

(2011) 09 MAD CK 0246

In the Madras High Court

Case No : Writ Petition (MD) No. 1831 of 2007 and M.P. (MD) No. 1 of 2007

Taher Ali Industries and Projects (P) Ltd.

APPELLANT

Vs

State of Tamil Nadu and Another

RESPONDENT

Date of Decision : 27-09-2011

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15, 2(1)(aa), 2(1)(aa), 2(g)

Constitution of India, 1950 — Article 269, 286, 286(3)(b), 366, 366(29A)(b)

Tamil Nadu General Sales Tax Act, 1959 — Section 2, 2(1)(aa), 2(1)(aa), 2(p), 2(q)

Citation : (2012) 47 VST 155

Hon'ble Judges : Vinod K. Sharma, J

Bench : Single Bench

Advocate : P. Radhakrishnan, for the Appellant; S. Chellapandian, Additional Advocate-General, for the Respondent

Final Decision : Allowed

Judgement

Vinod K. Sharma, J.—M/s. Taher Ali Industries and Projects (P.) Ltd., has challenged the constitutional validity of Explanation V to section 2(1) (aa) of the Tamil Nadu Additional Sales Tax Act, 1970 (hereinafter referred to as, "the Act"), introduced by amendment Act 23 of 2002, to be ultra vires the Constitution of India, and beyond the legislative competence of the State. The petitioner is manufacturer and in business of laying, joining, testing and commissioning of PSC pipes, for water supply scheme on contract basis. The petitioner is a registered dealer under the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as, "the TNGST Act"), and, assessee with the Commercial Tax Officer II, Thanjavur. The business of the petitioner falls under the category "works contract", and the petitioner opted, to pay at compounded rate of tax, as per section 7C of the TNGST Act.

2. Section 7C of the TNGST Act, reads as under :

7C. Payment of tax at compounded rates by works contractor.--(1) Notwithstanding anything contained in section 3B, every dealer referred to in

item (vi) of clause (g) of section 2, may, at his option, instead of paying tax in accordance with section 3B, pay, either on the total value of each works contract or on the total value of all works contract, executed by him in a year, tax calculated at the following rate, namely :

(i)

Civil works contract

Two per cent of the total contract value of the civil works executed.

(ii)

All other works contracts

Four per cent of the total contract value of the works executed.

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

Provided that the option under this sub-section for the financial years commencing on the 1st day of April, 1993 and the 1st day of April, 1994, shall be exercised on or before the 30th day of June, 1994 :

Provided further that the option under this sub-section in respect of works contract other than civil works contract for the financial year commencing on the 1st day of April, 1999 shall be exercised on or before the 31st day of January, 2000.

(2A) Notwithstanding anything contained in sub-section (2), any dealer who executes works contract may apply to the assessing authority along with the first monthly return on the commencement of each works contract, his option to pay the tax under sub-section (1) in respect of each works contract.

(3) Where a dealer has exercised his option under sub-section (1),-

(a) in respect of each works contract, such option shall be final till the completion of such works contract;

(b) in respect of all works contracts, such option shall be final for that financial year.

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

3. The "taxable turnover" is defined u/s 2(p) of the TNGST Act, on which the

dealer is liable to pay tax, as determined after making such deductions from his total turnover in such manner, as may be prescribed.

4. Section 2(p) of the TNGST Act, reads as under :

taxable turnover" means the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed.

5. The "total turnover" is defined u/s 2(q) of the TNGST Act, to mean the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax.

6. The "turnover" is defined u/s 2(r) of the TNGST Act, which reads as under :

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

7. The scheme of the Act, therefore, provides that for the purpose of levy of tax u/s 3 of the TNGST Act, and other charging section require determination of total, and taxable turnover for the assessment.

8. Whereas for levy of tax at the compounded rate u/s 7C of the TNGST Act, it is not necessary to work out the taxable turnover, as it has to be paid on the total value of works contract or contracts.

9. The State Legislature also enacted "the Act", to levy additional sales tax on sale or purchase of goods.

10. Section 2(1)(aa) of the Act, reads as under :

2. levy of additional tax in the case of certain dealers.--(1)(aa) The tax payable under the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959) (hereafter in this section referred to as, "the said Act"), shall, in the case of a dealer including the principal selling or buying goods through agents, whose taxable turnover for a year exceeds ten crores of rupees, be increased by an additional tax, calculated at the following rates, namely :

Rate of tax

(i) Where the taxable turnover exceeds ten crores of rupees but does not exceed twenty five crores of rupees.

