
(2009) 03 GAU CK 0048
In the Gauhati High Court

Patel Engineering Ltd.

APPELLANT

Vs

State of Arunachal Pradesh and Others

RESPONDENT

Date of Decision : 05-03-2009

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15, 3, 4, 5
Constitution of India, 1950 — Article 226, 246, 265, 269, 286

Citation : (2010) 2 GLR 23 : (2009) 2 GLT 622 : (2009) 24 VST 481

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

Bench : Division Bench

Final Decision : Allowed

Judgement

I.A. Ansari, J.—The petitioner herein, which is a company, incorporated under the Companies Act, 1956, has been executing various works at Kameng Hydro Electric Project, in the district of West Kameng, Arunachal Pradesh. The petitioner is also involved in the business of construction of infrastructure facilities like dams, tunnels, powerhouse, etc., all over the country. Pursuant to the work orders, issued by North East Electric Power Corporation Ltd. (NEEPCO), in favour of the petitioner, the petitioner has been executing various civil works. The petitioner is a "registered dealer" under the Arunachal Pradesh Goods Tax Act, 2005, and possesses a certificate of registration issued, in this regard, by the appropriate authority.

2. The Arunachal Pradesh Goods Tax Act, 2005 (in short, "the Act of 2005") has been enacted with the object of levying consumption tax, on goods consumed in the State of Arunachal Pradesh, through a combination of tax on entry of goods into the local area as defined in the Act of 2005 and value added sales tax on the business carried out in the said State.

3. In the year 2007, the State of Arunachal Pradesh enacted Arunachal Pradesh Goods Tax (Amendment) Act, 2007, whereby the Act of 2005 has been amended. By this amendment, Section 47A has been inserted providing for deduction of tax at source.

4. After the insertion of Section 47A, the Superintendent of Tax and Excise, West Kameng, District Bomdila, issued a notice, dated February 15, 2008, to respondent No. 4 informing the latter that the Government has, vide its Notification No. 158 Vol. XIV, dated April 11, 2007, directed all the Government Departments to deduct tax, at source, at the time of payment to the "dealer", by adjustment or any other manner, an amount calculated at 12.5 per cent on the total value of the works contract. Respondent No. 4 has been accordingly directed to deduct tax at 12.5 per cent on the payments to be made to the works contractors. On the basis of such notice, respondent No. 4, namely, North Eastern Electric Power Corporation Ltd. has, according to the petitioner, verbally informed the petitioner that in view of the directions issued by the Superintendent of Tax and Excise, West Kameng, District, Bomdila, tax would be deducted at 12.5 paise in a rupee from the gross value of the bills of the petitioner.

5. Since Section 47A provides for deduction of tax, at a flat rate of 12.5 per cent, on the total amount payable to a dealer in respect of the works contract and does not provide for exclusion, at the time of making the said deduction, of the amount on which no tax is, otherwise, payable under the Act of 2005, the petitioner, with the help of this writ petition, made under Article 226 of the Constitution of India, has challenged the legality and validity of Section 47A as well as the notice, dated February 15, 2008, aforementioned, issued by the Superintendent of Tax and Excise, West Kameng, District Bomdila, the challenge being on the ground that the said provisions of Section 47A are beyond the legislative competence of the State and, hence, the same may be held as ultra vires and illegal.

6. I have heard Dr. A. K. Saraf, learned Senior Counsel, for the petitioner and Mr. R. H. Nabam, learned Senior Government Advocate, Arunachal Pradesh.

7. While considering the present writ petition, it needs to be noted that appearing on behalf of the petitioner, Dr. Saraf submits that Section 47A warrants the authority, who makes payments of bills to the works contractors, such as, the petitioner, to deduct, at source, tax, at a flat rate of 12.5 per cent of the total turnover, as payable under the Act of 2005, though, while executing a works contract, the petitioner's total turnover is not exigible to sales tax or value added tax, as the case may be, inasmuch as the petitioner, in the process of execution of works contract, uses, at times, "declared goods" (i.e.), goods, which are declared as goods of special importance u/s 14 of the Central Sales Tax Act, 1956, and also utilises labour and services and, hence, the expenses, which are so incurred by the petitioner, towards payment of declared goods or towards payment of the labour force and other services are not liable to be subjected to sales tax, yet the impugned provisions, contained in Section 47A, not only permit, but oblige the authority concerned to realise tax at a flat rate of 12.5 per cent on the total turnover, meaning thereby that by making deduction, at source, the petitioner is being forced to pay, with the help of the impugned statutory

provisions, much more than what the petitioner's legal liability would be. In the process, the State, according to Dr. Saraf, is seeking to realize tax from the petitioner without the petitioner being liable to pay such taxes. Such realization of tax, submits Dr. Saraf, is wholly against the Constitutional Scheme, particularly, Article 265, which makes it clear that no person shall be liable to pay tax except what the law provides.

8. As far as learned Government Advocate is concerned, he has merely submitted that Clause (3) of Article 246 of the Constitution has conferred powers upon the State Legislature to make laws, for the State or any part thereof, with respect to any of the matters enumerated in List II of the Seventh Schedule to the Constitution of India. In the present case, according to the learned Government Advocate, the power of the State Legislature to enact the Act of 2005 can be traced to entries 52 and 54 enumerated in List II of the Seventh Schedule to the Constitution of India. Mr. Nabam further submits that Section 47A, as enacted by the State Legislature, is valid and the provisions of Section 47A as well as the impugned notice may not be interfered with.

History of the development of the concept of "sale" in the realm of execution of works contract.

9. While dealing with the question of validity of Section 47A of the Act of 2005, it is necessary to recall that before the 46th Amendment, there was conflict of judicial opinion as regards the question as to whether the State has legislative power to impose sales tax on goods involved in the execution of works contract, where the contract was single and indivisible. The question, therefore, raised was whether there is at all a sale of those materials, which are used in the execution of a works contract. The Madras High Court, in *Gannon Dunkerley & Co. (Madras) Ltd. v. State of Madras* [1954] 5 STC 216 : AIR 1954 Mad 1130, took the view that works contract was not a contract for sale of materials used in the execution of the works contract, for, the contract, being entire and indivisible, cannot be broken into two separate segments, one being the contract for sale of materials and the other being the contract for payment of the works done. The court, therefore, concluded that the definition of "sale", as contained in the Madras General Sales Tax Act, 1939, which included, within the definition of the term "sale", a transfer of property in goods involved in the execution of a works contract, was beyond the legislative competence of the Provincial Legislature. This view was followed in judicial pronouncements of some of the High Courts. To the contrary was the view taken by the Mysore High Court, in *Mohamed Kashim v. State of Mysore* reported in [1955] 6 STC 211, for, this decision upheld the power of the State to impose sales tax on the entire turnover relating to construction work by treating the goods, used in execution of the works contract, as transfer of property in goods involved in the execution of the works contract.

