

(2009) 03 GAU CK 0020
In the Gauhati High Court

Jaiprakash Associates Limited (Cement Division)	APPELLANT
Vs	
State of Arunachal Pradesh and Others	RESPONDENT

Date of Decision : 05-03-2009

Acts Referred:

Central Sales Tax Act, 1956 — Section 6
Constitution of India, 1950 — Article 1, 145, 245, 246, 247

Citation : (2009) 22 VST 310

Hon'ble Judges : P.K. Musahary, J; I.A. Ansari, J

Bench : Division Bench

Final Decision : Allowed

Judgement

I.A. Ansari, J.—The petitioners, in this batch of writ petitions, who are involved in various commercial activities, in the State of Arunachal Pradesh, and import various goods from other States, have challenged the constitutionality, legality and validity of the Arunachal Pradesh Goods Tax Act, 2005 (in short, "the Act") and, particularly, Section 3(2)(b) thereof, which imposes tax on the entry of goods, other than non-taxable import, for consumption, use or sale thereof into the local area of the State of Arunachal Pradesh.

2. The levy has been challenged, broadly speaking, on three grounds, namely, (i) that the levy is violative of Article 301 of the Constitution of India inasmuch as the impugned legislation imposes unreasonable restrictions on the freedom of trade, commerce and intercourse and even if the impugned legislation is treated to impose, in public interest, reasonable restrictions, on the freedom of trade, commerce and intercourse, the impugned legislation cannot survive inasmuch as the legislation, in question, does not have previous sanction of the President, which is the requirement of Article 304(b) of the Constitution of India; (ii) that the impugned levy is discriminatory in nature inasmuch as it impedes import of goods into the State of Arunachal Pradesh from other States and Union territories, whereas the levy in question, does not impose any such restriction in respect of the movement or transportation of goods from one part of the State of

Arunachal Pradesh to other part(s) thereof; and (iii) that the impugned legislation aims at augmenting revenue of the State, it is neither regulatory nor compensatory inasmuch as it does not provide any facility to the traders or importers as a class and that the facilities, if any, provided by the State are in the interest of the welfare of the general public and the traders and importers, who are covered by the levy, may be, at best, mere incidental beneficiaries of such facilities, if any, and, hence, the levy is without any authority of law.

3. The respondents resist the writ petitions, their case being, in brief, thus: The imposition of entry tax, in the present case, is intended to generate revenue for the State and that the State utilises the revenue, so generated, for the overall welfare of its people and for developmental activities of the State. At times, unscrupulous dealers/importers were disturbing local markets by bringing goods from outside the States without payment of tax to the Governments of neighbouring States. Such unscrupulous activities lead to unhealthy trade competition between the dealers of the neighbouring States and those of Arunachal Pradesh. The imposition of entry tax, at the border points, checks and prevents goods from entering into the State of Arunachal Pradesh. The impugned levy neither hampers free flow of trade and commerce nor is the impugned levy discriminatory; rather, the levy, in question, protects bona fide interest of the local traders of Arunachal Pradesh. It is the duty of every citizen to pay tax for the transactions, which they conduct in the course of trade and commerce. Hence, in order to check/prevent illegal entry of goods into the State of Arunachal Pradesh, entry tax has been imposed. Such taxation is a reasonable restriction and the State has the authority to impose such restrictions under Article 304(a). The intention of the petitioners is to do business, in the State of Arunachal Pradesh, without paying tax on the goods, which are taxable under the impugned legislation. The petitioners do not want to pay tax for importing goods from outside the State of Arunachal Pradesh, though the same goods can be procured by them from the local market by paying local tax. The locally produced goods are levied under local tax and goods imported from other States are levied under entry tax. Such taxation is not discriminatory inasmuch as the local producers pay local tax and the importers and dealers are required to pay entry tax on the goods, which they import or bring into the State of Arunachal Pradesh. There is, therefore, no merit in the writ petitions and the same deserve dismissal.

4. Appearing on behalf of the writ petitioners, Dr. A.K. Saraf, learned Senior Counsel, contends that the Act is in violation of Article 301 of the Constitution of India inasmuch as Article 301 guarantees freedom of trade, commerce and intercourse throughout the territory of India, but the Act, in question, impedes free movement of goods into the State of Arunachal Pradesh. The restrictions, which the impugned Act so imposes on the freedom of movement of goods, have, according to Dr. Saraf, no sanction in law inasmuch as the imposition of tax, under the impugned legislation, is neither regulatory nor compensatory in nature. Such imposition of tax, contends Dr. Saraf, cannot be sustained in law.

5. Referring to *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, Dr. Saraf points out that the law of taxation is not immune from the guarantee of freedom of trade, commerce and intercourse, which Article 301 provides. Dr. Saraf concedes that it is not every restriction, which can be treated as infringement of the guarantee of freedom of trade, commerce and intercourse provided by Article 301, but only those restrictions, which have direct and immediate impact on the freedom of trade and commerce. However, relying on the *State of Karnataka and Another Vs. Hansa Corporation*, and *Jindal Stripe Ltd. and Others Vs. State of Haryana and Others*, Dr. Saraf contends that in the present case, the impugned levy has a direct impact on the movement of goods and impedes thereby the movement of goods into the State of Arunachal Pradesh inasmuch as whole of the State of Arunachal Pradesh has been defined, under the Act, as a local area.

6. Seeking to derive support from the decisions, rendered in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, and *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, Dr. Saraf submits that a tax, such as the present entry tax, which impedes movement of goods, can be saved only if it can be satisfactorily shown to be either regulatory or compensatory in nature. In the case at hand, the respondents do not even contend, points out Dr. Saraf, that the Act is compensatory in nature. This apart, submits Dr. Saraf, a careful analysis of the provisions of the Act as well as the materials on record clearly reveals that while the entry tax, imposed under the impugned Act, is restrictive in nature, it is not at all compensatory inasmuch as no trading facility is provided to the importers or traders of the goods, as a class, who are affected by the impugned levy. The Act, nowhere, provides or indicates, emphasises Dr. Saraf, that the revenue, realised by way of entry tax, will be utilized for facilitating, either directly or indirectly, trade and commerce. In fact, the State of Arunachal Pradesh, submits Dr. Saraf, has not provided to the importers or traders of the goods, which are imported into, or brought into, the State of Arunachal Pradesh, any facility whatsoever, which can be termed as trading facility. Far from this, submits Dr. Saraf, the respondents, admittedly, utilize the revenue collected from imposition of entry tax, for general welfare and developmental activities of the State. Thus, according to Dr. Saraf, the revenue realized from entry tax, is, in fact, meant for augmenting general revenue of the State and not for providing any specific or particular facility to the dealers or importers of goods, which are subject to entry tax. The entry tax, in the present case, cannot, therefore, be regarded, submits Dr. Saraf, as compensatory.

7. Pointing out that the Act, not being compensatory in nature, ought to have received, in the facts and circumstances of the present case, prior sanction from the President in accordance with the mandatory requirements of the proviso to Article 304(b). Dr. Saraf submits that no sanction from the President was obtained, at any stage, for imposing entry tax on the import of taxable goods. Hence, the impugned legislation, contends Dr. Saraf, having not received the requisite sanction of the President, is not sustainable in law.

8. Dr. Saraf, learned Senior Counsel for the petitioners, has put great emphasis on the affidavits filed by the respondents, and pointed out that it is the admitted case of the respondents that the levy has been imposed to augment general revenue of the State and to arrest entry of goods into the State of Arunachal Pradesh without payment of any tax. The imposition of entry tax is, thus, contends Dr. Saraf, a colourable exercise of power inasmuch as the Act never intended to impose entry tax as a compensatory measure for providing trading facilities, nor does the Act aim at regulating the business; rather, the Act, reiterates Dr. Saraf, aims at augmenting the general revenue of the State. Imposition of such tax, in the name of entry tax, is, according to Dr. Saraf, not sustainable in law. In support of his submissions, Dr. Saraf places reliance on *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, .

9. Controverting the submissions so made on behalf of the petitioners, Mr. R.H. Nabam, learned Senior Government Advocate, submits that the impugned enactment is a legislation under entries 52 and 54 of the State List of the Seventh Schedule and, since a State Legislature is competent to impost entry tax under Article 246(3), read with entries 52 and 54, such a tax cannot be said to be violative of Article 301 inasmuch as a tax, merely because it is an entry tax, does not cause any hindrance to the freedom of trade and commerce. Such legislation, therefore, does not require, according to the learned Senior Government Advocate, previous sanction of the President. In the present case, the imposition of entry tax, according to Mr. Nabam, does not, strictly speaking, required the President's prior sanction. Mr. Nabam also submits that the impugned levy is not discriminatory inasmuch every importer of goods, irrespective of his caste, creed, language, place of birth, etc., is required to pay entry tax on such goods, which he imports into the local area of the State for consumption, use or sale thereof. The accusation, therefore, that the impugned levy is discriminatory in nature and hit by Article 304(a) is also, according to Mr. Nabam, not correct.

10. Mr. Nabam, it may be noted, does not, even pretend, far less contend, that the entry tax, in the present case, is compensatory in nature; rather, concedes Mr. Nabam, that the entry tax, in the present case, aims at augmenting the general revenue of the State, because the State, according to Mr. Nabam, needs economic development and entry tax is one of the measures, adopted by the State, for the purpose of improving its financial strength. Mr. Nabam has further pointed out that though the impugned legislation helps the State, with the collection of entry tax, to augment its general revenue collection, the fact remains that the revenue, so generated, is utilised by the State for State's overall welfare and developmental activities, which, in turn, would obviously help the traders and importers in their commercial activities and, hence, to this extent, the impugned Act may be treated, though specifically not pleaded in the affidavit by the respondents, as compensatory in nature.

11. Countering the submissions, made on behalf of the respondents, Dr. Saraf

points out that when entry tax is collected not entirely as a compensatory measure against providing trading facilities to the importers, the mere fact that the traders would be amongst the beneficiaries of the State policy, cannot justify imposition of the entry tax. With the help of the general collection of revenue, submits Dr. Saraf, the State may take up many welfare activities for its residents and also those, who may come to the State, but such welfare activities, which are not meant at all for traders and/or importers, but for the general public, cannot become the basis of entry tax inasmuch as the traders or importers may become incidental beneficiaries of such welfare activities of the State, but, they, not being the sole or, at least, chief or substantive beneficiaries of such welfare activities, cannot be subjected to payment of entry tax. Dr. Saraf further submits that, when none of the welfare activities of the State are aimed at providing facilities to traders or importers, the imposition of entry tax cannot be regarded as compensatory so as to make the levy constitutionally valid.

12. While considering the rival submissions noted above, what is pertinent to note is that Part XIII of the Constitution of India contains the constitutional scheme with regard to the conduct of trade, commerce and intercourse. In the present case, apart from Articles 301 and 304, some references to Articles 302 and 303 are unavoidable. We, therefore, quote, here in below, Article 301 to Article 304:

301. Freedom of trade, commerce and intercourse.--Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

302. Power of Parliament to impose restrictions on trade, commerce and intercourse.--Parliament may by law impose such restrictions on the freedom of trade, commerce and intercourse between one State and another or within any part of the territory of India as may be required in the public interest.

303. Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce.--(1) Notwithstanding anything in Article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

(2) Nothing in Clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

304. Restrictions on trade, commerce and intercourse among States.--Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law--

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in the State are, subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no bill or amendment for the purposes of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

13. Article 1, if we may point out, conceives India as a Union of States and declares that the territory of India shall comprise of the territories of the States, the Union territories and such other territories as may be acquired.

14. It is in the backdrop of the fact that Article 1 conceives India as a Union of States that the constitutional scheme for the conduct of trade, commerce and intercourse, contained in Part XIII, needs to be analyzed. What becomes glaringly noticeable to the eyes are the two expressions used in Article 301, namely, "throughout the territory of India" and "subject to the other provisions of this part". The use of the words "throughout the territory of India" shows that Part XIII conceives India as one economic unit. To appreciate as to why Article 301 guarantees freedom of trade, commerce and intercourse "throughout the territory of India", the background in which Article 301 came to be enacted needs to be borne in mind.

Background events

15. Before the industrial revolution, the society, world over, was mainly agriculture based; there were small principalities and very little quantity of goods moved from one area to another, because goods were, ordinarily, produced for consumption by the producers themselves, such as, landowners and their tenants. Petty artisans, normally, produced very little commodities for sale. With the industrial revolution, expansion of industries took place, which gave rise to larger production of goods and this resulted into faster movement of goods to distant places. The trade-barriers were, therefore, required to be minimised in order to avoid obstructions to the free movement of goods. Because of the fact that the makers of our Constitution conceived India as a strong economic unit, it was but natural for them to introduce into our Constitution a meaningful scheme for growth of industries so as to strengthen the economic base of India. The makers of our Constitution knew that no meaningful growth of industries is achievable unless obstructions in the movement of the goods were, if not completely removed, at least, reduced as much as possible.