1 per cent of the taxable turnover

(ii) Where the taxable turnover exceeds twenty five crores of rupees but does not exceed fifty crores of rupees.

1.5 per cent of the taxable turnover

(iii) Where the taxable turnover exceeds fifty crores of rupees but does not exceed one hundred crores of rupees.

2 per cent of the taxable turnover

(iv) Where the taxable turnover exceeds one hundred crores of rupees but does not exceed three hundred crores of rupees.

2.5 per cent of the taxable turnover

(v) Where the taxable turnover exceeds three hundred crores of rupees

3 per cent of the taxable turnover

Explanation I.--"Taxable turnover" for the purpose of this clause in respect of a principal selling or buying goods through agents shall be the aggregate taxable turnover of all his agents relating to the sale or purchase of the goods of such principal within the State :

Provided that in respect of declared goods as defined in clause (h) of section 2 of the said Act, the tax payable by such dealer under the said Act, together with the additional tax payable under this sub-section, exceeds four per cent of the sale or purchase price thereof, the rate of additional tax in respect of such goods shall be reduced to such an extent that the tax and the additional tax together shall not exceed four per cent of the sale or purchase price of such goods.

Explanation II.--Notwithstanding anything contained in the said Act, for the purpose of this clause, "turnover" in respect of sugarcane excluding sugarcane setts shall be arrived at by multiplying the total metric tonnes of sugarcane excluding sugarcane setts purchased during the year, by the minimum price fixed under clause 3 and the additional price determined under clause 5A of the Sugarcane (Control) Order, 1966 and such turnover shall be included in the total turnover of the dealer and the taxable turnover shall be arrived at accordingly for the purpose of this clause.

Explanation III.--"Taxable turnover" for the purpose of this clause in respect of a dealer liable to pay tax u/s 3G of the said Act shall be the total turnover.

Explanation IV.--"Taxable turnover" for the purpose of this clause does not include the turnover of resale taxable u/s 3H of the said Act.

Explanation V.--"Taxable turnover" for the purpose of this clause in respect of a dealer liable to pay u/s 7C of the said Act for the financial years commencing on the 1st day of April, 1993, shall be the total value referred to in the said section.

(aaa) On any amount of additional tax or penalty imposed by the assessing

authority remaining unpaid under this Act, the dealer referred to in clause (aa) shall pay interest as specified in sub-section (3) of section 24 of the said Act, in addition to such amount of additional tax or penalty due.

11. The assessing authority under the Act sought to impose additional sales tax on the petitioner, with respect to works contract, in relation to which, the petitioner had opted, to pay tax at compounded rate u/s 7C of the TNGST Act.

12. The petitioner objected to additional sales tax, on the ground, that the additional sales tax under the Act, could be levied only on taxable turn over, and in absence of determination of taxable turnover under the TNGST Act, there was no statutory provision, authorizing the levy of additional sales tax.

13. Objection was also raised, that in absence of valid provision, authorizing the levy of additional sales tax, the demand was unconstitutional, being a tax, not authorized by law.

14. The question whether additional tax could be claimed under the Act, came up for consideration before the honourable Division Bench of this court, in the case of South India Corporation Ltd. Vs. Commercial Tax Officer and Others, , wherein the Division Bench upheld the contention of the assessee, that no additional tax could be imposed on an assessee, who opts, to pay tax u/s 7C of the TNGST Act.

15. The relevant portion of the judgment passed by the honourable Division Bench reads as under (pages 659-662 in 124 STC) :

7. While section 3B conforms to the law laid down by the apex court in the Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, section 7C gives an option to the dealer to pay prescribed percentage of the contract value instead of "paying tax in accordance with section 3B". The Legislature was obviously conscious of the fact that the adoption of the contract value as the basis for calculating the tax was not a permissible mode of levy and that it was only with the consent of the dealer that such a mode can be adopted.

8. It is evident that the contract value includes many things besides the value of the goods agreed to be transferred in the course of the execution of the works contract. All such amounts are not exigible to tax. Collecting a percentage of the total contract value is obviously a convenient mode which it is open to a dealer to either accept or reject. So far as the State is concerned while giving that option the State has expressed its readiness to accept the prescribed percentage of the contract value as an equivalent to or at any rate a payment made in full discharge of the liability of the dealer liable to pay tax on the transfer of goods involved in the works contract in respect of which option has been exercised by the dealer.

