
(2011) 03 GAU CK 0064
In the Gauhati High Court
Case No : Writ Petition (C) No. 42 of 2005

T.R. Freight Movers

APPELLANT

Vs

The State of Tripura

RESPONDENT

Date of Decision : 30-03-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 226, 246, 246(2)
Tripura Sales Tax Act, 1976 — Section 10, 13, 13A, 2, 21
Tripura Sales Tax Rules, 1976 — Rule 46A, 63A, 64A, 64A(5), 64A(6)
Tripura Value Added Tax Act, 2004 — Section 2(26), 2(28), 2(33), 2(35), 58

Citation : (2011) 41 VST 513

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

Bench : Division Bench

Advocate : Somik Deb, for the Appellant; A. Ghosh, P. Roy Barman and B. Saha, for the Respondent

Judgement

I.A. Ansari, J.—The present set of writ petitions raises following important questions of constitutionality centering on Entry 54 of List II of the Seventh Schedule to the Constitution of India and also the extent and purport of the ancillary powers vested in the State legislature, which has enacted the Tripura Sales Tax Act, 1976, and subsequently, the Tripura Value Added Tax Act, 2004.

1. Whether penalty can be imposed on a "transporter", who facilitates and/or abets evasion of tax by a "dealer" and because of whose such default, evasion of tax takes place?
2. Whether tax, which is, otherwise, chargeable on, and recoverable from, a "dealer", can be charged on, and/or recovered from, a "transporter" ?
3. Whether realization of tax from a "transporter" u/s 13A of the Tripura Sales Tax Act, 1976, and Section 77 of the Tripura Value Added Tax Act, 2004, is constitutionally valid?
4. Whether the provisions contained in Section 13A of the Tripura Sales Tax Act,

1976, and Section 77 of the Tripura Value Added Tax Act, 2004, imposing penalty to the extent of 150% of the "tax involved" is constitutionally valid ?

5. On a conspectus of all the statutory provisions, contained in the Tripura Sales Tax Act, 1976, prior to its 8th amendment, when the Supreme Court, in Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others, had already held that there is no liability on a "transporter" to pay tax and/or penalty, whether the subsequent insertion of Section 13A in the Tripura Sales Tax Act, 1976, vide the 8th amendment, can be sustained ?

2. The above are some of the important questions of law, which require adjudication in the present set of writ applications, wherein the legality and validity of Section 13A of the Tripura Sales Tax Act, 1976, and Section 77 of the Tripura Value Added Tax Act, 2004, are principally under challenge.

3. Before we attempt to answer the questions posed above, it is imperative that we take into account the circumstances, where under the writ petitions have been filed, under Article 226 of the Constitution of India, raising the questions, which we have indicated above. The material facts, therefore, giving rise to these writ petitions, may, first, be noted.

Background Facts

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4. The Petitioner, a transporter registered in terms of the provisions of Rule 64A of the Tripura Sales Tax Rules, 1976 (in short TST Rules, 1976), transported 18 MT [1545 packets] of HL Medicine, by two consignments in two trucks, the consignors thereof being M/s Nicholas Piramol India Limited. A Sub-Inspector of Police, East Agartala Police Station, detained the lorries loaded with the consignments and arrested the drivers of the two trucks. Thereafter, the drivers were produced before the Chief Judicial Magistrate, West Tripura, Agartala.

5. When the Petitioner submitted an application seeking release of the consignments, Deputy Drug Controller, Government of Tripura, opposed the said application and contended that the drugs were misbranded. Having heard both sides, the learned Chief Judicial Magistrate passed an order, on 07.10.2004, directing the Investigating Officer to release the vehicle on furnishing bond of Rs. 25 lakhs with a rider that the seized materials be sent back to the manufacturer for necessary rectification by way of proper labeling or, the in the alternative, proper labeling be made, at Agartala, by the manufacturer. The learned Chief Judicial Magistrate also directed that a compliance report, in this regard, be submitted to him within a period of one month. On application being made by the Petitioner seeking extension of time to comply with the direction issued, as indicated hereinbefore, the learned Chief Judicial Magistrate granted two months" time to comply with the order and also accorded permission to the Petitioner to move the Sales Tax authorities for permits.

6. The Petitioner, then, took up the matter with M/s Nicholas Piramol India

Limited and on reply thereto, M/s Nicholas Piramol India Limited made a communication, in writing, for re-consigning of the stocks and agreed to bear the incidental charges. The Petitioner accordingly took steps for sending back the consignments to the manufacturer, namely, M/s Nicholas Piramol India Limited. On a request made, in this regard, by the Petitioner, Respondent No. 3 issued Form No. XVIIIB. However, while sending the consignment, the Sales Tax authorities, at Churaibari, found that consignment was short of 12,360 bottles and accordingly issued notices, dated 28.02.2005 and 01.03.2005, to the Petitioner to show cause as to why action shall not be taken against for imposing taxable liability with penalty.

7. Responding to the notices of show cause aforementioned, the Petitioner appeared before the Respondent No. 3 and, upon hearing, Respondent No. 3 issued two orders, dated 15.03.2005 and 22.03.2005, whereby the Petitioner has been saddled with the taxable liability of Rs. 5,51,293/- coupled with penalty at the rate of 150% on the said taxable liability by adopting best judgment procedure. In furtherance of the best judgment assessment so made, notices of demand, dated 9.12.2003 and 23.03.2005, were issued. The Petitioner, then, sent a communication, in writing, on 16.03.2005, to M/s Nicholas Piramol India Limited, seeking clarification about the shortage of bottles and in response thereto, M/s Nicholas Piramol India Limited informed the Petitioner that due to negligence, on the part of the laborers in their factory, some of the medicine boxes were packed without putting requisite numbers of bottles inside. The Petitioner has, now, challenged the imposition of tax as well as the penalty, the case of the Petitioner being, broadly speaking, that the taxable liability and consequential penalty have been imposed on the Petitioner on the ground that he had transported the consignment, without obtaining from the dealer copies of valid permits pertaining to a period prior to the introduction of TVAT Act. The Petitioner, therefore, contends that no taxable liability can be imposed under TVAT Act inasmuch as the transaction took place before the TVAT Act came into force.

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8. The Petitioner, a transporter registered in terms of the provisions of Rule 64A of the Tripura Sales Tax Rules, 1976 (in short TST Rules, 1976), was issued an order, dated 28.11.2003, saddling the Petitioner with taxable liability of Rs. 79,075/- by adopting best judgment procedure. Consequent upon the order, dated 28.11.2003, aforementioned, a notice of demand, dated 09.12.2003, was also issued against the Petitioner. Feeling aggrieved by the notice of demand, so issued, the Petitioner has filed an appeal. A revision was also filed by the Petitioner, which, eventually, came to be rejected. Being aggrieved by the rejection of the revision, the Petitioner has filed this writ petition under Article 226 of the Constitution of India seeking to get set aside and quashed the impugned notice of demand.

9. The Petitioner has also challenged the imposition of tax as well as the penalty,

the case of the Petitioner being, broadly speaking, that the taxable liability and consequential penalty have been imposed on the Petitioner on the ground that he had transported the consignment, without obtaining from the dealer copies of valid permits pertaining to a period prior to the introduction of TVAT Act. The Petitioner, therefore, contends that no taxable liability can be imposed under TVAT Act inasmuch as the transaction took place before the TVAT Act came into force.

10. The Petitioner has accordingly sought for setting aside and quashing the impugned order of assessment, dated 28.11.2003, which has been made by adopting the procedure of best judgment assessment raised by the Respondent/authority concerned and the impugned notice of demand, dated 09.12.2003. The Petitioner has further sought for necessary direction to be issued restraining and prohibiting the Respondents/authorities concerned from pursuing further the impugned order of assessment and the notice of demand and also the order, dated 09.12.2003, whereby the Petitioner was directed to make deposit of the assessed amount on or before 09.01.2004.

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11. The Petitioner, namely, M/s. M.S. Freight Carriers, a transporter registered in terms of the provisions of Rule 64A of the Tripura Sales Tax Rules, 1976 (in short TST Rules, 1976), was served with an order, dated 08.01.2004, by the Respondent No. 3, namely, Superintendent of Taxes, Charge I, Agartala, West Tripura, saddling the Petitioner with taxable liability of Rs. 1,48,855/-. Thereafter, vide another order, dated 22.06.2004, Respondent No. 3 modified the said order, dated 08.01.2004, reducing the liability to the tune of Rs. 78,003.70/-. Consequent upon the order, dated 08.01.2004, aforementioned, two notices of demand, dated 20.01.2004 and 02.07.2004 were also issued against the Petitioner directing the Petitioner to make payment of the said amount. Feeling aggrieved by the notices of demand, so issued, the Petitioner filed three separate revision petitions u/s 21 of the Tripura Sales Tax Act, 1976, before the Respondent No. 2, namely, Commissioner of Taxes, Govt. of Tripura, Agartala, assailing the findings recorded in the said demand notices by the Respondent No. 3. By order, dated 12.07.2005, Respondent No. 2 dismissed the revision petitions filed by the Petitioner. Being aggrieved by the rejection of the revision petitions, the Petitioner has filed this writ petition under Article 226 of the Constitution of India seeking to get set aside and quashed the impugned notices of demand.

12. The Petitioner has also challenged the imposition of tax as well as the penalty, the case of the Petitioner being, broadly speaking, that the taxable liability and consequential penalty have been imposed on the Petitioner on the ground that he had transported the consignment, without obtaining from the dealer copies of valid permits pertaining to a period prior to the introduction of TVAT Act. The Petitioner, therefore, contends that no taxable liability can be imposed under TVAT Act inasmuch as the transaction took place before the TVAT Act came into force.

13. The Petitioner has accordingly sought for setting aside and quashing the impugned order of assessment, dated 08.01.2004, which has been made by adopting the procedure of best judgment assessment raised by the Respondent/authority concerned and the impugned notices of demand, dated 20.01.2004 and 02.07.2004. The Petitioner has further sought for necessary direction to be issued restraining and prohibiting the Respondents/authorities concerned from pursuing further the impugned order of assessment and the notice of demand and also the order, dated 22.07.2005, whereby the Petitioner was directed to make deposit of the assessed amount on or before 30.07.2005.

WP(C) 290/2005

14. The Petitioner, a transporter registered in terms of the provisions of Rule 64A of the Tripura Sales Tax Rules, 1976 (in short TST Rules, 1976), was issued an order, dated 17.05.2004, saddling the Petitioner with taxable liability of Rs. 21,300/- by adopting best judgment procedure. Consequent upon the order, dated 17.05.2004, aforementioned, a notice of demand, dated 24.05.2004, was also issued against the Petitioner. Feeling aggrieved by the notice of demand, so issued, the Petitioner filed a revision, which, eventually, came to be rejected by order, dated 22.07.2005. Being aggrieved by the rejection of the revision, the Petitioner has filed this writ petition under Article 226 of the Constitution of India seeking to get set aside and quashed the impugned notice of demand.

15. The Petitioner has also challenged the imposition of tax as well as the penalty, the case of the Petitioner being, broadly speaking, that the taxable liability and consequential penalty have been imposed on the Petitioner on the ground that he had transported the consignment, without obtaining from the dealer copies of valid permits pertaining to a period prior to the introduction of TVAT Act. The Petitioner, therefore, contends that no taxable liability can be imposed under TVAT Act inasmuch as the transaction took place before the TVAT Act came into force.

16. The Petitioner has accordingly sought for setting aside and quashing the impugned order of assessment, dated 10.09.2003, which has been made by adopting the procedure of best judgment assessment raised by the Respondent/authority concerned and the impugned notice of demand, dated 24.05.2004. The Petitioner has further sought for necessary direction to be issued restraining and prohibiting the Respondents/authorities concerned from pursuing further the impugned order of assessment and the notice of demand and also the order, dated 24.05.2004, whereby the Petitioner was directed to make deposit of the assessed amount on or before 24.06.2004.

WP(C) 347/2005

17. The Petitioner, a transporter registered in terms of the provisions of Rule 64A of the Tripura Sales Tax Rules, 1976 (in short TST Rules, 1976), was issued an order, dated 16.07.2003, saddling the Petitioner with taxable liability of Rs. 1,41,423/- by adopting best judgment procedure. Consequent upon the order,

dated 16.07.2003, aforementioned, a notice of demand, dated 18.08.2003, was also issued against the Petitioner. Feeling aggrieved by the notice of demand, so issued, the Petitioner filed a revision, which, eventually, came to be rejected. Being aggrieved by the rejection of the revision, the Petitioner has filed this writ petition under Article 226 of the Constitution of India seeking to get set aside and quashed the impugned notice of demand.

18. The Petitioner has also challenged the imposition of tax as well as the penalty, the case of the Petitioner being, broadly speaking, that the taxable liability and consequential penalty have been imposed on the Petitioner on the ground that he had transported the consignment, without obtaining from the dealer copies of valid permits pertaining to a period prior to the introduction of TVAT Act. The Petitioner, therefore, contends that no taxable liability can be imposed under TVAT Act inasmuch as the transaction took place before the TVAT Act came into force.

19. The Petitioner has accordingly sought for setting aside and quashing the impugned order of assessment, dated 10.09.2003, which has been made by adopting the procedure of best judgment assessment raised by the Respondent/ authority concerned and the impugned notice of demand, dated 18.08.2003. The Petitioner has further sought for necessary direction to be issued restraining and prohibiting the Respondents/authorities concerned from pursuing further the impugned order of assessment and the notice of demand and also the order, dated 10.09.2003, whereby the Petitioner was directed to make deposit of the assessed amount on or before 18.09.2003.