10. The above conflict of judicial opinion was resolved by the apex court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, wherein the decision of the Madras High Court was affirmed holding to the effect, inter alia,

that in a building contract, which is entire and indivisible, there is no sale of goods, because, in such a contract, the agreement between the parties is that the contractor should construct the building according to the specifications contained in the agreement and, in consideration therefor, receive payment as provided by the contract agreement and that in such an agreement, there is neither contract to sell the materials used in the construction nor does the property, in the goods, used in the construction work, pass, as movables to the person, who allots the works contract. The apex court, therefore, took the view that it was not within the legislative competence of the Provincial Legislature, under entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935, to impose tax on the supply of materials used in a works contract by treating the supply of such materials as a "sale". In *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, the apex court also clarified that while the Legislature is incompetent to impose sales tax on the goods used in execution of those works contracts, wherein the contracts are entire and indivisible, there may be a case, wherein the parties have entered into a distinct and separate contract, one for transfer of the materials for money consideration and the other for payment of remuneration for the service rendered and the works done. In the latter case, pointed out the Supreme Court, there are really two agreements, though there may be a single instrument embodying both the agreements ; hence, the power of the State to separate the agreement to sell from the agreement to do the work and render service is possible and, consequently, the State may, in the latter case, impose tax so far as the agreement relating to transfer of materials for money consideration is concerned.

11. In short, in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, what was held was that if, in the case of building construction, the works contract is entire and indivisible, the property in goods does not pass to the other party to the contract, but if a contract consists of two separate parts, one relating to the supply of materials for money consideration and the other for payment of remuneration for services rendered and for the works done, the Legislature is competent to impose tax so far as the supply of materials is concerned and, hence, the State cannot, if the contract is one, which is indivisible, impose sales tax on the goods, used in the execution of the works contract, by treating the use of such goods as transfer of property in the goods used in the execution of the works contract.

12. Following the decision in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, the apex court, in *Pandit Banarsi Das Bhanot Vs. The State of Madhya Pradesh and Others*, held that in a building construction, which is one, entire and indivisible, there is no sale of materials used and, hence, it is beyond the powers of the State Legislature to impose tax on supply of those materials, which are used in such works contract.

13. Consequent upon the decisions in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, and *Pandit Banarsi Das Bhanot Vs. The State of Madhya*

Pradesh and Others, it became impossible for the States to bring works contracts, involving supply of materials, within the State's sales tax enactments. Hence, by the 46th Amendment of the Constitution, powers were given to the State Legislature to impose, inter alia, sales tax on the transfer of property in goods-whether as goods or in some other form- involved in the execution of works contract. Article 366 of the Constitution, which is the definition clause, stood accordingly amended by insertion of Clause (29A). This clause of Article 366 reads as under:

(29A) "tax on the sale or purchase of goods" includes:

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

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

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments ;

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

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

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

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

14. What, now, needs to be noted is that with the 46th Amendment of the Constitution of India, the definition of "sale", as given in Article 366, stands widened by inserting Clause (29A) so as to include, within the meaning of the term "sale", transfer of property in goods involved in the execution of works contract.

15. In view of Article 366(29A)(b), a State Legislature is, now, competent to impose tax on transfer of property in goods involved in the execution of works contract. The effect of the 46th Amendment is that before the 46th Amendment, the materials, which were used in the execution of a works contract, were not exigible to State sales tax if the works contract was one and indivisible. However, after the 46th Amendment, it has become possible for the State to impose sales

tax on the materials, used in a works contract even if such contract is one and indivisible, by treating, with the help of a legal fiction, the use of such materials as a "sale", though such use may not be, in the traditional concept, a "sale". No distinction has, therefore, remained between a works contract, which is one and indivisible, and a works contract, which consists of two parts, one relating to supply of materials and the other relating to construction. In short, thus, the materials used, in execution of a works contract, is, now, deemed to be a sale of the property in the goods, which passes from the end of the builder to the end of other person to the contract. To put it a little differently, when the provisions of Clause (29A) are read, in the light of subclause (b) thereof, it becomes clear that tax on sale or purchase of goods includes, amongst others, a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract and that such transfer of property in goods shall be deemed to be a sale of the goods by the person, who makes transfer, delivery or supply, and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

16. The Constitutional validity of the 46th Amendment as well as the amendments made in the State legislations came to be considered by a Constitution Bench, in Builders Association of India and Others Vs. Union of India (UOI) and Others, wherein the apex court pointed out that what the 46th Amendment has done is that it has clarified that a transfer of property in goods (whether as goods or in some other form), involved in the execution of a works contract, would be deemed to be a sale of goods involved in the execution of the works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. Thus, what was, before the 46th Amendment, not regarded as a sale, because it was, initially, not a sale, became, with the help of the deeming provisions introduced by Sub-clause (b) of Clause (29A), a sale of goods. The object of the new definition of "sale", introduced by Clause (29A), was, thus, as observed by the Constitution Bench, in Builders Association of India and Others Vs. Union of India (UOI) and Others, to enlarge the scope of taxation on sale or purchase of goods so that it may include, within its sweep, transfer, delivery or supply of goods even in execution of a works contract. So construed, points out the Supreme Court, in Builders Association of India and Others Vs. Union of India (UOI) and Others, the expression "tax on the sale or purchase of goods", in entry 54 of the State List, includes a tax on the transfer of property in goods involved in the execution of the works contract. In short, thus, the object of the amendment was to bring into the tax net of the State Legislature those transactions, which would not have, otherwise, been brought to, or fallen under, the State's sales tax enactment.

Limitations on the power of the State Legislature to impose sales tax

17. Before dealing with the validity of Section 47A of the Act of 2005, it is also pertinent to point out the ambit of Article 286 of the Constitution of India. This article puts, in certain cases, restrictions on the State Legislature's power to

impose sales tax on sale and purchase of goods. Following insertion of Clause (29A) of Article 366, Article 286 was also amended and Clause (3) was substituted therein. With insertion of Clause (3), Article 286 runs as under:

Article 286. Restrictions as to imposition of tax on the sale or purchase of goods.-

(1) No law of a State shall impose, or authorize 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 inter-State trade or commerce ; or

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in Sub-clause (b), Sub-clause (c) or Sub-clause (d) of Clause (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.

