

(2011) 03 GAU CK 0115
In the Gauhati High Court
Case No : Writ Petition (C) No. 570 of 2000

Sri Pradip Paul

APPELLANT

Vs

The State of Tripura

RESPONDENT

Date of Decision : 30-03-2011

Acts Referred:

Arunachal Pradesh Goods Act — Section 47(A)
Central Sales Tax Act, 1956 — Section 14, 15, 3, 4, 5
Constitution of India, 1950 — Article 226, 246(1), 265, 269, 286
Tripura Sales Tax Act, 1976 — Section 115, 2, 3, 3A, 3AA
Tripura Sales Tax Rules, 1976 — Rule 3, 3A(1), 3A(2)

Citation : (2011) 5 GLR 814 : (2011) 41 VST 386

Hon'ble Judges : I. A. Ansari, J; C.R. Sharma, J

Bench : Division Bench

Advocate : Somik Deb, for the Appellant; A. Ghosh, S. Chakraborty and T.D. Mazumder, for the Respondent

Judgement

I.A. Ansari, J.—By making this writ petition, under Article 226 of the Constitution of India, the writ Petitioner, who is a "works contractor", has put to challenge, in the context of imposition of tax on execution of "works contract", the constitutional validity of certain provisions of the Tripura Sales Tax Act, 1976 (in short, the "TST Act, 1976"), and the Tripura Sales Tax Rules, 1976 (in short, "the TST Rules"). The principal challenge, in the present writ petition, is, therefore, to the constitutional validity of Section 3A of the TST Act, 1976, read with Rule 3A(1) of the TST Rules, which provide for levy of tax on transfer of property in goods involved in the execution of "works contract" and Section 3AA of the TST Act, 1976, read with Rule 3 of the TST Rules, which provide for deduction of tax, at source, at the time of making of payments to a "works contractor" for execution of "works contract". The Petitioner has also challenged the constitutional validity of the definitions of certain terms, namely, "dealer", as given in Section 2(b) of the TST Act, 1976, "sale", as given in Section 2(g) of the TST Act, 1976, "sale price", as given in Section 2(h) of the TST Act, 1976, and "turnover", as given in Section 2(m) of the TST Act, 1976.

WP(C) No. 570 of 2000.

2. The factual background of the case, which has given rise to the above challenges posed to the constitutional validity of the various provisions of the TST Act, 1976, and the Rules framed there under, may, first, be noted.

Factual Background:

3. Respondent No. 2, namely, Executive Engineer, Rig Division, Department of Public Works, Govt. of Tripura, at Agartala, issued a Notice Inviting Tender (in short, "the NIT") for drilling and development of 15 deep tube-wells in different places of West Tripura district, the estimated cost of the work being Rs. 24,36,390/-. In response to the NIT, the Petitioner, amongst others, participated in the tender process and was, eventually, awarded the contract. The Petitioner accordingly started execution of the contract work and raised, in course of time, 15 Running Accounts Bill (in short, "the RA Bills"). However, Respondent No. 2 made a deduction, at source, at the rate of 4% from the RA Bills in respect of sales tax, deductible at source, treating the said contract as a contract for works, i.e., works contract from the total amount of Rs. 27,40,128/-, which had been raised by the said 15 RA Bills, a sum of Rs. 1,09,604/- having been so deducted from each bill. These deductions have been impugned by the Petitioner as wholly without jurisdiction and illegal inasmuch as the Petitioner contends that the said contract is a contract for service and not a works contract and, hence, no tax, under the TST Act, 1976, could have been validly imposed and, in this context, the constitutionality of the various provisions, as indicated above, have been questioned by the Petitioner.

4. In the present writ petition, since the constitutionality of a number of provisions of the TST Act, 1976, have been challenged, we must be conscious of the width of the High Court's power under Article 226 to examine and declare the provisions of a statute unconstitutional. While the constitution is the highest law of the land and, no law, which is contrary to the Constitution, can survive, one can also not lose sight of the fact that a legislation is made by the representatives of the people of the land. Invalidating a statute is a serious matter and should, therefore, be done with great circumspection and shall be, as a corollary, resorted to in very rare, exceptional and unavoidable circumstances.

5. The Constitution is the fundamental law of the land and must prevail over every ordinary statute. In order to declare an Act of legislature to be invalid, the Court must reach a definite conclusion that it violates some provisions of the Constitution so clearly that the fact, that it violates the Constitution, is not left in doubt. If it is possible to have two views of a given statute, one making the statute constitutional and the other making it unconstitutional, the statute must be treated to be valid. This apart, it is the duty of the Court to make every effort to uphold the constitutional validity of a statute unless the violation of the Constitution by the statute is so clear that it does not remain open to questions. In *Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi Devi*, the

Supreme Court, while examining the power of the Court to declare a statute unconstitutional, held as under:

3. In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways e.g. if a State Legislature makes a law, which only Parliament can make under List I to the Seventh Schedule, in which case it will violate Article 246(1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope

(Emphasis added)

6. The Court certainly has the power to decide the constitutional validity of a statute; but since this power prevents the foreplay of democratic process, it is vital that it be exercised with rigorous self-restraint. Legislature must be given freedom to do experimentation in exercising its power provided, of course, it does not clearly and flagrantly violate the constitutional limits. In *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala*, the Supreme Court observed as under:

1535 ...in exercising the power of judicial review, the courts cannot be oblivious of the practical needs of the Government. The door has to be left open for trial and error.

7. In *P. Laxmi Devi (supra)*, the Supreme Court cautioned that while examining the constitutional validity of a statute, the Court should, ordinarily, defer to the wisdom of the legislature unless it enacts a law, which leaves no manner of doubt about its unconstitutionality.

8. There is always a presumption in favor of the Constitutionality of statutes and the burden is always upon the person, who attacks it, to show that there has been a clear transgression of the constitutional provisions. This view has been consistently taken by the Supreme Court. A reference may, in this regard, be made to the case of *The State of Bihar Vs. Sir Kameshwar Singh*, wherein a Constitution Bench observed as under:

The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to

recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation. (See also Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, to B.R. Enterprises Vs. State of U.P. and Others, . In fact, in Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd. and Others etc.,

9. With regard to the above, one may, perhaps, refer to the case of State of Bihar and others, etc. etc. Vs. Bihar Distillery Ltd., etc., wherein the Supreme Court has pointed out that the approach of the court, while examining the challenge to the constitutionality of an enactment, shall be that it starts with the presumption of constitutionality, the court should try to sustain its validity to the extent possible, it should strike down the enactment only when it is not possible to sustain it. The Supreme Court has also pointed out, in Bihar Distillery Ltd. (supra), that the court should not approach an enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed; rather, the defects of drafting, if any, should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment, for, an Act, made by the legislature, represents the will of the people and that cannot be lightly interfered with. The relevant observations, made, in this regard, in Bihar Distillery Ltd. (supra), read as under:

The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void.

10. Thus, if two views are possible, one making provisions, in a statute, constitutional and other making it unconstitutional, the former should be preferred. The court must, therefore, make every effort to uphold the constitutional validity of a statute, even if that requires giving the statutory provision a strained meaning, or narrower or wider meaning, than what appears on the face. It is only when all efforts to do so fail, should the court declare a statute unconstitutional. (See Kedar Nath Singh Vs. State of Bihar,

11. Having examined the power of the Court to declare a statute unconstitutional and the situations, wherein such power should be exercised, the stage has been reached, in the present case, to take note of the established principles of

interpretation of the taxing statutes, for, these principles have to be borne in mind, while examining the constitutionality of the various provisions of the TST Act, 1976, and the TVAT Act as well as the Rules framed there under, which forms the subject-matter of this set of writ petitions.

12. It is rudimentary principle that in construing a taxing statute, one must have regard to the strict letter of the law and not merely the spirit of the statute or the substance of the law. We may, while dealing with this subject, recall the observations of Rowlatt, J., in *Cape Brandy Syndicate v. I.R.* (1921) 1 KB 64 which were approved by the House of Lords in *Canadian Eagle Oil Company Ltd., v. The King* 27 TC 205. The observations of Rowlatt, J. in *Cape Brandy Syndicate* (supra), read as under:

In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied, one can only look fairly at the language used.

13. Thus, in a fiscal statute, one has to merely look at what is clearly stated therein. There is no equity about a tax. There is neither any room for any intendment nor is there any presumption as to a tax.

14. In *A.V. Fernandez Vs. The State of Kerala*, Bhagwati, J., observed as follows:

It is no doubt true that in construing physical statute and in determining the liability of a subject to tax one must have regard to the strict letter of statute or the substance of the law. If the revenue satisfied the Court that the case falls strictly within the provision or the law, the subject can be taxed. If, on the other hand, case is not covered within the four corner of the provision of the taxing statute, no tax can be imposed by inference or by analogy or by trying to prove into the intention of the legislation and by considering what was the substance of the matter.

15. We must bear in mind that while construing fiscal statute, the function of Court is not to give a strained and unnatural meaning to the provision. We cannot strain the scope of the provision by analogy or place upon it what is called a beneficial or equitable construction in order to prevent anomaly or a supposed anomaly. There is no scope for repair or reconstruction of a provision. The intention of the legislature, manifested in plain words, must be accepted. If provision of a taxing statute is doubtful or ambiguous, it is not possible to remove the ambiguity and create a new and added obligation not cast upon by the legislature. We can at best iron out the creases, but we cannot alter materials of which the provision is woven. So said, Lord Denning, in *Seaford Court Estate Ltd. v. Asher* (1949) 2 All ER 155 (CA):

...A judge must not alter the material of which the Act is woven, but he can and should iron out the creases.

