

(2008) 05 AHC CK 0133

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 5639 (M/S) of 2007

K.R.B.L.LTD., Gautam Budh Nagar

APPELLANT

Vs

State of U.P.and Others

RESPONDENT

Date of Decision : 02-05-2008

Acts Referred:

Central Sales Tax Act, 1956 — Section 5

Civil Procedure Code, 1908 (CPC) — Section 11

Constitution of India, 1950 — Article 286, 366(29A)

Sales of Goods Act, 1930 — Section 4

Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 — Section 17(iii)(b), 32, 5, 6, 8

Uttar Pradesh Trade Tax Act, 1948 — Section 3

Citation : (2008) 05 AHC CK 0133

Hon'ble Judges : Sabhajeet Yadav, J

Final Decision : Disposed Of

Judgement

Sabhajeet Yadav, J.—By this petition, petitioner has challenged the impugned order dated 9.10.2007 passed by respondent No. 3 and consequential recovery notice dated 10.10.2007 issued by respondent No. 2 making a demand of market fee and development cess from the petitioner under U.P. Krishi Utpadan Mandi Adhiniyam, 1964 (hereinafter referred to as "the Act").

2. The relief sought in the writ petition rests on the assertion that the petitioner is a Company incorporated under the Companies Act in the name and style of M/s KRBL Limited. It is world's largest Basmati rice exporting unit. Petitioner has its various branches in the State of U.P., Punjab, Haryana, Delhi and Rajasthan in the name of M/s KRBL Limited. It has its head office at Delhi and its processing unit and godown is at Alipur which is also situated in Delhi. The petitioner Company has established milling plant at Ghaziabad in U.P. which was operating since the year 20022003. The petitioner and all its branches are registered under their respective Sales Tax Act and under Central Sales Tax Act wherein they are being duly assessed. All the branches are also registered and being assessed under their respective Krishi Utpadan Mandi Law operating in the respective

States. It is stated that since the capacity of milling plant at Ghaziabad is very high and it has to fulfill the huge export requirement, hence the petitioner has to purchase paddy within U.P. and also mills the paddy received from its various branches. The paddy received from other States is procured after paying Mandi Fee and Development Cess in their respective States by the branches of petitioner Company which supplied paddy for the milling. The rice so recovered from the paddy procured for the purpose of milling from other States is either exported outside India or stock transferred on account of own branch of petitioner to Alipur situated in Delhi. It is also stated that rice sent to Alipur branch, Delhi after milling in Ghaziabad is further processed, sorted and packed. It is stated that no sale takes place within the market area of Ghaziabad and, therefore, there is no liability to pay Mandi Fee under the Act.

3. It is further stated that on 17.4.2004 Krishi Utpadan Mandi Samiti, Ghaziabad has illegally imposed Mandi Fee and Development Cess on the rice of petitioner for the year 20022003. A photostat copy of the order dated 17.4.2004 is on record as Annexure1 of the writ petition. Being aggrieved against the aforesaid order, the petitioner filed revision under Section 32 of the Act. Vide order dated 14.9.2006, the Additional Director (Admn.) has remanded the matter back to the Mandi Samiti only for deciding the issue of stock transfer from Ghaziabad to Alipur at Delhi Unit of the petitioner and refund of the amount of market fee and cess deposited by the petitioner under protest and has given conclusive finding regarding sale price of broken/Kinki/rice which was fixed at average rate of Rs. 700 per quintal. A photostat copy of the order dated 14.9.2006 passed by Additional Director is on record as Annexure2 of the writ petition.

4. In para 15 to 31 of the writ petition, it is stated that modus operand of petitioner is that the paddy is purchased by the various branches of petitioner in their respective States after paying Mandi Fee is sent for milling at Ghaziabad Unit of the petitioner. A photostat copy of one sample of document depicting the bill, stock transfer challan, bilty, G.R., unloading slip receipt, gate pass and arrival receipt issued by Krishi Utpadan Mandi Samiti, Ghaziabad depicting the movement of paddy from the ExU.P. Branch to the Ghaziabad unit is enclosed as Annexure5 of the writ petition. It is stated that this is a sample document and the details of each and every transaction can be produced if so desired by the Court. After milling the paddy, the rice is sent by way of stock transfer to Alipur branch of the petitioner on the instruction of respective branches situated outside the State of U.P. which have sent paddy for milling. A photostat copy of one such instruction received by Ghaziabad unit from its Haryana branch is enclosed as Annexure6 of the writ petition. In pursuance of the aforesaid instruction given by the branch of petitioner sending paddy for milling, the Ghaziabad unit of petitioner send the rice after milling to its Alipur branch, where challan, bilty, 9R, Mandi Gate Pass of Alipur branch are prepared. A photostat copy of one such document depicting the aforesaid transaction is enclosed as Annexure7 of the writ petition. It is evident from the aforesaid document that the goods are moving from M/s KRBL Limited, Gautam Budh Nagar to KRBL Limited, Alipur,

therefore, there is no dispute that goods are moving from one unit to another unit of petitioner and no two different persons are involved in the aforesaid transaction, as is also admitted by the respondents. It is also stated that the processing, sorting and packing of rice takes place in the Alipur branch of the petitioner Company and after goods are unloaded at Alipur branch, the instructions are given by the various branches of the petitioner which had sent paddy for milling, at the head office of the Company situated in Delhi. Thereafter the marketing division of the Delhi Head Office instructs the Alipur branch to send the rice to various distributors/buyers/customers which is the ultimate destination. It is also stated that Alipur branch maintains datewise stock register depicting the movement of rice. It also maintains datewise details of rice sent to various parties along with the details of customers. The aforesaid document has already been enclosed as Annexure4 to the writ petition. All the aforesaid documents have been filed before all the respondent authorities and also at the time of hearing. It is stated that in remand proceeding before Mandi Samiti, the petitioner has duly submitted its written submission, a photostat copy of which is on record as Annexure3 of the writ petition. Subsequently, on 10.7.2007 the petitioner has also submitted huge quantum of documents before the Chairman, Krishi Utpadan Mandi Samiti running into more than 500 pages and pairokar of the petitioner was personally present along with 15 boxes of documents in original to establish the veracity and truthfulness of each and every transaction of stock transfer made in the assessment year in dispute. A photostat copy of the index showing the documents submitted before the Chairman and documents at Serial No. 1, 2, 6 and 7 are on record as Annexure4 to this writ petition. But without verifying the details furnished by the petitioner Company the respondent No. 2 has erred in treating the stock transfer made by the Ghaziabad unit as its sale within market area of Ghaziabad vide order dated 11.7.2007. A photostat copy of the order dated 11.7.2007 is on record as Annexure10 of the writ petition. It is stated that from the aforesaid statements it is evident that the movement from Ghaziabad to Alipur branch is not in pursuance of any prior contract of sale. Alipur branch received rice by way of stock replenishment and is not purchasing it from the petitioner Company. It is further stated that being aggrieved by the order .dated 11.7.2007 passed by respondent No. 2 the petitioner has filed a revision under Section 32 of the Act and vide order dated 9.10.2007 respondent No. 3 has dismissed the revision while affirming the order dated 11.7.2007 passed by respondent No. 2. The copy of order was not served upon the petitioner, however, on 12.10.2007 the petitioner was surprised to receive the notice dated 10.10.2007 directing the petitioner to deposit a sum of Rs. 1,08,18,337/ as Mandi fee and development cess under the Act. Along with the said notice a photostat copy of the order dated 9.10.2007 was also annexed. A true copy of recovery notice dated 10.10.2007 and order dated 9.10.2007 are on record as Annexures14 and 15 respectively to the writ petition, hence this petition.

5. On the basis of assertions made in para 32 to 37 of the writ petition, learned

Senior Counsel for the petitioner Sri Bharat Ji Agrawal assisted by Sri Piyush Agrawal and Sri S.M.K. Chaudhary has submitted that according to Section 4 of Sales of Goods Act 1930, a sale is a bilateral contract because the property in goods has to pass from one person to another. Thus, for sale two separate entity are required and a person cannot sell to himself as has been held by Hon"ble the Allahabad High Court in the case of Commissioner Trade Tax v. M/s New Brij Shudh Deshi Ghee Store, 2002 UPTC 1031. While substantiating his argument, learned Counsel for the petitioner has submitted that the petitioner Company has paid Mandi Fee and Development Cess for rice sold within the market area of U.P. but the market fee cannot be imposed upon transaction wherein rice was sent to Alipur branch by way of stock transfer. Even otherwise there was agreement between the petitioner and its branches under clause 10 of which the rice cannot be sold by the milling unit. A photostat copy of the agreement is on record as Annexure11 of the writ petition. It has been specifically provided in clauses 10 and 11 of the agreement that Ghaziabad unit shall have no legal right to sell or transfer the rice without prior instruction/permission from various branches and it shall dispatch rice only on instructions of the branches which have sent paddy for milling.

6. It is further submitted that the assessment order passed under U. P. Trade Tax Act as well as under various Sales Tax laws of various States, the statutory authorities constituted under the Act have accepted the very same transaction as stock transfer of the Ghaziabad unit. A photostat copy of assessment order for the assessment year 20022003 passed under U.P. Trade Tax Act in case of Ghaziabad unit is on record as Annexure12 of the writ petition. At the strength of the aforesaid order it is submitted that the Sales Tax Act lays down complete procedure for determining inter/intraState sales/export sales and stock transfer. In the Mandi Adhiniyam there is no particular procedure for determining as to when sale has taken place within the market area and as to when it is a stock transfer. Therefore, when the Act is silent upon a particular point then the help can be taken from a statute which are specifically on the issue. The Sales Tax assessment orders were passed after making full enquiry and investigation as prescribed therein. Hence stock transfer under Sales Tax Act is held only after the requisite proof is furnished and the authorities are fully satisfied. On the contrary even if the same transaction is not regarded as stock transfer under the Trade Tax Act due to some procedural lapse it can still be a stock transfer under the Mandi Adhiniyam; hence the assessment order passed under the Sales Tax Act have more persuasive value than the order passed under the Mandi Adhiniyam. Thus, the transaction treated as stock transfer under the Trade Tax Act is binding upon the authorities constituted under the Mandi Adhiniyam, but not vice versa. Mandi Samiti has erred in passing the impugned order in cursory manner without examining/discussing the bulky documents submitted/shown by the petitioner which fully establishes the stock transfer made by the petitioner. The petitioner Company at Ghaziabad has no role to play with regard to sale made to ultimate customers/distributors situated outside the State of U.P. There

is no direct connection between the exact quantity of rice transferred from Ghaziabad unit and its produces by various buyers at destination.

7. While attacking the impugned order passed by respondent No. 3, it is further submitted that respondent No. 3 has altogether taken for the first time a new ground alleging that in the event the petitioner is having its branches outside the State of U.P. then it is not clear who is bearing the expenses of house rent, employees wages, telephone and electricity charges and miscellaneous expenses and further, how and by what process the same were paid is not clear. Further the godowns and offices situated in other States are in whose name and who is owner of the same, this is also not clear. In respect of all the aforesaid doubts and disputes raised in the impugned order, it is stated in para 43 of the writ petition that petitioner craves leave to produce few of the documents showing the expenses of its Delhi Depot duly registered with Sales Tax Authorities, Regional Provident Fund Commissioner, State Employees Corporation, Electricity Department, lease agreement towards the godown etc. In paras 44 to 53 of the writ petition specific averments with full details alongwith enclosures have been given. From a bare perusal of the aforesaid documents it is absolutely clear that all the expenses under the aforesaid heads are borne on the petitioner Company and the same is evident from the Balance sheet as well.

8. It is further submitted that the proviso of subclause (4) of Section 17 of Mandi Adhiniyam specifically provides that no market fee or development cess shall be levied on transaction of sale on specified agricultural produce on which fee or cess have been levied in any other market area and if the trader furnishes a declaration that on such specified produce fee or cess has already been levied in any other market area. Since the fee has already been paid by various branches on the paddy purchased by them, as is evident from their purchase bill, therefore, no market fee or development cess can be again realised from the petitioner. In support of his aforesaid submission learned Counsel for the petitioner has placed reliance upon a decision of Hon''ble Apex Court in the case of Ram Chandra Kailash Kumar v. State of U.P., AIR 1980 SC 1124 wherein it has been held that if the Mandi Fee is being paid on the purchase of raw material, no Mandi Fee can be realised on its finished product. While substantiating his argument learned Counsel for the petitioner has submitted that the petitioner has purchased the paddy within the State of U.P. after duly paying Mandi Fee and Development Cess and thereafter rice was produced at factory situated at Ghaziabad. The mandi fee is liable to be paid at single point at the time of purchase of paddy or at the time of sale of final produce, i.e. rice. The benefit of Rs. 5,38,472/ paid I towards Mandi Fee and Development Cess has not been given to the petitioner on sale/stock transfer of 39,886.841 quintals of rice vide notification dated 25.1.2001 of Rajya Krishi Utpadan Mandi Parishad, Lucknowas stated in para 56 of the writ petition. Since Mandi Fee and Cess paid while paddy was purchased by the petitioner, the benefit of the same were sought to have been given. Photostat copy of notification dated 25.1.2001 is on record asAnnexure24 of the writ petition.

9. It is also submitted that Mandi Samiti is not rendering any service to the petitioner Company and there is no element of quid pro quo, which is necessary element for imposition of Mandi Fee. Hon"ble High Court in the case of M/s Indodan Milk Products. State of U.P. and others, 1985 UPLBEC 406 in paragraph 12 and 22 of the decision has held that the transfer of agricultural product by the petitioner from their factory premises to their depot is not sale and therefore, Mandi Samiti is not legally entitled to charge any market fee from the petitioner. Thus, according to explanation also there is to be element of sale in the transaction before any market fees can be charged. At the strength of statement made in paras 59 to 62 it is submitted that Alipur branch is the real selling centre and no sale has ever taken place in the Mandi area of Ghaziabad. From the Gate Pass issued by Mandi Samiti itself it is evident that the consignor and consignee are one and the same person i.e. M/s KRBL Limited, which amounts to conclusive proof that no sale has taken place within the Mandi area of Ghaziabad. It is also pertinent to mention that Ghaziabad unit has not received any payment or any milling charges against the job work of milling done by them and hence no Mandi Fee can be realised as no sale has taken place within the market area of Ghaziabad.

10. It is also contended that the petitioner has deposited Mandi Fee under protest to obtain gate pass. Even in the form 9R it has been mentioned that both the consignor and consignee are M/s KRBL Limited. Not only this but Chairman of Mandi Samiti by its order dated 6.7.2007 contained in Annexure 25 of the writ petition himself specified the documents, account books which were required to be furnished by the petitioner. In pursuance thereof the petitioner has furnished all account books and various details as required by the Chairman and which is also necessary for establishing the transaction of stock transfer taking place from the Ghaziabad unit. From the aforesaid documents it is clear that movement of goods proving stock transfer has been furnished. It is also submitted that Mandi Samiti ought to have appreciated that with regard to the rebuttal of presumption of sale as per explanation of Section 17 (iii)(b) of Adhinyam, the law is well settled by decision of Hon"ble Apex Court in case of Sod/7/Transport Company and others v. State of U.P. and others, 1986 (2) SCC 486, wherein a similar provision which also raised rebuttable presumption on sale within the market area was considered and in para 14 of the decision it was clarified that such rebuttable presumption would be considered as rebutted if the party produces evidence which clearly and reasonably tends to show that the real fact is not such as presumed. It was further held that once this presumption is rebutted then the evidence will determine true nature of the fact to be established. This judgement lays down the law as to how and to what extent the evidence of assessee is to be considered to rebut the presumption of sale in market area.

11. It is further contended that the observation of Mandi Samiti and respondent No. 3 that Article 366 (29A) of the Constitution of India is applicable to Mandi Adhinyam is misconceived. This issue stands concluded by the decision of Hon"ble Apex Court in the case of State of West Bengal and another v. E.I.A.

India Limited, 2003 (5) SCC 239, wherein the Hon'ble Apex Court has considered an analogous provision of West Bengal Act which is parimateria to Section 17 (iii)(b) of the Act with reference to a similar explanation of Section 11 (i) of the, West Bengal Act and in para 12 of the decision it has been held that providing statutory presumption which is in the nature of rebuttable presumption is normal legislative practice. Indeed, there can be no analogy between the definition of deemed sale incorporated in Clause 29A of Article 366 of the Constitution and the statutory presumption incorporated in explanation to subsection (1) of Section 11 of West Bengal Act.

12. At the strength of averments made in para 68 of the writ petition it is I submitted that the petitioner had admittedly received the paddy from outside the State of U.P for milling of rice and after milling rice so produced, is either exported or sent to Delhi branch. Therefore, there was no liability for payment of any Mandi Fee on the said rice sent by the petitioner from Ghaziabad to its own branch, I view of the above fact the rice procured out of paddy received from outside Sate of I UP., there is no question of levy of Mandi Fee on the difference between standard I recovery and actual recovery. But the respondent No. 3 has erred in affirming the order of Mandi Samiti while deciding the revision of petitioner.

13. It further is submitted that to meet the higher requirement of export from I foreign buyer some quantity of rice is also being produced by the petitioner on I account of Delhi branch and it has been stock transferred to Ghaziabad for the purpose of export. Mandi Samiti has erred in not granting benefit of export policy I to the petitioner as regards the aforesaid transaction of stock transfer, wherein the export has been admittedly made from State of U.P. In paras 74 to 77 of the writ petition it is stated that notification dated 24.10.2000 prescribes the export policy applicable in State of U.P. for the relevant year in dispute. A photostat copy of this is on record as Annexure26 of the writ petition. It is stated that by making export of 52575 qntl. of rice from State of U.P. on account of Delhi branch the petitioner is entitled for benefit granted by the aforesaid export policy which nowhere require that milling should also be done within State of U.P. Even otherwise the export made from the State of U.P. is only on instruction and on account of Delhi branch, hence no Mandi Fee can be levied within the market area of Ghaziabad. It is submitted that no Mandi Fee is leviable on the transaction of export. Even otherwise the rice received from Delhi branch is reprocessed in the Ghaziabad factory and since the petitioner has its factory situated within the State of U.P. and hence all the requirement laid down in export policy has been fulfilled.

