the same family.

42. Let us turn to the provisions of the Income Tax Act to find out whether the provisions are *pari materia* so that provisions of the Income Tax Act can be looked into to interpret the provisions of the CST Act in the peculiar facts and circumstances of the case in hand.

43. The relevant part of Section 80HHC of the Income Tax Act is reproduced hereinbelow:

80HHC. Deduction in respect of profits retained for export business.-

1) Where an Assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the Assessee, a deduction of the profits derived by the Assessee from the export of such goods or merchandise

Provided ..... ..

(1A) to (4C) ..... ..

Explanation: For the purposes of this section,--

(a) ..... ..

(aa) "export out of India" shall not include any transaction by way of sale or otherwise in a shop, emporium or any other establishment situate in India, not involving clearance at any customs station as defined in the Customs Act, 1962 (52 of 1962);

(b) to (e) ..... ..

44. Reading of the aforesaid relevant part of the statutory provision of the Income Tax Act by way of explanation has explained the concepts of "export out of India". This Court had an occasion to interpret this concept and observed as under:

The phrase "export out of India" has been defined in Clause (aa) in Explanation to Sub-section (4A). The apex Court has considered this clause in the case of Commissioner of Income Tax Vs. Silver and Arts Palace, wherein the apex Court has observed that for the purposes of special deduction under that section there will be no export out of India; if two cumulative conditions are fulfilled, viz., (a) the transaction is one by way of sale or otherwise in a shop, etc. situated in India, and (b) it does not involve clearance in any customs station as defined in the Customs Act.

Subsection (1) of Section 80HHC only contemplates export out of India of any goods or merchandise by the Indian company or a person resident in India engaged in that 23 str-9.02.sxw business. Sub-section (1) by itself does not contemplate any transaction of sale. However, while defining the words "export out of India" it is said that it shall not include any transaction by way of sale or otherwise in a shop, emporium or any other establishment situated in India not involving clearance at any customs station as defined under the Customs Act, 1962. The concept is defined by using two negatives. Two negatives make the sentence positive. The positive meaning of the term, which is judicially recognised by the Apex Court in the case of Silver Art Palace (supra) is that any sale of an article on counter shop, emporium or other establishment situated in India, ultimately, results in taking the goods out of India subjecting it to customs

clearance and would amount to export out of India.

45. The question involved in the case of Abdulgafar A. Nadiadwala (supra) was whether there was export out of India. According to the Assessee in that case one of the tests that was to be applied to find out whether there was an export out of India is whether the transaction was subject to customs clearance. According to the Assessee in that case, the goods were subject to customs clearance at the Customs Station. The articles and goods were physically exported and were subject to customs clearance. The condition precedent for claiming deduction u/s 80HHC was held to be proved resulting in export out of India. In that context, it was held that the goods were required to be cleared from the customs station either by 24 str-9.02.sxw the purchaser or the seller. In that view of the matter, it was held that the goods were exported out of India.

46. With the above foundation, if we turn to the provision of Section 5(1) of the CST Act, one would find a little difference between the concept of "sale in the course of export" and the "export out of India". As held by the Apex Court in Ben Gorm Nilgiri Plantations case (supra), the goods sold in India may be regarded as "sale for export" but it is not necessary to regard it as "sale in the course of export" unless the sale occasions export. In that case the Apex Court found sale by the Appellant therein was incomplete without export and as such it could not be said that the sale had occasioned export. The sales were for export and not in the course of export.

47. If one turn to the facts of the present case, it is a sale on the shop counter. The moment goods were segregated for sale and the amount of sale consideration was paid in the shop, the sale was complete. The delivery of the goods was to be given just before the Customs area. Therefore, the sale was complete with the factum of delivery of goods. There was no compulsion on the purchaser to export it. It was at the sweet will of the purchaser whether or not to take it to its country. Absence of export was not to nullify the transaction of sale. The sale was complete the moment goods were identified on the counter and sale price was paid in the shop though delivery of goods was postponed till the date of journey, which the foreign going passenger (purchaser) 25 str-9.02.sxw was to undertake. It was open to the foreign going passenger (purchaser) to gift it before customs clearance. Such an act was not to invalidate sale. In other words, validity of sale was not to depend upon necessity of export. It may be a sale for export or purchaser may have purchased it to take the goods abroad but, surely, sale did not occasion export.

48. In the above backdrop, the sale was for export and not in the course of export. As observed by the Apex Court in the case of BurmahShell (supra), if the goods are exported and there is sale or purchase in the course of that export and the sale or purchase occasions the export to a foreign destination, the exemption is earned. The crucial fact is the sending of the goods to a foreign destination where they would be received as imports.

49. In case of Commissioner of Income Tax Vs. Silver and Arts Palace, similar view has been upheld where admittedly the goods involved customs clearance. In the present case there is no material to show that the goods did involve custom clearance or that it was impossible to divert goods to Indian territory.

50. In case of Abdulgafar A Nadiadwala (supra), this Court, explaining in detail, inter alia, observed that Section 80HHC is attracted on export and it need not be by way of sale. In that case there was no dispute about the goods having subjected to customs clearance. In the present 26 str-9.02.sxw case there is no material to show that the goods were cleared at custom station except that the goods were delivered to the foreigners at Airport . Hence the ratio is not applicable to the present case and moreover the case did not involve sale at shop but sale or transfer or dispatch involved export of the goods to identifiable foreign destination as per record. The judgment is therefore of no assistance to the applicant.

51. In the result, the view taken by the Tribunal cannot be faulted. Thus, the first question is answered in affirmative i.e. in favour of the Revenue.

52. As far as second question relating to penalty u/s 36(2)(c) of the BST Act is concerned, none of the authorities under the Act have recorded detailed reasons for levying penalty under the said Section 36(2) (c). If one turns to the text of Section 36(2)(c), the common thread which needs to be established by the Revenue is that the Assessee has concealed the particulars of any transactions or knowingly furnished inaccurate particulars of any transaction as such liable to tax. In the instant case, it cannot be said that the Assessee has concealed any particulars of any transaction or knowingly furnished inaccurate particulars of transaction. The Assessee is relying on the interpretation of the provisions which involved complexity of principles of interpretation. This Court, while deciding first issue, was required to go into detail of the constitutional provisions followed by various judgments of the Apex Court as well as of this Court. It 27 str-9.02.sxw was purely a question of law which was required to be answered by this Court or rather required to be considered by the authorities under the Act. Under these circumstances, the penalty u/s 36(2)(c) cannot be sustained. The Tribunal was therefore not justified in law in confirming the penalty levied u/s 36(2)(c) Explanation (1) of the BST Act.

53. In the result, second question is answered in negative i.e. in favour of the Assessee and against the Revenue. Reference, accordingly, stands disposed of in terms of this order.