16. In *Rakesh Vij v. Raminder Pal Singh Sethi* (Dr.) (2005) 8 SCC 504 the

Supreme Court held as under:

The rule of construction is "to intend the legislature to have meant what they have actually expressed". The object of all interpretation is to discover the intention of Parliament, "but the intention of Parliament must be deduced from the language used", for "it is well accepted that the beliefs and assumptions of those who frame the Acts of Parliament cannot make the law.

17. In *Emperor v. Benoari Lal Sarma*, Lord Chancellor Viscount Simon said: (IA p. 71)

In construing enacted words the court is not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used.

18. That greater latitude and flexibility shall be given to fiscal statutes has been insisted upon in *R.K. Garg and Others Vs. Union of India (UOI) and Others*, wherein the Court observed as under:

Another rule of equal importance is that laws, relating to economic activities, should be viewed with greater latitude than laws touching civil rights, such as, freedom of speech, religion, etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true. Having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature in case of legislation dealing with economic matters. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved.

19. The principles of the strict interpretation of the fiscal enactments were reiterated by the Supreme Court in *Ajmera Housing Corporation and Another Vs. Commissioner of Income Tax*, In the said decision, the Supreme Court held that in interpreting a taxing statute, the Court must look squarely at words of the statute and interpret them. Consideration of hardship, injustice and equity are entirely out of place in interpreting a taxing statute. Tax and equity are strangers and an equitable construction has no room in a taxing statute. If interpretation of fiscal enactment is open to doubt, the construction, most beneficial to the subject, should be adopted even if it results in granting a double advantage. In *Mahadeolal Kanodia Vs. The Administrator-general of West Bengal*, , *The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur*, it has been held that it is the duty of the Court to give effect to the words used without scanning the wisdom or policy of the legislature and without engrafting, adding or implying anything, which is not congenial to, or consistent with, such expressed intent of the law giver. If the statute is a taxing statute, we must assume that the law making authority does not commit mistake or make omission.

20. If the language of a statute is clear and explicit, effect must be given to it, for, in such a case, the words best declare the intention of the law-giver. It would not be right to refuse to place on the language of the statute the plain and natural meaning, which it must bear on the ground that it produces a consequence, which could not have been intended by the legislature. It is only from the language of the statute that the intention of the legislature must be gathered, for, the legislature means no more and no less than what it says. It is not permissible for the Court to speculate as to what the legislature must have intended and, then, to twist or bend the language of the statute to make it accord with the presumed intention of the legislature.

21. Bearing in mind the above principles of interpretation of taxing statutes, let us, now, examine various provisions of the TST Act, 1976, to determine if those provisions, which are under challenge in this set writ petitions, transgress the constitutional limitations or violates the provisions of the Constitution.

22. In order to, however, examine the validity of the various provisions of the TST Act, 1976, which are under challenge in the context of "works contract", it is necessary to take note of the bare minimum facts, which led to the making of transfer of property in goods, involved in the execution of "works contract", exigible to sales tax.

23. It is necessary to recall, in this regard, 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.

24. The question, therefore, raised was if 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 and Co. (Madras) Ltd. v. State of Madras 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 by the Hyderabad High Court in Jubilee Engineering Co. Ltd. v. STO (1956) 7 STC 423).

25. Contrary to the above view taken by Madras High Court, Mysore High Court, in Mohamed Khasim v. State of Mysore, reported in (1955) 6 STC 211 (Mys), 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. The same view was followed by Kerala High Court in Gannon Dunkerley

& Co. (Madras) (P) Ltd. v. STO (1957) 8 STC 347. In Pandit Banarsi Das v. State of M.P. (1955) 6 STC 93, the Nagpur High Court, while declining to follow the decision of the Madras High Court, in Gannon Dunkerley & Co. (Madras) (P) Ltd. (supra), expressed the view that the State Legislature could pick out a "sale" from the composite transaction of a building contract, which included transfer of property in materials and could make the portion attributable to the cost of such materials subject to payment of "sales tax" in exercise of its undoubted and plenary powers. The Rajasthan High Court, in Bhuramal v. State of Rajasthan (1957) 8STC 463, took a similar view.

26. The above conflict of judicial opinion was resolved by the Supreme 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 therefore, 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 Supreme Court, therefore, took the view that it was not within the legislative competence of the Provincial Legislature, under Entry 48 in list II of 7th 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 Gannon Dunkerley and Co. (Madras) Ltd. (supra), the Supreme Court, however, 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.

27. In short, in Gannon Dunkerley and Co. (Madras) Ltd. (supra), what was held by the Supreme Court 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 "works 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 a transfer of property in the goods used in the execution of the "works contract".

28. The decision, in Gannon Dunkerley's case (supra), though rendered by the Supreme Court, in the context of Entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935, was equally applicable to the provisions found in Entry 54 in List II of the Seventh Schedule to the Constitution.

29. Following the decision, in Gannon Dunkerley and Co. (Madras) Ltd. (supra), the Supreme 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".

30. Consequent upon the decisions in Ganon Dunkerley and Co. (Madras) Ltd. (supra) and Pandit Banarasi Das Bhanot (supra), 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).

The other amendments introduced by it are not relevant for this case. Clause (29-A) of Article 366 is in the following terms:

(29-A) "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 installments;

(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 valuable consideration,

31. While considering the scope of 46th amendment, one has to also clearly keep in view the fact that the Constitution (46th Amendment) Act, 1982, also added Sub-clause (b) to Clause (3) of Article 286. To be clearer, it may be noted that Clause (3) of Article 286 provides as under:

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

(a) * * *

(b) a tax on the "sale" or purchase of goods, being a tax of the nature referred to in Sub-clause (b), Sub-clause (c) or Sub-clause (d) of Clause (29-A) of Article 366,

* * *

be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.

32. 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 insertion of Clause 29 (A) so as to include, within the meaning of the term "sale", transfer of property in goods involved in the execution of "works contract".

33. 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 46th Amendment, it has become possible for the State to impose "sale"s 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.

34. 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 (29-A) are read, in the light of Sub-clause (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, deliver or supply, and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

35. In fact, by the 46th Amendment Act of the Constitution, the definition of the word "sale", as given in Article 366, was widened by insertion of Clause (29A), to make, there under, by way of a legal fiction, various transactions, enumerated therein, which were, otherwise, not "sales", have to be deemed, by a legal fiction, as "sales". It may, however, be borne in mind that "sales", which have been created by a legal fiction by introduction of Clause 29A, are commonly called "deemed sales" as against the traditional concept of "sales", which are popularly called "actual sales".

36. In the present set of writ petitions, we are concerned only with one kind of transactions, namely, transactions, which involve execution of "works contract". We are, therefore, consciously not taking note of, and entering into, the matter of those other transactions, which have been, by creating a legal fiction with the help of insertion of Clause 29A, are, now, treated as "sales", though they could not have been under the traditional concept of sale, been regarded as "sales".

37. Consequent upon the 46th amendment of the Constitution, almost all the States amended their respective definitions of the word "sale" in their sales tax legislations in order to enable them to impose tax on those transactions, which were, under the traditional concept of "sale", not sales, but have, now, become, with the help of the legal fiction, as indicated hereinbefore, "deemed sale" so as to enable them impose sales tax on those transactions, which were traditionally not within the ambit of their legislative power.

38. The Constitutional validity of the 46th amendment as well as the amendments made in the State legislations, particularly, with regard to the transactions involving execution of works contract, came to be considered by a Constitution Bench, in Builders Association of India and Others Vs. Union of India (UOI) and Others, wherein the Supreme 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 (29-A), a "sale" of goods. The object of the new definition of "sale", introduced by Clause (29-A), was, thus, as observed by the Constitution Bench, in Builders Association (supra), 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 (supra), 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 "sale"s tax enactment.

39. Following the 46th amendment of the Constitution of India, the TST Act, 1976, too underwent changes bringing within the ambit of sales tax, the transfer of the property in goods involved in the execution of "works contract". A new provision was inserted, namely, Section 3A to levy tax on the transfer of property in goods involved in the execution of "works contract".

40. A careful reading, therefore, not only of the definition of the term, "sale", as contained in Section 2(g) and the definition of the term, "dealer, as contained in Section 2(b), but also of the provisions contained in the charging Section, namely, Section 3, is imperative.

41. With the above object in view, Section 2(g), Section 2(b) and Section 3 of the TST Act, 1976, is reproduced herein below:

2 (g) - "sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration, and includes -

(i) any delivery of goods on hire-purchase or any system of payment in installments,

(ii) any 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, and such delivery or transfer of any goods shall be deemed to be a "sale" of those goods by the person making the delivery or transfer and a purchase of those goods by the person to whom such delivery or transfer is made, but does not include a mortgage, hypothecation, charge or pledge.

42. Section 2(b) of TST Act, 1976, defines "dealer" as under:

dealer" means any person who sells taxable goods manufactured, made or processed by him in Tripura or brought by him into Tripura from any place outside Tripura for the purpose of "sale" in Tripura and includes government and any person making a "sale" u/s 3A.