14. It is also submitted that the impugned order passed by respondent No. 3 is cryptic, nonspeaking and without any reason and without discussing the evidence documents and legal arguments raised by the petitioner. The respondent No. 3 has erred in applying Rule 2 (18) of Primary Arrival of U.P. Krishi Utpadan Mandi Niamawali, whereas the case of petitioner is covered under Secondary Arrival in

Rule 2 (19) of the Rules. It is further submitted that although the arguments advanced by the petitioner has been admitted by the departmental authority that after milling, the rice is sent by Ghaziabad unit to its Alipur branch but has erred in rejecting the stock transfer made by the Ghaziabad unit of petitioner on the basis of irrelevant considerations. It is immaterial that who is bearing expenses of various branches of petitioner when the factum of there being the existence of branch is neither doubted nor ever denied. The respondent No. 3 had deliberately omitted to deal with specific fact regarding the name of both consignor and consignee mentioned in the gate pass and 9R. The respondent No. 3 has also erred in drawing adverse inference against the petitioner on the basis of surmises and conjectures and has denied the benefit of stock transfer to the petitioner only because many traders evade tax by showing sale as stock transfer. Learned Counsel for the petitioner has placed reliance upon a recent decision of this Court rendered in *I.T.C. Limited v. Mandi Parishad U.P.*, 2007 (3) AWC 2241, wherein it was held that declaration in Form No. 5 under Rule 50A relating to gate pass does not contemplate the case of trader where no sale has taken place. The documents furnished by the trader were held to be sufficient to rebut the presumption raised in explanation to Section 17 (iii)(b) of the Act and it was also held that the transfer from one unit to another unit cannot be a sale as a person cannot sell any thing to itself. In support of his aforesaid submissions, learned Senior Counsel for the petitioner Sri Bharat Ji Agrawal has placed reliance upon some more authorities to which I shall refer a little latter while dealing with his submissions.

15. While refuting the aforesaid submissions Sri B.D. Mandhyan, learned Senior Counsel assisted by Sri Satish Mandhyan appearing for U.P. Krishi Utpadan Mandi Parishad respondents No. 2 and 3 of the writ petition has filed a detailed counteraffidavit sworn by Sri Nirmal Kumar working as Market (Mandi) Inspector, Mandi Samiti, Ghaziabad whereby various assertions made in the writ petition have been disputed and denied and attempts have also been made to justify the impugned orders passed by concerned respondents. Besides, aforesaid counteraffidavit; Sri B.D. Mandhyan has also filed written submissions and has contended that the assessment relates to the financial year 20022003 for manufacturing and sale of rice from the paddy purchased within the State of U.P. and outside. Initially assessment order was passed by the Mandi Samiti on 17.4.2004, in respect of rice measuring 10632.930 quintals, as difference between the ideal recovery i.e. 66.187% and actual recovery of rice from paddy. As the petitioner itself produced the material about the different selling rate of the rice varied from Rs. 700 to Rs. 3300/ per qntl., therefore, by adopting an average rate of Rs. 1350/ per quintal, the Mandi Samiti has assessed the petitioner's liability for market fee and development cess. Being aggrieved, the petitioner filed Revision under Section 32 of the Act, the Additional Director by means of the order dated 14.9.2006 remanded the matter back. In the order, though the Additional Director clearly mentioned that selling rate of Kinki/Tutan was Rs. 700/ per quintal, but in the end without specifying it was remanded that

the selling rate would be Rs. 700/per quintal.

16. It is further submitted that on aforesaid remand the Mandi Samiti has assessed the entire quantity of rice under four heads; namely: (i) quantity of rice converted from the paddy purchased from outside the State where out of ideal recovery of rice i.e. 66.66% the recovery was less by 1.437% and came to be 12985.62 Qns. (ii) Rice received from out of market area of Mandi Samiti, Ghaziabad, which was exported from Ghaziabad in tune of 52575.00 Qns. (iii) Rice produced ? from the paddy purchased from within the State in tune of 10632.930 Qns. (iv) Rice which was produced from the paddy purchased within the State and paddy purchased from outside the State in tune of 567815.480 Qns., which was not exported, but was sold locally and also sent to other Mandies for sale. As there was wide variation of rates of rice from Rs. 700 to Rs. 3300/ per Qntl, therefore, an average rate of rice Rs. 1350/ per Qn. was applied and on that basis calculations have been made at page 247 of the Writ Petition. Against that order again Revision was preferred thereupon the Additional Director by means of the order dated 9.10.2007 has dismissed the Revision and affirmed the order of Mandi Samiti.

17. It is further submitted that the Central Government under the policy decision provided incentive for export of rice and the UP. Government also issued notification dated 24.10.2000 granting exemption from trade tax as well as market fee just to encourage the export of Basmati and Super Fine rice in the interest of farmers, who produced the paddy and to earn the foreign exchange for the country. Under that notification, the petitioner obtained the registration from the Ministry of Agriculture Industry and Export Promotion Department on 1.11.2000. The petitioner has also obtained the licence from the Mandi Samiti, Ghaziabad ? as wholesaler and Mill Karkhana. The petitioner moved applications from time to time before the Mandi Samiti Ghaziabad seeking permission for exemption on the purchase of paddy in the State of U.P. The Mandi Samiti wrote letter to the concerned Mandi Samiti not to charge the market fee and development cess on paddy as the rice produced from the paddy was meant for export. The petitioner also got paddy from other States, which was primary arrival under Rule 2 clause (XVIII) of the Rajya Krishi Utpadan Mandi Niyamawali, 1965 and could be subjected to payment of market fee to Mandi Samiti, Ghaziabad, but it was exempted from market fee and development cess. Under the policy contained in the notification dated 24.10.2000, the petitioner was bound to export at least 50% of rice produced by it. According to the said notification the remaining quantity of, rice with the petitioner would be treated as sale within the market area under clause III of the notification to be determined according to Clause VIII of said notification. The object of the aforesaid notification was that the paddy must be purchased within the market area of Ghaziabad where the petitioner has got its rice mill and after converting into rice, the petitioner was required to export that rice. The minimum quantity of rice was also specified for taking the benefit of exemption. The petitioner exported only 50% rice, on that exemption has been granted and no market fee and

development cess has been charged. The rice which remained with the petitioner after export, on that quantity the petitioner was bound to pay the market fee and development cess as it was deemed sale within the market area of Mandi Samiti, Ghaziabad.

18. So far as the paddy purchased within the State and outside the State are concerned, on the material furnished, it was found that the recovery of rice has been shown less than ideal recovery which is 66.66%. The less recovery shown was calculated separately from the paddy purchased in the State and outside.

The petitioner also disclosed that it received 52.00 thousand and odd quintal of rice and has exported, whereas according to the policy contained in the said notification, the petitioner had to purchase the paddy within the State and outside and it must be hulled in the rice mill and be exported. Therefore, the benefit of exemption could not be granted to the rice which was brought from outside the State, rather from Delhi and thereafter it was exported from Ghaziabad unit of the petitioner, therefore, that was rightly treated by the Mandi Samiti as sale within the market area under the Explanation appended to Section 17 of the Act. On that, no exemption has been provided from payment of market fee and development cess. The last category was regarding quantity, which was not exported, but was sold locally and was sent to other States. The quantity which was sent to other States was also deemed sale under the notification dated 24.10.2000 as well as under the Explanation. Besides it was shown by the petitioner that the paddy was received for job work and after converting into rice, it was sent to the States from where the paddy was purchased, outside the State. Out of that paddy, part of it was exported and remaining quantity was sent to Delhi and not to those places from where the paddy was purchased, therefore, the Mandi Samiti has rightly imposed the market fee and development cess.

19. While refuting the contention advanced by learned Counsel for the petitioner, learned Counsel appearing for the respondents has further submitted that the order passed by the Mandi Samiti and the Additional Director are administrative orders, therefore, the earlier order passed by the Additional Director would not amount to resjudicata under Section 11, CPC and after the matter was remanded by the Additional Director, the scope of assessment was also enlarged. In the previous order, which was subject to Revision, the quantity of rice produced from the paddy within the State was determined as 10632.930 On., whereas after remand four categories of rice as have been mentioned and from the own documents of the petitioner, there was wide variation of selling rates of rice from Rs. 700/ to 3300/ per Qn. From its own documents, the rates were Rs. 700, 800, 1400, 1800, 2100, 2400 and 3300/ perQns., therefore, the Mandi Samiti took a reasonable view regarding the sale price of the rice by taking its average rate. Admittedly, the petitioner has failed to prove or has not even placed any material about any other lowest rate than that of Rs. 700/ per Qn., which was for Tutan/ Kinki rice and was the lowest category of the rice and normally that would be

hardly 2% or so. Though the petitioner has not bifurcated and that the entire quantity which was subject matter in the earlier Revision was not Tutan/Kinki, the rate of Rs. 700/ has been taken by the Revisional authority in earlier proceeding only in respect of hardly 2% of entire quantity of rice and if that was accepted, then the petitioner ought to have been required to pay selling rate of Rs. 3300/per Qn., as that is also admitted by the petitioner that rice which was exported, the selling rate was Rs. 3300/ per Qn. In that event, the petitioner would have been rather looser. By adopting average rate, the petitioner has been given the benefit and when the petitioner has not stated in the petition or anywhere else that the entire quantity was Tutan/Kinki, therefore, cannot be allowed to urge that selling rate was only Rs. 700/ per Qn.

20. Besides, after assessment the matter was taken up in Revision and the Additional Director, Mandi Parishad has affirmed the assessment order by dismissing the Revision vide order dated 9.10.2007. The principle of resjudicata is not applicable in fixation of market fee. Even in the matter of taxation, this Hon"ble Court, as well as the Apex Court has been pleased to hold that the principles of resjudicata in the taxation matters is not applicable. The latest decision of Hon"ble Supreme Court reported in (2007) 8 SCC 688, In re: Municipal Corporation of City " Thane v. Vidkyut Metallic Limited and others, where it has been held that in the case of tax matters there is no resjudicata and even if it is applicable that will be applicable for particular year and for particular matter.

21. The another argument raised by the petitioner was that there can be no sale unless there are two persons. Though, there is no universal law and in certain circumstances, it may be possible but stumbling block in the way of the petitioner is that they have not produced the original Accounts books and Statement of Bank Account from which it can be ascertained the real nature of the transaction. It is not impossible that the money was received in advance or the order was booked with the petitioner at Ghaziabad. There are varieties of ways where the contract can be entered into, it can be on telephone, it can be on EMail etc., therefore, unless it is made transparent by the petitioner by producing the original records, it cannot be said what was the nature of transaction; accordingly, the Mandi Samiti rightly treated the sale within the market area and according to the policy notification also, it will be deemed sale within the market area as per para 3 of the notification, therefore, the Mandi Samiti was well within its power to impose the market fee and development cess on the balance quantity of rice, which was not exported. In this connection also, there is decision of Hon"ble Supreme Court relating to export of rice from Haryana reported in (2004) 6 SCC 101 para 10 and 11 (Mangal Rice Mill). There is yet another decision reported in (2007) 8 SCC 629, ICI India Limited and another v. State of Orissa, where concession of similar nature was provided, but the traders did not fulfil the condition, therefore, it was held that it became subject of sales tax.

22. With regard to the contention raised by the petitioner that the notification in question was merely a Government policy contained in the said Government order, therefore, it has got no statutory force, it is submitted by learned Counsel for the respondents that even the levy of rice under the Mandi Adhiniyam is on account of the notification under Sections 5, 6 and 8 only. The mode of levy is provided under Section 17. The exemption has been provided for payment of market fee and development cess in Section 17, therefore, it has got statutory force and construed strictly. The levy was on account of notification and exemption by way of notification and it is valid for exporting the rice. On the balance quantity of rice remaining with the petitioner, it would amount to sale subject to market fee and development cess.

23. The last, but not the least the submission was that Article 366 (29A) of the Constitution of India would not be applicable as it is applicable to tax, whereas the respondents are realising the market fee and development cess. The clause 28 of the Article 366 of the Constitution of India defines the taxation, which includes imposition of any tax. The word impose has wide connotation, it will include fee as there is no substantial difference between the tax and fee as both are compulsory exactions. In the matter of tax, it is under sovereign powers, requires no quid pro quo, whereas for imposing fees, it must be spent on person from whom fee is realised by rendering the services. The provisions of Article 366 have been incorporated in the U.P. Trade Tax Act. As the definition of sale under the U.P. Trade Tax is very wide, whereas definition of sale under Section 2(r) is inclusive. The inclusive sale includes barter or hypothecation of goods by way of pledge as security for the amount received as advance. It being inclusive, therefore, wide definition as provided under Article 366 and such definition provided in U.P. Trade Tax Act is also applicable while determining the sale under the Mandi Adhiniyam. It will be unthinkable that no part of transaction has taken place within the market area of Ghaziabad, therefore, the fee is attracted on the movement of goods from market area to outside and it was not necessary to make amendment in the Krishi Utpadan Mandi Adhiniyam to apply the wide definition of sale as provided in the Constitution of India. This has already been accepted that Article 366 (29A) is applicable in the transaction of specified agricultural produce, that was in respect of Ghee in unreported judgment rendered by Hon''ble Mr. Justice Bhanwar Singh, copy of the judgment has already been advanced to the Hon''ble Court.

24. Learned Counsel for the respondent has further submitted that the petitioner is recipient of service rendered by Mandi Samiti and impact of the amount towards the fee would not be much looking to the quantum of business, which the petitioner carries on, it is worth on 100 and 1000 crores, therefore, there was no justification to show any leniency to the traders who indulge in undue profiteering without parting with some small amount towards the market fee and development cess. It will be utilised for development of market area of Ghaziabad and also for the benefit of poor agriculturist as well as traders. The Mandi Samiti is doing a lot of developmental activities in the market area by

constructing market yard, godowns, roads and provide other amenities.

25. Since counter and rejoinder affidavits have been exchanged between the parties and case was ripped for final disposal, therefore, with the consent of the learned Counsel for the parties the case has been heard for final disposal at the admission stage itself under the Rules of the Court.

26. I have considered rival submissions of the learned Counsel for the parties and also perused the records of the writ petition.

27. Having regard to the rival submissions of the learned Counsel for the parties, the first question which arises for consideration of this Court, is that, as to whether the issue concluded at higher forum by Additional Director of U.P. Krishi Utpadan Parishad vide order dated 14.9.2006 in revision filed by the petitioner earlier could be gone into by the Mandi Samiti in remand proceeding? In this connection the contention of learned Counsel for the petitioner is that while passing order dated 14.9.2006 in revision earlier filed by the petitioner, the price of rice both broken/tootan/rice/Kinki and wand rice had been conclusively fixed by Additional Director at a rate of Rs. 700/ per Qn. and the aforesaid issue was concluded between the parties and attained finality and had not been remanded back for redetermination to the Mandi Samiti, instead thereof only other issues of stock transfer and refund of the amount deposited by the petitioner under protest for issue of gate pass claimed by the petitioner were remanded back to Mandi Samiti for disposal as fresh. Therefore, it was not open for Mandi Samiti in remand proceeding to go into the aforesaid issue again afresh into the matter of fixation of price of rice including tootan rice and redetermine the same at average rate of Rs. 1350/ per Qn. which was not subject matter of remand proceeding before it, instead thereof the aforesaid issue had attained finality between the parties.

28. The submission in nutshell is that the issue concluded at higher forum cannot be reagitated in the remand proceeding and only that issue can be considered which has been remanded by higher forum. In support of his aforesaid contention learned Counsel for the petitioner has placed reliance upon decision of Hon"ble Apex Court rendered in Radha Raman Samant v. Bank of India and others, (2004) 1 SCC 605 wherein the Hon"ble Apex Court has held that only that issue can be considered which has been remanded by Higher Court or authority. The pertinent observation made in para 12 of the decision is extracted as under:

"12.....Therefore, the learned Single Judge was bound to address only on one issue upon which the matter had been remanded. Thus, the Division Bench could not have overlooked these facts in the appeal arising from the order of the learned Single Judge on the second occasion after remand and need not have gone into the question as to whether the writ petition could have been entertained at all or not. Therefore, we are of view that the High Court could not have overlooked these facts and interfered with the order of the learned Single

Judge."

29. The same view has been reiterated by Hon"ble Apex Court in *Bharat & Co. v. Trade Tax Officer and another*, (2005) 6 SCC 796. The pertinent observation made by Hon"ble Apex Court in para 19 of the decision is extracted as under:

"19.....The Trade Tax Tribunal as early as on 31.3.2000 had held that the appellant had the locus standi to ask for the release of goods because the appellant was the owner of the goods. The decision of the Tribunal was not challenged by the respondents. The decision of the Tribunal not being challenged, the issue of title was concluded in the appellant's favour. In the face of this order, it was not open to the Assistant Commissioner, Trade Tax " on remand to reject the application of the appellant on the ground that it was not the owner of the goods. The High Court should have considered this aspect of the matter particularly when it had been expressly drawn to the High Court's attention. The High Court was also precluded from redeciding the same issue between the same parties."

30. At the strength of aforesaid decisions, learned Counsel for the petitioner has submitted that the rate of rice which included Kinki or broken rice to the] extent of 10,632 quintals could not be enhanced from Rs. 700/ per quntl. to Rs. 1350 per quntl. for levy of Mandi fee and Development Cess.

31. Contrary to it, the submission of Sri B.D. Mandhyan, learned senior Counsel for respondents No. 2 and 3 is that initially the assessment order was passed I by Mandi Samiti on 17.4.2004 in respect of rice measuring 10632.930 quintals as I a difference between ideal recovery i.e. 66.187% and actual recovery of rice from I paddy, as the petitioner itself produced the material about different selling rate of I rice varied from Rs. 700/ to Rs. 3300/ per quintal, therefore, adopting an average I rate of Rs. 1350 per quintal, the Mandi Samiti assessed the petitioner's liability for market fee and development cess. Aggrieved by the aforesaid order, the petitioner filed revision and vide order dated 14.9.2006 the Additional Director remanded the matter back for fresh disposal before Mandi Samiti and on remand, the Mandi has classified the entire quantity of rice into four heads by excluding the rice exported by the petitioner which was produced from paddy purchased within the State and outside the State. Since there was wide variation of rates from Rs. 700/ to Rs. 3300/ per quintal, therefore, an average rate of Rs. 1350 per quintal was applied in respect of entire quantity of rice including both broken and wand rice which was found as sale within the market area of Ghaziabad vide order dated 11.7.2007. The Revisional Authority has also affirmed the aforesaid order vide impugned order dated 9.10.2007, therefore, no fault can be found with regard to the levy of Mandi fee on rice at an average rate of Rs. 1350/ per quintal.

32. It is further submitted that order passed by Mandi Samiti and Additional Director are administrative in nature, therefore, they would not amount to resjudicata under Section 11 of the provisions of C.P.C. and after the matter was

remanded by Additional Director, the scope of assessment was also enlarged. In earlier proceeding which was subject of revision, the quantity of rice produced from paddy within the State was determined only as 10632.930 Qn., whereas after remand large quantity of rice under four heads were shown to have been assessed by the Mandi Samiti and from own documents of petitioner, there was wide variation of selling rates of rice from Rs. 700 to Rs. 3300/, and as the rates were shown as Rs. 700, 800, 1400, 1800, 2100, 2400 and 3300/ per Qns, therefore, the Mandi Samiti took a reasonable view regarding the sale price of the rice by taking its average rate. Admittedly, the petitioner has failed to prove or has not placed any material about any other lowest rate than that of Rs. 700/ per quintal which was only for tootan/kinki rice. In other words, as it is not the case of petitioner that entire quantity of rice which was subject matter of levy of fee and was also subject matter of earlier revision filed by the petitioner was tootan/Kinki rice only and the entire quantity of rice upon which Mandi Samiti has levied the fee subsequently on remand is also tootan/Kinki rice alone. The rate of Rs. 700/ has been taken by Revisional Authority in earlier proceeding was only in respect of broken/Kinki rice which is hardly 2% of entire quantity of rice and if it was accepted, then the petitioner was required to pay the market fee at selling rate of Rs. 3300/ per quintal in respect of the quantity which was sold at aforesaid rate, as that is also admitted by the petitioner that rice which was exported, the selling rate of the same was Rs. 3300/ per quintal.

