

(1994) 06 MAD CK 0033

In the Madras High Court

Case No : Writ Petition No's. 10593, 10594, 11148, 12071, 12740, 12747, 13257, 13258, 14019, 14244, 15477, 15705, 15706, 15707, 15967, 16031, 16044, 16144, 16192, 16254, 16283, 16320, 16321, 16495, 16555, 16556, 16558, 16559, 16563, 17041, 17054, 17100, 17135, 173

Kamatchi Lamination (P) Ltd.

APPELLANT

Vs

State of Tamil Nadu and another

RESPONDENT

Date of Decision : 13-06-1994

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15, 3, 4, 5

Tamil Nadu General Sales Tax Act, 1959 — Section 2, 3, 3A, 3B, 3B(1)

Citation : (1994) 06 MAD CK 0033

Hon'ble Judges : M.S. Janarthanam, J

Bench : Single Bench

Advocate : C. Natarajan, for the Appellant; Mrs. Chitra Venkataraman, Additional Government Pleader (Taxes), S. Sivanandam, for the Respondent

Judgement

Janarthanam, J.—The challenge in these actions is relatable to tax on "goods", involved in the execution of works contract, as per the sanguine provisions adumbrated in section 3B of the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act No. 1 of 1959 - for short "the Principal Act"), substituted from March 12, 1993 by Act No. 25 of 1993 - Gazette dated May 28, 1993.

2. Before narrating and enumerating the specific challenges made, better it is, I think, to trace the legislative history leading to the enactment of a statutory provision, namely, section 3B, in its present form, in a bid, to rather understand, in a crisp fashion, such challenges and solve the tangle posed therefor, with ease and grace, and without any difficulty whatever.

3. Under entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935 (for short "the GI Act"), the legislative power to impose taxes on sale of goods and on advertisements was conferred on the Provincial Legislatures.

Under the Constitution, as adopted, the said power was divided between Parliament and State Legislature, under entry 92 in List I and entry 54 of List II of the Seventh Schedule to the Constitution of India (for short "the Constitution").

4. Parliament was empowered to impose taxes on the sale or purchase of newspapers and on advertisements published therein and under entry 54 in List, II, the State Legislatures were empowered to impose taxes on the sale or purchase of goods, other than newspapers.

5. With regard to imposition of sales tax on goods involved in the execution of works contracts, where the contract was single and indivisible, the question arose whether there was a "sale" of those materials within the meaning of that word in entry 48 in List II of the Seventh Schedule to the GI Act and entry 54 in List II of the Seventh Schedule to the Constitution.

6. There was a sharp cleavage of opinion among the High Courts on that question. This Court, in *Gannon Dunkerley & Co. (Madras) Ltd. v. State of Madras* [1954] 5 STC 216; AIR 1954 Mad. 1130 took the view that the expression "sale of goods" in entry 48 in List II of the GI Act and entry 54 in List II of the Constitution had the same meaning as it has in the Sale of Goods Act, 1930 and that construction works contracts were not contracts for sale of the materials used there in and that the contract, being entire and indivisible, could not be broken into a contract for sale of materials and a contract for payment for work done. On that view, it was held that the provisions of the amendments introduced by the Amendment Act of 1947 in the Madras General Sales Tax Act, 1939, whereby the definition of "sale" was enlarged to include "a transfer of property in goods involved in the execution of a works contract" and thereby impose sales tax on such transfers, were declared ultra vires the powers of the Provincial Legislature.

7. This sort of a view of this Court was adopted by the Hyderabad High Court in *Jubilee Engineering Co. Ltd. v. Sales Tax Officer* [1956] 7 STC 423; AIR 1956 Hyd 79.

8. The Kerala High Court in *Gannon Dunkerley and Co., Madras (Private) Ltd. Vs. Sales Tax Officer, Mattancheri*, and the Mysore High Court in *Mohamed Khasim v. State of Mysore* [1955] 6 STC 211 took the contrary view and upheld the power of the State to impose sales tax on the turnover relating to construction works.

9. The Nagpur High Court in *Pandit Banarsi Das v. State of Madhya Pradesh* [1955] 6 STC 93 while declining to follow the decision of this Court, expressed the view that the State Legislature could pick out a sale from the composite transaction of a building contract, which included transfer of property in materials and could make the portion attributable to the cost of such materials subject to payment of sales tax in exercise of its undoubted and plenary powers. The Rajasthan High Court in *Bhuramal and Others Vs. State of Rajasthan*, took a similar view.

10. This sort of a conflict was resolved by the apex Court of this country in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, where in the decision of this Court was affirmed and it was held that the expression "sale of goods" in entry 48 in List II of the Seventh Schedule to the GI Act, had the same meaning as the said expression had in the Sale of Goods Act, 1930, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. It was further held that in building contract, which is entire and indivisible, there is no sale of goods because in such a contract the agreement between the parties is that the contractor should construct the building according to the specifications contained in the agreement and in consideration therefore receive payment as provided therein and in such an agreement, there was neither a contract to sell the materials used in the construction; nor does the property pass therein as movables. The apex Court therefore laid down that it was not within the competence of the Provincial Legislature under entry 48 in List II of the Seventh Schedule to the GI Act, to impose a tax on the supply of materials used in such a contract treating it as a sale. The said decision, though rendered in the context of entry 48 in List II of the Seventh Schedule to the GI Act, was equally applicable to the provisions found in entry 54 in List II of the Seventh Schedule to the Constitution.

11. While laying down such a rule, the apex Court at page 387 of STC (427 of SCR), observed :

"It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials of money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment."

12. After the decision of the apex Court as above, the matter with regard to taxability of goods involved in the execution of works contracts was examined by the Law Commission. In its 61st Report, the Law Commission, after considering the legal position, recommended for inserting in article 366 of the Constitution, a wide definition of "sale", so as to include "works contract", obviously with a view to avoid multiple amendments, by the adoption of other drafting devices open, e.g., amending State List, entry 54 or adding a fresh entry in the State List.

13. Keeping in view the said recommendation of the Law Commission, the Constitution was amended by the Forty-sixth Amendment. By the said amendment, clause (29-A) was inserted in article 366 and clause (3) of article 286 was substituted. The other amendments introduced by it are not relevant for our present purpose.

14. So, much of the portion of clause (29-A) of article 366, which is relevant for our present purpose is couched in the following terms :

"(29-A) "Tax on the sale or purchase of goods" includes -

(a)

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) to (f).....

and such transfer..... shall be deemed to be a sale of those goods by the person making the transfer..... and a purchase of those goods by the person to whom such transfer..... is made."

15. Clause (3) of article 286 reads as under :

"(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of, -

(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce; or

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause (b), sub-clause (c), or sub-clause (d) of clause (29-A) of article 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."

16. After the Forty-sixth Amendment, various State Legislatures amended their sales tax legislations to make provisions for imposition of sales tax in relation to works contracts. The constitutional validity of the Forty-sixth Amendment as well as the amendments made in the State legislations on that basis were challenged before the apex Court in appeals as well as writ petitions filed under article 32 of the Constitution. The said matters were disposed of by its judgment in Builders Association of India and Others Vs. Union of India (UOI) and Others, . Two points were raised therein. They are :

(i) the Forty-sixth Amendment was unconstitutional for the reason that it had not been ratified by the Legislatures of not less than one-half of the States by resolutions passed to that effect by those Legislatures before the Bill which led to the amendment in question was presented to the President for assent; and

(ii) it was not open to the States to ignore the provisions contained in article 286 of the Constitution and the provisions of the Central Sales Tax Act, 1956 (Act No. 74 of 1956 - for short "the Central Act"), while making assessment under the sales tax laws passed by the Legislatures of the States.

17. Rejecting the first contention, the apex Court upheld the validity of the Forty-sixth Amendment in view of the Memorandum dated January 31, 1982, signed by the Secretary-General, Rajya Sabha, which showed that the Bill, before it was presented to the President for his assent, had been ratified by the Legislatures of twelve States and it showed that there was due compliance with the provisions contained in the proviso to article 368(2) of the Constitution.

18. As regards the second contention, the apex court declared that "sales tax laws passed by the Legislatures of States levying taxes on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract are subject to the restrictions and conditions mentioned in each clause or sub-clause of article 286 of the Constitution".

19. The Parliament - the Supreme Court would say - had amended article 366 by introducing sub-clause (b) of clause (29-A) in order to overcome the effect of the decision in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, and while construing the said provision, it expressed at pages 396-397 of STC (347-348 of SCR) thus :

"Sub-clause (b) of clause (29-A) states that "tax on the sale or purchase of goods" includes among other things a tax on the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract..... It refers to a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. The emphasis is on the transfer of property in goods (whether as goods or in some other form). The latter part of clause (29-A) of article 366 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that takes place as per sub-clauses (a) to (f) of clause (29-A), the latter part of clause (29-A) says that "such transfer, delivery or supply of any goods" shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. Hence, a transfer of property in goods under sub-clause (b) of clause (29-A) is deemed to be a sale of the goods involved in the execution of works contract by the person making the transfer and purchase of those goods by the person to whom such transfer is made. The object of the new definition introduced in clause (29-A) of article 366 of the Constitution is, therefore, to enlarge the scope of "tax on sale or purchase of goods" wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) thereof, wherever such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression "tax on the sale or purchase of goods" in entry 54 of the State List, therefore, includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also. The tax leviable by virtue of sub-clause (b) of clause (29-A) of article 366 of the Constitution thus becomes subject to the same discipline to which any levy under entry 54 of the State List is made subject to under the Constitution."

20. Explaining the effect of the Forty-sixth Amendment, on the powers of the State to levy sales tax, the apex Court further said at page 400 of STC; (pages 351-352 of SCR) thus :

"Even after the decision of this Court in *The State of Madras Vs. Gannon*

Dunkerley and Co., (Madras) Ltd., , it was quite possible that where a contract entered into in connection with the construction of a building consisted of two parts, namely, one part relating to the sale of materials used in the construction of the building by the contractor to the person who had assigned the contract and another part dealing with the supply of labour and services, sales tax was leviable on the goods which were agreed to be sold under the first part. But sales tax could not be levied when the contract in question was a single and indivisible works contract. After the 46th Amendment the works contract which was an indivisible one is by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and services. After the 46th Amendment, it has become possible for the States to levy sale tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts as stated above. It could not have been the contention of the Revenue prior to the 46th Amendment that when the goods and materials had been supplied under a distinct and separate contract by the contractor for the purpose of construction of a building the assessment of sales tax could be made ignoring the restrictions and conditions incorporated in article 286 of the Constitution. If that was the position can the States contend after the 46th Amendment under which by a legal fiction the transfer of property in goods involved in a works contract was made liable to payment of sales tax that they are not governed by article 286 while levying sales tax on sale of goods involved in a works contract ? They cannot do so. When the law creates a legal fiction such fiction should be carried to its logical end. There should not be any hesitation in giving full effect to it. If the power to tax a sale in an ordinary sense is subject to certain conditions and restrictions imposed by the Constitution, the power to tax a transaction which is deemed to be a sale under article 366(29-A) of the Constitution should also be subject to the same restrictions and conditions."