16. Before India achieved her independence, the western world, particularly, Europe was, as already indicated above, fragmented into small principalities having toll-barriers imposing toll taxes and these toll-barriers caused hindrance

to the movement of goods resulting into obstructions to the growth of industries and commerce in those countries.

17. Having realised that unless these trade barriers were removed, no real growth of industry was possible, these trade barriers were started being removed. Having noticed the history of development of industries all over the world, and in order to give India strong economic base, the makers of our Constitution incorporated, in Part XIII, a specific Constitutional scheme for conduct of trade, commerce and intercourse and while making this scheme, they naturally considered and treated India as one economic unit.

18. No wonder, therefore, that the trade, commerce and intercourse were guaranteed to be free "throughout the territory of India", which, as Article 1 reflects, consists of various States and Union territories. However, as the conduct of every facet of life needs some regulations and regulatory measures, the freedom of trade, commerce and intercourse too could not have been left absolutely free or completely without any regulation. It is, in this light, that the words "subject to the other provisions of this part", occurring in Article 301, need to be read. Some of these aspects of our Constitutional scheme succinctly surface from the decision of the Constitution Bench, in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, wherein the court, at paragraph 34, observed as follows:

In drafting the relevant articles of Part XIII the makers of the Constitution were fully conscious that economic unity was absolutely essential for the stability and progress of the federal policy which had been adopted by the Constitution for the governance of the country. Political freedom which had been won, and political unity which had been accomplished by the Constitution, had to be sustained and strengthened by the bond of economic unity. It was realised that in course of time different political parties believing in different economic theories or ideologies may come in power in the several constituent units of the Union, and that may conceivably give rise to local and regional pulls and pressures in economic matters. Local or regional fears or apprehensions raised by local or regional problems may persuade the State Legislature to adopt remedial measures intended solely for the protection of regional interests without due regard to their effect on the economy of the nation as a whole. The object of Part XIII was to avoid such a possibility. Free movement and exchange of goods throughout the territory of India is essential for the economy of the nation and for sustaining and improving living standards of the country. The provision contained in Article 301 guaranteeing the freedom of trade, commerce and intercourse is not a declaration of a mere platitude, or the expression of a pious hope of a declaratory character; it is not also a mere statement of a directive principle of State policy; it embodies and enshrines a principle of paramount importance that the economic unity of the country will provide the main sustaining force for the stability and progress of the political and cultural unity of the country. In appreciating the significance of these general considerations we

may profitably refer to the observations made by Cardozo, J., in *Charles H. Baldwin v. G.A.F. Seeling* [1934] 294 U.S. 511 at page 523 : 79 Law Ed. 1032 at page 1038 while he was dealing with the commerce clause contained in Article 1, Section 8, Clause 3 of the American Constitution. "This part of the Constitution", observed Cardozo J., "was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together and that in the long run prosperity and salvation are in union and not division".

19. From the above observations made in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , it is clear that our Constitution makers wanted to ensure freedom of movement and exchange of goods "throughout the territory of India" in order to strengthen the economic base of the nation and for sustaining and improving the living standard of our countrymen.

20. Pointing out that by granting freedom of trade throughout India, Article 301, primarily, aims at removing the barriers in the "movement" or "transportation" part of the goods, the Supreme Court in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , observed as follows:

50. Let us now revert to Article 301 and ascertain the width and amplitude of its scope. On a careful examination of the relevant provisions of Part XIII as a whole as well as the principle of economic unity which it is intended to safeguard by making the said provisions, the conclusion appears to us to be inevitable that the content of freedom provided for by Article 301 was larger than the freedom contemplated by Section 297 of the Constitution Act of 1935, and whatever else it may or may not include, it certainly includes movement of trade which is of the very essence of all trade and is its integral part. If the transport or the movement of goods is taxed solely on the basis that the goods are thus carried or transported that, in our opinion, directly affects the freedom of trade as contemplated by Article 301. If the movement, transport or the carrying of goods is allowed to be impeded, obstructed or hampered by taxation without satisfying the requirements of Part XIII the freedom of trade on which so much emphasis is laid by Article 301 would turn to be illusory. When Article 301 provides that trade shall be free throughout the territory of India primarily it is the movement part of the trade that it has in mind and the movement or the transport part of trade must be free subject of course to the limitations and exceptions provided by the other articles of Part XIII. That we think is the result of Article 301 read with the other articles in Part XIII.

Whether taxing statutes, enacted under Part XII, are outside the purview of Part XIII of the Constitution of India?

21. Alive to the fact that fiscal barriers impede free flow of goods and that the growth of trade or commerce is not possible to achieve unless the movement of goods is made free from unreasonable fiscal barriers, Article 301 seeks to ensure that tax shall not be imposed on movement of goods solely for the reason that

the goods are carried to, or transported through, a given State, for, if such restrictions are not avoided, the freedom of trade cannot be achieved; The question, therefore, which naturally arose, was as to whether tax laws or fiscal legislations were beyond the constitutional scheme of the freedom of trade, commerce or intercourse. Consequently, addressing the question as to whether tax or fiscal legislation stood excluded from the provisions of Part XIII and whether tax laws were immune from the freedom guaranteed under Article 301, the Supreme Court in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , observed:

51. Thus the intrinsic evidence furnished by some of the articles of Part XIII shows that taxing laws are not excluded from the operation of Article 301; which means that tax laws can and do amount to restrictions freedom from which is guaranteed to trade under the said Part. Does that mean that all tax laws attract the provisions of Part XIII whether their impact on trade or its movement is direct and immediate or indirect and remote? It is precisely because the words used in Article 301 are very wide, and in a sense vague and indefinite that the problem of construing them and determining their exact width and scope becomes complex and difficult. However, in interpreting the provisions of the Constitution we must always bear in mind that the relevant provision "has to be read not in vacuo but as occurring in a single complex instrument in which one part may throw light on another". (*Vide James v. Commonwealth of Australia* [1936] AC 578 at page 613). In construing Article 301 we must, therefore, have regard to the general scheme of our Constitution as well as the particular provisions in regard to taxing laws. The construction of Article 301 should not be determined on a purely academic or doctrinaire considerations; in construing the said article we must adopt a realistic approach and bear in mind the essential features of the separation of powers on which our Constitution rests. It is a federal Constitution which we are interpreting, and so the impact of Article 301 must be judged accordingly. Besides, it is not irrelevant to remember in this connection that the article we are construing imposes a constitutional limitation on the power of the Parliament and State Legislatures to levy taxes, and generally, but for such limitation, the power of taxation would be presumed to be for public good and would not be subject to judicial review or scrutiny. Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld. If the said argument is accepted it would mean, for instance, that even a legislative enactment prescribing the minimum wages to industrial employees may fall under Part XIII because in an economic sense an additional wage bill may indirectly affect trade

or commerce. We are, therefore, satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be : Does the impugned restriction operate directly or immediately on trade or its movement? It is in the light of this test that we propose to examine the validity of the Act under scrutiny in the present proceedings.

22. From the above observations made in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , it is clear that the apex court answered, in the negative, the question as to whether the tax laws are immune from the operation of Article 301. Having held that tax laws were not immune from the operation of the Article 301 or, for that matter, the constitutional scheme, embodied in Part XIII, the Constitution Bench, in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , clarified that it is not all taxes, which will hit Article 301, but only such taxes, which, directly and immediately, restrict trade, for, it is only direct restrictions causing impediments to the movement of goods that Article 301 seeks to avoid and nullify. It is in this light that the following further observations, made in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , need to be read.

52. We do not think it necessary or expedient to consider what other laws would be affected by the interpretation we are placing on Article 301 and what other legislative entries would fall under Part XIII. We propose to confine our decision to the Act with which we are concerned. If any other laws are similarly challenged the validity of the challenge will have to be examined in the light of the provisions of those laws. Our conclusion, therefore, is that when Article 301 provides that trade shall be free throughout the territory of India, it means that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States themselves. It is the free movement or the transport of goods from one part of the country to the other that is intended to be saved, and if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of Article 301, and its validity can be sustained only if it satisfies the requirements of Article 302 or Article 304 of Part XIII. At this stage we think it is necessary to repeat that when it is said that the freedom of the movement of trade cannot be subject to any restrictions in the form of taxes imposed on the carriage of goods or their movement all that is meant is that the said restrictions can be imposed by the State Legislatures only after satisfying the requirements of Article 304(b). It is not as if no restrictions at all can be imposed on the free movement of trade.

Whether Article 301 applies both to inter-State as well as intra-State movement of goods?

23. What, thus, surfaces from the above discussion, is that Article 301 guarantees freedom of trade, commerce and intercourse "throughout the territory of India". It is, however, not freedom from all laws that Article 301 aims at protecting; rather, it guarantees freedom only from such laws, which restrict

or impede the movement or transportation of goods or adversely affect the activities of trade and commerce amongst the States. In effect, Article 301 casts an obligation on the legislative power of the Parliament and the States to ensure that the trade, commerce and intercourse throughout India shall be free. Article 301, therefore, refers to freedom from laws, which go beyond regulations, and which put restrictions on, or prevent, movement beyond States or within the States, for, Article 301 applies not only to inter-State trade, commerce and intercourse, but also to intra-State trade, commerce and intercourse. In other words, when Article 301 guarantees freedom of trade and commerce "throughout the territory of India", it obviously implies that free flow of goods is guaranteed not only from one State to another, but also from one place to another in the same State. This becomes clearer, when one notices that Article 302 empowers the Parliament to impose restrictions on the freedom of trade, commerce or intercourse not only "between one State and another" but also "within any part of the territory of India", which would mean that the Parliament can impose restrictions not only on the movement of goods from one State to another, but also from one part of a State to another part thereof. *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , therefore, points out that Article 301 not only covers inter-State trade but also intra-State trade.

A brief survey of the scheme of Articles 301, 302, 303 and 304.

24. What may, now, be pointed out is that though Article 301 restrains both the Parliament and the State Legislatures from enacting laws including tax laws, which create hindrance to the freedom of trade, commerce and intercourse throughout India, Article 302 permits the Parliament to impose, by law, such restrictions on these freedoms as may be required in public interest. Article 303, however, clarifies that neither Parliament nor the Legislature of States shall have the power to make any law giving or authorizing the making of any discrimination between one State and another by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule. In other words, Article 303 clarifies that even in public interest, Parliament is not authorized to make laws giving preference to one State over the other. This restriction is, however, subject to one exception, the exception being that the Parliament is left with the discretion to make laws giving preferential treatment or making discriminatory provisions if such laws become necessary for the purpose of dealing with the situation arising from scarcity of goods in any part of the territory of India.

25. Thus, a State Legislature, apart from the limitation imposed by Article 301, has the limitation of not making laws to give preference or make discrimination between one State and another, while making laws, in exercise of its powers, relating to trade, commerce and intercourse. However, this limitation, on the State Legislature, is lifted in two cases, namely, that the State may, under Article 304(a), impose, on goods, imported from sister States or Union territories, any tax to which similar goods manufactured in its own State are subjected, but not

so as to discriminate between the imported goods and the goods manufactured in the State. In other words, Article 304(a) authorizes State Legislature to impose non-discriminatory tax on goods imported from sister States even if such law interferes with the freedom of trade, commerce and intercourse guaranteed by Article 301. Apart from non-discriminatory taxes, the ban imposed, under Article 303(1), on the State's power to impose restrictions on the freedom of trade, commerce and intercourse, stands lifted if the legislation fulfils three conditions, which Article 304(b) embodies, namely, (i) that such restrictions shall be reasonable, (ii) the same shall be in public interest and, above all, (iii) no Bill or amendment for the purpose of Clause (b) or for making amendment thereto shall be introduced or moved in the Legislature of any State without previous sanction of the President. To be more precise, one can point out that even restrictions, which may be reasonable and are also in public interest, cannot be imposed on the freedom of trade and commerce unless prior sanction of the President has been procured by the State before introduction of the Bill or before making the legislation.

Regulatory measures restricting movement of goods--If completely barred under the Constitutional scheme or is it only such laws, which, directly and immediately, impact free flow of trade and commerce, which stand barred.

26. A microscopic reading of Article 304 of the Constitution of India makes it clear that the legality and validity of a given levy has to be examined with reference to both Clause (a) as well as Clause (b) of Article 304 inasmuch as both these clauses of Article 304 operate in different spheres. While Article 304(a) speaks about imposition of non-discriminatory taxes upon goods imported from outside the State or Union Territory, Article 304(b) relates to imposition of reasonable restriction, as may be required in public interest, by a State on the freedom of trade, commerce and intercourse with other States or within the State, which imposes such restrictions.

27. It may be noted that while Article 304(a) relates to inter-State movement of goods, Article 304(b) relates to both inter-State as well as intra-State movement of goods. Moreover, a calm and careful analysis of Article 304(b) would show that Clause (b) allows the State Legislature to impose reasonable restrictions on the movement of goods provided they are "in public interest" and prior sanction of the President has been obtained before. moving the Bill in the Legislature of the State. Even when a non-discriminatory tax imposes restrictions, the same has to be not only reasonable and in public interest, but that such a fiscal legislation ought to comply with the proviso to Article 304(b).