33. In support of his submission that earlier order passed by Mandi Samiti and Additional Director are administrative in nature, therefore, they would not amount to resjudicata under Section 11, C.P.C. Learned Counsel for the respondents Sri B.D. Mandhyan has also placed reliance upon a decision of Supreme Court rendered in Municipal Corporation of City of Thane v. Vidyut Metallics Ltd. and another, (2007) 8 SCC 688, wherein the pertinent observations made in paras 18 and 22 of the decision are extracted as under:

"18. So far as the proposition of law is concerned, it is well settled and needs no further discussion. In taxation matters, the strict rule of res judicata as envisaged by Section 11 of the Code of Civil Procedure, 1908 has no application. As a general rule, each year's assessment is final only for that year and does not govern later years, because it determines the tax for a particular period. It is, therefore, open to the Revenue/Taxing Authority to consider the position of the assessee every year for the purpose of determining and computing the liability to pay tax or octroi on that basis in subsequent year. A decision taken by the authorities in the previous year would not estop or operate as res judicata for subsequent year.

22. In our opinion, however, it is necessary to distinguish a decision on a question which directly and substantially arose in any dispute about the liability for a particular year, and a question which arose incidentally or collaterally. If, for instance, the validity of a taxing statute is impeached by an assessee who is called upon to pay a tax for a particular year and the matter is taken to a High

Court or to this Court and it is held that the taxing statute is valid, it may not be easy to hold that the decision on this basic and material issue would not operate as res judicata against the assessee in a subsequent year. (Vide Amalgamated Coalfields Ltd. v. Janapada Sabha, AIR pp. 101920, para 23.)

34. From a careful consideration of the aforesaid decision of Hon"ble Apex Court it is clear that in the said case the applicability of principles of resjudicata in the matter of assessment of tax was involved wherein Hon"ble Apex Court has held that in tax matter, assessment made in particular year in respect of particular matter shall not operate as resjudicata for subsequent years except in the cases where a decision on question which directly and substantially arose in any dispute about liability for a particular year and a question which arose incidentally or collaterally, if for instance the validity of a taxing statute is impeached by an assessee who is called upon to pay the tax in a particular year and matter is taken to a High Court or Apex Court and it is held that taxing statute is valid, it may not be easy to hold that the decision on basic and material issue would not operate as resjudicata against the assessee in subsequent year. In my opinion, the aforesaid decision of Hon"ble Apex Court cited by Sri B.D. Mandhyan, learned Senior Counsel appearing for respondents has no material bearing with the question in controversy involved in the case for two reasons firstly that in instant case the assessment for levy of Mandi fee and development cess does not pertain to subsequent year, rather it was in respect of same assessment year and secondly, the controversy in issue in nutshell is that whether the matter concluded at higher forum can be reagitated in remand proceeding. For that matter the decisions cited by Sri Bharatji Agrawal, learned Senior Counsel for the petitioner have dealt with the issue but the question still remains to be answered by applying the aforesaid proposition in given facts and circumstances of the case. In this connection it would be necessary to examine as to whether the question for fixation of price of the rice which has been concluded at higher forum is same in quality and quantity both or on remand it substantially differed from the earlier proceeding?

35. In this connection, for better appreciation of the controversy it would be useful to extract the operative portion of the order dated 14.9.2006 passed by Addl. Director as under:

36. A mere reading of the operative part of the order dated 14.9.2006 passed by Addl. Director, it is clear that in earlier proceeding, which was subject matter of earlier revision the quantity of rice as a difference between ideal recovery and actual recovery produced from paddy purchased within the State was only 10632.930 Qns. and for levy of market fee and development cess the price of only broken rice/tootan/kinki rice was fixed at a rate of Rs. 700/ per Qn. (Annexure2 of the writ petition). The price of rice which was fixed at aforesaid rate was not for both categories; namely broken and wand rice, therefore, the submission of learned Counsel for the petitioner that the rice in respect of which Rs. 700/perQn. Price was fixed for both broken/tootan/kinki rice and wand rice

appears to be factually incorrect, hence has to be rejected.

37. After remand it appears that by excluding the quantity of rice produced from paddy purchased within the State and outside the State exported by the petitioner, the Mandi Samiti vide order dated 11.7.2007 (Annexure 10 of the writ petition) has assessed the remaining quantity of rice for levy of Mandi fees and development cess under four heads : namely (i) paddy purchased from outside the State from which recovery of rice was found less than ideal recovery in tune of 12985.52 Qns. and by treating its sale in the market area at an average rate of Rs. 1350/ per Qn. the fee and cess were levied, (ii) Rice received from outside the State in tune of 52575 Qns. and exported at a rate of Rs. 3300/ per Qn. thereupon Mandi fee and cess were levied by treating the same as sale within the market area, (iii) Paddy purchased within State and rice which found as a difference between ideal recovery and actual recovery in tune of 10632.930 Qns was treated as sale within market area at an average rate of Rs. 1350/ per Qn. thereupon fee and cess were levied accordingly; and (iv) The last category of rice was rice produced from paddy purchased from within State and outside the State in tune of 567815.480 Qns. which was treated to be sale in the market area concerned at an average rate of Rs. 1350/ per Qn. The aforesaid facts revealed from the order dated 11.7.2007 (Annexure 10 of the writ petition at page 247 of paper book).

38. Thus from the aforesaid facts it is clear that the rice mentioned at item No. 3, alone was produced from paddy purchased within the State as difference between ideal recovery and actual recovery was under consideration before Additional Director Administration in earlier revision (Annexure 2 of the writ petition) and rice shown in other three heads were not subject matter of dispute in the earlier revision, for simple reason that in earlier proceeding before the Mandi Samiti the quantity of rice produced from paddy purchased within the State only to the extent of 10632.930 quintal as a difference between ideal recovery and actual recovery was taken into consideration and was treated as sale at an average rate of Rs. 1350/ per quintal within market area of Ghaziabad. With regard to the paddy and rice purchased from outside the State; the stand of the Mandi Samiti was not clarified by that time at the level of Mandi Parishad and Government, therefore, it was mentioned in the order dated 17.4.2004 passed by Mandi Samiti that separate order shall be passed subsequently. On challenge being made against the said order before revisional authority, the order dated 14.9.2006 was passed by Addl. Director (Administration), and the matter was remanded back to the Mandi Samiti, and at this time the assessment in respect of remaining rice was also made by Mandi Samiti for levy of market fee and development cess on enhanced quantity of rice. Thus the scope of assessment in remand proceeding was also enlarged, but learned Counsel for the petitioner could not raise any grievance against the enlarged scope of assessment and confined his claim about the rate of rice only to the extent of 10632.930 quintal on aforesaid grounds. Therefore, in given facts and circumstances of the case, in my opinion, it cannot be said that the issue in question before Mandi Samiti,

has already been concluded at higher forum before Additional Director and cannot be reagitated in remand proceedings particularly when learned Counsel for the petitioner has no legitimate objection against assessment of enhanced quantity of rice in remand proceeding which was not subject matter of assessment in earlier proceeding on the aforesaid grounds. Accordingly, the decision relied upon by learned Counsel for the petitioner has no application in given facts and circumstances of the case and do not lend any support to the case of the petitioner.

39. Now before accepting the findings of Additional Director dated 14.9.2006, it is necessary to examine the correctness of his aforesaid decision, otherwise it would be possible that on quashing the decision of Mandi Samiti dated 11.7.2007 affirmed by Additional Director in revision dated 9.10.2007 the earlier order dated 14.9.2006 passed by Additional Director, which may be found illegal would revive automatically.

40. In this connection it would be useful to refer a decision of Hon''ble Apex Court rendered in *Gadde Venkateswara Rao v. Govt. of Andhra Pradesh*, A. I. R. 1966 S.C. 828, wherein the Panchayat Samiti, in exercise of its statutory powers passed a resolution on 25.8.1960 to locate a primary health centre at Dharmajigudem. Later, it passed another resolution on 29.5.1961 to locate it at Lingapalem. On a representation by villagers of Dharmajigudem, Government passed orders on 7.3.1962 setting aside the second resolution dated 29.5.1961 and thereby restoring the earlier resolution dated 25.8.1960. The result was that the health centre would continue at Dharmajigudem. Before passing the orders dated 7.3.1962, no notice was given to the Panchayat Samithi. The Hon''ble Apex Court traced the said order of the Government dated 7.3.1962 to be under Section 62 of the Act and if that were so, notice to the Samithi under Section 62(1) was mandatory. Later, upon a review petition being filed, Government passed another order on 18.4.1963 cancelling its order dated 7.3.62 and accepting the shifting of the primary centre to Lingapalem. This was passed without notice to the villagers of Dharmajigudem. This order of the Government was challenged unsuccessfully by the villagers of Dharmajigudem in the High Court. On appeal by the said villagers to the Hon''ble Apex Court it was held that the latter order of the Government dated 18.4.1963 suffered from two defects, it was issued by Government without prior show cause notice to the villagers of Dharmajigudem and Government had no power of review in respect of Government orders passed under Section 62(1). But that there were other facts which disentitled the quashing of the order dated 18.4.1963 even though it was passed in breach of principles of natural justice. The Hon''ble Apex Court noticed that the setting aside of the latter order dated 18.4.63 would restore the earlier order of Government dated 7.3.62 which was also passed without notice to the affected party, namely, the Panchayat Samithi. It would also result in the setting aside of a valid resolution dated 29.5.61 passed by the Panchayat Samithi. The Hon''ble Apex Court refused relief and agreed that the High Court was right in not interfering under Article 226 even if there was violation of natural justice.

Subba Rao, J. (as he then was) observed (p. 189) (of SCR) (at pp. 837 of AIR) as follows :

"Both the orders of the Government, namely, the order dated March 7, 1962 and that dated April 18, 1963, were not legally passed : the former, because it was made without giving notice to the Panchayat Samithi, and the latter, because the Government had no power under Section 72 of the Act to review an order made under Section 62 of the Act and also because it did not given notice to the representatives of Dharmajigudem village.

His Lordship concluded as follows:

"In those circumstances, was it a case for the High Court to interfere in its discretion and quash the order of the Government dated April 18, 1963? If the High Court had quashed the said order, it would have restored an illegal order it would have given the Health Centre to a village contrary to the valid resolutions passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumstances of the case."

41. In *Mohammad Swalleh v. IIIrd Additional District Judge Meerut*, AIR 1988 SC 94, the High Court has refused to set aside illegal order of District Judge on the ground that on setting aside such illegal order, earlier illegal order passed by prescribed authority would be restored. The facts of the aforesaid case in brief was that a dispute arose under U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, the prescribed authority dismissed an application filed by landlord and this was held clearly to be contrary to the very purpose of Section 43 (2)(rr) of the Act. The District Court entertained an appeal by the landlord and allowed the landlord's appeal without noticing that such appeal was not maintainable. Tenant filed a writ petition in the High Court contending that the appeal of landlord before District Court was not maintainable, this was a correct plea but the High Court refused to interfere. On further appeal before Hon"ble Apex Court the pertinent observations made in para 7 of the decision are extracted as under:

"7. It was contended before the High Court that no appeal lay from the decision of the Prescribed Authority to the District Judge. The High Court accepted this contention. The High Court finally held that though the appeal laid before the District Judge, the order of the Prescribed Authority was invalid and was rightly set aside by the District Judge. On that ground the High Court declined to interfere with the order of the learned District Judge. It is true that there has been some technical breach because if there is no appeal maintainable before the learned District Judge, in the appeal before the learned District Judge, the same could not be set aside. But the High Court was exercising its jurisdiction under Art. 226 of the Constitution. The High Court had come to the conclusion that the order of the Prescribed Authority was invalid and improper. The High Court itself could have set it aside. Therefore, in the facts and circumstances of

the case justice has been done though, as mentioned hereinbefore, technically the appellant had a point that the order of the District Judge was illegal and improper. If we reiterate the order of the High Court as it is setting aside the order of the Prescribed Authority in exercise of the jurisdiction under Art. 226 of the Constitution then no exception can be taken. As mentioned hereinbefore, justice has been done and as the improper order of the Prescribed Authority has been set aside, no objection can be taken."

42. The aforesaid view taken by Hon'ble Apex Court has been again reiterated in *M.C. Mehta v. Union of India*, AIR 1999 SC 2583, by placing reliance upon the aforesaid decision. The pertinent observations made in para 18 of the decision are as under:

"18.....The above case is clear authority for the proposition that it is not always necessary for the Court to strike down an order merely because the order has been passed against the petitioner in breach of natural justice. The Court can under Article 32 or Article 226 refuse to exercise its discretion of striking down the order if such striking down will result in restoration of another order passed earlier in favour of the petitioner and against the opposite party, in violation of principles of natural justice or is otherwise not in accordance with law,"

43. In view of aforesaid legal position the proposition which emerges is that whether this Court can refuse to exercise its discretionary writ jurisdiction under Article 226, if quashing of an order on finding it erroneous on any technical ground would automatically restore an illegal order or an order which is otherwise not in accordance with law. Therefore, it is necessary to examine both the orders, namely passed by Additional Director dated 14.9.2006 and order dated 11.7.2007 passed by Mandi Samiti in remand proceeding.

44. Now coming again to the order dated 14.9.2006 passed by Additional Director, it appears that on behalf of Mandi Samiti, the Monthly Stock Register of the petitioner was produced and it was shown that the petitioner has sold the rice Basmati at a rate varied from Rs. 700/ per Qns. to Rs. 3300/ per Qns. and Mandi Samiti has assessed the same at an average rate of Rs. 1350/ per Qns. but the Director has rejected the aforesaid assessment on the ground that the value or price of broken/tootan/Kinki rice cannot be fixed at par with wand rice for the reason that on the form (9R) produced by the petitioner the price of broken rice/tootan/Kinki rice has been mentioned at a rate of Rs. 700/ per Qns. on which gate pass has been issued by the employees of Mandi Samiti. In case aforesaid rate was less than actual rate, they would have objected against the said rate and action would have been taken against them in case they were failed to do so, but in absence of any such objection at proper time it appears that the Additional Director has accepted the aforesaid rate of Rs. 700/ per Qns. only for broken/tootan/Kinki rice and in my opinion it was not for both categories of broken and wand Basmati rice. Although in earlier proceeding before Mandi Samiti and Additional Director, the entire quantity of rice was not only broken/tootan/Kinki rice, rather as appears from the records that there were both

categories of rice i.e. broken and wand rice. Therefore, the reasons given by Additional Director for accepting the rate of rice only Rs. 700/ per Qns. is not understandable as to how when both the categories, broken and wand rice, were before his consideration, how he has fixed the rate of only broken/tootan/Kinki rice as Rs. 700/ per Qns.

45. Besides, according to learned Counsel for the respondents the quantity of broken/tootan/Kinki rice can hardly be only 2% of entire quantity of rice procured from paddy by the Mill of the petitioner. Not only this but in para 72 of the writ petition it is also admitted by the petitioner that refund claimed by the petitioner in respect of deposits of market fee and development cess made under protest before the respondent No. 3 was Rs. 43,55,839/ on a calculation at a rate of Rs. 700/per Qns., but it was found that the petitioner has even deposited the fee at a rate of Rs. 1350/ per Qns. on some transactions of stock transfer, as such now correct refund claimed is of Rs. 61,14,890/. It is also necessary to point out that from monthly stock Register of the petitioner, the rate of rice shown to have been sold was varied from Rs. 700/ to Rs. 3300/ per Qns. has not been disputed by learned Counsel for the petitioner. Therefore, in my opinion the average rate of rice fixed by Mandi Samiti as Rs. 1350/ per Qns. which includes both broken and wand rice cannot be faulted with. Contrary to it, the finding of Additional Director dated 14.9.2006 appears to be contrary to the material on record; he has not taken into consideration the aforesaid relevant materials instead thereof has based his findings on irrelevant consideration as such are not acceptable. Since I have held that order passed by Additional Director dated 14.9.2006 was erroneous and illegal and the order passed by Mandi Samiti on remand fixing the price of rice at an average rate of Rs. 1350/ per Qns. for both broken and wand rice which has also been upheld by Additional Director vide impugned order dated 9.10.2007 appears to be reasonable. Therefore, in case subsequent orders passed by Mandi Samiti and Additional Director are quashed to that extent, the earlier order passed by Additional Director which is not in accordance with law will automatically revive, as such, I am not inclined to exercise discretionary jurisdiction of this Court under Article 226 in favour of petitioner for quashing aforesaid orders on that score.

46. Now next question arises for consideration before this Court is that as to whether the rice obtained by the petitioner from its Delhi Branch and exported from Ghaziabad Unit (U.P.) in tune of 52575 quintals can be treated to be sale within the market area of Ghaziabad for the purpose of levy of market fee and development cess or it should be exempted from such levy in view of UP. Government's Notification dated 24.10.2000?

47. In this connection it is necessary to point out that the Mandi Samiti vide its order dated 11.7.2007 has classified and bifurcated the entire quantity of rice into four different heads for sake of convenience while making assessment for the purpose of levy of Mandi fee and development cess and the aforesaid amount of rice was mentioned at Item No. II in chart prepared at page 247 of the paper

book. The rate of sale price of rice has been mentioned therein as Rs. 3300/ per Qn. and total price of rice has been calculated as Rs. 17,34,97,500/ accordingly levied 2% Mandi fee in tune of Rs. 34,69,950/ and 1/2% development cess in tune of Rs. 8,67,488/ by treating the same as sale within the market area of Mandi Samiti, Ghaziabad.

48. In this connection the submission of learned Counsel for the petitioner is that since the rice has been exported from State of Uttar Pradesh, therefore, the petitioner is entitled to get exemption from Mandi fee and development cess in view of policy of Government of Uttar Pradesh contained under U.P. Government's Notification dated 24th October, 2000 (Annexure 26 of the writ petition). While substantiating his submission at the strength of pleadings made in paras 74 to 77 of the writ petition he has urged that even otherwise since the aforesaid quantity of rice has been exported from the State of U.P. on account of Delhi branch of the petitioner which has transferred the aforesaid rice by way of stock transfer to Ghaziabad Unit for the purpose of export, therefore, aforesaid export will be covered under the policy of State Government contained under the said notification and under the said export policy nowhere requires that the milling should be done within State of U.P. Even otherwise the rice received from Delhi branch is reprocessed in Ghaziabad factory and since the petitioner has its factory situated within the State of U.P. hence all the requirements laid down in said export policy of the Government has been fulfilled.

