

(2000) 08 RAJ CK 0020

In the Rajasthan High Court

Case No : Civil Writ Petitions No's. 1902, 1974, 1976, 3797 and 3798 of 1999 and 1103 of 2000

D.P. Metals

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 16-08-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)
Rajasthan Sales Tax Act, 1994 — Section 68, 78, 78(2), 78(5)
Rajasthan Sales Tax Rules, 1995 — Rule 53

Citation : (2000) 4 RLW 486 : (2001) 121 STC 311 : (2001) 4 WLC 115 : (2000) 3 WLN 445

Hon'ble Judges : Rajesh Balia, J; Mohd. Yamin, J

Bench : Division Bench

Advocate : Vineet Kothari and Anjay Kothari, for the Appellant; S.M. Mehta, Advocate-General, Sanjeev Johari, Sangeet Lodha and Sandeep Bhandawat, for the Respondent

Judgement

This Judgment has been overruled by : State of Rajasthan and Another Vs. M/s D.P. Metals, AIR 2001 SC 3076 : (2001) 8 JT 328 : (2001) 7 SCALE 14 : (2002) 1 SCC 279 : (2001) 124 STC 611 : (2001) AIRSCW 4091 : (2001) 7 Supreme 667

Rajesh Balia, J.—In these writ petitions, since common questions of law are involved and, therefore, we deem it proper to decide them by a common order.

2. By these writ petitions, the petitioners have challenged the constitutional validity of Section 78(5) of the Rajasthan Sales Tax Act, 1994 (for short "the Act"), It is relevant to mention here that except Writ Petitions Nos. 2541 of 1999 and 1103 of 2000, all the five writ petitions were initially filed as original applications before the Rajasthan Taxation Tribunal, Jodhpur, and on its abolition, they have been transferred to this Court.

3. In all these writ petitions, while the goods were in transit with the transporters, the goods were checked in exercise of the powers conferred u/s 78

of the Act and on finding that either documents required under Sub-section (2) of Section 78 of the Act were not being carried along with the goods or there was some deficiency in the particulars of the documents or some of the documents were not being accompanying the goods, notices for levying penalty u/s 78(5) of the Act were issued.

4. Section 78(5) of the Act specifically provides that the in-charge of the check-post or the officer empowered under Sub-section (3), after having given the person in-charge of the goods a reasonable opportunity of being heard and after having held such enquiry as he may deem fit, shall impose on him for possession or movement of goods, whether seized or not, in violation of the provisions of Clause (a) of Sub-section (2) or for submission of false or forged documents or declaration, a penalty equal to thirty per cent of the value of such goods.

5. It has been contended by the learned counsel appearing for the petitioners that provisions of Section 78(5) of the Act are ultra vires because they are beyond the scope of entry 54 of List II of the Seventh Schedule appended to the Constitution. Entry 54 authorises the State Government to levy tax on sale or purchase of goods. A carrier or transporter who carries on goods sold by the dealer is not in any sense reasonably and proximately connected with the sale that may occasion the liability to pay sales tax and, therefore, to make any provision fastening any obligation on such transporter who is not connected with the sale or purchase of the goods in any manner which are carried by him neither falls under provision for levying of tax nor can be termed as ancillary or incidental matter, for which the State may legislate under the said entry. The other contention is founded on the ground of reasonableness. It is contended that levy of penalty u/s 78(5) on person in-charge of goods linked with value of goods at the rate of 30 per cent of the goods is unreasonable because : (i) requiring transporter of goods, in all conditions which may or may not be connected with sale or purchase of goods to statute obligation u/s 78(5) itself amounts to unreasonable restriction on freedom of trade under Article 19(1)(g) of the Constitution ; (ii) the restriction referred to above impede free movement of goods affecting free trade, commerce and intercourse throughout the territory of India contrary to Articles 301 and 303 of the Constitution which does not amount to reasonable restriction on freedom of trade within the meaning of Article 404(b) of the Constitution ; and lastly (iii) the penalty at the rate of 30 per cent of the value of goods, in breach of obligation cast on person in-charge of goods in transit itself is unreasonable, as the amount of penalty has no reasonable nexus with the nature of obligation imposed and the purpose for which such obligation has been imposed, who are not ordinarily connected with the taxable event. It has been urged by the learned counsel for the petitioners that even if the Legislature is competent to legislate such a provision, the provisions of Section 78(5) of the Act suffer from the vice of unreasonableness inasmuch as a penalty equal to thirty per cent of the value of such goods cannot be said to be reasonable, fair and proportionate one. The obligation cast u/s 78 of the Act can at best be considered as an ancillary and incidental provision for

eliciting the requisite informations for levy of tax and as such, it impinges upon the test of reasonableness under Article 14 of the Constitution of India and amounts to unreasonable restriction on freedom of trade under Article 19(1)(g) of the Constitution and Articles 301 and 304(b) of the Constitution. Learned counsel placed reliance on *State of Haryana and Others Vs. Sant Lal and Another*,

6. Mr. S.M. Mehta, the learned Advocate-General urged that entries contained in the Lists appended to the Seventh Schedule to the Constitution only provide for the topics for which the respective Legislatures may legislate the law. He has contended that widest amplitude should be given to the language of the entries and each general word and the area of legislation should be held to extend to all ancillary or subsidiary matters, which can reasonably and fairly be said to be comprehended and which makes the law effective. It was pointed out by Mr. Mehta that the language of the impugned provision itself suggests that to check and prevent avoidance or evasion of tax, this provision has been enacted. He has submitted that power to levy tax inheres in the power to make a provision for preventing or checking the avoidance or evasion of tax, which may be resorted by a tax-payer. Eliciting requisite information from the person in possession of the goods about the consignor and the consignee are only required to effectuate the levy of sales tax under the Act, which may be said to be avoided or evaded by surreptitious dealings in fictitious names or transporting goods clandestinely. Therefore, the legislation providing for securing requisite information from the driver or the person in-charge of the vehicle or carrier of goods in movement is a matter ancillary and incidental to the levy of tax on sale of such goods and thus, it must be held to be within the competence of the State legislation.

7. He has further urged that once it is established that the provision of the statute is within the statutory competence of the State Legislature, an obligation has been cast on certain persons to divulge information or carry documents in relation to goods in movement, on failure to do so, providing consequences for such a failure necessarily follows within the scope of the said legislation. The quantum of penalty prescribed for any alleged breach of the provision of the statute which is within the legislative competence of the State being matter of policy cannot be examined by the court by way of judicial review.

8. *Sodhi Transport Co. and others Vs. State of U.P. and others, State of Madhya Pradesh and others Vs. Bharat Heavy Electricals, and Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others*,

9. Contours of considering challenge to any legislation are well-settled. A law can be declared to be ultra vires if (i) it is beyond the legislative competence of Legislature or its delegate under Article 246 of the Constitution, viz., it is beyond the subject-matter on which the concerned legislative authority can legislate ; (ii) if it infringes any fundamental right guaranteed under Part III of Constitution. Taxing statutes too are not immune from this text, though more laxity is permitted to the Legislature in considering its effect vis-a-vis fundamental rights ; (iii) it contravenes any other mandatory provision of the Constitution

which impose restrictions on the powers of a Legislature, e.g., Articles 301, 303 and 304 of the Constitution, restrict legislative authority impeding the free trade, commerce and interaction throughout the territory of India.

10. We may first set out the limits of enquiry while considering the question of legislative competence of the Legislature to enact the particular provision.

11. It is well-settled that entries in the respective Lists of the Seventh Schedule appended to the Constitution only provide broad topics, over which the concerned Legislature can legislate and they cannot be read in a mechanical and pedantic manner so as to limit the powers of the Legislature to enact covering entire field of topic and it extends to provide for all matters which are ancillary or incidental for the purpose of effecting the substantive legislation.

12. In AIR 1941 16 (Federal Court) Gwyer, C.J., speaking for the court stated :

".....I think however that none of the items in the lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it....."

13. In Navinchandra Mafatlal Vs. The Commissioner of Income Tax, Bombay City, , while considering the definition of "income" under the Indian Income Tax and Excess Profits Tax (Amendment) Act, 1947, the court held :

"It should be remembered that the question before us relates to the correct interpretation of a word appearing in a Constitution Act which, as has been said, must not be construed in any narrow and pedantic sense..... none of the items in the Lists is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it..... The cardinal rule of interpretation, however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude."

14. In connection with the taxing powers, the law is well-settled that making provision for preventing evasion of tax fall within the purview of ancillary and incidental matters. Reference in this connection may be made to Sardar Baldev Singh Vs. Commissioner of Income Tax, Delhi and Ajmer, wherein while considering entry 54 of List I appended to the Seventh Schedule to the Government of India Act, 1935, Sarkar, J., speaking for the court, said :

"So entry 54 should be read not only as authorising the imposition of a tax but also as authorising an enactment which prevents the tax imposed being evaded. If it were not to be so read, then the admitted power to tax a person on his own income might often be made infructuous by ingenious contrivances."

15. In *State of Haryana and Others Vs. Sant Lal and Another*, on which strong reliance has been placed by learned counsel for the petitioners, the court held :

"There can, therefore, be no doubt that the State Legislature had, by reason of entry 54 of List II in the Seventh Schedule to the Constitution, the power to legislate in respect of taxes on the sale or purchase of goods, and it had, therefore, the power to legislate with respect to the imposition of a sales tax, to prescribe the machinery for the collection of such tax, to designate officers by whom such liability could be enforced and in respect of all matters ancillary or subsidiary thereto which could fairly and reasonably be said to be comprehended within the legislative entry."

16. It may be discerned that in *AIR 1941 16 (Federal Court) and Navinchandra Mafatlal Vs. The Commissioner of Income Tax, Bombay City*, the limits of legislative field have been bounded with what can be fairly and reasonably comprehended in it.

17. The principle is too well-settled that where a person is obligated in any manner by the Legislature in connection with levy and collection of tax, the decision of Legislature on casting such obligation is not final and the court would examine to see whether there was a direct and intimate connection or nexus between the person so chosen and the taxable event.

18. In *Resch v. Federal Commissioner of Taxation [1942] 66 CLR 198*, Dixon, J., speaking for the court said :

"Where the main or substantial subject of the tax has thus been ascertained, then the question whether particular provisions directed at defining or widening the area or incidence of the tax or the liability to it or preventing avoidance or evasion or facilitating collection have in truth introduced a new or second subject must be determined by considering their natural connection with or relevance to the main subject."

19. In *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, provisions of the Assam Taxation (on Goods carried by Roads or Inland Waterways) Act, 1954 were under consideration before a Constitution Bench. The liability to tax was on production of the tea. However u/s 3 for collection of such tax the persons recovering the goods on destination was made liable for payment. The validity of Section 3 of the Assam Taxation Act which made person other than the producer of tea liable for collection of tax on any tea carried by road or inland waters within the State the court held that it was within the legislative powers to designate suitable person from whom tax will be collected. However, the court also pointed out that in such cases the decision of Legislature was not final and the court would examine to see whether there was a direct and intimate connection or nexus between the person so chosen and the taxable event. That is to say person who can be put under obligation for recovering the tax imposable on production of taxing event must have a reasonable nexus with such event. In the case the recipient of produce was found to have such connection.

Gajendragadkar, J., as his Lordship then was spoke for majority with Shah, J., concurring :

".....though the power of levying tax is essential for the very existence of the Government, its exercise must inevitably be controlled by the constitutional provisions made in that behalf. It cannot be said that the power of taxation per se is outside the purview of any constitutional limitations."

The court further said :

".....whether or not the restrictions imposed are reasonable would be justiciable and in that sense laws passed by the State Legislatures may on occasions have to face judicial scrutiny."

The court held the provision to be ultra vires Article 404(b).

20. In the aftermath of above case Assam Taxation (on Goods carried by Roads or Inland Waterways) Act, 1961 was enacted by the Assam Legislatures with the previous sanction of President. The validity of Section 3 of the Act was challenged in Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam, The court referred to statement of Chief Justice Marshall in *McCulloch v. Maryland* (1819) 4 L Ed 579 that the power of taxing the people and their property is essential to the very existence of Government, and may legitimately be exercised on the objects to which it is applicable to the utmost extent to which the Government may choose to carry it and lodged a caveat :

"The statement of the law must, however, be read subject to the condition that even tax statutes have to satisfy the test of reasonableness prescribed by Clause (6) of Article 19, and the fundamental right of equality before law guaranteed by Article 14 as well as the test prescribed by Article 401."

The court went on to say :

"It may be conceded that when the Legislature constructs machinery for the recovery of the taxes which is within its competence to impose, the said machinery should have some rational or intelligent connection with the tax. In, the absence of a rational nexus between the producer and the tax on goods carried, it may be open to a citizen to contend that the tax is not one justified by entry 56."