18. Article 286 of the Constitution imposes fetters on the powers of the State to impose tax on the sale and purchase of goods, where (a) such sale or purchase of goods takes place outside the State or (b) in course of import of the goods into, or export of the goods out of, the territory of India. By Clause (2) of Article 286, Parliament is authorized to formulate principles for determining as to when a sale or purchase of goods takes place in any of the ways mentioned in Clause (1), namely, outside the State or in the course of import into, or export out of, the territory of India. Clause (3) of the Article 286 provides that any law of the State, in so far as it imposes or authorizes imposition of tax on the sale or purchase of goods declared by Parliament by law to be of special importance in the inter-State trade or commerce or a tax on the sale or purchase of goods, being a tax of the nature referred to in Sub-clause (b), Sub-clause (c) and Sub-clause (d) of Clause (29A) of the Article 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of tax as the Parliament may by law specify. The object of Article 286 of the Constitution is to invest the Parliament with exclusive authority to enact laws imposing tax on sale or purchase of goods, where such sale or purchase takes place in the course of inter-State trade or commerce or in the course of import into, and export out of, the territory of India.

19. As the Central Sales Tax Act, 1956, has been enacted by the Parliament in exercise of its powers under Article 286, it logically follows that any State

enactment, relating to imposition of sales tax on sale or purchase, which takes place in the course of inter-State trade or commerce, shall be subject to the restrictions and conditions imposed by the Central Sales Tax Act, 1956. It further follows from the conclusion, so reached, that when the Parliament declares goods as goods of special importance u/s 14 of the Central Sales Tax Act, 1956, the legislative power of the State to impose tax on such goods shall be subject to the restrictions and limitations, which Section 15 of the said Act imposes. Situated thus, it is clear that even the declared goods, when used in the execution of works contract, would be subject to the limitations imposed by Section 14 and the State Legislature cannot impose State sales tax on such "declared goods" with the same sense of freedom as it may do, while imposing sales tax on those goods, which are not declared as goods of special importance u/s 14 of the Central Sales Tax Act, 1956.

20. In view of the above, it is also plain that the principles for determining as to when a "sale" takes place in the course of inter-State trade and commerce, embodied in Section 3 of the Central Sales Tax Act, 1956, would apply, with equal force, to transfer of property in goods involved in the execution of works contract. It is imperative to note that Section 3 of the Central Sales Tax Act explains as to when a sale or purchase of goods takes place in the course of inter-State trade or commerce. Section 4 of the Central Sales Tax Act explains as to when a sale or purchase of goods takes place outside a State and Section 5 explains as to when a sale or purchase of goods takes place in course of import or export. Section 14 of the Central Sales Tax Act, as already pointed out above, enumerates the goods, which are considered by the Parliament to be of special importance in inter-State trade or commerce and Section 15 thereof sets out restrictions and conditions subject to which tax, on sale and purchase of "declared goods", within a State, may be imposed.

21. From what has been pointed out above, it is clear that the legislative power of the State, under entry 54 of State List, to impose tax on sale or purchase of goods is subject to two limitations. One limitation, which flows from the entry itself, is that the State's legislative power "is subject to the provisions of entry 92A of List I" and the other one flows from the restrictions contained in Article 286. Under entry 92A of List I, Parliament has the power to make laws in respect of taxes on sales and purchases, which take place in the course of inter-State trade and commerce. The levy and collection of such tax is governed by Article 269. This shows that the State's legislative power, under entry 54, does not extend to imposing of tax on sale or purchase of goods, which takes place outside the State or in the course of import or export of goods. Naturally, therefore, the State's legislative power to impose sales tax on sale or purchase of declared goods too shall be, if I may reiterate, subject to the restrictions imposed by law, which may be made by the Parliament.

22. In view of these limitations imposed by the Constitution on the legislative powers of the State under entry 54 of the State List, it is clear that it is beyond

the competence of the State Legislature to make a law imposing tax, with the aid of Sub-clause (b) of Clause (29A) of Article 366, on those transactions, which take place in course of inter-State trade and commerce, or transactions, which constitute sales outside the State or in course of import or export. Consequently, it is not permissible for State Legislature to make legislative enactments in exercise of its legislative powers conferred by entry 54, in the State List, in such a manner as to assume power to impose tax on the kinds of transactions as mentioned hereinbefore and thereby transgress the Constitutional limitations.

23. Referring to Clause (3) of Article 286, the Supreme Court, in Builders Association of India and Others Vs. Union of India (UOI) and Others, observes that Clause (3) of Article 286 deals with a tax on sale or purchase of goods declared by the Parliament by law to be of special importance in inter-State trade or commerce and the restriction, so envisaged, by Clause (3) of Article 286, being general in nature, applies with equal vigour to transfer, delivery or supply of goods, which are deemed to be sales by virtue of Clause (29A) of Article 366.

24. Leaving no room for doubt, the Constitution Bench, in Builders Association of India and Others Vs. Union of India (UOI) and Others, : Builders Association of India and Others Vs. Union of India (UOI) and Others, holds (page 397 of STC), "... If any declared goods, which are referred to in Section 14 of the Central Sales Tax Act, 1956 are involved in such transfer, supply or delivery, which is referred to in Clause (29A) of Article 366, the sales tax law of a State, which provides for levy of sales tax thereon will have to comply with the restrictions mentioned in Section 15 of the Central Sales Tax Act, 1956. . ." (emphasis1 is added).

25. From the observations noted above, it becomes clear that even when declared goods are used in execution of a works contract and though use of such declared goods would amount to sale for the purpose of taxation, yet the tax on sale or purchase of such goods would be subject to the restrictions, which Section 15 of the Central Sales Tax Act, 1956, imposes on the sale or purchase of goods in such cases.

26. What surfaces from the above discussion is this : Notwithstanding the fact that by taking recourse to entry 54 of List II a State Legislature has the power to enact law imposing sales tax on the materials used in the execution of works contract, such imposition of sales tax by the State will not authorize the State to impose tax on those sales, which take place outside the State or in the course of import of the goods into, or export of the goods out of, the territory of India nor will such power of legislation entitles the State to make law on sale or purchase of goods, which are of special importance in inter-State trade or commerce, including transfer, supply or delivery of declared goods, which are deemed to be sales under Clause (29A) of Article 366. If any declared goods, which are referred to in Section 14 of the Central Sales Tax Act, 1956, are involved in such transfer, supply or delivery of goods in execution of the works contract, State cannot impose sales tax on those goods.

27. Bearing in mind the Constitutional limitations on the power of the State to impose tax even on deemed sale, which take place in the case of execution of "works contract", let me, now, turn to, and look into, the various provisions of the Act of 2005, which have some bearing in the present writ petition.