49. While refuting the aforesaid submission of learned Counsel for the petitioner learned Counsel for the respondents has submitted that the benefit of exemption from Mandi fee and development cess is available only in respect of rice procured from the paddy after milling in State of Uttar Pradesh under the said notification dated 24.10.2000 on fulfilment or satisfaction of the conditions stipulated thereunder and since the petitioner has not procured the aforesaid rice from paddy by milling the same in its mill and factory situated in Ghaziabad, U.P, therefore, under the scheme underlying in the aforesaid Government order the petitioner is not entitled for any exemption from levy of Mandi fee and development cess, despite the petitioner has exported the aforesaid quantity of rice from State of U.P.

50. In this connection it is to be pointed out that except the aforesaid notification dated 24.10.2000 contained in Annexure 26 of the writ petition learned Counsel for the petitioner could not point out any other provision of law either contained under the Act or rules framed thereunder wherein any exporter of rice can claim such exemption from levy of Mandi fee and development cess on the rice exported from the State of U.P. Therefore, the issue has to be examined strictly in accordance with the aforesaid Government notification.

51. From a perusal of aims and objects of the said notification it is clear that the Government of Uttar Pradesh has issued the aforesaid notification granting exemption from trade tax as well as market fee and development cess just to encourage export of Basmati and Superfine rice in the interest of farmers who

produce the paddy and to earn the foreign exchange for the country. It is no doubt true that under the said notification the petitioner has obtained registration from Ministry of Agriculture Industry and Export Promotion Department and the petitioner has also obtained licence from Mandi Samiti Ghaziabad as wholesaler and milling karkhana but under the policy contained in the said notification dated 24.10.2000 the petitioner is bound to export at least 50% of Basmati rice procured by it by milling paddy in its factory situated at Ghaziabad (U.P). According to clause 3 (1) of the said notification the ideal recovery of rice from paddy in respect of Basmati rice has been prescribed as 66.66%. The miller can export entire quantity of 66.66% Basmati rice procured from paddy but in any case the Miller is required to export at least 50% of rice recovered from paddy for taking the benefit of exemption from levy of Mandi fee and development cess inasmuch as trade tax. However, the amount of rice as difference between the ideal recovery and actual exported rice will be treated to be sale within the market area and miller shall be liable to pay trade tax, Mandi fee and development cess thereon. In case of lesser export of Basmati rice than 50% amount recovered from paddy the miller shall not be entitled for any exemption in trade tax, Mandi fee and development cess.

52. Under Clause 3 (ii) of said notification, in case of superfine and other nonBasmati rice the ideal recovery has been prescribed as 66.66% and the millers are required to export entire quantity of ideal recovery of rice, otherwise the benefit of exemption from trade tax, Mandi fee and development cess shall not be given to the miller.

53. Thus from a careful examination of entire scheme underlying in the notification it appears that the aforesaid exemption from trade tax, Mandi fee and development cess is available only where the miller procured the rice from paddy after milling in the factory situated in State of Uttar Pradesh. The aforesaid exemption is not available if the rice is obtained from outside the State and exported in State of U.P. even by processing the same in the mill situated in State of U.P. despite the Miller exported prescribed quantity of rice stipulated in para 3 of the aforesaid notification or exported entire quantity of rice so obtained. The benefit of exemption is also not available to the Millers, if rice so produced from the paddy after milling in their factories and same is exported less than prescribed quantity of rice. Admittedly, the petitioner has obtained the rice by way of stock transfer from its Delhi branch to Ghaziabad Unit, even if the rice so obtained was processed in the Mill situated at Ghaziabad, even then the petitioner is not entitled, in my considered opinion, to get the benefit of aforesaid notification and accordingly the petitioner cannot be exempted from trade tax, Mandi fee and development cess on the aforesaid quantity of rice which has been obtained by the petitioner from its Delhi branch by way of stock transfer to Ghaziabad Unit for exporting the same on Delhi account of the petitioner.

54. At this juncture the another submission of learned Counsel for the petitioner is that the aforesaid quantity of rice admittedly exported by the petitioner from

Ghaziabad Unit is export/sale, therefore, cannot be treated to be sale within the State of Uttar Pradesh much less in Market area of Ghaziabad, thus the Mandi Samiti would not be entitled to charge any Mandi fee and development cess on the aforesaid rice exported by the petitioner. In my opinion, the submission of learned Counsel for the petitioner though attractive but lacks merit and without any substance for the simple reason that the provisions of the Act does not recognise intraState trade/interState trade and export sale outside the India as have been specifically dealt with by State Sales Tax Act and Central Sales Tax Act. Mandi Adhiniyam as well as other sales tax Act have been enacted for different purposes. Conceptually imposition or levy of tax on sale of goods is different from levy of market fee and development cess. The distribution of power to levy a tax is not identical with that of power to levy a fee. Powers to impose taxes are specifically distributed between the Union and State Legislature by various entries in list I and II and the Legislative power to levy a tax which is not enumerated in any of these entries belongs to Parliament under Entry 97 of List I. On the other hand there is an entry relating to fee at the end of each of the three lists I, II and III and the entry to this effect is that "fees in respect of any of matters in the list except Court fee. The result is that each Legislature has power to levy a fee which is coextensive with the power to legislate with respect to substantive matters and that either legislature may, while making a law relating to subject matter within its competence, levy a fee with reference to services that would be rendered by State under such law.

55. There are various distinctions between tax and fee, one of which is that tax is an imposition made for public purpose without reference to any service rendered by State or any specific benefit to be conferred upon the tax payer as held in *Hingiri Rampur Coal Co. v. State of Orissa*, AIR 1961 SC 459. The object of levy of tax is to raise the general revenue as per decision in *Sakti Ousadhalaya v. Union of India*, AIR 1963 SC 622. On the other hand a fee is payment levied by the State in respect of services performed by it for the benefit of the individual. It is levied on principle just opposite to that of a tax. While a tax is paid for common benefits conferred by the Government on all tax payers, a fee is payment made for some special benefits enjoyed by payer and payment is usually proportionate to the special benefit as held by Hon"ble Apex Court in *Commr. H.R.E. v. Lakshmindra*, (1954) S.C.R. 1005; *Hingiri Rampur Coal Co. v. State of Orissa*, AIR 1961 SC459; *Kewal v. State of Punjab*, A.I.R. 1980S.C. 1008. While in case of a tax there is no quid pro quo between the tax payer and the State. There is a necessary corelation between fee collected and service intended to be rendered, though need not to be mathematical. A broad corelationship would justify the imposition of fee as held in *State of Rajasthan v. Sajan Lal*, AIR 1975 SC 706; *Delhi Municipality v. Yasin*, AIR 1983 SC 617; *Swamijji v. Commr. H.R.E.*, AIR 1980 SC 1. Therefore, in view of legal position aforestated, there can be no analogy between the sale of goods for the purposes of imposition of tax and levy of market fee and development cess.

56. Besides this, it is also necessary to point out that the power to impose taxes

on sale or purchase of goods other than newspapers belongs to State legislature under entry 54 of list II but the power to impose tax on sale taking place in the course of interState trade or commerce is within exclusive competence of Parliament (Art. 269: Entry 92A of List I). Similarly, the power to impose tax on import and export of goods and sale or purchase of goods outside the State lies with the Parliament under Art. 286. For ready reference the provisions of Article 286 are extracted as under:

"286. Restrictions as to imposition of tax on the sale or purchase of goods.(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

[(2) 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).

[(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 interState trade or commerce; or

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in subclause (b), subclause (c) or subclause (d) of clause (29A) 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.]]

57. From a plain reading of Clause (1)(a) of Article 286 of Constitution it is clear that State legislature is prevented to impose tax on sale or purchase which takes place outside the State. It is only Parliament which is empowered under Clause (2) of this article to formulate the principles for determining when a sale or purchase of goods takes place in the way mentioned in Article 286 (1)(a) of the Constitution. Similarly, State legislature is prevented by Article 286 (1)(b) to impose tax on sale or purchase which takes place in the course of import into or export out of India and only Parliament is empowered to formulate the principle for determining when a sale or purchase of goods takes place in the course of import of goods into or export of goods out of India within the meaning of Article 286 (1)(b) of the Constitution. However, under Clause (3) of Article 286 even though a sale does not take place in the course of interState trade or commerce, even then the State taxation law would be subject to restrictions and conditions if the sale relates to goods declared by Parliament to be of special importance in interState trade or commerce or comes under Article 366 (29A) subclause (b) subclause (c) subclause (d) as Parliament may by law specify. In this connection it is also to be noted that in exercise of the power conferred by Clause (2) of Article 286 of the Constitution, the Parliament has formulated the principles for

determining when a sale or purchase takes place outside a State inasmuch as when the sale or purchase takes place in the course of import of goods into or export of goods out of territory of India and in exercise of power conferred under Article 269 when a sale or purchase takes place in the course of interState trade or commerce by enacting the Central Sales Tax Act, 1956. The provisions have also been enacted under Central Sales Tax Act to determine situs or place of sale or purchase in the course of interState trade or commerce and sale or purchase outside the State inasmuch export and import sale.

58. Thus, from a close analysis of the provision of Articles 269 and 286 of Constitution it is clear that the aforesaid restriction and legal embargo imposed by the said articles are applicable only in respect of law of a State so far as it authorises the imposition of tax on sale or purchase of goods in the course of interState trade or commerce and import or export sale; the aforesaid articles (Arts. 269 and 286) have no bearing so far as imposition of market fee and development cess on specified agricultural produce is concerned. Beside this, since every list of Seventh Schedule contains an entry to the effect of fee in respect of matters enumerated in such list except Court fee, with the result that each Legislature is empowered to legislate for levy of fee on any of the matters assigned to it, which implies that the power to legislate for levy of fee is coextensive with the powers to legislate upon the substantive matters assigned to the respective Legislature. That apart the competence of State legislature while enacting the Act in question and validity of the provisions in respect of levy of market fee and development cess have neither been questioned nor can be doubted by this Court in view of aforesaid legal position, therefore, in my considered opinion, the analogy of imposition of taxes on sale of goods under State Sales Tax Act and Central Sales Tax Act in respect of levy of market fee on sale of specified agricultural produce in any market area cannot be applied. Therefore, the incidence of transaction of sale of specified agricultural produce in such market area has to be examined on the touchstone of the provisions of Act and rules framed thereunder and not on the basis of incidence of sale taking place under the aforesaid taxing statutes.

59. In this connection it is to be pointed out that Section 17 of the Act deals with the power of Market Committee or Mandi Samiti which includes the power to levy market fee and development cess on any specified agricultural produce. The provisions of Section 17 relevant for the purpose of question in controversy involved in the case are extracted as under:

"17. Powers of the Committees. A Committee shall, for the purposes of this Act, have the power to

(i).....

(ii).....

(iii) levy and collect

(a) such fees as may be prescribed for the issue or renewal of licences; and

(b) market fee which shall be payable on transaction of sale of specified agricultural produce in the market area at such rates, being not less than one percentum and not more than two and a half percentum of the price of the agricultural produce so sold as the State Government may specify by notification, and development cess which shall be payable on such transactions of sale at the rate of half percentum of the price of the agricultural produce so sold and such fee or development cess shall be realised in the following manner:

(1) if the produce is sold through a commission agent, the commission agent may realise the market fee and the development cess from the purchaser and shall be liable to pay the same to the Committee;

(2) if the produce is purchased directly by a trader from a producer, the trader shall be liable to pay the market fee and development cess to the Committee;

(3) if the produce is purchased by a trader from another trader, the trader selling the produce may realise it from the purchaser and shall be liable to pay the market fee and development cess to the Committee :

Provided that notwithstanding anything to the contrary contained in any judgment, decree or order of any Court, the trader selling the produce shall be liable and be deemed always to have been liable with effect from June 12, 1973 to pay the market fee to the Committee and shall not be absolved from such liability on the ground that he has not realised it from the purchaser:

Provided further that the trader selling the produce shall not be absolved from the liability to pay the development cess on the ground that he has not realised it from the purchaser;

(4) in any other case of sale of such produce, the purchaser shall be liable to pay the market fee and development cess to the Committee :

Provided that no market fee or development cess shall be levied or collected on the retail sale of any specified agricultural produce where such sale is made to the consumer for his domestic consumption only :

Provided further that notwithstanding anything contained in this Act, the Committee may at the option of, as the case may be, the commission agent, trader or purchaser, who has obtained the licence, accept a lump sum in lieu of the amount of market fee or development cess that may be payable by him for an agricultural produce, for such period, or such terms and in such manner as the State Government may, by notified order specify :

Provided also that [***]"no market fee or development cess shall be levied on transaction of sale of specified agricultural produce on which market fee or development cess has been levied in any market area if the trader furnishes in the form and manner prescribed, a declaration or certificate that on such specified agricultural produce market fee or development cess has already been

levied in any other market area;]

Explanation. For the purpose of clause (iii), unless the contrary is proved, any specified agricultural produce taken out or proposed to be taken out of a market area by or on behalf of a licensed trader shall be presumed to have been sold within such area and in such case, the price of such produce presumed to be sold shall be deemed to be such reasonable price as may be ascertained in the manner prescribed.]"

60. Rule 66 of the Rules deals with the levy and collection of market fee and development cess, the same is extracted as under:

" [66. Market fee and cess [Section 17 (iii)].(1) The Market Committee shall levy and collect market fee and development cess in the Market Area in accordance with the provisions of subclause (b) of clause (iii) of Section 17

Provided that no market fee and development cess shall be levied and charged prior to the date on which provisions of Section 10 of the Act are enforced:

Provided further that when the specified agricultural produce is presumed to have been sold in accordance with the explanation given under clause (viii) of Section 17 of the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964, the price of such produce shall be the price which prevailed for that type of produce in that market just on the previous working day.

(2) No market fee or development cess shall be levied more than once on any consignment of the specified agricultural produce brought for sale in the Market Yard if the market fee or development cess has already been paid on it in any Market Yard of the same Market Area and in respect of which a declaration has been made and a certificate has been given by the seller in Form No. V.]"

61. From a close analysis of the provisions of Section 17 (iii)(b) of the Act it is clear that substantive part of enactment contains charging provisions to the effect that the market fee and development cess shall be payable on a transaction of sale of specified agricultural produce in the market area at a rate stipulated thereunder and such market fee and development cess shall be collected and realised from the classes of persons mentioned in Clause (1) to Clause (4) of said subsection, but no mechanism has been prescribed or provided under the substantive provisions of the section to determine as to when or what moment the incidence of transaction of sale taking place in such market area; for that purpose one has to look into the provisions of explanation appended to that section, which provides in clearest terms that unless contrary is proved, any specified agricultural produce taken out or proposed to be taken out of a market area by or on behalf of licensed trader shall be presumed to have been sold within such area and in such case, the price of such produce presumed to be sold shall be deemed to be such reasonable price as may be ascertained in the manner prescribed. Thus, it appears that the explanation appended to the enacting part of the statute contains two things viz. (i) it raises rebuttable

presumption with regard to the time as to when or at what moment the incidence of transaction of sale of specified agricultural produce taking place in a market area which is to be the moment at which any such specified agricultural produce is taken out or proposed to be taken out of a market area by or on behalf of licensed trader, then it shall be presumed to have been sold in that market area and; (ii) it creates legal fiction by deeming provisions with regard to the price of agricultural produce, so sold in such market area in the manner prescribed by the rules.

62. At this juncture, before I deal with the nature of presumption raised by the explanation in some detail, I must point out the intent and legal impact of such explanation appended to the statute. In this connection a reference can be made to a decision of Hon''ble Apex Court, rendered in *S. Sundaram Pillai v. V.R. Pattabiraman*, AIR 1985 SC 582 wherein the pertinent observations made in paras 45 and 52 of the decision are extracted as under:

"45. We have now to consider as to what is the impact of the Explanation on the proviso which deals with the question of wilful default. Before, however, we embark on an enquiry into this difficult and delicate question, we must appreciate the intent, purpose and legal effect of an Explanation. It is now well settled that in Explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. Sarathi in "Interpretation of Statutes" while dwelling on the various aspect of an Explanation observes as follows:

"(a) The object of an explanation is to understand the Act in the light of the explanation;

(b) It does not ordinarily enlarge the scope of the original section which it explains, but only makes the meaning clear beyond dispute."

52. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

63. Thus, from a careful analysis of the aforesaid decision rendered by Hon''ble Apex Court it is clear that the explanation added to a statutory provision does not contain a substantive provision in any sense of the term but as the plain meaning of the word itself shows that it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. It does not ordinarily enlarge the scope of original section which it explains but only makes the meaning clear beyond doubt. On the basis of various authorities referred in the decision, the Hon''ble Apex Court has precisely narrated various objects of an explanation to a statutory provision, one of which is to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful. Another object is that an explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the explanation in order to suppress the mischief and advance the object of the Act, it can help to assist the Court in interpreting the true purport and intendment of the enactment by filling such gap in the substantive provisions of the statute without enlarging its scope.

64. Now applying the aforesaid legal principle enunciated by the Hon''ble Apex Court in present statutory back drop of the case, I find that the provisions contained in the explanation added to Section 17 (iii)(b) of the Act are intended to advance the object of the section by suppressing any sort of mischief to be adopted by the persons liable to pay market fee and development cess on transaction of sale of specified agricultural produce in market area. As indicated hereinbefore it raises statutory rebuttable presumption regarding the incidence of transaction of sale taking place in the market area and creates legal fiction due to deeming provision with regard to the price of agricultural produce presumed to have been sold in such market area so that the person liable to pay market fee and development cess cannot escape from its liability to pay exact amount to which such person is required to pay the Market Committee of the concerned area, thus the provisions contained in the said explanation, in my opinion, are also intended to provide an additional support to the charging provisions contained under the said section just to ensure due payment of market fee and development cess payable to the Mandi Samiti of concerned market area and also to prevent evasion of market fee and development cess by the traders.

65. Now I would refer the cases cited by learned Counsel for the petitioner in support of its case. In *Ram Chandra Kailash Kumar & Co. v. State of U.P.* and another, A.I.R. 1980 S.C. 1124, the Hon''ble Apex Court while dealing with the question as to whether market fee can be charged if only goods are brought in market area and dispatched outside it without there taking place any transaction of purchase or sale in respect of these goods, in para 29 of the decision the Hon''ble Apex Court has held as under:

"29. This point urged on behalf of the appellants is will founded and must be accepted as correct. On the very wordings of clause (b) of Section 17 (iii) market fee is payable on transactions of sale of specified agricultural produce in the market area and if no transaction of sale takes place in a particular market area no fee can be charged by the Market Committee of that area. If goods are merely brought in any market area and are despatched outside it without any transaction of sale taking place therein, then no market fee can be charged. If the bringing of the goods in a particular market area and their despatch therefrom are as a result of transactions of purchase and sale taking place outside the market area, it is plain that no fee can be levied."