43. Section 3, which is the charging Section, reads as under:

3. Liability to tax and exemption from tax.

(1) Every dealer in taxable goods shall pay a tax on his turnover at the rate specified in column (3) of the schedule attached to this Act;

Provided that subject to the provisions of Sections 14 and 15 of the Central "sale"s Tax Act, 1956 the State Government may, from time to time by notification in the Official Gazette and subject to such conditions as it may impose fix a higher rate of tax not exceeding forty percent or any lower rate of tax payable under this Act on account of the "sale" of any taxable goods or class of taxable goods specified in such notification; and thereupon the Schedule shall

be deemed to be amended accordingly;

Provided further that the rate of tax on any transfer of the right to use any goods for any purpose (whether or not for a specified period) shall be 4%.

(2) If the State Government is of opinion that it is necessary or expedient so to do for increasing the production of goods or for protection or encouragement of industry within the State, it may, by notification in the Official Gazette subject to such restrictions and conditions, exempt from payment of tax, either in whole or in part the "sale" of any taxable goods or class of taxable goods or any dealer or class of dealers for such period as may be specified therein.

(3) Subject to such restrictions and conditions as may be prescribed, the State Government may make an exemption, or reduction in rate, in respect of any tax payable under this Act on the "sale"s of any taxable goods to such person or class of persons as may be prescribed.

(4) Where exemption from the levy of tax under this Act on any "sale" of taxable goods is claimed by a dealer under the provisions of this Section the burden of proof shall lie on such dealer and the Commissioner may require the dealer to substantiate the claim in manner prescribed.

If any dispute or question regarding payment of tax arises, the matter shall be referred to the Commissioner whose decision thereon shall be final.

44. From a bare reading of Section 3 of the TST Act, 1976, it becomes clear that the liability to pay tax is on the "dealer", who deals with taxable goods, and he becomes liable to pay tax on the "turnover" at the rate specified in the third Column of the Schedule to the TST Act, 1976.

45. Since the liability of the "dealer" to pay tax, as indicated above, is based on his "turnover", the definition of the term, "turnover", needs to be looked into. Section 2(m) defines "turnover" to mean as under:

2(m) "turnover" means the aggregate of the amount of "sale price" receivable or if a dealer so elects actually received by the dealer in respect of any "sale" of goods made during any prescribed period in any year after deducting -

(i) the amount of "sale price", if any, refunded by the dealer to a purchaser in respect of any goods purchased and returned by the purchaser within the said period;

(ii) the amount arrived at by applying the following formula:

Rate of tax x aggregate of "sale price" 100 plus rate of tax

Provided that an election as aforesaid once made shall not be altered except with the permission of the Commissioner and on such terms and conditions as he may think fit to impose;

Provided further that in respect of a "sale" on hire-purchase or other system of

payment in installments only such amounts shall be included in turnover as has actually been received by the dealer during that period.

46. Considering the fact that the term, "dealer", as defined by Section 2(m), is relatable to "sale price", it is also necessary to look at the definition of "sale price" as given in the TST Act, 1976. Section 2(h) defines the term "sale price" as under:

2(h) "sale price" used in relation to a dealer means the amount of the money consideration for the "sale" on taxable goods manufactured, made or processed by him in Tripura, or brought by him into Tripura from any place outside Tripura for the purpose of "sale" in Tripura, less any sum allowed as cash discount according to the trade practice, but includes any sum charged for containers or other materials for the packing of such taxable goods;

Provided that "sale price" as defined in this clause does not include the "sale" referred to in Section 3A.

47. From a conjoint reading of Sections 2(d), 2(g), 2(h), 2(m) and Section 3 of the TST Act, 1976, it becomes clear that every "dealer", dealing with taxable goods, is liable to pay tax on its "turnover", which is aggregate of the "sale price" of the goods, the "sale price" being the money consideration for "sale" received or receivable by the "dealer". It also, now, becomes transparent that in order to attract the liability under the TST Act, 1976, the following preconditions have to be fulfilled:

(i) A person must be a "dealer" under the Tripura Sales Tax Act, 1976.

(ii) There must be a "sale" of any taxable goods

(iii) The "taxable goods" must have been manufactured, made or processed by him in Tripura or brought by him into Tripura from any place outside Tripura for the purpose of "sale" in Tripura.

(iv) Tax shall be payable on the "turnover" of the "dealer", which is the aggregate of the "sale price" of the goods, meaning thereby the amount of money consideration for the sale on taxable goods manufactured, made or processed by him in Tripura or brought by him into Tripura from any place outside Tripura for the purpose of "sale" in Tripura.

Whether the definition of "dealer" as given in Section 2(b) of the TST Act, 1976, is unconstitutional ?

48. Mr. S. Deb, learned Counsel appearing for the Petitioner, contends that since the definition of "sale", as appearing in Section 2(g) of the TST Act, 1976, does not include there under a "deemed sale" within the meaning of Section 3A of the TST Act, 1976, which provides for levy of tax on the transfer of property in goods involved in execution of "works contract", the definition of "dealer", as appearing in Section 2(b) of the TST Act, 1976, which includes there under persons executing "works contract", is unconstitutional.

49. To examine Mr. Deb's contention, it is necessary to examine Section 3A of the TST Act, 1976, which reads as under:

3 A. Tax on the transfer of property in goods involved in the execution of "works contract"- Notwithstanding anything contained elsewhere in this Act, any transfer of property in goods (whether as goods or in some other form) involved in the execution of a works- contract shall be deemed to be a "sale" of those goods by the person making the transfer and shall liable to be taxed at the rate specified in column 3 of the Schedule:

provided that in respect of any such transfer only so much value of the goods involved in the works-contract which has actually been paid to the dealer during the period, shall be taken into account for determining the turn over for that period.

Explanation: - For the purpose of this Section "property in goods" shall mean the aggregate of the goods for which amounts have been received or receivable by a dealer during such period as valuable consideration, whether or not such amount has been separately shown in the works contract. The amount is received or receivable shall include the value of such goods purchased, manufactured, processed, or procured otherwise by the dealer, and the cost of freight or delivery as may be incurred by such dealer for carrying such goods to the place where these are used in execution of such works contract, but shall not include such portion of the aforesaid amounts as may be prescribed.

50. We may pause here and look into Section 2(o) of the TST Act, 1976, which defines "works contract" to mean as under:

2 (o) "works contract" means any agreement for carrying out for cash or deferred payment or other valuable consideration -

(i) the construction, fitting out, improvement or repair of any building, road, bridge or other immovable property, or

(ii) the installation or repair of any machinery affixed to a building or other immovable property, or

(iii) the overhaul or repair of -

(1) any motor vehicle,

(2) any vessel propelled by internal combustion engine or by any other mechanical means,

(3) any aircraft,

(4) any component or accessory part of any of the items mentioned in paragraphs (1) or (3) above; the altering, ornamenting, finishing, improving or otherwise processing or adopting of any goods.

51. While considering the provisions of Section 3A of the TST Act, 1976, it may

be noted that Section 3A starts with a non-obstinate clause and provides that any transfer of property in goods (whether as goods or in some other forms), involved in the execution of "works contract", shall be deemed to be "sale" of those goods by the person making the transfer and shall be liable to be taxed at the rate specified in column 3 of the Schedule. Considering the fact that Section 3A of the TST Act, 1976, clearly provides that the transfer of property in goods, involved in the execution of "works contract", shall be deemed to be "sale", it cannot be said that since the definition of "sale", as provided in Section 2(g) of the TST Act, 1976, does not specifically state that the transfer of property in goods, involved in the execution of "works contract", shall be deemed to be a "sale", the inclusion of a person (who executes a "works contract") within the definition of "dealer", is unconstitutional. Even otherwise also, the inclusion of a person, who executes a "works contract" within the definition of a "dealer", cannot be said to be per se unconstitutional.

52. Even if the argument of the learned Counsel for the Petitioner that the definition of "sale", as given under the TST Act, 1976, does not include the transfer of property in goods, involved in the execution of "works contract", is accepted, the definition of a "dealer", which includes a person, who executes a "works contract", cannot be said to be unconstitutional.

53. The constitutional validity of the statutory provisions, defining a "dealer", cannot be examined on the basis of the answer to the question as to whether tax can be levied on a given person in a particular transaction or not. A person may not be liable to pay tax on a particular transaction; but that, by itself, will not make unconstitutional the definition of a "dealer", which includes or embraces within its ambit a class of persons as "dealer". The definition of "dealer" as given in Section 2(b) of the TST Act, 1976, is, therefore, not unconstitutional.

Whether tax u/s 3A of the TST Act, 1976, providing for imposition of tax on transfer of property in goods, involved in execution of "works contract", can be assessed and recovered?

54. In order to ascertain the constitutional validity of imposition of tax on the transfer of property in goods involved in the execution of "works contract", it will be necessary to have a close look at Section 3A of the TST Act, 1976, which has already been reproduced hereinabove.

55. From a plain reading of Section 3A and 2(o) of the TST Act, 1976, it is clear that the first part of Section 3A provides that the transfer of property in goods, involved in the execution of "works contract", shall be treated to be "sale". The proviso to Section 3A makes it clear that in respect of any such transfer, only so much value of the goods, involved in execution of "works contract", shall be taken into account for determining the "turnover" of a given period, which has "actually" been paid to the "dealer". In the backdrop of the definition of "turnover", as given by Section 2(m), when the proviso to Section 3A is considered, it becomes transparent that while the term, "turnover", according to

Section 2(m), means aggregate amount of "sale price" receivable or actually received by the "dealer", the proviso to Section 3A makes a "works contractor" liable to pay tax in respect of a "turnover", which means so much of the value of the goods involved in the "works contract", which has "actually" been paid to the "dealer" (i.e., the "works contractor") from the party.