28. Let me, first, turn to Section 2(zf), which defines "sale". A careful reading of Section 2(zf) shows that the definition of "sale" is inclusive in nature. No wonder, therefore, that, as defined in Section 2(zf)(v), "sale" includes a transfer of property in goods (whether as goods or in some other form) involved in the execution of a "works contract". What can, now, be noted is that "sale price" has been defined by Section 2(z)(g) of the Act of 2005 to mean the amount paid or payable as valuable consideration for every "sale". Thus, when the definition of "sale", as given in Section 2(zf)(v), is considered in the light of the definition of "sale price", as given in Section 2(z)(g), it becomes transparent that the materials, which a "works contractor" uses in the execution of "works contract", will be deemed to be a "sale", if the "works contractor" pays for the materials so used by him and if the cost of the materials is included within the valuable consideration receivable by the "works contractor" from the other party to the contract.

29. Let me, now, come to the definition of "dealer". Section 2(1), I find, defines "dealer" to mean, inter alia, (i) any person, who, for the purposes of or in connection with or incidental to or in the course of his business buys, sells, supplies or distributes goods directly or otherwise, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration. If this definition of "dealer", as given in Section 2(1)(i), is considered, in the light of the change in the definition of the term "sale", as given in Article 366(29A), and the term "sale", as defined in Section 2(zf)(i), it becomes transparent that when a person executes a "work contract" and, in the process of such execution, uses materials, which are not supplied by the person, who gets the "works contract" executed, then, the materials used by the "works contractor" shall be deemed to be a "sale" of those materials from the end of the "works contractor" towards the other person to the contract and the builder would be treated as a "dealer" in respect of the materials, which he has used in the execution of the "works contract", for, his "sale price" would include the value payable in respect of the materials used in the execution of the "works contract" provided that the materials are taxable under the Act of 2005.

30. Bearing in mind the definition of "dealer", when one turns to Section 3(1), which is the charging section and which imposes, on persons, who are "dealers", the liability to pay tax, it transpires that every "dealer", who is registered under the Act of 2005, or a person, who may not have been registered, but is required to be registered, under the Act of 2005, as a "dealer", shall be liable to pay tax as calculated under the Act. Section 3(2) provides that a "dealer" shall be liable to pay tax on every sale of goods effected by him. From the provisions contained in Section 3, it becomes clear that every person, who is a "works contractor" and

who uses materials in execution of "works contract", the materials having not been supplied to him, in the execution of the "works contract", by the other person to the contract, such a "works contractor" shall be liable, as a "dealer" to pay sales tax on the materials used by him in the execution of the "works contract" provided, however, that the value of the materials, so used, is included within the valuable consideration receivable by the "works contractor" from the other party to the contract.

31. When the provisions contained in Section 3(2) are read in the light of the provisions of Section 2(zf), it becomes clear that a person, who uses goods, in execution of a "works contract", is liable to pay sales tax on the goods used by him in the execution of "works contract" provided that the goods have not been supplied to the "works contractor" by the other person to the contract and the value of the materials, so used, is included within the valuable consideration receivable by the "works contractor" from the other party to the contract.

32. Let me, now, come to the question as to what "taxable turnover", under the Act of 2005, is. It may be noted, in this regard, that "taxable turnover" has been defined by Section 5 of the Act of 2005 as under:

Section 5. "Taxable turnover".-(1) For the purposes of this Act, "taxable turnover" means that part of dealer's turnover arising during the tax period which remains after deducting therefrom:

(a) the turnover of sales not subject to tax u/s 7 of this Act; and

(b) the turnover of sales of goods declared exempt u/s 6 of this Act.

(2) In the case of turnover arising from the execution of a works contract, the amount included in "taxable turnover" is so much of the dealer's turnover from the works contract as represents the charges towards goods, subject to such conditions as may be prescribed:

Provided that in the cases where the amount of charges towards goods in such contract is not ascertainable from the terms and conditions of the contract, the amount of such charges shall be calculated as the sale price stipulated in the contract reduced by the prescribed percentage.

33. From the definition of "taxable turnover", as contained in Section 5, what becomes clear is that "taxable turnover" means that part of a dealer's turnover, arising during a given tax period, which remains, after making various permissible deductions, under the Act of 2005, as the amount on which tax is payable. This, in turn, clearly shows that "taxable turnover" does not mean the entire turnover of the business of a "works contractor" in a given tax period ; rather, what "taxable turnover" means is only that amount on which tax has to be calculated during a given tax period and while making calculation as to what shall be the amount on which tax shall be payable, all deductions, which are constitutionally or statutorily liable for deductions, must be made and kept excluded, while calculating the "taxable turnover".

34. Let me, now, come to Section 6 of the Act of 2005, which exempts certain sales from tax. This section reads:

Section 6. Sales exempt from tax.-(1) The sale or import of goods listed in the First Schedule shall be exempted from tax subject to the conditions and exceptions set out therein.

(2) The dealers or class of dealers as may be notified and specified from time to time in the Fifth Schedule shall be exempted from payment of tax on all sales of goods effected by them subject to such condition as may be prescribed.

Explanation.-This exemption does not extend to the import of any goods made by the dealer.

(3) Exemption for goods used exclusively in making non-taxed sales. Where a dealer sells goods that it has used since the time of purchase exclusively for purposes other than making sales of goods, and has not claimed a tax credit in respect of those goods u/s 9, the sale of those goods shall be exempted from tax.

35. Close on the heels of Section 6, Section 7 of the Act provides that certain "sales" shall not be liable to be taxed under the Act. This section, (i.e., Section 7) is reproduced hereinbelow:

Section 7. Certain sales not liable to tax.-(1) Nothing contained in this Act or the Rules made thereunder shall be deemed to impose, or authorise, the imposition of tax on any sale of goods when such sale takes place:

(a) in the course of inter-State trade or commerce ; or

(b) outside Arunachal Pradesh ; or

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

Explanation 1.-Sections 3, 4 and 5 of the Central Sales Tax Act, 1956 (74 of 1956) shall apply for determining whether or not a particular sale takes place in the manner indicated in Clause (a), Clause (b) and Clause (c) of this section.

Explanation 2.-This section does not prohibit the levy of tax on the import of these goods.

(2) For the purposes of Sub-section (1), a sale of goods made for foreign currency by a duty-free store in the arrival or departure hall of the International airport terminal, shall be treated as a sale made in the course of the export of goods out of the territory of India.

36. A combined reading of the provisions contained in Sections 6 and 7 shows that Section 6 exempts completely the "sale" of the goods, which are listed in the First Schedule to the Act of 2005, and it also exempts, from taxation, those "dealers" or class of "dealers", who may be notified in the Fifth Schedule to the Act, as persons, whose transactions of "sale" shall not be subjected to taxation at

all under the Act. When Section 6 states that "sale" of certain of goods, which are listed in the First Schedule, shall be completely exempted from taxation, under the Act of 2005, what it really means is that if, in the execution of a "works contract", the "works contractor" uses any material, which is listed in the First Schedule, then, the "works contractor", as a "dealer", shall not be liable to pay tax thereon. This apart, even those "works contractors", who stand notified, in the Fifth Schedule to the Act of 2005 as "dealers" or class of "dealers", who would not be liable to pay tax at all for "sales" of goods effected to by them subject to such conditions as may be prescribed, then, such "works contractors" will remain exempted from payment of tax under the Act. Apart from these exemptions, Section 7 exempts from taxation all those sales, which take place (a) in the course of inter-State trade or commerce, (b) outside Arunachal Pradesh and (c) in the course of import of the goods into, or the export of the goods out of the territory of India.