21. After referring to the provisions of clause (1) of article 286, where the expression, "a tax on the sale or purchase of goods" is used, the apex Court at page 397 of STC (348 of SCR), observed :

"Here again we have to read the expression "a tax on the sale or purchase of goods" found in article 286 as including the transfer of goods referred to in sub-clause (b) of clause (29-A) of article 366 which is deemed to be a sale of goods and the tax leviable thereon would be subject to the terms of clause (1) of article 286."

22. With reference to clauses (2) and (3) of article 286, at page 397 of STC (348 of SCR), it further observed :

"Similarly, the restrictions mentioned in clause (2) of article 286 of the Constitution which says that Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1) of article 286 would also be attracted to a transfer of

goods contemplated under article 366(29-A)(b). Similarly, clause (3) of article 286 is also applicable to a tax on a transfer of property referred to in sub-clause (b) of clause (29-A) of article 366. Clause (3) of article 286 consists of two parts. Sub-clause (a) of clause (3) of article 286 deals with a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, which is generally applicable to all sales including the transfer, supply or delivery of goods which are deemed to be sales under clause (29-A) of article 366 of the Constitution. If any declared goods which are referred to in section 14 of the Central Sales Tax Act, 1956, are involved in such transfer, supply or delivery, which is referred to in clause (29-A) of article 366, the sales tax law of a State which provides for levy of sales tax thereon will have to comply with the restrictions mentioned in section 15 of the Central Sales Tax Act, 1956. Clause (b) is an additional provision which empowers Parliament to impose any additional restrictions or conditions in regard to the levy of sales tax on transactions which will be deemed to be sales under sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (29-A) of article 366 of the Constitution."

23. Rejecting the contention urged on behalf of the States that since sub-clause (b) of clause (3) of article 286 of the Constitution refers only to the transactions referred to in sub-clauses (b), (c) and (d) of clause (29-A) of article 366, the transactions referred to under those three sub-clauses would not be subjected to any other restrictions set out in clause (1) or clause (2) or sub-clause (a) of clause (3) of article 286 of the Constitution, the apex Court at page 398 of STC (349 of SCR) expressed :

"It may be that by virtue of sub-clause (b) of clause (3) of article 286 it is open to Parliament to impose some other restrictions or conditions which are not generally applicable to all kinds of sales. That however cannot make the other parts of article 286 inapplicable to the transactions which are deemed to be sales under article 366(29-A) of the Constitution. We are of the view that all transfers, deliveries and supplies of goods referred to in clauses (a) to (f) of clause (29-A) of article 366 of the Constitution are subject to the restrictions and conditions mentioned in clause (1), clause (2) and sub-clause (a) of clause (3) of article 286 of the Constitution and the transfers and deliveries that take place under sub-clauses (b), (c) and (d) of clause (29-A) of article 366 of the Constitution are subject to an additional restriction mentioned in sub-clause (b) of article 286(3) of the Constitution."

24. The contention urged on behalf of the States that the properties transferred to the owner in the execution of a works contract are not the goods involved in the execution of the works contract, but a conglomerate, that is the entire building that is actually constructed, was rejected by the apex Court and it was observed at page 402 of STC (354 of SCR), that after the Forty-sixth Amendment, it is not possible to accede to the plea of the States that what is transferred in a works contract is the right in the immovable property. The apex Court also rejected the plea put forward on behalf of the States that the Forty-

sixth Amendment had conferred on the States a larger freedom than what they had before in regard to their power to levy sales tax under entry 54 of the State List. It was held that the Forty-sixth Amendment does no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contract as if there was a sale of such goods and materials.

25. Since the apex Court interpreted the relevant provisions of the Constitution, it did not consider it necessary to take up each and every writ petition to express its opinion on the validity of the statutory provisions and rules, which were questioned before it and the petitioners concerned were given the liberty to approach the authorities under the Sales Tax Act or the High Court concerned for necessary relief and further made it clear that it would be open to them to question the validity of the statutory provisions and the rules made thereunder before the High Court concerned.

26. Reading the judgment of the Supreme Court in Builders Association of India and Others Vs. Union of India (UOI) and Others, , interpreting the relevant provisions of the Constitution, the position which emerges may be summed up as follows :

If in the process of executing a works contract, a transfer of property in the goods takes place -

(1) outside the State, or

(2) in the course of inter-State sale, or

(3) in the course of import, the State would have no power to levy sales tax on such a transfer.

(4) The price of goods supplied by a person, who has assigned the contract for the purpose of executing works contract cannot be treated as a part of the taxable turnover.

(5) If there is a transfer of property in declared goods - for example, steel products, in the process of execution of works contract, the State can levy tax only at 4 per cent and that too, only at one stage.

(6) The entire works contract is not deemed to be a sale. Therefore, only the price reasonably allocable to goods transferred under works contract can be taxed, and not the totality of the consideration paid for the works contract.

(7) If goods - for example, fuel and power - are used in the process of executing a works contract, but are consumed in the process, the property in such goods cannot conceivably be transferred, because the goods themselves cease to exist. Such goods cannot be the subject-matter for the levy of sales tax at all.

(8) The methods adopted to determine the taxable turnover relating to works contract for purposes of levy of sales tax should be such that the sales tax has to be paid by the contractor only on the value of the materials supplied by them in

connection with the works contract.

(9) While levying sales tax on the price of materials supplied in connection with the works contract, the sales tax authorities should take into account the conditions and restrictions imposed by article 286 of the Constitution and the provisions of the CST Act.

(10) The assessing authorities are required to ascertain whether the sale of goods involved in the execution of works contract had taken place in favour of the person who had assigned the contract outside the State in which works contract is being executed or whether any part of the goods so used in a works contract had been imported from abroad on account of the person, who had assigned the contract or whether any part of the goods, such as iron and steel, etc., which are declared goods, had already suffered sales tax at an earlier point in the State and whether on such goods the tax which was being levied exceeded the limit prescribed by section 15 of the Central Act.

(11) The assessing authority must also take into consideration whether the sale of the goods in question had been exempted under the sales tax laws of the State from payment of sales tax or whether it had suffered payment of tax earlier, where the sales tax law of the State had prescribed that the sale of such goods would be subjected to the levy of sales tax at a single point.

27. Pursuant to the Constitution (Forty-sixth Amendment) Act, 1982, the Tamil Nadu General Sales Tax (Fourth Amendment) Act, 1984 (Tamil Nadu Act 28 of 1984 - for short "the Act 28 of 1984") amended, among other things, clauses (g), (j), (n), (r) and (u) of section 2 of the Principal Act and rules 6-A and 6-B had been introduced to the Tamil Nadu General Sales Tax Rules, 1959 (for short "the Rules"), with effect from October 1, 1984 and the Tamil Nadu General Sales Tax (Fourth Amendment) Act, 1986 (Tamil Nadu Act 42 of 1986 - for short "the Act 42 of 1986") introduced section 3B and the Fourth Schedule to the Principal Act with effect from June 26, 1986 and amendments to rule 6-B, etc.

28. The amendments effected, as referred to above, may now be noticed. Items (v) to (ix) were inserted to the definition of "dealer" under clause (g) of section 2, items (v) to (viii) with effect from May 29, 1984 and item (ix) with effect from February 2, 1983.

(a) Section 2(g) defines "dealer" thus :

"2. Definition. - In this Act, unless the context otherwise requires, -

(g) "dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration and includes -

(i) to (iv)

(v) a person engaged in the business of transfer otherwise than in pursuance of

a contract of property in any goods for cash, deferred payment or other valuable consideration;

(vi) a person engaged in the business of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(vii) a person engaged in the business of delivery of goods on hire-purchase or any system of payment by instalments;

(viii) a person engaged in the business of transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(ix) a person engaged in the business of supplying by way of, or as part of, any service or in any other manner whatsoever of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration;

Explanation (1).....

Explanation (2)....."

(b) Section 2(j) defines "goods" thus :

"'goods' means all kinds of movable property (other than newspapers, actionable claims, stocks and shares and securities) and includes all materials, commodities, and articles including goods (as goods or in some other form) involved in the execution of works contract or those goods to be used in the fitting out, improvement or repair of movable property) and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale;" (was substituted by Act 28 of 1984 with effect from May 29, 1984).

(c) Items (i) to (v) with effect from May 29, 1984 and item (vi) with effect from February 2, 1983 in the definition of "sale" under clause (n) of section 2 of the Principal Act had been substitute by Act 28 of 1984, which read as under :

"(n) "sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable consideration and includes -

(i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) a delivery of goods on hire-purchase or any system of payment by

instalments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(vi) a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration;

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

Explanations (1), (1-A), (1-B)(2), (3) and (4)"

(d) "Turnover" is defined in clause (r) thus :

"(r) "turnover" means the aggregate amount for which goods are bought or sold, or delivered or supplied or otherwise disposed of in any of the ways referred to in clause (n), by a dealer either directly or through another, on his own account or on account of others whether for cash or for deferred payment or other valuable consideration, provided the the proceeds of the sale by a person of agricultural or horticultural produce, other than tea, and rubber (natural rubber latex and all varieties and grades of raw rubber) grown within the State by himself or on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover;

Explanations (1), (1A), (2), (3) and (4)"

(The portion was substituted by Act 28 of 1984 with effect from May 29, 1984)

(e) Clause (u) of section 2, substituted by Act 28 of 1984 with effect from May 29, 1984, defines "works contract", which reads :

"(u) "works contract" includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning, of any movable or immovable property."

(f) Rules 6-A and 6-B of the Rules, inserted by Notification S.R.O. No. A.235(a)/84 dated October 1, 1984, read as under :

"6-A. Notwithstanding anything contained in rule 5, the total turnover in relation to a works contract shall be the total amount payable for the execution of the works contract inclusive of the value of all goods and the labour and other

charges involved in the execution of the contract.

6-B. In determining the taxable turnover of a works contract, the amounts specified in the following clauses, shall, subject to the conditions specified therein, be deducted from the total turnover -

(a) Where under the contract, the transfer of property takes place in the form of finished goods or the contractor is required to build, construct, manufacture, process, fabricate, or otherwise procure or supply any finished goods -

(i) the charges for freight and delivery of the finished goods; and

(ii) any amount charged for, in respect of any work not involving any transfer of property, done after the emergence of the goods as finished goods but before the transfer of property is effected under the works contract :

Provided that the taxable turnover shall not be less than the market price of the same or similar finished goods sold otherwise than under a works contract."

(g) The introduction of section 3B, the Fourth Schedule of the Principal Act and amendment to rule 6-B by Act 42 of 1986 reflect as below :

(i) "Section 3-B : Levy of tax on the transfer of goods involved in works contract. - Notwithstanding anything contained in section 3, 4, 5, 7, or 7A but subject to the other provisions of this Act, every dealer referred to in item (vi) of clause (g) of section 2 whose total turnover relating to the business of transfer of property in goods involved in the execution of a works contract is not less than fifty thousand rupees and every casual trader or agent of a non-resident dealer in respect of such business whatever be his turnover for the year, shall pay for each year a tax on his turnover of transfer of property in goods involved in the execution of works contract mentioned in column (2) of the Fourth Schedule at the rates specified in the corresponding entries in column (3) of the said Schedule.