21. This question also fell for consideration before the Supreme Court in *R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad*, wherein Wanchoo, J., speaking for the courts, said :

"These incidental and ancillary powers have to be exercised in aid of the main topic of legislation, which in the present case, is a tax on sale or purchase of goods."

22. In that case, the court was considering Section 11(2) of the Hyderabad General Sales Tax Act, 1940, which provided for recovery of amount collected as

tax by the dealer though not exigible to tax under the Act. The court held powers to be ultra vires by holding that all powers necessary for the levy and collection of the tax concerned and for seeing that the tax is not evaded are comprised within the ambit of the legislative entry as ancillary or incidental. But where the legislation under the relevant entry proceeds on the basis that the amount concerned is not a tax exigible under the law made under that entry, but even so lays down that though it is not exigible under the law, it shall be paid over to Government, merely because some dealers by mistake or otherwise have collected it as tax, it is difficult to see how such a provision can be ancillary or incidental to the collection of tax legitimately due under a law made under the relevant taxing entry. The court said :

"We do not think that the ambit of ancillary or incidental power goes to the extent of permitting the Legislature to provide that though the amount collected--may be wrongly--by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to Government, as if it were a tax. The Legislature cannot under entry 54 of List II make a provision to the effect that even though a certain amount collected is not a tax on the sale or purchase of goods as laid down by the law, it will still be collected as if it was such a tax. This is what Section 11(2) has provided. Such a provision cannot in our opinion be treated as coming within the incidental or ancillary power which the Legislature has got under the relevant taxing entry to ensure that the tax is levied and collected and that its evasion becomes impossible."

23. There is a sequel to this case, which makes out certain distinctions between limits of ancillary power to effectuate levy and collection which is made without connection to the substantive levy.

24. The question again cropped up for consideration before the Supreme Court in *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*. In that case, the court noticed several dealers showed a tendency under the guise of sales tax levy to collect from buyers tax even in regard to tax-free items or sums in excess of the tax payable by them or where the dealers were not even assessable. The Legislature, therefore, to protect the public, enacted Section 46 in the Bombay Sales Tax Act, 1959, which provided that nothing shall be collected by way of tax in respect of sales of any goods exempted u/s 5 and no registered dealer shall exact by way of tax any sum exceeding what is payable under the Act. One who is not a registered dealer cannot collect any sum by way of tax from any other person. Section 63(1)(h) of the Bombay Act made it an offence to contravene the provisions of Section 46 and makes the dealer liable to punishment of imprisonment with or without fine. Section 37(1) authorised imposition of penalty departmentally for contravention of Section 46. It provides that if any person collects tax in contravention of the provisions of Section 46, he shall be liable to pay in addition to any tax, for which he may be liable, a penalty of an amount not exceeding Rs. 2,000 and in addition any sum collected by the person by way of tax in contravention of Section 46 shall be forfeited to the State

Government. The respondents had all collected from their customers amounts qua sales tax which came within the coils of Section 46. The tax officials, imposed penalties and forfeited the sums collected by the persons by way of tax in contravention of Section 46 less amounts shown to have been refunded to the customers as wrong levy of sales tax. The respondents challenged such forfeiture on the ground that Section 37(1) was not within the legislative competence of the State and the High Court held the part of the section which deals with forfeiture as ultra vires. The Supreme Court while approved and agreed generally with the ratio laid in R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, , noticed and underscored the following observations made by Shah, J., in R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad,

"It does not provide for a penalty for collecting the amount wrongly by way of tax from purchasers which may have been justified as a penalty for the purpose of carrying out the objects of the taxing legislation."

and then observed as under :

"The crucial ratio lies in the underscored passage. Had there been a penalty, including forfeiture, coupled with a prohibition against collecting any amount wrongly by way of tax from purchasers, it "may have been justified as a penalty for the purpose of carrying out the objects of the taxing legislation". In a sense, R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, demarcates the constitutional watershed between merely laying hands upon collection by way of tax by traders although they are not exigible from traders (a provision for which the State is under-powered by entry 54 of List II, even expanding it by the doctrine of implied powers) and the policing by penalising, including forfeiting illegal exactions, of the working of a taxing statute and inhibiting injury to the public."

25. Thus the provisions of Bombay the Act creating prohibition against collection of any amount as tax which is not tenable, and on committing breach of this prohibition, providing for penalties were upheld as a measure of penalty for prohibition imposed, which was incidental and ancillary to the subject.

26. That in deciding competency of the Legislature to enact any provision in a taxing statute the court has to look at taxable event and the reasonably proximate connection of the impugned provision with such taxable event to which legislation pertains, is emphasised by the apex Court in The Check Post Officer and Others Vs. K.P. Abdulla and Bros.,

27. In The Check Post Officer and Others Vs. K.P. Abdulla and Bros., , the court was considering the provisions of the Madras General Sales Tax Act, 1959, which provided for setting up of a check-post or the erection of a barrier at the places to be notified and for checking up of the vehicles by stopping the same at the check-post. The further requirement of the provision was to obligate the transporter carrying goods also carrying specified documents, failure to produce such specified documents entailed seizure or confiscation of goods in

consequence. Such power of confiscation without relating the goods in respect of which liability to pay tax within Madras State has arisen was found to be ultra vires and not falling within the ambit of ancillary and incidental matter. The court said :

"A taxing entry therefore confers power upon the Legislature to legislate for matters ancillary or incidental including provisions for preventing evasion of tax. Sub-sections (1) and (2) of Section 42 are intended to set up machinery for preventing evasion of sales tax. But, in our judgment, the power to confiscate goods carried in a vehicle cannot be said to be fairly and reasonably comprehended in the power to legislate in respect of taxes on sale or purchase of goods. By Sub-section (3) the officer in-charge of the check-post or barrier has the power to seize and confiscate any goods which are being carried in any vehicle if they are not covered by the documents specified in the three sub-clauses. Sub-section (3) assumes that all goods carried in a vehicle near a check-post are goods which have been sold within the State of Madras and in respect of which liability to pay sales tax has arisen, and authorises the Check Post Officer, unless the specified documents are produced at the check-post or the barrier, to seize and confiscate the goods and to give an option to the person affected to pay penalty in lieu of confiscation. A provision so enacted on the assumption that goods carried in a vehicle from one State to another must be presumed to be transported after sale within the State is unwarranted. In any event power conferred by Sub-section (3) to seize and confiscate and to levy penalty in respect of all goods which are carried in a vehicle whether the goods are sold or not is not incidental or ancillary to the power to levy sales tax. A person carrying his own goods even as personal luggage from one State to another or for consumption, because he is unable to produce the documents specified in clauses (i), (ii) and (iii) of Sub-section (3) of Section 42, stands in danger of having his goods forfeited. Power under Sub-section (3) of Section 42 cannot be said to be ancillary or incidental to the power to legislate for levy of sales tax."

28. In *Girdhari Lal Nannelal Vs. The Sales Tax Commissioner, M.P.*, the appellant Girdhari Lal Nanne Lal of Burhanpur was a partnership firm and was a dealer registered under the State sales tax law. The appellant was carrying on the business of purchasing and selling cotton and cotton seeds. It also carries on business as a commission agent. While determining the taxable turnover of the appellant for the period from November 1, 1950, to October 31, 1951, the assessing authority took into account a sum of Rs. 10,000 in respect of which there was a cash-credit entry in the account books of the appellant in the name of the wife of Kanji Deosi, partner of the appellant. The assessing authority under the Sales Tax Act treated that sum of Rs. 10,000 as income of the appellant out of concealed sales. Adopting ten per cent as the rate of profit, the turnover in this regard was determined to be rupees one lakh. The above amount of rupees one lakh was added to the turnover in computing the gross turnover of the appellant. In doing so the assessing authority rejected the plea of the assessee that rupees ten thousand represented the amount gifted by Kanji Deosi to his

wife before marriage in order to obtain her consent to the second marriage in 1941. The assessee-firm went up in appeal and again raised the contention that the amount of rupees ten thousand had been given by Kanji Deosi, partner of the appellant-firm, to his wife to obtain her consent for his second marriage in 1941. It was stated that the above amount had been lying with her, and had been deposited by her during the year in question with the firm. The appellate authority rejected this explanation. The same view was taken in second appeal by the Board of Revenue. At the instance of the assessee, the question about raising presumption that the amount represented profit arising out of undisclosed turnover was referred to High Court. The High Court, too held against the assessee-appellant, and referred to the fact that the explanation offered by the assessee in respect of possession of the amount of rupees ten thousand was not reasonable. It was accordingly inferred that the amount reflected profits of the business of the assessee. This profits, in the opinion of the High Court, arose out of the sales not shown in the account books. The Supreme Court reversed the judgment and held :

"The approach which may be permissible for imposing liability for payment of Income Tax in respect of the unexplained acquisition of money may not hold good in sales tax cases. For the purpose of Income Tax it may in appropriate cases be permissible to treat unexplained acquisition of money by the assessee to be the assessee's income from undisclosed sources and assess him as such, As against that, for the purpose of levy of sales tax it would be necessary not only to show that the source of money has not been explained but also to show the existence of some material to indicate that the acquisition of money by the assessee has resulted from transactions liable to sales tax and not from other sources."

29. In *Sodhi Transport Co. and others Vs. State of U.P. and others*, , we find that the court held that the impugned provision merely laid a rule of evidencing by raising rebuttable presumption about the existence of taxable event, but the levy depended on a decision judicially reached about occurrence of taxing event cannot be held unconstitutional because the provision has nexus with preservation of tax. In that case, the court was considering validity of Section 28-B of the U.P Sales Tax Act, 1948. Section 28 of the U.P. Sales Tax Act authorised the State Government to establish check posts and barriers, if it so desired, with a view to preventing evasion of tax or other dues payable under the Act in respect of sale of goods in the State of Uttar Pradesh. Section 28-B makes provision for the procedure to be followed by persons who intend to transport goods by roads into the State of Uttar Pradesh from places outside the State of Uttar Pradesh for the purpose of transporting them to places situated outside that State. It provides that when a vehicle coming from any place outside the State of Uttar Pradesh and bound for any other place outside the State passes through the State, the driver or other person in-charge of such vehicle has to obtain in the prescribed manner a transit pass from the officer in-charge of the first check post or barrier after his entry into the State and deliver it to the

officer in-charge of the check-post or barrier before the exit from the State. If he fails to do so, it shall be presumed that the goods carried thereby have been sold within the State by the owner or person in-charge of the vehicle. Such presumption when drawn against the owner or the person in-charge of the vehicle and he is held to have sold the goods inside the State of Uttar Pradesh all the liabilities under the Act which arise in the case of a person who sells goods inside the State would arise. Rule 87 provides that a person who wishes to get a transit pass shall make an application in form No. XXXIV to the officer in-charge of the check post concerned. It also provides for the issue of the transit pass in triplicate and for inspection of the documents, consignments and goods to ensure that the statements made are true. The Supreme Court held :

"In our opinion a statutory provision which creates a rebuttable presumption as regards the proof of a set of circumstances which would make a transaction liable to tax with the object of preventing evasion of the tax cannot be considered as conferring on the authority concerned the power " to levy a tax which the Legislature cannot otherwise levy. A rebuttable presumption which is clearly a rule of evidence has the effect of shifting the burden of proof and it is hard to see how it is unconstitutional when the person concerned has the opportunity to displace the presumption by leading evidence.....The authority concerned before levying sales tax arrives at the conclusion by a judicial process that the goods have been sold inside the State and in doing so relies upon the statutory rule of presumption contained in Section 28-B of the Act which may be rebutted by the person against whom action is taken u/s 28-B of the Act. When once a finding is recorded that a person has sold the goods which he had brought inside the State, then he would be a dealer even according to the definition of the word "dealer" as it stood from the very commencement of the Act subject to the other conditions prescribed in this behalf being fulfilled.....There is, therefore, no substance in the contention that a transporter was being made liable for the first time after 1979 with retrospective effect to pay sales tax on a transaction which is not a sale. Tax becomes payable by him only after a finding is recorded that he has sold the goods inside the State though with the help of the presumption which is a rebuttable one."

30. In like manner in State of Haryana and Others Vs. Sant Lal and Another, , the provisions of the Haryana General Sales Tax Act, 1973, requiring agents, dalals or brokers and the transporter to get themselves registered and give particulars and furnish particulars of the transaction of the goods held to be ultra vires because the person obligated to furnish particulars about the transaction of goods had no connection or nexus with the taxable event of sale of such goods. The court posed the following question :

"Having regard to the analysis of the said Section 38 and the relevant rules and forms made hereinabove, the question is whether the same can be said to be ancillary or subsidiary matters which are fairly and reasonably comprehended within the power to levy sales tax."