28. In short, if a non-discriminatory tax is imposed and such tax imposes restrictions, in the inter-State or intra-State movement of goods, the same has to comply with the proviso to Article 304(b) of the Constitution and must be reasonable and in public interest. The word "and" as mentioned in Article 304(a) will have to be read, while connecting the same to Article 304(b), conjunctively or else, the special provisions of Article 304(b) would stand defeated.

29. The use of the word "and" conveys a cumulative sense and requires fulfilment of all the conditions that it joins together. It is an antithesis to the word "or". The word "or" is a disjunctive article that makes an alternative, generally corresponding to "either this or that". It is not in dispute that the word "and" can, indeed, be used, at times, in a disjunctive sense and the word "or" can be used in a conjunctive sense provided that such construction becomes imperative so as to give effect to the manifest intention of the Legislature. However, such alteration or the meaning ought not to be resorted to unless some other part of the same statute or the manifest intention of the Legislature necessitates such a construction.

30. A close and patient examination of Article 304 would reveal the Legislature's definite intention to use the word "and" conjunctively inasmuch as Article 304(a) only speaks of inter-State trade; whereas Article 304(b) speaks about restrictions on intra-State as well as and inter-State movement of trade and commerce. If the word "and" is disjunctively construed between Article 304(a) and Article 304(b), then, the freedom guaranteed, under Article 301, and the power given to the State Legislature under Article 304(b) to impose reasonable restriction, in public interest, with prior sanction of the President, would become redundant and otiose.

31. A conjoint reading of Articles 301 - 304 of the Constitution would go to show that the State Legislature has no power whatsoever to impose a discriminatory tax. Although Parliament is, under Article 302, authorized to give preference or make or authorize the making of any discrimination, if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India, the fact remains that if the word "and" is read as "or", then, either compliance of Article 304(a) or Article 304(b) would be sufficient. In such event, a situation may develop, where a State Legislature would impose a discriminatory tax, by taking prior sanction of the President. This would amount to doing injustice to the intention of the Legislature, for even the Parliament has been debarred from imposing discriminatory tax.

32. It needs to be borne in the mind that every State enactment, relating to levy, shall have to be tested with reference to both Clause (a) as well as Clause (b) of Article 304; or else, Article 301 would mean freedom in respect of trade, commerce and intercourse in respect of inter-State movement of goods only and the use of the words "with or within that State", appearing in Article 304(b), would be rendered redundant. Furthermore, if such an interpretation is accepted, the State Legislature would be empowered to impose non-discriminatory taxes in the form of restrictions which even the Parliament cannot do under Article 302 of the Constitution of India.

33. If the word "and", appearing between Clauses (a) and (b) of Article 304, is read as "or", then, a statute, levying non-discriminatory taxes, cannot be assailed under Articles 301 and 304(b), though such taxing statute may be, in a

given case, imposing restrictions. If this proposition is accepted, the logical result would be that even a discriminatory tax would become valid on the fulfilment of the conditions of the provisions of Article 304(b) and its proviso.

34. From the scheme of Article 301 to Article 304 of the Constitution, it will be clear that where tax is discriminatory, the same shall be violative of Article 304(a) of the Constitution of India and is liable to be struck down. No further enquiry is required to be made in such a case and the Presidential assent, if obtained, would not validate such a fiscal legislation. In a case, where a tax is not discriminatory, but imposes, a restriction, the same has to be reasonable and in public interest and, further, the same can be imposed only with the previous sanction of the President.

35. While considering the above aspect of the case, it needs to be noted that the apex court in *State of Karnataka and Another Vs. Hansa Corporation*, came to a finding that the tax imposed was a non-discriminatory tax inasmuch the tax did not discriminate between Scheduled goods manufactured and produced within the State of Karnataka and those goods, which are imported from outside. Despite such a clear finding, reached in *State of Karnataka and Another Vs. Hansa Corporation*, the apex court, at paragraph 32 of its decision, considered the contention raised as regards Article 304(b) to the effect that the said levy would have a direct and an immediate impact on the movement of goods and, consequently, would infringe the freedom of trade guaranteed by Article 301. Again, at paragraph 37, the Supreme Court summed up stating, inter alia, that the impugned tax was not discriminatory in character as envisaged by Article 304(a) of the Constitution and although it imposes restrictions, but the said restrictions are reasonable and in public interest and the Act having subsequently obtained the assent of the President, the proviso to Article 304(b) must be held to have been complied with. We need to point out that if the word "and" were to be read as "or", then, the Supreme Court need not have gone into the contention raised in respect of Article 304(b) after having decided that the levy was a non-discriminatory tax.

36. We need to also point out that the Constitution Bench of the Supreme Court in *Andhra Sugars Ltd. and Another etc. Vs. State of Andhra Pradesh and Others*, held that nondiscriminatory tax on goods does not offend Article 301 unless it directly impedes the free movement or the transportation of goods. The celebrated author, H.M. Seervai, in his book "Constitutional Law of India", at paragraph 24.39, observed that the two clauses of Article 304 are connected by the word "and" and it is clear that "and" means "and/or" thereby empowering the State Legislature to exercise the power separately or together. This aspect of matter is emphasised by the fact that the power under Article 304(a) is unqualified and the power under Article 304(b) is qualified by the proviso.

37. What can also not be ignored is that while Article 304(a) deals exclusively with the power to impose tax, Article 304(b) relates to the imposition of restrictions, which may be an after-effect of imposition of tax of some legislation,

other than fiscal legislation. Whereas the imposition of discriminatory tax is totally barred under the scheme of our Constitution, reasonable restrictions, imposed in public interest, which may have an effect of the imposition of a non-discriminatory tax can be valid, if prior sanction of the President is obtained under the proviso to Article 304(b) of the Constitution.

38. We have already noticed that Article 301 guarantees freedom of trade and commerce "throughout the territory of India". This freedom is not, however, absolute, for, in an orderly society, the conduct of trade and commerce cannot be left completely free from regulations. Regulatory measures, therefore, cannot be regarded as impediments on the freedom of trade and commerce. It is for this reason that the Constitution Bench, in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , makes it clear that though tax laws are not immune from Article 301, all tax laws do not infringe Article 301. The question, which, naturally, arises is this : what can be these laws, which may hit Article 301 or be treated as infringement of the guarantee given by Article 301? Since it is the movement part of the goods, which Article 301 guarantees, the Supreme Court makes it clear, in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , that only such tax laws, which, directly and immediately, impedes the free flow of trade and commerce that will be impermissible under Article 301. However, a law, which has direct and immediate impact on the movement of goods, can be saved only if it falls in any of the permissible restrictions, which Articles 302, 303 and 304 perceive.

39. It may also be noted that in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , the three appellants before the Supreme Court were tea companies, two of whom carried on the trade of growing tea in Assam and the third one carried on its trade at Jalpaiguri. They carried their tea to Calcutta in order that it might be sold in Calcutta for consumption and sale outside India. Tea, produced in Jalpaiguri, had to move through a few miles of the territory of the State of Assam. Besides the tea, which was carried by railways, a substantial quantity of tea was also carried by road or by inland waterways and, as such, became liable to tax leviable under the Assam Taxation (On goods carried by Roads or Inland Waterways) Act, 1954, for, this Act levied tax on certain goods, such as tea, which was carried by road and inland waterways. The principal ground of attack on the legislation was that it violated the provisions of Article 301 and was not saved by Article 304(b).

40. It is of immense importance to note that in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , three views were expressed. The views, expressed in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , by the learned Chief Justice B.P. Sinha, which the Supreme Court, in its subsequent judgment in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , described as the narrow view, was that taxation simpliciter was not within the ambit of Article 301 and a tax, on the movement of goods or passengers, did not necessarily connote impediment or restraint in the matter of

trade and commerce. Drawing a distinction between laws of taxation, which are enacted for the purpose of general revenue, and taxation laws, which are enacted for the purpose of making discrimination or giving preference, the learned Chief Justice took the view that taxing statutes enacted for the purpose of general revenue were outside the purview of Article 301 and it is only those laws of taxation, which were made for the purpose of making discrimination or giving preference, which fall within the ambit of Article 301. The learned Chief Justice concluded these views in the following words:

...Thus, on a fair construction of the provisions of Part XIII, the following propositions emerge: (1) trade, commerce and intercourse throughout the territory of India are not absolutely free, but are subject to certain powers of legislation by Parliament or the Legislature of a State; (2) the freedom declared by Article 301 does not mean freedom from taxation simpliciter, but does mean freedom from taxation which has the effect of directly impeding the free flow of trade, commerce and intercourse; (3) the freedom envisaged in Article 301 is subject to non-discriminatory restrictions imposed by Parliament in public interest (Article 392); (4) even discriminatory or preferential legislation may be made by Parliament for the purpose of dealing with an emergency like a scarcity of goods in any part of India [Article 303(2)]; (5) reasonable restrictions may be imposed by the Legislature of a State in the public interest [Article 304(b)]; (6) nondiscriminatory taxes may be imposed by the Legislature of a State on goods imported from another State or other States, if similar taxes are imposed on goods produced or manufactured in that State [Article 304(a)]; and lastly (7) restrictions imposed by existing laws have been continued, except in so far as the President may by order otherwise direct (article 305). (pages 242).

41. The other view, which may be called the third view, as expressed by Shah, J, and described, in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , as the widest view was that the freedom, contemplated under Article 301, was freedom of trade, commerce and intercourse in every aspect of all such activities, which constitute commerce and intercourse and not merely restrictions on the movement or transportation part of goods. Shah, J (as his Lordship then was) expressed his view thus, "The guarantee of freedom of trade and commerce is not addressed merely against prohibitions, complete or partial; it is addressed to tariffs, licensing, marketing regulations, price-control, nationalization, economic or social planning, discriminatory tariffs, compulsory appropriation of goods, freezing or stand-still orders and similar other impediments operating directly and immediately on the freedom of commercial intercourse as well. Every sequence in the series of operations which constitutes trade or commerce is an act of trade or commerce and burdens or impediments imposed on any such step are restrictions on the freedom of trade, commerce and intercourse. What is guaranteed is freedom in its widest amplitude--freedom from prohibition, control, burden or impediment in commercial intercourse."

42. However, the majority, in *Atiabari Tea Co., Ltd. Vs. The State of Assam* and

Others, , differed from what the learned Chief Justice had concluded and did not accept as the correct proposition that tax laws are governed by Part XII of the Constitution and were outside Part XIII. The majority did not also agree with the views expressed by Shah, J. Hence, speaking for the majority, in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , Gajendragadkar, J, observed as follows:

...It is a federal Constitution which we are interpreting, and so the impact of Article 301 must be judged accordingly. Besides, it is not irrelevant to remember in this connection that the article we are construing imposes a constitutional limitation on the power of the Parliament and the State Legislatures to levy taxes, and generally, but for such limitation, the power of taxation would be presumed to be for public good and would not be subject to judicial review or scrutiny. Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld....

43. In short, thus, in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , while the narrow view was to the effect that unless a tax law is enacted for the purpose of making discrimination or giving preferential treatment, such a law would not fall within the purview of Article 301, the majority view was that apart from discrimination or preferential treatment, it was the movement or transport part of goods, which Article 301 seeks to make free, and, hence, any such law, which, directly and immediately, restrict the free flow or movement of goods would fall within the ambit of Article 301. The third view, expressed by Shah, J, was that it is not merely movement part of the goods, which Article 301 seeks to make free, but also trade and commerce, in all its varied aspects and in all its activities, shall be free.