12. The Act does not anywhere provide that the total value of the works contract in respect of which a dealer has exercised the option to pay the prescribed percentage towards tax instead of paying in accordance with section 3B, shall be deemed to be either the turnover of such dealer or the taxable turnover of such

dealer in so far as the works contract in which he is engaged is concerned.

15. As the additional tax is thus levied at the prescribed percentage on the taxable turnover of the dealer that percentage varying from 1.5 to 3 depending on the turnover of the assessee for the purpose of levy of this additional tax, the determination of the taxable turnover is crucial. Despite the declared intention to levy additional tax on the sale or purchase of goods, the tax levied under that Act having been linked solely to the taxable turnover, mere payment of tax under the principal enactment would not render the dealer liable for the additional sales tax unless taxable turnover of that dealer is determinable under the principal Act.

16. While there is no difficulty in determining the taxable turnover of a dealer who is engaged in the execution of a works contract in cases where the tax is computed in terms of section 3B of the Act, the determination of turnover of a dealer who has opted for payment of tax u/s 7C is not possible at all under the parent Act, as the amount computed u/s 7C is not an amount which is determined as tax on the taxable turnover, but is determined with reference to the total value of the works contract in respect of which option is exercised. As already noticed there is no provision in the Act which deems such a total contract value as total turnover.

18. In the absence of any determination of the value of the goods transferred under the works contract in cases where a dealer has exercised an option u/s 7C, there is no determination of the taxable turnover as the dealer is not required to maintain books of accounts and is not called upon to render any account in relation to the actual value of the goods transferred under the works contract. There is no scope of determining the actual value of the goods transferred under such contract in cases where option has been exercised u/s 7C.

19. While it may be convenient to the Revenue to treat the value of the works contract as the turnover of the dealer and even regard it as taxable turnover the limits of the legislative competence of the State Legislature render any such exercise wholly impermissible. In the absence of any determination of taxable turnover, no tax under the Additional Sales Tax Act can be levied. The claim for additional sales tax by treating the contract value as the taxable turnover is not permissible under the provisions of either the TNGST Act or the Additional Sales Tax Act.

16. To overcome the decision of the Division Bench of this court, the State Legislature added the impugned Explanation V, vide amendment 23 of 2002, which reads as under :

Taxable turnover" for the purpose of this clause in respect of a dealer liable to pay tax u/s 7C of the said Act for the financial years commencing on the 1st day of April, 1993, shall be the total value referred to in the said section.

17. The learned counsel for the petitioner contended, that the Explanation V to section 2(1)(aa) of the Act, is ultra vires, the power of the State Legislature, and

also contrary to section 2(1)(aa) of the Act, which prescribes additional sales tax to be payable on the taxable turnover, which is defined u/s 2(p) of the TNGST Act, 1959.

18. The contention of the learned counsel for the petitioner is that the contract value cannot be taken to be taxable turnover, as given in Explanation V to section 2(1)(aa) of the Act, therefore Explanation V to section 2(1) (aa) of the Act be declared ultra vires.

19. In support of this contention, the learned counsel for the petitioner placed reliance on the judgment of this court in *South India Corporation Ltd. Vs. Commercial Tax Officer and Others*,

20. The honourable Supreme Court in the case of *Rajiv Savin v. State of Uttarakhand* [2011] 3 RCR (CIVIL) 946 (SC), has been pleased, to lay down when there is challenge, to legislative competence of an Act, enacted by the Legislature, the courts are bound, to try to ascertain the pith and substance of such enactment, on a scrutiny of the Act in question. In this process, it is also necessary for the courts, to examine the true nature and character of the enactment, its objects, its scope and effect to find out, whether the enactment in question is genuinely referable to a field the legislation allotted to the respective Legislature under the Constitutional scheme. When the arguments of the learned counsel for the petitioner are tested on these guidelines, these deserve to be accepted.