After examining the above question, the court observed :

".....there has to be a reasonable and proximate connection between the transaction of sale and the clearing or forwarding agent, "dalal" or person transporting goods before the State Legislature can, in exercise of the power to levy sales tax, enact legislation concerning him. We are not satisfied that there is such close and direct connection between the transaction of sale of goods by a dealer and the clearing or forwarding agent or "dalal" who books or receives such goods or a person who transports such goods within the meaning of the said Section 38."

31. From the discussion made hereinabove, it can fairly be stated that entries in the Lists contained in Seventh Schedule appended to the Constitution prescribing legislative fields must be construed with widest amplitude and within its scope must include the power of Legislature on all ancillary and incidental matters comprehended within it with reasonable and proximate connection with the principal object of the legislation. In the case of entry 54 authorising levy of tax on the sale or purchase of goods if any provision is aimed at preventing or checking evasion of substantive levy, to make levy and its collection effective such provision falls within the ambit of incidental and ancillary matters. However the provision must have a reasonable and proximate nexus with the subject-matter of entry, in order to qualify for ancillary and incidental to main subject.

32. The second touchstone at which validity of any legislation can be tested is that whether it is contravening any of the fundamental rights guaranteed under Part III of the Constitution. Article 13(1) declares all laws in force immediately before commencement of the Constitution, to the extent they are not in conformity with Part III of the Constitution void, Clause (2) of Article 13 prohibits State from making any law which takes away or abridges the rights conferred by Part III of the Constitution.

33. It is now well-established that while any impost may be within scope of legislative entry yet if any imposition is unreasonably excessive, it may still falter at the altar of Articles 14 and 19(1)(g) of the Constitution. Though ordinarily what impost may be made is within the domain of legislative policy and State has wider discretion and latitude in formulating its policy and court will be slow to draw inference of unreasonableness and that any breach of obligation cast may entail subjecting the person obligated to reasonable penalty but the same is not immune from judicial review is too well-established.

34. In *Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*, , the court said that a threat by the State of realise tax from the assessee without authority of law by using coercive machinery of the impugned Act was a sufficient infringement of fundamental right under Article 19(1)(g) of the Constitution.

35. In *Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others*, the court stated :

"It is, therefore, manifest that the law must satisfy two tests before it can be a valid law, namely, (1) that the appropriate Legislature had competency to make the law ; and (2) that it does not take away or abridge any of the fundamental rights enumerated in Part III of the Constitution."

36. Again the court in *Balaji Vs. Income Tax Officer, Special Investigation Circle, Subba Rao, J.* (as he then was) speaking for the constitution Bench said, after referring to Articles 265 and 13 of the Constitution :

"A combined and plain reading of the said provisions makes it abundantly clear that a law which is inconsistent with any of the provisions of Part III is void. It cannot be denied that a law providing for levy and collection of taxes is a law within the meaning of Part III of the Constitution, and therefore, it must stand the test laid down by Article 13 of the Constitution. The "law" in Article 265 of the Constitution must be a valid law. A law to be valid must not only be one passed by the Legislature in exercise of a power conferred on it, but must also be one that does not infringe the fundamental rights declared by the Constitution."

37. Gajendragadkar, C.J., speaking for six members of the 7 member Bench constituted to answer the reference made to the court under Article 143, Constitution of India In the matter of: Under Article 143 of the Constitution of India, (In re under Article 143, Constitution of India) said :

"Our Legislatures have undoubtedly plenary powers, but these powers are controlled by the basic concepts of the written Constitution itself and can be exercised within the legislative fields allotted to their jurisdiction by the three Lists under the Seventh Schedule ; but beyond the Lists, the Legislatures cannot travel. They can no doubt exercise their plenary legislative authority and discharge their legislative functions by virtue of the powers conferred on them by the relevant provisions of the Constitution; but the basis of the power is the Constitution itself. Besides, the legislative supremacy of our Legislatures including the Parliament is normally controlled by the provisions contained in Part III of the Constitution. If the Legislatures step beyond the legislative fields assigned to them, or acting within their respective fields, they trespass on the fundamental rights of the citizens in a manner not justified by the relevant articles dealing with the said fundamental rights, their legislative actions are liable to be struck down by courts in India. Therefore, it is necessary to remember that though our Legislatures have plenary powers, they function within the limits prescribed by the material and relevant provisions of the Constitution."

38. In connection with statute levying tax the two provisions of the Part III of the Constitution came to force for consideration, viz., Articles 14 and 19(1)(g). Article 14 envisages equality before law. It is now no more in doubt that Article 14 in its reach is not confined to protect against irrational classification, but its reach is to rout any arbitrariness in any State action, including legislative.

39. The court in first instance gave an added dimension to reach an amplitude of

Article 14 beyond the traditional limits of rule against irrational classification in *E.P. Royappa Vs. State of Tamil Nadu and Another*, The court while considering the ambit of Article 14 vis-a-vis another Article 16 of Part III held that Article 14 is the genus and Article 16 is a specie, as an instance of application, of concept of equality enshrined in Article 14 and basic principle informs equality and inhibition against discriminations. Bhagwati, J., as he then was spoke :

"Now, what is the content and reach of this great equalising principle ? It is a founding faith, to use the words of Bose, J., "a way of life" and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies ; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment,"

40. The court restated with added emphasis and the wide and positivistic reach of Article 14 in its requirement of reasonableness and fair play in all State actions in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, while considering the inter-play of fundamental rights guaranteed under different articles of faith in Part III of the Constitution, particularly Articles 21, 19 and 14, the majority view opined that a law requiring to lay down procedure for depriving a person of his personal liberty, has to stand the test of one or more of fundamental rights conferred under Article 19 "ex hypothesi it (such law) must be tested with reference to Article 14". About reach of Article 14, Bhagwati, J., speaking for majority said :

"There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits..... The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive ; otherwise, it would be no procedure at all....."

Thus, it was emphasised that what is not just, what is not fair, what is oppressive

is unreasonable and cannot sustain the test of non-arbitrariness and reasonableness. Law must not be such. The court also held natural justice as an essential ingredient of reasonableness and fairness of procedure prescribed by law.

41. The test of reasonableness was again held to be fundamental in considering the question of challenge on the ground of Article 14 in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, . The court said that content and reach of Article 14 ought not be confused with doctrine of classification, which is but a judicial formula for determining whether the legislative or executive action in question is arbitrary which amounts to denial of equality. Article 14 has highly activist magnitude and embodies guarantee against arbitrariness. The court said :

"Wherever therefore, there is arbitrariness in State action whether it be of the Legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

Touchstone of reasonableness to test the constitutional validity of a taxing statute made by Parliament within its authority was accepted by the apex Court in *Indian Express Newspapers (Bombay) Private Ltd. v. Union of India* . The question arose about levy of tax on newspapers. The notification issued by Central Government was challenged on various grounds including that it violates freedom of expression under Article 19(1)(g), freedom of trade under Article 19(1)(a) and that it is arbitrary and unreasonable so as to violate equality before law guaranteed under Article 14 of the Constitution. The court reasoned that newspaper industry enjoys two of fundamental rights guaranteed under Article 19, viz., freedom of expression under Article 19(1)(a) and freedom to enjoy any profession, occupation or trade, industry or business guaranteed under Article 19(1)(g). The court laid that though tax is leviable on newspaper industry, and so long as it is within reasonable limits so as does not transgress the limits of reasonableness under Clause (2) and does not impede the freedom of expression and to carry on trade unreasonably within those limits, the law will be constitutional.

42. While recognising that power of Parliament in U.K. is plenary "and not subject to judicial review, unlike in India, the jurists have recognised and applied the test of reasonableness in evaluating the vires of subordinate legislation, which do not enjoy the same immunity, the court quoted with approval opinion of Prof. Alan Wharam in his article entitled "Judicial Control of delegated legislation" :

"it is possible that the courts might invalidate a statutory instrument on the ground of unreasonableness or uncertainty, vagueness or arbitrariness."

In the Indian context the court said :

"In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned, to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution."

43. The next enquiry, relevant for our purposes in the context of challenge is what is the test of reasonableness of the law ? We have seen that reach and content of Article 14 is to test the impugned action legislative or executive on the touchstone of reasonableness and non-arbitrariness. Article 19 recognises a number of rights and it also envisages in the case of each of such rights, the circumstances in which it can be subjected to reasonable restrictions, e.g., Article 19(1)(g) which ensures all citizens right to practice any profession or to carry on any occupation or business, under Clause (6) permits the State to impose reasonable restriction in the interest of general public on exercise of such right. Article 401 ensures freedom of trade, commerce and intercourse throughout the territory of India, but such freedom can be subjected to reasonable restrictions by Legislatures under Articles 303 and 304(b). As early as in 1950, the Supreme Court has occasion to consider the expression "imposing reasonable restrictions" in *Dr. N.B. Khare Vs. The State of Delhi*, and opined that both substantive and procedural aspects of the impugned law should be examined from the point of view of reasonableness and the court should consider factors such as the discretion and the extent of restrictions but also circumstances under which and the manner in which their imposition has been authorised.

44. Patanjali Sastri, C.J., speaking for the Constitution Bench in *State of Madras Vs. V.G. Row*, said :

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

Thus, the court laid bare the principle that extent of imposition must bear relation to purpose of such statute and a disproportionate imposition may fall outside the purview of reasonableness.

45. The court reiterated the principle while quoting the above principle with approval in *Mohammed Faruk Vs. State of Madhya Pradesh and Others*, that in order to satisfy the test of reasonableness of the impugned law, there has to be vital connection between the object of restriction and the extent of imposition on constraint to which the person obligated has been put. The court opined that in evaluating the reasonableness of impugned law imposing restriction on carrying

on business or trade or occupation must consider the direct and immediate impact upon the fundamental rights of the citizen affected and the larger public interest sought to be ensured in the light of the object sought to be achieved and the possibility of achieving the object by imposing a less drastic restraint must be considered, a substantive aspect and on procedural fairness, the court opined that in the absence of exceptional situation, whether there exist a machinery to satisfy the administration of law that no case of such imposition is made out.

46. Again the Supreme Court considered the issue in *Harakchand Ratanchand Banthia and Others Vs. Union of India (UOI) and Others*, The court pointed out the need to first look into the object and policy underlying the impugned statute when a law is challenged as violative of Article 14. It is only then that validity of such law can be tested on the anvil of Article 14, keeping in view the nexus of provision with that object. The court said :

"When a law is challenged as violative of Article 14 of the Constitution it is necessary in the first place to ascertain the policy underlying the statute and the object intended to be achieved by it. Having ascertained the policy and object of the Act the court has to apply a dual test in examining its validity."

47. We remind ourselves here that until the apex Court laid bare the dynamic magnitude and activist spirit of Article 14 in *E.P. Royappa Vs. State of Tamil Nadu and Another*, to cut through arbitrariness in any State action, the court has evolved a judicial formula of finding discriminatory nature of law and the limits of reasonable classification. The test of reasonableness in State action in all its sphere of activity was first applied in *E.P. Royappa Vs. State of Tamil Nadu and Another*, and its latter development we have seen above. In *Harakchand Ratanchand Banthia and Others Vs. Union of India (UOI) and Others*, while considering the ground of reasonableness of the impugned provisions, the court reiterated the principle stated in *State of Madras Vs. V.G. Row*, referred to above, again laying down that disproportionate imposition to the object of the impugned law will afflict the validity of law.

48. In *State of Haryana and Others Vs. Sant Lal and Another*, while the court examined in the context of putting any person under an obligation to furnish such information and particulars which he comes to possession in the course of his business, and to subject to him to a penal consequence of such breach of obligation in legitimate legislative measures, yet was cautious to add that subjection to consequence be only to a reasonable penalty. Thus, reasonableness of penalty in relation to obligation imposed was again reiterated by the apex Court in a provision of the like shade with which we are concerned in this case. We shall be referring to the said case in ensuing discussion.

49. These decisions do establish that in examining validity of a statute, reasonableness of such measures is a vital test. A citizen cannot be compelled to exercise his fundamental rights and freedoms under conditions and inhibition which are unreasonable, that makes the law oppressive.

50. Here it would be apposite to notice the provisions of Section 78 of the Act with reference to which these petitions have been filed. Section 78 of the Act reads as under :

Section 78 : Establishment of check-post and inspection of goods while in movement.--(1) The Commissioner may, with a view to prevent or check avoidance or evasion of tax, by notification in the official Gazette, direct the setting up of a check-post at such place and for such period as may be specified in the notification, and every officer or official who exercises his powers and discharges his duties at such check-post by way of inspection of documents produced and goods being moved, shall be its in-charge.