44. In *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , which is a decision of a seven-judge Bench, the correctness of the majority view, expressed in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , came to be questioned. Having examined all the three views, as indicated hereinabove, the majority, in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , held that the widest view, expressed by Shah, J, being based on purely textual interpretation of Part XIII of the Constitution of India, was not the correct view, for, this view ignores altogether, amongst others, the reality that the freedom of trade, commerce and intercourse in a society, regulated by law, must be understood in the context of working of an orderly society and the effect of such a view, if conceded to, would be that even when a State Legislature wishes to control or regulate trade,

commerce and intercourse in such a way as to facilitate its free movement, it must, nevertheless, proceed to make a law under Article 304(b) and that no such Bill can be introduced or moved in the Legislature of the States without the previous sanction of the President. In other words, the views of Shah, J, if acceded to, would mean that even when a Bill seeks to impose restrictions in order to facilitate trading or commercial activities, such a Bill has to receive the sanction of the President under Article 304(b). Such an interpretation, according to the majority, in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , would, if accepted, result in stoppage of every Bill undermining thereby effective legislation, which may, at times, be, otherwise, urgent in nature. Pointing to the difficulties in accepting the views expressed by Shah, J, the court, in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , observed as follows:

11. The most serious objection to the widest view canvassed before us is that it ignores altogether that in the conception of freedom of trade, commerce and intercourse in a community regulated by law freedom must be understood in the context of the working of an orderly society. The widest view proceeds on the footing that Article 301 imposes a general restriction on legislative power and grants a freedom of trade, commerce and intercourse in all its series of operations, from all barriers, from all restrictions, from all control and from all regulation, and the only qualification that is to be found in the article is the opening clause, namely, subject to the other provisions of Part XIII. This in actual practice will mean that if the State Legislature wishes to control or regulate trade, commerce and intercourse in such a way as to facilitate its free movement, it must yet proceed to make a law under Article 304(b) and no such Bill can be introduced or moved in the Legislature of a State without the previous sanction of the President. The practical effect would be to stop or delay effective legislation which may be urgently necessary. Take for example, a case where in the interests of public health, it is necessary to introduce urgently legislation stopping trade in goods which are deleterious to health, like the trade in diseased potatoes in Australia. If the State Legislature wishes to introduce such a Bill, it must have the sanction of the President. Even such legislation as imposes traffic regulations would require the sanction of the President. Such an interpretation would, in our opinion, seriously affect the legislative power of the State Legislatures which power has been held to be plenary with regard to subjects in List II. The States must also have revenue to carry out their administration and there are several items relating to the imposition of taxes in List II. The Constitution-makers must have intended that under those items the States will be entitled to raise revenue for their own purposes. If the widest view is accepted, then there would be for all practical purposes, an end of State autonomy even within the fields allotted to them under the distribution of powers envisaged by our Constitution. An examination of the entries in the Lists of the Seventh Schedule to the Constitution would show that there are a large number of entries in the State List (List II) and the Concurrent List (List III) under which

a State Legislature has power to make laws. Under some of these entries the State Legislature may impose different kinds of taxes and duties, such as property tax, profession tax, sales tax, excise duty, etc., and legislation in respect of any one of these items may have an indirect effect on trade and commerce. Even laws other than taxation laws, made under different entries in the Lists referred to above, may indirectly or remotely affect trade and commerce. If it be held that every law made by the Legislature of a State which has a repercussion on tariffs, licensing, marketing regulations, price-control, etc., must have the previous sanction of the President, then the Constitution in so far as it gives plenary power to the States and State Legislatures in the fields allocated to them would be meaningless. In our view the concept of freedom of trade, commerce and intercourse postulated by Article 301 must be understood in the context of an orderly society and as part of a Constitution which envisages a distribution of powers between the States and the Union, and if so understood, the concept must recognise the need and the legitimacy of some degree of regulatory control, whether by the Union or the States : this is irrespective of the restrictions imposed by the other articles in Part XIII of the Constitution. We are, therefore, unable to accept the widest view as the correct interpretation of the relevant articles in Part XIII of the Constitution.

45. As regards the narrow view expressed by the learned Chief Justice, in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , which was to the effect that taxing laws were governed by the provisions of Part XII and except when a tax law is made under Article 304(a), Article 301 did not come into play or, in other words, none of the provisions of Part XIII, except Article 304(a), extended to taxing laws, it may be pointed out that the majority, in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , did not accept this view either; rather, accepting the majority view expressed in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , the majority, in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , held thus, "It would appear from what we have stated above that this interpretation consists of two main parts : one part is that taxation simpliciter is not within the terms of Article 301 and the second part is that Article 301 must take colour from the provisions of Article 303 which, it is said, is restricted to legislation with respect to entries relating to trade and commerce in any of the Lists in the Seventh Schedule. In *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, this Court dealt with the correctness or otherwise of this narrow interpretation and by the majority decision held against it. The majority judgment in the *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , deals with the arguments advanced in support of the interpretation in detail and as we are substantially in agreement with the reason given in that judgment, we do not think that any useful purpose would be served by repeating them. It is enough to point out that though the power of levying tax is essentially for the very existence of Government, its exercise may be controlled by constitutional provisions made in that behalf. It cannot be laid down as a general proposition

that the power to tax is outside the purview of any constitutional limitations. We have carefully examined the provisions in Part XII of the Constitution and are unable to agree that those provisions exhaust all the limitations on the power to impose a tax. The effect of Article 265 was considered in the majority decision and it was pointed out that the power of taxation under our Constitution was subject to the condition that no tax shall be levied or collected except by authority of law. Article 245 which deals with the extent of laws made by Parliament and by the Legislatures of States expressly states that the power of Parliament and of the State Legislatures to make laws is, "subject to the provisions of this Constitution". The expression "subject to the provisions of this Constitution" is surely wide enough to take in the provisions of both Part XII and Part XIII. In view of the provisions of Article 245, we find it difficult to accept the argument that the restrictions in Part XIII of the Constitution do not apply to taxation laws. As to the argument that Article 301 must take colour from Article 303, we are unable to accept as correct the argument that the provisions of Article 303 must delimit the general terms of Article 301. It seems to us that so far as Parliament is concerned, Article 303(1) carves out an exception from the relaxation given in favour of Parliament by Article 302; the relaxation given by Article 302 is itself in the nature of an exception to the general terms of Article 301. It would be against the ordinary canons of construction to treat an exception or proviso as having such a repercussion on the interpretation of the main enactment so as to exclude from it by implication what clearly falls within its express terms."

Regulatory measures vis-?-vis compensatory tax

46. Having, thus, agreed with the views expressed by the majority, in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , the seven-judge Bench, in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , further held that regulatory measures, which do not impede the freedom of trade, commerce and intercourse, and compensatory taxes for use of the trading facilities are not hit by Article 301, for, such regulatory measures or compensatory taxes, instead of hampering trade, commerce and intercourse, facilitate them.

47. In short, in the opinion of the majority, in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , regulatory measures, which do not impede freedom of trade, commerce and intercourse, are not hit by Article 301 nor can compensatory taxes, which are imposed for providing trading facilities to the traders, as a class, be said to be violative of Article 301. The majority view, so expressed, in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , runs as under:

14. After carefully considering the arguments advanced before us we have come to the conclusion that the narrow interpretation canvassed for on behalf of the majority of the States cannot be accepted, namely, that the relevant articles in Part XIII apply only to legislation in respect of the entries relating to trade and

commerce in any of the Lists of the Seventh Schedule. But we must advert here to one exception which we have already indicated in an earlier part of this judgment. Such regulatory measures as do not impede the freedom of trade, commerce and intercourse and compensatory taxes for the use of trading facilities are not hit by the freedom declared by Article 301. They are excluded from the purview of the provisions of Part XIII of the Constitution for the simple reason that they do not hamper trade, commerce and intercourse but rather facilitate them.

...

17. We have, therefore, come to the conclusion that neither the widest interpretation nor the narrow interpretations canvassed before us are acceptable. The interpretation which was accepted by the majority in the *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, is correct, but subject to this clarification. Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Article 301 and such measures need not comply with the requirements of the proviso to Article 304(b) of the Constitution.

48. Having laid down the parameters of the freedom guaranteed under Article 301, the majority examined the scheme of the Act, which was under challenge in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, and having found that the tax imposed by the enactment, questioned therein, was compensatory in nature, it upheld the enactment. This aspect can be discerned from the observations made in paragraph Nos. 19 and 20, which run as follows:

19.... The taxes are compensatory taxes which instead of hindering trade, commerce and intercourse facilitate them by providing roads and maintaining the roads in a good state of repairs. Whether a tax is compensatory or not cannot be made to depend on the preamble of the statute imposing it. Nor do we think that it would be right to say that a tax is not compensatory because the precise or specific amount collected is not actually used in providing any facilities. It is obvious that if the preamble decided the matter, then the mercantile community would be helpless and it would be the easiest thing for the Legislature to defeat the freedom assured by Article 301 by stating in the preamble that it is meant to provide facilities to the tradesmen. Likewise actual user would often be unknown to tradesmen and such user may at some time be compensatory and at others not so. It seems to us that a working test for deciding whether a tax is compensatory or not is to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities. It would be impossible to judge the compensatory nature of a tax by a meticulous test and in the nature of things that cannot be done.

20. Nor do we think that it will make any difference that the money collected

from the tax is not put into a separate fund so long as facilities for the trades people who pay the tax are provided and the expenses incurred in providing them are borne by the State out of whatever source it may be. In the cases under our consideration the tax is based on passenger capacity of commercial buses and loading capacity of goods vehicles; both have some relation to the wear and tear caused to the roads used by the buses. In basing the taxes on passenger capacity or loading capacity, the Legislature has merely evolved a method and measure of compensation demanded by the State, but the taxes are still compensation and charge for regulation.

Birth of the concept of compensatory tax and working test for determination whether a levy is compensatory or not.

49. Thus, *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, clearly takes the view that those taxes, which facilitate trade, commerce and intercourse, by providing roads or maintaining roads in a good state of repairs, are compensatory in nature. This decision also lays down a working test for answering the question as to whether a tax is compensatory or not, the working test being whether the people are having the use of certain facilities for better conduct of their business and paying "patently not much more than what is required for providing the facilities". In *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , as the tax was found to have imposed restrictions on the freedom of trade, the enactment, in question, was declared void, for, the State Legislature had not complied with the mandatory provisions of Article 304(b). In *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , however, the court, as reflected from para 19 of the decision, on noticing that the tax imposed was really compensatory in nature, upheld the levy. The court further clarified, in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, of the decision. "...If a statute fixes a charge for a convenience or service provided by the State or an agency of the State, and imposes it upon those who choose to avail themselves of the service or convenience, the freedom of trade and commerce may well be considered unimpaired."

50. Thus, the concept of compensatory tax, which has not been specifically incorporated, in our Constitution, was judicially evolved in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, as a part of the regulatory charge, the concept of compensatory tax being that the taxes, which would, otherwise, interfere with unfettered freedom under Article 301, will still be protected from the vice" of unconstitutionality if such taxes are compensatory. For the purpose of determining as to whether a given levy is or is not compensatory, *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, prescribed a working test, the working test being whether the people, involved in the trading activities, have been using the facilities for better conduct of their business or not and, whether for such "use of facilities", the users of such facilities are paying patently much more than what is required

by the State in order to provide such facilities to the traders. In short, thus, the concept of compensatory tax is an exception to Article 301.

Changes in the working test in the realm of compensatory tax.

51. It is, now, pertinent to point out that a three-judge Bench of the apex court, in its later decision, in *G.K. Krishnan and Others Vs. State of Tamil Nadu and Others*, , speaking through Mathew, J, observed that "the very idea of a compensatory tax is a service more or less commensurate with the tax levied." Thus, even in *G.K. Krishnan and Others Vs. State of Tamil Nadu and Others*, , the apex court took the view that compensatory tax is more or less commensurate with the services offered or facilities provided. However, in *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others*, , though the State had demonstrated that the levy was compensatory, the court further observed thus : (page 658 of STC) "The concept of compensatory nature of tax has been widened and if there is substantial or even some link between the tax and the facilities extended to such dealers directly or indirectly the levy cannot be impugned as invalid". For coming to this conclusion, the court in *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others*, , it may be noted, placed reliance on *State of Karnataka and Another Vs. Hansa Corporation*, .

52. Thus, in *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others*, , the three-judge Bench took a view, which was glaringly different from what had been held in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , for, while in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , the working test laid down for determining whether a levy is compensatory or not was to enquire whether the traders, as a class, are having the use of certain facilities for better conduct of their business and paying not patently much more than what is required for providing facilities, the decision, in *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others*, , reflected that even if some "link", direct or indirect, between the tax imposed and the facilities extended to the dealers, is established, the levy would still be treated compensatory. We may also pause here to point out that in *State of Karnataka and Another Vs. Hansa Corporation*, , which *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others*, , relies upon, though a challenge to the levy of entry tax was posed, the issue as to whether the tax, in question, was compensatory in nature or not had not been really decided, because Article 304(b) was found to have been complied with.

53. Be that as it may, a two-judge Bench of the Supreme Court in *Bihar Chamber of Commerce* [1996]2SCR184 , extended the concept of some "link" between the tax imposed and the facilities provided, as propounded in *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others*, , by holding thus : (at page 8 of 103 STC)

12. It is not possible to deny the force of this submission. Where the local areas contemplated by the Act cover the entire State, the distinction between the State

and the local areas practically disappears. (The situation would, no doubt, be different if the local areas are confined to a few cities or towns in the State and the levy is upon the entry of goods into those local areas alone. This is an important distinction which should be kept in mind while appreciating this aspect and also while examining the decisions of this Court rendered in "fifties and sixties.") The facilities provided in the State are the facilities provided in the local areas as well. Interests of the State and the interests of the local authorities are, in essence, no different. It is not and it cannot be stipulated that for the purpose of establishing the compensatory character of the tax, it is necessary to establish that every rupee collected on account of the entry tax should be shown to be spent on providing the trading facilities. It is enough if some connection is established between the tax and the trading facilities provided. The connection can be a direct one or an indirect one, as held by this Court in *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others*,

The concept of compensatory nature of tax has been widened and if there is substantial or even some link between the tax and the facilities extended to such dealers, directly or indirectly, the levy cannot be impugned as invalid.