WP(C) 348/2005

20. The Petitioner, a transporter registered in terms of the provisions of Rule 64A of the Tripura Sales Tax Rules, 1976 (in short TST Rules, 1976), was issued an order, dated 10.09.2003, saddling the Petitioner with taxable liability of Rs. 79,145/- by adopting best judgment procedure. Consequent upon the order, dated 10.09.2003, aforementioned, a notice of demand, dated 27.09.2003, was also issued against the Petitioner. Feeling aggrieved by the notice of demand, so issued, the Petitioner filed a revision, which, eventually, came to be rejected. Being aggrieved by the rejection of the revision, the Petitioner has filed this writ petition under Article 226 of the Constitution of India seeking to get set aside and quashed the impugned notice of demand.

21. The Petitioner has also challenged the imposition of tax as well as the penalty, the case of the Petitioner being, broadly speaking, that the taxable liability and consequential penalty have been imposed on the Petitioner on the ground that he had transported the consignment, without obtaining from the dealer copies of valid permits pertaining to a period prior to the introduction of TVAT Act. The Petitioner, therefore, contends that no taxable liability can be imposed under TVAT Act inasmuch as the transaction took place before the TVAT Act came into force.

22. The Petitioner has accordingly sought for setting aside and quashing the impugned order of assessment, dated 10.09.2003, which has been made by adopting the procedure of best judgment assessment raised by the Respondent/authority concerned and the impugned notice of demand, dated 27.09.2003. The Petitioner has further sought for necessary direction to be issued restraining and prohibiting the Respondents/authorities concerned from pursuing further the impugned order of assessment and the notice of demand and also the order, dated 27.09.2003, whereby the Petitioner was directed to make deposit of the assessed amount on or before 26.10.2003.

WP(C) 89/2006

23. The Petitioner, a transporter registered in terms of the provisions of Rule 64A of the Tripura Sales Tax Rules, 1976 (in short TST Rules, 1976), was issued a show-cause notice, dated 07.12.2005. Consequent upon the show-cause notice, dated 07.12.2005, an order was issued, on 09.01.2006, saddling the Petitioner with taxable liability of Rs. 4,07,262.32/- including penalty by adopting the best judgment procedure. Thereafter, notice of demand, dated 12.01.2006, was also issued against the Petitioner. Feeling aggrieved by the notices of demand, so issued, the Petitioner has filed this writ petition under Article 226 of the Constitution of India seeking to get set aside and quashed the impugned notices of demand.

24. The Petitioner has also challenged the imposition of tax as well as the penalty, the case of the Petitioner being, broadly speaking, that the taxable liability and consequential penalty have been imposed on the Petitioner on the ground that he had transported the consignment, without obtaining from the dealer copies of valid permits pertaining to a period prior to the introduction of TVAT Act. The Petitioner, therefore, contends that no taxable liability can be imposed under TVAT Act inasmuch as the transaction took place before the TVAT Act came into force.

25. The Petitioner has accordingly sought for setting aside and quashing the impugned order of assessment, dated 09.01.2006, which has been made by adopting the procedure of best judgment assessment raised by the Respondent/authority concerned and the impugned notice of demand, dated 12.01.2006. The Petitioner has further sought for necessary direction to be issued restraining and prohibiting the Respondents/authorities concerned from pursuing further the impugned order of assessment and the notice of demand and also the order, dated 12.01.2006, whereby the Petitioner was directed to make deposit of the assessed amount on or before 12.02.2006.

WP(C) No. 88/2007

26. The Petitioner carries on business of transportation of goods of different persons, who are registered dealers, as defined under the Tripura Sales Tax Act, 1976 (in short the TST Act, 1976), with respective Superintendents of Taxes within whose jurisdiction such dealers are carrying on their respective business.

Under the scheme of the TST Act, 1976, the dealers are required to be registered under the TST Act so as to be able to import goods from outside the State of Tripura and this registration enables the taxing authority to assess and collect taxes from such dealers for the goods so imported. Rule 64A of the Tripura Sales Tax Rules, 1976 (in short TST Rules) requires transporters/carriers, running the transport business in the State of Tripura, relating to taxable goods, to apply for registration to the jurisdictional Superintendent of Taxes. In terms of the requirements of Rule 64A, the Petitioner stands registered as a transporter.

27. In fact, Rule 64A(1) lays down that no transporter/ carrier/transporting agent shall operate its transport business, in Tripura, relating to taxable goods without being registered with the Commissioner of Taxes in such a manner as he may direct. Rule 64A (4) lays down that every transporter, carrier or transporting agent operating its transport business, in Tripura, shall maintain in a Register in Form No. XXII, a true and correct account of every consignment of goods transported into Tripura, and in Form No. XXIII of goods transported outside Tripura, through it and it shall furnish a statement of stock of undelivered consignments in Form XXV quarterly. As per Sub-rule (5) of Rule 64A, no taxable goods shall be delivered by the transporters, carriers or transporting agents unless the requirements laid down in Rule 46 and 47 have been complied with, while according to Sub-rule (6) no delivery of taxable goods shall be given by the transporter without obtaining a copy of declaration in Form XVIII signed by the Superintendent of Taxes/Inspector of Taxes.

28. Alleging that the Petitioner has delivered taxable consignments to dealers without obtaining from the dealers copies of valid permits pertaining to a period prior to the introduction of the Tripura Value Added Tax Act, 2004, (in short TVAT Act), the Petitioner was served with a notice, on 19.10.2006, to show cause as to why action shall not be taken against him in accordance with law, the action contemplated being that the Petitioner shall be saddled with the liability to pay not only the tax which was payable by the dealer, whose goods the Petitioner had allegedly carried, but also penalty at the rate of 150% on the taxable amount. Though the Petitioner gave its reply denying and disputing the taxable liability, the Respondent/authority concerned passed an order, on 27.12.2006, imposing tax payable to the tune of Rs. 56,812.40 paisa and penalty at the rate of 150% on the said tax payable, the amount of the penalty being Rs. 85,280.60, the total sum payable being Rs. 1,42,031/-.

29. By filing this writ petition under Article 226 of the Constitution of India, the Petitioner has challenged the constitutionality and validity of the provisions contained in Section 13A of the TVAT Act, which provides for imposition of tax, which a transporter may be made liable to pay, being value of the goods, which the transporter might have carried without obtaining copy of valid permit from the dealer concerned coupled with the liability to pay penalty, which may extend to 150% of the tax involved. The Petitioner has accordingly sought for setting aside and quashing the impugned order of assessment, dated 27.12.2006, which

has been made by adopting the procedure of best judgment assessment raised by the Respondent/authority concerned and the impugned notice of demand, dated 28.12.2006. The Petitioner has further sought for necessary direction to be issued restraining and prohibiting the Respondents/authorities concerned from pursuing further the impugned order of assessment and the notice of demand and also the order, dated 14.02.2007, whereby the Petitioner was directed to make deposit of the assessed amount on 21.02.2007.

Submissions

30. Mr. Somik Deb, learned Counsel, appearing on behalf of the Petitioners, has made multi-fold submissions in support of the challenges as indicated in the questions formulated above. He submitted that that unless there is a "sale" of goods, State Legislature cannot cast liability on a person to pay tax and/or penalty for evasion of tax. He also submits that since Section 2(j) of the Tripura Sales Tax Act, 1976 (since repealed and hereinafter referred to as the TST Act, 1976) and Section 2(28) of the Tripura Value Added Tax Act, 2004 (hereinafter referred to as the TVAT Act, 2004) defines the term "tax" to mean "tax payable" under the said enactments, the provisions of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, providing for realization of penalty, which may extend to 150% of the "tax involved" in addition to the tax, without, however, making any corresponding provisions for levy and determination of tax on "transporters", is constitutionally invalid. Mr. Deb further contends that penalty cannot be levied on "transporters" unless charge is created imposing liability on the "transporters", as a class, to pay tax, and corresponding mechanism is made for assessment as well as realization of such tax, no penalty can be imposed on the "transporters" inasmuch no liability to pay penalty can be said to have arisen, for, penalty can be imposed only when there is default in making payment of tax, which is, otherwise, payable by the "transporter".

31. Mr. Deb, learned Counsel for the Petitioners, contends that although a State Legislature has the ancillary power to make provisions, in a taxing statute, so as to prevent evasion of tax, commonly known as regulatory provisions, it cannot create taxable liability by resorting to its ancillary power of making regulatory provisions. It is also contended by Mr. Deb that legislative powers include all incidental and subsidiary powers, but power to tax is neither incidental nor a subsidiary power. It is further contended by Mr. Deb that the principle that the topics/field of legislation, as indicated by various Entries in the List of the Seventh Schedule of the Constitution of India, must be given the widest possible meaning does not apply to a taxing statute inasmuch as a taxing statute merits strict construction.

32. According to learned Counsel for the Petitioners, unless there is an express power derived from a constitutional Entry, authorizing the Legislature to levy tax, a taxable liability, through a statutory provision, would be unconstitutional.

33. Mr. Deb submits that in a fiscal statute, the subject, sought to be taxed,

must clearly fall within the charging provisions and taxing statutes are to be strictly construed. In applying the terms of the charge or the terms of an exemption from a charge, no consideration of equity or hardship are to affect the construction of a given fiscal statute. Relying on para 912 of volume 44 of Halsbury's Laws of England , Mr. Deb submits that while construing words in a taxing statute, the Court must have primary regard to the words themselves and the same must be construed according to their natural meaning in their context. In support of his contention, Mr. Deb relied on a decision of the Supreme Court in Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, wherein it was held as under:

Taxation is considered to be a distinct matter for purposes of legislative competence . Hence, the power to tax cannot be deduced from a general legislative entry as an ancillary power.

34. Reliance has also been placed by Mr. Deb on a decision of the Supreme Court in Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, wherein it was held that the legislative powers, normally, include all incidental and subsidiary powers, but the power to tax is neither incidental nor subsidiary to the power to legislate on a matter or topic. On the same score, Mr. Deb has relied on the decision of the Constitution Bench in The State of West Bengal Vs. Kesoram Industries Ltd. and Others,

35. In support of his contention that no taxable liability can be imposed on a "transporter" inasmuch as he neither sells nor does he purchase any goods, reliance has been placed on a decision of the Madras High Court A.B.A. Azeez Khan Sahib Vs. The State of Madras, too, wherein it was held that in the absence of a finding that the Petitioner was either a "dealer" or owner of the goods, the penalty collected from him, through his driver, cannot be sustained.

36. In support of his contentions indicated above, reliance has also been placed on the decisions in K.P. Abdulla and Bros. and Another Vs. Check Post Officer, Kandaigoundanchavadi and Others, Hindustan Steel Ltd. v. State of Orissa (1979) 25 STC 211 (SC) Yogesh Trading Co., Kotachery Vs. The Intelligence Officer of Sales Tax Cannanore and Another, , The Check Post Officer and Others Vs. K.P. Abdulla and Bros., , The Anantapur District Co-operative Marketing Society Ltd. and Others Vs. The Special Assistant Commercial Tax Officer (Evasions) and Others, , Dunlop India Ltd. v. State of Punjab (1972) 30 STC 597 (P&H) , State of Punjab v. Dunlop India Ltd. (1974) 33 STC 168 (P&H), Babu Ram Golyani and Others Vs. The State of Haryana and Others, State of Haryana and Others Vs. Sant Lal and Another, Amrit Banaspati Compnay Ltd. v. State of Punjab: (2001) 122 STC 323 (P&H) , Mool Chand Chuni Lal Vs. Manmohan Singh and Another, , Sodhi Transport Company v. State of U.P (1986) 62 STC 381 (SC), Syed Sirajuddin Vs. Intelligence Officer, Squad No. IV, Agricultural Income Tax and Sales Tax and Others, .

37. It is submitted by Mr. Deb that in exercise of the legislative powers under

Entry 54 of List II, a State cannot legislate on matters, which do not have reasonable or proximate connection with the levy of tax.

38. Referring to the provisions of the TST Act, 1976, it is pointed out by Mr. Deb that the definition of "dealer", as given in Section 2(b) thereof, does not embrace, within its fold, a "transporter" inasmuch as no legal fiction to include a "transporter" within the definition of "dealer" has been created. Similarly, points out Mr. Deb, the definitions of "sale" and "sale" price as given in Section 2(g) and 2(h) of the TST Act, 1976, respectively, do not relate to the transporters. It is further pointed out by Mr. Deb that the definition of tax as given in Section 2(j) of the TST Act, 1976, and the liability to pay tax, as per Section 3(i), suggest that only a "dealer" has the liability to pay "tax" under the said Act. Similarly, contends Mr. Deb, the liability to submit return or provisions for assessment of tax are relatable to only a "dealer" and not to anyone else, particularly, a "transporter" inasmuch as he does not sell goods nor does he fall within the definition of "dealer", as given in the TST Act. It is pointed out by Mr. Deb that while Section 2(p) of the TST Act and Section 2(33) of the TVAT Act, defines the expression "transporter" to mean a registered transport company, a carrier or a transporting agent operating transport business, in Tripura, in taxable goods and the said definitions do not make a "transporter" a "dealer" within the meaning of the respective enactments, yet penal provisions have been made, through Section 13A of the TST Act and Section 77 of the TVAT Act, respectively, against transporters and without, thus, creating any charge or deeming provisions thereunder making a "transporter" a "dealer" enabling the State to impose tax on the transporter. Such imposition of penalty, according to Mr. Deb, is constitutionally impermissible. In support of his contention, Mr. Deb relies on the decision of the Supreme Court in J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another,

39. Relying on the decision of the Supreme Court in Maruti Wire Industries Pvt. Ltd. Vs. S.T.O., Ist Circle, Mattancherry and Others, Mr. Deb, learned Counsel for the Petitioners, submits that in the present cases, the penalty, which is required to be calculated on the basis of tax payable, cannot be imposed on the "transporters" unless the enactment specifically provides for levy of tax on the "transporters". In support of this contention, E.I.D. Parry (India) Ltd. Vs. Assistant Commissioner of Commercial Taxes, Chennai, , Gursahai Saigal Vs. Commissioner of Income Tax, Punjab,

40. Mr. Deb submits that the provisions, in a taxing statute, dealing with the machinery for assessment, have to be construed by the ordinary rules of construction, that is to say, in accordance with the clear intention of the legislature, which has to make a charge levied effective. In support of his contention, Mr. Deb relies on the decisions in Murarilal Mahabir Prasad and Others Vs. Shri B.R. Vad and Others, , Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others, , Khazan Chand and Others Vs. State of Jammu and Kashmir and Others, , Goodyear India Ltd., Gedore (India) Pvt. Ltd.,

Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, India Carbon Ltd. etc. Vs. State of Assam, Harshad Shantilal Mehta Vs. Custodian and Ors, and Mathuram Agrawal Vs. State of Madhya Pradesh,

41. Mr. Deb submits that Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, are mere penal provisions without, however, making any changes or alterations in the foundation of the conclusions arrived at Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others, and such legislative provisions, superseding a judicial decision, is impermissible in law.