21. The learned Additional Advocate-General, in support of the Explanation V to section 2(1)(aa) of the Act, placed reliance on the judgment of the honourable Supreme Court in the case of *Gannon Dunkerley & Co. v. State of Rajasthan* [1993] 88 STC 204 (SQ, wherein the honourable Supreme Court was pleased, to lay down as under :

In exercise of its legislative power to impose tax on sale or purchase of goods under entry 54 of List II of Schedule VII to the Constitution of India read with article 366(29A)(b), the State Legislature, while imposing 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 is not competent to impose a tax on such a transfer (deemed sale) which constitutes a sale in the course of inter-State trade or commerce or a sale outside the State or a sale in the course of import or export. 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 92A of List "I", and the other flowing from the prohibition contained in article 286. Under entry 92A of List I, Parliament has the power to make a law in respect of taxes 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 clause (1) of article 286 prohibits the State from making a law imposing or authorising the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State or (b) in the course of the import of goods into or export of the goods out of the territory of India. As a result of the said provision, the legislative power conferred under 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 or export of goods. In view of the aforesaid limitations imposed by the Constitution on the legislative power of the States under entry 54 of the State List it is beyond the competence of the State Legislature to make a law imposing or authorising the imposition of a tax on transfer of property in goods involved in the execution of a works contract, with the aid of sub-clause (b) of clause (29A) of article 366, in respect of transactions which take place in the course of inter-State trade or commerce or transactions which constitute sales outside the State or sales in the course of import or export. Consequently, it is not permissible for a State Legislature to frame the legislative enactment in exercise of the legislative power conferred by entry 54 in State List in such a manner as to assume the power to impose tax on such transactions and thereby transgress these constitutional limitations. As a result of the Forty-sixth Amendment, the contract which was single and indivisible has been altered by a legal fiction into a contract which is divisible into one for sale of goods and other for supply of labour and services and as a result such a contract which was single and indivisible has been brought at par with a contract containing two separate agreements. Since the provisions of sections 3, 4 and 5 of the Central Sales Tax Act, 1956, are applicable to such contracts containing two separate agreements, there is no reason why the said provisions should not apply to a contract which, though single and indivisible, by legal fiction introduced by the Forty-sixth Amendment, has been altered into a contract which is divisible into one for sale of goods and other for labour and services. If the legal fiction introduced by article 366(29A)(b) is carried to its logical end it follows that even in a single and indivisible works contract there is a deemed sale of the goods which are involved in the execution of a works contract. Such a deemed sale has all the incidents of a sale of goods involved in the execution of a works contract where the contract is divisible into one for sale of goods and the other for supply of labour and services. Even in the absence of any amendment having been made in the Central Sales Tax Act (after the Forty-sixth Amendment) expressly including transfers of property in goods involved in execution of a works contract, the provisions contained in sections 3, 4 and 5 would be applicable to such transfers and the legislative power of the State Legislature to impose tax on such transfers under entry 54 of the State List will have to be exercised keeping in view the provisions contained in sections 3, 4 and 5 of the Central Sales Tax Act. For the same reasons sections 14 and 15 of the Central Sales Tax Act would also be applicable to the deemed sales resulting from transfer of property in goods involved in the execution of a works contract and the legislative power under

entry 54 in State List will have to be exercised subject to the restrictions and conditions prescribed those sections in respect of goods that have been declared to be of special importance in inter-State trade or commerce. The absence of any amendment in the definition of "sale" contained in section 2(g) of the Central Sales Tax Act, 1956, so as to include transfer of property in goods involved in the execution of a works contract does not in any way affect the applicability of sections 3, 4 and 5 and sections 14 and 15 of the Central Sales Tax Act to such transfers.

In view of sub-clause (b) of clause (29A) of article 366, the State Legislatures are competent to impose tax on transfer of property in goods involved in the execution of a works contract and under sub-clause (b) of clause (3) of article 286, Parliament has been empowered to make a law specifying restrictions and conditions in regard to the system of levy, rates or incidence of such tax. This does not mean that the legislative power of the State Legislatures cannot be exercised till the enactment of a law under sub-clause (b) of clause (3) of article 286 by Parliament. It only means that in the event of a law having been made by Parliament under article 286(3)(b) the exercise of the legislative power of the State Legislatures under entry 54 in List II to impose a tax of the nature referred to in sub-clauses (b), (c) and (d) of clause (29A) of article 366 would be subject to restrictions and conditions in regard to the system of levy, rates and other incidents of tax contained in the said law. The existence of a law enacted under article 286(3)(b) cannot, therefore, be regarded as a condition precedent for the exercise of the taxing power of the State under entry 54 in List II to impose a tax of the nature referred to in sub-clauses (b), (c) and (d) of clause (29A) of article 366.