66. At this juncture it is necessary to point out that the aforesaid decision has been rendered by Hon''ble Apex Court when the explanation appended to Section 17 (iii)(b) of the Act was not in existence at all, as it was inserted by U.P. Act No. 12 of 1987 w.e.f. 31.3.1987. Therefore, the observation made by Hon''ble Apex Court to the effect that if the bringing of goods in a particular market area and their dispatch therefrom are as a result of transactions of purchase and sale taking place outside the market area, no fee can be levied thereon, should be understood in the context of statutory provisions existing while deciding the aforesaid case and Hon''ble Apex Court had no occasion to consider the impact of aforesaid explanation while deciding the said case.

67. Relying upon the aforesaid decision in M/s. Indodan Milk Products Ltd., Bombay v. State of U.P. and others, 1985 UPLBEC 406 a Division Bench of this Court has held that if any specified agricultural produce is transferred from factory premises situated within market area by producer to their depots situated outside is not sale and Mandi Samiti is not legally entitled to charge any market fee from producers on these transactions. The pertinent observation made in para 12 of the decision are extracted as under:

"12. Now we have to determine whether the petitioners are liable to pay market fee on the agricultural produce transported by them to their depots at Ghaziabad and Delhi and other places. Section 17 (iii)(b) empowers the Mandi Samiti to levy market fee on transaction of sale on specified agricultural produce in the market area. The transfer of agricultural produce by the petitioners from their factory premises to their depots is not sale and, therefore, in our opinion, the Mandi Samiti is not legally entitled to charge any market fee from the petitioners on these transactions."

68. But I cannot reach the true import of the provisions of Section 17 (iii)(b) of the Act, unless I examine the legal nature and impact of the explanation appended thereto. In this connection reference can be made to the decisions referred hereinafter.

69. In Sodhi Transport Co. and others v. State of U.P. and others, (1986) 2 S.C.C. 486 while dealing with the meaning and nature of statutory rebuttable presumption the Hon''ble Apex Court in para 14 and 16 of the decision held as

under:

"14. A presumption is not in itself evidence but only makes a prima facie case for party in whose favour it exists. It is a rule concerning evidence. It indicates the person on whom the burden of proof lies. When presumption is conclusive it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and, when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over. Then the evidence will determine the true nature of the fact to be established. The rules Of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts, and circumstances.

16. In our opinion a statutory provision which creates a rebuttable presumption as regards the proof of a set of circumstances which would make a transaction liable to tax with the object of preventing evasion of the tax cannot be considered as conferring on the authority concerned the power to levy a tax which the legislature cannot otherwise levy. A rebuttable presumption which is clearly a rule of evidence has the effect of shifting the burden of proof and it is hard to see how it is unconstitutional when the person concerned has the opportunity to displace the presumption by leading evidence."

70. Relying upon Sodhi Transport Company's case Hon''ble Apex Court in State of West Bengal and another v. E.I.T.A. India Ltd. and others, (2003) 5 S.C.C. 239 : A.I.R. 2003 S.C. 4126 in para 12 of the decision has held that providing statutory presumption which is in the nature of rebuttable presumption is normal legislative practice. Indeed there can be no analogy between definition of deemed sale incorporated in clause (29A) of Article 366 of the Constitution and statutory presumption incorporated in Explanation to subsection (1) of Section 11 of West Bengal Act. For ready reference the observations made by Hon''ble Apex Court in para 12 of the decision are extracted as under:

"12. The Explanation to subsection (1) says that where a transporter or an owner or a lessee of a warehouse, deemed to be a casual trader in respect of any goods referred to in subsec. (1), is found to have disposed of such goods, the disposal of such goods shall be deemed to have been made by way of sale by him in West Bengal, unless he proves to the contra with satisfactory evidence. It is this Explanation which has been subject matter of, a lengthy debate. It is contended by Mr. Yashank Adhyaru that except to the extent the provision of clause (29A) of Article 366 of the Constitution of India" provides for a deemed sale, no State Legislature can create a fiction to treat any other transaction as sale and, therefore, the disposal of the goods by a casual trader cannot per se be treated as sale of the goods and he cannot be put to onerous task of providing a negative fact that the disposal of the goods was not by way of sale. This contention, though attractive, lacks substance. It will be apposite to notice here

Section 4 of the Indian Evidence Act, 1872, which defines, inter alia, the expressions "may presume" and "shall presume". The expression "may presume" postulates whenever it is provided by the Evidence Act that the Court may presume a fact, it will regard such fact as proved, unless and until it is disproved, or may call for proof of it; but the expression "shall presume" implies, whenever the Evidence Act says that the Court "shall presume" a fact, it shall regard such fact as proved, unless and until it is disproved. The statutory presumption incorporated in Explanation to subsection (1) of Section 11 is in the nature of the second category of presumption; The deeming provisions embodied in the Explanation does not extend the meaning of sale to every disposal of goods. It is attracted when a transporter or an owner or a lessee of a warehouse is unable to account for the disposal of goods : the fact of disposal of the goods in question having been established, the statutory presumption which is a rebuttable presumption, would apply and the disposal of goods shall be deemed to be by way of sale; it will be open to such a person to rebut the presumption. Raising of such rebuttable presumption is a normal legislative practice and no invalidity can be attributed to the same. It will be wholly misconceived, in our view, to treat the statutory presumption incorporated in the Explanation as extending the definition of "sale" in clause (29A) of Article 366 of the Constitution. Indeed, there can be no analogy between the definition of deemed sale incorporated in clause (29A) of Article 366 of the Constitution and the statutory presumption incorporated in Explanation to subsection (1) of Section 11. For these reasons, we cannot sustain the finding of the Tribunal. We hold that the said Explanation is valid in law and the challenge to its invalidity is misconceived and unsound."

71. In Civil Appeal No. 17691773 of 1998, *Krishi Utpadan Mandi Samiti v. M/s. Saraswati Cane Crusher and others*, decided on 25.3.1998 preferred against the order of this Court a Three Judges Bench of Hon'ble Apex Court while explaining the scope and legal nature of explanation of Section 17 (iii)(b) of the Act by noting the observations of this Court has held as under:

"We are satisfied that the orders of this Court aforesaid referred to would need some repair work. We treat the said order to be conceiving of a provisional assessment whereafter doors are opened for a final assessment. We conceive that when demands are raised by the Krishi Utpadan Mandi Samiti against a trader before he could ask for transit of goods outside the market area, the trader would be entitled to tender a valid rebuttal to say that no sale had taken place within the notified area and that if the explanation is accepted there and then by the Mandi Samiti, no question of payment would arise as also of withholding the gate passes. If prima facie evidence led by the trader is not acceptable by the Mandi Samiti, the trader or the dealer can be compelled to pay the market fee as demanded before issuance of gate pass. If the trader makes the payment without demur, the matter ends and the assessment finalised. But in case he does so and raises protest, then the assessment shall be taken to be provisional in nature making it obligatory on the trader to pay the fee before obtaining the requisite gate pass. After protest has been lodged and the provisional

assessment has been made, a timeframe would be needed to devise making the final assessment. We, therefore, conceive that it innately be read in the order of this Court that a final assessment has to be made within a period of two months after provisional assessment so that the entire transaction in that respect is over enabling the aggrieved party, if any, to challenge the final assessment in the manner provided under the afore Act or under the general law of the land in appropriate forum. Having added this concept in this manner in the two Judges Bench decision of this Court, we declare that what repair has been done instantly would add to the orders of the High Court and the instant corrective decision shall be the governing rule. The Civil Appeals would thus stand disposed of."

72. In *I.T.C. Ltd. v. Mandi Parishad U.P.*, (2007) 3 AWC 2241, a Division Bench of this Court while considering the import of explanation of Section 17 (iii)(b) of the Act has held that it raised statutory rebuttable presumption in favour of incident of sale, but the documents furnished by the trader contrary to the incident of sale should be held sufficient to rebut presumption raised in explanation to Section 17 (iii)(b) of the Act and it was also held that transfer of goods from one unit to another unit cannot be sale, as a person cannot sell anything to himself.

73. In *Commissioner of Trade Tax v/M/s. New Brij Sudh Deshi Ghee Store*, 2002 U.P.T.C. 1031 in para 22 of the decision, this Court has held as under:

"22.....The purchaser and seller being same, there was no interState sale within the meaning of Section 3 of the Central Sales Tax Act. It was for this reason that the first Appellate Authority also held that even assuming what the Assessing Authority had found was correct/there could be no interState sales by oneself to himself and, therefore, the order under Central Sales Tax Act was liable to be set aside....."

74. In *Tata Engineering & Locomotive Co. Ltd. v. Assistant Commissioner of Commercial Taxes and another*, A.I.R. 1970 S.C. 1281, wherein the assessee a manufacturer of motor vehicle was assessed to tax in respect of certain transactions in which vehicles were moved from site of works to various stock yards in different States. The procedure adopted by the assessee indicated that the completion of sales to the dealers took place at stock yards. Further from the terms of contract between assessee and dealer it was found that when the vehicles were moved from site of works to the stock yards, it was not necessary that number of vehicles allocated to the dealer should necessarily be delivered to him. The appropriation of the vehicles was also done at stock yards. On the question whether movement of vehicle from the site of works to various stock yards could be said to be occasioned by any covenant or incident of contract of sale to attract the tax, the Hon''ble Apex Court has held that it could not be said that the movement of vehicles from the site of works to stock yards was occasioned by any covenant or incident of contract of sale. The transaction could not be taxed. The pertinent observations made by Hon''ble Apex Court in para 5 of the decision are extracted as under:

"5.....It is also necessary to refer to the definition of "sale" as given in Section 2 (g), the substance of that definition is that sale means any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration. As observed in *Tata Iron & Steel Co. Ltd., Bombay v. S.C. Sarkar*, (1961) 1 SCR 379 : (AIR 1961 SC 65) a transaction of sale is subject to tax under the Act on the completion of the sale: A mere contract of sale is not a sale within the definition of "sale" in Section 2 (g). A sale being transfer of property becomes taxable under Section 3 (a) "if the movement of goods from one State to another is under a covenant or incident of the contract of sale". In *Ben Gorm Nilgiri Plantations Co., Conoor v. Sales Tax Officer, Special Circle, Ernakulam*, (1964) 7 SCR 706 : (AIR 1964 SC 1752), the provisions of Section 5 of the Act came up for consideration and the principle settled by that decision would indisputably be applicable to Section 3 (a) of the Act. It has been laid down that the sale in the course of export predicated connection between the sale and export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted without a breach of the contract or the compulsion arising from the nature of the transaction. To occasion export there must exist such a bond between the contract of sale and the actual exportation that each link is inextricably connected with the one immediately preceding it. The principle thus admits of no doubt, according to the decisions of this Court, that the sales to be exigible to tax under the Act must be shown to ; have occasioned the movement of the goods or articles from one State to another/The movement must be the result of a covenant or incident of the contract of sale.?

75. At this juncture I would like to refer the relevant passage from the book namely *Legislation and Interpretation* (4th Edition pages 307 to 311) by Late Sri Jagadish Swarup wherein learned author of the Book has explained the legal nature and import of legal fiction created by legislature in statutes as under:

"Legal fictions are created only for some definite purpose; they should be limited to the purpose for which they are created and should not be extended beyond that legitimate field. [*Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603; *Braithwaite and Company (India) Ltd. v. Employee's State Insurance Corporation*, AIR 1968 SC 413; *Commissioner, Wealth Tax v. Sarvanga Kumar*, (1973) 2 SCC 288; *Income Tax Commissioner v. Amarchand*, AIR 1963SC 1448 and *Income Tax Commissioners. Express Newspapers Ltd.*, AIR 1965 SC 33]. The only limit on the power of a legislature to create a fiction is that it should not transcend its power by its creation. (*Chandrana v. State of Mysore*, (1972) 1 S.C.C. 17)

A legal fiction is one which is not an actual reality but which the law requires the Court to accept it as a reality. Therefore in case of legal fiction, the Court believes something to exist which, in reality, does not exist. In other words, it is nothing but a presumption of the existence of a state of affairs which in actual reality is nonexistent. When viewed from this context there is not much

difference between a legal fiction and presumption. However, it cannot be said that legal fiction and a presumption are wholly identical in all respects. A presumption may be conclusive or it may be rebuttable. A presumption gives rise to a legal fiction. It is conclusive, if no evidence can be permitted to be led to deny it. In case of a presumption which is rebuttable, unless the contrary is established, fictitious state of affairs is presumed to exist as if it is an actual reality.

A deeming provision creates a legal fiction. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under certain circumstances.

The deeming fiction cannot be introduced by construction and it is the exclusive privilege of the legislature to apply a deeming fiction in a given case."

76. In view of aforesaid legal position I must conclude my view regarding true import of Section 17 (iii)(b) and legal nature of explanation appended thereto in the terms that the market fee is payable on transactions of sale of specified agricultural produce in market area and if no transaction of sale takes place in a market area, no fee can be charged by the Market Committee of that area. If goods are merely brought in any market area and are dispatched outside it without any transaction of sale taking place therein, then no market fee can be charged. It is no doubt true that charging provision of said section does not specifically provide complete mechanism to determine as to when or at what movement the incidence of transaction of sale taking place in the market area, but explanation appended to the said section makes the position clear in this regard. It postulates in clearest terms that unless contrary is proved any specified agricultural produce taken out or proposed to be taken out of a market area by or on behalf of a licensed trader shall be presumed to have been sold within such market area and in such case, the price of such produce presumed to be sold shall be deemed to be such reasonable price as may be ascertained in the manner prescribed. Thus it appears as indicated earlier that explanation contains two things; viz. (i) it raises statutory rebuttable presumption with regard to the time as to when the incidence of transaction of sale of specified agricultural produce taking place in the concerned market area and; (ii) it creates legal fiction by deeming provisions with regard to the price of specified agricultural produce so sold in that market area as prescribed by rules.

77. But the statutory rebuttable presumption and legal fiction aforesaid are confined to their respective specific purpose indicated above. They cannot be extended so as to mix up together and confuse one from another. The statutory rebuttable presumption should not be confused further with the presumption of conclusive nature which obviates the production of any other evidence to dislodge the conclusion drawn on presumption of proof of certain facts, whereas the statutory rebuttable presumption makes only a prima facie case for a party in whose favour it exists and only points out the party on whom lies the duty of going forward with evidence on the fact presumed and when that party has

produced evidence fairly and reasonably tending to show the real fact, is not as presumed; the presumption is over. Then the evidence will determine the true nature of fact to be established. In other words rebuttable presumption of the nature contained in the said explanation supposes the state of circumstances in existence and proved so long as it is not disproved or otherwise proved contrary to the presumed state of affairs. Thus, the statute with which I am concerned, the explanation in question raises statutory rebuttable presumption in favour of Market Committee of concerned market area with regard to proof of transaction of sale of specified agricultural produce by the trader in that market area by shifting the burden of proof upon the trader to prove contrary to the effect that no transaction of sale has taken place in the said market area, otherwise it shall be presumed to have taken place in the said market area.

78. On the other hand deeming provisions under a statute, create a legal fiction about the existence of a thing or situation as real which in fact is not in existence in reality. In other words a legal fiction is one which is not an actual reality but which the law requires the Court to accept as real and no party of the proceeding can be permitted to lead any evidence contrary to such state of affairs to which the law requires the Court to accept as reality, therefore, legal fiction created by deeming provisions under a statute differs from rebuttable presumption in that regard. At this juncture it is to be made further clear that the aforesaid deeming provision under the said explanation is confined to only sale price of specified agricultural produce presumed to have been sold within a market area, which shall be deemed to be such reasonable price as may be ascertained in the manner prescribed by the rules framed under the Act in this regard. There can be no legal fiction with regard to the incidence of transaction of sale of specified agricultural produce in any market area, which implies that there will be no deemed sale within a market area from which any specified agricultural produce is taken out or proposed to be taken out by or on behalf of a licensed trader. In respect of the incidence of transaction of sale of specified agricultural produce in a particular market area only rebuttable presumption is raised, which can be dislodged by the trader provided he adduces the evidence contrary to the facts presumed to be proved by such presumption, therefore, the aforesaid distinction between the legal fiction and rebuttable presumption should be kept in mind while dealing with explanation appended to the Section 17 (iii)(b) of the Act.

79. Now applying the aforestated proposition of law on the facts of the case, it is to be seen that it is not disputed by the petitioner that aforesaid quantity of rice obtained from Delhi branch of the petitioner by way of stock transfer to Ghaziabad unit and thereafter the aforesaid quantity of rice has been admittedly sold by the petitioner from the Ghaziabad unit byway of export sale outside India. Therefore, the question as to whether the petitioner has made any attempt to dislodge the rebuttable presumption of sale of aforesaid rice in the concerned market area of Ghaziabad does not arise. I have already held that it is not the case of petitioner that rice so exported by the petitioner was procured by milling the paddy in its rice mill situated at Ghaziabad and also held that analogy

of sale for the purpose of imposition of tax under State Sales Tax Act and Central Sales Tax Act does not apply for the purpose of imposition of market fee and development cess on transaction of sale of specified agricultural produce in market area of Ghaziabad. Therefore, I have no hesitation to hold that such admitted sale in the market area of Ghaziabad by way of export sale outside India is treated to be sale within the market area of Ghaziabad under Section 17 (iii)(b) of the Act. Besides, another submission of learned Counsel for the petitioner that the aforesaid quantity of rice obtained from Delhi Branch to Ghaziabad unit by way of stock transfer and exported outside India after processing in the Ghaziabad unit on account of Delhi Branch entitles the petitioner for exemption from market fee and development cess under U.P. Government's notification dated 24.10.2000, has also been rejected by me hereinbefore, therefore, on that count also the petitioner is not entitled for any exemption from levy of market fee and development cess on the aforesaid quantity of rice under the Notification dated 24.10.2000 and in given facts and circumstances of the case the petitioner is liable to pay mandi fee and development cess thereon.

80. In view of foregoing discussion, I must conclude the issue by holding that the petitioner is not entitled for any benefit of exemption from market fee and development cess on the aforesaid quantity of rice exported by the petitioner from Ghaziabad unit to outside India and concerned Mandi Samiti of Ghaziabad has rightly levied the market fee and development cess on the aforesaid quantity of rice in the tune of Rs. 34,69,950/ as Mandi fee and Rs. 8,67,888/ as development cess by, treating the same as sale within the concerned market area of Ghaziabad, I am further of the view that the decisions of Mandi Samiti and Revisional Authority on that score cannot be faulted with. The decisions cited by learned Counsel for the petitioner referred hereinbefore, in my considered opinion, do not lend any support to the case of petitioner on the question in issue. Therefore, the question formulated hereinbefore is decided accordingly.

81. Now the next question which arises for consideration is that as to whether on the rice procured by the petitioner from the paddy purchased within the State of U.P. and outside the State after excluding the exported quantity of rice procured from said paddy the Market Committee, Ghaziabad could levy market fee and development cess by treating the same as sale within the market area or to be treated as stock transfer from Ghaziabad Unit to Alipur Delhi branch of the petitioner, if so, what would be its effect?

