

Varshney General Sales and anr. Vs. State of U.P. and ors.

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Court : Allahabad

Decided On : Nov-02-1994

Reported in : [2003]130STC202(All)

Judge : A.P. Misra and ;T.P. Garg, JJ.

Acts : Central Sales Tax Act or Additional Duties of Excise (Goods of Special Importance) Act, 1957; [Constitution of India](#) - Articles 14, 245, 246, 269(1), 286, 286(3), 301, 304 and 366(29A); [Central Sales Tax Act, 1956](#) - Sections 14 and 15; Uttar Pradesh Tax on Luxuries (Second) Ordinance, 1994 Sections 2, 3, 4, 6, 6(6), 9 and 9(1); [Uttar Pradesh Trade Tax Act, 1948](#); Standards of Weights and Measurement Package Rules, 1976; Tobacco Boards Act, 1975

Appeal No. : Civil Misc. Writ Petition Nos. 586, 591, 613, 619, 628, 637, 683, 710, 730 and 840 of 1994

Appellant : Varshney General Sales and anr.

Respondent : State of U.P. and ors.

Advocate for Def. : Rakesh Dwivedi, Additional Adv. General

Advocate for Pet/Ap. : Shanti Bhushan and ;Raja Ram, Advs., ;Sudhir Chandra, Senior Counsel, ;Satya Narain Gupta, ;S.P. Gupta and ;Bharatji Agarwar, Advs.

Disposition : Petition allowed

Judgement :

A.P. Misra, J.

1. These groups of petitioners have challenged the vires of the U.P. Tax on Luxuries Ordinance, 1994 (U.P. Ordinance No. 8 of 1994) promulgated by the Governor of Uttar Pradesh on 14th May, 1994 and the Notification No. TT-2-1767/IX-9 (382)/93-U.P., dated 28th May, 1994, the Notification No. TT-2-1768/IX-9 (382)/93-U.P., dated 28th May, 1994 and Notification No. TT-2-2032/XI-9 (382), dated 15th June, 1994. The petitioners are either manufacturers, producers, sellers within and outside State of specific branded cigarettes, pan masala, zarda, chewing tobacco, khaini under branded or unbranded name also sellers of unmanufactured tobacco. The purchase and sale by all the petitioners are done within or outside the State. Some of the petitioners have specifically pleaded their sale of tobacco outside the State being up to 98 per cent. The validity of the Ordinance is challenged being violative of Articles 14, 19(1)(g), 213, 245, 246, 265, 269, 286, 301 and 304 of the [Constitution of India](#) and further being ultra vires of the [Central Sales Tax Act, 1956](#) (hereinafter referred to as 'the 1956 Act'). During the hearing of this case the impugned Ordinance was repealed and substituted by the U.P. Tax on Luxuries (Second) Ordinance, 1994 (Ordinance No. 22 of 1994) retrospectively with effect from 1st June, 1994 which is almost similar to the earlier Ordinance except some minor changes which we shall be referring to later hence, this is also challenged by an amendment. It is also relevant to mention that during the hearing, under Section 4 of the U.P. Ordinance No. 8 of 1994 by Notification No. TT 2-3355/XI-9 (383)-93 U.P. dated 24th September, 1994 with effect from 25th September, 1994 tobacco priced at Rs. 150 or less per kg. and pan masala by whatever name called with or without tobacco have been exempted from tax. By virtue of the deeming clause under Section 13(2) of the substituted Ordinance No. 22 the notification is deemed to be continuing. Thus even those petitioners on whom there is no liability of tax by virtue of this, still maintain their challenge as this notification being only prospective with effect from September 25, 1994.