(2) The driver or the person in-charge of a vehicle or carrier or of goods in movement shall--

(a) carry with him a goods vehicle record including "challans" and "bilties", bills of sale or despatch memos and prescribed declaration forms ;

(b) stop the vehicle or carrier at every check-post set up under Subsection (1) ;

(c) produce all the documents including prescribed declaration forms relating to the goods before the in-charge of the check-post ;

(d) give all the information in his possession relating to the goods ; and

(e) allow the inspection of the goods by the in-charge of the check-post or any other person authorised by such in-charge.

Explanation.--For the purposes of this Chapter--

(i) "vehicle or carrier" shall include any means of transportation including an animal to carry goods from one point to another point ;

(ii) "goods" shall include animals also ; and

(iii) "goods in movement" shall means--

(a) the goods which are in the possession or control of a transporting agency or person or other such bailee ;

(b) the goods which are being carried in a vehicle or carrier belonging to the owner of such goods ; and

(c) the goods which are being carried by a person.

(3) Where any goods are in movement within the territory of the State of Rajasthan, an officer empowered by the State Government in this behalf may stop the vehicle or the carrier or the person carrying such goods, for inspection, at any place within his jurisdiction and the provisions of Sub-section (2) shall mutatis mutandis apply.

(4) Where any goods in movement, other than exempted goods are without

documents, or are not supported by documents as referred to in Sub-section (2), or documents produced appear false or forged, the in-charge of the check-post or the officer empowered under Sub-section (3), may--

(a) direct the driver or the person in-charge of the vehicle or carrier or of the goods not to part with the goods in any manner including by retransporting or rebooking, till a verification is done or an enquiry is made, which shall not take more than seven days ;

(b) seize the goods for reasons to be recorded in writing and shall give a receipt of the goods to the person from whose possession or control they are seized ;

(c) release the goods seized in Clause (b) to the owner of the goods or to anybody else duly authorised by such owner, during the course of the proceeding if the adequate security of the amount equal to "the estimated value of the goods is furnished.

(5) The in-charge of the check-post or the officer empowered under Subsection (3), after having given the person in-charge of the goods a reasonable opportunity of being heard and after having held such enquiry as he may deem fit, shall impose on him for possession or movement of goods, whether seized or not, in violation of the provisions of Clause (a) of Sub-section (2) or for submission of false or forged documents or declaration, a penalty equal to the amount of five times of the tax leviable on such goods or thirty per cent of the value of such goods, whichever is less.

(6) During the pendency of the proceeding under Sub-section (5), if anybody appears before the in-charge of the check-post or the officer empowered under Sub-section (3) and prays for being impleaded as a party to the case on the ground of involvement of his interest therein, the said in-charge or the officer on being satisfied may permit him to be impleaded as a party to the case ; and thereafter, all the provisions of this section shall mutatis mutandis apply to him.

(7) The in-charge of the check-post or the officer empowered under Sub-section (3) may release the goods to the owner of the goods or to anybody else duly authorised by such owner, if seized and not already released under Clause (c) of Sub-section (4), on payment of the penalty imposed under Sub-section (5) or on furnishing such security for the payment thereof, as such in-charge or officer may consider necessary.

(8) Where the driver or the person in-charge of the vehicle or the carrier is found guilty for violation of the provisions of Sub-section (2), subject to the provisions of Sub-section (10), the in-charge of the check-post or the officer empowered under Sub-section (3) may detain such vehicle or carrier and after affording an opportunity of being heard to such driver or person in-charge of the vehicle or the carrier, may impose a penalty on him as provided in Sub-section (5).

(9) The in-charge of the check-post or the officer empowered under Subsection (3) may release the vehicle or the carrier on the payment of the amount of

penalty imposed under Sub-section (8) or on furnishing such security as may be directed by such in-charge or officer.

(10) Where a transporter, while transporting goods, is found to be in collusion with a trader to avoid or evade tax, the in-charge of the check-post or the officer empowered under Sub-section (3) shall detain the vehicle or carrier of such transporter and after affording him an opportunity of being heard and with the prior approval in writing of the Deputy Commissioner (Administration) having jurisdiction, may confiscate such vehicle or carrier.

(11) If a transporter fails to give information as required from him under Clause (d) of Sub-section (2) about the consignor, consignee or the goods within such time as may be specified or transports the goods with forged documents, besides imposing the penalty under Sub-section (5), it shall be presumed that the goods so transported have been sold in the State of Rajasthan by him and he shall be deemed to be a dealer for those goods under this Act.

(12) The provisions of this Act shall, for the purpose of levy, collection and assessment of tax, determination of interest, payment and recovery of tax and interest, appeal, review or revision, apply to the transporter deemed to be a dealer under Sub-section (11)."

51. A close look at the above provision unbare the scheme of obligating certain persons to carry out certain obligations. With what object this provision has been made ? Who are the persons obligated ? What are the obligations cast ? What are the consequences that follow and befall persons obligated ? Answer to these will help finding the nexus between the provision and the subject and also between the consequences for such breach of obligation with power to levy tax on sale or purchase of goods so that the provision can be tested on the altar of twin tests, viz.,

(1) Whether it is within the ambit and scope of ancillary and incidental matter to the subject on which State could legislate under entry 54 ; and

(2) Whether it satisfies the test of reasonableness so as not to violate rights guaranteed under Article 14 and Article 19(1)(g) and does not breach requirement of Articles 301 with 304(6) of the Constitution.

52. A journey through the decided cases concerning like provision under different Sales Tax Acts enacted by different States reveals that for different shades of obligations and consequences, different conclusions have been reached.

53. We have already seen that it is fairly well-established that the Parliament or the State Legislature may legislate while making the law for imposition of tax including all incidental or ancillary matters which may fairly and reasonably be said to be comprehended therein and necessary to make the law effective. However, different answers have been reached by the courts depending on whether there is a reasonable and proximate nexus of the impugned provision with the principal subject to which the Legislature relates, and also with the

object sought to be achieved by enacting such provisions.

54. The issue has also been examined by the courts with reference to the constitutional limits of the legislative powers of the Union or the State under Chapter XIII of the Constitution to ensure freedom of trade, commerce and intercourse throughout the territory of India and to ensure that economic unity of the India may not be broken up by internal barriers. The laws which impede the free movement of goods through territory of India except to the extent permissible under the said Chapter including the law relating to taxation have been looked down.

55. In *The Check Post Officer and Others Vs. K.P. Abdulla and Bros.*, , the court was considering the provision of Section 42 of the Madras General Sales Tax Act, 1959, which is almost similar to the provision of Section 78 of the Rajasthan Act. The obligations contained in Section 42(2) of the Madras General Sales Tax Act are very much similar to the provisions of Section 78(2) of the *Commissioner of Commercial Taxes and Others Vs. Ramkishan Shrikishan Jhaver and Others*, *Balaji Vs. Income Tax Officer, Special Investigation Circle*, , *Navinchandra Mafatlal Vs. The Commissioner of Income Tax, Bombay City*, and AIR 1941 16 (Federal Court) the court observed as under :

"A taxing entry therefore confers power upon the Legislature to legislate for matters ancillary or incidental including provisions for preventing evasion of tax. Sub-sections (1) and (2) of Section 42 are intended to set up machinery for preventing evasion of sales tax. But, in our judgment, the power to confiscate goods carried in a vehicle cannot be said to be fairly and reasonably comprehended in the power to legislate in respect of taxes on sale or purchase of goods. By Sub-section (3) the officer in-charge of the check-post or barrier has the power to seize and confiscate any goods which are being carried in any vehicle if they are not covered by the documents specified in the three sub-clauses. Sub-section (3) assumes that all goods carried in a vehicle near a check-post are goods which have been sold within the State of Madras and in respect of which liability to pay sales tax has arisen, and authorises the Cheek Post Officer, unless the specified documents are produced at the check-post or the barrier, to seize and confiscate the goods and to give an option to the person affected to pay penalty in lieu of confiscation. A provision so enacted on the assumption that goods carried in a vehicle from one State to another must be presumed to be transported after sale within the State is unwarranted. In any event power conferred by Sub-section (3) to seize and confiscate and to levy penalty in respect of all goods which are carried in a vehicle whether the goods are sold or not is not incidental or ancillary to the power to levy sales tax. A person carrying his own goods even as personal luggage from one State to another or for consumption, because he is unable to produce the documents specified in Clauses (i), (ii) and (iii) of Sub-section (3) of Section 42, stands in danger of having his goods forfeited. Power under Sub-section (3) of Section 42 cannot be said to be ancillary or incidental to the power to legislate for levy of sales tax.

..... In the present case, however, the power to confiscate the goods and to levy penalty in lieu of confiscation, when in respect of the goods found in a vehicle the driver of the vehicle is not carrying with him the documents specified therein is not a provision which is ancillary or incidental to the power to tax sale of goods."

56. The aforesaid decision of the constitutional Bench primarily holds seizure and confiscation of goods in the hands of a transporter which may or may not have connection with any taxable event and the goods. Subjecting the transporter to the consequences of confiscation of goods and penalty merely for not carrying document specified in statute which extend to any case without having any connection with taxable event was found to be beyond ancillary or incidental power to levy sales tax.

57. In *Sodhi Transport Co. and others Vs. State of U.P. and others*, , the court was concerned with the U.P. Sales Tax Act. u/s 28 of the said Act, the State Government was empowered to set up check-posts or barriers. While considering the constitutional validity of Section 28 of the said Act, the court observed :

"Section 28-B as inserted in 1973 in U.P. Sales Tax Act and Rule 87 as inserted in 1974 in U.P. Sales Tax Rules are introduced to check evasion of tax and to provide a machinery for levying tax from persons (transporters) who dispose of goods inside the State and avoid tax which they are otherwise liable to pay. The law provides enough protection to them and makes provision to enable them to show that they are in fact not liable to pay any tax. Thus, the said provisions are not unconstitutional. The provisions are not unreasonable and the State Legislature is competent to legislate them."

58. We may discern that like U.P. Act, Rajasthan Act of 1994 though provided for setting up of check-posts for inspection and verification of goods in movement within the State of Rajasthan for preventing and checking evasion and avoidance of tax, yet unlike U.P. Act such power is irrespective of their connection with any sale of such goods within the State anterior or exterior to such movement. The U.P. Sales Tax Act specifically related the setting up of check-posts to sale of goods within the State after their import and it further enacted Section 28-B which was under consideration before the court. Section 28-B provided for transit of goods by road through the State and issue of transit pass. It envisaged that when a vehicle coming from any place outside the State passes through the State, the driver or other person in-charge of such vehicle shall obtain in the prescribed manner a transit pass from the officer in-charge of the first check-post or barrier after his entry into the State and deliver it to the officer in-charge of the check-post or barrier before his exit from the State, failing which, it shall be presumed that the goods carried thereby have been sold within the State by the owner or the person in-charge of the vehicle.

59. Thus, under the scheme of the U.P. Sales Tax Act, the consequence of failure to submit the transit pass within the prescribed period resulted in raising a

presumption of existence of taxation event within the State and that provision was held to be within the ambit of entry 54. There was a clear nexus between the set of facts in which the provision operates with the presumption raised. Goods which have entered the State through the carrier with destination outside State, if do not leave the State territory within reasonable period, it gives rise to reasonable inference that goods have been disposed of within the State. Since goods was brought in the State by the carrier, and it was his obligation to carry it outside the State, he had the proximate nexus with the presumption raised against him in respect of disposal of such goods unless rebutted.

60. Here we may notice that a presumption of sale is also raised in the circumstances enumerated in Section 78(11) of the Act which, inter alia, provides that if a transporter fails to give information as required from him under Clause (d) of Sub-section (2) about the consignor, consignee or the goods within such time as may be specified or transports the goods with forged documents, besides imposing the penalty under Sub-section (5), it shall be presumed that the goods so transported have been sold in the State of Rajasthan by him and he shall be a dealer for those goods under this Act. Section 78(12) of the Act further provides that the provisions of this Act shall for the purpose of levy, collection and assessment of tax, determination of interest, payment and recovery of tax and interest, appeal, review or revision, apply to the transporter deemed to be a dealer under Sub-section (11). Obviously the presumption under Sub-section (11) is rebuttable one and not conclusive proof of the sale within the State of Rajasthan. Therefore, the provision of Sub-section (11) as a rule of evidence may fall within the scope of *Sodhi Transport Co. and others Vs. State of U.P. and others*, But there is a vital difference that presumption is not confined in respect of goods coming from outside and destined outside State but did not find exit within reasonable time but applies to all goods including goods moving within the State on breach of any of the provisions of Clause (2)(d) or for production of documents which are forged or fraudulent. Whether raising such a presumption in the absence of any material about its retention within the State territory, while it is still in possession of transporter, who is not connected in any sense with taxable event of sale, is a question which needs consideration in the light of obligation cast, and any reasonable inference flowing from the existing materials about connection of the transporter with the transaction that may have taken place within the State in the light of principles enunciated by the Supreme Court in connection with different nature of obligation cast on transporter under various enactment as discussed above with particular reference to *The Check Post Officer and Others Vs. K.P. Abdulla and Bros.*, wherein the court did not countenance raising a presumption of sale of goods by transporters to hold him responsible for taxing provision merely for non-furnishing information. Since this question is not before us we leave it at that.