Though not stated in the counter-affidavit, we can take notice of the fact that the State does provide several facilities to the trade including laying and maintenance of roads, waterways and markets, etc. As a matter of fact, since the levy is by the State, we must also look to the facilities provided by the State for ascertaining whether the State has established the compensatory character of the tax. On this basis, it must be held that the State has established that the impugned tax is compensatory in nature. This finding is by itself sufficient to negative the attack based on Article 301 but even if we assume that the State has not established the said fact, even so the result is no different. We proceed to elaborate.

54. In *Bihar Chamber of Commerce [1996]2SCR184*, the court, it may be noted, did not insist on the State to furnish the details of the facilities provided to the traders and the expenditure incurred or incurable thereon, for, it took the view that for a levy to be compensatory, it is enough if some connection, direct or indirect, is established between the tax imposed and the facilities provided inasmuch as the facilities provided, in the State, are, according to the court, in *Bihar Chamber of Commerce [1996]2SCR184*, the facilities provided in the local areas as well.

55. Thus, until *G.K. Krishnan and Others Vs. State of Tamil Nadu and Others*, the view held by the Supreme Court, on the concept of compensatory tax, was that a compensatory tax must be, more or less, commensurate with the definite purpose of meeting the expenses on account of providing trading facilities or for making improvement in trading facilities and that there must be a reasonable relation between the actual and projected expenditure, on the one hand, and the services offered or facilities provided, on the other, so that the traders, as users of such facilities, shall not be required to pay "patently much more than what is

required to provide such facilities". However, in *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others, and Bihar Chamber of Commerce* [1996]2SCR184 , the court took the view that it is not necessary for a levy, to be compensatory, that the purpose of the levy shall be to provide any specific service or facility to the traders and that for a levy to be compensatory, it is enough if the facilities are provided to the public, in general, and traders are incidentally beneficiaries of such facilities.

56. Confronted with the fact that the constitutionally held view as regards the compensatory tax has been departed from in *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others, and Bihar Chamber of Commerce* [1996]2SCR184 , a two-judge Bench, in *Jindal Stripe Ltd. and Others Vs. State of Haryana and Others*, that if *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others, and Bihar Chamber of Commerce* [1996]2SCR184 are taken to their logical conclusion, there will be no distinction left between a tax imposed for the purpose of revenue collection and a compensatory tax meant for a specific purpose of providing facilities or services to the persons subject to such tax. The relevant observations made, at para 23, Para 21 at page 312 of [2004] 134 STC 312 , of *Jindal Stripe Ltd. and Others Vs. State of Haryana and Others*, , read thus : "It is contended by the appellants, with considerable force, that if the concept of compensatory tax has to be understood in the manner in which it has been viewed by the court in the decisions of *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others, and Bihar Chamber of Commerce* [1996]2SCR184 , there will be no practical distinction between a tax raised for general revenue purposes and a compensatory tax meant for the specific purpose of providing facilities or services to the persons subjected to the tax. All State revenues are presumably expended or at least are expendable only for the welfare of the nation or the State as a whole. This may result in a general economic upliftment and the betterment of all facets of life including ultimately and in an indirect sense the trading community. The approach in the two decisions noted does away with the difference between taxes in general and compensatory taxes. If that is the law then any tax could pass the test of compensatory tax judged from the standard applied. Then no tax can impinge on the freedom ordained by Article 301, a result which, it is pointed out, would go counter to the court's decision in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, and the long line of authorities referred to earlier starting with the *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, ."

57. Having thus noticed that the parameters of the concept of compensatory tax, which was judicially evolved in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , as an exception to Article 301 have come to be blurred by the decisions rendered in *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others, and Bihar Chamber of Commerce* [1996]2SCR184 , the court, in *Jindal Stripe Ltd. and Others Vs. State of Haryana and Others*, , referred the matter to a Constitution Bench for an authoritative

pronouncement on the subject. This can be easily discerned from the observations made in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, , which proceed, thus : "16. According to the referral order, since the concept of compensatory tax has been judicially evolved as an exception to the provisions of Article 301 and as the parameters of this judicially evolved concept are blurred, particularly, by reason of the decisions in *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others*, , the court felt that the interpretation of Article 301 vis-a-vis compensatory tax should be authoritatively laid down with certitude by the Constitution Bench under Article 145(3)."

58. In *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, , the Constitution Bench has, in fact, pointed out that Part XIII of our Constitution amalgamates two distinctly different concepts of freedom of trade as prevails, on the one hand, in the Constitution of the United States and, on the other, in the Constitution of Australia. The decision, in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, , points out that Section 8 of Article 1 of the U.S. Constitution, contains what is called "commerce clause", which regulates trade and commerce, and in view of the dual form of Government in the United States, the U.S. Supreme Court has held that the commercial power, embodied in the commerce clause, implies the power to regulate, that is, power to prescribe the rules by which the commerce has to be governed, but this commercial power prohibits, at the same time, the States from enacting any law, which impedes the very flow of trade between the States. As against the commercial power, which the U.S. Constitution envisages, Section 92 of the Australian Constitution provides for freedom of trade and commerce and does not seek to regulate commerce as in the case of commerce clause. However, notwithstanding the fact that the Australian Constitution provides for complete freedom of trade and commerce, the decisions of the Privy Council and Australian High Courts have taken the view that Section 92 leaves open the regulation of trade and commerce, at all events, until the regulations enacted provide that the regulation do not impede the true freedom of inter-State commerce. These decisions are based on the principle that all trade and commerce must be conducted subject to law. Thus, there lies, points out the Constitution Bench, in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, , a distinction between taxing laws and regulatory laws and that the regulatory laws give rise to regulatory charges and this is how the concept of payment for revenue and the concept for payment for regulation arose and it was from this point of view that the court, in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , had taken the view that compensatory tax constitutes an exception to the freedom of trade, commerce and intercourse, which Article 301 guarantees. It has also been pointed out, in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, , that the concept of compensatory tax had not been discussed in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, and that it is in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, that their Lordships have explained the concept of

compensatory tax. This aspect of the compensatory tax and its co-relation with Article 301 can be discerned from a careful reading of the observations made in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, , which read as follows : (at page 566 of STC)

26. Section 8 of Article 1 of the U.S. Constitution contains what is called "commerce clause", which regulates trade and commerce. Keeping in mind the dual form of Government in U.S. A. and the concept of "police power" vis-a-vis the "taxing power", the U.S. Supreme Court has held that the commerce power embodied in the commerce clause implies the power to regulate, that is, the power to prescribe the rule by which commerce is to be governed (see : *Constitutional Law by Stone*). Section 8 of Article 1 is an authorisation in favour of the Congress to enact laws for the protection and encouragement of commerce among the States. By its own force, it creates an area of trade free from interference by the States. Therefore, the commerce clause is per se a limitation upon the power of the States and is not dependent upon the law being enacted. It prohibits the States from enacting a law which impedes free flow of trade between the States.

27. On the other hand, Section 92 of the Australian Constitution provides for freedom of trade and commerce. It does not seek to regulate, as in case of commerce clause. However, it has been held in numerous decisions of the Privy Council and the Australian High Courts that Section 92 leaves open the regulation of trade and commerce at all events until the regulation is enacted provided it does not impede the true freedom of inter-State commerce. This reasoning is based on the principle that all trade and commerce must be conducted subject to law. Thus, we have the difference between taxing and regulatory laws. This is how the concept of "regulatory charges" came about.

28. Article 301 is inspired by Section 92 of the Australian Constitution when it refers to freedom of trade and commerce, however, Article 301 is subject to limitations and conditions in Articles 302, 303 and 304 which are borrowed from the commerce clause under Article 1 of the U.S. Constitution. Therefore, Part XIII is an amalgam of the United States and Australian Constitutions which brings out the difference between regulatory and taxing powers. This is how the concept of payment for revenue and concept of payment for regulation arose. This is how the regulatory power stood excluded from the taxing power and on that reasoning in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , this Court took the view that compensatory taxes constitute an exception to Article 301. It is a judicially evolved concept. However, the basis of that concept was not discussed by this Court in that case which we have done in this case. Suffice it to state at this stage that the basis of special assessments, betterment charges, fees, regulatory charges is "recompense/reimbursement" of the cost or expenses incurred or incurable for providing services/facilities based on the principle of equivalence unlike taxes whose basis is the concept of burden based on the principle of ability to pay. At this stage, we

may clarify that in the above case of The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, , this Court has equated regulatory charges with compensatory taxes and since it is the view expressed by a Bench of seven-judge, we have to proceed on that basis. The fall-out is that compensatory tax becomes a sub-class of fees.

59. Having noted, in detail, the parameters of not only Article 301, but also of Articles 302, 303 and 304, the Constitution Bench, in Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, , pointed out, at para 34, "The concept of compensatory tax is not there in the Constitution but is judicially evolved in The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, as a part of regulatory charge. Consequently, we have to go into concepts and doctrines of taxing powers vis-a-vis regulatory powers, particularly when the concept of compensatory tax was judicially crafted as an exception to Article 301 in The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, ."

60. The Constitution Bench, in Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, , has also pointed out that primary purpose of a taxing statute is collection of revenue, whereas regulations are administrative actions, which produce regulatory effects on trade and commerce. The Constitution Bench reiterates, in Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, , that there is a working test for deciding the question as to whether a given levy is the result of exercise of regulatory power or whether it is the product of exercise of taxing power, the working test being that if the impugned levy seeks to control the conditions under which an activity like trade has to take place, then, such a levy is regulatory, but if the impugned tax chooses an activity, such as, movement or transportation of goods, as the criterion for its imposition and if the effect of such imposition of tax is to impede trading activities, then, the levy would be restrictive as conceived under Article 301. In short, if the law enacted is meant to enforce discipline or regulate conduct of the trade or commerce or if the payment is for regulation of conditions or incidence of trade or manufacture, then, the levy is regulatory. One may, in this regard, refer to the observations made, in Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, , which proceed, at para 35 as under:

In the generic sense, tax, toll, subsidies, etc., are manifestations of the exercise of the taxing power. The primary purpose of a taxing statute is the collection of revenue. On the other hand, regulation extends to administrative acts which produces regulative effects on trade and commerce. The difficulty arises because taxation is also used as a measure of regulation. There is a working test to decide whether the law impugned is the result of the exercise of regulatory power or whether it is the product of the exercise of the taxing power. If the impugned law seeks to control the conditions under which an activity like trade is to take place then such law is regulatory. Payment for regulation is different from payment for revenue. If the impugned taxing or non-taxing law chooses an

activity, say, movement of trade and commerce as the criterion of its operation and if the effect of the operation of such a law is to impede the activity, then the law is a restriction under Article 301. However, if the law enacted is to enforce discipline or conduct under which the trade has to perform or if the payment is for regulation of conditions or incidents of trade or manufacture then the levy is regulatory. This is the way of reconciling the concept of compensatory tax with the scheme of Articles 301, 302 and 304. For example, for installation of pipeline carrying gas from Gujarat to Rajasthan, which passes through M. P., a fee charged to provide security to the pipeline will come in the category of manifestation of regulatory power. However, a tax levied on sale or purchase of gas which flows from that very pipe is a manifestation of exercise of the taxing power. This example indicates the difference between taxing and regulatory powers. [See : Essays in Taxation by Seligman].

61. The Constitution Bench proceeds further to observe, in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, , as under : (at page 571 of STC)

37. Tax is levied as a part of common burden. The basis of a tax is the ability or the capacity of the tax-payer to pay. The principle behind the levy of a tax is the principle of ability or capacity. In the case of a tax, there is no identification of a specific benefit, and even if such identification is there, it is not capable of direct measurement. In the case of a tax, a particular advantage, if it exists at all, is incidental to the State's action. It is assessed on certain elements of business, such as, manufacture, purchase, sale, consumption, use, capital, etc., but its payment is not a condition precedent. It is not a term or condition of a licence. A fee is generally a term of a licence. A tax is a payment where the special benefit, if any, is converted into common burden.

38. On the other hand, a fee is based on the "principle of equivalence". This principle is the converse of the "principle of ability" to pay. In the case of a fee or compensatory tax, the "principle of equivalence" applies. The basis of a fee or a compensatory tax is the same. The main basis of a fee or a compensatory tax is the quantifiable and measurable benefit. In the case of a tax, even if there is any benefit, the same is incidental to the Government action and even if such benefit results from the Government action, the same is not measurable. Under the principle of equivalence, as applicable to a fee or a compensatory tax, there is an indication of a quantifiable data, namely, a benefit which is measurable.