2. It is urged that the impugned tax to the extent it levies tax on supply for consideration by way of sale of tobacco is nothing but a tax on sale falling within the definition of the expression 'a tax on sale or purchase of goods' under Article 366(29A) of the Constitution. Thus the impugned Ordinance under the guise of luxury tax is pertaining to impose tax on sale and purchases of tobacco which has been declared to be goods of special importance under Article 286(3) of the Constitution read with Section 14 of the 1956 Act, inasmuch as Ordinance authorises a levy of tax on it up to a maximum of 25 per cent which is in excess of 4 per cent thus violative of Section 15 of the 1956 Act and Article 286(3) of the Constitution. Further, in view of enactment of the Additional Duties of Excise (Goods of Special Importance) Act, 1957, by Parliament the State cannot levy sales tax on tobacco, since the levy of additional duties of excise under it is also in lieu of sales tax. Under this Act, the State gets proportionate share of the levy and collection of additional excise duty. The impugned Ordinance so far as it seeks to levy tax on tobacco manufactured within the State is in pith and substance levy of excise duty falling under List I, entry 84, the competence to legislate on which is only with Parliament hence ultra vires articles 245 and 246 of the Constitution. It is also violative of Article 14 of the Constitution being unreasonable, arbitrary and discriminatory in so far as in the definition of tobacco under Section 2(g) it excluded cigarettes priced at rupees five or less per packet of ten and biris but includes 'khaini' which is consumed by the poorest of poor of this country and sold in small pouches of 25 paise to 50 paise only. Further the imposition of the tax by the Ordinance impedes freedom of trade and commerce and intercourse within and outside the State, hence ultra vires Article 301 and is further not saved by Article 304(b) as prior assent of the President is required under it and under Article 313(1) was not obtained. Further it purports to impose tax on goods otherwise than by sale, i.e., when goods are sent by a person to his own godown or depots from within to outside the State would amount to a tax on consignment, the levy which is exclusively with the Union under entry 92-B of List I read with Article 269(1) of the Constitution and thus ultra vires. Finally this Ordinance is also void since it purports to legislate in respect of tobacco, the control of this industry has been taken over by the Parliament by passing of the Tobacco Boards Act, 1975 and the entire field being covered by it the State was not competent to legislate on

it. This last point though raised in the petition but only learned counsel appearing for the Writ Petition No. 730(T) of 1994 made formal submissions.

3. The Ordinance came into force from 1st June, 1994, in pursuance of notification dated May 28, 1994 issued under Section 1(2). By notification issued on the same day, i.e., May 28, 1994 under Section 3 of the Ordinance, a tax has been fixed at 15 per cent payable on the turnover of receipts of all classes of tobacco except pan masala, by every tobacconist. By subsequent notification dated June 15, 1994, pan masala was also included to be taxed at 15 percent as luxury tax. But again by notification dated September 24, 1994 as aforesaid 'pan masala' tobacco priced at Rs. 150 or less per kg. have been exempted from tax from September 25, 1994. Thus liability of tax on these items is confined to the price from June 1, 1994 to September 24, 1994.

4. Before entering into the grounds raised by the petitioners we are hereunder giving certain basic facts raised by various petitioners. The petitioners in Civil Misc. Writ Petition No. 619 of 1994(T) (Varshney General Sales v. State of U.P.) are carrying on the business of purchase and sale of ITC Limited's brands of cigarettes and smoking mixtures. These products are purchased by the first petitioner from the ITC Limited either from the latter within the State of Uttar Pradesh or from its factory or godown situated outside the State upon such purchase the first petitioner sells products to secondary wholesaler, from him the products are purchased by retailers for eventual sale to the consumer. This group of petitioners deal in cigarettes.

5. The petitioner in Civil Misc. Writ Petition No. 628(T) of 1994 (Satya Narain Gupta) is engaged in the business of manufacture and sale of pan masala in the brand name of 'Rajnigandha' through the firm Swastik Fragrances. Thus, he is manufacturer and seller of pan masala in specified branded name.

6. The petitioners in Civil Misc. Writ Petition No. 730(T) of 1994 (The Tobacco Dealers Association, Registered Ramganj, Kanpur) are members of association (petitioner No. 1) representing tobacco growers, manufacturers, dealers in the State of U.P. and registered under the Societies Registration Act. They are dealing in the sale. and purchase of tobacco under branded and unbranded names. The

tobacco which the petitioners are dealing is more commonly known as khaini/tambakoo. The petitioners' case is that the raw tobacco is purchased by the petitioners within the State of U.P. and outside the State mainly from the States of Gujarat, Bihar and some other States. It is then packed in purias/packets and sent to other States like Bihar, Assam, Bengal, Orissa and Madhya Pradesh and also within the State of Uttar Pradesh. The petitioners purchase raw unmanufactured tobacco which is then manually scented to give it flavour and prevent fungus, moulds and this tobacco is then packed in purias/packet and marketed under their brand names. Their case is that they are paying excise duty upon their products to the extent of 40 per cent, 30 per cent basic excise duty under Central excise and 10 per cent additional excise duty in lieu of sales tax not being charged on tobacco in the State of Uttar Pradesh. The manufacturer of hooka tobacco also pay excise duty and bulk of their product is exported to foreign countries. The sales of the petitioner relate to the sale made by the petitioners to the wholesale dealers in tobacco, the distributors of tobacco, who in turn, through salesmen, sell to panwalas, etc., who then sell to the consumers.