56. Mr. Deb, learned Counsel for the Petitioner, submits that the procedure for computation of tax u/s 3A of the TST Act, 1976, on the transfer of property in goods, involved in the execution of "works contract", having not been provided for in the Act, tax cannot be assessed and recovered u/s 3A.

57. It is also submitted by Mr. Deb, learned Counsel, that u/s 3A of the TST Act, 1976, the liability to pay tax is at the rate specified in Column 3 of the Schedule and since no prescription whatsoever has been made in the Schedule in respect of "works contract", the provisions of Section 3A are unworkable. Mr. Deb contends that since as per the proviso to Section 3A, the value of the goods, involved in the execution of "works contract", is the only determinative factor without stipulating any deduction there from, the same is in clear violation of the laid down by the Supreme Court, in Gannon Dunkerley's case (supra), inasmuch as the Supreme Court has clearly held therein that while assessing the taxable liability of a "dealer", the value, in respect of certain charges/services, shall be kept outside the purview of the levy. The charges/services, which are to be excluded, are:

- i) The charges, which pertain to the contract for supply of labor and services;
- ii) The amount paid to a sub-contractor for labor and services;
- iii) The charges for planning, designing and architect's fees;
- iv) The charges for obtaining, on hire or otherwise, machinery and tools used in execution of "works contract";
- v) The cost of consumables, such as, water, electricity, fuel etc. which are consumed, during the execution of "works contract", and other similar expenses for labor and services;
- vi) Transportation charges for transport of the goods to the place of works;
- vii) Proportionate deduction of the charges for maintenance of the establishment of the contractor as well as the profit earned there under in so far as it relates to supply of labor and services;
- viii) Value of goods, which are not taxable, in view of Section 3, Section 4 and Section 5 of Central Sales Tax Act.

58. It is further contended by Mr. Deb that since the definition of "sale", u/s 2(g), does not contain the transfer of property in goods involved in execution of "works contract", the transfer of property in goods, involved in execution of "works contract", is not a "sale" under the TST Act, 1976.

59. It is submitted by Mr. Deb that since Section 3A of the TST Act, 1976, seeks to create a liability in respect of "works contract" without including, within the ambit of the definition of "sale", a transaction, involved in execution of "works contract", the provisions of Section 3A of the TST Act, 1976, is unconstitutional.

60. Mr. Deb also submits that from a bare reading of the Schedule to the TST Act, 1976, it is clear that there is no entry prescribing rate of tax exigible on various materials on account of transfer of property in goods involved in execution of "works contract" (whether in goods or some other forms involved in the execution of "works contract"). Referring to the decisions of this Court, in Santosh Kumar Harlalka V. State of Assam (1995) 99 STC 615, Guwahati Municipal Corporation Contractors Association V. Guwahati Municipal Corporation (1996) 102 STC 77, the decision of the Madras High Court, in Indian Sugar & General Industry Export Import Corporation Ltd. V. Commercial Tax Officer and Ors. (2002) 127 STC 329 and the decision of the Supreme Court, in Edward Kevnter Pvt. Ltd. V. Bihar State Agricultural Marketing Board (2002) 118 STC 431, it is contended that due to non-specification of the rate of tax in the Schedule to the TST Act, 1976, in respect of transfer of property in goods, involved in the execution of "works contract", no tax can be imposed by resorting to the provisions of Section 3A on the transfer of property in goods involved in execution of "works contract".

61. We may pause, at this stage, to point out that the components, which enter into the concept of "tax", are well known. The "first" is the character of the imposition known by its nature, which prescribes the taxable events attracting the levy, the "second" is the clear indication of the person on whom the levy is imposed and who is obliged to pay tax, the "third" is the rate at which the tax is imposed and the "fourth" is the measure or value to which rate will be applied for computing the tax liabilities. The Supreme Court, in Govind Saran Ganga Saran Vs. Commissioner of Sales Tax and Others, reiterated that if the said components are not clearly or definitely ascertainable, it is difficult to say that levy exists in point of law. Any uncertainty or vagueness in the legislative scheme, which defines any of the components of levy, will be fatal to its validity. The Supreme Court, again, in R and B Falcon (A) Pty Ltd. Vs. Commissioner of Income Tax, held that if the provisions for computation fail, the charging Section cannot be effectuated. The Supreme Court, in R & B Falcon (supra), while examining the validity of levy of fringe benefit tax, held that if there was no provision for computing the value of any fringe benefit, the same was not liable to fringe benefit tax even if might fall under Clause (a) or Clause (b) of Section 115 WB (1).

62. u/s 3A of the TST Act, 1976, the procedure for computation of taxable liability has not been provided for inasmuch as it, nowhere, provides as to what "turnover", for the purpose of a "works contract", means and as to how the "turnover" has to be computed for the purpose of a "works contract". It is pertinent to note here that the definition of "turnover", as given in Section 2(m)

of the TST Act, 1976, is not applicable to the cases covered by Section 3A of the TST Act, 1976, inasmuch as the proviso to Section 2(h) of the TST Act, 1976, which defines "sale price", makes it clear that the "sale price", as defined in Section 2(h), does not include "sale" referred to in Section 3A of the TST Act, 1976. When the expression "turnover", as defined u/s 2(m) of the TST Act, 1976, means the aggregate of the "sale price" receivable or received by a "dealer" and, at the same time, when the expression "turnover", as defined in Section 2(m) of the TST Act, 1976, cannot be made applicable to those "sales", which are taxable u/s 3A of the TST Act, 1976, it is not discernible from the scheme of the TST Act, 1976, as to how taxable liability in a case of "deemed sale", arising out of a "works contract", would be computed. In other words, u/s 3A of the TST Act, 1976, since tax has to be levied on the "turnover" of the transfer of the property in goods, involved in the execution of a "works contract", but when the TST Act, 1976, does not provide for the manner of computation of "turnover" u/s 3A of the TST Act, 1976, tax cannot be assessed and recovered in respect of sales arising out of a "works contract".

63. Although the proviso to Section 3A of the TST Act, 1976, provides that only so much value of the goods, involved in the "works contract", which has actually been paid to the "dealer" during the period, shall be taken into account for determination of "turnover", the fact remains that Section 3A, nowhere, provides for the manner in which the "turnover" has to be determined. No other provision in the TST Act, 1976, and/or the TST Rules has been brought to our notice, which lays down the manner of determination of the "turnover" for the purpose of Section 3A. As held by the Supreme Court, in R & B Falcon (supra), if the provision for computation fails, the charging section cannot be effectuated. Since there is no provision, in Section 3A, for computing the taxable "turnover" in respect of transfer of property in goods, involved in the execution of "works contract", u/s 3A of the TST Act, 1976, the said transaction cannot be brought to tax. The vagueness and uncertainty of the legislative scheme u/s 3A of the TST Act, 1976, as regards the computation and assessment of tax u/s 3A, is fatal to the imposition of the tax u/s 3A.

64. In so far as the contentions of the Petitioner that no tax can be levied u/s 3A of the TST Act, 1976, inasmuch as there is no specific entry, in the Schedule of the TST Act, 1976, fixing rates of taxes imposable on the transfer of property, in goods, involved in the execution of "works contract" (with regard to the goods, which may be used in execution of "works contract") is concerned, it is be noted that from a plain reading of Section 3A, it is clear that the transfer of property in goods, involved in execution of "works contract", has been treated to be "sale" by the person making the transfer and the same has to be taxed at the rate specified in Column 3 of the Schedule. The proviso to Section 3A provides that only so much of the value of the goods in the transfer of property in goods, involved in execution of "works contract", shall be taken into account for the determination of "turnover" for that period, which has actually been paid during the period. The Explanation to Section 3A explains the term "property in goods"

to mean aggregate value of the goods for which the amount is received or receivable by the "dealer" as valuable consideration irrespective of the fact whether the said amount has been separately shown in the "works contract" or not. The Explanation further makes it clear the amount, received or receivable, shall include the value of the goods purchased, manufactured, processed or procured by the "dealer" and the cost of freight or delivery as may be incurred by such "dealer" for carrying such goods to the place, where they are used in the execution of "works contract".

65. The object of the 46th amendment of the Constitution of India is to convert what was not a "sale" into a "sale". Sub- Clause (b) of Clause (29- A) States that tax, "on the "sale" or purchase of goods", includes, among other things, a tax "on the transfer of property in the goods, (whether as goods or in some other form), involved in the execution of "works contract". The tax becomes payable "on the transfer of property in goods" (whether as goods or in some other form) involved in the execution of a "works contract". The emphasis is "on the transfer of property in goods" irrespective of the fact as to whether such transfer of property, in goods, takes place "as goods or in some other form". The latter part of Clause (29-A) of Article 366 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that takes place as per Sub-clauses (a) to (f) of Clause (29- A), the latter part of Clause (29-A) says that "such transfer, delivery and supply of any goods" shall be deemed to be a "sale" of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. Hence, a transfer of property in goods, under Sub-clause (b) of the Clause (29-A), is "deemed" to be a "sale" of the goods, involved in the execution of "works contract", by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The tax livable by virtue of Sub-clause (b) of Clause (29-A) of Article 366 of the Constitution, thus, becomes subject to the same discipline to which any levy under Entry 54 of the State List is made. It is, therefore, not correct to say that the properties that are transferred to the owner in the execution of a "works contract" are not the goods involved in the execution of the "works contract"; but a conglomerate. The Forty-sixth amendment does no more than make it possible for the States to levy sales tax on the price of goods and materials used in "works contracts" as if there was a "sale" of such goods and materials. Sub-clause (b) of Article 366(29-A) should not be read as being equivalent to a separate Entry in List II of the Seventh Schedule to the Constitution enabling the States to levy tax on "sales" and "purchases" independent of Entry 54 thereof.