37. Thus, the scheme of the Act of 2005 shows, broadly speaking, that this Act exempts from sales tax not only certain goods, which are listed in the First Schedule to the Act of 2005, but also exempts, from payment of tax, certain transactions, indicated hereinbefore, which are constitutionally and statutorily not permissible to be taxed.

38. Hence, while calculating the taxable "turnover" of a dealer, who may be a "works contractor", apart from those transactions of sale, which take place (i) in the course of inter-State trade or commerce, (ii) outside Arunachal Pradesh and (iii) in the course of import of the goods into, or the export of the goods out of, the territory of India, the sale prices of those goods, which are listed in the First Schedule, have to be deducted and/or kept excluded.

39. Coupled with the above, Rule 5(2) of the Arunachal Pradesh Goods Tax Rules, 2005 (in short, "the Rules of 2005"), provides that in the case of "turnover" arising from execution of "works contract", the amount, representing the charges towards labour, services and like charges, shall be excluded from the "taxable turnover" of the "dealer". Rule 5(2) of the Rules of 2005 reads:

Rule 5. Works contract.-(1) in case of turnover arising from the execution of the works contract, the amount representing the charges towards labour, services and like charges shall be excluded from the "taxable turnover" of the dealer subject to the dealer's producing invoice, voucher, challan or any other document evidencing payment of charges towards labour and services to the satisfaction of the Commissioner.

(2) The charges towards labour and services and other like charges shall include:

(a) Labour charges for execution of works ;

(b) Charges for planning and architects fees ;

(c) Charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;

(d) Cost of consumables such as water, electricity, fuel, etc., used in the execution of the works contract the property in which is not transferred in the course of execution of a works contracts ;

(e) Cost of establishment of the contractor to the extent it is relatable to supply of labour and services ;

(f) Other similar expenses relatable to supply of labour and services ;

(g) Profits earned by the contractor to the extent it is relatable to supply of labour and services subject to furnishing of a profit and loss account of the works sites:

Provided where amount of charges towards labour and service are not ascertainable from the accounts of the dealer, the amount of such charges shall be calculated at the percentages specified in the annexure 8.

40. Thus, when Rule 5(2) is read along with the provisions contained in Sections 6 and 7, what emerges is that in the case of a "dealer", apart from the sale prices of the goods, which are listed in the First Schedule, the transactions, which are mentioned in Section 7, shall remain excluded from the "taxable turnover". No wonder, therefore, that "taxable turnover", according to Section 5, means only that part of a dealer's "turnover", arising during a tax period, which remains taxable after allowing such deductions as are permitted by Sections 6 and 7. In the case of a "works contract", while calculating the "taxable turnover", the amounts, which represent the charges towards payment of labour and services and like charges, shall also have to be excluded from the total "turnover" of the "dealer".

41. Let me, now, turn to Section 47A, which stands impugned in this writ petition. This section reads as under:

Section 47A.-(1) (a) Every person other than an individual, a Hindu Undivided Family, a firm or a company not under the control of the Government, responsible for making any payment of discharging any liability on account of any amount purporting to be full or part payment of "sales price" or consideration for the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall, deduct at the time of credit to the account of or payment to the dealer (hereinafter referred to as, "the contractor") of such amount in cash, by cheque, by adjustment or in any other manner, an amount calculated at the rate of twelve-and-half paise in the rupee, from such sum towards part or, as the case may be, full satisfaction of the tax payable under this Act on account of total value of such works contract.

(b) Where, on an application being made by any contractor in this behalf, the prescribed authority is satisfied that any works contract under reference is separable and involves only labour and services and accordingly, justifies deduction of tax on a part of the sum payable in respect of any works contractor, as the case may be, justifies no deduction of tax at all, he shall, after giving the

contractor a reasonable opportunity of being heard, grant him such certificate as may be appropriate.

(c) Any person entering into any contract with any contractor for transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract shall furnish within fifteen days from the date of signing of the contract, such information as may be prescribed to the prescribed authority under whose jurisdiction the contractor's place of business is situated. Failure to do so shall entail a penalty not exceeding five hundred rupees per day of default after affording such person a reasonable opportunity of being heard.

(2) Every person, responsible for paying sale price or consideration or any amount purporting to be the full or part payment of sale price or consideration in respect of any sale or supply of goods liable to tax under this Act to the Government or Corporation, Board, Authority undertaking or any other body by whatever name called, owned, financed or controlled wholly or substantially by the Government, at the time of credit to the account of or payment to the payee of such amount in cash, by cheque, by adjustment or in any other manner, whatsoever, shall deduct an amount calculated at the rate as may be specified in the Schedule from such sum towards full satisfaction of the tax payable under this Act on account of total sale price of such sale or supply.

(3) Notwithstanding anything contained in any other law for the time being in force, every person mentioned in Sub-section (1) and Sub-section (2) responsible for paying sale price in respect of any works contract or sale or supply of goods shall not enter into such transaction unless the contractor, or seller or supplier, as the case may be, produces an authenticated copy of the certificate of registration under this Act or furnishes an undertaking for getting himself registered and any such contractor, or seller or supplier who is not so registered under this Act shall not be paid by the said responsible person any amount in respect of the sale or supply, before he gets himself registered under this Act and submits an authenticated copy of certificate of registration.

(4) Any tax deducted under this section shall be paid into the Government account within such time and in such manner accompanied with such documents and statements of accounts as may be prescribed.

(5) The person making any deduction of tax under this section and paying it into the Government account shall issue to the payee a certificate of tax deduction and payment in such form and manner and within such time as may be prescribed.

(6) Any deduction made in accordance with the provisions of this section and credited into the Government account, shall be treated as payment of tax on behalf of the person from whose bills and invoices, the deduction has been made and credit shall be given to him for the amount of tax finally assessed or determined as being payable by the concerned person in the assessment for the relevant assessment year and any amount deducted in excess of the tax so

assessed or determined shall be refundable in accordance with the provisions of this Act.

(7) The person responsible for deduction of tax shall within the prescribed time after the end of each year, file a return in the prescribed form to the prescribed authority.