Explanation. - Where any works contract involves more than one item of work specified in the Fourth Schedule, the rate of tax shall be determined separately for each such item."

(ii) "THE FOURTH SCHEDULE

(See section 3B)

-----				Serial
Description of works contract		Rate of tax (Effective number (per cent) from)		(1)
(2)	(3)	(4)	-----	1
Fabrication and installation	15	26-6-1986	of elevators (lifts) and escalators	2
Supply and installation of	15	26-6-1986	air-conditioners and air-coolers	3
Supply and installation of	15	26-6-1986	air-conditioning equipments including deep freezers, cold storage plants, humidification plants and dehumidification plants	4
Construction of railway	15	26-6-1986	coaches on under carriages	

supplied by Railways 5 Construction, repair, 15 26-6-1986 improvement and overhauling of aircrafts and helicopters 6 Supply and fixing, laying all 15 26-6-1986 kinds of floor tiles, mosaic tiles, slabs, stones, marbles and glazed wall tiles 7 Supply and installation of 12 26-6-1986 generators, generating sets and transformers 8 Fabrication and installation 10 26-6-1986 of cranes and hoists 9 Supply and fitting of 10 26-6-1986 electrical goods and supply and installation of electrical and electronic equipments 10 Painting and polishing 10 26-6-1986 11 Fabrication and installation 8 26-6-1986 of plant and machinery 12 Supply and fixing of furniture 8 26-6-1986 and fixtures, partitions, counters, wall panelling including interior decorations including false ceiling 13 Supply and erection of weighting 8 26-6-1986 machines and weigh bridges 14 Supply and installation of 8 26-6-1986 submersible and centrifugal pumpsets with necessary panel boards starters, pressure gauges, electrical switches, fuses, etc. 15 Supply and erection of sanitary 8 26-6-1986 fittings and articles for plumbing, drainage, sewerage, etc. 16 Ship and boat building including 5 26-6-1986 construction of barges, ferries, tugs, trawlers and dredgers 17 Fabrication and installation of 5 26-6-1986 rolling shutters and collapsible gate 18 Fabrication and erection of 5 26-6-1986 structural works including fabrication, supply and erection of iron trusses, purlins, etc. 19 Fabrication and installation of 5 26-6-1986 door frames, windows and frames, window grills, gates, gate grills. 20 Civil works like construction of 5 26-6-1986 buildings, bridges, roads, etc. 21 Other contracts, not falling 10 26-6-1986 under serial numbers 1 to 20 above 5 23-3-1987

(iii) Clause (b) to rule 6-B of the Rules, as substituted by Notification S.R.O. No. A-21(b)/86 dated December 15, 1986, runs as under :

Rule 6-B. In determining the taxable turnover of a works contract, the amounts specified in the following clauses, shall, subject to the conditions specified therein, be deducted from the total turnover -

(a)

(b) Where under the contract the transfer of property does not take place in the form of goods but takes place in some other form, such sum towards labour and other charges, not involving any transfer of property in goods, actually incurred in connection with the execution of the contract :

Provided that where the labour and other charges not involving any transfer of property in goods incurred in connection with the execution of the contract are not determinable from the accounts or where such charges as shown in the accounts are, according to the assessing authority, unreasonably high considering the nature of the contract, the deduction towards labour and other charges, shall be made by the assessing authority according to the best of his judgment, subject to the limits prescribed in column (3) for the type of contract specified in column (2) of the Table below :

THE TABLE -----						
Serial	Type of contract	Labour or other charges as a number percentage of the value	of the contract	(1)	(2)	(3)
-----					1	Electrical
contracts 15	2 All structural contracts	15	3 Sanitary contracts	25	4 Watch and/or clock repair	50
contracts 5	5 Dyeing contracts	50	6 All other contracts	30	-----	

29. Batch of writ petitions had been filed before this Court challenging the validity of the amendments introduced by the Tamil Nadu Act 28 of 1984, rules 6-A and 6-B introduced with effect from October 1, 1984 and Tamil Nadu Act 42 of 1986 introducing section 3B and the Fourth Schedule to the Principal Act with effect from June 26, 1986 and the amendments to rule 6-B and all those writ petitions had been disposed of by a common judgment by a Division Bench of this Court in *Larsen and Toubro Limited v. State of Tamil Nadu* [1993] 88 STC 289.

30. As far as Act 28 of 1984 (referred to therein as "the 1984 Amendment Act") is concerned, the Division Bench upheld its constitutional validity by observing in paragraph 19 (at page 305) thus :

"19. The challenge to the amendments introduced by the 1984 Amendment Act on the basis of the Constitution (Forty-sixth Amendment) Act, 1982, could no longer survive after the decision of the apex Court in the *First Builders Association case* [1989] 73 STC 370. The challenge to the said provisions, therefore, fails and shall consequently stand rejected."

31. The Bench, by adopting the technique of construction, known as "reading down", upheld the constitutional validity of section 3B of the Principal Act and in so doing, the said section had been read down to tax only the transfer of property in goods involved in the execution of works contract and not any and every turnover, notwithstanding the fact that the word, "turnover", in contrast to "taxable turnover" had been used therein. It was observed in that connection that the use of the word "turnover", in contrast to "taxable turnover" is not a pernicious or vitiating factor, provided the provisions in the Principal Act or the Rules ensure properly that the levy of tax is on the value of goods alone and not on something, which is not part of that value. The absence of sufficient provisions to properly determine the turnover, on which alone the tax could be levied and collected, either in the Principle Act or the Rules prescribed, might have the consequence at the most, of making section 3B dormant; but not liable to be struck down. With the prescription of proper rules, section 3B can always be activated and enforced. The provisions of section 3B, though begins with a non obstante clause, is not absolute in its overriding effect, but proceed further making it "subject to the other provisions of the Act", and, therefore, does not stand by itself and that too completely divorced from then other provisions. It cannot be ignored that the non obstante clause is sometimes appended to a section or rule in the beginning with a view to give the enacting part of that

section or rule, in case of conflict, an overriding effect over the provisions of the Act mentioned in that clause. Though the non obstante clause would indicate that section 3B should prevail, despite anything to the contrary in sections 3, 4, 5 and 7 or 7A, the immediately following phrase, "but subject to the other provisions of this Act", makes the manmade clear that it would be subject to the other governing provisions. For the reasons so assigned, the Bench was unable to countenance the challenge to the provisions of section 3B either on the ground of absence of the word "taxable" prefixed to the word "turnover", or on the omission to formulate in the provision of the Act itself the procedure for determination of the taxable turnover by having an in-built and illustrated items of deductions, the charge or levy u/s 3B itself being only on the value of the goods involved in the execution of the works contract as and when the transfer of property takes place and not the cost or value of the incorporation of the goods forming part of work and labour. The provisions of section 3B, in the view of the Bench, are constitutionally valid and do not also suffer from any other infirmity in law, warranting or necessitating it to be struck down.

32. The contention that since the charging section 3B levies a tax on transfer of property in goods alone and not the transfer of property "in some other form", rule 6-B(b) of the Rules, which provides for levying tax on the turnover relating to transfer of property in goods involved in execution of works contract in "some other form" exceeds the scope of levy of the said charging section and is therefore, not sustainable had been considered by the Bench, which ultimately negated it. The Bench would say, that with the amendment to the definition of "sale" in section 2(n) of the Principal Act, which serves as the the interpretation clause for the Act as a whole encompassing all categories of transfer of property in goods, whether as goods in some other form, the word "goods" in section 3B has to be considered in the sense in which it has been defined, so as to include a transfer of property in goods or in some other form and the dichotomy which existed prior to the Forty-sixth Amendment to the Constitution and the consequent amendments carried out in the local sales tax laws of the States concerned, could not be said to exist any longer and that in view of the legal fiction created by clause (29-A) of article 366 of the Constitution, it is difficult to hold that the properties that are transferred to the owner in the execution of a works contract are not the goods involved in the execution of the works contract, but a conglomerate and the very object of the new definition introduced in clause (29-A) of article 366 of the Constitution is only to enlarge the scope of sale or purchase of goods, wherever it occurs so that it may include within its scope of transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) thereof, whether as goods or in some other form, in view of the execution of a works contract also.

33. The Bench also held that rules 6-A and 6-B of the Rules do not pass the tests laid down and are ultra vires the Constitution as well as section 3 to 6, 14 and 15 of the Central Act and in so doing, it also rendered rule 6-B(b), as it existed between October 1, 1984 and December 14, 1986, illegal. The rationale is this.

Rules 6-A and 6-B, as framed with effect from October 1, 1984 to December 14, 1986, provide for an invariable and flat rate of deduction towards labour and other charges, not involving any transfer of property in goods incurred in connection with the execution of the contract, irrespective of the fact, as to whether the accounts maintained by a dealer reflect the correct position and gave sufficient and proper details relating to the actual expenditure so incurred in that regard. This method of standard and uniform deductions, de hors the account of the dealer or the actual materials available in a case disclosing the actual expenditure has a vicious and vitiating effect of bringing into the net of taxation that part of turnover which is shown in the accounts, as obviously referable and to having been incurred towards labour and other charges.

34. The Bench, ultimately, summarised its conclusions and findings in paragraph 38 (pages 319-320) as below :

(a) The provisions of the Tamil Nadu General Sales Tax (Fourth Amendment) Act, 1984 (Tamil Nadu Act 28 of 1984) in so far as it amended section 2(g), (j), (n), (r) and (u) pursuant to the Constitution (Forty-sixth Amendment) Act, 1982 are intra vires and valid and quite in accordance with law;

(b) The provisions of the Tamil Nadu General Sales Tax (Fourth-Amendment) Act, 1986 (Tamil Nadu Act 42 of 1986), are intra vires and valid and quite in accordance with law;

(c) The provisions of rules 6-A and 6-B of the Tamil Nadu General Sales Tax Rules, 1959, are unconstitutional, illegal and are struck down as unenforceable in law; consequently any orders passed and any action initiated on the basis of such rules shall be invalid in law;

(d) The liability or otherwise of the dealers/assesseees under the Tamil Nadu General Sales Tax Act, 1959 and the Rules made thereunder, de hors our decision striking down rules 6-A and 6-B shall not stand in any manner affected or undermined by this decision;

(e) The State shall be at liberty to bring to life, force and effect section 3B by appropriate legislation, including subordinate legislation in accordance with the principles and dicta laid down by the Supreme Court of India in the decisions in (i) Gannon Dunkerley & Co. v. State of Rajasthan [1993] 88 STC 204 ; (1992) 2 MTCR 474 and (ii) Builders Association of India v. State of Karnataka [1993] 8 STC 248; (1992) 2 MTCR 542;

(f) Nothing in this order shall affect the right of the Revenue to initiate or continue or pursue and proceed to decide or pass orders or assess and recover the tax due as and when the law is validity made and in accordance with law; and

(g) These writ petitions, shall stand ordered and finally disposed of in the above terms."