The question whether a deemed sale resulting from transfer of property in goods involved in the execution of a particular works contract amounts to a sale in the course of inter-State trade or commerce u/s 3 of the Central Sales Tax Act or an outside sale u/s 4 of the Central Sales Tax Act or a sale in the course of import u/s 5 of the Central Sales Tax Act has to be decided in the light of the particular terms of the works contract and it cannot be decided in the abstract.

So far as sales in the course of inter-State trade or commerce are concerned, the position is well-settled that the situs of the sale or purchase is wholly irrelevant as regards its inter-State character. The location of the situs of the sale in sales tax legislation of the State would, therefore, have no bearing on the chargeability of tax on sales in the course of inter-State trade or commerce since they fall outside the field of legislative competence of the State Legislatures and will have to be excluded while assessing the tax liability under the State legislation. The same is true of sales which are outside the State and sales in the course of import and export. The State Legislature cannot so frame its law as to convert an outside sale or a sale in the course of import and export into a sale inside the State. The question whether a sale is an outside sale or a sale inside the State or whether it is a sale in the course of import or export will have to be determined

in accordance with the principles contained in sections 4 and 5 of the Central Sales Tax Act and the State Legislature while enacting the sales tax legislation for the State cannot make a departure from those principles.

The measure for the levy of the tax contemplated by article 366(29A)(b) is the value of the goods involved in the execution of a works contract. It is wrong to say that the value of such goods for levying tax can be assessed only on the basis of the cost of acquisition of the goods by the contractor. Since the taxable event is the transfer of property in goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works, the value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works and not the cost of acquisition of the goods by the contractor. We are also unable to accept the contention urged on behalf of the States that in addition to the value of the goods involved in the execution of the works contract the cost of incorporation of the goods in the works can be included in the measure for levy of tax. Incorporation of the goods in the works forms part of the contract relating to work and labour which is distinct from the contract for transfer of property in goods and, therefore, the cost of incorporation of the goods in the works cannot be made a part of the measure for levy of tax contemplated by article 366(29A)(b).

The value of the goods involved in the execution of a works contract will, have to be determined by taking into account the value of the entire works contract and deducting therefrom the charges towards labour and services which would cover :-

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

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

contractor.

In cases where the contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence it would, be permissible for the State Legislature to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. It must, however, be ensured that the amount deductible under the formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying scales for deduction on account of cost of labour and services for various types of works contracts.

In the field of taxation the decisions of the Supreme Court have permitted the Legislature to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes.

It would be permissible for the State Legislature to tax all the goods involved in the execution of a works contract at a uniform rate which may be different from the rates applicable to individual goods, because the goods which are involved in the execution of the works contract when incorporated in the works can be classified into a separate category for the purpose of imposing the tax.

The Supreme Court should not, except when it is demonstrated beyond all reasonable doubt that its previous ruling given after due deliberation and full hearing was erroneous, go back upon its previous ruling, particularly on a constitutional issue.

Section 5(3) of the Rajasthan Sales Tax Act, 1954, 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 take place in course of inter-State trade or commerce, or which take place outside the State or which take place in the course of import and export within the meaning of sections 3, 4 and 5, respectively of the Central Sales Tax Act and it does not take into account the conditions and restrictions imposed by section 15 of the Central Sales Tax Act on goods declared to be of special importance in inter-State trade or commerce u/s 14 of the Central Sales Tax Act. Clause (i) of sub-rule (2) of rule 29 of the Rajasthan Sales Tax Rules also suffers from the same infirmity. Section 5(3) of the Rajasthan Sales Tax Act and clause (i) of sub-rule (2) of rule 29 of the

Rajasthan Sales Tax Rules are unconstitutional and void. Since the invalidity of section 5(3) goes to the root of the imposition of tax, in the absence of the said provision the tax cannot be levied.

22. A reading of the judgment would show, that this does not support the Explanation V to section 2(1)(aa) of the Act, as it proposes to take the value of the contract as taxable turnover, to bring within the charging section 2(1)(aa) of the Act, which provides for additional tax on taxable turnover.