(8) No interest or penalty shall be imposed or no recovery proceedings against the dealer or payee shall be initiated in respect of deduction of tax under this section.

(9) Where the amount has not been, deposited after deduction, such amount and any other sum which may be payable under this section shall be charged upon, all the assets of the person concerned who made the deduction or who is liable to pay other amount and shall be recoverable from him as arrears of land revenue:

Provided that no recovery proceedings shall be drawn up by the prescribed authority having jurisdiction over the person concerned without prior approval of the Commissioner.

(10) If any person as referred to in Sub-section (1), or Sub-section (2) fails to make the deduction or after making the deduction fails to deposit the amount so deducted into the Government account, the prescribed authority may, after giving such person a reasonable opportunity of being heard, by an order in writing, direct that such person shall pay, by way of penalty, a sum not exceeding twice the amount deductible under this section, besides tax deductible but not so deducted and, if deducted, not so deposited into the Government account.

42. A careful reading of Section 47A shows that every person, who is responsible for paying sale price or consideration or any amount purporting to be the full or part payment of "sale price" or consideration in respect of any sale or supply of goods liable to be taxed under the Act of 2005 to the Government or Corporation, Board, Authority, undertaking or any other body by whatever name called, owned, financed or controlled wholly or substantially by the Government, at the time of credit to the account of or payment to the payee of such amount in cash, by cheque, by adjustment or in any other manner, whatsoever, shall deduct an amount calculated at the rate as may be specified in the Schedule from such sum towards full satisfaction of the tax payable under this Act on account of total sale price of such sale or supply.

43. What also follows from the provisions contained in Section 47A is that Section 47A requires the "prescribed authority" to make deduction, at source, from the bills of a contractor, who executes a works contract, at a flat rate of 12.5 per cent on the total value of the works contract irrespective of the fact as to what the taxable liability of the contractor is except that Section 47A enables the prescribed authority to not deduct, if the contractor satisfies the authority

concerned that the works contract involves only charges for labour and services and/or that the components of labour and service charges are separable from the total value of the works contract. In short, thus, Section 47A does not make room for non-deduction of those components of such bills, which may not be, otherwise, exigible to tax.

44. While considering the impact of the provisions contained in Section 47A, what is necessary to bear in mind is that under the scheme of the Act of 2005, in respect of those "sales", which take place (i) in the course of inter-State trade and commerce or (ii) outside the State of Arunachal Pradesh or (iii) in the course import of the goods into, or export of the goods out of, the territory of India, no tax is payable at all. Hence, all the said classes of "sale", which may take place, even in execution of "works contract", shall be kept excluded, while calculating the "taxable turnover". This apart, while calculating the "taxable turnover" of a "works contractor", the "sale price" of those goods, which are used in the execution of the "works contract", but are listed in the First Schedule to the Act of 2005 shall also be kept excluded, while determining "taxable turnover". Further, in respect of the turnover, arising out of the execution of works contract, certain further deductions are to be made as have been provided for in Rule 5(2) of the Rules of 2005, namely, the amounts, which represent the charges towards labour, services and like charges.

45. In the light of the above scheme of the Act of 2005, when one considers the provisions of Section 47A, what transpires is that Section 47A makes provisions for deduction of tax at a specified flat rate of 12.5 per cent on the total amount payable to a "works contractor", as a "dealer", in respect of a "works contract". In other words, u/s 47A, deduction has to be made, at the given percentage of 12 per cent, even on the amounts, which are not exigible to tax at all, or, in other words, while determining the "taxable turnover", the amounts, which are required to be excluded, get included within the taxable turnover. Since the charging section, namely, Section 3, provides for levy of tax on the transfer of property in goods in the execution of works contract only, Section 47A, which is an incidental and ancillary power to the main charging section, cannot exceed the ambit of jurisdiction prescribed by Section 3 and thereby permit deductions from the bills of "works contractor", as a "dealer", those amount(s), which a "works contractor" is, as a "dealer", statutorily not liable to pay. Thus, the deduction of tax, u/s 47A, exceeds far more the circumscribed limits of Section 3.

46. It needs to be borne in mind that the power to make deduction must be within the competence of the State Legislature inasmuch as the ancillary power can be exercised in aid of the main subject of legislation and not in derogation thereof. When the State Legislature does not have the power to collect tax on "deemed sale" of those goods, which are declared as goods of special importance as discussed above, or those "sales", which take place in the course of inter-State trade and commerce or outside the State of Arunachal Pradesh or in the course of import of goods into, or export of goods out of, the territory of India,

and when the charging section, i.e., Section 3 does not permit imposition of taxes on the goods mentioned in the First Schedule, the ancillary provisions of the enactment, such as, Section 47A, which relate to deduction at source, cannot go beyond the legislative powers of the State.

47. Thus, the question as to whether, in a given case, the entire turnover relating to a works contract is taxable or not would really depend on the facts of the given case. While imposing sales tax on the value of the goods, used in a works contract, the value of the labour and service components, which is not taxable by virtue of the legal fiction of "deemed sale" (which Forty-sixth Amendment to the Constitution, has introduced) has to be kept excluded. It is the transfer of property in goods involved in the execution of a works contract that constitutes the taxable event. Hence, when tax is sought to be deducted at source at a flat rate of 12.5 per cent on the entire turnover of a "dealer", it clearly follows that before such deduction is authorized to be made by the State Legislature, the State Legislature must give to the authority, who is required to make deduction, the freedom and responsibility to ensure that the total value of the works contract is exigible to sales tax. If, in a given case, it is found that the total value of the "works contract" is not subject to payment of sales tax and/or that only a part of the total value of the works contract is exigible to sales tax, it will be wholly illegal to make deduction at a flat rate of 12.5 per cent on the total value of the works contract. If this is permitted, it would enable the State to extract much more than what its dues are. Consequently, in such a case, the provisions of Article 265 would stand violated, because the State would be making deduction and thereby, though, may be, for a short duration, collecting tax, which the State is not empowered to do inasmuch as Article 265 does not permit, we have already pointed out above, collection of tax except by authority of law.

48. In *Gannon Dunkerley & Co. v. State of Rajasthan* reported in [1993] 88 STC 204, the apex court held as under : (at page 208)

The value of the goods involved in the execution of works contract will have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover : (a) labour charges for execution of the works ; (b) amount paid to a sub-contractor for labour and services ; (c) charges for planning, designing and architect's fees ; (d) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract; (e) cost of consumables such as water, electricity, fuel, etc., used in the execution of the works contract the property in which is not transferred in the course of execution of works contract; (f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services ; (g) other similar expenses relatable to supply of labour and services ; (h) profit earned by the contractor to the extent it is relatable to supply of labour and services. The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of

the materials produced by the contractor.