42. It is submitted by Mr. Deb that the State legislature only wanted to override the decision/conclusion arrived at by the Supreme Court, in Tripura Goods Transport Association (supra), without, however, altering/ neutralizing the base of the said judgment. Mr. Deb contends that such a course of action, adopted by the State legislature, is impermissible in law.

43. According to Mr. Somik Deb, a "transporter" does not have, under the TST Act, 1976, and the Tripura Sales Tax Rules, 1976, any obligation whatsoever to pay any tax and/or penalty, yet Section 13A of the TST Act, 1976, which was inserted in the statute subsequently by the Eight Amendment Act and the incorporation of Section 77 of the TVAT Act, 2004, aims at superseding the observations made, conclusions reached and decision rendered, in Tripura Goods Transport Association (supra) Mr. Deb submits that under the constitutional scheme, although the appropriate legislature, within its legislative limitations, has the competence to annul the efficacy of a judicial pronouncement by diluting/ neutralizing the foundations of a judicial pronouncement, yet no legislature can simply overrule a judicial decision by making amendments in the statute and what it can do is that it can render the judgment ineffective by altering/ neutralizing the foundational facts leading to the making/passing of the judgment.

44. In support of his above contention, Mr. Deb relies on the decisions of Supreme Court in Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others, , The Municipal Corporation of The City of Ahmedabad and Another, Vs. The New Shrock Spg. and Wvg. Co. Ltd. etc. etc., , Janapada Sabha Chhindwara Vs. The Central Provinces Syndicate Ltd. and Another, , Madan Mohan Pathak and Another Vs. Union of India (UOI) and Others, , State of Haryana and others Vs. The Karnal Co-op. Farmers' Society Limited, etc. etc. and others, Cauvery Water Disputes Tribunal, Re 1993 Supp (1) SCC 96, Indian Aluminium Co. etc. etc. Vs. State of Kerala and others, , K. Sankaran Nair (Dead) through Lrs. Vs. Devaki Amma Malathy Amma and Others, , The State of Maharashtra and Others Vs. Kumari Tanuja, and B. Krishna Bhat Vs. State of Karnataka and Another,

45. Mr. N. Adhikari, the learned Advocate General, Tripura, controvert the

submissions made by Mr. Deb, counsel for the Petitioners, contends that the provisions of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, are constitutionally valid.

46. The learned Advocate General points out that the provisions, contained in Section 13A of the TST Act and Section 77 of the TVAT Act, are meant to check evasion of tax and are intended to operate as deterrent against tax evaders and are, therefore, ancillary and incidental to the power to levy tax on the sales of goods. Learned Advocate General submits that a taxing statute may make provisions to prevent, stop and arrest pilferage of tax by introducing such mechanism as it deems fit. In other words, what the learned Advocate General contends is that a State legislature is competent to make provisions for checking evasion of tax and in doing so, it may impose any obligations on any person, other than a "dealer", who has connection with the consignor or consignee in relation to the goods sold or purchased requiring him to perform such obligation and to make him liable for an offence, if he acts contrary to what he is obliged to do or when his conduct suffers from dereliction of duty. Such provisions, according to the learned Advocate General, cannot be construed to be beyond the competence of the Legislature. Learned Advocate General, in support of his submissions, places reliance on *State of West Bengal and Another Vs. E.I.T.A. India Ltd. and Others*,

47. The learned Advocate General also contends that by the impugned provision of Section 13A of the TST Act and Section 77 of the TVAT Act, no tax and/or penalty can be said to have been imposed on a "transporter", which is, otherwise, on a "dealer" and, therefore, the aforesaid provisions, can, in no way, dilute the base of the judgment in *Tripura Goods Transport Association (Supra)*.

48. In reply, Mr. Somik Deb, learned Counsel for the Petitioners, submits that in *E.I.T.A India Ltd (Supra)*, the statutory provisions, which fell for consideration, contained deeming provisions treating a particular class of dealing by transporters as a sale, but no such deeming provisions exist in the TST Act and/or the TVAT Act and, hence, the decision, in *E.I.T.A India Ltd (Supra)*, is not applicable to the present case.

49. In the present set of writ applications, since the constitutionality of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, have been challenged, let us, first, examine the power of the Court to declare the provisions of a given statute unconstitutional. Let us, therefore, ascertain, first, the contours of the High Courts' power to declare, in exercise of its extra-ordinary jurisdiction, under Article 226, the provisions of a given statute unconstitutional.

The Contours of the High Courts' power to declare the provisions of a given statute unconstitutional:

50. 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 left in no 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 upon 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)

51. There can be no doubt that the High Court 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 the 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.

52. 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.

53. 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.*,

54. 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 and 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.

55. 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,

56. 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 and the TVAT Act as well as the Rules framed hereunder, which form the subject-matter of this set of writ petitions.

57. 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.

58. 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.

59. 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.

60. We must bear in mind that while construing fiscal statute, the function of a 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:

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

61. 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.

62. 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

63. 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.

64. 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.

65. 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.

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

67. Before we examine the constitutional validity of the provisions of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, it will also be necessary to examine the distribution of legislative power under our constitutional scheme. There is well defined distribution of legislative powers contained in Part XI of the Constitution. Every State legislature and the Parliament, as the case may be, has the power to make laws with respect to any of the matters, which fall within its field of legislation under Article 246 read with the Seventh Schedule of the Constitution. It is well settled that entries, in the Seventh Schedule to the Constitution, are not powers, but fields of legislation. The legislature derives its power from Article 246 and other related articles of the Constitution. The language of the respective entries should be given the widest scope of their meaning. When a Court is called upon to interpret the Constitution, it must not be construed in any narrow or pedantic sense. The Supreme Court, in *Jilubhai Nanbhai Khachar, etc. etc. Vs. State of Gujarat and another, etc. etc.*, held that the broad and liberal spirit should inspire those, whose duty it is to interpret the Constitution and to find out whether an impugned Act is relatable to any entry in the relevant list . The function of the lists is not to confer powers; they merely demarcate the legislative field. The Federal Court, while interpreting the Government of India Act, 1935, in the *Governor- General in Council v. Relegih Investment Co.*, reported in 1944 IC 51, observed:

It would not be right to derive the power to legislate on this topic merely from

the reference to it in the List, because the purpose of the List was not to create or confer powers, but only to distribute between Federal and the Provincial Legislatures the powers which had been conferred by Section 99 and 100 of the Act.

68. The lists are designed to define and limit the respective areas of competence of the Union and the States. They neither impose any implied restriction on the legislative power conferred by Article 246 of the Constitution nor do the entries prescribe any duty to exercise the legislative power in any particular manner. Hence, the language of the entries should be given, as indicated above, widest scope. These lists should be construed in a liberal spirit so as to include within each of them all that is subsidiary and incidental to the power thereunder enumerated. But an interpretation of the content and scope of such power, however liberal, cannot be adopted to include within its meaning anything, which an entry, in positive terms, excludes or restricts. In construing such an entry conferring legislative powers, the widest possible construction, according to their ordinary meaning, must be put upon the words used therein. The cardinal rule of interpretation is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power, the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude. The heads of the legislation should not be construed in a narrow and pedantic sense. Indeed, in interpreting a constituent or organic statute, such as, the Constitution, the construction, which is most beneficial to the widest possible amplitude of its powers, must be adopted. In *Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.)*, reported in (1936) 56 C.L.R.337, the observations, relied on, are the following:

In any investigation of constitutional powers of these great Dominion Legislatures, it is not proper that a Court should deny to such a legislature the right of solving taxation problems unfettered by a priori legal categories which often derive from the exercise of legislative power in the same constitutional unit.

69. The words of a Constitution, conferring legislative powers, should be construed in such a manner as to make it flexible and elastic so as to enable that power to be exercised in respect to the matters, which might be unknown at a time, when it was enacted, but might come into existence with the march of time and progress in science. Its general word has to be extended to all ancillary and subsidiary matters, which can fairly and reasonably be comprehended as included, embodied and embedded therein. It was held by the Supreme Court, in the *The Check Post Officer and Others Vs. K.P. Abdulla and Bros.*, , that an entry confers power upon the legislature to legislate for matters ancillary or incidental including provisions preventing evasion of the law. A power, conferred on the Legislature to levy tax, must include the power not only to impose tax, but also select the article or commodity for exercise of such powers. It must, likewise, include the power to fix rate and prescribe the machinery for the recovery of the

tax including provisions necessary to prevent evasion of tax. The provisions, in a fiscal statute, are not to be so construed as to furnish a chance to escape or as a means of evasion. In *A.B.C. (India) Ltd. Vs. State of Assam and Another*, the Supreme Court held as under:

As per the accepted norms of taxation jurisdiction (Sic) whatever ancillary or subsidiary provision necessary for achieving the object of a tax statute is covered by Entry 54 List II of the Seventh Schedule to the Constitution. The entries in the legislative list have a very wide meaning and scope and should have a broad interpretation so as to make provisions in the Act workable and in the interest of the Revenue.

70. Before entering into the examination of the constitutionality of the impugned provisions of the statute aforementioned, it may be noted that TST Act, 1976, provides for levy of tax on the "turnover" of the sales at the rate specified in Column (3) of the Schedule attached to the Act, the "turnover" having been defined, u/s 2(m), to mean the aggregated amount of the "sale price" receivable or actually received by a "dealer" in respect of any sale of goods made, during any prescribed period, in any year, after making statutorily permissible deductions there from and the "sale price" being, as defined by Section 2(h), 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, 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.

71. Section 3 of the TST Act, 1976, provides for levy of tax on "sale", Section 9 provides for assessment of tax and Section 10 embodies provisions for cancellation of assessment. Section 13 prescribes penalty for concealment of "turnover" and evasion of tax by a dealer; whereas Section 13A makes provisions for imposition of penalty on the "transporter" subject to conditions as would be discussed later in this decision. (See *Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others*,

72. Turning to the TVAT Act, 2004, one may note that this enactment provides for a levy of "value added tax" on the "taxable turnover" of the sales. Section 3 of the TVAT Act, now, provides for the incidence of tax, Section 5 thereof provides for levy of tax on sale, Section 7 provides for the rates of tax and Section 9 thereof provides the procedure for determination of "tax payable". While Chapter IV of the TVAT Act, 2004, contains provisions for registration of "dealer", Section 22 thereof provides for registration of transporters. Similarly, while Chapter v. of the TVAT Act, 2004, contains provisions relating to returns and assessment, Chapter VI contains provisions relating to realization of payment and recovery of tax, penalty, and interest on the dues. More importantly, Chapter X of the TVAT Act, 2004, contains provisions relating to detection and prevention of tax evasion and Chapter XII thereof relates to offences and penalties.

73. To appreciate the scope of the controversy involved in the present set of writ petitions, the relevant provisions of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, are reproduced herein below:

13 A (1)- If the commissioner is satisfied that any transporter has delivered taxable goods to any person without obtaining from the dealer copy of the valid permit or has concealed the actual particulars of the consignment transported by him, the Commissioner may direct that such transporter shall pay, in addition to tax, by way of penalty, a sum which may extend to one hundred and fifty percent of the tax involved.

(2) No order under Sub-section (1) shall be made unless the transporter has been heard or has been given reasonable opportunity of being heard,

74. Section 77 of the Tripura Value Added Tax Act, 2004, is reproduced herein below:

77. Penalty payable by the transporters:

(1) If the Commissioner is satisfied that any transporter has delivered taxable goods to any person without obtaining from the dealer, copy of the valid permit or has concealed the actual particulars of the consignment transported by him, the Commissioner may direct that such transporter shall pay, in addition to tax, by way of penalty, a sum which may extend to one hundred and fifty percent of the tax involved.

(2) No order under Sub-section (1) shall be made unless the transporter has been heard or has been given reasonable opportunity of being heard.

Whether penalty can be imposed on a transporter, who facilitates and/or abets evasion of tax by a dealer and because of whose such default, evasion of tax takes place?