82. In this connection it is to be pointed out that Mandi Samiti vide its order dated 11.7.2007, which has been affirmed vide revisional order dated 9.10.2007, has classified the entire quantity of rice into four different heads indicated hereinbefore and except the rice mentioned at Item No. 2 of the chart at page 247 of the paper book of writ petition, in respect of which I have dealt with separately hereinbefore in preceding issue, the remaining quantity of rice mentioned at remaining three items procured from the paddy purchased within

the State of UP. and outside it from different States have been treated as sale within the market area of Ghaziabad by excluding the exported quantity of rice procured from said paddy. Therefore, before dealing with the question formulated hereinbefore, one more incidental question arises for consideration is that as to whether the market fee and development cess can be levied by the Mandi Samiti, Ghaziabad on paddy purchased by the petitioner in various market areas of State of U.P and other States and further as to whether the rice procured from the aforesaid paddy by excluding the exported quantity of rice can be subjected to levy of market fee and development cess?

83. In this connection the submission of learned Counsel for the petitioner is that the petitioner has already paid Mandi fee and development cess on the paddy purchased from outside the State of Uttar Pradesh by respective branches of it and has also paid the market fee and development cess on the paddy purchased in various market areas of State of Uttar Pradesh, therefore, the petitioner is not required to pay Mandi fee again on the rice so procured from the aforesaid paddy as once the market and development cess are charged on the paddy then rice procured from said paddy cannot be subjected to market fee and development cess and further since the rice procured from paddy so purchased has been either exported outside India which is not sale within the market area of Ghaziabad or has been sent to Alipur branch by way of stock transfer which is also not sale within the market area of Ghaziabad as sale of goods by one person to another person which is very essence of the transaction of sale, therefore, no transaction of sale took place in respect of rice so procured from the paddy in the market area of Ghaziabad. Accordingly, no market fee and development cess can be charged by Mandi v Samiti Ghaziabad on aforesaid paddy purchased either from outside State or within the State and rice procured therefrom. In support of his aforesaid submission learned Counsel for the petitioner has placed reliance upon the cases referred herein before and cases to be referred hereinafter to which I would refer a little latter.

84. Contrary to it the submission of learned Counsel appearing for Krishi Utpadan Mandi Samiti is that the petitioner was required to pay Mandi fee and development cess to the respective Market Committee on the paddy purchased in various market areas of the State of Uttar Pradesh or to the Mandi Samiti, Ghaziabad where the paddy has been brought for converting into rice and was also liable to pay mandi fee and cess to the Mandi Samiti, Ghaziabad on the paddy purchased from outside State and brought to market area of Ghaziabad for milling in its factory situated in that market area but since the petitioner has sought exemption from levy of Mandi fee and development cess on the paddy so purchased within the State of U.P. in various market areas under the Government order dated 24.10.2000 for the purpose of exporting rice after milling in its factory at Ghaziabad, therefore, on the paddy so purchased by the petitioner, the Mandi Samiti, Ghaziabad has granted exemption from levy of market fee and development cess which could be granted to the petitioner only under the Government order dated 24.10.2000 and not otherwise, as except the aforesaid

GO. there is no other provision under the Act and rules framed under the Act under which such exemption could be granted to the petitioner on the paddy so purchased from various market areas of State of U.P. and brought to Ghaziabad for converting the paddy into rice.

85. According to the submission of respondents the paddy purchased by the petitioner from outside the State of U.P. and brought to Ghaziabad was to be as primary arrival of specified agricultural produce in the market area of Ghaziabad for sale, as contemplated under Rule 2 (XVIII) of Rules. The respondents did not charge Mandi fee and development cess thereon, as the rice procured from such paddy was intended to be exported by the petitioner, though on such paddy also market fee and development cess could be charged by Mandi Samiti, Ghaziabad by treating it as sale within market area of Ghaziabad. It is also submitted that the paddy and rice are different specified agricultural produce under the schedule appended to the Act as the paddy and rice are mentioned at item No. 3 and 4 in Group A(I) cereals amongst the agricultural produce. Therefore, if the transaction of sale takes place in respect of both the articles by converting the paddy into rice and sold even in the same market area, the Mandi fee and development cess can be charged thereon under the Act and Rules as both would be different transactions of sale. It cannot be said to be sale on same consignment or same specified agricultural produce within the same market area. Since the petitioner has exported only minimum prescribed quantity of rice outside the country and rest of the rice has been either sent to Alipur Branch, Delhi or sold otherwise than the aforesaid export, therefore, the same has been treated as sale within the market area of Ghaziabad in view of said GO. dated 24.10.2000 and Rule 2 (XVIII) of said Rules, accordingly levy of market fee and development cess on that quantity of rice is fully justified under the said Government notification inasmuch as according to the provisions of Act and Rules as well.

86. Before dealing with the rival submissions of the learned Counsel for the parties on the question in issue, it would be useful to make the stand of Mandi Samiti clear. The averments of paras 4 to 8, 10, 12 and 13 of the counteraffidavit filed on its behalf are extracted as under:

"4. That it is stated that the petitioner submitted a declaration with reference to the notification dated 24.10.2000 that it has got the export oriented unit for manufacturing Basmati and Superfine rice. He submitted set of papers which included the certificate of recognition by the Central Government and on that basis licence being granted by the State of Uttar Pradesh on 1.11.2000 where declaration was that the Unit would be engaged in manufacturing and export of rice. All these papers are being collectively annexed herewith and marked as Annexure CA1 to this counteraffidavit.

5. That for the purpose of export, the petitioner wanted permission of Mandi Samiti that they may not be charged the market fee and development cess on the purchase of paddy, quantity of paddy to be purchased and name of firm was disclosed and the Mandi Samiti issued the permission that the paddy may be

exempted from the market fee and development cess under the policy for only export vide notification dated 24.10.2000. Some of the applications and permission granted by the Mandi Samiti are collectively annexed herewith and marked as Annexure CA2 to this counteraffidavit

6. That on the basis of permission, the petitioner was able to purchase the paddy in the State of Uttar Pradesh without paying the market fee and development cess. The paddy purchased in the State of U.P. with opening balance of 8,97,093 quintals for the Kharif year 200203. Out of that, petitioner used the paddy measuring 8,44,836 quintals for converting into rice. The rice produced from that paddy with opening balance measuring 6,16,981 quintals. Out of that, petitioner's firm has shown the export of rice measuring 2,63,115 quintals, therefore, remaining stock of rice would be deemed to have been sold within the market area of Ghaziabad. Therefore, the petitioner was liable to pay the market fee and development cess on the balance quantity. The petitioner obtained exemption in respect of paddy from which rice was manufactured and remained balance within the market area of Mandi Samiti Ghaziabad.

7. That besides the petitioner purchased paddy from outside State of U.P. and brought the same within the market area of Ghaziabad and that was to be treated as primary arrival under Rule 2 (xviii) of Rule framed under Krishi Utpadan Mandi Adhiniyam and it was for sale, therefore, otherwise Mandi Samiti was entitled to charge the market fee on the consignment of paddy received from outside the State. The quantity of paddy was received from outside the State measuring 9,13,338 quintals. Out of that, petitioner used the paddy measuring 8,82,780 quintals for manufacturing the rice. The rice produced comes with opening balance measuring 9,40,492 quintals. This included the rice weighing with opening balance 58,418 quintals, which was brought outside the State of U.P. and was not manufactured by the petitioner, in respect of which the petitioner was not entitled of benefit as according to the policy issued by the Government, paddy purchased within the State or outside the State would be exempted and it would be processed within the Mill situated within the market area of Ghaziabad. As the petitioner has not exported the whole rice it would not carry exemption for nonexported rice. This would be treated as sold within the market area of Ghaziabad.

8. That the rice which has been exported, produced from the paddy within the State or outside the State, comes to 6,20,524 quintals and balance of rice, which remained with the petitioner within the market area of Ghaziabad measuring 5,67,815 quintals, which would be treated as deemed sale within the market area of Ghaziabad according to notification dated 24.10.2000. All the relevant charts have been annexed with the Assessment Order and that has been annexed by the petitioner along with writ petition at page 241 and 242.

10. That everything is in black and white. The quantity which has been exported, has been disclosed by the petitioner and the remaining quantity has been calculated on the basis of ideal standard recovery of rice from the paddy, which is

66.66% and after deducting 50% rice, which was exported, balance quantity of rice was treated as sale within the market area of Ghaziabad according to paragraph 3 of the notification and in paragraph No. 8 of notification it is mentioned that if the licence has been obtained under the notification dated 24.10.2000 then determination of quantity of paddy purchased, quantity of rice exported and quantity of remaining balance, would be determined only according to notification, therefore, Mandi Samiti was well within its power to assess and direct the petitioner's firm to pay the market fee and development cess on remaining quantity of rice.

12. That for the year 200102, the petitioner paid the market fee and development cess on the balance quantity of rice, which was with the petitioner in market area of Ghaziabad, which was balance after the export but for the year 200203 it introduced the case that the paddy was received from Haryana, Punjab and Rajasthan that was for job work and after converting into rice it was sent back whereas the petitioner pleaded that the rice converted was sent to branch Delhi and it was stock transfer. Therefore, the Mandi Samiti has to deal with that quantity of rice, which was reported to be stock transfer to Delhi whereas the paddy purchased within the State or outside the State was subject to payment of market fee and development cess. In the State of U.P. when exemption was granted, the petitioner was bound to convert that paddy into rice and export the same. If the petitioner failed to export the entire quantity manufactured, the Mandi Samiti is entitled to charge the market fee and development cess on the rice sold within the market area of Ghaziabad. It was immaterial that part of it or whole of balance of rice was sent to Delhi, allegedly to their headquarters or it's branch at Delhi. The Mandi Samiti was not concern with that as it was deemed sale under the notification dated 24.10.2000 within the market area of Ghaziabad and there was no case for rebuttal but as the plea of stock transfer was taken, therefore, Mandi Samiti has also devoted time to consider that plea and Additional Director has devoted to me to consider in revision. The plea of stock transfer was not relevant at all. After the licence was obtained under the notification dated 24.10.2000, the petitioner was bound to carry out the policy in law and spirit and the petitioner was solely entitled to manufacture the rice for export under the policy.

13. That the petitioner was not entitled for exemption on paddy either purchased in State or outside the State if it was not brought for manufacturing rice for export. Any quantity, which was not exported, became subject to payment of market fee and development cess without exemption."

87. At this juncture it is necessary to point out that from mere perusal of foregoing paragraphs of the counteraffidavit, it is clear that an unambiguous statement of fact has been made to the effect that neither the Mandi Samiti, Ghaziabad charged mandi fee and development cess on paddy purchased by the petitioner in various market areas of State of U.P. and brought to the market area of Ghaziabad for converting paddy into rice nor the concerned Committees

have charged the same from where such paddy was purchased by the petitioner and brought to the market area of Ghaziabad. In support of its aforesaid statement of facts, the respondents have filed various documents contained in Annexures CAI and CAII of counteraffidavit filed on behalf of respondents showing that petitioner has sought exemption from Mandi Samiti, Ghaziabad in respect of levy of market fee and development cess on the paddy purchased by it from various market areas of State of U.P. under Government order dated 24.10.2000, in pursuance thereof necessary instructions were issued by Mandi Samiti, Ghaziabad to the concerned market committees instructing them not to charge market fee and development cess from the petitioner as paddy purchased by it was to be utilised for export of rice outside the country under the aforesaid GO. The aforesaid statement of fact has neither been controverted by the petitioner vide its rejoinder affidavit, nor any material has been brought on record to show that the petitioner has paid any market fee and development cess on the said paddy either to the concerned Mandi Samiti of aforesaid market areas from where the aforesaid paddy has been brought to the market area of Ghaziabad for converting into rice for export or to the Mandi Samiti, Ghaziabad. Therefore, in the wake of specific denial by the respondents in respect of payment of market fee and development cess on the paddy purchased within the State it was necessary for the petitioner to produce necessary material in proof of such payment and mere bald assertion in the pleading of writ petition in that regard, in my opinion, does not suffice the purpose as in given facts the onus was upon the petitioner to discharge its burden of proof in this regard, contrary thereto the respondents have shown that they have granted exemption to the petitioner from payment of mandi fee and development cess on said paddy, therefore, I have no hesitation to hold that the petitioner did not pay mandi fee and development cess on the paddy purchased by it within the State either to concern market committees or to the Market Committee Ghaziabad. Accordingly, the submissions of learned Counsel for the petitioner at the strength of assertions made in pleading of writ petition alone in this regard being contrary to the material on record cannot be accepted, rather held to be factually incorrect.

88. So far as paddy purchased by various branches of petitioner in their respective States outside the State of U.P. is concerned, in para 18 of the writ petition categorical statement of fact has been made by the petitioner to the effect that various branches of petitioner have purchased such paddy from outside the State by paying mandi fee thereon in respective area under respective law applicable thereto and said paddy is sent for milling to Ghaziabad. In support of assertions a photostat copy of one sample document depicting the Bill, Stock transfer, Challan, Bilty, G.R. Unloading slip receipt, Gate pass and Arrival Receipt issued by Krishi Utpadan Mandi Samiti, Ghaziabad depicting the movement of paddy from outside State to Ghaziabad unit has been brought on record by the petitioner and collectively filed as Annexure5 of the writ petition. Besides, it is further stated that this is sample document and details of each and every transaction can be given at the time of hearing. Contrary to the aforesaid

assertions made in para 18 of the writ petition, no specific denial has been made by the respondents in their counteraffidavit particularly in para 33 of it wherein reply of aforesaid paragraph of writ petition has been given and merely it has been stated that paddy purchased by the petitioner from outside the State and brought to Ghaziabad is primary arrival of specified agricultural produce, which could be subjected to market fee but Mandi Samiti, Ghaziabad did not charge market fee thereon, except the aforesaid statement it was nowhere stated that petitioner has not paid any mandi fee on such paddy to respective market committees outside the State, therefore, it cannot be held at this stage as to whether the petitioner has paid mandi fee to the respective market committees outside the State of U.P. or not from where the paddy was purchased by various branches of petitioner and sent to Ghaziabad for milling but this is not in dispute that the petitioner did not pay any mandi fee to the Market Committee, Ghaziabad on the paddy purchased by the petitioner from outside State and brought to Ghaziabad only for milling. Therefore, question still remains to be answered as to whether in given facts and circumstances of the case petitioner was liable to pay mandi fee on such paddy purchased by it from outside the State and brought to Ghaziabad for milling purpose?

89. In this connection, it is to be pointed out that there can be no quarrel with the proposition that market fee can be charged only on the sale of specified agricultural produce in the market area from the persons mentioned in clause 1 to 4 of Section 17 (iii)(b) of the Act and if no transaction of sale of specified agricultural produce takes place in a market area within the meaning of Section 17 (iii)(b) of the Act, the market fee cannot be charged on such specified agricultural produce in that market area. At this juncture the proviso (iii) of Section 17 (iii)(b) of the Act assumes significance. The proviso as existing, provides that no market fee or development cess shall be levied on transaction of sale of specified agricultural produce on which market fee and development cess has been levied in any market area if the trader furnishes in the form and manner prescribed a declaration or certificate to the effect that on such specified agricultural produce market fee or development cess has already been levied in other market area.

90. In this connection a reference can be made to a decision of Hon''ble Apex Court rendered in S. Sundaram Pillai's case (supra), wherein while dealing with the purpose and object of the proviso appended to a particular statute in para 42 of the decision the Hon''ble Apex Court has held as under:

"42. We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes:

- (1) qualifying or excepting certain provisions from the main enactment;
- (2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the

enactment workable;

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an option addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

91. In view of law laid down by Hon"ble Apex Court it appears that the aforesaid proviso has been used as exception to the main enacting part of the statute. The charging provision of Section 17 (iii)(b) of the Act empowers the Market Committee of concerned market area to levy market fee and development cess on transaction of sale of specified agricultural produce in concerned market area but by virtue of proviso appended thereto it is provided that no mandi fee and development cess can be charged on transaction of sale of any specified agricultural produce in respect of which market fee or development cess has been levied in any market area, if the trader furnishes in the form and manner prescribed a declaration or certificate that on such specified agricultural produce market fee and development cess has already been levied in other market area. It implies that once a market fee has been levied on a transaction of sale of any specified agricultural produce in a particular market area on the same specified agricultural produce no market fee can be charged if sold in another market area subsequently. The Market Committee of concerned market area would not be competent to charge mandi fee and development cess on such subsequent transaction of sale of specified agricultural produce if the mandi fee and development cess has already been levied on the earlier transaction of sale of aforesaid specified agricultural produce in another market area.

92. In other words no market fee or development cess can be levied more than once on any consignment of specified agricultural produce sold in a market area if the market fee and development cess has already been paid on it in any other market area provided that the trader furnishes a declaration or certificate in the form and manner prescribed to the effect that on such specified agricultural produce market fee and development cess has already been levied in another market area. Although Rule 66 (2) of the rules has narrowed the scope of operation of aforesaid proviso contained under Section 17 (iii)(b) of the Act but the rule framed under the Act can neither enlarge the scope of provisions of the Act nor restrict the same. Therefore, in view of aforesaid discussion it is clear that unless such declaration or certificate in the form and manner prescribed under Rules is furnished by trader before the concerned Mandi Samiti where the specified agricultural produce is brought for sale, in my considered opinion, the Mandi Samiti of concerned market area would be competent to charge Mandi fee and development cess on such specified agricultural produce only if any transaction of sale takes place in such market area as contemplated under Section 17 (iii)(b) of the Act as explained and discussed earlier in preceding issue.

93. In case in question, learned Counsel for the petitioner could neither point out any specific pleading in the writ petition nor filed any document showing that the petitioner has furnished any declaration or certificate before Mandi Samiti, Ghaziabad to the effect that market fee and development cess has already been paid by the petitioner to other market committees within the State from where the aforesaid paddy has been brought to Market area of Ghaziabad. Contrary thereto, as revealed from Annexures CA1 and II to the counteraffidavit that the respondents have already granted exemption to the petitioner directing the concerned market committees not to charge mandi fee on the paddy purchased by the petitioner in various market areas in State of U.P. as the paddy was to be utilised for export of rice. Therefore, on this count also it cannot be held at all that the petitioner has actually paid market fee and development cess on paddy purchased within various market areas of the State of U.P. to the concerned market committees.

94. Now further question arises for consideration as to whether Market Committee, Ghaziabad can charge mandi fee and development cess on paddy purchased by petitioner within the State and outside it, and brought to Ghaziabad as primary arrival of specified agricultural produce for sale, storage or processing by treating the same as sale within that market area? In this connection it would also be useful to extract the definition of "primary arrival" given under Rule 2 (xviii) of rules as under:

"Primary Arrival" means the first arrival of a specified agricultural produce in the Market Area for sale, storage or processing on which no market fee has been levied in the Market Area, whether brought from place in the same a market area, or from any other market area or from outside the State or the country."