7. The petitioners in Civil Misc. Writ Petition No. 591 (T) of 1991 (M/s. Ravindra and Company and others) are engaged in the sale of tobacco. Petitioner No. 1 is a partnership firm consisting of three partners, viz., petitioner Nos. 2, 3 and 4. They are selling tobacco, which is not manufactured and is not subject to any manufacturing process. This tobacco is sold under the brand name of 'Bandar Dholak Chhap' and 'Hari Chhap'. This tobacco is unmanufactured branded tobacco. They sell tobacco in 'puriyas/packets' of 7 gms. and 9 gms., each of which is retailed at the price of 50 paise and 60 paise per puriya respectively. The price of per kilogram of this is approximately Rs. 30. They export 96 per cent of the total turnover outside the State of U.P. and primarily for consumption in the North-Eastern States of the country. Only less than 4 per cent (approximately) of the total turnover is consumed locally in the State of Uttar Pradesh.

8. The petitioners in Civil Misc. Writ Petition No. 613(T) of 1994 (M/s. Chandra Tobacco Co. and others) are carrying on the business of manufacture and sale of chewing tobacco known as manufactured tobacco/zarda. The petitioners purchase raw tobacco and thereafter manufacture chewing tobacco, snuff gul, etc.

9. Learned Senior Counsel Sri Shanti Bhushan pressed the petition of Varshney General Sales. His argument was adopted by other learned counsel for the petitioners appearing in Civil Misc. Writ Petition Nos. 586 and 637 of 1994. Learned Senior Counsel Sri Raja Ram appeared for Sri Satya Narain Gupta in Civil Misc. Writ Petition No. 628 of 1994. Learned Senior Counsel Sri S.P. Gupta appeared for petitioners in Writ Petition No. 591 of 1994, and Writ Petition No. 710 of 1994. Learned Senior Counsel Sri Bharatji Agarwal appeared in Civil Misc. Writ Petition No. 613 of 1994 and learned counsel for petitioners in Writ Petitions Nos. 683 and 840 of 1994 adopted his arguments in the aforesaid writ petition. Learned Senior Counsel Sri Sudhir Chandra appeared in Civil Misc. Writ Petition No. 730 of 1994. Sri Rakesh Dwivedi, learned Additional Advocate-General appeared for the respondent-State. None appeared for the Union of India in spite of notice being served on them.

10. Learned counsel for the petitioners have raised the following grounds for adjudication.:

(A) Whether impugned Ordinance under the guise of luxury tax is imposing :

(a) tax on sale and purchase of tobacco falling within the definition of the expression 'a tax on sale or purchase of goods' under Article 366(29-A) of the Constitution....If yes,--

(i) whether such tax is violative of Section 15 of the [Central Sales Tax Act, 1956](#) and Article 286(3) of the Constitution as tobacco being declared as one of the goods to be of special importance under Section 14 of 1956 Act read with Article 286(3) inasmuch as Ordinance authorises levy up to 25 per cent while Section 15 restricts it up to 4 per cent only ?

(ii) whether in view of the Additional Duties of Excise (Goods of Special Importance) Act, 1957, the State can levy sales tax on 'tobacco' ?

(b) whether the impugned levy is in fact levy of excise duty falling under entry 84, List I hence ultra vires Articles 245 and 246 of the Constitution ?

(c) whether the impugned levy is in fact a levy of tax on consignment which is exclusively within the competence of the Union falling under List I, entry 92-B read with Article 269(1)(h) of the Constitution, hence ultra vires ?

(B) Whether it is violative of Article 301 of the Constitution and not saved by Article 304(b) of the Constitution ?

(C) Whether it is in violation of Article 14 of the Constitution ?

(D) Whether the impugned Ordinance is void as it purports to legislate in respect of tobacco, the control of this industry has been taken over by Parliament by the passing of the Tobacco Boards Act, 1975

11. Now we take up the petitioners' submission on ground No. (A)(a). The contention is that the impugned levy though has been termed as 'luxury tax' but truly it is a cloak delusioning for sales tax. In other words, ostensibly though termed as 'luxury tax' but it is in fact sales tax. Further the respondents were fully aware that on the situation existing no sales tax could be levied on tobacco by the State, hence imposition under the guise of luxury tax is a colourable piece of legislation amounting to fraud on the Constitution and statute.