35. The judgment of the Division Bench of this Court as above necessitated the

passing of the Tamil Nadu General Sales Tax (Second Amendment) Act, 1993 (Tamil Nadu Act No. 25 of 1993 - for short "the Act 25 of 1993"), which got published in the Tamil Nadu Government Gazette, Extraordinary (No. 287), Part IV, Section 2, dated May 28, 1993 at pages 87 to 96, after receiving of the assent of the Governor on May 27, 1993. The said Act, adopted the technique of amendment, substitution, insertion and omission of certain provisions in the principal Act and by such a process, it amended sections 2, 3, 4, 7A, 12, 16, 16B and 16C; substituted sections 3A and 3B; inserted sections 7C and 16AA and omitted section 5. It provided, by way of legal fiction that sections 3 to 8 and 27 shall be deemed to have come into force on March 12, 1993 and sections 9, 12 and 14 on April 1, 1993. Worthy it is to mention here, a peculiar feature of it. Normally, it is the invariable practice that the principle Act shall contain the charging provision and the machinery provision shall be provided for by way of rules appended thereto. Such a procedure in practice had not been adopted here; but what had been resorted to was that while substituting the charging provision, namely, section 3B of the principal Act, by section 3B, the machinery provision had been provided for by way of sub-section (2) of section 3B, instead of providing a rule therefore and that apart, retrospectivity for such a provision had been given by expressly stating that the taxable turnover of the dealer of transfer of property involved in the execution of works contract shall, on and from June 26, 1986, be arrived at, after deducting the amounts mentioned in clauses (a) to (d) and the amounts mentioned in clause (e) or the Table provided thereunder.

36. Old section 3B has been extracted in paragraph 28(g)(i) supra. The substituted section 3B, old section 4 and amended section 4, besides the newly added section 7C by way of insertion, relevant for our present purpose, read as under :

(i) Section 3B (as substituted).

"Section 3-B : Levy of tax on the transfer of goods involved in works contract. - (1) Notwithstanding anything contained in sub-sections (2-A), (2-B), (3), (4), (7) and (8) of section 3, or section 7A, but subject to the other provisions of this Act, including the provisions of sub-section (1) of section 3, every dealer referred to in item (vi) of clause (g) of section 2 shall pay, for each year, a tax on his taxable turnover of transfer of property in goods involved in the execution of works contract at the rates mentioned in sub-section (2) of section 3, or, as the case may be, in section 4.

Explanation. - Where any works contract involves more than one item of works, the rate of tax shall be determined separately for each such item of work.

(2) The taxable turnover of the dealer of transfer of property involved in the execution of works contract shall, on and from the 26th day of June, 1986, be arrived at after deducting the following amounts form the total turnover of that dealer :-

(a) all amounts involved in respect of goods involved the execution of works contract in the course of export of the goods out of the territory of India, or in the course of import of the goods into the territory of India or in the course of inter-State trade or commerce;

(b) all amounts for which any goods specified in the First Schedule or Second Schedule, are purchased from registered dealers liable to pay tax under this Act and used in the execution of works contract in the same form in which which goods were purchased;

(c) all amounts relating to the sale of any goods involved in the execution of works contract which are specifically exempted from tax under any of the provisions of this Act;

(d) all amounts paid to the sub-contractors as consideration for execution of works contract whether wholly or partly :

Provided that no such deduction shall be allowed unless the dealer claiming deduction, produces proof that the sub-contractor is a registered dealer liable to pay tax under this Act and that the turnover of such amounts is included in the return filed by such sub-contractor; and

(e) all amounts towards "labour charges and other like charges" not involving any transfer of property in goods, actually incurred in connection with the execution of works contract, or such amounts calculated at the rate specified in column (3) of the Table below, if they are not ascertainable from the books of accounts maintained and produced by a dealer before the assessing authority.

THE TABLE -----					
Serial	Type of contract	Labour or other charges as a number percentage of the value of the contract	(1)	(2)	(3)
1	Electrical contracts	15	2	All structural contracts	15
3	Sanitary contracts	25	4	Watch and/or clock repair	50
5	Dyeing contracts	50	6	All other contracts	30

(ii) Section 4 (old)

"Section 4 : Tax in respect of declared goods. - Notwithstanding anything contained in section 3 or 3B, the tax under this Act shall be payable by a dealer on the sale or purchase inside the State of declared goods at the rate and only at the point specified against each in the Second Schedule on the turnover in such goods in each year, whatever be the quantum of turnover in that year."

(iii) Section 4 (as amended)

"Section 4 : Tax in respect of declared goods. - Notwithstanding anything contained in sub-sections (2) to (8) of section 3 or section 3A or section 3B but subject to the provisions of sub-section (1) of section 3, the tax under this Act shall be payable by a dealer on the sale or purchase inside the State of declared goods at the rate and only at the point specified against each in the Second

Schedule on the turnover in such goods in each year."

On a comparison of the old and new section 4, the following is explicit :

(a) The expression, "Notwithstanding anything contained in sub-sections (2) to (8) of section 3 or section 3A or section 3B but subject to the provisions of sub-section (1) of section 3" was substituted for the expression, "Notwithstanding anything contained in section 3 or 3A"; and

(b) The expression, "whatever be the quantum of turnover in that year" occurring in the fag end of old section 4 had been omitted in the new section 4.

(iv) Section 7C (newly added by insertion)

"Section 7-C : Payment of tax at compounded rates by civil works contractor. - (1) Notwithstanding anything contained in section 3B, every dealer referred to in item (vi) of clause (g) of section 2, in so far as civil works contract is concerned, may, at his option, instead of paying tax in accordance with section 3B, pay, on the total value of the civil works contract executed by him in a year, tax calculated at the rate of two per cent of such total contract value of the civil works executed by him in that year.

(2) Any dealer who executes civil works contract may apply to the assessing authority along with the first monthly return for the financial year, his option to pay the tax under sub-section (1) and shall pay the tax during the year in monthly instalments and for this purpose, he shall furnish such return within such period and in such manner as may be prescribed :

Provided that the option under this sub-section for the financial year commencing on the 1st day of April, 1993 shall be exercised on or before the 30th day of June, 1993.

(3) The option exercised under sub-section (1) shall be final for that financial year.

(4) A dealer, exercising option under sub-section (1) shall, so long as the option remains in force, not be required to maintain accounts of his business under this Act or the Rules made thereunder except the records in originals of the civil works contract, extent of their execution and payments received or receivable in relation to such civil works contract, executed or under execution.

Explanation. - For the purpose of this section "civil works contract", means civil works of construction of new building, bridge, road, runway, dam or canal including any lining, tiling, painting or decorating which is an inherent part of the new construction; but shall not include any repair, maintenance, improvement or upgradation of such civil work by means of fixing and laying of all kinds of floor tiles, mosaic tiles, slabs, stones, marbles, glazed tiles, painting, polishing, partition, wall paneling, interior decoration, false ceiling, carpeting and extra fittings, or any manner of improvement on an existing structure."

37. What is the true scope and ambit of sections, namely, section 3B (as substituted), section 4 (as amended) and section 7C (newly added by insertion) and whether those provisions are ultra vires of the relevant provisions of the Constitution and CTS Act are the main questions, besides certain other cognate questions, that arise for consideration in all these actions and the fact that the nature of the works contracts may be varied and multifarious is of no consequence, inasmuch as such a factor, if at all, will have relevance in respect of individual assessment and determination of liability of the assessee concerned and in this view of the matter, I do not think it necessary to pen down the facts even in some detail in one or two actions and in other cases generally, except to state that in most of the cases, interim orders in the nature of stay or injunction had been obtained preventing or restraining the authorities concerned from proceeding further, pending disposal of the respective writ petitions.

(a) When those W.M.Ps. came up for hearing, learned counsel for the respective petitioners-assesseees and learned Additional Government Pleader (Taxes) agreed for the disposal of the main writ petitions themselves and consequently, all of them had been listed for hearing and arguments were heard.

38. From the nature of the submissions, emerged from the array of learned counsel for the respective petitioners-assesseees and learned Additional Government Pleader (Taxes) representing the respective respondents in all these actions, the following points, in pith and substance, arise for consideration :

(1) The non obstante clause in section 3-B (old), which overrides section 4 (before amendment) is in violation of the provisions of the Central Act.

(2) Section 3-B (old) is inadequate to charge a construction contract and even sub-section (1) of section 3B (as substituted) levies tax on transfer of property "in goods" alone and not transfer of property "in some other form" and as such, it cannot at all be stated that the power of the State to levy tax on transfer of property in goods in some other form, although inheres in the States by virtue of the purposeful 46th Amendment by the introduction of clause (29-A) in article 366 of the Constitution, had been exhausted; and therefore, it is, that it is not permissible to levy on the transfer of property in goods in some other form.

(3) The classification in the Fourth Schedule for rate purposes and classification for deduction should be identical (for the period between June 26, 1986 and March 11, 1993). The deduction categories fall short of the measure of tax provided in section 3B (old).

(4) Whether retrospectivity given to sub-section (2) of section 3B (as substituted) with effect from June 26, 1986, is valid or not in law ?

(5) Whether section 3B (both prior to and after March 12, 1993) violates article 286(3)(a) of the Constitution, as well as sections 14 and 15 of the Central Act ?

(6) Whether consumables, not involving transfer of property in goods, which go in the manufacture of goods, involved in the execution of works contract, are

includible in the expression, "labour charges and other like charges", as a deduction under clause (e) of sub-section (2) of section 3B, in computing the taxable turnover of the contractor ? If not, what is its effect ?

(7) Whether section 7-C (newly added by insertion) is violative of article 14 of the Constitution ?