95. From a plain reading of the Rule2(xviii) of the Rules it appears that expression "primary arrival" has been defined thereunder but the learned Counsel for the respondents Sri B.D. Madhyan could not point out any provisions of Rules under which the expression "primary arrival" has been used so as to authorise the concerned Market Committee to treat the primary arrival of specified agricultural produce in particular market area as a transaction of sale of specified agricultural produce taking place in that market area. In absence of any rule wherein such expression (primary arrival) is used indicating the aforesaid intention of rule making authority, it is very difficult for this Court to conceive that the definition clause can be given meaning assigned to it, as a transaction of sale of specified agricultural produce taking place in a particular market area merely because the expression "primary arrival" given in the definition clause assigned the meaning that the first arrival of specified agricultural produce in the market area for sale, storage or processing on which no market fee has been levied in the market area whether brought from the place in the same market area or from any other market area or from outside the State or the country. Even in the said definition clause it is nowhere mentioned that mere incidence of primary arrival of a specified agricultural produce in a particular market area for sale,

storage or processing on which no market fee had been levied in any other market area referred herein before is treated to be a transaction of sale taking place in respect of the aforesaid specified agricultural produce in such particular market area. Therefore, I am unable to understand as to how the expression "primary arrival" as defined under Rule 2(xviii) of the Rules without its use in any particular rule indicating it to be sale within that market area, can be treated to be sale of specified agricultural produce in that market area and how the paddy brought to the market area of Ghaziabad from various market area of State of Uttar Pradesh and outside the State of Uttar Pradesh can be treated to be sale within the market area of Ghaziabad and how the concerned market committee of Ghaziabad would be competent to levy market fee and development cess on such specified agricultural produce unless the transaction of sale takes place in Ghaziabad. In my considered opinion, unless the transaction of sale of aforesaid paddy brought by the petitioner from various market area of State of Uttar Pradesh and outside the State are sold in the market area of Ghaziabad the concerned market committee of Ghaziabad would not be competent to charge mandi fee thereon.

96. In this connection it is also necessary to point out that under Sections 12 and 13 of the Act the provisions have been made to the effect that for every market area there shall be a committee to be called mandi samiti of that market area which shall be a body corporate having perpetual succession and an official seal and subject to such restriction or qualifications, if any as may be imposed by this or other enactment, may sue or be sued in its corporate name and acquire, hold and dispose of property and enter into a contract. The committee shall be deemed to be a local authority for the purpose of Land Acquisition Act and other law for the time being in force. The committee shall be constituted in the manner provided under the provisions of Section 13 of the Act and perform the functions and discharge the obligations assigned to it under the provisions of Act and Rules framed thereunder.

96A. In view of aforesaid legal position, it is clear that every Market Committee or Mandi Samiti is a separate legal entity having power and jurisdiction in their respective market area. It cannot be said at all that if a trader has not paid any market fee chargeable in another market area from where the specified agricultural produce is merely brought for sale, storage or processing in a market area, market committee of such area can charge market fee on such specified agricultural produce even without any transaction of sale of aforesaid agricultural produce has taken place in such market area. In other words, if any specified agricultural produce is brought by a trader in market area by purchasing it from another market area, unless such specified agricultural produce is again sold in such market area, the Market Committee of that market area would not be competent to charge market fee merely because it is brought for sale to that market area. There is distinction between actual sale or bringing the agricultural produce for sale in a particular market area. However, if the agricultural produce is again sold and the trader furnishes a certificate that market fee has already

been levied on such specified agricultural produce by another market committee, in that event of the matter the trader would not be liable to pay market fee on such subsequent transaction of sale but that does not itself empower to such market committee to realise market fee which could be charged by another market committee of another market area where earlier transaction of sale has taken place, if the trader has not paid market fee to that market committee without any further or subsequent transaction of sale taking place in such market area. Therefore, in my considered opinion, if the market committee of another market area of State of U.P. or outside it did not charge market fee on paddy purchased by petitioner, therefrom, Mandi Samiti Ghaziabad would not be competent to charge market fee unless it is again sold in market area Ghaziabad.

97. Now the question in issue can be examined from the point of view of case law. In this connection it would be useful to refer a Constitution Bench decision of Hon"ble Apex Court wherein the question of levy of mandi fee and development cess on paddy and rice has been considered by Hon"ble Apex Court in *Ram Chandra Kailash Kumar & Co. v. State of U.P. and another*, AIR 1980 SC 1124. The pertinent observations made in paras 13 and 20 of the decision in this regard are extracted as under:

"13.....The greater difficulty arises with respect to paddy and rice as both of them are mentioned in the Schedule as well as in the notification. We shall show hereinafter that in a particular market area market fee cannot be levied both in relation to the transaction of purchase and sale of paddy and the rice produced from the same paddy. Fee can be charged only on one transaction. This finds support from the unamended Rules as they are, wherein it is to be found subrule (2) of Rule 66. But we find nothing in the provisions of the Act or the Rules to warrant the taking of the view that in another market area the Market Committee of that area cannot levy fee on a fresh transaction of sale and purchase taking place in that area.

20.....While discussing the question of levy of market fee on paddy and rice this aspect of the matter is important and therefore we thought it appropriate to highlight it at this stage. By and large in the notification dated April 11, 1978 there is hardly any duplication of any item of agricultural produce.....But in case of paddy and rice mentioned as Items 3 and 4 in Group A1 "Cereals", there is a duplication as rice is obtained from paddy. We would, therefore, like to clarify the position of law in this regard. If paddy is purchased in a particular market area by a rice miller and the same paddy is converted into rice and sold then the rice miller will be liable to pay market fee on his purchase of paddy from the agriculturistproducer under subclause (2) of Section 17 (iii) (b). He cannot be asked to pay market fee over again under subclause (3) in relation to the transaction of rice. Nor will it be open to the Market Committee to choose between either of the two in the example just given. Market fee has to be levied and collected in relation to the transaction of paddy alone. Otherwise, there will be a risk of violation of Article 14 if it is left to the sweetwill of the Market

Committee in the case of some rice millers to charge market fee on the transaction of paddy and in case of others to charge it when the sale of rice takes place. If, however, paddy is brought by the ricemiller from another market area, then the Market Committee of the area where paddy is converted into rice and sold will be entitled to charge market fee on the transaction of sale in accordance with subclause (3). We now take the example of a producer-trader who is an agriculturist and produces paddy in his own field but owns a rice mill also in the same market area. He mills the paddy grown by him into rice and sells it as such. It is plain that in his case no market fee can be charged on paddy because there is no transaction of sale and purchase of paddy and market fee can be charged only on the sale of rice by him in accordance with subclause (3) and he will be entitled to pass on the burden to his purchaser."

98. From a close analysis of aforesaid observations of Hon'ble Apex Court the propositions which emerged are that (i) if paddy is purchased in a particular Market Area by a rice miller and the same is converted into rice and sold, then he will be liable to pay market fee on his purchase of paddy not in relation to transaction of rice, (ii) if the producer owns a rice mill in the same market area and he mills the paddy grown by him into rice and sells it, no market fee can be charged on paddy and market fee can be charged only on the sale of rice, (iii) if paddy is brought by the ricemiller from another Market Area, the Market Committee of the area where paddy is converted into rice and sold will be entitled to charge market fee on the transaction of sale of rice in accordance with subclause (3). It implies that in the given situations indicated hereinabove market fee can be charged either on paddy or on rice in the same market area in situation contemplated under point No. (i) and (ii), it cannot be charged on paddy and rice both in the same market area even if in respect of both the items of specified agricultural produce transactions of sale take place in the same market area. However, if the paddy is brought by rice miller from another market area as in the case in hand, the Market Committee of the area where paddy is converted into rice and sold will be entitled to charge market fee on rice in accordance with subclause (3) of Section 17 (iii)(b) of the Act, as indicated at point No. (iii) hereinbefore. Therefore, in view of law laid down by Hon'ble Apex Court in *Ram Chandra Kailash Kumar Co. v. State of Bihar* since paddy is brought by the petitioner rice miller from another market area to the Market area of Ghaziabad for converting into rice within that market area and if it is sold within that market area only, then the Mandi Samiti of that market area i.e. Ghaziabad would be entitled to charge market fee and development cess on rice so sold irrespective of fact as to whether rice miller has paid any market fee on paddy purchased from another market area to the concerned market committee or not in view of the proposition as indicated at point No. (iii) hereinbefore.

99. Now further question arises for consideration as to whether rice procured from paddy purchased by the petitioner within the State and outside the State has been sold in the market area of Ghaziabad or not? In this connection the submission of learned Counsel for the petitioner in nutshell is that the petitioner

has exported some rice procured from the said paddy outside the country and rice so sold being export sale is not sale within the market area of Ghaziabad and remaining rice so procured sent to its Alipur Branch, Delhi, by way of stock transfer is also not sale within the market area of Ghaziabad between one person and another, therefore, Mandi Samiti, Ghaziabad is not entitled for levy of market fee and development cess even \t it could be levied on sale of paddy and rice both. While elaborating his submission, learned Counsel for the petitioner has urged that on the paddy that had been purchased by different branches of petitioner in other States, the aforesaid branches had already paid mandi fee in those areas according to the respective Krishi Utpadan Laws and has been brought to Ghaziabad only for milling the paddy so purchased and the said paddy has not been sold by the petitioner in Ghaziabad market area, therefore, no transaction of sale of said paddy has taken place in the market area of Ghaziabad. Similarly, on paddy purchased from different market areas of State of U.P. mandi fee and development cess has already been paid by the petitioner to the Mandi Samiti of the concerned areas and has been brought to Ghaziabad only for converting into rice and no transaction of sale has taken place in respect of said paddy in the market area of Ghaziabad, therefore, no mandi fee and development cess can be charged by the Mandi Samiti on rice and paddy as well. The submission of learned Counsel for the petitioner is no doubt attractive and have some substance but cannot be accepted in toto.

100. In this connection, it is necessary to point out that in preceding paragraphs of this judgment, I have already held that the petitioner has failed to produce any material before this Court, on the basis of which it can be said that it had already paid the Mandi fee and development cess to respective market committee in State of U.P. from where it purchased the paddy and brought to the market area of Ghaziabad. Contrary thereto in the wake of material shown in the Annexure C.A.I and 11 of the counteraffidavit of respondents to the effect that the petitioner has sought exemption from mandi fee and it was given such exemption on the aforesaid paddy under Government order dated 24.10.2000 as the rice procured therefrom was intended to be exported under the policy contained in the said Government order. Therefore, I have held that the petitioner has not paid any mandi fee on the paddy purchased within various market areas of U.P. either to the concerned market committees or market committee, Ghaziabad. Besides this, so far as export of rice from Ghaziabad to outside the country is concerned, I have already held while deciding earlier question that export sale is sale within the market area of Ghaziabad under the provisions of Section 17 (iii)(b) of the Act as the provisions of Act does not recognize export sale outside India and sale in the course of interState trade as contemplated by Central Sales Tax Act as there can be no analogy between the sale for the purpose of imposition of tax and market fee because of the reason that both are conceptually distinct and different from each other, therefore, on the rice exported by the petitioner procured from the aforesaid paddy the mandi fee and development cess could be charged by the Market Committee,

Ghaziabad but due to the policy of State Government under GO. dated 24.10.2000 the market committee Ghaziabad could not charge the mandi fee and development cess on the exported quantity of rice procured from the aforesaid paddy by petitioner though it was chargeable under the provisions of Act.

101. Now so far as the remaining quantity of rice procured by the petitioner from aforesaid paddy after excluding the exported rice is concerned, the submission of learned Counsel for the petitioner is that it has been sent to the Alipur Branch, Delhi of the petitioner and it has not been sold in the market area Ghaziabad. Whereas contrary to it, the stand taken by respondents mandi samiti Ghaziabad is that rice procured from the aforesaid paddy, which has not been exported outside the India is liable for mandi fee and development cess by treating the same as sale within the market area of Ghaziabad under said Government order dated 24.10.2000. At this juncture the submission of learned Counsel for the petitioner is that there is no provision under Section 17 (iii)(b) of the Act including the explanation appended thereto under which there can be any deemed sale of specified agricultural produce in any particular market area. The explanation attached therewith raises only rebuttable presumption with regard to the transaction of sale of any specified agricultural produce in a particular market area. The Government order dated 24.10.2000 contrary to it cannot create a provision regarding the deemed sale of any specified agricultural produce in any particular market area, which is left with the petitioner after export of rice procured from the said paddy or transferred to its Alipur branch Delhi by way of stock transfer, therefore, the provisions of the Government order dated 24.10.2000 to that extent creating legal fiction for deemed sale and thereby casting an obligation upon the petitioner to pay the mandi fee and development cess on the rice which remains with the petitioner after exported quantity of rice and sent to its Alipur branch by way of stock transfer without any actual sale of said rice in the concerned market area is nullity and liable to be ignored for the simple reason that unless the provisions of Act is amended comprehending the stock transfer from one unit to another unit of the petitioner as deemed sale, there can be no deemed sale of specified agricultural produce in a particular market area; and such deemed sale cannot be effected on said rice merely by Government order dated 24.10.2000, which has no sanctity of law and has no statutory force as the same has not been issued under any provision of the Act and/or Rules framed thereunder.

102. Besides this, learned Counsel for the petitioner has further submitted that even Clause (29A) under definition Clause of Article 366 of the Constitution of India does not empower the mandi samiti to treat the aforesaid remaining quantity of rice procured from the said paddy as deemed sale within the market area of Ghaziabad. The aforesaid Clause (29A) inserted under Article 366 of the Constitution of India by 46th Amendment Act 1982 merely enables the State Legislature to enact a law for imposing a tax on sale and purchase of goods being a tax of the nature referred to subclause (b), subclause (c) or subclause

(d) of Clause (29A) of Article 366 of the Constitution subject to restrictions and conditions in regard to the system of levy, rate and other incidence of tax as Parliament made by law specify, therefore, the submission of learned Counsel for the petitioner in this regard is that even by taking assistance of definition clause contained under Clause (29A) of Article 366 of the Constitution of India, the respondents cannot treat the stock transfer of rice made by the petitioner from its Ghaziabad Unit to its Alipur Branch, Delhi as transaction of sale taking place in Ghaziabad market area because "of the reason that there can be no two persons as separate and distinct legal entities involved as seller and buyer in such transaction which is most essence of transaction of sale. It is merely a transportation of specified agricultural produce from one unit of the petitioner to another unit without any incidence of transaction of sale taking place between two persons in market area of Ghaziabad. In support of his submission learned Counsel for the petitioner has placed a reliance upon the case of Ram Chandra Kailash Kumar (supra), M/s Indodan Milk Product Ltd., Bombay v. State of U.P. and others (supra), Krishi Utpadan Mandi Samiti v. M/s Saraswati Cane Crusher and others (supra) decided on 25.3.1998 by Hon"ble Apex Court, I.T.C. Ltd. v. MandiParishad U.P. (supra), Commissioner of Trade Tax v. New Brij Shudh Deshi Ghee Store (supra), Tata Engineering and Locomotive Co. Ltd. v. Assistant Commissioner of Commercial Tax and another (supra), and also referred Division Bench decision of Hon"ble Andhra Pradesh High Court rendered in Hotel Dwarika, Hyderabad v. Union of India, 1985 (58) STC 241 and the case decided by Madras High Court in Sri Annapurna and others v. State of Tamil Nadu and another, 1986 (63) STC 18 and a decision of Hon"ble Apex Court rendered in T.N. Kalyana Mandapam Association v. Union of India and others, (2004) 5 SCC 632. Except last three cases, I have already referred other cases cited by learned Counsel for the petitioner herein before in preceding part of this judgment, therefore, I would refer only last three cases a little latter.

103. So far as the submission of learned Counsel for the respondents that except the exported quantity of rice procured from the paddy purchased by the petitioner from various market areas of State of U.P. and outside the State which remains with the petitioner has been either sent to Alipur branch Delhi or sold otherwise is treated to be sale within market area of Ghaziabad under Government order dated 24.10.2000 is concerned, in my opinion, cannot be accepted as it stands. In this connection it is to be pointed out that in Ram Chandra Kailash Kumar and Co"s. case (supra) it has been held by the Hon"ble Apex Court that market fee is payable only on the transaction of sale of specified agricultural produce in market area and if no transaction of sale takes place in market area, no fee can be charged by market committee of that area. If the goods are merely brought into market area and are dispatched outside it without any transaction of sale taking place therein, no market fee can be charged but at the time of aforesaid decision the explanation attached with the Section 17 (iii) (b) was not in existence as the same was added by the U.P. Act No. 12 of 1987 w.e.f. 31.3.1987. So far as legal nature and impact of explanation appended to

Section 17 (iii)(b) of the Act is concerned, after discussing in quite detail while deciding preceding question in view of law laid down by Hon"ble Apex Court in *Sod/?/Transport Co. and others v. State of U. P. and others*, (1986) 2 SCC 486; *State of West Bengal and another v. E.I.T.A. India Ltd. and others*, (2003) 5 SCC 239 : AIR 2003 SC 4126, in Civil Appeal 17691773 of 1998; *Krishi Utpadan Mandi Samiti v. M/s. Saraswati Cane Crusher and others*, decided by Three Judges Bench of Hon"ble Apex Court on 25.3.1998 and Division Bench of this Court in *I.T.C. Ltd. v. Mandi Parishad U.P.*, (2007) 3 AWC 2241, I have already held that the explanation appended to the said section raises only statutory rebuttable presumption in respect of transaction of sale of specified agricultural produce in a particular market area which can be rebutted by the Trader by adducing the material contrary to said presumption raised by the statute. It does not contain any deeming provision with regard to sale of specified agricultural produce in the market area. The deeming provision is restricted to only sale price of specified agricultural produce presumed to have been sold in the market area. Therefore, in view of aforesaid legal position, in my opinion, the provisions of G.O. dated 24.10.2000 which provides deeming provisions for creation of legal fiction for sale of rice, a specified agricultural produce, in particular market area, which is left with the petitioner rice miller after exporting the rice procured from the said paddy, to that extent is contrary to the aforesaid provisions of Section 17 (iii)(b) of the Act. Learned Counsel for the respondents could not point out any provisions under the Act, under which the aforesaid Government order has been issued by the State Government. Therefore, the aforesaid Government order has to be held merely an executive order and cannot be held to be statutory in nature, thus have no force of law. Accordingly, no market fee on the remaining quantity of rice left with the petitioner after export can be levied unless said rice is found to be otherwise sold in the said market area. The decision rendered by Hon"ble Apex Court in *Monga Rice Mill and others v. State of Haryana and another*, (2004) 6 SCC 101 cited by learned Counsel for the respondents does not lend any support to the case of respondents, as the aforesaid decision has been rendered in different statutory backdrop.