61. In *State of Haryana and Others Vs. Sant Lal and Another*, the court was considering challenge to Section 38 of the Haryana General Sales Tax Act, 1973. In that case, Section 38(1) provided that every clearing or forwarding agent,

dalal or any other person transporting goods, within the State who during the course of his business handles documents of title to goods for or on behalf of any dealer, shall furnish to the assessing authority the particulars and information in respect of the transactions of the goods in such, form and manner as may be prescribed. Section 38(2) further provides that no clearing or forwarding agent, dalal or any other person transporting goods within the State shall carry on his business unless he obtains from the assessing authority, on payment of a fee not exceeding fifty rupees, licence in the form and manner and subject to such conditions as may be prescribed. Section 38(3) also provides that if any clearing or forwarding agent or dalal or person transporting goods within the State contravenes the provisions of Sub-section (1) or Sub-section (2), the Commissioner or any person appointed to assist him under Sub-section (1) of Section 3 may after giving the person concerned a reasonable opportunity of being heard direct him to pay by way of penalty an amount equivalent to twenty per cent of the value of goods in respect of which no particulars and information has been furnished under Sub-section (1). In that case, two-fold attack was made against Section 38 of the Haryana General Sales Tax Act firstly that it was ultra vires the scope of entry 54 of the State List not falling within the ancillary or incidental matters which could fairly and reasonably be said to be comprehended within the legislative entry. Secondly prescribing penalty linked with the value of goods at 30 per cent thereof was unreasonable restraint on freedom of trade and movement of goods keeping in view the nature of obligation cast on dalals or the transporter of goods, who are not connected with sale of goods. On appeal, the Supreme Court held on first question :

".....there has to be a reasonable and proximate connection between the transaction of sale and the clearing or forwarding agent, "dalal" or person transporting goods before the State Legislature can, in exercise of the power to levy sales tax, enact legislation concerning him. We are not satisfied that there is such close and direct connection between the transaction of sale of goods by a dealer and the clearing or forwarding agent or "dalal" who books or receives such goods or a person who transports such goods within the meaning of the said Section 38."

62. It may be noticed that in State of Haryana and Others Vs. Sant Lal and Another, also the court was concerned with the obligation for divulging information by the dalals, forwarding agents, clearing agents or the transporters about the transaction with which they were not concerned and the court was not considering about divulging informations merely in respect of details of goods in their possession and about the consignor and the consignee of such goods about whom the requisite information would be in possession of transporter. This case makes it clear that there has to be a reasonable and proximate nexus between the person obligated to keep and give information about the transaction of sale about which information was required to be divulged and the event of sale attracting liability to be taxed. As a transporter has no connection with transaction of sale and he merely carries the goods at the instance of consignor,

he does not have any proximate and reasonable connection with the transaction of sale by the dealers, so that obligating him to keep and disclose information in that regard does not fall within the ambit of matters ancillary and incidental to main topic.

63. The other issue with which the court was directly concerned about the reasonableness of the penalty envisaged on breach of provision with reference to its constitutional limits and not with the tax sought to be avoided. The court held that relating the" penalty to value of goods for breach of obligation to furnish information by the transporter was clearly unreasonable.

64. About this aspect, the question also arose before the Supreme Court in State of Madhya Pradesh and others Vs. Bharat Heavy Electricals, wherein the provisions of Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976, were challenged whereby the registered dealers were required to issue bills, etc., stating that goods sold are local goods within the meaning of the provisions of the Act, Where any dealer has failed to make such statement, it was presumed that he has facilitated the evasion of entry tax on the local goods and he was accordingly made liable to pay penalty equivalent to ten times of the entry tax payable on such goods as if they were not.

65. In that case, the penalty equivalent to ten times was challenged on the ground of unreasonable and disproportionate. While considering that question, the court observed :

"It is not necessary for us to decide whether the provision for levy of penalty equal to ten times the amount of entry tax would be confiscatory and, therefore, ultra vires since Mr. Sanghi, in fairness, submitted that the State treats it as the maximum limit and not fixed amount of penalty leaving no discretion for imposition of lesser penalty. This stand of the State itself concedes that the assessing authorities are not bound to levy fixed penalty equal to ten times the amount of entry tax whenever the provisions of Section 7(5) are attracted."

66. In Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others, the question arose under the Tripura Sales Tax Act, 1976 and the Rules framed thereunder. In that case, the provisions of the Tripura Act which cast an obligation on transporters and carriers to get themselves registered, maintain accounts of goods transported and to furnish declaration forms relating to consignments were challenged. The Gauhati High Court upheld the validity of those provisions on the ground of legislative competence. The penalty prescribed for failure to discharge such obligations was an offence punishable with simple imprisonment, which could extend to six months or with a fine which may extend to Rs. 1,000 in addition to tax recoverable.

67. The relevant provisions of Sections 36A and 38B of the Tripura Sales Tax Act are as under :

"Section 36A : Maintenance of accounts by carriers.--(1) Notwithstanding

anything contained in any other Act, any transporter, carrier or transporting agent operating its transport business in Tripura, shall maintain proper account of goods transported to or outside Tripura through it in the manner prescribed and shall on demand by the Commissioner be liable to furnish in the prescribed manner such information as the Commissioner may require relating to the transportation of such goods and shall also be bound to produce books of accounts for inspection and examination by the Commissioner,"

"Section 38B : For carrying out the purposes of Section 38 every transporter, carrier or transporting agent operating its transport business relating to taxable goods in Tripura shall be required to obtain a certificate of registration in the prescribed manner from the Commissioner of Taxes on payment of such fees as may be prescribed."

68. The aforesaid provisions reveal that the transporters were required to maintain proper accounts of goods transported outside the State of Tripura through them and they were also required to furnish the requisite informations about the same in proper manner to the Commissioner relating to transportation of such goods and were also bound to produce books of accounts for inspection and examination by the Commissioner.

69. Considering these provisions, the Supreme Court held ;

".....Whenever any goods is sold or purchased inside or outside the State, the incidence of tax and the quantum of tax has to be ascertained under the provisions of the relevant taxing statute. For this, it is necessary to fix a dealer, the taxable goods, place of sale or purchase of such goods and the quantum of tax. If a dealer in taxable goods transaction of sale or purchase escapes attention of the taxing, authority, tax on such goods escapes with resultant loss to the State revenue.....This fact is brought in through the counter-affidavit filed by the respondents-State that some such consignments are booked with consignee as self, without disclosing the name, registration number and address of the consignee in the appropriate column of form XXIV.

.....One is punished only if he knows or believes to be false, yet does not disclose it or even does not believe to be true, but still makes statement to the contrary. u/s 29(4) and Section 30, the offences in case committed by transporter are relatable to checking of evasion of tax, then composition of offence u/s 32 would also confine itself within this sphere. We do not find any of these provisions in any way placing any liability on the transporter which is otherwise on a dealer under this Act. Similarly, as aforesaid, the maintenance of account by the transporters, carriers, etc., u/s 36A is only to render help to the authorities in checking the evasion of tax. This does not put any such obligation on the transporter to hold that these provisions transgress the legislative competence of the State Legislature."

70. The aforesaid observations clearly indicate that the provision which requires a transporter to furnish such informations which is true and bona fide "about the

goods" transported through "him, expected reasonably to be in his possession and did not relate to "transaction of goods" was for securing such evidence from the carrier which in the course of his business will be with him, viz., the details of goods transported, the identity and whereabouts of the consignor and consignee to whom such goods are destined. Seeking such evidence from a person who is otherwise a witness of the facts, if called upon during the enquiry, makes the proximate nexus between the person obligated and the obligation cast to the levy and collection of tax. Hence such a provision of collecting in advance evidence from a witness, was held to be in furtherance of the prevention or checking tax avoidance or evasion. If such nexus is established, the provision cannot be held to be transgressing the limits of legislative powers under entry 54 of List II of the Seventh Schedule of the Constitution. In the aforesaid case, the court was considering the provision of Section 36A of the Tripura Sales Tax Act, regarding obligation to divulge information.

71. It may be noticed that about reasonableness of the penalty provision, in the case of Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others, the court held that the punishment was leviable only in cases where there is falsity in the informations furnished by the transporter and if the transporter has faithfully and bona fide disclosed the informations in his possession, he is not liable to penalty as a consequence. This rather reflects reasonableness of the provision on the anvil of Articles 14, 19 and 304 of the Constitution of India.

72. These decisions further reveal that different conclusion has been reached by the court in relation to different obligations and consequences to befall in case of breach of such obligation on the basis of proximity of nexus of the person obligated with the taxable event, and the nature of obligation required to be discharged.

73. The learned counsel has challenged the validity of Section 78(5) of the Act to the extent it levies penalty up to 30 per cent of the valuation of the goods or carrier from the person in-charge of the goods in transit, on the ground that it is violative of Section 78(2) of the Act as also the fundamental rights guaranteed under Part III of the Constitution of India being unreasonable and having no reasonable proximity with the object sought to be achieved. It is well-established principle of law that like any other statute, fiscal statute is also subject to be put to same test. In the instant case also, while the obligations cast under Sub-section (2) of Section 78 of the Act are merely to carry the documents named therein and the documents prescribed in the Rules. In this light the scheme of Section 78 of the Act need be examined.

74. The scheme of the provision is very clear that it cast certain obligations on the transporter of the nature prescribed in the provision. A transporter may be carrying goods in pursuance of any sale transaction or he may be carrying such goods which are presently not subjected for sale transaction but are intended to be subjected to such taxing event in future or he may be carrying goods which

may be for personal use, i.e., the transfer by way of methods other than sale or purchase. However, at the time of inspection or checking, he is found in possession and control over such goods and is also in possession of certain basic informations about the source from which the goods have emanated in transit. Thus, an obligation is cast on the transporter or the carrier to the goods in movement as is apparent from Sub-section (2) of Section 78 of the Act referred to above. Section 78 by itself does not cast any obligation on the dealer who brings into existence taxing event within the State on which tax on sales become payable as such. The obligation cast on the transporter/carrier firstly is to carry with him a goods vehicles record, challans and bilties, bills of sale or despatch memos and prescribed declaration forms. The second obligation cast is to stop the vehicle or carrier at every check-post set up under Sub-section (1) and the third obligation cast is to produce all the documents including prescribed declaration forms relating to the goods before the in-charge of the check-post. The fourth obligation cast is to allow the inspection of the goods by the in-charge of the check-post or any other person authorised by such in-charge. Obviously all these obligations have been cast on the driver or the person in-charge of the vehicle or carrier or person in-charge of goods in movement, who is not ordinarily a party to taxable event under the Act.

75. We pause here to look to the obligations and corresponding penalty provisions on the person obligated. On analysis of the aforesaid provision, the following features become apparent :

76. The object of the scheme of Section 78 of the Act is made clear in Sub-section (1) that this is a measure to prevent or check the avoidance or evasion of tax. Obviously, this provision is a part of the machinery for making effective imposition of tax on sale or purchase of goods, which takes place within the State of Rajasthan and for that purpose, it authorises the State Government to establish check-posts and barriers at various places within the State and also authorises the person in-charge to inspect the documents produced and the goods that are being moved within the State.