66. In view of the above, it is not necessary that there must be a separate entry in the Schedule fixing rates of tax in respect of various goods involved in the execution of "works contract". The goods, used in the execution of "works contract", shall have to be taxed at the different rates specified in Column 3 of the Schedule in respect of different goods.

67. Situated thus, it is clear that the submission of Mr. Deb, that since there is no separate entry in the Schedule relating to "works contract", Section 3A of the TST Act, 1976, is unworkable, has no force. The two decisions of this Court, rendered in Santosh Kumar Harlalka (supra) and Guwahati Municipal Corporation Contractors Association (supra), which Mr. Deb relies upon, have no application to the facts of the present case inasmuch as the said two cases relate to deduction of tax, at source, from the payments made in respect of "works contract". In the said cases, relevant provisions of the enactments provided for deduction of tax, at source, at such rate and in such manner as may be prescribed by Rules. Since the rate and manner for deduction of tax, at source, had not been prescribed by Rules, this Court held that no deduction, at source, can be made from the payments made in respect of the "works contract". The said two decisions have no application to the facts of the present case. The decision of Supreme Court, in Edward Kevnter Pvt. Ltd. V. Bihar State Agricultural Marketing Board (2000) 118 STC 431, is also not applicable to the facts of the present case. The decision, in Edward Kevnter (supra), relates to the market fee on agricultural produces specified in the schedule to the Act, which had fallen for consideration in Edward Kevnter (supra). In Edward Kevnter (supra), although fruit was specified as an item in the Schedule, neither fruit nor apple, which were beverages, produced from fruit, had been specified in Schedule. The Supreme Court, therefore, held that no market fee is livable on the said items.

68. The decision, in Indian Sugar & General Industry Export Import Corporation Ltd. V. Commercial Tax Officer and Ors. (2002) 127 STC 329, too is not applicable to the case at hand inasmuch as Section 3(1) of the Tamil General Sales Tax Act, 1959, read with Section 4 thereof required the "dealer", who dealt in "sale" or purchase of declared goods, inside the State, to pay tax "at the rate and only at the points specified against each in the Second Schedule" on the "turnover" of such goods in each year. In view of such incorporated provisions, the Madras High Court held, in Indian Sugar (supra), as under:

The specification of the rate and the stage is, therefore, an essential requirement, without which the dealer cannot be held liable to pay tax under the Act.

69. The facts of the case, in Indian Sugar (supra), are altogether different from the ones at hand and, therefore, the decision, in Indian Sugar (supra), can be of no assistance to the learned Counsel for the Petitioners.

70. Next contention of Mr. Deb, learned Counsel for the Petitioner, is, as already indicated above, to the effect that since various deductions on account of labor charges and other charges, as held to be allowable by the Supreme Court in Gannon Dunkerley's case (supra), have not been provided for in Section 3A, Section 3A is ultra vires and unconstitutional. In this regard, it is necessary to, again, examine Section 3A. Explanation to Section 3A clearly lays down that "property in goods" shall mean aggregate of the goods for which amount has

been received or receivable by the "dealer" as value for consideration. Section 3A provides that the transfer of property in goods, involved in execution of "works contract", shall be treated to be "sale". The Explanation makes it very clear that it is only the value of the goods, which shall be taken into consideration for the purpose of determination of the valuable consideration in respect of the "works contract", labour charges and other charges are to be deducted only when the total amount received for the execution of "works contract" includes the value of goods, the value of labour charges and/or services. Since Section 3A of the TST Act, 1976, expressly makes it clear that it is only the value of the goods, which shall be taken into consideration for the purpose of determination of the valuable consideration in respect of "works contract", Section 3A cannot be held to be ultra vires on the ground that the provisions, embodied in Section 3A, do not provide for various deductions as held to be allowable by the Supreme Court, in Gannon Dunkerley case (supra).

71. Notwithstanding what has been pointed out above, it is worth noticing that the legislative power of the State Legislatures, under Entry 54 of the State List, is subject to two limitations - one flowing from the Entry itself, which makes the said power "subject to the provisions of Entry 92 A of List I", and the other flowing from the prohibition contained in Article 286. Under Entry 92 A of List I, Parliament has the power to make a law in respect of tax on "sale" or purchase of goods other than newspapers, where such "sale" or purchase takes place in the course of inter-State trade or commerce. The levy and collection of such tax is governed by Article 269. This shows that the legislative power, under Entry 54 of the State List, is not available in respect of transactions of "sale" or purchase, which take place in the course of inter-State trade or commerce. Similarly, Article 286(1) prohibits the State from making a law imposing or authorizing 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 import of goods into, or export of goods out of, the territory of India. As a result of the said provisions, the legislative power, conferred by Entry 54 of the State List, does not extend to imposing tax on a "sale" or "purchase" of goods, which takes place outside the State, or which takes place in the course of import of goods into, or export of goods out of, the territory of India.

72. In view of the above limitations imposed by the Constitution on the legislative power of the State under Entry 54 of the State List, it is beyond the competence of the State Legislature to make a law imposing or authorizing, with the aid of Sub-clause (b) of Clause (29-A) of Article 366, imposition of a tax on transfer of property in goods, involved in the execution of a works-contract, if a given transaction takes place in the course of inter-State trade or commerce or if the transaction constitutes a "sale" outside the State or "sale" in the course of import of goods into, or export of goods out of, the territory of India.

73. Resultantly, therefore, it is not permissible for a State Legislature to make, in exercise of its legislative power, conferred by Entry 54 in the State List, a

legislation in such a manner as to assume the power to impose tax on a transaction, wherein transfer of property in goods, involved in the execution of "works contract", takes place in the course of inter-State "sale" or in the course of import of goods into, or export of goods out of, the territory of India, and thereby transgress these constitutional limitations. The principles for determining as to when a "sale" takes place, in the course of inter-State trade or commerce, as embodied in Section 3 of the Central Sales Tax Act, 1956, would apply with equal vigour to transfer of property in goods involved in the execution of "works contract" if the transfer of property in goods takes place in the course of inter-State "sale" or in the course of import of goods into, or export of goods out of, the territory of India. The fact that the use of the materials was made in a "works contract" or the property, in materials, passed in a State will not affect the inter-State nature of a transaction if the transaction is, otherwise, a transaction in the course of inter-State "sale" or proved to be a transaction in the course of import of goods into, or export of goods out of, the territory of India.

74. It needs to be borne in mind that Sales tax laws, passed by the Legislature of a State, levying taxes on the transfer of property in goods, involved in execution of a "works contract", are subject to the restrictions and conditions mentioned in each clause and sub-clause of Article 286 of the Constitution. No authority has been conferred on the State Legislature to make such laws, which would infringe upon the principles laid down in Sections 3, 4 and 5 of the Central Sales Tax Act, 1956, for the determination of the question as to when a "sale" or "purchase" can be said to have been made in the course of inter-State trade or commerce or outside the State or in the course of import of goods into, or export of goods out of, India. The State Legislature cannot define "sale" for its own purpose and levy tax solely on the basis of the sites of "sale" by creating a legal fiction to that effect as a non-obstinate provision, by deeming any "sale" to have taken place within the State on the basis of the place of appropriation without excluding transactions, which can be properly considered as "sale" or "purchase" in the course of inter-State trade or commerce or outside the State or in the course of import of goods into, or export of goods out of, the territory of India.

75. The Explanation to Section 3A of the TST Act, 1976, provides that the amount, received or receivable, in respect of "works contract", shall include the value of such goods, purchased, manufactured, processed or procured, otherwise, by the "dealer" and the cost of freight or delivery as may be incurred by such "dealer" for carrying such goods to the place, where they are used in the execution of "works contract".

76. By virtue of the Explanation to Section 3A of the TST Act, 1976, tax shall be livable even on a transaction, which takes place in the course of inter-State trade or commerce or outside the State or in the course of export of goods out of the territory of India inasmuch as the value of the goods purchased, manufactured, processed, or procured by a "dealer" and the cost of freight or delivery, as may

be incurred by such a "dealer" for carrying such goods to the place, where they are used in the execution of "works contract", have been included within the term "property in goods". In such a situation, even in respect of a transaction taking place, in the course of inter-State trade or commerce or outside the State, or in the course of export of goods out of the territory of India, shall also become taxable if the goods were purchased, manufactured, processed or procured by the "dealer" within the State of Tripura. If a particular "sale" takes place in course of inter-State trade or commerce or outside the State or in the course of export of goods out of the territory of India, the same cannot become taxable in Tripura merely because goods were purchased, manufactured, processed, or procured by the "dealer" within the State of Tripura.

77. Thus, the Explanation to Section 3A clearly transgresses the limits of the legislative power conferred on the State Legislature under Entry 54 of the State List inasmuch as it enables tax being imposed on "deemed sales" resulting from transfer of property in goods (whether as goods or in some other form), involved in the execution of a "works contract", which takes place in the course of inter-State trade or commerce, or which takes place outside the State, or takes place in the course of export of goods out of the Indian territory, within the meaning of Sections 3, 4 and 5 respectively of the Central Sales Tax Act, 1956.