12. To appreciate the challenge it is necessary to give a short summary of some provisions including the historical background of the Constitution as well as the [Central Sales Tax Act, 1956](#), the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (hereinafter referred to as 'the 1957 Act'). Under the Government of India Act, 1935, there was no entry relating to sales tax in List I of Schedule VII, and there was no provision corresponding to Article 286 of the [Constitution of India](#). However, entry 48 of List II of Schedule VII of the Government of India Act, 1935 authorised the provincial Legislature to levy sales tax. Entry 48 reads as under :

'48. Tax on the sale of goods and on advertisements.'

Under the Constitution, entry 92 of List I of Schedule VII provides for a tax on the sale or purchase of newspapers and on advertisements published in them. Entry 54, List II provides for a tax on the sale or purchase of goods other than

newspapers ; entry 55 for taxation on advertisements other than those published in newspapers. Entry 54, List II of the Seventh Schedule originally read as under :

'54. Tax on the sale or purchase of goods other than newspapers,.....'

Article 286 as it originally stood dealt with three matters. Article 286(1) prohibited the imposition of tax on the sale or purchase of goods (a) outside the State or (b) in the course of import or export of goods in India or out of the territory of India. Article 286(2) prohibited the imposition of a tax on the sale or purchase of goods in the course of inter-State trade or commerce except in so far as Parliament may by law otherwise provide. Article 286(3) required that any law imposing a tax on the sale of goods which had been declared by Parliament by law to be essential to the life of the community should not have effect till it was reserved for and received the assent of the President of India.

13. The Constitution (Sixth Amendment) Act, 1956 made several changes in Article 286. In the first phase, the Explanation to Article 286(1)(a), which had been the subject-matter of sharp judicial controversy in the Supreme Court, was deleted and new Sub-articles (2) and (3) were inserted. Article 286 after its amendment by the Sixth Amendment reads as under :

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

(a) outside the State ; or

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

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in Clause (1),

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

(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce,

(b).....

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

By the 6th Amendment, (i) entry 92-A was inserted in List I, namely :

'Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.'

Entry 54, List II was amended to take into account the insertion of entry 92-A in List I, and read as under :

'54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92-A of List I,'

By the Constitution (46th Amendment) Act, 1982, Article 286(3) was amended to take into account the insertion of Clause (29-A) in Article 366. Article 366(29A) reads as under :

'366(29A) 'tax on the sale or purchase of goods' includes--

(a) to (e).....

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

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

As a result of the insertion of Clause (29-A) in Article 366, Article 286(3) was amended and now reads as under :

'286. Restrictions as to imposition of tax on the sale or purchase of goods.--(1).....

(2).....

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

(a) a tax on the sale or purchase of goods declared by the Parliament by law to be of special importance in inter-State trade or commerce ; or

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

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

14. Parliament enacted the [Central Sales Tax Act, 1956](#) and Section 3 thereof formulates principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce. Section 4 formulates principles when a sale or purchase of goods can be said to take place outside a State. Chapter IV deals with goods of special importance in inter-State trade or commerce. Section 14 as originally enacted declared certain goods to be of special importance in inter-State trade or commerce. Section 15 places restrictions and conditions in regard to tax on sale or purchase of declared goods within a State. One of the restrictions contained in Section 15 is that a tax payable in respect of any sale or purchase of declared goods inside the State shall not exceed 4 per cent of the sale or purchase price thereof, and such tax shall not be levied at more than one stage.

15. Shortly after the [Central Sales Tax Act, 1956](#) was enacted, Parliament enacted the Additional Duties of Excise (Goods of Special Importance) Act, 1957. Reliance has been placed on the Statement of Objects and Reasons of this 1957 Act which is quoted hereunder :

'The object of the Bill is to impose additional duties of excise in replacement of the sales tax levied by the Union and the State on sugar, tobacco and mill-made textiles and to distribute the net proceeds of these taxes, except the proceeds

attributable to Union territories, to the States. The distribution of the proceeds of the additional duties broadly follows the pattern recommended by the Second Finance Commission. Provision has been made that the States which levy a tax on the sale or purchase of these commodities after the 1st April, 1958 do not participate in the distribution of the net proceeds. Provision is also being made in the Bill for including these three goods to be of special importance in inter-State trade or commerce so that, following the imposition of uniform duties of excise on them, the rates of sales tax if levied by any State are subject from 1st April, 1958 to the restrictions in Section 15 of the [Central Sales Tax Act, 1956](#).'