77. Sub-section (2) particularises the persons who have been put under certain obligations in connection with inspection of documents and goods as mentioned in Clause (a) of Sub-section (2) of Section 78 of the Act. The persons obligated are (a) the driver ; (b) the person in-charge of the vehicle ; (c) the person in-charge of the carrier or of goods ; and (d) the person in-charge of goods in movement. The explanation to Sub-section (2) defines "vehicle or carrier", "goods" and "goods in movement". The vehicle or carrier has been given a wide connotation. It means any means of transportation including an animal to carry goods from one point to another point. So also the goods have been defined to include animals also. The goods in movement have been defined to mean the goods which are in the possession or control of a transporting agency or person or other such bailee and also the goods which are being carried in a vehicle or carrier belonging to the owner of such goods that is to say if the owner of the

vehicle as well as of the goods is the same person and even if the goods which are being carried by a person, his obligation as a transporter or carrier of goods u/s 78(2)(a) remains as such. The definition clause and explanation makes it abundantly clear that the persons referred to in Sub-section (2) and in other parts of the chapter on whom such obligations have been cast can be compendiously described as "transporter" or the "carrier" for the purposes as has been referred to later in this discussion. The goods in movement are such goods which have been put in transit for transportation from one place to another place. The obligation is not dependent on the transporter being in any way connected with the taxable event, viz., transaction of sale or purchase of goods and also it operates on all goods in movement where they are subjected to any taxing event under the Act or not on such persons obligated. The obligations cast on transporter are :

(i) to carry with him requisite documents which includes the goods vehicle record, challans, bilties, bills of sale or despatch memos, prescribed declaration forms. The goods vehicle record pertains to the requisite documents of the vehicle, namely, the licence, registration documents and permits, etc., for plying the vehicle. These are always required to be with vehicle. The challans and bilties in common parlance are the documents which are issued by the transporter containing terms of such transportation and for facilitating the delivery at the destination to the consignee. The bills of sale and despatch memos are the documents which usually emanate from the, consignor which are otherwise required to be carried to or sent to the consignee or buyer and came in existence prior to or at the time of booking of goods for transportation and could be made available to the transporter for carrying it to the destination without affecting movement of goods in any manner. Apart from these documents it has been left to State Government to prescribe such declaration which may be required to be carried along with goods and produced before the inspecting authority. Obviously such authority can be exercised in the like manner and for the purpose of substantive provision only.

(ii) to stop the vehicle or carrier at every check-post set up under Sub-section (1). In other words, on reaching the check-post, he is required to keep the vehicle stationary for the purposes of inspection of documents and goods.

(iii) to produce all the documents including prescribed declaration forms relating to the goods before the in-charge of the check-post.

(iv) to give all the information in his possession relating to consignor and consignee.

(v) to allow the inspection of the goods by the in-charge of the check-post or any other person authorised by such in-charge.

78. Thus, in totality the transporter under Sub-section (2) of Section 78 of the Act is obligated to carry with him certain documents relating to the goods which are in his possession for transportation and make such information that is in his

possession relating to the goods available to the in-charge check-post wherever he is required to do so.

79. Sub-section (3) of Section 78 of the Act authorises the State Government to empower any officer of the State where any goods are in movement within the territory of the State of Rajasthan to stop the vehicle or the carrier or the person carrying such goods, seeking inspection of documents and goods as envisaged in Sub-section (2).

80. The consequence of breach of obligations forms part of Sub-sections (4) to (12) of Section 78 of the Act. No obligation has been cast on any person other than the driver of the vehicle, person in-charge of vehicle or carrier or person in-charge of goods in movement. Owner of the goods or dealers are otherwise subject to other provisions of the Act, Obviously the obligation u/s 78 starts from the point the goods are set in motion and ends with delivery of goods at destination. So also is the journey of operation of Section 78. The obligation of owner of the goods or dealer liable to tax under the Act remain the same and are not affected by these provisions.

81. Thus, with the object of preventing and checking evasion and avoidance of tax, within the State of Rajasthan, a transporter has been put under obligation to furnish informations relating to the goods in his possession to the in-charge of the check-post within the territory of the State while the goods are in movement. Sub-section (4) authorises the in-charge of the check-post to seize the goods in movement which are not supported by documents referred to in Sub-section (2) for the reasons to be recorded in writing. Such seized goods can be released to the owner of the goods or to anybody else duly authorised by such owner during the course of proceedings, if adequate security of the amount equal to the estimated value of the goods is furnished.

82. It has to be noticed that while the goods are seized which are in possession of a transporter then the goods are not to be released to the transporter but are liable to be released only to the owner or any person duly authorised by such owner, Sub-section (5) provides for imposition of penalty on the person in-charge of the goods for possession or movement of goods in violation of the provisions of Clause (a) of Sub-section (2) of Section 78 of the Act, that is to say, for not carrying with the goods the requisite documents referred to above and for submission of false or forged documents. The penalty prescribed is equal to 30 per cent of the value of such goods. Neither maximum nor minimum limit of the penalty has been prescribed. Penalty is neither related to the tax sought to be avoided or evaded nor Sub-section (5) restricts the levy of penalty only in case where the goods are in transit are subject to a taxable event or are meant to be subject of taxing event in the State. No notice is required to be given to the owner of the goods either by the officer.

83. However, under Sub-section (6) it has been left to any other person to make an application for being impleaded as a party on the ground of involvement of his

interest in the proceedings and on such application being made, it is left to the person conducting the proceedings to permit him to be impleaded as party in the case and it is only after the competent authority permits such an applicant to become a party to the case, he can be subjected to other provisions of Section 78 of the Act.

84. Sub-section (7) empowers the in-charge of the check-post or other officer empowered in this regard to release the goods to the owner of the goods or to anybody else duly authorised by such dealer, if seized goods are not already released under Clause (c) of Sub-section (4), on payment of the penalty imposed under Sub-section (5) or on furnishing such security for the payment thereof. Thus, again the goods are not liable to be released to the transporter. Sub-section (8) makes the transporter, as distinct from the person in-charge of the goods, liable to penalty as envisaged under Sub-section (5), that is to say that while Sub-section (5) envisages the levy of penalty equal to 30 per cent of the value of such goods on the person in-charge of the goods or in whose possession the goods have been found. Under Sub-section (8), prescribed penalty under Sub-section (5) is imposed on the person in-charge of the vehicle who may be driver or any other person, who is found to be carrying goods in breach of any of the obligation u/s 78(2). Levy of penalty u/s 78(8) read with Section 78(5) is not restricted to breach of provision of Section 78(2)(a) as is in the case of person in-charge of goods. Penalty for furnishing false or forged documents is to be considered separately, the penalty to the same extent as is to be imposed on the person in-charge of the goods, namely, 30 per cent of the value of the goods. The vehicle in which goods are in movement also is liable to be seized u/s 78(8) and such vehicle can be released to such person in-charge of the vehicle on payment of penalty imposed on him under Sub-section (8) read with Sub-section (5) or on furnishing such security as may be directed by such in-charge or the officer.

85. Sub-sections (10), (11) and (12) form part of the ultimate consequence which can be fall on the transporter on finding him in collusion with the trader. In case a transporter is found to be in collusion with the trader to avoid or evade tax, the in-charge of the check-post or the officer empowered under Sub-section (3) may detain the vehicle or carrier of such transporter and after affording him an opportunity of being heard and with the prior approval in writing of the Deputy Commissioner (Administration) having jurisdiction may confiscate such vehicle or carrier. If a transporter fails to give information as required from him under Clause (d) of Sub-section (2) about the consignor, consignee or the goods within such time as may be specified or transports the goods with forged documents, besides imposing the penalty under Sub-section (5), it shall be presumed that the goods so transported have been sold in the State of Rajasthan by him and he shall be deemed to be a dealer for those goods under this Act. For the purposes of levy, collection and assessment of tax, determination of interest, payment and recovery of tax and interest, appeal, review or revision apply to the transporter who is deemed to be a dealer under Sub-section (11) by dint of Sub-

section (12).

86. In the first instance, if we examine the nature of the obligations cast under Sub-section (2) of Section 78 of the Act, we find that the provision is designed to obligate the transporter to furnish the informations which are reasonably in his possession in the ordinary course of his business and relate to the goods which are in movement with him, viz., the details about the consignor and the consignee and the details of the goods. Conspicuously by the parent Act, the transporter has not been obligated to transmit or to furnish or carry any information regarding transaction of goods in transit as he is not ordinarily connected with the taxable event that may have taken or may take place within the State in connection with such goods. To this extent, the Act only authorises collection of information in possession of transporter which may be necessary for imposing and collecting the tax in connection with those goods, whether the goods are moving within the State of Rajasthan or are imported from outside the State which may facilitate the authorities under the sales tax laws of the State in implementing the imposition of obligation to furnish information can be treated as an ancillary or incidental matter to the main subject on the principles enunciated in *Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others*,

87. We may notice that u/s 94 the provisions of C.P.C. for enforcing attendance of the witnesses or enforcing production of documents, etc., have been made applicable to the proceedings under the Act. Thus collecting relevant evidence in connection with taxable events that have taken place in the State or likely to take place in the State are very much the part of effective procedure required for making the imposition effective. Section 94 of the Act reads as under :

"94. Power to enforce evidence.--Any officer not below the rank of Assistant Commercial Taxes Officer or appellate authority or the Tax Board while exercising powers or discharging duties under any of the provisions of this Act, shall have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (Central Act V of 1908) when trying a suit, in respect of the following matters arising in any proceeding under the Act, namely :--

- (a) enforcing the attendance of any person and examining him on oath or affirmation ;
- (b) compelling the production of documents ; and
- (c) issuing commission for examination of witness ;

and the proceeding before the said officer or authority shall be deemed to be a judicial proceeding within the meaning of Sections 193, 196 and 228 of the Indian Penal Code (Central Act XLV of 1860)."

88. This provision clearly postulates that a person who can depose about particular relevant fact can be enforced to give his statement as witness and a person who is in possession of a relevant documentary evidence can be enforced

to produce such document that may be relevant for the enquiry under the Act. At the same time power does not extend to enforce a person to give statement of facts which in the ordinary course of his conduct does not come to his knowledge, or to produce such documents which do not or are not expected to be in his possession. In other words a witness can be enforced to produce oral or documentary evidence that is within his possession but he cannot be enforced to collect such information from other sources and produce in the proceedings. If any provision is made to the extent it requires a person to produce such material as is within his knowledge or possession, same is within the ambit of Section 94 but if a person is asked to collect information about facts or documents, which does not come to his knowledge or possession in ordinary course of conduct of his affairs, it falls beyond the scope of aforesaid power.

89. For failure simplicitor of the obligations under Sub-section (2), two-fold penalties have been envisaged : one is envisaged under Sub-section (5) of Section 78 of the Act, to be imposed on the person in-charge of the goods for not carrying the documents prescribed under Sub-section (2)(a) and for carrying documents which are forged or false. Secondly, the transporter, viz., the owner or the person in-charge of the vehicle or carrier significantly under this provision the person in-charge of the goods having been included for committing the breach of any obligations under Sub-section (2) of Section 78 of the Act. He is also held liable for the penalties provided under Sub-section (5) of Section 78 of the Act by reference in Sub-section (8) of Section 78 of the Act. So far as making provision for providing some penalty as a consequence of breach of one or more of such obligations is concerned, also falls within the ambit of ancillary and incidental matter subject to test of reasonableness as per the principle enunciated in *State of Haryana and Others Vs. Sant Lal and Another*, Therefore, these part of the provisions of Section 78 of the Act cannot be held to be beyond the legislative competence of the State Legislature as such.

90. This takes us to examine the question of testing the impugned provision on the touchstone of reasonableness both as to procedural as well as substantive.

91. In this connection, an ancillary argument has been raised about the validity of requiring the declaration in form S.T. 18A or 18AA from the importer within the State of Rajasthan in terms of Section 81 read with Rule 53 to be carried along with the goods in transit by the transporter and to be furnished at the check-post at the entry in the State. This aspect of the matter need a scan through the scheme of Chapter VIII of the Act.

92. Section 77 provides for inspection and seizure of accounts and goods kept and found at the place where dealer is carrying on business or believed to be carrying on business. For which the officers can be authorised to enter the premises and conduct inspection and search. Section 78 is a provision to check the goods in transit and for that purpose transporter is put under certain obligations as noticed above. Section 79 authorises Commissioner to establish check-post on contract basis in respect of building, stones and animals.

93. u/s 80 of the Act where a vehicle or carrier coming from any place outside the State and bound for any place outside the State and carrying any goods bound for any place outside the State, passes through the State, the owner, the driver or the person in-charge of such vehicle or carrier of goods shall obtain in the prescribed manner a transit pass for such goods from the in-charge of the first check-post after his entry into the State and deliver it to the in-charge of the last check-post before his exit from the State. Sub-section (2) of Section 80 of the Act further provides that where such owner, driver or person in-charge fails to deliver such transit pass in respect of any goods in accordance with the provisions of Sub-section (1) or is found to have suppressed or given false particulars of any consignment of goods in his application for issue of transit pass, it shall be presumed that such goods have been sold within the State by the owner, the driver or the person in-charge of the vehicle or the carrier or the goods and after having afforded an opportunity of being heard to such owner, driver or person in-charge, any officer not below the rank of Assistant Commercial Taxes Officer as may be authorised by the Commissioner, shall make an order that notwithstanding anything contained in this Act, such owner, driver or person in-charge shall, pay tax on such sale together with the penalty equal to double the amount of such tax. The provision has somewhat like shade as were in consideration before the Supreme Court in *Sodhi Transport Co. and others Vs. State of U.P. and others*,

83. Section 81 of the Act of 1994 is relevant for the instant enquiry. It reads as under :

"Section 81 : Import of goods into the State or export of goods outside the State.--(1) Any registered dealer or any other person, who intends to import or bring any goods, or otherwise receives within the State of Rajasthan goods as may be notified by the State Government from outside the State, for sale, use, consumption or for other disposal in the State, shall, unless otherwise prescribed, obtain a prescribed declaration form from the prescribed authority, and shall cause it to be carried with the goods as part of the documents specified in Sub-section (2) of Section 78 and produced along with other documents before the in-charge of the entry check-post of the State.