39. A tax can be progressive. However, a fee or a compensatory tax has to be broadly proportional and not progressive. In the principle of equivalence, which is the foundation of a compensatory tax as well as a fee, the value of the quantifiable benefit is represented by the costs incurred in procuring the facility/services which costs in turn become the basis of reimbursement/recompense for the provider of the services/facilities. Compensatory tax is based on the principle of "pay for the value". It is a sub-class of "a fee". From the point of view of the Government, a compensatory tax is a charge for offering trading facilities. It adds to the value of trade and commerce which does not happen in the case of a

tax as such. A tax may be progressive or proportional to income, property, expenditure or any other test of ability or capacity (principle of ability). Taxes may be progressive rather than proportional. Compensatory taxes, like fees, are always proportional to benefits. They are based on the principle of equivalence. However, a compensatory tax is levied on an individual as a member of a class, whereas a fee is levied on an individual as such. If one keeps in mind the "principle of ability" vis-a-vis the "principle of equivalence", then the difference between a tax on the one hand and a fee or a compensatory tax on the other hand can be easily spelt out. Ability or capacity to pay is measurable by property or rental value. Local rates are often charged according to ability to pay. Reimbursement or recompense are the closest equivalence to the cost incurred by the provider of the services/facilities. The theory of compensatory tax is that it rests upon the principle that if the Government by some positive action confers upon individual(s), a particular measurable advantage, it is only fair to the community at large that the beneficiary shall pay for it. The basic difference between a tax on one hand and a fee/compensatory tax on the other hand is that the former is based on the concept of burden whereas compensatory tax/fee is based on the concept of recompense/reimbursement. For a tax to be compensatory, there must be some link between the quantum of tax and the facility/services. Every benefit is measured in terms of cost which has to be reimbursed by compensatory tax or in the form of compensatory tax. In other words, compensatory tax is a recompense/reimbursement.

How compensatory tax differs from other taxes?

62. What emerges from the above discussion is that a tax is levied as a part of common burden, the basis of tax being the ability or capability of the tax-payer to pay. In the case of a tax, there may not be any identifiable benefit, and even if there is some benefit, it may not be directly measurable. A tax is, thus, a payment for the special benefit, if any, converted into a common burden; whereas a fee is based on the principle of equivalence, the principle of equivalence being the converse of the principle of ability and in the case of a compensatory tax, it is the principle of equivalence, which is applicable. Compensatory tax is, thus, a charge for offering trading facilities. It is based on the principle that if the Government, by some positive action, confers upon individual, as a class, a particular measurable advantage, it is only fair that one, who receives such benefits, pays for the same, as a class, irrespective of the fact as to whether he has an individual is using such facilities or not. In other words, compensatory tax is realised from traders as a class and an individual trader cannot charge such levy on the ground that he does not utilise such facilities.

63. Hence, the basis of a compensatory tax is quantifiable and measurable benefit; whereas, in the case of tax, the benefit, if any, is incidental, indirect and immeasurable. A tax can be progressive, whereas a compensatory tax has to be broadly proportional and not progressive. The concept of compensatory tax is based on the principle of "pay for the value" and from the point of view of the

Government, a compensatory tax is a charge for offering trading facilities. It adds to the value of the trade and commerce, which does not happen in the case of tax. A compensatory tax is levied on an individual as a member of a class, whereas a fee is levied on an individual as such. Reimbursement or recompense are the closest equivalence to the cost incurred by the provider of the services/facilities. The principle of compensatory tax is that if the Government, by some positive action, confers upon individuals, as a class, a particular measurable advantage, it is only fair that those, who receive such benefit, pay for the same. For a tax to be compensatory, there must be a link between the levy and the facilities provided. It is, therefore, said that compensatory tax is a kind of reimbursement. When a tax is imposed not as a part of a regulation or as a part of a regulatory measure, its basis shifts from the concept of burden to the concept of measurable or quantifiable benefit and, then, it becomes a compensatory tax and its payment is, then, not for revenue, but as reimbursement/recompense to the services/facilities provided. Thus, compensatory tax is, by nature, hybrid, but it is more close to fees than to tax inasmuch as both "fee" and "compensatory tax" are based, broadly speaking, on the principle of equivalence. The burden shall be on the State as a service or facility provider to place before the court all such materials, as may be required and show that payment of compensatory tax is reimbursed or recompensed in the quantifiable or measurable benefits, which are provided, or intended to be provided, to its payer(s).

64. Firmly laying down the parameters of compensatory tax, the court, in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, observed:

40. In the context of Article 301, therefore, compensatory tax is a compulsory contribution levied broadly in proportion to the special benefits derived to defray the costs of regulation or to meet the outlay incurred for some special advantage to trade, commerce and intercourse. It may incidentally bring in net-revenue to the Government but that circumstance is not an essential ingredient of compensatory tax.

65. Having, thus, made it clear as to how a compensatory tax differs from a tax imposed as a measure of collection of general revenue, the court, in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, , has pointed out that whenever a tax law is impugned as violative of Article 301, the court has to determine its effect on the operation of the impugned law on the inter-State and intra-State movement of goods, for, movement or transportation of goods constitutes an integral part of trade. If the court finds, on such examination, that the tax imposed is causing impediment, it cannot survive unless it complies with the provisions of Article 304(b); but if the tax, so imposed, facilitates trade instead of causing hindrance thereto and it is for providing such facility to the traders, as a class, that the tax has been imposed, then, such imposition of tax would be compensatory. Laying down the law, so indicated, the Supreme Court, in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, , further

observed, at para 43 : "43. Applying the above tests/parameters, whenever a law is impugned as violative of Article 301 of the Constitution, the court has to see whether the impugned enactment facially or patently indicates quantifiable data on the basis of which the compensatory tax is sought to be levied. The Act must facially indicate the benefit which is quantifiable or measurable. It must broadly indicate proportionality to the quantifiable benefit. If the provisions are ambiguous or even if the Act does not indicate facially the quantifiable benefit, the burden will be on the State as a service/facility provider to show by placing the material before the court, that the payment of compensatory tax is a reimbursement/recompense for the quantifiable/measurable benefit provided or to be provided to its payer(s). As soon as it is shown that the Act invades freedom of trade it is necessary to enquire whether the State has proved that the restrictions imposed by it by way of taxation are reasonable and in public interest within the meaning of Article 304(b) [See : paragraph 35 of the decision in the case of Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam,

66. Having analysed the concept of compensatory tax, which was judicially propounded in The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, , the Constitution Bench, in Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, , has pointed out : "46. The concept of compensatory taxes was propounded in the case of The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, in which compensatory taxes were equated with regulatory taxes. In that case, a working test for deciding whether a tax is compensatory or not was laid down. In that judgment, it was observed that one has to enquire whether the trade as a class is having the use of certain facilities for the better conduct of the trade/business. This working test remains unaltered even today." Having, thus, adhered to the working test of compensatory tax, which was laid down in The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, , the Constitution Bench, in Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, , commented on the decisions, rendered in Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others, and Bihar Chamber of Commerce [1996]2SCR184 , in the following words : (at page 574 of 145 STC)

47. As stated above, in the post 1995 era, the said working test propounded in the The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, , stood disrupted when in Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others, , a Bench of three-judge enunciated the test of "some connection" saying that even if there is some link between the tax and the facilities extended to the trade directly or indirectly, the levy cannot be impugned as invalid. In our view, this test of "some connection" enunciated in Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others, is not only contrary to the working test propounded in The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, , but it obliterates the very basis of compensatory tax. We may reiterate that when a tax is imposed in the regulation or as a part of regulatory measure the controlling factor of the

levy shifts from burden to reimbursement/recompense. The working test propounded by a Bench of seven judge in the case of *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, and the test of "some connection" enunciated by a Bench of three-judge in *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others*, cannot stand together. Therefore, in our view, the test of "some connection" as propounded in *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others*, is not applicable to the concept of compensatory tax and accordingly to that extent, the judgments of this Court in *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others*, and *State of Bihar v. Bihar Chamber of Commerce* : [1996]2SCR184 stand overruled.

67. From what have been observed, at para 47, in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, , there remains no escape from the conclusion that whenever a tax is impugned as violative of Article 301, the court has to, first, determine if the tax is causing restriction. If the tax is restrictive in nature, it must not only be shown to be reasonable and in public interest, but it must also be shown to have been imposed after obtaining prior sanction of the President and satisfy thereby the mandatory requirements of Article 304(b). Even when the tax may facially appear to be restrictive or impeding movement of goods, yet, when such restrictions are imposed as a measure of regulation or as a measure of compensation, the imposition would be valid, for, regulatory measures or compensatory taxes do not impede, but facilitate trade. If a tax is claimed to be compensatory in nature, some kind of working connection between the tax collected and facilities provided would not be enough; rather, the State must establish that the tax imposed is not for general revenue, but as a measure of reimbursement or to recompensate the services offered or facilities provided, for, the compensatory tax is founded on the principle of equivalence and is based on the concept of reimbursement. The parameters of compensatory tax, as laid down in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, , are summarised here in below:

- (a) The "principle of equivalence", which is converse of the "principle of ability to pay", applies to a case of compensatory tax;
- (b) The benefits, under a compensatory tax, are quantifiable and measurable;
- (c) A compensatory tax has to be broadly proportional and not progressive;
- (d) A compensatory tax is based on the principle of "pay for the value";
- (e) Reimbursement or recompense are the closest equivalence to the cost incurred by the provider of the services/facilities;
- (f) Compensatory tax is based on the concept of recompense/reimbursement;
- (g) Compensatory tax is a compulsory contribution levied broadly in proportion to the special benefits derived to defray the cost of regulation or facilities or special advantages provided to trade, commerce and intercourse.

(h) The burden of showing that the tax is compensatory in nature lies on the State.

68. Put in the briefest of words, one can safely say that the Constitution Bench, in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, , made it clear that the law laid down, in *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others*, , and *Bihar Chamber of Commerce* [1996]2SCR184 , is contrary to what *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, had laid down, meaning thereby that the State must satisfy, when a levy is challenged as violative of Article 301, that what the traders are required to pay is not "patently much more than what is required for providing the facilities". The decision in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, also makes it clear that the decisions in *Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others*, and *Bihar Chamber of Commerce* [1996]2SCR184 , are not projecting the correct position of law, wherein the court had taken the view that it is not necessary for a levy, to be compensatory, that the purpose of the levy shall be to provide any specific service or facility to the traders and that for a levy to be compensatory, it is enough if the facilities are provided to the public, in general, and traders are incidentally beneficiaries of such facilities.

Summary

69. From the discussions, held above, as a whole, what emerges is this : our Constitution-makers aimed at ensuring freedom of movement and transportation of goods "throughout the territory of India" in order to strengthen the economic base of the nation. No wonder, therefore, that Part XIII of the Constitution conceives India as one economic union and guarantees freedom of trade, commerce and intercourse "throughout the territory of India". Thus, Article 301 primarily aims at removing barriers, including fiscal barriers, which adversely affect the movement or transportation of goods. The Constitution-makers had rightly realised that fiscal barriers impede free flow of goods and that the growth of trade and commerce is not possible unless the movement of goods is made free from unreasonable fiscal barriers. Article 301 accordingly seeks to ensure that tax shall not be imposed on movement of goods solely for the reason that the goods are carried to, or transported through, a given State so that freedom of trade, commerce and intercourse can be achieved in true sense. The tax laws have, therefore, been held, in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , not to be immune from the operation of Article 301. Having held that tax laws are not immune from the operation of the Article 301 or, for that matter, the constitutional scheme, embodied in Part XIII, the Constitution Bench, in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , clarified that it is not all taxes, which will hit Article 301, but only such taxes, which, directly and immediately, restrict trade, for, it is only direct restrictions causing impediments to the movement of goods that Article 301 seeks to avoid and nullify. When a tax is imposed on the entry of goods into a local area for the purpose of use,

consumption or sale therein, it has an immediate impact on the movement of the goods. That such measure would fall within the ambit of Article 301 is clearly indicated by the Constitution Bench in *State of Karnataka and Another Vs. Hansa Corporation*, , when it observed, "32. The next limb of the contention is that the impugned tax being leviable on the entry of goods into a local area will have a direct and immediate impact on the movement of goods and consequently would infringe freedom of inter-State trade guaranteed by Article 301.... To the extent the impugned tax is levied on the entry of goods in a local area it cannot be gainsaid that its immediate impact would be on movement of goods and the measure would fall within the inhibition of Article 301...." (emphasis here italicised is supplied). In *Jindal Stripe Ltd. and Others Vs. State of Haryana and Others*, , too, the court, while making the reference, observed, "The tax levied upon the entry of goods into a local area for the purpose of use, consumption or sale therein has a direct effect on the movement of goods and therefore it can be saved only if the levy is in the nature of compensatory tax for the use of trading facilities or it comes under the protective umbrella of Article 304." Thus, even *Jindal Stripe Ltd. and Others Vs. State of Haryana and Others*, , makes it abundantly clear that a tax, levied upon the entry of goods into a local area for the purpose of use, consumption and sale therein, has a direct effect on the movement of goods and can be saved only if the levy is in the nature of compensatory tax for the use of trading facilities or if it satisfies the requirements of Article 304(b).