39. Point Nos. 1 to 3 : There points, though hover on issues, distinct and separate from each other, can, however, be grouped and disposed of, for the simple reason that it is not as if they had never been raised anterior in point of time insuperior courts of jurisdiction and the plain fact is that such points had been raised before this Court, which had the occasion to consider and express its views, in the case of Larsen and Toubro Limited [1993] 88 STC 289, which get reflected as below :

"..... The provisions of section 3B though begins with a non obstante clause is not absolute in its overriding effect but proceed further making it, "subject to the other provisions of the Act", and, therefore, does not stand by itself and that too completely divorced from the other provisions. Notwithstanding the non obstante clause in the opening part of the section, it abundantly makes clear in the following phrase that it is also subject to the other provisions of the Act. It cannot be ignored that the non obstante clause as also sometimes appended to a section or rule in the beginning with a view to give the enacting part of that section or rule, in case of conflict, an overriding effect over the provisions of the Act mentioned in that clause. In this case before us, though the non obstante clause would indicate that section 3B should prevail despite anything to the contrary in sections 3, 4, 5 and 7 or 7A, the immediately following phrase "but subject to other provisions of this Act" makes the mandate clear that it would be subject to the other governing provisions," (paragraph 25, pages 310-311)

"27. The contentions of the learned counsel for the petitioners that though in the execution of a works contract, transfer of property in goods is involved whether as goods or in some other form, section 3B which is the charging provision as well as rules 6-A and 6-B conspicuously omits to provide for the levy in respect of the property in goods in some other form, otherwise than as goods and consequently such category of transfer of property is not and cannot be subjected to tax u/s 3B of the Act and the rules made thereunder, have no merit or substance. With the amendment to the definition of "sale" in section 2(n) of the main Act which serves as the interpretation clause for the Act as a whole encompassing all categories of transfer of property in goods whether as goods or in some other form, the word "goods" in section 3B has to be considered in the sense in which it has been defined, so as to include a transfer of property in goods or in some other form and the dichotomy which existed prior to the Forty-sixth Amendment to the Constitution and the consequent amendments carried out in the local sales tax law of the States concerned, could not be said to exist any longer. As a matter of fact, in the first Builders Association of India case [1989] 73 STC 370, the apex Court held that in view of the legal fiction created

by clause (29-A) of article 366 of the Constitution, it is difficult to hold that the properties that are transferred to the owner in the execution of a works contract are not the goods involved in the execution of the works contract but a conglomerate and the very object of the new definition introduced in clause (29-A) of article 366 of the Constitution of India is only to enlarge the scope of sale or purchase of goods, wherever it occurs so that it may include within its scope of transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) thereof, whether as goods or in some other form, in view of the execution of a works contract also. Consequently, the reliance placed by the learned counsel for the petitioners on the decisions reported in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, ; *Sentinel Rolling Shutters and Engineering Company (Pvt.) Ltd. Vs. The Commissioner of Sales Tax*, and *Ram Singh and Sons Engineering Works Vs. Commissioner of Sales Tax, U.P.*, are wholly irrelevant and inappropriate. The plea of alleged inconsistency raised for the very same reason of the Fourth Schedule with section 3B of the Act equally deserves to be rejected in view of our conclusions as above." (pages 312-313).

"30. Equally untenable, in our view, are the contentions based on the so-called under-classification, the alleged invalidity in fixing the ceiling of percentage for deduction in respect of works-labour and other charges and the alleged absence of guidelines when a particular contract may be construed to fall under more than one of the illustrated items in the Table appended to clause (b) of rule 6-B of the Rules. The apex Court had on occasion to consider the legality and propriety of fixing a percentage for deduction, on account of the labour and other charges in the second Builders Association of India case [1993] 88 STC 248; (1992) 2 MTCR 542 which arose under the Karnataka Sales Tax Act. While repelling the challenge in this regard, the apex Court held that charges for labour and services cannot be uniform for all types of works contracts and they would vary with the nature of the contract and services, and consequently, it is permissible for the rule-making authority to categorise all works contracts into different categories and prescribe a different percentage of the value of the contract for the purpose of deduction of amounts towards labour charges and other charges. There is also no merit, in our view, in the plea that the rule-making authority himself can make as many classifications as there were categories enumerated in the Fourth Schedule to the Act, while providing for deduction for labour and other like charges. The classification for the purposes of fixing the rate of taxation and the classification for fixing the national percentage for deduction towards labour and other like charges, need not necessarily be one and the same since they have distinct and different purposes to be served, and aim at objects to be achieved, and that by itself provides sufficient scope for different kinds and nature of classification for different purposes. Equally without substance is the plea that the fixation of the percentage for deduction with a limit or ceiling has the consequence of interfering with the exercise of quasi-judicial powers by the assessing officers concerned. Whatever may be the

position, prior to December 15, 1986, at least after the substitution of clause (b) of rule 6-B of the Rules with the proviso appended thereto, the need for applying the Table appended to clause (b) arose only in cases where the labour and other charges could not be determined from the accounts maintained or where such charges as shown in the accounts are unreasonably high, considering the nature of the contract, and not in every other case. In our view, the provisions made in the rules cannot be said to suffer from any infirmity, merely on account of a notional fixation so long as it is found to be reasonable. Except contending that the percentage fixed in the rules does not have any basis on the facts obtained on any research for investigation, no concrete material whatsoever has been produced before this Court to come to a conclusion that the percentages fixed are so arbitrary or demonstrably unreasonable or illogical, warranting our interference on that account, in these proceedings under article 226 of the Constitution of India, That apart, it is by now a well-accepted proposition of law, often reiterated by courts including the apex Court that a very wide latitude is available to the Legislature in the matter of classification of objects, persons and things for purpose of taxation, and it needs to be shown particularly, having regard to the complexities involved in the formulation of a taxation policy. Consequently, the plea of alleged discrimination has no merit and it has not been also substantiated before us with any definite or concrete materials, warranting our interference on that ground." (pages 315-316)

40. Thus it is crystal clear that point Nos. 1 to 3, as now raised, had been earlier considered and negated by a Division Bench of this Court, in the case of *Larsen and Toubro Limited* [1993] 88 STC 289.

41. Useful reference may be made at this juncture as to what the apex Court of this country has said as to the binding effect of a decision in the case of *T. Govindaraja Mudaliar Vs. The State of Tamil Nadu and Others*, . Among several challenges, what came up for consideration was, whether the question regarding the validity of Chapter IV-A of the Motor Vehicles Act, 1939, on the ground of infringement of article 19(1)(f) of the Constitution, which though open, was not raised in earlier writ petitions, can ever be raised in subsequent writ petitions, notwithstanding the fact that the validity of the said chapter had been upheld in all previous decisions. Their Lordships, in answering the said question expressed in a scintillating fashion, at paragraph 10 (page 978) thus :

"10. The argument of the appellants is that prior to the decision in *Rustom Cavasjee Cooper Vs. Union of India (UOI)*, it was not possible to challenge Chapter IV-A of the Act as violative of article 19(1)(f) owing to the decision of this Court that article 19(1)(f) could not be invoked when a case fell within article 31 and that was the reason why this Court in all the previous decisions relating to the validity of Chapter IV-A proceeded on an examination of the argument whether there was infringement of article 19(1)(g), and clause (f) of that article could not possibly be invoked. We are unable to hold that there is much substance in this argument. *The State of Bombay Vs. Bhanji Munji and*

Another, and other decisions which followed it were based mainly on an examination of the inter-relationship between article 19(1)(f) and article 31(2). There is no question of any acquisition or requisition in Chapter IV-A of the Act. The relevant decision for the purpose of these cases was only the one given in Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others, after which no doubt was left that the authority of law seeking to deprive a person of his property otherwise than by way of acquisition or requisition was open to challenge on the ground that it constituted infringement of the fundamental rights guaranteed by article 19(1)(f). It was, therefore, open to those affected by the provisions of Chapter IV-A to have agitated before this Court the question which is being raised now based on the guarantee embodied in article 19(1)(f) which was never done. It is apparently too late in the day now to pursue this line of argument. In this connection we may refer to the observations of this Court in Mohd. Ayub Khan Vs. Commissioner of Police, Madras and Another, according to which even if certain aspects of a question were not brought to the notice of the court it would decline to enter upon re-examination of the question since the decision had been followed in other cases. In Smt. Somavanti and Others Vs. The State of Punjab and Others, , a contention was raised that in none of the decisions the argument advanced in that case that a law may be protected from an attack under article 31(2) but it would be still open to challenge under article 19(1)(f), had been examined or considered. Therefore, the decision of the court was invited in the light of that argument. This contention, however, was repelled by the following observations at page 794 :

"The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the joint with reference to which an argument was subsequently advanced was actually decided."

It is common ground in the present cases that the validity of Chapter IV-A of the Act has been upheld on all previous occasions and merely because the aspect now presented based on the guarantee contained in article 19(1)(f) was not expressly considered or a decision given thereon will not take away the binding effect of those decisions on us."

42. In view of what has been stated as above, it is not open to the petitioners-assesseees in all these actions to reagitate the same and consequently point Nos. 1 to 3 are answered in the negative.

43. Point Nos. 4 : It is but necessary to recapitulate at this juncture that the charge created u/s 3B by the Act 42 of 1986, with effect from June, 26, 1986, though held to be valid, had, however, been made dormant and liable to be benumbed by striking down rules 6-A and 6-B, the machinery provisions, with a direction for the prescription of relevant statutory provisions to activate, revitalise and bring to life such charging provision, by a Division Bench of this Court in the case of Larsen and Toubro Ltd. [1993] 88 STC 289 and in accordance with such a direction, Act 25 of 1993 had been passed, introducing

the machinery provisions (deduction provisions), as forming part and parcel of the principal Act itself, in the shape of sub-section (2) of section 3B, giving retrospective effect from June 26, 1986, to fall in line with the charge created u/s 3B by Act 42 of 1986. The deduction provisions, being procedural in the computation of the taxable turnover, retrospectivity giving to a portion of the Amendment Act cannot at all be stated to be not in accordance with the legislative practice.

44. The apex Court had the occasion to consider the extent of retrospectivity of an Act in the case of *The Ahmedabad Mfg. and Calico Printing Co., Ltd. Vs. S.C. Mehta, Income Tax Officer and Another*, wherein their Lordships expressed in paragraph 34 (page 170 of ITR; 1445 of AIR) thus :

"34. The date on which the amendment comes into force is the date of the commencement of the amendment. It is read as amended from that date. Under ordinary circumstances, an Act does not have retrospective operation on substantial rights which have become fixed before the date of the commencement of the Act. But this rule is not unalterable. The Legislature may affect substantial rights by enacting laws which are expressly retrospective or by using language which has that necessary result. And this language may give an enactment more retrospectivity than what the commencement clause gives to any of its provisions. When this happens the provisions thus made retrospective, expressly or by necessary intendment, operate from a date earlier than the date of commencement and affect rights which, but for such operation, would have continued undisturbed."

In this view of the matter, it cannot be stated that the retrospectivity given to sub-section (2) to section 3B (substituted) with effect from June 26, 1986, is not valid in law and this point is answered accordingly.