(2) Any registered dealer or any other person by whom any goods taxable within the State of Rajasthan are despatched from within the State to a place outside the State either in the course of inter-State trade or commerce or for sale outside the State, such registered dealer or other person shall, unless otherwise prescribed, furnish or cause to be furnished a prescribed declaration form obtained from the prescribed authority as part of the documents specified in Sub-section (2) of Section 78, before the in-charge of the exit check-post of the State."

94. Thus, Section 81 of the Act principally obligates registered dealer and importer of the goods from outside State to within State for sale, use, consumption or otherwise disposal to give a declaration in the prescribed form. It

also obligates such importer to get such declaration produced before the in-charge of entry check-post of the State. It is to discharge this obligation of the importer, he is required further to make it available to transporter, so that such declaration too may be produced along with other documents at the check-post. So also under Sub-section (2) it obligates an exporter of taxable goods outside State of Rajasthan too to furnish a prescribed declaration to the prescribed authority as part of documents u/s 78(2).

95. Another limb of the provision concerning the chain is Section 82 which requires a clearing or forwarding agent to get himself registered and obtain licence, and obligates him to furnish information regarding certain informations. A perusal of Section 82 of the Act reveals that this provision is of the nature which was subject-matter of scrutiny in State of Haryana and Others Vs. Sant Lal and Another, However, the scope and ambit of the provisions of Section 81 is not subject-matter of this petition.

96. For the purpose of giving effect to Section 81 read with Section 78 of the Act, Rule 53 has been framed, which requires that a registered dealer who imports any taxable goods as notified by the State, or who receives any notified goods consigned from outside State or intends to bring, import or otherwise receives any notified goods from outside State shall furnish or cause to be furnished a declaration in form S.T. 18A completely filled in all respect in ink. The counterfoil of the declaration shall be retained by such dealer and its portions marked "Original" and "Duplicate" shall be carried with the goods in movement. In the like manner any dealer or person other than a registered dealer importing, receiving or bringing goods from outside State is required to furnish declaration.

97. Section 81 clearly cast two-fold obligations on an importer of the goods within the State of Rajasthan for the purposes mentioned therein. Firstly he is required to give a declaration to that effect in the prescribed form. Secondly he is put under an obligation to cause his declaration to be carried by the transporter along with such goods consigned to him and to be produced along with other documents u/s 78(2)(a) of the Act. The form of declaration has been prescribed under Rule 53 referred to above. Form No. S.T. ISA is required to be completely filled in all respect in ink signed by the importer in triplicate. It requires that completely filled and signed original and duplicate to be carried with the goods in movement and the counterfoil to be retained by the dealer. Obviously the obligation must be to fill in all the requirements in the prescribed form simultaneously, and the act of furnishing may be done by the declarant himself or through somebody else. Like obligation is cast on any dealer or person other than registered dealer to furnish like declaration in form S.T. 18AA. So far as obligation is cast on the importer is concerned, it is outside the scope of present controversy. So far as obligation cast on the transporter and consequence to befall on him in breach thereof is provided as an ancillary to obligation of importer. On the other hand the person other than registered dealer also has to obtain the prescribed form S.T. 18AA from the prescribed authority and is

subjected to fill such declaration and cause it to be carried along with other documents required u/s 78(2). Form S.T. 18AA reveals it is in the form of a permit to import or bring goods declared therein within the State issued by the prescribed authority.

98. A perusal of form S.T. 18A reveals that primarily the object of form No. S.T. 18A is to bind the importer of the goods from outside for the purposes mentioned in Rule 53 in respect of the liability for payment of tax as per the law of sales tax within the State of Rajasthan. This prescribed form can only be obtained by the registered dealer, who is the importer of the goods. Obviously it has to be filled in by the declarant under his signatures. The proprietor/partner/director/karta/manager/secretary of the dealer-firm depending on whether it is a proprietary firm or partnership firm or company or HUF firm or any association of person or body of persons is required to declare about the correctness of the facts or statement made therein. The importer-dealer declarant is required to disclose the name and complete address of the consignee ; R.C. No. of the consignee under R.S.T. Act and C.S.T, Act ; nature of the transaction whether it is a consignment or depot transfer or inter-State transaction or any other nature. He is also required to disclose the description of the goods ; price/estimated value of the goods in rupees ; invoice No./challan No. and date and the name and full address of the carrier (transport company or the owner of the vehicle) as also registration number of the vehicle.

99. The question do arise whether requirement of carrying these declarations from the importer in form No. S.T. 18A with the goods by the transporter can be said to be reasonably connected with the object of the provisions of the Act of 1994 and whether it amounts to reasonable restriction on the freedom of trade so as not to transgress the freedom of trade under Article 19(1)(g) and inhibition against restriction on movement of goods throughout the territory of India under Article 401 read with 304(b). In other words does it amounts to an exercise of legislative power, to sustain the test of reasonable restrictions ? However this rule has been framed in exercise of delegated authority and is a part of subordinate legislation. Its validity has not been challenged before us. We refrain from expressing any opinion on this. It will be suffice to state that even if subordinate legislation suffers from some defect or invalidity it does not affect the validity of parent Act, if otherwise the provisions of parent Act do not transgress constitutional limits. Moreover we find that this Court in number of decisions has expressed this view that so far as liability of transporter to carry declaration in form S.T. 18A or S.T. 18AA is concerned, the requirement is directory and does not entail automatic penalty, and the production of such forms subsequently during the course of enquiry be treated as substantial compliance of the provisions. On such compliance no penalty is warranted. Reference be made to decision in Assistant Commercial Taxes Officer, Flying Squad, Raniwada Distt. Jalore (Rajasthan) Vs. M/s. Voltas Limited Jaipur (Rajasthan), wherein on comparing the provisions of Section 22-A of the 1954 Act and Section 78 of the Act of 1994 and the required information in the

declaration form S.T, 18A, the court said :

".....the law does not provide that once the goods in transit are found to be unaccompanied by the requisite documents, the levy of penalty is automatic and if that were so, the provision for issuing a show cause notice to the owner or transporter will be meaningless. Notices are issued to the person likely to be affected by the order, only with a view to give him an opportunity against the proposed penalty. Such an opportunity must necessarily include the opportunity to show that no penalty is leviable."

The court concluded, when the form was incomplete :

".....the substantive part of the declaration in form S.T. 18A is the requisite declaration and Undoubtedly by the importer of goods as envisaged in the form about payment of tax. That undoubtedly the respondent has given and the other particulars referred in the form when are unequivocally available from all other requisite documents, about veracity of which there is no doubt, it cannot be said that such a mistake was more than a technical breach of procedural provision. The case will squarely be within the ratio of Hindustan Steel Ltd. Vs. State of Orissa,

100. Following the aforesaid decision the court in another decision in Assistant Commercial Taxes Officer v. Tata Engineering and Locomotive Co. Ltd.--S.B. Sales Tax Revision No. 929 of 1999 and two connected revisions decided on March 23, 2000 ; the court said :

"However, I am in agreement with the ultimate conclusion of the Board that this was not a case in which penalty ought to have been levied merely on the failure to produce declaration in form S.T. 18A at the time of checking when all other requisite informations were available with the vehicles in question and the declaration form S.T. 18A were also submitted in response to show cause notice fulfilling the requirement of giving an undertaking for payment of tax and liability which may arise from the transactions in the goods imported in the State of Rajasthan in future. Such undertaking is the primary object of requirement of such declarations."

101. In this connection, reference may also be made to decision in Mahaveer Conductors v. Assistant Commercial Taxes Officer [1997] 104 STC 65 (Raj). The court after examining the provision of Section 22A of the repealed Act had held as under :

"These provisions are indicative of the fact that the penalty is to be levied where the breach committed or the default for which penalty is levied, is related and has a rational nexus with the purpose for which the provisions of Section 22A have been enacted, namely, that the breach must be related to evasion or avoidance of tax. If that be so., in my opinion, mens rea or deliberate defiance of the provision with intention to evade or avoid liability of tax that may arise as a result of the transaction, which was sought to be shielded by keeping it out of

accounts, must be necessary ingredient before penalty could be levied.

It may further be noticed that where goods are found in transit unaccompanied with requisite documents, when the vehicle is checked, the breach is complete. In defence, the person concerned can produce the relevant documents only after the event regarding which breach has been committed and not earlier. Therefore, the mere fact that the goods were not accompanied by documents and were produced later on, during the proceedings by itself does not lead to any conclusion that such documents have been prepared later on by ante-dating the same. That finding must depend upon an inquiry into the facts and not merely on the presumption, solely on the basis that documents were not accompanying the goods when the same was checked. That would be the case, in every case of breach of provisions of Section 22A."

102. Section 78 of the new Act is corresponding provision under the new Act.

103. Looking to the nature of the obligations imposed on the transporter and the nature of connection with the goods in movement, as discussed above, we are in agreement with the opinion expressed by this Court in *Mahaveer Conductors v. Assistant Commercial Taxes Officer, Ward III, Circle "C", Jodhpur* [1997] 104 STC 65, that penalty is not leviable merely for non-production of any document without there being effective opportunity to the person affected to show that no penalty is imposable on him. We have already referred to the principle above that the principles of natural justice, unless the emergency of action to be taken so warrants, forms part of the concept of reasonableness of any procedure prescribed for affecting the rights of the citizen and the principle of natural justice demands that before imposing the penalty against any person, he must have an opportunity to show that no penalty at all is leviable. If mere non-production of document with this opportunity being there, is sufficient to levy the penalty then giving him a notice to show cause before imposing the penalty is illusory inasmuch as the transporter not carrying one or more of the document required by him is necessarily to be subjected to penalty even if he satisfied that he has no connection with the avoidance or evasion of tax, or that goods are not in any way connected with any taxable event or that he is not at all connected with such transaction which may result in avoidance or evasion of tax within the State of Rajasthan or that the documents required to be produced are produced before the person in-charge during the course of enquiry without any delay and failure to produce document at the time of checking is shown to be bona fide not on account of any fault which is attributable to the transporter. In other words taking other view will render the provision in its procedural aspect unreasonable in the sense that a transporter found carrying goods without any of the required documents on the spot cannot later on show that no penalty at all is imposable except in case he is able to show that he did carry all the requisite documents. That is an impossible situation because notice is required to be given when he is not found in possession of goods. In such event only possible explanation that may be considered is want of any element of evasion or avoidance, for " the

object of penalty which the provision has been enacted.

104. We shall be slow to accept such interpretation which render the provision unconstitutional, when it is reasonably possible to reach another conclusion which saves the provision from such vice.

105. Without expressing any opinion as to constitutional validity of provisions to require such declarations with the details stated in form S.T. 18A and requirement of permit to import goods inherent in form S.T. 18AA, to be carried with goods as part of the transporters obligation, we are in agreement with aforesaid view.

106. This conclusion of ours is further strengthened by separate provision that has been made for levying penalty and consequence to follow when the transporter is found acting in collusion with the trader while carrying goods in transit and deliberately not divulging information which is supposed to be with him in his possession. Sub-sections (10) and (11) provides for imposing penalty of confiscation if he is found to be in collusion with the trader to avoid payment of tax and Sub-sections (11) and (12) forms part of the scheme where a transporter fails to give information as is required of him under Clause (d) of Section 78(2) about the consignor or the consignee of goods within such time as may be specified or transported the goods with forged documents is not only liable to penalty u/s 78(5) of the Act but is deemed to have sold the goods within the State of Rajasthan, and is deemed to be a dealer. Then he is suggested to same liability as a dealer who has goods within the State under the Act and is subjected to same procedure including his right of remedies under the Act as are available to a dealer in connection of levy and assessment of tax. Therefore, for deliberately producing forged and false documents and not divulging informations that is in his possession u/s 78(2) is distinct from mere non-carrying of documents and for being acting in collusion with the trader to avoid or evade the tax as for both these consequences, independent penalties and consequences have been provided. Therefore, penalty under Sub-section (5) or Sub-section (8) for non-carrying of documents or for non-discharge of the obligations u/s 78(2) of the Act, without anything more cannot by itself result in levy of penalty and if the person in-charge of the goods or the driver or the person in-charge of the vehicle or the person in-charge of the carrier fails to show sufficient cause for not discharging that obligations or furnishes the requisite informations during enquiry bona fide, such penalty is not imposable. Such interpretation brings the provision within the purview of reasonableness of procedural aspect, so far as transporter is concerned.