75. As regards the imposition of "penalty" on a "transporter", who facilitates and/or abets evasion of tax by a dealer and because of whose such default, evasion of tax takes place, it cannot be disputed that a transporter transports goods and is reasonably and proximately connected to the transactions of sale as well as purchase of such goods. With the help of a law, enacted by taking recourse to Entry 54 of List II of the Seventh Schedule of the Constitution of India, tax can be imposed on a transaction of sale and purchase of goods. In order to realize tax legitimately due to a State on a sale and purchase of goods, certain obligations can, indisputably, be cast on transporters to furnish information about the consignor and consignee, whose goods a transporter may be transporting. Indisputably, obligation can also be cast on the transporters, as a class, to furnish declaration, in prescribed forms, so that evasion of sales tax may not take place.

76. The legislature may make appropriate provisions, in a taxing statute, to the effect that in the event of a transporter's default to fulfill its obligation and/or his

default to furnish declaration forms and/or furnish true and correct particulars of the consignor/consignee, "penalty" shall be imposed on such a transporter. The transporters are, as a class, not strangers to the sale or purchase of goods. To the contrary, they are, ordinarily, inextricably a part and parcel of transactions of sale and purchase of goods and are directly involved in storing the goods purchased or sold by dealers. In many cases, such transactions are fictitiously carried on in false names and addresses besides false classifications vis-à-vis transportation of such goods in and outside the State making themselves thereby parties to the episodes of such fictitious transactions with the purpose of helping evasion of tax by dealers, who make sales and purchases of such goods.

77. Provisions for prevention of evasion of tax are ancillary and subsidiary powers necessary for achieving the objects of a taxing statute and such ancillary and subsidiary powers are covered by Entry 54 of List II of the Seventh Schedule of Constitution of India. Hence, the provisions, imposing "penalty" on a "transporter", who facilitates and/or abets evasion of taxes, and because of whose fault, an evasion of tax takes place, cannot be said to be outside the ancillary and subsidiary powers of the State legislature under Entry 54. The levy of "penalty", on a transporter, has intimate nexus with evasion of tax by the dealer, whose goods are carried by the transporter and for whose failure to procure the road permit and furnish correct information, evasion of tax takes place. The Supreme Court, in *Commercial Tax Officer V. Swastik Roadways*, reported in (2004) 135 STC 1 rejected the contention that when tax is sought to be recovered from the clearing and forwarding agents in the form of "penalty", the same falls outside the ancillary and incidental power of the State legislature under Entry 54 of List II. S.H. Kapadia, J., (as his Lordship then was), speaking for the Court, observed thus:

What is disputed is that when tax is sought to be recovered from the clearing and forwarding agents in the form of penalty u/s 57(2), the same falls outside the ancillary or incidental powers of the State Legislature under entry 54 of List II as the levy under the Act is on sale and purchase of goods and as there is no nexus between such sale or purchase of goods and the clearing and forwarding agents, Sections 57 and 58 and especially the penalty provisions fall outside such ancillary powers. As stated above, the said Act provides for computation of tax, incidence of tax, recovery of tax, assessment and reassessment. The impugned provision of Section 57(1) and Section 58(1) operate in aid of Sections 27, 28 and 29 of the Act.

78. It was further observed, in *Swastik Roadways* (supra), as under:

In our view, the basis of penalty was three times the amount of tax evaded by the dealer. This basis was a measure or yardstick. It cannot convert a penalty on the defaulting clearing and forwarding agent into a tax. The object of Section 57(2) is to penalize any person who abets in or facilitates the evasion of tax. Therefore a heavy penalty is prescribed to check tax evasion, subject to satisfaction of conditions laid down in the subsection.

79. Thus, penalty can, undoubtedly, be imposed on a transporter, who facilitates and/or abets evasion of tax and because of whose default, evasion of tax takes place.

Whether tax, which is, otherwise, chargeable on, and recoverable from, a dealer, can be charged on and/or recovered from a transporter?

80. The TST Act, 1976, was enacted in exercise of the State Legislature's power traceable to Article 246(2) read with Entry 54 of List- II of the Seventh Schedule of the Constitution of India, where under a tax, on sale or purchase of goods, may be imposed. The provisions of Sections 29, 30, 32, 36A, 38 and 38B of the Tripura Sales Tax Act, 1976, cast obligation on transporters and carriers to get themselves registered, maintain accounts of goods transported and furnish declaration forms relating to consignments. These obligations aim at achieving the objective of sealing loopholes of evasion of sales tax. The legislature is free to make provisions that when a transporter fails to fulfill its obligation and/or fails to furnish declaration form and/or fails to furnish true or correct particulars of the consignor/consignee, the transporter shall be deemed to be a dealer and it shall be presumed that the goods carried by him have been sold within the State. Such presumptions are, normally, rebuttable presumptions and if the transporter proves that the goods have not been sold or otherwise disposed off within the State, tax cannot be imposed on him. When such a presumption is drawn, tax is not charged on the transporter; rather, the transporter is treated to be a dealer and the tax is charged accordingly.

81. It needs to be borne in mind that tax cannot be charged on a transporter nor can recovery of any sum be made, in the form of tax, from a transporter, which is, otherwise, chargeable from a dealer unless the transporter is, with the help of deeming provisions, either made a dealer or is presumed to be a dealer or is, at least, presumed to have sold the taxable goods, transported by him, without making payment of the taxable dues. Thus, in exercise of its legislative powers, under Entry 54 of List II of Seventh Schedule of Constitution, a State legislature, while enacting a taxing statute, cannot impose taxable liability on a transporter and the transporter cannot be made liable to pay the tax, which is payable by a dealer, unless by creating legal fiction, the "transporter" is either made a "dealer" or is presumed to be a "dealer" or is, at least, presumed to have sold the taxable goods, transported by him, without making payment of the taxable dues.

82. In Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others, the Supreme Court has held that a transporter, transporting goods, is reasonably and proximately connected to the said transaction and is, occasionally, liable under sales tax laws. There is a marked difference between provisions creating a charge for imposition of tax and provisions to deal with escapement of tax by casting obligations on some persons to perform certain acts so as to ensure that no tax liability of a dealer escapes notice of the taxing authority.

83. While analyzing the provisions of the TST Act, 1976, prior to the insertion of Section 13A therein, the Supreme Court, in *Tripura Goods Transport Association* (supra), had held that the impugned provisions of the Act are not charging provisions and no liability to pay tax is placed on the transporter. The Supreme Court pointed out, in *Tripura Goods Transport Association* (supra), that whenever any goods are sold or purchased inside or outside a State, the incidence of tax and quantum of tax have to be ascertained under the relevant taxing statute and it is necessary, for this purpose, not only to fix a "dealer" and "taxable goods", but also place of sale or purchase of goods and quantum of tax. If a "dealer", involved in a transaction of sale or purchase of taxable goods, escapes attention of the taxing authority, the result of would be that tax, on such goods, would not be paid or recovered causing thereby loss to the revenue. To oversee such possible escapements, pointed out the Supreme Court, in *Tripura Goods Transport* (supra), a mechanism is invariably drawn, in a fiscal statute, to deal with such loopholes by casting obligations on some persons to perform certain acts so as to ensure that no tax liability of any dealer escapes notice of the taxing authority.

84. Before Section 13A came to be inserted in the TST Act, 1976, the Supreme Court had observed, in *Tripura Goods Transport Association* (supra), that the liability of transporter, carrier or transporting agent arises only when he does not disclose what is required and what is within his knowledge so as to help the taxing authority collect the tax payable on a given transaction of sale of goods. In this regard, it would be appropriate to take note of a decision of this Court, in *Freight Carriers v. State of Tripura* (2009) 26 VST 233(Gau), wherein one of us (Ansari, J.) clearly held that the obligation, imposed on transporter to check evasion of tax, would not make him a dealer. While analyzing the provisions of Section 32(b) of TST Act, 1976, this Court observed, in *Freight Carriers* (supra), that the said provisions do not impose payment of tax on a transporter. In *Freight Carriers* (supra), this Court held as under:

Clause (b) does not impose payment of tax on transporter. What it does is that the tax, which was payable by the dealer, is made recoverable from the transporter if the transporter, who has committed any of the offences u/s 29, opts for composition. It is one thing to say that statute imposes tax on a person and it is quite another that the statute makes it an offence for any person, who helps in concealment of a transaction of sale or purchases by dealer or in concealment of tax liability of a dealer. Section 32(1)(b) tax care of those cases, where a person, though not a dealer, does an act or omit to do an act, which becomes and offence under any of the subsections of Section 29 and u/s 30.

85. While agreeing with the decision in *Freight Carriers* (supra), we like to clarify that although no liability can be imposed on a transporter to pay any sales tax under the TST Act, 1976, it is open to the Legislature to recover, from a transporter, an amount equivalent to the value of tax by making appropriate provisions for recovery of tax, which is, otherwise, liable to be paid, on a given

consignment of goods, by a dealer and also for imposing penalty on the "transporter" for his act of helping evasion of such tax if it is because of the conduct of the transporter that any tax escapes assessment. In *Freight Carriers* (supra), the provisions of Section 32 of the TST Act, 1976, were held to be valid inasmuch as Section 32 provided for composition of offence committed by a transporter if the transporter opted to seek composition of offence. Section 32 also provided that when the offence consisted of failure to pay tax or evasion of tax recoverable under the TST Act, 1976, then, the transporter was liable to pay, in addition to the tax including interest, if any, or penalty or both so recoverable, a sum of money not exceeding one thousand rupees or double the amount of the tax recoverable, whichever is greater. Section 32 was held to be valid, because the same did not impose any taxable liability on the transporter. What Section 32 did was that it simply provided for recovery, by way of penalty, a sum of money not exceeding rupees one thousand or double the amount of tax recoverable, whichever was greater. Thus, Section 32 provided for composition of offence by imposing penalty on the transporter making him liable to pay such a sum, which was, otherwise, liable to be paid by a dealer by way of tax and interest provided that the tax recoverable could be determined. The relevant observations, made in *Freight Carriers* (supra), read as under:

58. Situated thus, what becomes crucial to remember is that Section 32 does not impose any liability to pay tax; what it does is that if a "transporter" or carrier or transporting agent commits an offence, he becomes liable for conviction u/s 29. If he opts for composition of the offence as provided in Section 32, he would become liable to pay sum(s) of money to the extent as Section 32 imposes on such a "transporter", carrier or transporting agent.

59. A careful analysis of Section 32 shows that though failure or evasion of tax can be compounded under Clause (a) of Sub-section (1) of Section 32, the act of aiding or abetting such evasion does not fall within Clause (a) of Sub-section (1) of Section 32. Except those cases, where the offence consists of failure to pay, or evasion of, tax recoverable under the TST Act, other persons, who commit any of the offences u/s 29, would fall under Clause (b) of Sub-section (1) of Section 32, which provides for composition of offence by imposing liability to pay a sum of rupees one thousand "in addition to tax recoverable". Clause (b) does not impose any taxable liability on "transporter" nor does it create any charging provisions for payment of sales tax on the "transporter". What it does is that the amount, which is required to be paid as a taxable liability by a "dealer", makes recoverable from the "transporter" by taking resort to Clause (b) of Sub-section (1) of Section 32 if the "transporter" opts for composition of offence, which he has committed under any or all the clauses of Section 29 and u/s 30.

86. From the above discussion, the irresistible conclusion that can be arrived at is that tax can be imposed on transporters by treating a transporter as a dealer by creating legal fiction so as to treat, in the prescribed circumstances, a transporter, as a dealer, and/or by raising a legal presumption that the taxable

goods, handled by a transporter, have been delivered to a dealer without any valid permit or that the transporter has concealed the actual particulars of the goods transported by him and the goods have thereby been sold within the State by the dealer without making payment of tax for such sale. However, such a presumption may be made by the Legislature, as was done in the case of *Sodhi Transport Co. and others Vs. State of U.P. and others*, as a rebuttable presumption and the transporter concerned would not, in such a case, stand debarred from convincingly showing that the goods have not been actually sold inside the State. He may, in such a case, also establish that the goods have been delivered to a person other than a dealer or that the transaction was not a "sale" or that the goods have been "consumed" inside the State or that the goods have been re-dispatched outside the State without effecting a "sale" within the State, etc.

87. For a better appreciation of the questions, raised in *Sodhi Transport (supra)*, vis-?-vis Section 28 of the U. P. Sales Tax Act, the provisions made by Section 28 and 28-B may be looked into. Section 28 of the U . P . Sales Tax Act contemplated establishment of check posts and barriers, while Section 28-B made provisions for the procedure to be followed by persons, who intended to transport goods, by road, into the State of U. P. from places outside the State not for sale inside the State of U . P ., but for the purpose of transporting the goods outside the State of U.P. A vehicle, while entering the State of U.P., was required to obtain transit pass, which was to be delivered to the officer in-charge of the check post or barrier at the time of exit from the State. In the event of failure to produce the prescribed transit pass, the statute raised a presumption that the goods, carried thereby , had been sold within the State by the owner, or the person in charge of the vehicle, and, consequently, sales tax was livable on the goods and the owner, or in-charge of the goods, was liable to pay the tax so levied . The Supreme Court, while analyzing the provisions of Section 28 of the U . P . Sales Tax Act, took the view that Section 28B of the said Act raised a rebuttable presumption and if the presumption was not rebutted, in a given case, it was to be presumed that the goods had been sold in the State of U .P . Consequently, if presumption is raised that the goods have been sold within the State of U .P ., there would be no impediment in law to treat the transporter as a person liable to pay tax so levied . While dealing with the term, "presumption", contained in Section 28B of the U.P. Sales Tax Act, the Supreme Court pointed out, in *Sodhi Transport (supra)* , that if the transit pass was not handed over to the officer in -charge of the check -post or barrier before the goods were carried out of the State, it could be validly presumed that the goods, carried by the transporter, had been sold inside the State by the person in-charge of the said goods . The relevant observations of the Supreme Court, in *Sodhi Transport (supra)*, read as under:

10. We shall now deal with the question relating to the presumption contained in Section 28-B of the Act. It is seen that if the transit pass is not handed over to the officer in-charge of the check-post or barrier before his exit from the State it

shall be presumed that the goods carried thereby have been sold inside the State by the person in-charge of the said goods. It is contended that the said rule virtually makes a person who has not actually sold the goods liable to pay sales tax and it is further argued that a transporter being just a transporter cannot be treated as a dealer within the meaning of that expression as it was defined in the Act at the time when Section 28-B was introduced into the Act. The Appellants contend that the words "it shall be presumed that the goods carried thereby have been sold within the State" in Section 28-B of the Act as meaning that it shall be conclusively held that the goods carried thereby have been sold within the State to buttress their argument that a tax is being levied on a transaction which is not a sale at all under Entry 54 of List II of the Seventh Schedule by introducing a legal fiction.