By virtue of Section 3 of the 1957 Act, read with the First Schedule, additional excise duty was levied, inter alia, on tobacco produced or manufactured in India at the rates specified in column 4 of the said Schedule. Section 4 provides for the distribution of additional duties of excise levied and collected during the financial year amongst the States as specified in Schedule II, Item 2 of Schedule II pertains to tobacco and it states that on and after 1st April, 1984 there shall be paid to each of these States specified in column 1 of the table below, such percentage of the net proceeds of additional duties levied and collected during the financial year in respect of tobacco after deducting a sum equal to 2.192 per cent of the said proceeds as being attributable to the Union territories, as set out against it in column 2.

Reference is further made to the proviso to Section 4, which is quoted hereunder ;

'Provided that if during that financial year there is levied and collected in any State a tax on the sale or purchase of tobacco..... by or under any law of that State), no sums shall be payable to that State under this paragraph in respect of that financial year, unless the Central Government by special order otherwise directs.'

As originally enacted Section 7 of the 1957 Act contained a declaration that sugar, tobacco, cotton fabrics, rayon or artificial silk fabrics were of special importance in inter-State trade and commerce and that any sales tax law of a State shall, in so far it imposes or authorises the imposition of a tax on the sale or purchase of these goods be subject as from 1st day of April, 1958 to the restrictions and conditions specified in Section 15 of the Central Sales Tax Act. Subsequently, considering

that it was desirable to make Section 14 of the Central Sales Tax Act, exhaustive and self-contained, the above goods were declared as goods of special importance under that Section with effect from 1st October, 1958, and simultaneously the declaration contained in Section 7 of the 1957 Act was repealed. It is significant, it is from that date tobacco under the U.P. Sales Tax Act has been exempted from tax.

16. Placing reliance on the aforesaid constitutional and legislative history learned counsel for the petitioners submitted that in view of Article 366(29A)(f), viz., definition of 'tax on sale or purchase of goods', which includes even supply for cash or deferred payment of any article, the impugned tax is, in fact, tax on sale and not on luxuries. In other words, the impugned tax to the extent it seeks to levy tax on supply, for consideration, tobacco including cigarettes, pan masala, etc., is nothing but a tax on sale falling within the definition of the aforesaid article. Further, all forms of manufactured tobacco including cigarettes are declared by Parliament to be goods of special importance in inter-State trade or commerce under Section 14 of the 1956 Act. Under the 1957 Act on or after 1st of April, 1958, manufactured tobacco including cigarettes were liable to levy and collection of additional excise duty in lieu of sales tax (section 3 read with Schedules I and II of the said 1957 Act). The argument is that if any State levied and collected a tax on the sale and purchase of tobacco by or under any law of that State the amount of additional excise duty which would otherwise be payable to that State in respect of that financial year would not be payable to that State unless specifically directed otherwise by the Central Government. Since tobacco has been declared by Parliament under Section 14 to be goods of special importance in inter-State trade or commerce has to conform to such restrictions and conditions in accordance with the system of levy, rates and other incidents of the tax as Parliament may by law specify. Consequently, Parliament has by law specified that amount of levy shall be single point and the rate of tax will not be more than 4 per cent. Thus, no State law can impose a tax on the sale or purchase of any such declared goods in excess of 4 per cent or otherwise at a single point. In the present case, the impugned tax permits levy on tobacco up to 25 per cent and thus the impugned notification so far it has levied tax at 15 per cent, is admittedly, in excess of four per cent and as such is ultra vires.

17. Under 1957 Act, option is left on the States, to receive revenue under it on the condition not to tax on sale that subject for which levy is collected. The respondents are not entitled to levy any tax on sales since the State has already opted under 1957 Act and is receiving revenue under it. This part of the argument co-related to ground No. (A)(a)(ii).