49. From the above observations, made in *Gannon Dunkerley & Co.* [1993] 88 STC 204 (SC), what becomes transparent is that the value of the goods, involved in the execution of the works contract, will have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services. Thus, the labour charges, in the execution of works contract, would have to be kept excluded from "taxable turnover". This apart, even service charges are not taxable and such service charges would include service charges for planning, designing and architect's fees, charges for obtaining, on hire or otherwise, machinery and tools for the execution of the works contract, cost of consumables, such as, water, electricity, fuel, etc., used in the execution of works contract, wherein the property in the goods is not transferred in the course of execution of works contract, cost of establishment of the contractor to the extent it is relatable to supply of labour and services and profit earned by the contractor. The apex court has further clarified, in *Gannon Dunkerley & Co.* [1993] 88 STC 204, that the amounts, deductible under various heads, will have to be determined in the light of the facts of a given case on the basis of the materials produced by the contractors.

50. Section 47A of the Act has not provided any mechanism to exclude any transaction from its purview, even if, ultimately, the transaction is found to be not at all exigible to sales tax. If Section 47A is allowed to survive as it exists today, the result would be that even in a case, wherein labour and service form part of the works contract, the person, responsible for making payment to a "works contractor", would have no option, but to deduct tax at the rate of 12.5 per cent on the entire turnover, though the contractor may not be liable to pay tax on the whole value of the works contract.

51. The provisions, contained in Section 47A(l)(b), do not take into consideration the fact that there may be some components in a transaction of "sale", which may not be taxable at all under the Act of 2005. No provision has been made in Section 47A or in any other part of the Act to enable an authority, who has to make deduction at source, to ensure, or even take into account, the fact that while making deduction at a flat rate of 12.5 per cent, what is not taxable is not deducted. No provision has, thus, been made for exclusion of such "sales" from the gross turnover, while deducting tax, at source, in a "works contract". Section 47A(l)(b) is bad, because of the reason that while enacting Section 47A(l)(b), the Legislature appears to have completely lost sight of the fact that even if works contract involves both transfer of property in goods as well as labour and service, State sales tax may not be payable at all on the entire value relating to transfer of property in goods for the simple reason that such sale may be an inter-State sale or it may be a sale outside the State or a sale in the course of import of goods into, or export of goods out of, the territory of India. The prescribed authority has been empowered to look into only the question as to whether any labour and service is involved in the works contract, though it is trite that if a

particular sale or purchase is exempted from tax altogether, they can never be taken into account for the purpose of calculating, or arriving at, the "taxable turnover". The apex court, therefore, pointed out, in *Bhawani Cotton Mills Ltd. v. State of Punjab* reported in [1967] 20 STC 290, that the imposition of liability to pay, at the initial stage itself, will be invalid, even when tax is collected from a person subject to the provisions for possible refund at a later stage, if found not liable to pay tax originally, for, when a particular sale or purchase is not subject to taxation, such a transaction can never be taken into account at any stage, for the purpose of calculating, or arriving at, "taxable turnover" or for levying tax. The relevant observations, made in this regard, in *Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another*, read as under : (page 330)

...If a person is not liable for payment of tax at all, at any time, the collection of a tax from him, with a possible contingency of refund at a later stage, will not make the original levy valid ; because if particular sales or purchases are exempt from taxation all together, they can never be taken into account, at any stage, for the purpose of calculating or arriving at the taxable turnover and for levying tax.

52. From the decision of *Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another*, it becomes clear that if a person is not liable to pay tax on a given item or is not liable to pay tax at a rate, which is not permissible, no tax, even at source, can be deducted from him.

53. To levy a tax means "to impose or assess" or "to impose, assess or collect under authority of law". It is a unilateral act of superior legislative power to declare the subjects and rates of taxation and to authorize the collector to proceed to collect the tax. Assessment is the official determination of liability of a person to pay a particular tax. Collection is the power to gather money by enforcing payment if necessary. The levy of taxes is, generally, a legislative function; assessment is a quasi-judicial function and collection an executive function. These three expressions "levy", "assessment" and "collection", are expressions of widest significance and embrace, in their broad sweep, all the proceedings, which can possibly be imagined for raising money by the exercise of the power of taxation from the inception to the conclusion of the proceedings. The provisions, as regards deduction of tax, at source, are nothing but one of the modes of collection of tax by the State. Hence, a transaction in respect whereof, no tax can be levied, there cannot be any provision for deduction of such a tax at source.

54. The apex court in *Steel Authority of India Ltd. Vs. State of Orissa and Others* etc. etc., while declaring the provisions of Section 13AA of the Orissa Sales Tax Act, 1947, to be ultra vires, has held as under : (page 304)

There can be no doubt, upon a plain interpretation of Section 13AA, that it is enacted for the purposes of deduction at source of the State sales tax that is payable by a contractor on the value of a works contract. For the purposes of the

deduction neither the owner nor the Commissioner who issues to the contractor a certificate u/s 13AA(5) is entitled to take into account the fact that the works contract involves transfer of property in goods consequent upon of an inter-State sale, an outside sale or a sale in the course of import. The owner is required by Section 13AA(1) to deposit towards the contractors' liability to State sales tax four per cent of such amount as he credits or pays to the contractor, regardless of the fact that the value of the works contract includes the value of inter-State sales, outside sales or sales in the course of import. There is, in our view, therefore, no doubt that the provisions of Section 13AA are beyond the powers of the State Legislature for the State Legislature may make no law levying sales tax on inter-State Sales, outside sales or sales in the course of import.

55. The decision in *Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc.*, is squarely applicable to the facts of the present case inasmuch as in the present case, same as in the case of *Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc.*, deduction was to be made regardless of the fact that the value of the works contract, in a case, might have included the value in respect of "sales" outside the State or "sales" in the course of import of the goods into, or export of the goods out of, the territory of India. When deduction, at source, does not take into account those components of sale or purchase, which are not exigible to the State's power to impose sales tax, provisions for such deduction must be held to be, in the light of the decision in *Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc.*, beyond the powers of the State Legislature inasmuch as no law made by the State can authorize imposition of sales tax, amongst others, in respect of sales in the course of import of the goods into, or export of the goods out of, the territory of India or "sales" outside the State or inter-State sale.