(Emphasis is added)

88. In a case, as indicated above, it is only when the legal presumption raised is not successfully rebutted that the Authority concerned can levy tax on the transporter treating him to be a dealer if such statutory provisions exist and if such transactions can be statutorily treated as sales. The Authority concerned, before levying tax on the transporter, must, in a case of such nature, arrive at a conclusion by judicious application of mind that the goods have been sold by the transporter in the State. Explaining the rule of presumption, in such a case, the Supreme Court, in *Sodhi Transport Co.* (supra), held as under:

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

89. The Supreme Court, in *Sodhi Transport* (Supra), also pointed out that a statutory provision, which creates a rebuttable presumption, as regards the proof of a set of circumstances, which would make a transaction liable to tax with the object of preventing evasion of the tax, cannot be considered as conferring on the authority concerned the power to levy a tax, which the Legislature cannot, otherwise, levy. The relevant observations, appearing, in this regard, in *Sodhi Transport Co.* (supra), read as under:

16. In our opinion, a statutory provision which creates a rebuttable presumption as regards the proof of a set of circumstances which would make a transaction

liable to tax with the object of preventing evasion of the tax cannot be considered as conferring on the authority concerned the power to levy a tax which the legislature cannot otherwise levy. A rebuttable presumption which is clearly a rule of evidence has the effect of shifting the burden of proof and it is hard to see how it is unconstitutional when the person concerned has the opportunity to displace the presumption by leading evidence.

90. What surfaces from the above discussion is that tax can be imposed on a transporter. In order to, however, enable the State legislature to do so, the transporter must be treated to be a dealer by creating necessary legal fiction in this regard and such statutory provisions must provide that the goods, carried by the transporter, shall, subject to the prescribed conditions, be deemed to have been sold within the State by the transporter.

91. In fact, even in the case of *Swastik Roadways (supra)*, wherein the Madhya Pradesh Commercial Tax Act, 1994, (in short, "the MP Commercial Tax Act") was enacted to levy tax on sale and purchase of goods and incidence of tax was on the dealer, but Section 57 of MP Commercial Tax Act required Clearing and Forwarding Agents (C&F) to furnish information including the statement of accounts to the Commissioner and, in the case of their failure to furnish, penalty could imposed three times the tax evaded by the owner/dealer of the goods. Dealing with such a situation, the Court took the view, as we have already indicated above, that tax can be recovered from the C&F agents in the form of penalty and such legislative measures are in exercise of ancillary and incidental powers of the legislature under Entry 54 List II. It is in this context that the Court observed that the basis of penalty was three times the amount of tax evaded by the dealer and this basis was a measure or yardstick and the Court, therefore, held that such a measure cannot convert a penalty into a tax. The relevant observations, if we may repeat, read, "...the basis of penalty was three times the amount of tax evaded by the dealer. This basis was a measure or yardstick. It cannot convert a penalty on the defaulting clearing and forwarding agent into a tax."

92. What follows from the above discussion is that tax can be imposed on a transporter if the transporter can, by creating necessary legal fiction, be treated as a dealer and tax would become imposable, when the sale of the goods by the transporter, as a dealer, is proved with the help of legal presumption in such a manner as the law permits. Otherwise also, the amount of tax, which is evaded by a dealer with the aid or help of a transporter, can be recovered from the transporter, by way of penalty, and such a measure of penalty will fall within the ambit of ancillary and incidental power of the State legislature under Entry 54 of Schedule II.

93. The case of *The Check Post Officer and Others Vs. K.P. Abdulla and Bros.*, which Mr. Deb has relied upon, needs to be, now, examined. In *K. P. Abdulla and Bros. (supra)*, the Supreme Court held that a provision, enacted on the assumption that goods, carried in a vehicle from one State to another, must be

presumed to have been transported after "sale" within the State, was unwarranted and, therefore, the power to seize and confiscate was liable to be struck down.

94. While considering the case of *K . P. Abdulla and Bros. (supra)*, it needs to be noted that the reason, for the conclusion reached by the Supreme Court, in *K . P . Abdulla and Bros. (supra)*, was that Sub-section (3) of Section 42 of the Madras General Sales Tax Act, 1959, assumed all goods carried in the vehicle as being those, which had been sold within the State and authorized the check post officer to seize them unless the specified documents were produced at the check post or the barrier. A provision, so enacted on the assumption that goods, carried in a vehicle from one State to another, must be presumed to have been transported after sale within the State, was held to be unwarranted and, therefore, the power to seize and confiscate was struck down and was held not to be ancillary or incidental to the power to legislate for levy of sales tax.

95. To put it a little differently, *K . P . Abdulla and Bros. (supra)*, is a case, wherein tax was sought to be imposed on assumption that all goods, carried in a vehicle from one State to another, must be presumed, without exception, to have been transferred after the sale thereof within the State. In such a legislative provision, there was no scope for anyone to show, prove or satisfy the authority concerned that the goods carried was not for sale and it is this legislative omission, which made it possible to impose tax even on a person, who carried his personal belongings from one State to another or for consumption within the State of U.P. if he was unable to produce the documents specified in various clauses of Section 42. Such sweeping powers made it possible for the authorities concerned to forfeit and confiscate even personal belongings of a person. It was because of such inflexible statutory provisions, which had made imposition of tax payable on mere assumption, that the Constitution Bench, in *K . P . Abdulla and Bros. (supra)*, struck down the enactment. This becomes clearly discernible if the observations, made in *K . P . Abdulla and Bros. (supra)*, are taken note of. The relevant observations read:

3. Entry 54 of List II of the Seventh Schedule to the Constitution authorizes the State Legislature to legislate in respect of taxes on the sale or purchase of goods. A legislative entry does not merely enunciate powers: it specifies a field of legislation and the widest import and significance should be attached to it. Power to legislate on a specified topic includes power to legislate in respect of matters which may fairly and reasonably be said to be comprehended therein: See *United Provinces v. Atiq Begum*; *Navin-Chandra Mafatlal v. CIT, Bombay City*; and *Balaji v. Income tax Officer, Special Investigation Circle*. A taxing entry therefore confers power upon the Legislature to legislate for matters ancillary or incidental including provision for preventing evasion of tax. Sub-sections (1) and (2) of Section 42 are intended to set up machinery for preventing evasion of sales-tax. But, in our judgment, the power to confiscate goods carried in a vehicle cannot be said to be fairly and reasonably comprehended in the power to legislate in

respect of taxes on sale or purchase of goods. By Sub-section (3) the officer in charge of the check post or barrier has the power to seize and confiscate any goods which are being carried in any vehicle if they are not covered by the documents specified in the three sub-clauses. Sub-section (3) assumes that all goods carried in a vehicle near a check post are goods which have been sold with the State of Madras and in respect of which liability to pay sales tax has arisen, and authorizes the check post officer, unless the specified documents are produced at the check post or the barrier, to seize and confiscate the goods and to give an option to the person affected to pay penalty in lieu of confiscation. A provision so enacted on the assumption that goods carried in a vehicle from one State to another must be presumed to be transported after sale within the State is unwarranted. In any event power conferred by Sub-section (3) to seize and confiscate and to levy penalty in respect of all goods which are carried in a vehicle whether the goods are sold or not is not incidental or ancillary to the power to levy sales tax. A person carrying his own goods even as personal luggage from one State to another or for consumption, because he is unable to produce the documents specified in Clauses (i), (ii) and (iii) of Sub-section (3) of Section 42, stands in danger of having his goods forfeited. Power under Sub-section (3) of Section 42 cannot be said to be ancillary or incidental to the power to legislate for levy sales tax.

4. The High Court was of the view that the question which fell to be determined was concluded by the judgment of this Court in *Commissioner of Commercial Taxes v. R.S. Jhaver*. That cases arose u/s 41(2) of the Madras General Sales Tax Act, 1 of 1939, and this Court struck down the power conferred under the Madras General Sales Tax Act, 1359, upon the officer of the Government to seize such accounts, registers, records or other documents of the dealer as he may consider necessary, if he had reason to suspect that any dealer is attempted to evade payment of any tax, fee or other amount. This Court held that tax and penalty cannot be levied before the first sale in the State, and on that account authority conferred to levy tax and penalty before the sale and to confiscate the goods for non-payment was outside the legislative competence of the State. That case may have no direct bearing in this case.

5. In the present case, however, the power to confiscate the goods and to levy penalty in lieu of confiscation, when in respect of the goods found in a vehicle the driver of the vehicle is not carrying with him the documents specified therein, is not a provision which is ancillary or incidental to the power to tax sale of goods.

96. In fact, the decision of the Constitution Bench, in *The Check Post Officer, Coimbatore v. K.P. Abdulla and Bros .* (Supra), was also referred to in *Commercial Tax Officer and Others Vs. Swastik Roadways and Another*, and the Supreme Court, in its later decision, in *Swastik Roadways (s u p r a)*, distinguished the decision of the Constitution Bench, in *K . P . Abdulla (supra)*, as under:

As far as the penalty u/s 57(2) is concerned, we have already noted that it is

levied only on the satisfaction being reached by the officer concerned that the failure of the C & F agent to furnish the information required by the Commissioner facilitated the dealer to evade the tax. It presupposes that there was a taxable sale in respect of which the tax evasion appears to have occurred. The penalty u/s 57(2), unlike Section 42 (3) of the MGST Act, is not levied on a mere assumption that a taxable sale or purchase took place. The impugned sections of the Madhya Pradesh Act are meant to get timely information which will help the Department to detect tax evasion.

97. Explaining its decision in *K. P. Abdulla and Bros's case* (supra), the Supreme Court, in *State of Rajasthan and Another Vs. M/s D.P. Metals*, observed:

15. In *K P Abdulla's case* this Court considered the validity of Section 42(3) of the Madras General Sales Tax Act, 1959, which gave the power to the officer in-charge of the check-post or barrier or any other duly authorized officer to seize and confiscate the goods, which were not covered by the documents specified therein. It was held that the power to confiscate the goods carried in a vehicle cannot be said to be fairly and reasonably comprehended in the power to legislate under Entry 54 of List II in respect of taxes on sale or purchase of goods. The reason for this conclusion was that Sub-section (3) assumed all goods carried in the vehicle as being those, which had been sold within the State and authorized the check post officer to seize them unless the specified documents were produced at the check post or the barrier. A provision, so enacted on the assumption that goods carried in a vehicle from one State to another must be presumed to have been transported after sale within the State was held to be unwarranted and, therefore, the power to seize and confiscate was struck down and was held not to be ancillary or incidental with the power to legislate for levy of sales tax.

98. From what have been discussed and pointed out above, what becomes transparent is that it is possible to realize from a transporter, by way of penalty, the amount, which is payable by the dealer, as tax, and, in order to ensure that evasion of tax does not take place, statutory provisions can be made raising legal presumption treating a transaction as sale.

99. In *State of Rajasthan and Another Vs. M/s D.P. Metals*, the Supreme Court reversed the decision of the High Court, which had held Section 78 of the Rajasthan Sales Tax Act unconstitutional on the ground of legislative incompetence. Section 78 provided for establishment of check post and inspection of goods, while in movement. Sub-section (5) of Section 78 empowered the officer-in-charge of the check post to impose, on the person in-charge of the goods, a penalty equal to 30% of the "value of the goods" for possession or movement of goods if they are not covered by prescribed documents, such as, Challans, bills of sale, declaration forms, etc., or for submission of false or forged documents, etc. The challenge to legislative competence was negated in this case also. It was, however, clarified that the impugned sub-section cannot relate to personal belongings, which are not

meant for sale. Explained the Supreme Court the position of law, in this regard, as under:

30 . It is thus settled law that provisions to check evasion of tax are within the legislative competence of the States under Entry 54 of List II . This being so, the provisions to make the imposition of tax efficacious or to prevent evasion of tax are within the legislative competence.... If there was legislative competence to enact Section 78 (2) then the same power contained in Entry 54 of List II could enable the State Legislature to provide for consequence of non-compliance by incorporating sub-section (5) therein.

100. While dealing with the submissions on behalf of the writ petitioners, one must take note of the decision in *Delight Carriers (Regd.) v. State of Haryana*, reported in (2002) 1 SCC 290 too, though this decision has not been referred to by any of the parties to this writ petition. In *Delight Carriers (Regd.) (supra)*, the validity of Section 37 of Haryana General Sales Tax Act, 1973, was put to challenge on the ground of lack of legislative competence inasmuch as it created penal provisions in the sense that a person, who violated the provisions of Section 3, could be made liable to pay penalty not exceeding two thousand rupees or 20% of the "value of the goods", whichever is greater. The provisions, contained in Section 37, read as under:

37 . Establishment of check post or barriers and inspection of goods in transit . -

(1) * * *

(2) * * *

(3) * * *

(4) The owner or person in charge of the goods or goods carrier, entering or leaving the limits of the State, shall furnish in duplicate a declaration containing such particulars, as may be prescribed, of the goods carried by him or in such carrier, as the case may be, before the officer in charge of the check post or barrier and shall produce the copy of the said declaration duly verified and returned to him by the officer in charge of the check post or barrier before any other officer as mentioned in Sub-section (2).