18. The entire legislative history of tobacco taxation establishes that it recognised the importance of tobacco as it was being over-taxed by the States. A scheme was formulated between the Central and States, whereby States surrendered their right to levy various taxes on tobacco, by whatever name called. This was with reference to the report of the Taxation Enquiry Commission appointed by the Ministry of Finance, Government of India, in April, 1953, under the Chairmanship of Dr. John Mathai. In the course of its extensive analysis of the various systems of State and local taxes prevalent in the country, the Commission dwelt at some length on the various State level taxes and duties levied on tobacco. The Commission expressed its concern at the fact that tobacco and tobacco products were subjected to a very high level of taxation by the States as well as by the Central at para 32 of chapter VIII of the Report, which is reproduced below :

'The main question to be considered in relation to the sales tax or special taxes on tobacco and tobacco manufacturers is their incidence in relation to the Central excise duties. Several complaints have been received by us about the unduly heavy burden of the Central and State taxes on tobacco and tobacco manufacturers. These goods are also liable to be octroi duties of municipalities in many instances. The need is obvious for ensuring proper co-ordination between the different taxes on tobacco levied by the Central Government, the States and the local authorities. We consider that such co-ordination would be best evolved through the machinery of the Inter-State Taxation Council to which we have already alluded.'

Pursuant to the above observations in the meeting of the National Development Council held in December, 1956 it was agreed unanimously that sales tax levied in States on mill-made textiles, tobacco including manufactured tobacco and sugar should be replaced by a surcharge on the Central excise duties on these articles

with the income derived therefrom to be distributed among the States on the basis of consumption. The Second Finance Commission after studying the revenue earned by the various States from the various taxes levied on goods of special importance over the preceding several years, recommended, (i) an amount equivalent to 1 per cent of the net proceeds be retained by the Union of India on behalf of the Union territories, (ii) a sum equivalent to 1.1/4 per cent be paid to the State of Jammu and Kashmir, and (iii) and the balance of the net proceeds..... after deduction of the sum mentioned in sub-paragraphs (1) and (2), be the income of the States on account of sales taxes, by whatever name called, be paid to them. In implementation of the aforesaid agreement between the States and the Centre and the recommendations of the Second Finance Commission, the Additional Duties of Excise Act, 1957 was enacted on 24th December, 1957. The Act expressly provides that in the event of a State levying a tax, inter alia, on the sale or purchase of tobacco, it shall lose its proportionate share of revenue from the additional excise duty levied and collected by the Centre. The State of Uttar Pradesh as also the other States, participate in the revenue collected by way of additional duties of excise. In this context the facts and figures are extremely revealing. In 1985-86 revenue obtained by the State of Uttar Pradesh from additional excise duty on cigarettes alone was Rs. 39.57 crores. In 1993-94 this amount increased to Rs. 139.85 crores. In a period of eight years the amount received by the State of U.P. as its share of additional excise duty on cigarettes has thus increased manifold.

19. The petitioner in Writ Petition No. 619(T) of 1994 in para 12 of the supplementary affidavit has averted that in August, 1994, in reply to a question in the Parliament as to whether the Government proposes to re-consider the imposition of 'luxury tax' on tobacco, the Minister of State for Finance informed the members that the Union Finance Minister has requested the Chief Ministers of the States where such tax is imposed to re-consider their decisions. The question and answer has been annexed as annexure A to the supplementary affidavit. As a consequence thereof the Finance Minister Sri Man Mohan Singh some time in May, 1994 addressed letters to the Chief Ministers of States in which after referring, regarding scheme of additional excise duty in lieu of sales tax under 1957 Act referred to sugar, textile and tobacco to the items which was subject to

additional excise duty to replace all the taxes then being imposed on such products. The relevant portion of letter is reproduced below :

'.....It has now come to our notice that some States have imposed or now contemplate imposing various levies on tobacco products. These levies are not in tune with the consensus that emerged unanimously at the meeting of the NDC held in December 1956. These levies can be objected to on the following grounds :

(i) Where these levies are called sales or purchase taxes, they constitute a direct infringement of the AED Act, 1957 ;

(ii) In other case, the nomenclature has been changed or levied under any other entry in the State List, the levies will affect collection of AED and may also constitute an infringement of the consensus reached in the NDC meeting held in December 1956. In any case, it is felt that the intention all along has been to reserve these commodities for taxation by the Central Government under the heading of additional duties of excise. Thus any levy whatsoever would possibly constitute an infringement of the consensus achieved in 1956 ;

(iii) The imposition of such levies changes the final price of these products from State to State and thereby segments the Indian common market.