78. The legislature, in the present case, has not made any provision for exclusion of transactions constituting those "deemed sales", which take place outside the State or takes place in the course of import of goods into, or export of goods out of, the Indian territory in relation to which the State Legislature lacks the competence to impose a tax under Entry 54 of the State List. Rule 3 of the TST Rules also does not provide for exclusion of the interstate "sale", or a "sale", which takes place outside the State, or a "sale", which takes place in the course of import of goods into, or export of goods out of, the Indian territory, which are governed by the Central Sales Tax Act, 1956.

79. In short, thus, Section 3A of the TST Act, 1976, with its Explanations transgress the limits of the legislative power conferred on the State Legislature under Entry 54 of the State List inasmuch as it enables tax being imposed on "deemed sales" resulting from transfer of property in goods (whether as goods or in some other form) involved in the execution of a "works contract", which take place in the course of inter-State trade or commerce, or which take place outside the State or which take place in the course of import of goods into, or export of goods out of, the Indian territory within the meaning of Sections 3, 4 and 5 respectively of the Central Sales Tax Act, 1956. Section 3A must, therefore, be held, with its Explanation, to be unconstitutional and void.

Whether the provisions of Sections 2(b), 2(g) and 2(m) of the TST Act, 1976, also contemplates levy of tax on sale or purchase of goods taking place outside the State or in the course of inter-State trade or commerce or in the course of import of goods into, or export of goods out of, the territory of India and whether such provisions are, in the face of the mandate contained in Article 286 of the

Constitution of India, sustainable ?

80. Learned Counsel for the Petitioner submits that a reading of Sections 2(b), 2(g) and 3 of the TST Act, 1976, shows that the State Legislature has not put any restriction on imposition of tax on sale and purchase of goods, when such a sale has taken 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 or on the goods declared to be of special importance u/s 14 of the Central Sales Tax Act, 1956. Mr. Deb submits that under the TST Act, 1976, a "dealer" is liable to pay tax on the sale of the taxable goods manufactured in the State of Tripura regardless of the sites of the sale and, therefore, Sections 2(b), 2(g) and 3 of the TST Act, 1976, are liable to be declared unconstitutional.

81. Section 2(b) of the TST Act, 1976, defines a "dealer" and Section 2(g) defines "sale". Section 3 of the TST Act, 1976, is the charging Section, which provides that every "dealer", in taxable goods, shall pay a tax, on his "turnover", at the rate specified in Column 3 of the Schedule to the Act.

82. As already indicated above, legislative power of a State, under Entry 54 of the State list, is subject to two limitations; one flowing from entry itself which makes that said power "subject to the provision of entry 92A of List I", and the other flowing from prohibition contained in Article 286. Under entry 92A of List I, Parliament has the power to make law in respect of tax on sale or purchase of goods, when such sale or purchase takes place in the course of inter-State trade and commerce. The levy and collection of such a tax is governed by Article 269. This shows that the Legislative power, under Entry 54 of the State List, is not available in respect of transaction of "sale" or "purchase", which takes place in the course of inter-State trade and commerce. Similarly, Clause (1) of Article 286 prohibits the States from making a law imposing or authoring the imposition of tax on sale or purchase of goods, where such sale or purchase takes 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. As a result of the said provisions, the legislative power, conferred under Entry 54 of the State List, does not extend to imposing tax on sale or purchase of goods, which takes 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.

83. In the light of the above, when Section 2(b), Section 2(g) and Section 3 of the TST Act, 1976, are carefully examined, it is, nowhere, found that the Act seeks to levy tax on sale or purchase of goods on the sales taking place outside the State or in the course of inter-State trade and commerce or in the course of import of the goods into, or export of the goods out of, the territory of India. Section 3, in fact, provides for levy of tax on the "turnover" of a "dealer". Section 2(m) defines the term "turnover" to be the aggregate of the "sale price" received or receivable in respect of the sale of any goods. Section 2(h) defines "sale price" in respect of a "dealer" to mean "the amount of money consideration for the sale of taxable goods manufactured, made or processed by him in Tripura

or brought by him into Tripura from outside Tripura for the purpose of sale in Tripura (Emphasis supplied). As such, money consideration, received or receivable in respect of the sale of only those taxable goods, which have been manufactured, made or processed in Tripura, or brought into Tripura, from any place outside Tripura, for the purpose of sale in Tripura, form the part of "sale price", the aggregate of which is liable to be taxed under the TST Act, 1976. Not only that there is no provision by which tax is sought to be imposed on a "sale", which takes place outside the State or in the course of inter-State trade and commerce or in the course of import of the goods into, or export of the goods out of, the territory of India; rather, the definition of "sale price" makes it very clear that tax is sought to be imposed only on a "sale", which takes place in the State of Tripura.

84. In view of the above, we find no force in the submission of learned Counsel for the Petitioner that under the TST Act, 1976, tax is sought to be levied on the sales, which take place outside the State, or in the course of inter-State trade, or in the course of import of the goods into, or export of the goods out of, the territory of India.

85. As regards Mr. Deb's contention that under the TST Act, 1976, tax is also sought to be imposed on the "declared goods" and, therefore, the same is violative of Article 286 of the Constitution of India, we have already discussed the said issue, while examining the provisions of the Tripura VAT Act, 2004, in the earlier part of this judgment. We have already held that there is no bar imposed by Article 286 of the Constitution of India read with Sections 14 and 15 of the Central Sales Tax Act, 1956, on imposing a tax on the goods declared to be of special importance u/s 14 of the Act. As already pointed out above, the restriction is only with regard to the rate of tax and other conditions of levy and it cannot, therefore, be said that there is any violation of Article 286 of the Constitution of India in levying tax on "declared goods". The submission of the learned Counsel of the Petitioner, on this aspect, too, cannot be accepted.

Whether Section 3AA of the Tripura Sales Tax Act, 1976, and Rule 3 A(1) of the Tripura Sales Tax Rules, 1976, providing for deduction of tax, at source, in respect of payments made towards transfer of property in goods, involved in the execution of works contract, are constitutionally valid?

86. Section 3A of the TST Act, 1976, provides for deduction of tax, at source, on the payments made for the transfer of property in goods involved in execution of "works contract". Section 3AA provides that such amount, as may be prescribed, has to be deducted at source. Rule 3A (1) provides that while discharging a liability on account of valuable consideration payable for the transfer of property in goods in execution of "works contract", 1.5 % gross amount of the bill in the case of RCC bridge and 4% of the gross amount of the bills in the case of other works shall be deducted towards tax payable u/s 3AA of the Act on account of "works contract". Since Section 3AA read with Rule 3A (1) provides for deduction of tax at the flat rate of 1.5% in the case of RCC bridge and 4 % in the case of

other works from the gross amount of the bill in respect of "works contract" and such deduction does not provide, at the time of making of payment, for exclusion of the amount on which no tax is, otherwise, payable under the Act, the legality and validity of Section 3AA of the Act and Rule 3 A(1) has been challenged on the ground that the said provisions are beyond the legislative competence of the State legislature.

87. The learned Counsel for the Petitioner submit that the Section 3AA read with Rule 3 A(1) warrants the authority, who makes payment of bill to a "works contractor", to deduct tax, at source, at a flat rate of 1.5 % and 4%, as the case may be, while executing a "works contract", although the total "turnover" is not exigible to sales tax inasmuch as from the gross amount received or receivable for the execution of "works contract", various deductions are required to be made for determination of the "taxable turnover" and, thus, by making a deduction, at the flat rate, from the gross amount of the bill, the "works contractors" are forced to pay much more than the actual legal liability.

88. By the impugned provisions, it is contended, the State is seeking to realize tax from the "works contractors" irrespective of the fact whether the "works contractors" are or are not liable to pay such taxes. Such realization of tax, submits Mr. Deb, 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.

89. We have already discussed the limitations imposed by the Constitution on the legislative power of State under Entry 54 of the State List in the earlier part of this decision. Bearing in mind the constitutional limitations, on the power of the State, to impose tax even on "deemed sale", which takes place in case of execution of "works contract", let us, now, turn to, and look into, the provisions of Section 3AA of the Act and Rule 3 A(1) of the Rules. Section 3AA of the Act and Rule 3A (1) of the Rules reads as under:

Section 3AA:

3A. Deduction of tax at the time of payments.

Any person responsible for paying any sum to any person liable to pay tax u/s 3A of the Act, shall at the time of credit of such sum to the account of the person or at the time of payment thereof in cash or by issue of a cheque or draft or any other mode, deduct such amount towards sales tax as may be prescribed.

Rule 3A:

3A. (1) Every person responsible for making payment to any person (here-in-after in this rule as the contractor) for discharge of any liability on account of valuable consideration payable for the transfer of property in goods (whether is goods or in any other form) in pursuance of the works contract shall at the time of making such payment to the contractor either in cash or in any manner, deduct an amount equal to the tax payable u/s 3A of the Act on account of such

works contract:

Provided that no such deduction shall be made from the bill (s) or invoice (s) of the contractor for execution of works contract on account of the contracts for which work order was issued prior to first January, 1989.

Provided also that any person responsible to make deduction of any amount equal to the amount of tax as mentioned in this rule may refer the matter to the Superintendent of Taxes, having jurisdiction over the area, for provisional computation of the net turnover and the amount of tax payable thereof by such contractor for the valuable consideration of the goods involved in the works contract.