23. The learned Additional Advocate-General, thereafter, placed reliance on the judgment of the honourable Supreme Court in the case of Ashok Service center and Others Vs. State of Orissa, wherein the honourable Supreme Court was pleased/ to lay down as under (pages 10-12 in 53 STC) :

17. Section 3(2) of the Act which makes the provisions of the principal Act mutatis mutandis applicable to the levy of additional tax is a part of the charging provision of the Act and it does not say that only those provisions of the principal Act which relate to assessment and collection of tax will be applicable to the proceedings under the Act. Before considering what provisions of the principal Act should be read as part of the Act, we have to understand the meaning of the expression "mutatis mutandis". Earl Jowitt's The Dictionary of English Law (1959) defines "mutatis mutandis" as "with the necessary changes in points of detail". Black's Law Dictionary (revised fourth edition, 1968) defines "mutatis mutandis" as "with the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like. Housman v. Waterhouse 191 App Div 850; 182 NYS 249, 251. In Bouvier's Law Dictionary (3rd revision, volume II), the expression "mutatis mutandis" is defined as "The necessary changes. This is a phrase of frequent practical occurrence, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like". Extension of an earlier Act "mutatis mutandis" to a later Act brings in the idea of adaptation, but so far only as it is necessary for the purpose, making a change without altering the essential nature of the thing changed, subject of course to express provisions made in the later Act. Section 3(2) of the Act shows that the State Legislature intended not to depart substantially from the principal Act except with regard to matters in respect of which express provision had been made in the Act. The assumption made by the High Court that the Act was an independent Act having nothing to do with the principal Act is not correct. The Act only levied some extra sales tax in addition to what had been levied by the principal Act. The nature of the taxes levied under the Act and under the principal Act was the same and the Legislature expressly made the provisions of the principal Act mutatis mutandis applicable to the levy under the Act. The additional sales tax was in the nature of a surcharge over and above what was due and payable by an assessee under the principal Act. The Act, though it had a long title, a short title and other usual features of every statute, could not be considered as an independent statute. It had to be read together with the

principal Act to be effective. In the circumstances the conclusion reached by the High Court that the two Acts were independent of each other was wrong. We are of the view that it is necessary to read and to construe the two Acts together as if the two Acts are one, and while doing so to give effect to the provisions of the Act which is a later one in preference to the provisions of the principal Act wherever the Act has manifested an intention to modify the principal Act. The following observations of Lord Simonds in *Fendoch Investment Trust Co. v. Inland Revenue Commissioners* [1945] 2 All ER 140 (HL) made in connection with the construction of certain fiscal statutes are relevant here. He said at page 144 :

My Lords, I do not doubt that in construing the latest of a series of Acts dealing with a specific subject-matter, particularly where all such Acts are to be read as one, great weight should be attached to any scheme which can be seen in clear outline and amendments in later Acts should if possible be construed consistently with that scheme.

18. Originally when the Act was passed in 1975, the Act levied an additional tax on dealers whose annual gross turnover did not exceed rupees one lakh at two per cent of the tax payable by them under the principal Act, on dealers whose gross turnover exceeded rupees one lakh but did not exceed rupees five lakhs at three per cent of the tax payable under the principal Act and on dealers whose gross turnover exceeded rupees five lakhs at five per cent of the tax payable under the principal Act. Such additional tax levied under the Act could not be passed on to consumers. The object of the amendment made in 1979 was, as can be seen from the Statement of Objects and Reasons, to rationalise the scheme of additional sales tax and to facilitate "wider application of first point levy" and to introduce flexibility in the implementation of the Act. What the words "wider application of first point levy" mean is not very clear. The words "first point levy" are no doubt a single point levy. Even a last point levy in the same series of sales is a single point levy which is distinguishable from a multi-point levy. If the State Legislature wanted that the new levy, i.e., the additional tax, should be a multi-point tax which had to be paid by every dealer irrespective of the fact that the entire annual gross turnover in his hands may not be liable to bear the tax under the principal Act, it would have expressly said so as it would have amounted to a substantial departure from the general scheme of the principal Act as set out in the proviso to section 8 thereof which stipulated that no goods should suffer tax which could be passed on to the purchaser at more than one point in the same series of sales or purchases by successive dealers to which the people of the State of Orissa had become accustomed. If the object of the amendment was to make the additional tax a multi-point levy, nothing was easier than using the appropriate words in the Act by excluding the application of section 8 of the principal Act expressly in section 3(2) of the Act. In the absence of any such words in the Act, by reason of section 3(2) of the Act, we have to construe that section 8 of the principal Act which is given an overriding effect by the use of the non obstante clause is applicable to the levy of additional tax also. This construction receives support from the use of the word "additional" in