104. Now another submission of learned Counsel for the respondent that extended definition of deemed sale as contemplated by Article 366 (29A) of Constitution would cover the case of stock transfer of rice from Ghaziabad unit of the petitioner to its Alipur Delhi branch, as a deemed sale within the market area of Ghaziabad also appears to be misplaced for the simple reason that normally the expressions and words defined under definition clause of particular enactment or Rules signifies the meaning assigned to them, wherever used in the body of the statute unless context of the statute otherwise requires. Similarly words and expressions defined under Article 366 of the Constitution also signify the meaning assigned to them wherever used in body of the Constitution. They cannot be straight way imported while interpreting another statute without its incorporation in such statute to its permissible limit. In other words, therefore, in my opinion, unless the existing statute is amended by comprehending the

situation contemplated by clause (29A) of Article 366 of the Constitution and legislature in question is competent enough to amend the statute, it shall not be open for the Court to take assistance of the aforesaid definition clause for interpreting the existing provisions of the Act/statute without its incorporation in the concerned statute. It is subject matter of competent legislation and cannot be assumed by the Court while interpreting the statute without any valid legislation. In this connection a reference can be made to the few cases referred hereinafter.

105. In *Hotel Dwaraka, Hyderabad v. Union of India and others*, 1985 (58) STC 241, one of the question for consideration before a Division Bench of Andhra Pradesh High Court was that as to whether there was any necessity to amend definition of sale in Sales Tax Act as definition of sale or purchase given in Article 366 (29A) or it automatically applies to the definition of sale in Sales Tax Act and does it authorise the levy of sales on the supply of food stuffs without amending the definition of the Expression "sale" and "turnover" in the Sales Tax Act? While answering the aforesaid question a Division Bench of Andhra Pradesh High Court has held as under:

"The Amendment Act by the expansion of the legislative entry has merely conferred legislative competence in respect of a matter the State Legislature was found not competent to legislate. Now the Amendment Act enables the State Legislature to enact the law imposing tax on foodstuffs supplied or served to customers. Without an amendment to Section 2(1)(n) and (s) of the Sales Tax Act relating to the definition of "sale" and "turnover" respectively, there will be no law providing for levy and collection of tax. Therefore, we reject the contention that no further amendment of the Sales Tax Act is necessary to levy and collect tax on sale of foodstuffs and beverages from the date of the Amendment Act."

106. Similar view has been taken by the Madras High Court in *Sree Annapoorna and another v State of Tamil Nadu and another*, 1986 (63) STC 18 and I am also in full agreement with the view taken by the aforesaid High Courts.

107. In *T.N. Kalyana Mandapam Association v. Union of India and others*, (2004)5 S.C.C. 632 while considering the impact of insertion of clause (29A) under definition clause of Article 366 in para 43 and 44 of the decision Hon''ble Apex Court has held as under:

"43. As far as the above point is concerned, it is well settled that for the tax to amount to a tax on sale of goods, it must amount to a sale according to the established concept of a sale in the law of contract or more precisely the Sale of Goods Act, 1930. The legislature cannot enlarge the definition of sale so as to bring within the ambit of taxation transactions, which could not be a sale in law. The following judgments and the principles laid down therein can be very well applied to the case on hand :

(1) *J.K. Jute Mills Co. Ltd. v. State of U.P.*, AIR 1961 SC 1534 : (1962) 2 SCR1.

(2) Gannon Dunkerley & Co. v. State of Rajasthan, (1993) 1 SCC 364

(3) State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., AIR 1958 SC560: 1959 SCR 379

(4) S.IO. v. Budh Prakash Jai Prakash, AIR 1954 SC 459 : (1955) 1 SCR 243.

(5) George Oakes (P) Ltd. v. State of Madras, AIR 1962 SC 1037: (1962) 2 SCR 570.

44. In regard to the submission made on Article 366 (29A) (f), we are of the view that it does not provide to the contrary. It only permits the State to impose a tax on the supply of food and drink by whatever mode it may be made. It does not conceptually or otherwise include the supply of services within the definition of sale and purchase of goods. This is particularly apparent from the following phrase contained in the said subarticle "such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods". In other words, the operative words of the said subarticle are supply of goods and it is only supply of food and drinks and other articles for human consumption that is deemed to be a sale or purchase of goods."

108. In view of legal position enunciated hereinbefore, it is clear that unless the provisions of Act is amended so as to comprehend stock transfer of specific agricultural produce by a person from his one unit to another unit as deemed sale, there can be no deemed sale for such stock transfer of rice by the petitioner from its Ghaziabad rice mill to its Alipur branch. In my opinion, such stock transfer cannot be deemed sale merely by virtue of clause (29A) of Article 366, unless the statute i.e. Act is amended comprehending the situation contemplated under said Article as pointed out earlier that such deemed sale cannot be contemplated by merely by executive order dated 24.10.2000, which has no statutory force at all. I am of the further opinion that even by amending the provisions of Act, the State legislature cannot enlarge the definition of sale by bringing the stock transfer of rice by a person from its rice mill to its depot as deemed sale without any transaction of sale taking place between two persons as distinct and separate legal entities which is most essence of sale and purchase. The aforesaid view also finds support from the decision of Hon"ble Apex Court rendered in T.N. Kalyana Mandapam Association case (supra) wherein the Hon"ble Apex Court has held that the legislature cannot enlarge the definition of sale so as to bring it within the ambit of taxation of a transaction which could not be a sale in law. It was further observed that to impose a tax on Sales of Goods it must amount to a sale according to the established concept of a sale in law of contract or more precisely under the law sale of goods Act. It was further held that Article 366 (29A) (f) does not provide to the contrary. It only permits the State to impose a tax on supply of food and drink by whatever mode it may be made. It does not conceptually or otherwise include the supply of service. Therefore, there can be no doubt to hold that such stock transfer of rice by the petitioner from its one branch to another cannot be treated to be deemed sale

even by taking assistance to the provisions of aforesaid Government order dated 24.10.2000 and no mandi fee and development cess can be charged thereon by market committee Ghaziabad. Therefore, the view taken by Mandi Samiti Ghaziabad in this regard vide order dated 11.7.2007 and Additional Director Mandi Parishad vide order dated 9.10.2007 otherwise contrary to it, is illegal and cannot be sustained and the same are hereby quashed to that extent.

109. Now before parting with the issue, one aspect of the matter still remains to be clarified that in order to determine as to whether any particular transaction is stock transfer by the petitioner from its Ghaziabad unit situated within the market area of Ghaziabad to Alipur branch Delhi or is sale within the market area of Ghaziabad, it is pointed out that the issue has to be examined only on touchstone of the explanation added to Section 17 (iii)(b) of the Act and unless contrary is proved as discussed hereinbefore in the preceding part of the judgment, any specified agricultural produce taken out or proposed to be taken out of a market area by or on behalf of the trader shall be presumed to have been sold in such market area. Therefore, the movement of every individual transaction of goods within the market area of Ghaziabad has to be examined by the market committee from the aforesaid point of view and while deciding the factum of stock transfer, it is needless to say that chalan, Bilty, GR, Mandi Gate Pass can be examined. It should also be seen that dispatch of goods from Ghaziabad unit to Alipur branch Delhi or elsewhere outside the State are not as a result of any transaction of sale or purchase taking place outside the State in pursuance of any contract entered into between the petitioner and Another persons. It is also to be examined that Alipur branch receives rice by way of stock transfer and is not purchasing it from petitioner company.

110. That apart it is also open to the respondents to examine house rent, employees wages, telephone, electric charges, miscellaneous expenses and the manner in which it is paid by various branches of the petitioner and as to whether various branches of petitioner are working as separate unit or as subsidiary company of K.R.B.L. Ltd. company or they are merely sub units or branch offices of the K.R.B.L. Limited Company. In order to ascertain the aforesaid fact it is open to the respondents to examine necessary documents in this regard including their registration, under Company law and in the office of respective sales tax authorities, Regional Provident Fund Commissioner, State Employees Corporation, Electricity Department etc. and satisfy as to whether all the branches are separate legal entity or they are part and parcel of same legal entity. And in the light of aforesaid facts to be ascertained the question of stock transfer has to be examined as to whether the movement of goods are merely transportation and dispatch from one unit to another unit or it is somehow as a result of contract of any sale between the branches of the petitioner's company or as result of contract of sale by any branch with another person. In case various branches are found to be as subsidiary company of K.R.B.L. Ltd. company in that event of the matter, they will be treated as distinct and separate legal entity and transfer from one branch to another cannot be treated as stock

transfer, rather it would be presumed to be sale, unless contrary is proved. If it is found that it is a case of stock transfer from one branch to another branch without any transaction of sale taking place, it is not open to the Mandi Samiti Ghaziabad to charge any mandi fee and development cess on such stock transfer of rice.

111. However, while determining the issue of stock transfer of rice, the Market Committee, Ghaziabad has to ignore the assessment orders made by the Authority under State Sales Tax Act and Central Sales Tax Act for the reasons discussed in quite detail in preceding part of the judgment. It is quite possible that a transaction in particular market area like Ghaziabad may or may not be a sale under State Sales (Trade) Tax Act or may be a sale in the course of interState trades under Central Sales Tax Act or it may be an export sale which is exempted from tax under Central Sales Tax Act, nevertheless such transaction may be sale within the said market area under the provisions of Section 17 (iii) (b) of the Act provided the conditions stipulated under explanation appended to the aforesaid section are satisfied. I have already held while deciding earlier issue that situs of incidence of transaction of sale determined under aforesaid taxing statutes for the purpose of levy of tax on the sale of goods cannot determine the situs of transaction of sale for the purpose of imposition of market fee on such goods under this Act as imposition of tax and fee on sale of goods are conceptually distinct and are altogether different from each other that is why I have held that the export of rice from Ghaziabad to outside the country is sale within market area of Ghaziabad and market fee can be levied thereon by Market Committee, 1 Ghaziabad under the Act, while deciding the second question formulated hereinbefore but the exemption from market fee on rice allowed hereinbefore is not because of the export sale of said rice cannot be subjected to market fee under this Act but because of the Government Order dated 24.10.2000, wherein such exemption has been provided by the Government itself, provided the rice millers by converting the paddy into rice in their mills in State of U.P. exports the rice to the extent of prescribed minimum quantity indicated in the said Government Order otherwise there is no provision under the Act which provides any such exemption from mandi fee and development cess on exported quantity of rice. Therefore, the submission of learned Counsel for the petitioner that in absence of any provision contemplating stock transfer, the assessment made by Authorities under Sales Tax Act should be treated to be conclusive proof of the fact of stock transfer or at least it has persuasive value for such proof, in my opinion, appears to be misplaced and has to be rejected. I am of the view that respondent shall examine every transaction on the touchstone of provision contained under Section 17 (iii)(b) of the Act along with the explanation appended thereto.

112. In this connection, I want to make it further clear that the observation made by Hon''ble Apex Court in para 29 of the decision rendered in Ram Chandra Kailash Kumar Co. ''s case (supra) to the effect that if the bringing of goods in a particular market area and their dispatch therefrom are as a result of

transactions of purchase and sale taking place outside the market area, no fee can be levied, should be understood in context of statutory provisions existing while deciding the aforesaid case. In this connection it is to be pointed out that at that time the explanation appended to Section 17 (iii) (b) of the Act was not in existence and it was first time inserted vide U.P. Act No. 12 of 1987 w.e.f. 31.3.1987, as discussed in earlier part of this judgment, Hon''ble Apex Court had no occasion to consider the impact of aforesaid explanation while deciding the aforesaid case. Besides this, while deciding the second question formulated herein before I have held that imposition of market fee and tax are conceptually distinct and are altogether different from each other and there can be no analogy between the two, therefore, the aforesaid observation of Hon''ble Apex Court should be understood in aforesaid backdrop of the case.

113. In view of foregoing discussion, I must conclude the question formulated hereinbefore holding that the petitioner did not pay market fee and development cess on paddy purchased by it from the various market area of State of U. P. either to the concerned market committee or to the market committee Ghaziabad. So far as paddy purchased by various branches of the petitioner from outside the State is concerned, on account of rival claim of the parties I have left the issue to be decided by the Mandi Samiti, Ghaziabad or Director Mandi Parishad as to whether the various branches of petitioner have paid market fee to their respective area or not? If it is found that the respective branches of petitioner have not paid mandi fee to the respective market area according to law applicable in respective State, it shall be open to the respective committees outside the State to realise from the petitioners'' branches. In this connection, I have further held that since aforesaid paddy has not been sold within the Ghaziabad market area rather it was brought to Ghaziabad only for converting into rice, therefore, Ghaziabad market committee cannot charge market fee and development cess on such paddy either purchased from various other market areas within the State of U.P. or outside it.

114. On the rice procured from the aforesaid paddy purchased by the petitioner from various market areas of State of U.P. and exported by it, the State Government and Mandi Parishad has already granted exemption from levy of market and development cess and trade tax on paddy and rice both, therefore, no mandi fee can be charged thereon in view of Government Order dated 24.10.2000. However, it is made further clear that as I have held earlier while dealing with the second question formulated hereinbefore that Ghaziabad Mandi Samiti was quite competent to charge market fee and development cess on the rice exported by the petitioner which has been obtained from its Delhi branch to Ghaziabad and exported from there without actually milling the paddy in its Ghaziabad unit, which was dealt with by Mandi Samiti as item No. II in the chart prepared at page 247 of the paper book of writ petition. It was further held in earlier part of the judgment that such rice was not covered under Government Order dated 24.10.2000, therefore, I do not disturb the finding of Mandi Samiti Ghaziabad dated 11.7.2007 which was affirmed by Additional Director vide his

order dated 9.10.2007 to that extent.

115. So far as rice procured from the aforesaid paddy sent to Alipur Branch Delhi by way of stock transfer is concerned, it cannot be held as transaction of sale taking place in the market area Ghaziabad for simple reason that one cannot sell the goods to himself. For a transaction of sale, there must be two separate and distinct legal entities as seller and purchaser, in absence thereof there can be no sale. The quantity of such rice which remains with Ghaziabad unit of the petitioner after export and rice sent by Ghaziabad unit by way of stock transfer to Alipur Branch, can also not be treated as sale within market area of Ghaziabad without its actual or presumed sale under Section 17 (iii) (b) of the Act. I have also held that there can be no deemed sale of rice in the market area of Ghaziabad either under the aforesaid provision of the Act or under Government order dated 24.10.2000 because of the reason that provision of aforesaid Government order creating legal fiction for deemed sale has been held contrary to the aforesaid provisions of Act and held to be nullity being *ultravires* to the said provision of the Act.

116. At this juncture it is to be noted that in case the petitioner would be able to prove stock transfer of rice from its Ghaziabad unit to Alipur Branch Delhi, in that event of the matter the petitioner would neither be liable to pay mandi fee to Mandi Samiti, Ghaziabad on exported rice procured from said paddy nor would be liable to pay mandi fee to Ghaziabad Mandi Samiti on the rice sent to its Alipur branch Delhi by way of stock transfer and other rice which still remains with the petitioner at Ghaziabad but in such situation the petitioner would be still liable to pay market fee on such quantity of paddy to the concerned market committee which was left with the petitioner after deduction of only exported quantity of rice procured from said paddy for the simple reason that the petitioner has been granted exemption from mandi fee, development cess and trade tax on paddy and rice both vide Government order dated 24.10.2000 only for exporting the rice procured from the paddy after milling in its rice mill situated in State of U.P. Under the said policy the petitioner was liable to export prescribed minimum quantity of rice procured from said paddy and exemption from mandi fee, trade tax and development cess was granted only to the extent of exported rice and the rice which was left with the petitioner after export of minimum prescribed quantity was treated to be sale in the hands of petitioner and he was liable to pay market fee thereon under the aforesaid Government order but since I have held earlier that in case if it is found that rice is either sent to Alipur branch by way of stock transfer or still lying with the petitioner at Ghaziabad, Mandi fee cannot be charged on such rice, but there can be no legal embargo or no hurdle in charging market fee by concerned Market Committee on such paddy which was converted into rice and sent to Alipur branch Delhi without selling it at Ghaziabad or into such rice which is still lying with the petitioner at Ghaziabad unit without any export. In my opinion, such paddy utilised by the petitioner for sending the rice from Ghaziabad to Alipur branch Delhi and/or still lying with the Ghaziabad unit or disposed otherwise, cannot be exempted from

fee under Government order dated 24.10.2000, as such no exemption from Mandi fee and development cess can be claimed thereon by the petitioner. The petitioner shall be liable to pay market fee and development cess to the concerned Market Committee.

117. The reason for aforesaid approach is simple that in given facts and circumstances of the case, it shall not be open for the petitioner to obtain paddy for export of rice by seeking exemption from market fee thereon and deceive the Government and Market Committee without actually exporting total rice procured from such paddy. It is no doubt true that in order to seek exemption from market fee, development cess and trade tax the petitioner was liable to export only prescribed minimum quantity of rice but on the rice which was not exported by the petitioner, it is very difficult to conceive how the petitioner can claim exemption from market fee etc. on paddy and rice both, which was not exported rather utilised for other purposes. If the rice left with the petitioner after export is not sold, the petitioner can still be liable to pay market fee on such paddy from which such rice was procured for simple reason that on such paddy and rice no exemption can be granted under GO. dated 24.10.2000. In case the petitioner would be permitted to escape from such liability, that would be tantamounted to defeating the policy of Government, contained under Government order dated 24.10.2000 and evasion of market fee, development cess to which the petitioner is liable to pay to the concerned market committee under law. It would also be unjust enrichment of the petitioner, therefore, in my opinion the petitioner cannot be permitted to evade the market fee, development cess and trade tax on remaining quantity of paddy, which was left with the petitioner after export of rice in view of the said Government order. Thus the petitioner would be liable to pay market fee and development cess on such paddy to the concerned market committee from where the petitioner has purchased aforesaid paddy but instead of remitting the matter to individual market committee I would remit the matter to the Director Mandi Parishad for taking decision thereon.

118. In view of foregoing discussions and observations, instead of directing the Mandi Samiti Ghaziabad, in order to shorten further litigation, it would be appropriate to direct the Director, Mandi Parishad to undertake and complete the necessary exercise within a period of three months from the date of production of certified copy of this order before him and pass a fresh order. Such order shall be passed after affording opportunity of hearing to the petitioner and its Counsel by considering the various aspect of the matter as observed in this order. While passing fresh order, it is needless to say that Director shall also decide as to whether in given facts and circumstances of the case, the amount paid by the petitioner while issuing gate pass shall be refunded or adjusted against the amount found due against the petitioner but unless the aforesaid exercise is completed, no recovery shall be made against the petitioner.

119. Lastly, it is also necessary to point out that although in the pleadings of writ petition there is assertion that there is no reasonable nexus between the services

rendered by respondents and market fee and development cess charged by them from the petitioner, as there is no element of quid pro quo which is necessary element for imposition of market fee. But in the wake of reply submitted by learned Counsel for the respondents in the counteraffidavit and settled legal position thereon learned Counsel for the petitioner did not press the aforesaid submission into service, therefore, I need not to go into detail and I am satisfied that in the wake of settled legal position and assertions made in the counteraffidavit filed on behalf of respondents, the petitioner is liable to pay market fee and development cess to be charged on specified agricultural produce in the market area of Ghaziabad and other concerned market areas from where petitioner has purchased paddy.

120. In view of the aforesaid observations and directions, writ petition stands disposed of finally.

121. There shall be no order as to costs and parties shall bear their own costs.