(2) Every person responsible for making payment to any person for discharge of any liability on account of valuable consideration payable for any transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash or in any manner, shall at the time of making such payment, deduct an amount equal to four percent of such towards part or, as the case may be, full satisfaction of the tax payable under the Act, on account of such transfer of right;

Provided no such deduction shall be made from the bill (s) or invoice (s) of the transfer:

(a) On account of such transfer where the transfer of right to use goods was agreed to before first day of January, 1989;

(b) The amounts received as penalty for defaults in payment or as damages for any loss or damage caused to the goods by the person to whom such transfer was made; and (c) The amount representing the valuable consideration received for such transfer in respect of goods exempt from tax under Sub-section (2) and (3) of Section 3 of the Act.

(3) The amount deducted under sub-rules (1) and (2) shall be deposited into the Government Treasury by Challan in form XI by the person making such deduction within 7th day of the month following that in which the deduction is made.

(4) The person making such deduction under sub-rules (1) and (2) shall at the time of payment or discharge, furnish to the person from whose bill (s) and invoice (s) such deduction is made a certificate specifying the amount deducted and the rates (s) at which it has been deducted.

(5) A copy of the Challan showing the deposit of the amount in Sub-rule (3) shall be made over by the person making the deduction to the person from whom the deduction is made within 7 (seven) days of such deposit.

(6) The person making such deduction shall furnish to the Superintendent of Taxes, having jurisdiction over the area, a report of such deduction within 15 (fifteen) days from the date of deposit of such amount in form VI A.

(7) The person from whose bill (s) or invoice (s) the deduction was made shall

furnish the returns along with the Challan to the Superintendent of Taxes having jurisdiction over the area, in accordance with the provisions of the rules.

(8) All such deductions and deposits into the Government Treasury shall be deemed to be provisional payment of tax, which shall be adjusted at the time of assessment u/s 9 of the Act.

(9) Any deduction made in accordance with the provision of this rule and credited into the Government Treasury shall be treated as a payment of tax on behalf of the person from whose Bill (s) or invoice (s) the deduction has been made and credit shall be given to him for the amount so deducted as per deposit Challan submitted to the Superintendent of Taxes along with the returns in the assessment made for the assessment year.

(10) If any person as is in Sub-rule (1) and (2) of this rule fails to make deduction or after deducting, fails to deposit the amount so deducted as required by Sub-rule (3), the Superintendent of Taxes may after giving to such person opportunity of being heard, by order in writing, direct that such person shall pay, by way of penalty a sum not exceeding one and a half times the amount not so deducted and/or deposited into the Government Treasury.

(11) Without prejudice to the provisions of Sub-rule (10), if any such person fails to make the deduction or, after deducting fails to deposit the amount so deducted, he shall be liable to pay simple interest at the rates contained in Section 25 of the Act, on the amount not so deducted, and/or deposited from the date on which such amount was deductible to the date on which the amount is actually deposited.

(12) Where the amount has not been deposited after deduction, such amount together with interest and penalty, if any, shall be recoverable from the person in default as an arrear of land revenue as per provision of Sub-section (3) of Section 26 of the Act.

90. From a conscious reading of Section 3AA of the TST Act, 1976, along with Rule 3 A(1) of the Rules , what transpires is that Section 3AA makes provisions for deduction of tax at the flat rate of 1.5 % and 4 % on the gross amount of the bill in respect of the "works contract" depending upon the nature of works contract. In other words, deduction has to be made at the given percentage of 1.5% or 4% even on the amounts, which are not exigible to tax at all. In other words, while determining the "taxable turnover", the amounts, which are required to be excluded, get included with the "taxable turnover".

91. 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 with the aid of main subject of legislation and not in derogation thereof. When the State Legislature does not have the power to collect tax on "deemed sales" which take place outside the State, or in the course of interstate trade and commerce, or in the course of import of goods into, and export of

goods out of, the territory of India, and on the labour and other charges, Section 3AA and Rule 3 A (1) cannot so worded as to go beyond the legislative power of the State.

92. Section 3AA of the TST Act, 1976, and Rule 3 A(1) of the Rules, as indicated above, have not provided for any mechanism for exclusion of any non-taxable transaction from the purview of taxation, even if, ultimately, the transaction is found to be not at all exigible to sales tax. If Section 3AA of the TST Act, 1976, and Rule 3 A(1) of the Rules are allowed to survive as these provisions exist 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 flat rate of 1.5% or 4 % on the entire "turnover", though the contractor may not be liable to pay tax on the whole value of the "works contract". The provisions, contained in Section 3AA of the TST Act, 1976, and Rule 3 A(1) of the Rules, 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 TST Act, 1976, and Rules made there under. No provision has been made in Section 3AA of the TST Act, 1976, and Rule 3 A(1) of the Rules or in any other part of the Act or Rules to enable the 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 1.5 % or 4%, what is not taxable is not deducted. For having, thus, made no provision for exclusion, while deducting tax, at source, in a "works contract", of those components of the bills of a works contractor, which are not exigible to sales tax and also for having not made any provisions for exclusion of "sales" from the gross "turnover", which may be inter-State sales, or which may be "sales" taking place out the State, or "sales", which may be taking place in the course of import of goods into, or export of goods out of, the territory of India, Section 3AA of the TST Act, 1976, and Rule 3(1) of the Rules cannot survive.

93. We may make it clear that Section 3AA of the TST Act, 1976, and Rule 3 A(1) of the Rules are bad, because of the reason that while enacting Section 3AA and Rule 3 A(1), the legislature is found to have completely lost sight of the fact that even if a "works contract" involves both, transfer of property in goods as well as labour and service, the same is not made a subject of deduction as a taxable liability of a works contractor and also for having not taken into account the fact that 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 a sale or part thereof may be an interstate 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.

94. 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 Supreme 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.* (supra), read as under:

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 or 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 turn over and for levying tax.

95. From the decision of *Bhawani Cotton Mills Ltd.* (supra), 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 such tax, even at source, can be deducted from him. 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, largely, 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.

96. The Supreme Court, in *Steel Authority of India Ltd. v. State of Orissa*, reported in (2000) 118 STC 297, while declaring the provisions of Section 13-AA of Orissa Sales Tax Act, 1947, to be ultra vires, has held as under:

there can be no doubt, upon a plain interpretation of Section 13-AA, that it is enacted for the purpose of deduction at source of the State Sales tax that is payable by a contractor on the value of works contract for the purposes of the deduction neither the owner nor the Commissioner who issues to the contractor a certificate u/s 13-AA (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 13-AA (1) to deposit towards the contractors' liability to State sales tax four percent 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 13-AA 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 course of import.

97. The decision, in *Steel Authority of India Ltd. (supra)*, 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. (supra)*, 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. (supra)*, 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 sales.

98. The Supreme Court further held, in *Steel Authority of India Ltd. (supra)*, that Section 13-AA 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 the inter-State sales, outside sales and sales in course of import. Pointing out these deficiencies in the legislation, in question, the Supreme Court further observed, in *Steel Authority of India Ltd. (supra)*, as under:

unfortunately, it would appear that the State Legislature overlooked its limitations, even as contained in the preamble, when enacting Section 13-AA. It was also contended that the deduction that was required to be made u/s 13-AA (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 13-AA 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 13-AA 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.

99. Since the impugned provisions of Section 3AA of the TST Act, 1976, and Rule 3 A(1) of the Rules framed there under suffer from similar lack of legislative competence as in the case of *Steel Authority of India Ltd. (supra)*, one cannot, but struck down Section 3AA and Rule 3 A(1).

100. In *Nathpa Jhakri JT. Venture v. State of Himachal Pradesh*, reported in (2000) 118 STC 306 too, 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 *Nathpa Jhakri (supra)*, the Supreme Court declined to accept the proposition that refund can be obtained at a latter 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 Supreme Court, therefore, in *Nathpa Jhakri (supra)*, declared Section 12 A of the Himachal Pradesh General Sales Tax Act as ultra vires. In its decision, the Supreme Court observed (page 309) as under:

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 4 per cent or 2 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 if 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.

101. In view of the position of law, as discussed above, it becomes clear that Section 3AA of the TST Act, 1976, and Rule 3 A(1) of the Rules, in the present case, are beyond the legislative competence of the State Legislature inasmuch as they mandate 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.

102. Under similar circumstances, this Court in *Patel Engineering Ltd. V. State of Arunachal Pradesh and Ors.* (2009) 24 VST 481 (Gau) wherein one of us (Ansari, J) was a party, declared Section 47(A) of the Arunachal Pradesh Goods Act as ultra vires.

103. As per Section 3AA of the Tripura Sales Tax Act, 1976, tax is leviable on transfer of property in goods involved in execution of "works contract" at the rate specified in column 3 of the schedule. Different rates of tax have been fixed in the schedule in respect of different goods. Hence, unless and until a uniform rate is prescribed for all goods used in the execution of "works contract", it is not possible to realize or even deduct tax, at source, at uniform or flat rate.

104. To put a little differently, since no uniform rate has been prescribed in respect of different goods in the execution of "works contract", it clearly follows that the deduction of tax at the flat or uniform rate of 1.5.% or 4% in terms of Section 3AA of the TST Act, 1976, read with Rule 3 A(1) of the Rules are ultra vires, illegal and liable to be struck down.