section 3(1) which involves the idea of joining or uniting one thing to another so as thereby to form one aggregate (see Black's Law Dictionary). The gross turnover referred to therein should, therefore, be understood as that part of the gross turnover which is taxable under the principal Act. The definition of the expression "gross turnover" in section 2(dd) of the principal Act does not present any insurmountable difficulty as the words defined in section 2 of the principal Act have to be given the meaning as indicated in that section unless there is anything repugnant in the subject or context. In view of the foregoing, section 3(1) of the Act has to be read as :

Every dealer (who is liable to pay tax under the Principal Act) shall, in addition to the tax payable by him for a year under the said Act, be liable to pay additional tax at such rate not exceeding one per cent of his gross turnover (which is taxable under the principal Act) for that year, as may be notified from time to time by the State Government :

Provided

Provided

24. This judgment, again, does not advance the case of the State, as the question before the honourable Supreme Court was not whether by way of Explanation, tax can be imposed, which is not permissible under the statute.

25. The learned Additional Advocate-General also contended, that the necessity, to add Explanation arose, in view of the judgment of the Division Bench of this court, holding that the Act did not anywhere provide that the total value of the work contract in respect of which a dealer has exercised the option to pay the prescribed percentage towards tax, instead of paying in accordance with section 3B of the TNGST Act, shall be deemed to be the turnover of such dealer for the taxable turnover of the dealer, in so far as the works contract in which he is engaged is concerned.

26. In support of the Explanation, the learned Additional Advocate-General also placed reliance on the judgment of the honourable Supreme Court, in the case of D. Cawasji and Co., Mysore Vs. State of Mysore and Another, wherein the honourable Supreme Court held as under :

That in its earlier judgment the High Court had held that sales tax could not be collected on excise duty and cesses imposed on arrack and the High Court had issued writs directing the State Government to forbear from collecting such sales tax and to refund to the appellant the amounts which might have been collected from it by way of sales tax on items of excise, health cess and education cess. That judgment became final on the Government withdrawing its appeal therefrom to the Supreme Court. The Amendment Act did not proceed to cure the defect or lacunae by bringing in an amendment providing for exigibility of sales tax on excise duty, health cess and education cess. Instead of remedying the defect or removing the lacunae the Amendment Act had merely sought to

raise the rate of tax from 61/2 per cent to 45 per cent, with retrospective effect from April 1, 1966, to avoid the liability of refunding the excess amounts collected and had further purported to nullify the judgment and order passed by the High Court which had become conclusive and become binding on the parties. Thus, the only object of enacting the Amendment Act was to nullify the effect of the judgment of the High Court and to enable the State Government to retain the amount wrongfully and illegally collected as sales tax. The enhancement of the rate of tax was, therefore, clearly, arbitrary and unreasonable. To the extent that the Act imposed the higher levy with retrospective effect and it sought to nullify the judgment and order of the High Court the Act was invalid and unconstitutional.

It may be open to the Legislature to impose a levy of tax at a higher rate with prospective operation, but levy of taxation at a higher rate, which really amounts to imposition of tax, with retrospective operation has to be justified on proper and cogent grounds.

A validating Act seeks to validate the earlier Act declared illegal and unconstitutional by courts by removing the defect or lacunae which led to the invalidation of the law. With the removal of the defect or lacunae resulting in the validation of any Act held invalid by a competent court, the Act may become valid, if the validating Act is lawfully enacted. But the question may still arise as to what will be the fate of acts done before the validating Act curing the defect was passed. To meet such a situation and to provide that no liability may be imposed on the State in respect of such acts done before the passing of the validating Act making such acts valid, a validating Act is usually passed with retrospective effect. The retrospective operation relieves the State of the consequences of acts done prior to the passing of the validating Act. The retrospective operation of a validating Act properly passed curing the defects and lacunae which might have led to the invalidity of any act done may be upheld, if considered reasonable and legitimate.

27. There can be no dispute, with the proposition of law, but the State Legislature, was required to remove the lacuna by amending the Act, but it could not add Explanation, to expand the scope of the charging section.