70. In short, when a tax is imposed on the entry of goods into a local area, its immediate impact would be on the movement of goods affecting the trade. Such a measure of taxation, commonly called entry tax, can be saved only if it is shown that either the tax imposed is compensatory in nature or is protected under Article 304(b). The working test for determining whether a levy is compensatory or not is that the people, in business, are making use of the facilities provided for development of trade and commerce and whether, in order to make use of such facilities, the people, in the business, are or are not paying patently much more than what is required by the State for providing the facilities.

If the impugned levy is valid?

71. In the case at hand, the imposition of entry tax, as already pointed out above, stands impugned on two grounds, namely, (i) that the impugned provisions of entry tax are violative of Article 304(a), the same being discriminatory in nature inasmuch as, under the impugned provisions, while the importers are required to pay entry tax on the entry of specified goods into the State of Arunachal Pradesh, the local manufacturers or producers of such goods are not required to pay any entry tax, when such goods or products move from one part of the State to another part thereof; and (ii) the impugned provisions of entry tax are neither regulatory nor compensatory in nature and, hence, the same is violative of Article 304(b).

72. Let us, now, consider the two distinct challenges to the provisions of entry

tax, which form the subject-matter of controversy in this set of writ petitions.

Whether entry tax levied by the act is violative of Article 304(a) of the Constitution of India?

73. In the light of the position of law as noted above, we, now, proceed to ascertain if the impugned levy is discriminatory in nature and if, on this ground, the impugned levy can be struck down.

74. As already discussed above, Clause (a) of Article 304 empowers a State Legislature to impose non-discriminatory tax on goods imported from other States even if imposition of such tax interferes with the freedom of trade and commerce guaranteed by Article 301. The principle, behind giving such a liberty to the State Legislature, is that no State shall impose a tax, which discriminates between inter-State trade and commerce by providing a direct commercial advantage to the local traders. A tax will be discriminatory if it operates as a disadvantage to the importer of a specified class of goods into a State vis-à-vis the producer or manufacturer of such goods within the State. Such discrimination may occur for a variety of reasons, such as, violation of the rate of tax between the imported goods and the locally manufactured ones or exemption of local goods from payment of a tax, while similar imported goods are subjected to such tax.

75. Bearing in mind the scope of Article 304(a) as indicated above, let us, now, turn to some salient features of the impugned Act. The term, "entry of goods into Arunachal Pradesh", has been defined by Section 2(m) of the Act as under:

Section 2(m) "entry of goods into Arunachal Pradesh" means taking, receiving, bringing, carrying, transporting, or causing to bring or receive goods into the local area of Arunachal Pradesh from any place outside Arunachal Pradesh. In the case of goods arriving in Arunachal Pradesh from a foreign country customs, the import of the goods occurs at the place where the goods are cleared by customs for home consumption.

76. Thus, the definition of the expression, "entry of goods into the State of Arunachal Pradesh", clearly shows that entry tax is imposed whenever, goods are brought, received, carried into, or transported to, the local area of Arunachal Pradesh.

77. The term "local area of Arunachal Pradesh" is defined, u/s 2(f), to mean, "the area falling within the jurisdiction of the State of Arunachal Pradesh".

78. The word "import", as defined in Section 2(q), means causing entry of goods into the local area of Arunachal Pradesh.

79. In the light of the definition of term "local area of Arunachal Pradesh", as contained in Section 2(t), it becomes clear that whenever goods are brought into any area of the State of Arunachal Pradesh, entry tax would be payable. Thus, a combined reading of Section 2(m) and 2(t) clearly shows that entry tax is

realisable whenever goods, specified under the Act, in question, are brought into, or received within, any part of the State of Arunachal Pradesh or carried into, or transported into, any place within the territorial jurisdiction of the State of Arunachal Pradesh.

80. We, now, turn to Section 2(r), which defines the term, "importer". According to Section 2(r), "importer" means, (i) a person who brings their own goods into Arunachal Pradesh; or (ii) a person on whose behalf another person brings goods into Arunachal Pradesh; or (iii) in the case of a sale occurring in the circumstances referred to in Section 6(2) of the Central Sales Tax Act, 1956 (74 of 1956), the person in Arunachal Pradesh to whom the goods are delivered.

81. Bearing in mind the definition of the term "importer", we, now, turn to Section 3, which contains the charging provisions. The relevant provisions of Section 3 read:

3. Imposition of tax.--(1) Imposition on persons who are dealers and importers. Subject to other provisions of this Act, every person who is--

(a)....

(i) and (ii)....

(b) an importer of goods;

shall be liable to pay tax in accordance with this Act, at the time in the manner provided in this Act.

(2) Imposed on sale and entry of goods. Every person who--

(a)....

(i) and (ii)....

(b) is an importer, shall, be liable to pay tax on every entry effected by or for him of goods for consumption, use or sale in local area of Arunachal Pradesh other than a non-taxable import.

82. From a close reading of the relevant provisions of Section 3, what becomes clear is that every importer of a specified goods, i.e., a person, who brings or causes to be brought specified goods into any part of the State of Arunachal Pradesh, or a person on whose behalf, specified goods are brought into the State of Arunachal Pradesh, for the purpose of consumption, use or sale, into the local area of the State of Arunachal Pradesh shall be liable to pay entry tax.

83. A conjoint reading of the various definitions, as quoted hereinabove, would go to show that entry tax can be levied and collected on entry of the goods, specified in the Schedules, appended to the Act, into any local area for consumption, use or sale thereof at the rate stipulated in Section 4 of the Act. The definition of the term "local area of Arunachal Pradesh", as given in Section 2(t), indicates that the entire State of Arunachal Pradesh has been treated as

one local area, i.e., entry tax is charged, u/s 3 of the Act, only upon goods, which are imported into the State of Arunachal Pradesh and, consequently, there is no entry tax on the goods, which are manufactured or produced within the State of Arunachal Pradesh, when such locally manufactured or produced goods move from one part or area of the State to another part or area of the State. The effect, undoubtedly, is that while the goods, specified in the Schedules appended to the Act, are subjected to entry tax, when such goods enter into the State of Arunachal Pradesh for consumption, use or sale thereof, similar goods, which are produced or manufactured within the State, are not subjected to such taxation, when such goods move from one area of the State to another.

84. Article 304(a) of the Constitution prohibits a State Legislature from imposing any tax on goods imported from other States, when similar goods, manufactured or produced in that State, are not subjected to such a tax. Hence, when the products brought from outside the State are subjected to tax without subjecting the similar goods, produced or manufactured in the State, to such taxation, imposition of such tax would be violative of Article 304(a) as well as Article 301, which guarantees freedom of trade, commerce and intercourse throughout the territory of India unless, in the light of the provisions of Article 304(a), a tax is one, which a State Legislature imposes not only on the goods, which is produced or manufactured within that State, but also on similar goods, when such goods are moved from one part of the State to another part thereof.

85. In *State of Assam and Others Vs. Chhotabhai Jethabhai Patel Tobacco Products Co. Ltd.*, some writ petitions challenged the validity of the Assam Entry tax Act, 2001, as enacted prior to its first amendment, on the ground that the imposition of entry tax "Was discriminatory and is in violation of Article 304(a). It may be pointed out that prior to the first amendment of the Assam Entry tax Act, 2001, entry tax was levied only on goods brought from outside the State into the local area of the State of Assam; whereas similar goods, manufactured or produced within the State of Assam, were not subjected to such tax. A Division Bench, in *State of Assam and Others Vs. Chhotabhai Jethabhai Patel Tobacco Products Co. Ltd.*, while allowing the writ petitions, held that the principal Act, prior to its first amendment, was unconstitutional and violative of Article 301 inasmuch as tax, in question, was discriminatory, for, while it subjected a class of goods to entry tax on being imported into the State of Assam, it did not subject similar goods, produced or manufactured in Assam, to such taxation. The relevant observations made, in this regard, in *State of Assam and Others Vs. Chhotabhai Jethabhai Patel Tobacco Products Co. Ltd.*, read as under: (page 115)

...It is, therefore, evident that by the charging section what have been subjected to tax are the goods brought from a place outside the State on its entry into a local area. The principal Act did not subject the similar goods specified in the Schedule to tax, which are manufactured or produced in the State when brought into a local area for consumption, use or sale thereof. Article 304(a), of the Constitution prohibits the State Legislature from imposing any tax on goods

imported from other States to which similar goods manufactured or produced in that State are not subjected to. Therefore, if the goods brought from outside are subjected to tax without so subjecting similar goods produced or manufactured in the State, such tax would be violative of Article 304(a) as well as Article 301 of the Constitution, which provides for free trade, commerce and intercourse through out the territory of India. In such eventuality, it would amount to impeding the free movement of goods into a State which imposes such discriminatory tax....

86. Coupled with the above, it is of immense importance to note that while responding to the petitioners' contention that the levy of entry tax on import of goods into the State of Arunachal Pradesh is violative of Article 304(a) of the Constitution, the respondents, at paras 9 and 10 of their affidavit-in-opposition, averred as under:

9. That with regard to statement made in para 13 of the writ petition, the humble deponent submits that the free trade, commerce, and intercourse throughout India, should not be encouraged to facilitate illegal trade and commerce by vested interests. Whereas, it is the duty of all citizen to pay tax for the transaction they conducted in course of trade and commerce, the intention of the petitioner is to do business without payment of taxes, which he is liable. So in order to check/prevent illegal entry of goods into the local area, the entry tax has been imposed. Such reasonable restrictions can be imposed by the State Legislature under Clause (a) of Article 304, on the goods imported from other State. If the writ petitioners are not willing to pay entry tax, they should not import/bring goods from outside, but should procure their requirements from the local market. On the way out to avoid payment of entry tax is to make purchase by paying local tax that is value added tax (VAT). Entry tax cannot be termed as discriminatory as much as the same protects illegal entry of goods into the local area of Arunachal Pradesh.

10. That with regard to statement made in para 14 of the writ petition, the humble deponent submits that u/s 3 of the Act all goods except non-taxable goods are liable to entry tax. The goods locally produced suffer local tax and the goods coming from outside the State suffer entry tax. Therefore, there is no question of treating the goods imported from outside the State differently, and hence entry tax cannot be treated as discriminatory. All taxable goods either locally manufactured or imported from outside the State suffer either VAT in case of locally manufactured goods or entry tax in case of imported goods, respectively. Hence all goods are treated equal in terms of levy of entry tax.

87. The above averments, made in the writ petition, particularly, the statements "that if the writ petitioners are not willing to pay entry tax, they should not import/bring from outside, but should procure their requirement from local market" and that "the only way out to avoid payment of entry is to make local purchase by paying local tax, i.e., value added tax", amply demonstrate and put beyond pale of doubt that the levy, in question, is aimed at forcing the dealers or

importers not to purchase goods from outside the State of Arunachal Pradesh. In such circumstances, there can be no doubt that the levy is discriminatory in nature. The statements aforementioned, made in their affidavit-in-opposition by the respondents, run counter to the well-settled principles of law laid down by the apex court in a series of decisions commencing from *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, and until *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, Thus, the impugned entry tax, being discriminatory in nature, is clearly violative of Article 304(a) and cannot be allowed to survive.

88. It needs to be pointed out that the Act envisages imposition of tax on sale or purchase of goods within the State of Arunachal Pradesh and entry tax on the entry of goods into the State of Arunachal Pradesh. These two taxes are completely different from each other and operate at different points of time and these two taxes cannot, therefore, be said to be *pari materia* so as to avoid accusation of discrimination. While the tax on sale or purchase of goods within the State of Arunachal Pradesh is traceable to entry 54 of List II of the Seventh Schedule to the Constitution, entry tax is traceable to entry 52 of List II of the Seventh Schedule to the Constitution. Entry tax can be imposed only when the same is compensatory in nature or when the same comes under the protective umbrella of Article 304. The object of imposition of tax on sale or purchase of goods, on the one hand, and imposition of tax on entry of goods, on the other, are totally different and distinct from each other; hence, levy of entry tax, in the present case, cannot be justified merely on the ground that the State realises tax on sale or purchase of such goods by virtue of its powers traceable to entry 54 of List II of the Seventh Schedule.

89. What follows from the above discussion is that the impugned provisions of entry tax, in the present case, are violative of Article 304(a) inasmuch as the levy is discriminatory in nature and cannot, under the Constitutional scheme, be allowed to survive.

Is the impugned levy regulatory or compensatory in nature?

90. Turning to the question as to whether entry tax, as imposed under the impugned Act, is compensatory in nature or not, it is important to bear in mind that such a question has to be judged on the facts and circumstances of a given case.

91. As already indicated above, when an entry tax is challenged as unconstitutional on the ground that it is not compensatory in nature, the burden rests on the State to show that the tax, so imposed, is compensatory in nature. The State, in the present case has to, therefore, satisfy the court that the principles of equivalence is attracted to the imposition of entry tax inasmuch as the revenue realised by imposition of tax is, if not entirely, substantially utilised for the facilities provided to the traders. The facilities provided should be in relation to the tax levied on an individual as a member of a class.