Where it is contended by the owner of the goods that the goods were not sold within the State after their import and were either consumed or exported by him or were sold in the course of inter-State trade or commerce or in the course of export out of the territory of India, the assessing authority may call for such other information and documents as he thinks fit:

Provided that where the owner or person in charge of the goods or the driver or the person in charge of the goods carrier bound for any place outside the State passes through the State, such owner or person in charge of the goods or the driver or other person in charge of such carrier shall furnish, in duplicate, to the officer in charge of the check post or barrier of his entry into the State, a

declaration in the prescribed form and obtain from him a copy thereof duly verified. The owner or person in charge of the goods carrier or the driver or other person in charge of the goods carrier shall deliver within twenty-four hours the said copy to the officer in charge of the check post or barrier at the point of his exit from the State, failing which he shall be liable to pay a penalty, to be imposed by the officer in charge of the check post or barrier of the entry, not exceeding two thousand rupees or twenty per centum of the value of the goods, whichever is greater:

Provided further that no penalty shall be imposed unless the person concerned has been given a reasonable opportunity of being heard:

Provided -further that where the owner or person in charge of the goods or the driver or other person in charge of the goods or carrier bound for any place inside the State has to pass through another State, such owner or person or the driver or other person shall furnish, in duplicate, to the officer in charge of the check post or barrier of his exit from the State, a declaration in the prescribed form and obtain from him a copy thereof duly verified and shall deliver the same to the officer in charge of the check post or barrier of his entry into the State, within four hours of his exit from the previous barrier or check post in the State, failing which he shall be liable "to pay a penalty to be imposed by the officer in charge of the check post or barrier of his entry, not exceeding two thousand rupees or twenty per centum of the value of the goods, whichever is greater, unless he explains the time taken in excess to the satisfaction of the officer in charge of the entry barrier or check post.

101. Noticing the above provisions of the Haryana General Sales Tax Act, 1993, the Supreme Court observed, in *Delight Carriers (supra)*, as under:

We have explained in *Sodhi Transport Co. v. State of U.P.*, decided on 20.03.1986, the object of establishing check posts and introducing provisions in the sales tax law of a State which would facilitate inspection of goods, which are carried from one State to another through a third State. In the abovementioned decision, we have upheld the provisions of Section 28 -B of the U .P . Sales Tax Act, 1948 and the Rules made thereunder. For the same reasons we uphold the provisions of Section 37 of the Haryana General Sales Tax Act, 1973, Rule 43- and Forms 38 and 39 of the Haryana General Sales Tax Rule, 1975. These writ petitions are disposed of accordingly. There will be no order as to costs.

102. Thus, in *Delight Carriers (supra)*, the Supreme Court upheld the validity of Section 3 of Haryana General Sales Tax Act, 1973, which made a person liable to pay penalty not exceeding Rs . 2000/- or 20 % of the "value of the goods ", whichever is greater if such person violated the provisions of Section 3 of the said Act. Thus, the decision, in *Delight Carriers (supra)*, shows that so long as it is possible to compute the penalty, imposition of penalty is not impermissible in law if a person happens to violate the provisions embodied in a fiscal legislation, whose compliance would ensure that no evasion of tax takes place.

103. From the decision, in *Delight Carrier* 's case (supra), it becomes more than abundantly clear that a provision, enacted in the Sales Tax Law of a State, which would facilitate inspection of goods, carried from one State to another, would fall within the legislative ambit of Entry 54 of List 11. Referring to the case of *Delight Carriers* (supra), the Court, in *D. P. Metal*'s case (supra), observed as under:

20. From the aforesaid decision, *Delight Carriers* case, it is evident that the Court regarded Section 37 of the Haryana General Sales Tax Act as being nothing more than a provision, which had been enacted in the sales tax law of a State, which would facilitate inspection of goods carried from one State to another and would fall within the legislative ambit of Entry 54 of List 11. The said Section 37 of the Haryana Act is in *pari materia* with Section 78 of the Rajasthan Act.

104. What surfaces from the above discussion is that the statutory provisions to check evasion of tax are within the legislative competence of the States under Entry 54 of List II. Naturally, therefore, the provisions, causing imposition of tax, realization of tax and prevention of evasion thereof are within the legislative competence . Referring to the penal provisions, the Supreme Court observed, in *D. P . Metal*'s case (supra), that the penal provisions work as a deterrent to tax evasion and there is nothing wrong in making such a provision nor can such provision be regarded as illegal . The Court further observed, in *D. P . Metal*'s case (supra), that it is within the ambit of legislative power to fix, if the legislature, in i t s wisdom, so decides, penalty @ 3 0 % of the value of the goods . In *D . P. Metal*'s case (supra), it has been further pointed out by the Supreme Court that it is within the legislative competence to make law imposing statutory obligations for carrying goods and to penalize if the statutory provisions are contravened inasmuch the penal provisions would work as deterrent to evasion of tax and would make realization of tax more effective . It is also clear that so long as the tax is not imposed, but the tax can be measured, it is possible to make provisions for realization of the amount of tax as a penalty for violation of those statutory obligations, whose compliance would ensure that no evasion of tax takes place. In a given case, however, it is possible to even impose tax, as already indicated above, on a transporter if he can, by a legal fiction, be treated to be a dealer and if sale of the goods by him, as a dealer, is proved either by raising statutory presumption or otherwise. However, such a presumption has to be rebuttable so that it does not take away the right of a person to satisfy the authorities concerned that no sale had taken place and/or that the goods carried was not meant for sale, but a person's personal belongings, which may be transported by a transporter. [See *K.P. Abdullah and Bros.* (supra)].

Whether the realization of tax from transporter u/s 13A of the Tripura Sales Tax Act, 1976, and Section 77 of the Tripura Value Added Tax Act, 2004, is constitutionally valid?

105. From a careful analysis of the provisions embodied in Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, what we notice is that both

these Sections contain two parts inasmuch as both these Sections make a transporter liable to pay, on non-fulfillment of his obligations, "in addition to tax", by way of "penalty", a sum, which may extend to 150% of the tax involved. Thus, a transporter has clearly been made liable to pay not only the penalty, which may extend to 150% of the tax involved, but also the tax itself. Both these provisions have to be separately analyzed for the purpose of determining the legislative competence of the State to make these provisions in the sense that Section 13A of the TST Act, 1976, and Section 77 of the TVAT, 2004, consist of two parts, namely, (i) by way of penal provisions, it imposes, on a transporter, the liability to pay tax and (ii) it also imposes penalty, which may extend up to 150% of the tax involved. In short, thus, the penal provisions consist of two parts inasmuch as these provisions realize not only tax, but also up to 150% of the tax involved. Whether such realization of the tax and also imposition of penalty, up to 150% of the tax involved, are constitutional, or not, is the question.

106. Let us, first, determine as to whether the tax, under the scheme of the enactment, in question, could have been realized, by way of penalty, from the transporters?

107. Before we draw the distinction, if any, between the two expressions, namely, "tax" vis-?-vis "tax involved", suffice it to point out, at this stage, that transporter has been made liable to pay, in no uncertain words, by taking resort to Section 13A and Section 77, "tax", which means, as rightly pointed out by Mr. Deb, the "tax payable", for, the term tax means, under both the enactments, "tax payable". However, the "tax payable" would, obviously, mean that there must be an assessment of tax at the hands of the dealer, because a transporter does not fall within the definition of dealer as embodied in the said two enactments. Clearly, thus, the transporter has been made liable to pay "tax" without deeming him as dealer by creating a legal fiction in this regard and without any determination or assessment of "tax". There is no mechanism provided, in any of the two enactments, for assessment of "tax", which a transporter helps to evade. Section 32, which has been upheld in Freight Carriers (supra), does not make the transporter liable to pay "tax"; what Section 32 makes a transporter liable to pay is "penalty" and the "penalty" was a sum of money not exceeding rupees one thousand or double the amount of "tax recoverable", whichever is greater. If the "tax" was found to be recoverable from a dealer, there was no legal prohibition for imposing "penalty" of double the amount of "tax" so recoverable from the dealer. The sum, recoverable as "penalty", could not have exceeded, in the light of the provisions of Section 32, a sum of rupees one thousand. As Section 32 provided for such limited penalty, the same was upheld, particularly, when it had not made the transporter liable to pay the tax, which was, otherwise, payable by a dealer.

108. As regards the realization of "tax" from the transporters, which is in addition to the "penalty" as provided u/s 13A of TST Act, 1976, and Section 77

of the TVAT Act, 2004, we find force in the submission of Mr. Somik Deb that the liability to pay tax, which the statutes impose on the transporter, is constitutionally impermissible. Section 13A of TST Act, 1976, and Section 77 of the TVAT Act, 2004, are in two parts. On non-fulfillment of the obligations cast on a transporter, the transporter has been made, by way of "penalty", liable to pay, "in addition to tax", a sum, which may extend to 150% of the "tax involved". Thus, a transporter has been clearly made liable to pay not only penalty, but "tax" too.

109. Having regard to Article 265 read with Article 366(28) of the Constitution of India, nothing can be realized by way of tax, which has not been authorized by the legislature or no action akin thereto is permitted by law.

110. Article 265 of the Constitution imposes a limitation on the taxing power of the States in so far as it provides that no tax shall be levied or collected except by authority of law, which means a valid law. In order that a law may be valid, the tax proposed to be levied must be within the legislative competence of the legislature imposing the tax and authorizing the collection thereof. A law providing for levy and collection of tax is a law within the meaning of Part- III of the Constitution and it, therefore, must withstand the constitutional test of a valid law. Viewed in this light, the "law", in Article 265 of the Constitution, must be a valid law and a law, in order to be valid, must not only be one, which a legislature makes in exercise of a power conferred on it, but also be one, which does not abridge the fundamental rights enshrined in the Constitution.

111. Under Entry 54 of List II of the Seventh Schedule of the Constitution, State is empowered to make a law imposing tax on sale or purchase of goods. In exercise of this power, the TST Act, 1976, and the TVAT Act, 2004, came to be enacted. Under both the enactments, "tax" is leviable on the "taxable turnover" of the goods. In exercise of such powers, "tax" cannot be imposed on the transporter, which the dealer is, otherwise, required to pay. Thus, a transporter cannot, ordinarily, be made liable to pay "tax", which may be payable by a dealer. No doubt, in a taxing statute, provisions can be made for prevention of evasion of tax and in that process, provision for imposition of "penalty" on the transporter can, indeed, be made for non-fulfillment of the statutory obligations cast on the transporter, but the transporter cannot be made liable to pay tax payable by the dealer unless the legislature so provides by incorporating deeming provisions, creating legal fiction and making, thus, constitutionally sustainable provisions. On a careful perusal of the provisions embodied in Section 13A and Section 77, it becomes transparent that transporters have been made liable to pay, apart from the penalty, "tax payable" by dealer. Is this constitutionally permissible, as noted above, is the question.

112. From a close reading of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, it, no way, transpires that the legislature has made provisions to the effect that while transporting taxable goods if a transporter delivers to any dealer or any person such goods without obtaining from him a

copy of the valid permit or if the transporter conceals the actual particulars of the consignment transported by him, the goods, in question, so transported by transporter, shall be deemed to have been sold by transporter within the State of Tripura. If such a provision had been made in Section 13A of the TST Act, 1976, and/or in Section 77 of the TVAT Act, 2004, a transporter would have automatically fallen, within the definition of dealer, in the situations as indicated hereinbefore and he could have, then, been made liable to pay tax under the Act. However, as held in the earlier part of this judgment, such a presumption should, ordinarily, be a rebuttable presumption and if the fiscal statute makes the presumption rebuttable, the transporter can prove, by documentary evidence or otherwise, that the goods have been delivered to some person other than a dealer or that the transaction was not a sale or that the goods have been consumed inside the State or dispatched outside the State without effecting sale thereof within the State. In such eventualities, as indicated hereinbefore, no tax would be livable on the transporter.

113. In the complete absence of any such deeming provisions, for realization of "tax" from the transporters, having been made u/s 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, as indicated above, one cannot but hold that it was beyond the legislative competence of the State legislature, under Entry 54, to impose, on the transporter, the liability to pay the "tax", which is, otherwise, payable, by a dealer, particularly, when there is no mechanism provided in the said two enactments for assessment of tax, which the transporter may have evaded or helped in evasion. Section 13A merely states that if the Commissioner is satisfied that any transporter has delivered taxable goods to any person without obtaining from the dealer copy of the valid permit or has concealed the actual particulars of the consignment transported by him, the Commissioner may direct that such transporter shall pay, "in addition to tax", by way of "penalty", a sum, which may extend to one hundred and fifty percent of the "tax involved" meaning thereby that the Commissioner may direct the transporter to pay, apart from "penalty", tax as well. This "tax", in the light of the definition of "tax", as given in the two enactments, would, obviously, mean the "tax payable".

114. It is not at all discernible from the provisions of the two enactments, when read as a whole, as to how "tax" would be recovered from the transporter, for, "tax" is recoverable, under the two enactments, on the basis of the turnover of a dealer and the turnover would, obviously, mean, in the light of the definition of turnover as given in Section 2(m) of the TST Act, 1976, and Section 2(35) of the TVAT Act, 2004, respectively, the aggregate of the amount of the "sale prices" 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. Sale price, in

the light of the definition given in Section 2(h) of the TST Act, 1976, and Section 2(26) of the TVAT Act, 2004, respectively, would mean the amount of the money consideration for the sale of 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.