45. Point Nos. 5 and 6 : Article 286(3)(a) of the Constitution provides that any law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify. The Central Act came to be passed in 1956 and section 14 declared certain goods to be of special importance in inter-State trade or commerce. u/s 15 of the same Act, every sales tax law of a State in so far as it imposes or authorises imposition of tax on the sale or purchase of the declared goods was to be subjected to restrictions and conditions as set out therein. One of the conditions was that the tax payable under the State law in respect of such declared goods shall not exceed 4 per cent of the sale or purchase price thereof and that such tax shall not be levied at more than one stage. The second condition was that where the sales tax was levied under the State law in respect of the sale or purchase inside the State of any declared goods, and such goods were sold in the course of inter-State trade or commerce, the tax levied and if paid was to be refunded to such person in manner and subject to such conditions

48. Let me now embark upon a discussion of that facet of the submission, which revolves on the alleged aspect of two stage levy of tax in respect of declared goods from the point of view of purchase from registered and unregistered dealers u/s 3B. In order to understand the various facets of the submissions, as aforesaid, one must visualise a clear picture of the methodology that had been provided for subjecting the goods involved in the execution of the works contract to sales tax. It is not as if sales tax is calculated on each and every item of goods involved in the execution of works contract and then totalled up in determination of the quantum of tax payable by the assessee. This is not done, because of the peculiar features of the works contract. Transfer of property involved in execution of the works contract takes place at the time of incorporation and not earlier. Therefore, the transfer value at the time of incorporation has to be taken into account for levy of tax. The methodology therefore adopted is that "taxable turnover" is arrived at by the process of deduction of amounts, as had been specified in sub-section (2) of section 3B from the total contract receipt of the contractor, taking it as "total turnover". In the illustration, the contract receipt is Rs. 500. Therefore, the taxable turnover is arrived at by the process of deduction from Rs. 500, as contemplated by sub-section (2) of section 3B and what remained is taxed as taxable turnover under sub-section (1) of section 3B. In the illustration, the contractor purchases declared goods within the State from registered dealer for Rs. 40. The profit margin is Rs. 10. The transfer value is therefore Rs. 50. It is submitted that u/s 3B, only the amount for which goods are purchased from registered dealers is liable to pay tax and used in the same form are deducted, with the result that the contractor will be able to get only a deduction of Rs. 40 on account of the purchase from registered dealers of declared goods from the gross receipt of Rs. 50 and the profit margin will not be deducted and therefore remains as taxable turnover at the hands of the contractor. In respect of ordinary sales, as opposed to works contract, deduction u/s 4 is the sale value and not the purchase value of the declared goods. As such, what is contended on behalf of the respective petitioners-assesseees is that there is a violation of section 15 of the Central Act, in the sense that section 3B results in tax at two stages, namely, (i) Rs. 40 is taxed at the hands of the registered dealer on first sale; and (ii) Rs. 10 is taxed at the second stage, at the hands of the contractor.

49. But, on the other hand, placing implicit reliance on the decision of the Constitution Bench of the apex Court in *Gannon Dunkerley & Co. v. State of Rajasthan* [1993] 88 STC 204, wherein their Lordships expressed that since the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works and not the cost of acquisition of the goods by the contractor, and it would be permissible for the State Legislature to tax all the goods involved in the execution of works contract

at a uniform rate which may be different from the rates applicable to individual goods, because the goods which are involved in the execution of the works contract, when incorporated in the works can be classified into a separate category for the purpose of imposing the tax. What is contended on behalf of the State is that the profit margin of the contractor on the tax suffered declared goods, namely, Rs. 10 in the illustration, cannot at all be excluded from the "taxable turnover" and to put it otherwise, such profit margin should also suffer tax and that perhaps was the reason for the deduction given for such goods at the purchase value u/s 3B(a)(b) and such being the case, the contention of the other side, as noted above, has to necessarily bristle next to nothing.

50. To the submissions emerging from the State as well as from the petitioners-assesseees, I am unable to affix my seal of approval. The submissions as above appear to be captivating and attracting at first sight, on a cursory glance or survey of salient provisions adumbrated u/s 3B(a)(b), if made, treating section 3B (as substituted) as an independent and distinct, not having any sort of a connection with the provisions of the Principal Act, in the sense of it not having been controlled by any other provision. But, on a harmonious reading of section 3B (as substituted) and section 4 (as amended), it is clear that section 3B, the charging provision, is not only subject to the mandatory provision of sub-section (2) thereof, but also subject to provisions contained in section 4 (as amended), in the sense of disciplining section 3B charging sale or purchase inside the State of declared goods at the rate and only at the point specified against each in the Second Schedule on the turnover in such goods in each year. This would, in effect, mean that though the transfer of property in goods involved in the execution of works contract takes place at the time of incorporation, yet the transfer value of the declared goods must have to go in deduction u/s 3B. But on the other hand, if the sale or purchase value of declared goods alone goes in deduction, it would result in profit margin of the contractor getting taxed, which is not the purport and intendment of the sanguine provisions adumbrated u/s 3B (as substituted) and section 4 (as amended).

51. The discussion may now revolve on the purchase by the contractor of First and Second Schedule goods from unregistered dealers and used in the execution of works contract. If such goods are purchased by the contractor from unregistered dealers and used in execution of works contract u/s 3B(2)(b), deduction is not permissible. This, it is submitted, is bad in law and elaboration proceeds thus. u/s 4 (amended), tax is levied on the sale by "dealer" at the points specified in the Second Schedule. The "dealer" is defined u/s 2(g), as the person carrying on business of buying, or selling. Section 4 (as amended) read with the Second Schedule, charges tax on the first sale by a dealer, e.g., iron and steel, irrespective of the fact as to whether the dealer is registered or unregistered. Thus, an unregistered dealer cannot escape the liability due to non-registration. Therefore, section 3B, not permitting deduction in respect of declared goods purchased from unregistered dealers, not taking into account, his liability to pay tax for such goods is bad in law. In respect of such a stand,

implicit reliance is placed in *Govindan & Co. v. State of Tamil Nadu* [1975] 35 STC 50, wherein a Division Bench of this Court expressed that to claim the benefit of tax on the ground that the sales effected by the assesseees are second sales, the assesseees need only to show that the dealers in question are real persons and their sales are taxable under the Act and there is no need to show that their sellers in fact paid the tax.

52. Of course, to such a view of this Court, the Supreme Court affixed its seal of approval in the case of *State Tamil Nadu v. Raman & Co.* [1994] 93 STC 185. But the said decision approving the view of this Court is distinguishable for the simple reason, as rightly contended by learned Additional Government Pleader (Taxes) that in order to claim deduction in respect of second sales of goods in the First and Second Schedules, unlike section 3B, rule 6(g) of the Rules does not contain any such restriction, as purchase from a registered dealer liable to pay tax. Rule 6 uses the word "dealer", which is in contra distinction to the words used in section 3B, namely, "registered dealer". The insistence on proof of a condition for purposes of deduction as an anti-tax evasion measure is a reasonable restriction, which the State is entitled to specify and hence, the reliance on the aforesaid decision of the Supreme Court cannot at all be stated to advance or improve the case of the petitioners-assesseees to any extent whatever.

53. Equally untenable is the contention, as relatable to profit margin of the contractor of such goods being included in the taxable turnover and thereby getting taxed in respect of the goods involved in the execution of the works contract by a sub-contractor, who is an unregistered dealer.

54. The inadequacy of section 3B (prior to and after March 12, 1993) to charge construction contract had already been dealt with under point Nos. 1 to 3, and the discussion made thereon will also hold good here. Besides an addition is made to such a discussion as below :

By the adoption of a technique of reading down, the Division Bench of this Court, upheld the validity of section 3-B (old), as not being violative of the relevant provisions of the Constitution and Central Act. Worthy it is to mention here that Act 25 of 1993, included in section 3B, among other things, a non obstante clause, in the opening paragraph of section 4 by way of abundant caution, obviously, in order to avoid any further challenge.

55. Let me now delve deep to consider the question of validity or otherwise of the requirement of same form as respects declared goods. Section 3B insists that unless "declared goods" are used in "the same form", they will not be deducted, though taxed earlier. It is submitted that the State is not competent to say that the goods shall be used in "the same form", or otherwise, it will be taxed again. Section 14 of the Central Act enumerates "declared goods". The various items of "declared goods" are enumerated in several items and continued to be treated specially, irrespective of change in form. The fact of "form" is a matter for the Parliament to take note of, and stipulate any condition and therefore, the

State cannot dilute the effect of section 14 of the Central Act. While repelling such a submission, what emerges from learned Additional Government Pleader (Taxes) representing the State is this :

(a) For purposes of taxation, it is the commercial identity and the distinctiveness of the character, which alone is the criteria and the fact that the goods in question have come out of a basic raw material or a common substance is not of any consequence. The object of taxation is the commercial identity and not the substance out of which it is made.

56. It is not as if the tangle posed by the rival submissions as above did not arise for consideration before courts of superior jurisdiction and in fact, the apex Court of this country dealt with such a question in decisions more than one and of them, the decision in *State of Tamil Nadu v. Pyare Lal Malhotra* [1976] 37 STC 319, which decided the said question, by entering into discussion in a scintillating fashion, may be usefully referred to here.

(a) It was claimed on behalf of the dealers that by reason of restrictions imposed by section 15 of the Central Act, the levy of tax under the Tamil Nadu Sales Tax Act (referred to therein as "the Tamil Nadu Act") was not permissible. The discussion leading to the conclusion on such a sort of contention is reflected as below :

"Section 14 of the Central Act declares certain goods enumerated there to be "of special importance in inter-State trade or commerce". The list of goods given there at No. (iv), as it stood in 1968, was :

(iv) iron and steel, that is to say, -

(a) pig iron and iron scrap;

(b) iron plates sold in the same form in which they are directly produced by the rolling mill;

(c) steel scrap, steel ingots, steel billets, steel bars and rods;

(d)(i) steel plates, --- | (ii) steel sheets, | sold in the same form in which | they are directly produced by the (iii) sheet bars and tin bars, | rolling mill. | (iv) rolled steel sections, | | (v) tool alloy steel; ---

By the Central Sales Tax (Amendment) Act 61 of 1972, clause (iv) was redrafted. It now reads as follows :

"(iv) iron and steel, that is to say, -

(i) pig iron and cast iron including ingot moulds, bottom plates, iron scrap, cast iron scrap, runner scrap and iron skull scrap;

(ii) steel semis (ingots, slabs, blooms and billets of all qualities, shapes and sizes);

- (iii) skelp bars, tin bars, sheet bars, hoe-bars and sleeper bars;
- (iv) steel bars (rounds, rods, squares, flats, octagons and hexagons, plain and ribbed or twisted, in coil form as well as straight lengths);
- (v) steel structurals (angles, joists, channels, tees, sheet piling sections, Z sections or any other rolled sections);
- (vi) sheets, hoops, strips and skelp, both black and galvanised, hot and cold rolled, plain and corrugated, in all qualities, in straight lengths and in coil form, as rolled and in rivetted condition;
- (vii) plates both plain and chequered in all qualities;
- (viii) discs, rings, forgings and steel castings;
- (ix) tool, alloy and special steels of any of the above categories;
- (x) steel melting scrap in all forms including steel skull, turnings and borings;
- (xi) steel tubes, both welded and seamless, of all diameters and lengths, including tube fittings;
- (xii) tin-plates, both hot dipped and electrolytic and tinfree plates;
- (xiii) fish plate bars, bearing plate bars, crossing sleeper bars, fish plates, bearings plates, crossing sleepers and pressed steel sleepers, rails - heavy and light crane rails;
- (xiv) wheels, tyres, axles and wheel sets;
- (xv) wire rods and wires - rolled, drawn, galvanised, aluminised, tinned or coated such as by copper;
- (xvi) defectives, rejects, cuttings or end pieces of any of the above categories."