92. While considering the question as to whether the impugned levy is compensatory in nature or not, the averments, made in paras 5 and 7 and by the respondents in their affidavit-in-opposition, need to be taken note of. The relevant averments are reproduced here in below:

5. That with regard to the statement made in para 2 of the writ petition, the humble deponent submits that the imposition of entry tax on the goods entered into the local area of the State of Arunachal Pradesh is intended for collection of revenue to fund the State exchequer, which in turn is utilised for the overall welfare of its people. After its implementation with effect from April 1, 2005, it is smoothly in operation in the State. The contention that it hampers the free flow of trade and commerce is incorrect inasmuch as entry tax is levied u/s 3 of the Arunachal Pradesh Goods Tax Act, 2005 (hereinafter called, "the Act") in public interest duly enacted by the State Legislature. Arunachal Pradesh is geographically having many porous entry points bordering the neighboring States of Assam, Nagaland, etc. At times unscrupulous dealers/importer are disturbing the local markets by bringing goods without payment of tax either to the Government of neighboring State or to Arunachal Pradesh which lead to unhealthy trade war between the dealers of neighboring State and that of Arunachal Pradesh. Hence, entry tax cannot be said to be discriminatory; rather it is a necessity, which in turn protects the bona fide interest of the local traders of Arunachal Pradesh.

....

7. That with regard to the Statement made in para 11 of the writ petition, the humble deponent submits that taxation is an economic policy of the State Government of which law is made by the State Legislature permissible under Article 246 of the Constitution of India. As per the provision under the Arunachal Pradesh Goods Tax Act, cement, steel, diesel and plant and machinery, etc., are taxable and all importers of taxable commodities including above items are liable to pay tax at the prescribed rate. Because of the fact that entry tax has been imposed on the said items it cannot be said to have interfered with the freeflow of trade, commerce as guaranteed under Article 301 of the Constitution. Any tax revenue collected is to fund the consolidated fund of the State Government which is again utilised for the development and welfare of its citizen.

93. From the averments made in the above paragraphs in the affidavits of the respondents, it clearly transpires that the entry tax is levied under the impugned Act, on the entry of the goods into the State of Arunachal Pradesh for the purpose of augmenting general revenue of the State and the tax, so imposed, is not at all compensatory in nature. A tax, which is levied upon entry of goods into a local area, for consumption, use or sale thereof, has a direct effect on the movement of goods and, hence, such a levy can only be saved if the levy is in the nature of compensatory tax or it comes under the protective umbrella of Article 304. For a tax to be compensatory, there must be a link between the levy of the tax and the facilities provided. Whenever a levy is impugned as violative of

Article 301, the court has to determine if the impugned enactment, facially and patently, indicates any quantifiable data on the basis of which the compensatory tax is levied. Such a legislation, if put to challenge, must facially indicate the benefit, which is quantifiable or measurable. In case of any ambiguity, the burden would be on the State, as a service provider, to place, before the court, requisite materials to show that payment of tax is recompensed/reimbursed for quantifiable/measurable benefit provided or to be provided to its tax-payers.

94. In the present case, apart from the fact that the impugned Act does not facially indicate the quantifiable benefits provided or to be provided to a taxpayer, the averments, made in paragraphs 5 and 7 of the respondents' affidavit, clearly show that the impugned levy is not compensatory in nature; rather, it aims at raising general revenue collection of the State. Only because of the fact that certain goods are liable to be taxed under the local sales tax laws, it will not empower the State to impose tax on the entry of goods into the State until and unless the levy complies with the requirements of Articles 301 - 304 of the Constitution of India.

95. In the case at hand, as in the case of *ITC Ltd. Vs. State of Assam and Others*, a careful reading of the preamble, the Statement of Object and Reasons of the Act and also the provisions contained, as a whole, in the Act, we find that the provisions, contained in the Act, clearly demonstrate that the Act was envisaged as a taxing statute for augmenting revenue of the State and the tax levied thereunder was not specifically meant for providing any trading facility nor are the provisions of the impugned Act regulatory in nature. In such a case, imposition of entry tax cannot be sustained.

96. It needs to be borne in mind that though the respondents have taken the plea that since the imposition of entry tax is in exercise of its power under entry 52 of the State List, it is constitutionally valid, what needs to be carefully noted, in this regard, is that the various entries in the three Lists of the Seventh Schedule to the Constitution are not really powers of the legislation, but fields of legislation. The entries, in these Lists, are mere legislative heads or fields of legislation and these entries are, thus, of enabling character. Whereas the powers to legislate are given to the Union and the State Legislatures under Articles 245 - 255, the entries are designed to define and delimit the respective areas and legislative competence of the Union and the State Legislatures.

97. Thus, entry 52 of the State List does not, in itself, give the power to the State Legislatures to make enactment imposing entry tax. The power to make legislation imposing entry tax arises from Article 246(2) read with entry 52, for, while Article 246(2) empowers the State Legislature to legislate on the subjects enlisted in the State List, entry 52 allows the State to impose a levy in the nature of entry tax. However, the power, contained under Article 246, has to be read subject to other provisions of the Constitution. It is worth noticing that Article 301 is not subject to provisions other than Part XIII of the Constitution. Consequently, Article 301 cannot be read subject to Article 246; rather, Article

246 is subject to Article 301. Hence, the power to legislate, under Article 246, has to be read subject to the provisions of Article 301. It clearly follows, therefore, that while exercising powers under Article 246, a State Legislature cannot enact a law, which infringes or violates Article 301. To put differently, entry tax cannot be imposed in violation of freedom of trade and commerce granted under Article 301. It is, therefore, no answer to the question that an entry tax, being legislation under entry 52 of the State List, is a valid piece of legislation even if the imposition of entry tax is, otherwise, found to be violative of Article 301.

98. In the case at hand, it was constitutional obligation of the State to show as to what trading facilities it has really provided or is contemplating to provide, to the importers, what expenses have been incurred for providing such facilities, or what expenses are likely to be incurred for providing such facilities, how much amount, realised from the imposition of entry tax, is being utilised, or is likely to be utilised, for providing trading facilities, so as to satisfy this Court that the importers are required to pay entry tax for the facilities provided to them and that the tax, being so paid, is patently not much more than what is required for providing such facilities. The State, in the present case, has completely failed to discharge this burden. Situated thus, we are constrained to hold that the impugned levy is not compensatory in nature.

99. What surfaces from the above discussion is that the impugned levy is a measure of general collection of revenue of the State and not specifically for facilitating trade or commerce. It may be pointed out that the State may raise revenue for its various welfare and developmental activities. If such activities are meant for people, in general, and not particularly for the trading community, the mere fact that the trading community is an incidental beneficiary of such developmental and welfare activities of the State, would not justify imposition of a levy, which has a direct impact on the freedom of movement of trade and commerce. The State may, however, raise revenue, as already indicated above, for its various developmental programmes. If, however, such developmental programmes are meant not for providing trading facilities, but for the residents and/or non-residents, in general, no tax, in the form of entry tax, which puts restrictions on the freedom of movement of goods, can be imposed merely on the ground that the traders are incidental beneficiaries of such welfare and developmental activities of the State.

100. When the levy is imposed on the movement of goods in order to realise State's revenue for the purpose of providing facilities to the traders as a class, such a levy, even if it puts restrictions on the movement of goods, would, nevertheless, be valid if the collection of revenue is not patently much more than what is required for the purpose of providing such facilities. The fact as to whether a particular trader is utilising such facilities or not is immaterial. So long as the levy is imposed against certain trading facilities provided by the State, no trader can challenge such a levy on the ground that he does not make use of the

facilities, which have been provided by the State to facilitate trade and commerce. A trader cannot also impugn such a levy on the ground that besides the traders, as a class, the facilities are also enjoyed by non-traders. To put it a little differently, when the traders are the substantive beneficiaries of the facilities, provided by the State, which help in the development of trade and commerce, the levy cannot be challenged on the ground that people, other than traders, are also incidentally receiving the benefits of such facilities, which the State provides to the trading community. When, however, the facilities, provided by the State, are not aimed at development of trade and commerce, but are aimed for the general people, the fact that the traders are also enjoying such benefits, which are aimed for the general public, no levy can be imposed if the levy impedes the movement of goods and thereby deny to the trading community the guarantee of freedom of movement of trade, commerce and intercourse.

101. In *State of Assam and Others Vs. Chhotabhai Jethabhai Patel Tobacco Products Co. Ltd.*, a Division Bench of this Court has held as under: (at pages 132-133, 136-137 of VST)

106. The question, therefore, whether the impugned levy is compensatory or not largely depends upon the provisions contained in the Act and/or also whether the State is providing the quantifiable/measurable benefit to the payers of the tax for reimbursement/recompense.

....

109. Thus the preamble and Statement of Objects and Reasons of the impugned Act do not indicate that the entry tax is sought to be levied to provide facilities to the payers to facilitate the trade.

....

112. Though the impugned Act initially does not provides any stipulation for providing the facilities to the tax-payers to facilitate the trade, Section 8A has been inserted by the Second Amendment Act of 2005 with effect from May 12, 2005....

113. From the provision of Section 8A as inserted by the Second Amendment Act of 2005, it is evident that the amount collected by way of tax is proposed to be spent for maintenance of roads, for the purpose of development of trade facilities and other infrastructures. The provision of Section 8(A) does not indicate facially the quantifiable/measurable benefit provided or to be provided to its payers. This would, however, not prevent the State to show by placing materials before the court that the amount collected by way of such entry tax is spent or to be spent for providing quantifiable/measurable benefit to its payers. The affidavits filed by the State, as discussed above, revealed that except for contending that a large portion of the amount so collected by way of entry tax has been spent for facilitating the trade by providing the infrastructure facility and in maintaining

the roads, etc., no detailed particulars have been furnished to the court to substantiate the plea that the impugned levy is compensatory in nature. The laying of roads and its maintenance is sovereign function of the Government, which it is bound to do, irrespective of whether any entry tax is levied or not. Such laying and maintenance of roads in the local areas also is in discharge of its Governmental duties and such laying and maintenance of roads cannot be termed as providing special benefits to the payers of such entry tax, which the Government is otherwise duty-bound to do. From the chart filed along with the additional affidavit filed in Writ Appeal No. 465 of 2006, which has been reproduced above, it also appeared that the amount spent includes the State's share in respect of rural development, compensation and assignment of the local bodies, Panchayati Raj institutions. Apart from giving figure towards assistance for development of urban and rural and local areas under GMC no details have been provided to show that the amount collected by way of entry tax, has in fact been spent or is to be spent for benefit of the payers and to facilitate the trade. It is also evident from Section 8(A) of the impugned Act, which has been inserted by the Second Amendment Act of 2005, that the State Government has been empowered to spend such amount of tax collected under the said Act for the purpose of development of trading facilities, maintenance of roads and other infrastructure in the local areas, subject to such condition as may be prescribed, leaving it to the State Government to determine the sum to be spent. But such conditions for determination of the sum to be spent have not been laid down, as no rule has been framed specifying the conditions under which such sum is to be spent.

114. In view of the aforesaid discussions, we are of the view that the State has miserably failed to substantiate that the substantial portion of the entry tax collected under the impugned enactment has been spent or is to be spent for providing the facilities to its payers so as to facilitate the trade, by producing materials before the court. The contentions of the learned AAG supporting the "some connection" theory cannot be accepted.

....

116. In view of the aforesaid discussion, we hold that the impugned enactment does not satisfy the test laid down for compensatory tax and hence cannot be held to be compensatory in nature. The judgment and order of the learned single judge is affirmed, on this point.

102. In the case of State of Assam and Others Vs. Chhotabhai Jethabhai Patel Tobacco Products Co. Ltd., the Division Bench of this court, on finding that the State has not produced materials to show that the amount collected by way of entry tax was being spent for providing trading facilities, struck down the levy. In the present case, the situation is worse than the situation in State of Assam and Others Vs. Chhotabhai Jethabhai Patel Tobacco Products Co. Ltd., inasmuch as the State does not even pretend, in the present case, that it is providing any specific or special benefit to the traders and/or that it is imposing levy for the

purpose of raising revenue, which would be used for the purpose of development of trade and commerce. When the clearly expressed intent of the State, in the present case, in imposing levy, is to augment general revenue of the State and to prevent evasion of local sales tax, such a levy cannot but be held to be constitutionally not permissible.

103. What surfaces from the above discussion, held as a whole, is that the 1 impugned levy, being discriminatory in nature, violates the provisions of Article 304(a) and cannot be maintained. This apart, the impugned levy is neither regulatory nor compensatory and, hence, such a levy cannot be allowed to survive.

104. Because of what have been discussed and pointed out above, it becomes 1 clear that the impugned levy, on import of goods into the State of Arunachal Pradesh, is violative of Article 301 and also Article 304 and, hence, the impugned provisions must be held to be ultra vires. Consequently, the levy must be struck down.

105. In the result and for the reasons discussed above, this set of writ petitions succeed and the imposition of entry tax, by virtue of the provisions of the impugned Act, particularly, the provisions of Section 3 thereof, are, to the extent that the same imposes entry tax, hereby quashed.

No order as to costs.