115. Thus, while it is not possible, under the scheme of the two enactments, to impose "tax" on the "transporter", it is, indeed, as we would show, at a later stage of this judgment, possible to quantify, as a measure of yardstick, the sum, which is livable on goods as "tax" and determine thereby as to how much "tax" was involved. In other words, it is possible to treat tax, which is payable, on assessment, as different from the tax, which was livable on the goods involving the transactions. The question is whether "tax involved" can be calculated without there being any direct or indirect evidence or without there being deeming provisions that the goods, which passed the hand of a transporter without his having complied with the obligations imposed on him by the law, were actually a sale of those goods from the hand of the transferor to the person, whom goods were delivered to.

116. Since the provisions for realization of tax in Section 13A of TST Act, 1976, and Section 77 of the TVAT Act, 2004, are severable from the remaining part of Section 13A of TST Act, 1976, and/or of Section 77 of the TVAT Act, 2004, respectively, Section 13A of TST Act, 1976, and Section 77 of the TVAT, 2004, are not required to be struck down as a whole.

117. For forgoing reasons, we hold that Section 13A of TST Act, 1976, and Section 77 of the TVAT Act, 2004, are, in so far as the same permit imposition of tax on "transporters", ultra vires Entry 54 of List II of Seventh Schedule of Constitution of India.

Whether the provisions for imposition of penalty to the extent of 150% of "tax involved" as embodied in Section 13A of the Tripura Sales Tax Act, 1976, and Section 77 of the Tripura Value Added Tax Act, 2004, are constitutionally valid ?

118. The power to levy a "tax", as already noted above, includes all incidental power to prevent evasion of such tax. The powers, such as, the power to seize and confiscate goods in the event of evasion of tax and the power to levy penalty are meant to check evasion of tax and are intended to operate as deterrent against tax evaders and are, therefore, ancillary or incidental to the power to levy tax on the sale of goods and, thus, falls within the ambit and scope of entry 54 of List II to the Seventh Schedule of the Constitution of India. This position is not disputed by the Petitioners. What is disputed by the Petitioners is that when the TST Act, 1976, as well as the TVAT Act, 2004, define "tax" to mean tax payable under the respective Acts and when there is no provision made for imposition of any "tax" on the transporters, provisions for realization of penalty

to the tune of 150% of the "tax involved" is constitutionally invalid inasmuch as three essential conditions, mutually inclusive in nature, must be satisfied, before imposing "tax" on a person, namely i) there is a declaration of liability, i.e., the part of the statute, which determines what persons, in respect of what properties are liable, ii) there is an assessment and iii) lastly, the method of recovery, if the person taxed does not voluntarily pay the tax due. It is the contention of the Petitioners that unless there is a charge created declaring liability, determining the person liable to pay tax and corresponding mechanism for assessment of tax, coupled with a provision for realization of tax, there cannot be any liability to pay any penalty inasmuch as liability to pay penalty arises only when there is a default in payment of tax.

119. Yet another ground of challenge, posed to the constitutionality of the expression "tax involved", is that a tax is impossible to be levied on goods unless under the scheme of the Acts, in question, there is a sale of goods. In other words, what is contended is that in the absence of either direct or indirect evidence proving sale of the goods, which a "transporter" is alleged to have transported, and, particularly, when there is no deeming provisions either making delivery of such goods amounting to "sale", it is not possible to describe the transaction as a "sale" and without determining the question as to whether there was or there was no "sale" of the goods, it is impossible to determine as to what the quantum of tax payable for the goods was and as long as it is not determined or determinable as to what was the measure of tax, it is not possible to realize, by way of fine or otherwise, from the "transporter" the "tax involved". To put it a little differently, what is contended is that if tax has to be measured without assessment on the turnover as provided under the scheme of the Acts, there must, at least, be "sale" in order to make the "tax" livable and since there is no deeming provisions, in any of the Acts, treating delivery of the goods by the "transporter" to any person, without discharging the "transporter's" obligation, as a sale of the goods, it is not even possible to quantify tax livable on the goods, far less tax payable by the "transporter".

120. The TST Act, 1976, as well as the TVAT Act, 2004, provide not only for levy of tax on sale and purchase of goods, but also provide for computation of tax, incidence of tax, recovery of tax, assessment and reassessment thereof. The impugned Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, operates in aid of the main charging section. To check evasion of tax, the impugned provisions have been made. The obligations of the transporters to obtain copy of the valid permits from the dealer and to furnish correct particulars of the consignment, transported by him, are aimed at ensuring the Revenue to identify the nature of the transaction, to verify the claim of the dealer and trace the taxable transaction so that a person or a transaction liable to sales tax does not escape payment of tax. Realization of 150% of such tax from the transporters is by way of penalty and the use of the expression "tax involved", in Section 13A of TST Act, 1976, and Section 77 of the TVAT Act, 2004, is only a measure and yardstick for determination of the amount of penalty. It cannot

convert a penalty on the transporter into a "tax" unless it is shown that the "tax involved" is not possible to be determined under the schemes of the relevant Acts. The object of Section 13A of TST Act, 1976, and Section 77 of the TVAT Act, 2004, is to penalize a transporter, who abets or facilitates the evasions of tax. The penalty provisions, contained in Section 13A of the TST Act, 1976, and Section 77 of TVAT Act, 2004, have intimate nexus with evasion of tax by the dealers, whose goods are carried by the transporter and for whose failure to procure the road permit and furnish correct information, evasion of tax takes place.

121. So far as the applicability of the definitions as given u/s 13A of the TST Act, 1976, and Section 77 of TVAT Act, 2004, are concerned, it is a cardinal principle of construction of enactments that, unless the context otherwise requires, the definition of an expression, contained in an enactment, should prevail throughout the enactment. However, departure from the legislative dictionary or statutory meaning of a word is not only permitted, but justified if literal interpretation, or interpretation, according to legislative dictionary, is likely to lead to unjust result or is not likely to achieve the object of the provisions, wherein the word occurs. It is one of the settled canons of interpretation of statutes that if an interpretation clause gives a particular meaning to a word, it does not follow, as a matter of course if the same word is used more than once in the Act, that, on each occasion, the "word" used must be attributed one and the same meaning. Whether the same meaning, as has been given in the interpretation clause, should be given to a "word", where it occurs, will depend upon the context. That is why, all definitions, in statutes, generally, begin with the qualifying words, viz., unless the context otherwise requires, etc. In view of such prescribed qualification, a Court is bound not only to look at the word, but also to examine the context in which the word has been used and, then, establish the connection between the word used and the object, which is sought to be awarded.

122. The Supreme Court, in *The Commissioner of Gift Tax, Madras Vs. N.S. Getty Chettiar*, held that an interpretation clause, which extends a meaning of a word, does not take away its original meaning. An interpretation clause is not meant to prevent the word receiving its ordinary, popular and natural sense whenever that would be properly applicable. In *Annicola Investment Ltd. v. Minister of Housing and Local Government* (1965) 3 ER 850, it was held that every word has distinct fluidity of meaning and it is best construed in relation to the context in which it is found and in relation to the objects and purpose of the Act or of the Section of the Act in which it is used.

123. The Supreme Court, in *N.K. Jain and others Vs. C.K. Shah and others*, held as under:-

Due weight ought to be given to the words "unless the context otherwise requires". The subject matter and the context in which a particular word is used are of great importance and it is axiomatic that object underlying the Act must always be kept in view in construing the context in which a particular word is

used.

124. Again, the Supreme Court, in *Printers (Mysore) Ltd. and Another Vs. Asstt. Commercial Tax Officer and Others*, pointed out as under:

Where a particular word is defined with a qualification "unless the context otherwise requires:", it is not mandatory that one should mechanically attribute to the said word the meaning assigned to it in the definition clause. Ordinarily that is so. But where the context does not permit or where the context requires otherwise, the meaning assigned to it in the definition clause need not be applied.

125. From the authorities cited above, it becomes abundantly clear that the same word, phrase or expression connotes altogether different meaning, when read in the context of different words, phrase or expression even under one and the same enactment. The Court, when called upon to interpret a particular term, has to interpret it in the context of the entire phrase and the expression in which it is used. Thus, the legislature, which fixes contours for different expressions through the definition clause, also provides sufficient play at the joints for contextual adaptations. Thus, contextual variations are not impermissible if such variations are necessary to achieve the object of the enactment unless the enactment provides or indicates otherwise.

126. The definition of "tax", as given in Section 2(j) of the TST Act, 1976, and Section 2(28) of TVAT Act, 2004, is preceded by the words "Unless there is anything repugnant in the subject or context" and "Unless the context otherwise specifies" respectively. Thus, the definition of "tax", set out in the Act, is to be applied and given effect to; but this rule, which is the normal rule, may be departed from if there be something to show that the definition could not be applied. A word acquires meaning only with reference to the text and context and the meaning of a word or an expression, used in an Act, must take its color from the context in which it appears.

127. Further, it must be remembered that Section 13A of TST Act, 1976, makes provisions for imposition of penalty on transporters. Similarly Section 77 of TVAT Act, 2004, too, makes provisions for imposition of penalty on transporters. Imposition of penalty is different than that of determination of the liability to pay tax and charging Section.

128. The interpretation applied to charging section cannot, thus, be applied mechanically, while interpreting a "penalty" provision. Both the provisions, i.e., penalty and charging, have different objects to achieve and consequences to follow. They operate in altogether different fields. The Supreme Court, in *Joint Commissioner of Income Tax v. Saheli Leasing and Industries Ltd.* (2010) 6 SCC 384, has held that a particular word, occurring in one section of an Act, having a particular object, cannot carry the same meaning, when used in a different section of the Act, with a different object. The Supreme Court's observations, appearing, in this regard, in *Saheli Leasing and Industries Ltd.* (supra), read:

A particular word occurring in one section of the Act, having a particular object cannot carry the same meaning when used in a different section of the same Act, which is enacted for a different object. In other words, one word occurring in different sections of the Act can have different meanings, if object of the two sections is different and when both operate in different fields.

129. Thus, the definition of the word "tax", as given in the TST Act, 1976, and/or TVAT Act, 2004, cannot be applied, literally, to Section 13A of TST Act, 1976, and Section 77 of TVAT Act, 2004, and the same must be given a meaning as required in the context of imposition of penalty. The term "tax", used in Section 13A of TST Act, 1976, and Section 77 of TVAT Act, 2004, implies the "tax" that would have been payable by the dealer, but which was evaded, because of non-fulfillment of the obligations cast on the transporters.

130. The use of terminology "tax involved" must, therefore, be given a reasonable meaning. The word "involved", used in Section 13A and Section 77, cannot be said to be superfluous inasmuch as the Legislature does not waste its words or does not say anything in vain. The presumption is always against the superfluity in a statute. It is well settled rule of interpretation of statute that every part of a given statute should be given, as far as possible, its full meaning and effect and no word or clause should, ordinarily, be rejected as superfluous. In *King v. Berchet*, reported in 1 SHOW 106, a case decided in 1688, it was said that it is a well known rule in the interpretation of statutes that such a sense is to be made upon the whole as no clause, sentence, or word shall prove superfluous, void or insignificant if by any other construction, they may all be made useful and pertinent. The court applied this rule in *Queen V. Bishop of Oxford*, reported in 4 QBD 245, too.

131. Thus, effect should be given to every part of a section in an enactment and it should not be assumed that the Legislature used the language without any purpose. It is a well- settled principle of construction that words in a statute are designedly used and such an interpretation of a given word must be avoided, which would render the provision either nugatory or part thereof otiose. No part of a provision of a statute can be ignored by saying that the legislature enacted the same not knowing what it was saying. We must assume that the legislature deliberately used that expression and it intended to convey some meaning thereby; it is not to be assumed that the Legislature has used words meaning nothing. Law should be interpreted so as not to make any word redundant if it is possible so to interpret it in order to give all words, used in the legislation, a rational meaning consistent with the legislative intent and object.

132. Keeping in mind the principles of interpretation of statute, as indicated above, appropriate meaning must, now, be ascribed to the word "involved", appearing in Section 13A of TST Act, 1976, and Section 77 of TVAT Act, 2004. Further, as discussed earlier, in a taxing statute, the intention of the legislature has to be gathered from the words used in the statute. Hence, it cannot be said that by using the phraseology "tax involved", the legislature intended to mean

"tax payable" under either the TST Act, 1976, or the TVAT Act, 2004. If some reasonable meaning, in the context of penalty is required to be given to the word "tax involved", appearing in Section 13A of TST Act, 1976, and Section 77 of TVAT Act, 2004, it would mean that element of tax, which is involved in a given transaction, and it is not necessary that the said tax must be levied, charged, assessed and thereby made payable under the Act. The element of tax, involved in a transaction, is only a measure or yardstick for determination of penalty u/s 13A of TST Act, 1976, and Section 77 of TVAT Act, 2004, as the case may be, and it is not necessary that tax must be first levied, assessed and become payable before penalty is calculated on the basis of the tax, which is, otherwise, payable. Such an interpretation, if attributed, to the words "tax involved", would make the provisions of penalty u/s 13A of TST Act, 1976, and Section 77 of TVAT Act, 2004, redundant and otiose.