It will be seen that "iron and steel" is now divided into 16 categories which clearly embrace widely different commercial commodities, from mere scrap iron and leftovers of processes of manufacturing to "wires" and "wheels, tyres, axles and wheel sets". Some of the enumerated items like "melting scrap" or "tool alloys" and "special steels" could serve as raw material out of which other goods are made and others are definitely varieties of manufactured goods. If the subsequent amendment only clarifies the original intentions of Parliament, it would appear that heading (iv) in section 14, as originally worded, was also meant to enumerate separately taxable goods and not just to illustrate what is just one taxable substance : "iron and steel". The reason given, in the Statement of Objects and Reasons of the 1972 Act, for an elucidation of the "definition" of iron and steel, was that the "definition" had led to varying interpretations by assessing authorities and the courts so that a comprehensive list of specified declared iron and steel goods would remove ambiguity. The Select Committee, which recommended the amendment, called each specified category "a sub-

item" falling under "iron and steel". Apparently, the intention was to consider each "sub-item" as a separate taxable commodity for purpose of sales tax. Perhaps some items could overlap, but no difficulty arises in cases before us due to this feature. As we have pointed out, the statement of reasons for amendment spoke of section 14(iv) as a "definition" of "iron and steel". A definition is expected to be exhaustive. Its very terms may, however, show that it is not meant to be exhaustive. For example, a purported definition may say that the term sought to be defined "includes" what it specifies, but in that case, the definition itself is not complete.

Although, we have looked at the subsequent amendment of 1972 in order to find an indication of the original intention, because subsequent history of legislation is not irrelevant, yet, we think that, even if we confine our attention to section 14, as it originally stood at the relevant time, with which we are concerned in the cases before us, the object was not to lay down that all the categories or sub-items of goods, as specified separately ever before the amendment of 1972, were to be viewed as a single salable commodity called "iron and steel" for purposes of determining a starting point for a series of sales. On the other hand, the note against the brackets in front of the five smaller sub-divisions of (d) makes it clear that even each sub-category of a sub-item retains its identity as a commercially separate item for purposes of sales tax so long as it retains the sub-division. The more natural and normal meaning of such a mode of listing special or declared kinds of goods seems to us to be that the object of specification was to enumerate only those categories of items, each of which was to serve as a new starting point for a series of sales, which were to be classed as "declared" goods. If one were to state the meaning in different words, it would seem to us to be : "iron and steel goods of various types enumerated below".

What we have inferred above also appears to us to be the significance and effect of the use of words "that is to say" in accordance with their normal connotation and effect. Thus, in Stroud's Judicial Dictionary, 4th Edn., Vol. 5 at page 2753, we find :

"That is to say. - (1) "That is to say" is the commencement of an ancillary clause which explains the meaning of the principal clause. It has the following properties : (1) it must not be contrary to the principal clause; (2) it must neither increase nor diminish it; (3) but where the principal clause is general in terms it may restrict it : see this explained with many examples, *Stukeley v. Butter*, Hob. 171."

The quotation, given above, from Stroud's Judicial Dictionary shows that, ordinarily, the expression "that is to say" is employed to make clear and fix the meaning of what is to be explained or defined. Such words are not used, as a rule, to amplify a meaning while removing a possible doubt for which purpose the word "includes" is generally employed. In unusual cases, depending upon the context of the words "that is to say", this expression may be followed by illustrative instances. In *Megh Raj v. Allah Rakhia* AIR 1947 PC 72, the words

"that is to say", with reference to a general category "land" were held to introduce, "the most general concept" when followed, inter alia, by the words "right in or over land". We think that the precise meaning of the words "that is to say" must vary with the context. Where, as in *Megh Raj's case* AIR 1947 PC 72, the amplitude of legislative power to enact provisions with regard to "land" and rights over it was meant to be indicated, the expression was given a wide scope because it came after the word "land" and then followed "rights over land" as an explanation of "land". Both were wide classes. The object of using them for subject-matter of legislation, was obviously to lay down a wide power to legislate. But, in the context of single point sales tax, subject to special conditions when imposed on separate categories of specified goods. The expression was apparently meant to exhaustively enumerate the kinds of goods on a given list. The purchase of an enumeration in a statute dealing with sales tax at a single point in a series of sales would, very naturally, be to indicate the types of goods each of which would constitute a separate class for a series of sales. Otherwise the listing itself loses all meaning and would be without any purpose behind it.

Learned counsel appearing for an intervener argued that the chemical composition of iron and steel affords a clue to the meaning of "iron and steel" as used in section 14 of the Central Act. We are unable to agree that this could be what Parliament or any Legislature would be thinking of when enumerating items to be taxed as commercial goods. The ordinary meaning to be assigned to a taxable item in a list of specified items is that each item so specified is considered as a separately taxable item for purposes of single point taxation in a series of sales unless the contrary is shown. Some confusion has arisen because the separate items are all listed under one heading : "iron and steel".

If the object was to make iron and steel taxable as a substance, the entry could have been : "Goods of iron and steel". Perhaps even this would not have been clear enough. The entry, to clearly have that meaning, would have to be : "Iron and steel irrespective of change of form or shape or character of goods made out of them". This is the very unusual meaning which the respondents would like us to adopt. If that was the meaning, sales tax law itself would undergo a change from being a law which taxes sales of "goods" to a law which taxes sales of substances out of which goods are made. We, however, prefer the more natural and normal interpretation which follows plainly from the fact of separate specification and numbering of each item. This means that each item so specified forms a separate species for each series of sales although they may all belong to the genus : "iron and steel". Hence, if iron and steel "plates" are melted and converted into "wire" and then sold in the market, such wire would only be taxable once so long as it retains its identity as commercial goods belonging to the category "wire" made of earlier iron or steel. The mere fact that the substance or raw material out of which it is made has also been taxed in some other form, when it was sold as a separate commercial commodity, would make no difference for purposes of the law of sales tax. The object appears to us to be

tax sales of goods of each variety and not the sale of the substance out of which they are made.

As we all know, sales tax law is intended to tax sales of different commercial commodities and not to tax the production or manufacture of particular substances out of which these commodities may have been made. As soon as separate commercial commodities emerge or come into existence, they become separately taxable goods or entities for purposes of sales tax. Where commercial goods, without change of their identity as such goods, are merely subjected to some processing to finishing or are merely joined together, they may remain commercially the goods which cannot be taxed again, in a series of sales, so long as they retain their identity as goods of a particular type." (pages 321-325)

"Section 4 of the Tamil Nadu Act lays down :

"4. Tax in respect of declared goods. - Notwithstanding anything contained in section 3, the tax under this Act shall be payable by a dealer on the sale or purchase inside the State of declared goods at the rate and only at the point specified against each in the Second Schedule on the turnover in such goods in each year, whatever be the quantum of turnover in that year."

Item No. 4 of the Second Schedule specifies the rates of tax in accordance with the Central Act. It reproduces section 14(iv) of the Central Act. On an amendment of section 14(iv) of the Central Act, serial No. 4 of the Second Schedule to the Tamil Nadu Act was also correspondingly amended so as to reproduce the sixteen items found in section 14(iv) of the Central Act. Hence, the decision of these cases really depends on an interpretation of section 14 of the Central Act, which we have already given above. Other provisions only fortify our conclusion." (page 327)

57. In *The State of Tamil Nadu Vs. S. Syam Steel Rolling Mills (P.) Ltd.*, the assessee having its factory in Bangalore, purchased in the State of Tamil Nadu M.S. rounds, and transported them to Bangalore. The assessee subsequently sold in the State of Tamil Nadu M.S. rounds, M.S. angles and M.S. squares and claimed that no tax was payable on these sales since the goods were liable only to single point taxation and the M.S. rounds purchased by it earlier in Tamil Nadu had already suffered tax. This claim was negatived by the assessing officer and the appellate authority on the ground that the assessee had not proved that the goods sold by it in Tamil Nadu had come out of the earlier purchases made by it in Tamil Nadu and such purchases had suffered tax. The Tribunal found that the goods sold by the assessee were rolled by it at its factory in Bangalore out of the purchases made by it earlier and also held that M.S. rounds, M.S. angles and M.S. squares would fall within the ambit of entry 4 of the Second Schedule, namely, "iron and steel", read with section 4 of the Tamil Nadu Act and therefore, the turnover was exempt from tax.

(a) On revision, a Division Bench of this Court, following the rule laid down in *State of Tamil Nadu Vs. Pyare Lal Malhotra and Others*, expressed at page 158

thus :

"..... We are clearly of the opinion that for the purpose of enjoying the benefit of single point taxation, the various articles mentioned in the different entries must retain their identity as a commercial commodity. Once that identity is lost and a different commercial commodity emerges as a result of manufacturing process or as a result of any other process, then the resultant commodity cannot be said to be the same commodity as the one from which it resulted and, therefore, the assessee cannot claim exemption from tax in respect thereon on the ground that the original commodity suffered tax. In other words, in the present case, the assessee cannot claim exemption from tax in respect of sales of M.S. angles and M.S. squares on the ground that the M.S. rounds out of which they were produced had suffered tax already. The position will be different as far as M.S. rounds sold in this State are concerned. They are commercially the same as the M.S. rounds that were purchased from the State out of which the M.S. rounds sold were made. Consequently, we are of the opinion that out of the three articles sold in the State of Tamil Nadu, namely, M.S. rounds, M.S. angles and M.S. squares, only M.S. rounds will be entitled to the benefit of exemption from tax on the ground that the M.S. rounds had suffered tax already, and that the M.S. angles and M.S. squares will not get benefit of such exemption."

58. In *State of Tamil Nadu v. India Metal Industries* [1980] 46 STC 304, it is suffice to state that a Division Bench of this Court, followed the ratio of the apex Court in *Pyare Lal Malhotra's* case [1976] 37 STC 319, after noticing the earlier Bench decision in *The State of Tamil Nadu Vs. S. Syam Steel Rolling Mills (P.) Ltd.*, .

59. In view of the decisions, as aforesaid, it goes without saying that the contention that the requirement of "the same form" in respect of "declared goods involved in the execution of works contract" for claiming deduction u/s 3B is bad in law, cannot at all be countenanced.

60. Arena of discussion may now be entered into on the aspect of levy of tax on "labour charges and other like charges". Section 3B provides for deduction of "labour charges actually incurred in connection with the execution of the works contract". In the Table, the contractor incurred Rs. 80 towards labour charges. The profit margin is Rs. 20. He realised Rs. 100. Under the impugned provision, only Rs. 80 is deducted and Rs. 20 is taxed as part of the transfer value of the materials. The expression, "actually incurred" would suggest the cost to the contractor. If the assessee is having, paid employees being skilled and unskilled engineers and labourers, hire equipments, etc., the deduction could be made only as respect cost. It is submitted that the State is bound to exclude the receipts of the contractor towards labour as realised and not the cost incurred. The State has no competence to tax labour and services or any part thereof realised. The contractor essentially trades in his skill, expertise and engineering reputation. Substantial part of the contract receipts are use of the skill for which he is contracted. It will be anomalous to tax him on his receipts towards labour

and professional charges by deducting only the cost incurred by him. This is clearly abhorrent and will turn sales tax into Income Tax and so goes argument, which cannot at all be lightly brushed aside.