107. However so far as owner is concerned there is deviation from the provisions of Section 22A of the repealed Act while enacting Section 78 of the Act of 1994. We have noticed that under the scheme it is accepted premise that obligation is cast on the transporter as carrier of goods for divulging information about goods carried by him and persons for whom he carries such goods, viz., consignor and consignee. Ordinarily he is not the owner of the goods. u/s 78(4) the authority

has been empowered to seize the goods from the possession of carrier, but same are to be released to owner on furnishing security for the value of goods. u/s 78(5) the penalty is imposed on person in-charge of goods, for non-production of or for production of incomplete requisite documents. Apart from liability of the person in-charge of the goods, on whom the penalty is imposed, the coercive process for recovery of any penalty imposed u/s 78(5) is directed to the goods of owner. Penalty is imposable at the rate of 30 per cent value of the goods. Thus the person directly affected by the levy of penalty is the owner of goods. While under the repealed provision before imposition of penalty notice was required to be issued to the owner of goods as well as to person in-charge of such goods, no such duty has been cast on the competent officer to give a show cause notice to the owner of goods, even in case his identity is disclosed, before imposing penalty, It has been left to the person interested in goods to make an application and depend upon the permission given by the competent officer to be impleaded, before he can be heard. Exclusion of the owner from the field of duty to inform the person affected by the order to be made by such authority, while such notice is required to be given to transporter, does not appear to be founded on any rational nexus in making difference between the procedure to be adopted before making an order vitally affecting the owner of the goods and cannot be said to be reasonable on procedural aspect of the matter.

108. Looking to the substantive aspect of the impugned provision it is noticed that penalty prescribed is "equal to 30 per cent of the value of goods".

109. Quantum that has been prescribed by linking it with the value of the goods and not linking with the tax sought to be avoided or evaded due to the failure in discharging such obligations by the transporter patently appears to be excessive and disproportionate to the object with which obligations have been cast on the transporter to furnish informations relating to the goods in transit. That is the clear ratio laid down in State of Haryana and Others Vs. Sant Lal and Another, referred to above wherein the like provision authorising levy of penalty equal to 20 per cent of estimate value of goods for breach of obligation to transmit information was held to be unreasonable. The court said :

"It is difficult to hold that a clearing or forwarding agent, "dalal" or person transporting goods can be made liable to a penalty equivalent to 20 per cent of the value of the goods in respect of which no particulars and information have been furnished. Given the obligation to furnish particulars and information, a penalty for evasion of tax, in addition to the tax evaded, can reasonably and fairly be imposed which bears a proportion to the quantum of tax that has escaped assessment but it cannot reasonably and fairly bear a proportion to the value of the goods the sale of which has occasioned the liability to tax."

110. Section 78(5) which provides penalty for non-disclosure of information by the transporter either for not carrying the requisite documents with goods or producing documents, which are all delivered to him by consignors which are apprehended to be forged or false to the extent the same bears relation to value

of goods and not relatable to tax avoided or evaded or likely to be avoided or evaded clearly falls within the ratio laid in State of Haryana and Others Vs. Sant Lal and Another, . It may be noticed that so far as the transporter himself is found to be party to forged or false document or found acting in collusion with trader, separate provision has been made under Sub-sections (10) and (11) of Section 78. Obviously if the transporter is party to forgery, he does so either in collusion with the owner of goods or may himself be the owner of goods. In such event he is not only liable to reasonable penalty for breach of obligation as transporter, but makes the vehicle liable to be confiscated and renders himself to all other provisions of the Act as a dealer, inviting all penal provisions with which a dealer can be visited with on production of forged documents, including prosecution for such forgery.

111. Therefore, the provisions of Section 78(5) of the Act providing penalty equivalent to 30 per cent value of the goods is unreasonable and violative of Articles 14 and 19(1)(g) of the Constitution and thus, it cannot be sustained.

112. However, this does not render the transporter free from any consequences. According to State of Haryana and Others Vs. Sant Lal and Another, on which reliance is placed by the petitioners, says that where there is a statutory obligation, breach of it follows with reasonable penalty for the person responsible for such breach. In absence of such specific provision, a person is liable to penalty generally provided for breach of any provisions of the Act u/s 68 of the Act and therefore breach of obligations under Sub-section (2) of Section 78, a penalty can be levied against the person who has committed the breach of Section 78(2) of the Act under that provision also. That could only effect the quantum of penalty to be imposed in the case penalty is found leviable but not liability to penalty.

113. To summarise above discussion :

A. From the aforesaid discussion, the following principles are deducible ;

Principles governing question of ultra vires--

(i) Any legislative authority can legislate only in respect of subjects assigned to it by the respective entries in the Lists in the Seventh Schedule as to the subject-matters on which the Union or the State Legislature may legislate.

(ii) The entries in the legislative Lists are only legislative heads or fields of legislation demarcating the area, over which the appropriate Legislature can operate.

(iii) The rule of construction, concerning entries in the legislative List is not to interpret them in a narrow or restrictive manner and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it AIR 1941 16 (Federal Court)

(iv) Howsoever wide an entry in the legislative List is construed it has to be

exercised in aid of main topic of legislation only. R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad,

(v) In the context of taxing statute field of legislation on the subject in respect of any provision must relate to taxable event.

(vi) The ancillary and incidental power under the respective entries to levy any tax extends to provide for preventing and checking the evasion of tax.

(vii) Any provision calculated to check the evasion of tax or make it unprofitable is comprehended in the topic "levy and collection of any tax" Sardar Baldev Singh Vs. Commissioner of Income Tax, Delhi and Ajmer,

(viii) However, the touchstone of validity of a legislation is not merely distribution of legislative fields under Article 245 but it must equally be within the limits of other constitutional provisions relevant for present purposes.

(a) That it does not take away or abridge any of the fundamental rights enumerated in Part III of the Constitution. Balaji Vs. Income Tax Officer, Special Investigation Circle,

(b) It should not contravene any other mandatory provision of the Constitution which imposes limitation upon the powers of the Legislature, e.g., Article 401 of the Constitution which envisages that the trade, commerce and intercourse throughout the territory of India shall be free. This prohibition is subject to Articles 303 and 304. If the Legislature of the State made any law imposing such restriction on the freedom of trade, commerce and intercourse with or within that State as may be required in the public interest, such Bill has to be introduced or moved in the assembly with the previous assent of the President.

B. Applying these principles with reference to provisions relating to establishment of check-posts within a State by the State Legislature in exercise of powers to levy tax on sales or purchase of goods, the following principles can be culled out from the aforesaid discussion :

(i) Power to establish check-posts and barriers at various places in the State for checking the goods in transit within the State or the goods that is entering the State from other States are provisions for prevention and checking the evasion and avoidance of tax that may be levied within the State and therefore related to make effective the machinery for collection of sales tax that is leviable, are within the ambit of ancillary and incidental matters to the main subject.

(ii) The obligation imposed on the transporter while carrying goods must have nexus with the taxable event in order to satisfy the test of being a provision which can fairly and reasonably be comprehended within the scope of ancillary and incidental matters. Therefore, it will depend on type of obligation cast and consequences flowing.

(iii) The provisions which provides for disclosing information by the transporter or carrier of the goods which includes the person in-charge of the goods while the

goods in transit in relation to the goods in his possession, the consignor at whose instance the goods are put in transit and the consignee to whom the goods are consigned and which are in his possession or can reasonably be in his possession at the time of commencement of transit, are within ancillary and incidental matters to the main subject. Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others,

(iv) Where the goods transit starts from outside the State and the goods are also to be delivered outside the State but pass through another State during the course of its journey, it comes within the scope of ancillary and incidental matter to require a transporter to obtain a transit pass at the entry point where the goods first enter such State through whom they are only to pass and to surrender such transit pass at the exit point within reasonable period ; and it is also incidental thereto to raise a rebuttable presumption on failure to surrender the transit pass at any exit point within the prescribed time that the goods have been sold by the transporter within the State so as to subject the transporter to sales tax laws of the State as dealer which presumption can be rebutted by the transporter by leading evidence to the contrary. Sodhi Transport Co. and others Vs. State of U.P. and others,

(v) However, power to seize and confiscate and to levy penalty in respect of goods in the hands of transporter which are carried in a vehicle by raising a presumption of sale within the State whether the goods are sold or not within the State, is not incidental or ancillary to the power to levy sales tax and are ultra vires. In such case person subjected to rigours of law has no nexus with the taxing grant. Yet by presuming a taxing event to have taken place, penalty of seizure and confiscation follows. The Check Post Officer and Others Vs. K.P. Abdulla and Bros.,

(vi) Requiring the transporter to furnish information about transaction is not within the scope of ancillary and incidental matters which can fairly and reasonably be comprehended within the scope of the entry 54. State of Haryana and Others Vs. Sant Lal and Another,

(vii) (a) Where a law imposes an obligation which otherwise satisfies the test of the constitutional provisions, it will be legitimate to make such person obligated to a reasonable penalty to be reached by him for such obligation. State of Haryana and Others Vs. Sant Lal and Another,

(b) Looking to the nature of obligation cast on the transporter to furnish particulars and information, about goods a penalty though leviable, it cannot reasonably and fairly be linked with the value of the goods, the sale of which may occasion a liability to tax. [Sant Lal's case [1993] 91 STC 321].

C. Applying the aforesaid tests, our conclusion in respect of provisions under challenge are :

(1) The parent provision of the Section 78 so far as it requires carrying the

documents mentioned under Sub-section (2) by the transporter whose position ordinarily does not go beyond a witness about goods carried through them, for the purpose of divulging detailed information about the goods carried out by the transporter and about the consignor and the consignee itself at the check-post or barrier to any authorised officer u/s 78 as part of machinery provision for collecting evidence about goods coming in or going out of or moving within the State, can be considered as intended to prevent and check evasion and avoidance of tax and in aid of making effective the levy which has arisen or likely to arise within the State, are provisions incidental and ancillary in aid of main subject of levy and collection of sales tax.

(2) Provision as to notice before imposing penalty is not an empty formality for imposing penalty, for non-production or production of incomplete documents, but is intended to give an effective opportunity of hearing to show that no penalty is at all leviable. If it is reasonably established that such default is not with any intention to evade or avoid tax, but is bona fide default, the breach does not travel beyond technical breach, for which it is not compulsory to impose penalty. Such question has to be determined in each case on its own facts and circumstances.

(3) No opinion is expressed on the validity of requirement to carry declarations in form S.T. 18A or S.T. 18AA with goods, in view of no challenge made in the petitions.

(4) The provisions for carrying declaration of the importer in the form No. S.T. 18A or S.T. 18AA by the transporter or carrier is not treated to be mandatorily required and it is held that the production of such declaration later on during the course of enquiry even by the importer is substantial compliance of the provision.

(5) Lastly, the penalty u/s 78(5) linked with value of goods equal to 30 per cent thereof imposable on person in-charge of the goods in transit who is not owner of the goods and who is also not a dealer in the goods, for breach of obligation of divulging information and particulars relating to goods in his charge and the consignor and the consignee is highly unreasonable having no reasonable and proximate nexus with the obligation cast on the transporter and the object of the provision, the same, therefore, is unconstitutional. *State of Haryana and Others Vs. Sant Lal and Another*,

(6) However a reasonable penalty is imposable on transporter as a consequence for breach of obligation to divulge such information truly and faithfully which is in his possession and can reasonably be required of them to obtain from other sources while booking goods for transport. Until any specific provision for levy of tax is enacted by the Legislature, he may be subjected to penalty as envisaged u/s 68 of the Act.

114. As a result of this, Section 78(5) of the Act which is held to be unconstitutional and ultra vires, in each case where orders levying penalty u/s 78(5) to the extent of 30 per cent of the value of the goods has been made is set

aside and the same is sent back to assessing officer concerned to proceed in pursuance of notices issued by him for imposition of penalty for breach of Section 78(2) of the Act in accordance with law keeping in view the position of law stated hereinabove. In other cases pending proceedings in pursuance of impugned notices may be continued and decided in the light of aforesaid decision. The interim orders passed in each case as to release of goods/vehicle shall continue until proceedings are disposed off by the assessing authority. The order shall not affect any other proceedings taken or intended to be taken u/s 78(10) and (11) against the transporter or proceedings against the dealer under any other provisions of the Act.

115. Accordingly these petitions stands disposed of with no order as to costs.