105. After having examined the validity of various provisions of the TST Act, 1976, and the Rules framed there under, let us, now, examine the contention of the Petitioner that the work of digging and development of tube wells, in different districts of West Tripura, awarded to the Petitioner, in the present case, is not a works contract, but a service contract. Consequently, no tax, according to the Petitioner, is leviable under the TST Act, 1976, in respect of the said contract and the action of the Respondent authorities in deducting, at source, tax @ 4 % under the TST Act, 1976, from the payments received for execution of the said works by the Petitioners is, therefore, without jurisdiction and illegal.

106. After the 46th Amendment of the Constitution of India, the sale element of those contracts which are covered by the six sub-clauses of Clause (29 A) of Article 366 are separable and may be subjected to sales tax by State under Entry 54 of List II and there is no question of the dominant nature test being applied in such cases. The applicability of dominant nature theory in a case of works contract, has been discarded by Supreme Court in *Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others*, . The Supreme Court earlier, in *M/s. Rainbow Colour Lab and Another Vs. The State of Madhya Pradesh and Others [OVERRULED]*, applying the dominant intention theory had held that the division of contract, under the amended law, can be made only if works contract involves a dominant intention to transfer the property in goods and not in contracts, where transfer of the property in goods takes place as an incidence of contract of service. The Supreme Court, in *Rainbow Colour Lab (Supra)*, held that what is pertinent to ascertain, in each case, is what the dominant intention of the contract was. The Supreme Court, in *Rainbow Colour Lab (Supra)*, accordingly, held as under:

Prior to the amendment of Article 366, in view of the judgment of this Court in *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.* the States could not levy sales tax on sale of goods involved in a works contract because the contract was indivisible. All that has happened in law after the Forty-sixth Amendment and the judgment of this Court in *Builders'* case is that it is now open to the States to divide the works contract into two separate contracts by a legal fiction: (i) contract for sale of goods involved in the said works contract, and (ii) for supply of labour and service. This division of contract under the amended law can be made only if the works contract involved a dominant intention to transfer the property in goods and not in contracts where the transfer in property takes place as an incident of contract of service.... What is pertinent to ascertain in this connection is what was the dominant intention of the contract....

...On facts as we have noticed that the work done by the photographer which as

held by this Court in *STO v. B.C. Kame* is only in the nature of a service contract not involving any sale of goods, we are of the opinion that the stand taken by the Respondent State cannot be sustained.

107. The above conclusion of the Supreme Court, in *Rainbow Colour Lab (Supra)*, was doubted by the Supreme Court, in *M/s. Associated Cement Companies Ltd. Vs. Commissioner of Customs*, by observing that the conclusion, arrived at in *Rainbow Colour Lab's* case(s), runs counter to the express provision contained in Article 366(29-A) as also of the Constitution Bench decision in *Builders' Assn. of India (Supra)*. The observations so made by the Supreme Court, in *Associated Cement Companies Ltd. (Supra)*, was held to be merely obiter in *C.K. Jidheesh Vs. Union of India (UOI) and Others*, and the decision in *Rainbow Colour Lab (Supra)* was held to be a good law. However the Supreme Court, in its later decision, in *Bharat Sanchar Nigam Ltd (Supra)*, held that the observations of the Supreme Court, in *C.K. Jidheesh(Supra)*, were not correct and agreed with its observations made in *Associated Cement Companies Ltd. (Supra)*. The Supreme Court, therefore, held, in *Bharat Sanchar Nigam Ltd. (supra)*, that the dominant nature test has no application to composite contracts mentioned in Clause (29 A) of Article 366 of the Constitution of India. The Supreme Court, however, made it clear that the dominant nature test would still be applicable to those composite contracts, which are other than the ones mentioned in Clause (29 A) of Article 366 of the Constitution of India. The relevant observations, made in *Bharat Sanchar Nigam Ltd (Supra)*, read as under:

The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in *Gannon Dunkerley case* , namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than those mentioned in Article 366(29-A) continues to be: Did the parties have in mind or intend separate rights arising out of the sale of goods? If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is "the substance of the contract". We will, for the want of a better phrase, call this the dominant nature test.

108. In view of the law laid down in *Bharat Sanchar Nigam Ltd (supra)*, it will be appropriate to have a look into the agreement entered into by the present Petitioner with Government of Tripura for the work of digging and development of tube wells, in different districts of West Tripura, in order to find out as to whether there is any transfer of property in goods involved in the execution of said contract. From the schedule of rates contained in the said contract, it appears that though, for the execution of said works, certain materials like pipes were to

be supplied, free of cost, by the Department concerned, yet certain materials were also to be used by the contractor himself. Some of these items are as follows:

4. Carrying and lowering 350mm/300mm dia ERW housing pipes of about 9.5 mm thick including necessary welding etc. Complete with supply of all necessary fitting as per direction of the Engineer-in charge (Pipes will be supplied by the Deptt. At free of cost at Agartala)

7. Providing and fixing 150/200 mm dia Bail plug of approved quality and make complete as per direction of the Engineer- in- Charge.

8. Providing and fixing 30 cm x 20 cm/ 35cm x 20cm/30cm x 15cm/20cm x 15cm reducing socket suitable for ERW pipes complete completes as per direction of the Engineer- in- Charge.

9. Providing and shrouding of washed pea gravels of 30 mm effective size in annulars space between the pipes assembly and bore hole.

10. Providing and fixing 35 cm/30 cm dia housing clam suitable for ERW pipes of approved quality complete as per direction of the Engineer- in-Charge.

12. Providing and fixing of well cap suitable for ERW pipes of approved quality as per direction of the Engineer- in- Charge.

109. In the above work, which is a part of the contract, although pipes were to be supplied, free of cost, by the Department concerned, the contractor was to supply necessary fitting, bail plug of appropriate quality as well as washed pea gravels, etc. However, little may be, it cannot be denied that there was a transfer of property in goods involved in the execution of the said works, which is certainly taxable u/s 3A of the TST Act, 1976. It cannot, therefore, be said that the work, in question, was, as a whole, a service contract. The question, however, remains as to whether that part of the contract, which amounts to transfer of property in goods, involved in the execution of the works contract, is taxable under the relevant statute ? We, therefore, now, take up the question as to whether the contract, in question, is, to the extent that it involves execution of works contract, exigible to sales tax under the TST Act, 1976, and the rules framed there under.

110. What is, now, pertinent to note is that in the present case, there is, though very little, transfer of property in goods involved in the execution of works contract, the fact remains, as we have already noted above, in the preceding part of this judgment, that there is no provision, in the TST Act, 1976, for determination of the turnover, in respect of works contract, and no sales tax can be assessed and recovered in respect of sales arising out of a works contract and no tax can, therefore, be levied and/or recovered in respect of the transfer of property in goods taking place under the contract, in question. Since we have already held that no sales tax is recoverable, under the TST Act, 1976, in respect of a works contract, in question, and as we have also already declared Section

3AA of the TST Act, 1976, which provides for deduction of tax, at source, to be ultra vires the Constitution of India, the action of the Respondent authorities, in deducting tax, at source, from the payments made to the Petitioner in respect of the said contract.

111. In the result and for the reasons discussed above, the writ petition succeeds to the extent as indicated herein below:

(1) The definition of "dealer", as given in Section 2(b) of the TST Act, 1976, is not unconstitutional.

(2) Section 3A cannot be said to be bad in law, because of the fact that rate of tax has not been specified in Column 3 of the Schedule to the TST Act, 1976, in respect of transfer of property in goods involved in the execution of works contract inasmuch as separate entries, in the Schedule, fixing rates of tax, in respect of various goods involved in the execution of works contract, is not, as a matter of law, necessary or imperative.

(3) Section 3A cannot be said to be invalid, because it does not specifically allow deductions in respect of labour and other charges, which have been held allowable in Gannon Dunkerley's case (supra).

(4) No tax can be assessed and recovered in respect of sale arising out of a works contract, by taking recourse to Section 3A inasmuch as tax is leviable on turnover, but the manner of computation of turnover has not been provided for in the TST Act, 1976, in respect of works contract making thereby assessment and computation of tax inapplicable in respect of works contract.

(5) The State does not have power to impose tax on deemed sales in respect of sales, which take place in the course of inter-State trade or commerce or if the transactions constitutes a sale outside the State or if it is a sale in the course of import of goods into, or export of the goods out of, the territory of India. The State legislature is, however, not prevented from imposing tax on the goods, which are declared to be of special importance in terms of Section 14 of the Central Sales Tax Act, 1956, and the State's limitation, in this regard, is only with regard to the rate of tax inasmuch as rate of tax cannot exceed 4%, inasmuch as Section 15 of the Central Sales Tax Act, 1956, imposes restrictions on the State as regards rate of tax and not in respect of goods, which are declared to be of special importance by Central Government by Section 14 thereof.

(6) The definition of sale, as contained in Section 2(b) of the TST Act, 1976, is intra vires inasmuch as tax is imposed only on a sale, which takes place within the State of Tripura.

(7) Section 3AA of the TST Act, 1976 and Rule 3A(1) of the TST Rules are bad in law inasmuch as Section 3AA and Rule 3A(1) permit deduction, at source, at a flat rate.

112. For the reasons, which we have already discussed above, the Respondents are hereby directed to refund the amounts deducted, at source, as sales tax from the bills of the Petitioner, with interest, at the rate of 6% per annum from the date(s) of the deduction(s) made until payment thereof to the Petitioner.

113. No order as to costs.