61. I feel, better it is, to consider the question relatable to consumables, involved in point No. 6 here, in a compendious fashion, inasmuch as such a question is likely to fall under the head "other like charges", which is included under the caption, "labour charges and other like charges" in section 3B. The expression "labour charges and other like charges" is of wider import, which, I am of the view, will take in its fold profit margin of the contractor, apart, from labour charges actually incurred, besides the cost of consumables involved in the execution of works contract. The words "like charges" included in the expression, "labour charges and other like charges" immediately follow by the expression, "not involving transfer of property in goods" is full of significance. The word "like" will not mean "identical". The meaning of these two words are not identical but distinctively dissimilar, connoting different meanings.

62. The Concise Oxford Dictionary of Current English (Eighth Edition, 1990) at page 585, gives the meaning for the word, "identical" as,

- "1. (of different things) agreeing in every details;
2. (of one thing viewed at different times) one and the same ..."

and at page 687, for the word "like" as,

"similar to, characteristic of."

63. In the light of the meaning for the word, "like", as extracted above, I am of the view that the words, "other like charges" included in the expression, "labour and other like charges", immediately followed by the phraseology "not involving any transfer of property in goods" will take in its fold not only reasonable profit margin of a contractor in respect of labour charges, but also the extent of the cost of establishment, relatable to the supply of labour and services, apart from the cost of actual labour charges, besides the cost of consumables, which do not involve any transfer of property in goods in the execution of works contract.

64. The discussion under the heading "measure of tax" by the apex Court in the case of Gannon Dunkerley & Co. v. State of Rajasthan [1993] 88 STC 204, which is relevant for the purpose is reflected (at pages 232 to 235) as below :

"On behalf of the contractors, it has been urged that under a law imposing a tax on the transfer of property in goods involved in the execution of a works contract under entry 54 of the State List read with article 366(29-A)(b), the tax is imposed on the goods which are involved in the execution of a works contract and the measure for levying such a tax can only be the value of the goods so involved and the value of the works contract cannot be made the measure for levying the tax. The submission is further that the value of such goods would be the cost of acquisition of the goods by the contractor and, therefore, the

measure for levy of tax can only be the cost at which the goods involved in the execution of a works contract were obtained by the contractor. On behalf of the States, it has been submitted that since the property in goods which are involved in the execution of a works contract passes only when the goods are incorporated in the works, the measure for the levy of the tax would be the value of the goods at the time of their incorporation in the works as well as the cost of incorporation of the goods in the works. We are in agreement with the submission that measure for the levy of the tax contemplated by article 366(29-A)(b) is the value of the goods involved in the execution of a works contract. In Builders Association of India and Others Vs. Union of India (UOI) and Others, it has been pointed out that in article 366(29-A)(b), the emphasis is on the transfer of property in goods (whether as goods or in some other form) (page 396 of STC; 347 of SCR). This indicates that though the tax is imposed on the transfer of property in goods involved in the execution of a works contract, the measure for levy of such imposition is the value of the goods involved in the execution of a works contract. We are, however, unable to agree with the contention urged on behalf of the contractors that the value of such goods for levying the tax can be assessed only on the basis of the cost of acquisition of the goods by the contractor. Since the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works and not the cost of acquisition of the goods by the contractor. We are also unable to accept the contention urged on behalf of the States that in addition to the value of the goods involved in the execution of the works contract the cost of incorporation of the goods in the works can be included in the measure for levy of tax. Incorporation of the goods in the works forms part of the contract relating to work and labour which is distinct from the contract for transfer of property in goods and, therefore, the cost of incorporation of the goods in the works cannot be made a part of the measure for levy of tax contemplated by article 366(29-A)(b).

With regard to the determination of the value of the goods which are involving in the execution of a works contract the submission of the learned counsel appearing for the State is that a more convenient mode for such determination is to take the value of the works contract as a whole and deduct therefrom the cost of labour and services rendered by the contractor during the course of execution of the works contract. The submission of the learned counsel is that this mode would prevent evasion of tax. The learned counsel for the contractors have submitted that in that event the following deductions should be made from the value of the entire contract in order to arrive at the value of the goods involved in the execution of a works contract :

(i) labour charges for execution of the works;

- (ii) amounts paid to a sub-contractor for labour and services;
- (iii) charges for planning, designing and architect's fees;
- (iv) charges for obtaining on hire the machinery and tools used in the execution of the works contract;
- (v) cost of consumables such as water, electricity, fuel, etc.;
- (vi) transportation charges for transport of goods to the place of works;
- (vii) overhead expenses of the head office and branch office including rents, salary, electricity, telephone charges, etc., and interest charges to banks and financial institutions;
- (viii) profits expected on such contract;

Keeping in view the legal fiction introduced by the Forty-sixth Amendment whereby the works contract which was entire and indivisible has been altered into a contract which is divisible into one for sale of goods and other for supply of labour and services, the value of the goods involved in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services. This would mean that labour charges for execution of works [item No. (i)], amounts paid to a sub-contractor for labour and services [item No. (ii)], charges for planning, designing and architect's fees [item No. (iii)], charges for obtaining on hire or otherwise machinery and tools used in the execution of a works contract [item No. (iv)], and the cost of consumables such as water, electricity, fuel, etc., which are consumed in the process of execution of a works contract [item No. (v)] and other similar expenses for labour and services will have to be excluded as charges for supply of labour and services. The charges mentioned in [item No. (vi)] cannot, however, be excluded. The position of a contractor in relation to a transfer of property in goods in the execution of a works contract is not different from that of a dealer in goods who is liable to pay sales tax on the sale price charged by him from the customer for the goods sold. The said price includes the cost of bringing the goods to the place of sale. Similarly, for the purpose of ascertaining the value of goods which are involved in the execution of a works contract for the purpose of imposition of tax, the cost of transportation of the goods to the place of works has to be taken as part of the value of the said goods. The charges mentioned in item No. (vii) relate to the various expenses which form part of the cost of establishment of the contractor. Ordinarily the cost of establishment is included in the sale price charged by a dealer from the customer for the goods sold. Since a composite works contract involves supply of materials as well as supply of labour and services, the cost of establishment of the contractor would have to be apportioned between the part of the contract involving supply of materials and the part involving supply of labour and services. The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of

a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods. Similar apportionment will have to be made in respect of item No. (viii) relating to profits. The profits which are relatable to the supply of materials can be included in the value of the goods and the profits which are relatable to supply of labour and services will have to be excluded. This means that in respect of charges mentioned in items Nos. (vii) and (viii), the cost of establishment of the contractor as well as the profit earned by him to the extent the same are relatable to supply of labour and services will have to be excluded. The amounts so deductible would have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor. The value of the goods involved in the execution of a works contract will, therefore, have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover :

- (a) labour charges for execution of the works;
- (b) amount paid to a sub-contractor for labour and services;
- (c) charges for planning, designing and architect's fees;
- (d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;
- (e) cost of consumables such as water, electricity, fuel, etc., used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract; and
- (f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;
- (g) other similar expenses relatable to supply of labour and services;
- (h) profit earned by the contractor to the extent it is relatable to supply of labour and services.

The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor.

We may, however, make it clear that apart from the deductions referred to above, it will be necessary to exclude from the value of the works contract the value of the goods which are not taxable in view of sections 3, 4 and 5 of the Central Sales Tax Act and goods covered by sections 14 and 15 of the Central Sales Tax Act as well as goods which are exempt from tax under the sales tax legislation of the State. The value of goods involved in the execution of a works contract will have to be determined after making these deductions and exclusions from the value of the works contract."

64A. In view of what has been stated above, section 3B (both prior to and after March 12, 1993) cannot be stated to be violative of article 286(3)(a) of the Constitution as well as sections 14 and 15 of the Central Act.

65. Point No. 7 : This question hinges upon the validity of the newly added section 7C, as being violative of article 14 of the Constitution. This section applies exclusively to civil works contractors, who are exempt from maintaining accounts required u/s 40 of the Principal Act and rule 26 of the Rules, but are required to maintain only accounts relating to payments received by them to the civil works contracts executed by them. According to this section, a civil works contractor may, at his option, instead of paying tax in accordance with section 3B, pay on the total value of the civil works contract executed by him in a year, tax calculated at 2 per cent of such total contract value of the civil works executed by him in that year. This sort of a special treatment given to civil works contract involved in the execution of works contract excluding other types of contracts is claimed to be violative of article 14 of the Constitution, as being discriminatory in nature, pure and simple. To this sort of a submission, I am unable to affix my seal of approval on the face of the principles evolved by the apex Court in many a decision, including the recent one in *Shashikant Laxman Kale v. Union of India* : [1990]185ITR104(SC) .

(a) It is expressed therein that the latitude for classification in a taxing statute is much greater; and in order to tax something, it is not necessary to tax everything. These basic postulates have to be borne in mind, while determining the constitutional validity of a taxing provision challenged on the ground of discrimination. One has to look beyond the ostensible classification and to the purpose of the law and apply the test of "palpable arbitrariness" in the context of the felt needs of the times and societal exigencies informed by experience to determine reasonableness of the classification. For this test, it is first necessary to discern the true purpose or object of the impugned enactment because it is only with reference to the true object of the enactment that the existence of a rational nexus of the differentia on which the classification is based, with the object sought to be achieved by the enactment, can be examined to test the validity of the classification.

66. The classification of "civil works contracts" in the impugned section 7C, if tested, in the backdrop of the principles, as evolved by the Supreme Court as stated above, cannot at all be stated to be suffering the vice of arbitrariness, as contemplated under article 14 of the Constitution.

67. Before parting with these cases, I will be failing in my duty if I do not place on record, a word of appreciation as to the valuable assistance rendered by all learned counsel appearing for the petitioners-assesseees and learned Additional Government Pleader (Taxes). Mr. C. Natarajan spear-headed the attack in an admirable way, in his own, inimitable style, with clarity and precision, ably assisted, in such an arduous task, by learned counsel M/s. K. M. Vijayan, P. Abboy and R. L. Ramani, among others in particular. Mr. V. Ramachandran,

learned Senior Counsel also did his part well in making revelling and intrinsic submissions, on the tangle posed. Mrs. Chitra Venkataraman, learned Additional Government Pleader (Taxes) in her own style made incisive and crisp submissions, in the process of repelling those submissions emerging from the host of learned counsel appearing for the respective petitioners-assesseees, befitting the occasion, without causing, in the least, any sort of difficulty for the court in the determination of the issues involved. The enthusiasm exhibited by Mr. S. Sivanandam, learned counsel by participating in the discussion, in response to the invitation extended by the court, as *amicus curiae* is quite laudable.

68. In fine, the conclusions and findings are summarised as below :

(1) Section 3B (both prior to and after March 12, 1993) is not violative of article 286(3)(a) of the Constitution as well as sections 14 and 15 of the Central Act.

(2) Reasonable profit margin of the contractor on declared goods involving in the execution of a works contract should also go in deduction from the "total turnover" for arriving at "taxable turnover".

(3) The extent of cost of establishment of the contractor as relatable to the supply of "labour and services" and "reasonable profit margin on labour", besides "cost of consumables in the execution of works contract" should also go in deduction from the "total turnover" for arriving at the "taxable turnover".

69. All these writ petitions are accordingly disposed of, with no order as to costs. Consequently, all W.M.Ps. are also dismissed.

70. Writ petitions disposed of accordingly.