56. The apex court further held, in *Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc.*, , that Section 13AA should have been precisely drafted to make it clear that no tax was levied on that part of the amount credited or paid that related to inter-State sales, outside sales and sales in course of import. Pointing out these deficiencies in the legislation, in question, the apex court further observed, in *Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc.*, as under : (page 305)

...Unfortunately, it would appear that the State Legislature overlooked its limitations, even as contained in the preamble, when enacting Section 13AA. It was also contended that the deduction that was required to be made u/s 13AA(1) was of four per cent of the amount credited or paid by the owner to the contractor, whereas the sales tax liability of the contractor thereon was eight per cent. It was contended that this requirement proceeded on the assumption that half of the amount was not liable to tax being in respect of inter-State sales, outside sales and export sales. No such assumption based on the rate of tax at any given point of time can be made. Section 13AA should have been precisely drafted to make it clear that no tax was levied on that part of the amount

credited or paid that related to inter-State sales, outside sales and sales in the course of import, particularly after the previous Section 13AA had been struck down by the Orissa High Court for the reason that it was couched in terms wider than were permissible to the State Legislature and that judgment was accepted.

57. Since the impugned provisions of Section 47A suffer from similar lack of legislative competence as did the imposition of tax in the case of Steel Authority of India Ltd. Vs. State of Orissa and Others etc. etc., one cannot, but strike down Section 47A.

58. In M/s. Nathpa Jhakri Jt. Venture Vs. State of Himachal Pradesh and Others, too, the situation was similar in the sense that the enactment authorized deduction of tax, at source, at a flat rate and that while making such deduction, no provision had been made for exclusion of those transactions, which were not exigible to sales tax by the State. In M/s. Nathpa Jhakri Jt. Venture Vs. State of Himachal Pradesh and Others, the apex court declined to accept the proposition that refund can be obtained at a later stage if a person is found, on completion of assessment, not liable to pay tax. Even in such circumstances, the imposition of tax, at the initial stage, by way of deduction, at source, has been held to be impermissible in law. The apex court, therefore, in M/s. Nathpa Jhakri Jt. Venture Vs. State of Himachal Pradesh and Others, declared Section 12A of the Himachal Pradesh General Sales Tax Act to be ultra vires. In its decision, the Supreme Court observed (page 309), "A bare perusal of the two provisions will make it clear that in either provision there is an obligation to deduct from transaction relating to works contract on bills or invoices raised by the works contractor an amount not exceeding four per cent or two per cent, as the case may be. Though the object of the provision is to meet the tax in respect of the transaction on all works contract on the valuable consideration payable for the transfer of property in goods involved in the execution of the works contract, the effect of the provision is that, irrespective of whether the sales are inter-State sales or outside sales or export sales which are outside the purview of the State Act and those transactions in respect of which no tax can be levied even in terms of the enactment itself, such deductions have to be made in the bills or invoices of the contractors. To say that a person is not liable for payment of tax inasmuch as on completion of the assessment refund can be obtained at a later stage is no solace. . ."

59. The apex court further held, in M/s. Nathpa Jhakri Jt. Venture Vs. State of Himachal Pradesh and Others, as under:

Section 12A of the Himachal Pradesh General Sales Tax Act, 1968, which provides for the deduction of a percentage towards sales tax of the contractor from payments under a works contract, is invalid. Though the object of the section is to meet the tax in respect of the transactions on all works contracts on the valuable consideration payable for the transfer of property in goods involved in the execution of the works contract, the effect of the provision is that, irrespective of whether the sales are inter-State sales or outside sales or export

sales, which are outside the purview of the State Act, and those in respect of which there is no tax leviable even in terms of the enactment itself, such deductions have to be made in the bills or invoices of the contractors. Nor is there any provision for certification of the extent of the deduction that can be made by the person paying the amount.

60. In view of the position of law, as discussed above, it becomes clear that Section 47A, in the present case, is beyond the legislative competence of the State Legislature inasmuch as it mandates deduction not only on those components of the turnover, which are not exigible to tax by the State Legislature, but also mandates deduction on those amounts, which are outside the purview of entry 54 of List II and/or the amounts, which are not exigible to sales tax at all even under the State laws.

61. The deduction of tax at source by the respondents, on the total value of the works contract, without providing for exclusion on account of labour charges or without giving those deductions, which are provided for in Sections 6 and 7 of the Act of 2005, and/or those deductions, which have been held to be allowable by the Supreme Court, in *Gannon Dunkerley & Co.* [1993] 88 STC 204, is not only violative of Article 265 read with Article 286 of the Constitution, but also amounts to illegal deprivation of the property, which is violative of Article 300A of the Constitution. Viewed thus, it is clear that the impugned provisions of Section 47A as well as the impugned notice, dated February 15, 2008, issued by the Superintendent of Tax and Excise, West Kameng, District Bomdila, are liable to be declared ultra vires and illegal.

62. I may, now, pause here to point out that Section 4 lays down rates of tax. Section 4 reads:

4. Rates of tax.-(1) The rates of tax payable under the Act shall be,:

(a) in respect of goods specified in the Second Schedule, at the rate of one paisa in the rupee ;

(b) in respect of goods specified in the Third Schedule, at the rate of four paise in the rupee ;

(c) in respect of goods specified in the Fourth Schedule, at the rate of twenty paise in the rupee ;

(d) in the case of any other goods, at the rate of twelve-and-half paise in the rupee:

Provided that the rate of tax on packing materials or containers shall be the same as the rate in which the goods sold are chargeable to tax.

(2) The Government may, if it deems necessary, reduce the rates of tax as prescribed in Sub-section (1), by a notification to that effect in the Official Gazette.

63. A minute reading of Section 4 of the Act of 2005 would go to show that different rates of tax have been fixed in respect of goods, which are specified in Second, Third and Fourth Schedules and it is only in respect of those goods, which do not fall under any of the said three Schedules, that tax is realizable at the rate of 12.5 paise in a rupee. It is not in dispute that the goods used in execution of "works contract", are treated as "sale" and, hence, tax is leviable on the goods, used in the execution of "works contract," at such rate(s) as may have been prescribed in the said Schedules. Hence, unless and until a uniform rate of tax is prescribed for all goods used in execution of the "works contract", it is not possible to realize or even deduct tax at source at a uniform or flat rate. To put it a little differently, since no uniform rate has been prescribed in respect of the goods used in the "works contract", it clearly follows that the deduction of tax, at the rate of 12.5 per cent, in terms of Section 47A and the impugned notification issued by the respondents, are contrary to Section 4 and, hence, the same are liable to be struck down.

64. It is also worth noticing that when Section 4 has not provided for any separate rate of tax in so far as the goods used in the execution of works contract is concerned, the provisions of Section 47A of the Act of 2005 providing for deduction at source, at the rate of 12.5 paise in the rupee, are contrary to Section 4 of the Arunachal Pradesh Goods Tax Act, 2005, and, therefore, the same are, as rightly contended on behalf of the petitioner, ultra vires and illegal and liable to be struck down.

65. In the result and for the reasons discussed above, these writ petitions stand allowed and the impugned provisions of Section 47A of the Act, to the extent that the same permit deduction at the flat rate of 12.5 per cent irrespective of the "taxable turnover", are hereby set aside and quashed.