133. The word "involved" imports the idea of implicate, include, affect and to contend by implication. Corpus Juris Secundum explains the term "involved" to mean, to comprise, to contend, to include by rational or logical construction or to connect with something as a natural or logical consequence or affect, to include necessarily, to imply, to require as implied elements, antecedent conditions, affect, etc. Seen in this light, "tax involved" would mean the amount, which is payable or recoverable, in a given transaction, as tax. To determine the tax, involved in a given transaction, one must bear in mind the nature of goods, the value of the goods and the rate of tax, which is livable on the sale of such goods under the given enactment. If these elements are not discernible in a given enactment, "tax involved" cannot be worked out and determined. Conversely, if it is possible, under the scheme of a given enactment, to determine the amount, which was involved as tax, recovery of such an amount, by way of penalty from a transporter by making legislative measures, would not fall outside the ancillary and incidental powers of the State legislature under Entry 54 Schedule II. The authority concerned would have to, therefore, before imposing penalty u/s 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, determine the "tax involved" by taking into consideration the elements aforementioned and it is only upon such determination that the authority concerned can proceed to impose the penalty, which may be as high as 150% of the "tax involved". Thus, determination of "tax involved", which is different from "tax payable", is a condition precedent for the imposition of penalty u/s 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004.

134. We do not, therefore, find any merit in the arguments, advanced by Mr. Deb, that Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, in so far as the same relate to realization of penalty, are constitutionally invalid merely because they provide for imposition of such a penalty, which may extend to 150% of the tax involved without providing for determination of tax and levy of tax. Since Section 13A of TST Act, 1976, and Section 77 of TVAT Act, 2004, are incidental and ancillary to main charging section and since the Acts provide for the levy, determination, assessment, recovery etc., and impugned

provisions deal with imposition of penalty only, there is no question of first levying the tax by determining the tax payable for the purpose of imposition of penalty u/s 13A of the TST Act, 1976, and Section 77 of TVAT Act, 2004.

135. We also take note of a decision of the Supreme Court in *Hindustan Steels Ltd. v. State of Orissa* (1970) 25 STC 211, wherein it was held that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi- criminal proceeding and penalty will not, ordinarily, be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. There is no dispute as regards the proposition of law laid down in the *Hindustan Steels Ltd.* (Supra).

136. A microscopic examination of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, clearly reveals that penalty u/s 13A of TST Act, 1976, and Section 77 of the TVAT Act, 2004, is not compulsory or mandatory. It is only on the satisfaction arrived at by the Commissioner that the transporter had acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation that penalty can be imposed. A dispassionate reading of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, will also reveal that discretion has been given to the Commissioner to impose or not to impose penalty inasmuch as Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, provides that "the Commissioner may direct the s such transporter shall pay, in addition to tax, by way of penalty...". The use of the word "may" clearly shows the legislative intention that the Commissioner has to apply his mind to the facts of the case and only when the Commissioner is satisfied that transporter has acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation, that penalty can be directed to be paid.

137. In view of forgoing reasons, we hold that the Section 13A of TST Act, 1976, and Section 77 of the TVAT Act, 2004, in so far as the same relate to levy of penalty to the extent of 150% of tax involved, is intra vires Entry 54 of List II of Seventh Schedule of Constitution of India.

On a conspectus of all the statutory provisions, contained in the Tripura Sales Tax Act, 1976, prior to its 8th amendment, when the Supreme Court, in *Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others*, had already held that there is no liability on a "transporter" to pay tax and/or penalty, whether the subsequent insertion of Section 13A in the Tripura Sales Tax Act, 1976, vide the 8th amendment, can be sustained ?

138. The TST Act, 1976, was enacted in exercise of powers under Entry 54 of List- II of the Seventh Schedule to the Constitution of India imposing a tax on sale and purchase of goods. The provisions of Sections 29, 30, 32, 36A, 38 and 38B of the TST Act, 1976, cast obligation on transporters and carriers to get

themselves registered, maintain accounts of the goods transported by them and to furnish declaration forms relating to consignments. All these obligations are aimed at only achieving the objective of sealing loopholes of evasion of sales tax. The Supreme Court, in *Tripura Goods Transport Association* (supra), was examining the constitutional validity of the aforesaid provisions, which were challenged as being beyond the competence of the State legislature and ultra virus the Constitution offending Article 14, 19(1)(g), 246, 265, 286, 300A and 301 of the Constitution of India. The challenge was based on the ground that a transporter is not a dealer within the meaning of Section 2(b) of the said Act; hence, obligations, cast on the "transporter", under the Act and Rules, are beyond the legislative competence of the State legislature. By the aforesaid provision, the transporters, carrying on the business of transportation in Tripura, are required to obtain a Certificate of Registration and to comply with other various formalities under the Act and Rules, namely, to maintain account according to prescriptions made by the Rules u/s 36A of the Act for carrying on transport business, for entering into, and going out of, the State of Tripura, including making a declaration in Form-24. The Supreme Court was examining the issue as to whether the aforesaid provisions could be held to be beyond the legislative competence of the State legislature. While answering the said question, the Supreme Court was scrutinizing the provisions of the Act, in question, to ascertain as to what were the obligations cast on the transporter, what are the purposes of such obligations and whether the said provisions, in any way, taxing the transporters or impeding the transport business by casting obligations on the transporters and whether the obligations, so imposed, went beyond the legislative competence. While examining the said issue, the Supreme Court observed as under:

The maintenance of accounts by the transporter u/s 36-A is only to help the taxing authority to trace the dealer, fix the goods transported correlating with such dealers transporting such goods for fixing taxable liability in this regard. There is no provision, which fixes any liability on the transporters, carriers, etc., which is on a dealer. Liability, if at all, is only if such transporters, carriers, etc. do not disclose what is required and what is within their knowledge to help the authorities to collect the tax from escaping dealers which, but for this, would escape.

139. The Supreme Court, in *Tripura Goods Transport Association* (supra), further observed that the document and information sought for are either with or within the knowledge of the transporter. The said information is sought for the sole objective of ascertaining a consignor and consignee of the taxable goods, which the transporter is carrying. Such requirement has no correlation with the sale and purchase of the goods or to treat a transporter as dealer and consequently, no obligation is cast on him to pay any tax, interest or penalties, which a dealer is, otherwise, required to pay. In this regard, the Supreme Court observed thus:

Under Section 29(4) and Section 30, the offences in case committed by a

transporter are relatable to checking of evasion of tax, then composition of offence u/s 32 would also confine itself within this sphere. We do not find any of these provisions in any way placing any liability on the transporter which is otherwise on a dealer under this Act. Similarly, as aforesaid, the maintenance of account by the transporters, carriers etc. u/s 36-A is only to render help to the authorities in checking the evasion of tax. This does not put any such obligation on the transporter to hold that these provisions transgress the legislative competence of the State Legislature.

140. The Supreme Court, thus, upheld the validity of the impugned provisions of the TST Act, 1976.

141. After the decision, in Tripura Goods Transport Association (supra), was rendered by the Supreme Court, the TST Act, 1976, was amended by the Tripura Sales Tax (Eight Amendment) Act, 2000, and Section 13A was inserted w.e.f. 28.02.2000.

142. Before deciding the question as to whether the impugned provisions of Section 13A of the TST Act are contrary to the decision of the Supreme Court in Tripura Goods Transport Association (supra), or whether the provisions of Section 13A have been made to override the Supreme Court's decision, in Tripura Goods Transport Association (supra), without changing the basis of the said decision, it must be borne in mind that a judgment must be read as a whole and the observations made therein must be considered in the light of the questions, which were before the Court. It is neither desirable nor permissible to pick up a word or a sentence from the context of the question under consideration and treat it to be complete law decided by the Supreme Court. *Mehboob Dawood Shaikh Vs. State of Maharashtra*, Every judgment must, therefore, be read as applicable to the particular facts proved or assumed. Generally, an expression, used in a decision, must be read as qualified by the particular facts of the case. In *Bharat Forge Co. Ltd. Vs. Uttam Manohar Nakate*, it was held that a decision is an authority of what it decides and not what can logically be deduced there from. When a decision is binding as precedent, it is not everything in the decision that binds the courts of concurrent and inferior jurisdiction, but only its ratio decided, i.e., the proposition of law that was necessary for the decision of the actual issue between the parties. The "ratio decided" may be described roughly as the rule of law applied, and acted on, by the court or the rule, which the court regarded as governing the case. When a decision has binding precedent, it is only what has been decided, which is binding, and it is the principle, upon which the case was decided, which is binding. In *The Divisional Controller, KSRTC Vs. Mahadeva Shetty and Another*, the Supreme Court held as under:

The decision ordinarily is a decision on the case before the court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. Therefore, while applying the decision to a later case, the court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its color from the

question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decided are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made as a measure of social justice. Precedents sub selection and without argument are of no moment. Mere casual expressions carry no weight at all, nor every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement having the weight of authority.

143. In *Ram Prasad Sarma Vs. Mani Kumar Subba and Others*, , the Supreme Court observed that there is no precedent of facts and it is the legal proposition flowing from the judgment, which has binding effect.

144. To make a judgment applicable as precedence to a particular case, the factual aspects have to be firmly borne in mind.

145. Keeping in mind the above principles laid down by the Supreme Court, let us, once again, look at the decision in *Tripura Goods Transport Association* (supra). In this decision, the Supreme Court was examining the Constitutional validity of Sections 29, 30, 32, 36A, 38 and 38B of the TST Act, 1976, and Rule 46A, 63A and 64A of the Rules framed thereunder, which were claimed to be beyond the legislative competence of the State legislature on the ground that a transporter was not "dealer" within the meaning of Section 2(b) of the said Act and, hence, obligations cast, on the "transporters", as a class, under the Act and Rules, were beyond the legislative competence of the State legislature. While examining the vires of the said provisions of the Act, the Supreme Court observed that the provisions impose no such liability, on transporters or carriers, which are, otherwise, on dealers. The liability, if at all, is only if such a transporter, carrier, etc., does not disclose what is required and what is within his knowledge to help the authority to collect the tax from escaping assessment.

146. The validity of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, was not a subject matter of challenge before the Apex Court in *Tripura Goods Transport Association's* case (supra). As such, it cannot be said Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, were incorporated to override the decision of the Supreme Court in *Tripura Goods Transport Association* (supra). The submission of learned Counsel for the Petitioners that insertion of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, has the effect of annulling the efficacy of the decision in *Tripura Goods Transport Association* (supra) and the said provisions could not have been made without making any changes or alteration in the foundation of the decision arrived at in *Tripura Goods Transport Association* (supra) is incorrect and cannot be accepted. The provisions of Section 13A of the TST Act, 1976, and

Section 77 of the TVAT Act, 2004, are not validating provisions, but are independent provisions. No doubt, the validity of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, has to be examined on basis of the law laid down by this Court and the Supreme Court in various judicial pronouncements including Tripura Goods Transport Association (supra); but the said provisions cannot be per se declared unconstitutional, for, the Court does not find that insertion of Section 13A and/or Section 77 aforementioned require altering/neutralizing the base of the decision in Tripura Goods Transport Association (supra). In fact, the decision in Tripura Goods Transport Association (supra), has not been overridden by insertion of Section 13A and Section 77. Far from this, what the legislature has done is that it has made provisions as embodied in Section 13A and Section 77, which it deemed necessary to create stricter liabilities on the transporter so as to create a sense of deterrence in the transporters in helping or facilitating the dealers in their acts of avoiding payment of tax. The said provisions of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, does not have the effect of rendering the decision in Tripura Goods Transport Association (supra) ineffective and the same has not been enacted to override the decision in Tripura Goods Transport (supra). While examining the validity of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, we have already declared the provisions of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, in so far as the same relate to realization of "tax" from the transporter, as ultra vires the Constitution of India, but realization of a sum equivalent to 150% of the "tax involved" in the form of penalty from a transporter cannot be struck down on the ground as contended by the Petitioners.

147. In the result and for the reasons discussed above, the writ petitions partly succeed to the extent as indicated herein-below:

1. Penalty can be imposed on a transporter, who facilitates and/or abates evasion of tax and because of whose default, evasion of tax takes place.
2. Tax can be imposed on transporters by treating a transporter as a dealer by creating legal fiction so as to treat, in the prescribed circumstances, a transporter, as a dealer, and/or by raising a legal presumption that the taxable goods, handled by a transporter, have been delivered to a dealer without any valid permit or by raising a legal presumption that the transporter has concealed the actual particulars of the goods transported by him and the goods have been sold, within the State, by the dealer without making payment of tax for such sale.
3. The provisions of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, are, so far as the same permit imposition of tax on transporters, are ultra vires Entry 54 of List II of the Seventh Schedule to the Constitution of India.
4. The provisions of Section 13A of the TST Act, 1976, and Section 77 of the TVAT Act, 2004, is, in so far as the same relate to levy of penalty to the extent of

150% of the tax involved, intra vires Entry 54 of List II of the Seventh Schedule of the Constitution of India.

5. The provisions of the TST Act, 1976, and Section 77 of the Act of the TVAT Act, 2004, do not have the effect of rendering the decision of the Supreme Court in Tripura Goods Transport Association and Another Vs. Commissioner of Taxes and Others, ineffective and the said provisions have not been enacted to override the decision in Tripura Goods Transport Association (supra).

6. The orders of assessment as well as the notices of demand, which stand impugned in this set of writ petitions, are, in the light of the conclusions reached above, set aside and the same are remanded to the Respondents/authorities concerned with direction to examine the question of imposition of penalty for default, if any, of the Petitioners in the light of the position of law as indicated above and if the Petitioners and/or any of them are found to have violated the legal obligations cast by the statutes concerned, necessary penalty, in accordance with law, may be imposed, in accordance with law, on that transporter(s), who may have violated the law.

148. With the above observations and directions, these writ petitions shall stand disposed of.

149. There shall, however, be no order as to costs.