28. In order to appreciate the respective contentions of the parties, it would be necessary, to note down that the honourable Division Bench of this court, in the case of South India Corporation Ltd. Vs. Commercial Tax Officer and Others, clearly recorded, that it was not within the legislative competence, to calculate the tax, by taking contract value as the basis, in view of the judgment of the honourable Supreme Court, in the case of Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, . It was, therefore, with the consent of the dealer that such a method could be adopted. The honourable Division Bench further held that the contract value includes many things, besides the value of goods agreed to be transferred in the course of execution of works contract. All such amounts are not exigible to tax and therefore, collecting the percentage of

total contract value was obviously a convenient mode, which was left to the option of the dealer either to accept or to reject.

29. The imposition of sales tax, on the total contract value, therefore, is not within the competence of the State Legislature, as it is only the transfer of goods, on which tax can be imposed. The impugned Explanation V to section 2(1) (aa) of the Act, thus, expands, the scope of the charging section, which is not permissible, in view of the law, laid down by the honourable 2012] *Taher ALI Industries & Projects P. Ltd. v. State (Mad)* 175 Supreme Court, in the case of *S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others*, wherein the honourable Supreme Court was pleased, to lay down as under :

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

(a) The object of an Explanation is to understand the Act in the light of the Explanation.

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

46. Swarup in "Legislation and Interpretation" very aptly sums up the scope and effect of an Explanation thus :

Sometimes an Explanation is appended to stress upon a particular thing which ordinarily would not appear clearly from the provisions of the section. The proper function of an Explanation is to make plain or elucidate what is enacted in the substantive provision and not to add or subtract from it. Thus an Explanation does not either restrict or extend the enacting part; it does not enlarge or narrow down the scope of the original section that it is supposed to explain... The Explanation must be interpreted according to its own tenor; that it is meant to explain and not vice versa.

47. Bindra in "Interpretation of Statutes" (5th Edition) at page 67 states thus :

An Explanation does not enlarge the scope of the original section that it is supposed to explain. It is axiomatic that an Explanation only explains and does not expand or add to the scope of the original section... The purpose of an Explanation is, however, not to limit the scope of the main provision... The construction of the Explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. An "Explanation" must be interpreted according to its own tenor

48. The principles laid down by the aforesaid authors are fully supported by various authorities of this court. To quote only a few, in *Burmah Shell Oil Storage and Distributing Co. of India, Ltd. and Another Vs. The Commercial Tax Officer and Others*, a Constitution Bench decision, Hidayatullah, J., speaking for the court, observed thus :

Now, the Explanation must be interpreted according to its own tenor, and it is meant to explain clause (1)(a) of the article and not vice versa. It is an error to explain the Explanation with the aid of the article, because this reverses their roles

49. In *Bihta Co-operative Development Cane Marketing Union Ltd., and Another Vs. The Bank of Bihar and Others*, , this court observed thus :

The Explanation must be read so as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section.

50. In *Hiralal Rattanlal Vs. State of U.P. and Another etc. etc.*, this court observed thus :

On the basis of the language of the Explanation this court held that it did not widen the scope of clause (c). But from what has been said in the case, it is clear that if on a true reading of an Explanation it appears that it has widened the scope of the main section, effect be given to legislative intent notwithstanding the fact that the Legislature named that provision as an Explanation.

51. In *Dattatraya Govind Mahajan and Others Vs. State of Maharashtra and Another*, Bhagwati, J. observed thus :

It is true that the orthodox function of an Explanation is to explain the meaning and effect of the main provision to which it is an Explanation and to clear up any doubt or ambiguity in it... Therefore, even though the provision in question has been called an Explanation, we must construe it according to its plain language and not on any a priori considerations

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

- (a) to explain the meaning and intendment of the Act itself,
- (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,
- (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,
- (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the

Act it can help or assist the court in interpreting the true purport and intendment of the enactment, and

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

30. In view of the settled law, the impugned Explanation V to section 2(1)(aa) of the Act, being contrary to the provisions of the Act, as interpreted, has to be declared, to be arbitrary, and beyond the competence of the State Legislature, thus, unconstitutional.

31. Consequently, this writ petition is allowed, the Explanation V to section 2(1)(aa) of the Tamil Nadu Additional Sales Tax Act, 1970 is declared to be ultra vires the Constitution of India, being beyond the competence of the State Legislature.

32. No costs. The connected M.P. (MD) No. 1 of 2007 is closed.