In view of the above considerations, it is felt that States which have already imposed any levies should reconsider their actions on the lines of Maharashtra, which has recently withdrawn its luxury tax on tobacco. Other States which are contemplating the imposition of such levies may kindly reconsider the matter.'

20. On the basis of tobacco taxation history resulting into enactment by the Parliament of 1956 Act and 1957 Act, with declaration of tobacco as goods of special importance and State of U.P. having opted under the 1957 Act receiving revenue under it, the argument is that the State of U.P. is debarred firstly to impose any sales tax on tobacco and even if it does it cannot be at the rate more than 4 per cent.

21. On ground No. (A)(b) the argument is that the impugned tax so far as it seeks to levy on manufacturer of tobacco is in pith and substance a tax on manufacturer and is a levy of excise duty in the guise of luxury tax. The legislative power to levy and collect excise duty exclusively vests with the Union under entry 84 of List I of the Seventh Schedule of the Constitution. The State of U.P., therefore, lacks jurisdiction to levy this tax.

22. Argument on ground No. (A)(c) is that the petitioners effect sale of tobacco in the course of inter-State trade or commerce and inter-State sale and also transfer tobacco to other States for sale either on consignment basis or by way of stock transfer. Under the impugned Ordinance, the liability for payment of luxury tax is on the gross receipt of the petitioners irrespective as to whether the same has been sold in U.P. in the course of inter-State trade or commerce/ inter-State sale, and also of tobacco which has been sent to other States for sale on consignment basis or by way of stock transfer. The argument is by the Constitutional Forty-sixth Amendment, entry 92-B in List I was inserted, viz. :

'Taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.'

This legislative entry read with Article 269(1)(h) which deals with taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce is exclusively with the Union and State is incompetent to legislate on it under List II,

23. To appreciate the argument of the learned counsel for the petitioner on each of the sub-grounds of ground No. (A) it is necessary to refer to relevant provisions of the impugned Ordinance :

'An Ordinance to provide for levy and collection of luxury tax on tobacco and matters connected therewith or incidental thereto.

.....

2. Definitions.--(1) In this Ordinance-

(a).....

(b).....

(c) 'luxury tax' or 'tax' means the tax levied under Section 3 ;

(d) 'place of business' includes an office or any other place which a tobacconist uses for the purpose of supplying tobacco or where he keeps his books of accounts ;

(e) 'receipt' means-

(i) in respect of supply of tobacco by a tobacconist made by way of sale, the amount or valuable consideration received or receivable by him for such sale including any sum charged for anything done by him in respect of the tobacco so sold at the time of or before the delivery thereof and the price if charged separately, of any primary or secondary packing, other than the cost of freight or delivery or the amount realised as luxury tax when such cost or amount is separately charged ; and

(ii) in respect of supply of tobacco by a tobacconist made otherwise than by way of sale, the normal price at which the tobacco is sold, and the term 'normal price' shall have the same meaning as assigned to it in Section 4 of the Central Excises and Salt Act, 1944;

(f).....

(g) 'tobacco' means unmanufactured and manufactured tobacco as described in the notes and in the table in chapter 24 in the Schedule to the Central Excise Tariff Act, 1985 and includes pan masala (by whatever name called) with or without tobacco but does not include cigarettes priced at rupees five or less per packet of ten and biris ;

(h) 'tobacconist' means-

(i) a manufacturer whose turnover of receipts in a year exceeds one lakh rupees who supplies tobacco by way of sale or otherwise and includes any person who for the purpose of business gets the manufacturing done from any other person, whether or not on job work basis, but does not include any person who manufactures tobacco only on job-work basis without obtaining any proprietary right over it at any stage ;

(ii) any person who for the purposes of business brings or causes to be brought tobacco in the State or to whom any tobacco is despatched from any place outside the State and who supplies such tobacco by way of sale or otherwise ;

(iii) any person who supplies tobacco from a place within the State to any place outside the State by way of sale or otherwise ;

(iv) any person who does not buy or otherwise obtain unmanufactured tobacco under a brand name but supplies by way of sale or otherwise such unmanufactured tobacco in a sealed container under a brand name.

Explanation.--For the removal of doubts, it is clarified that a person-

(1) who as an agriculturist exclusively supplies tobacco grown by himself or grown on any land in which he has an interest whether as an owner, usufructuary mortgagee, tenant or otherwise whether or not in a sealed container and whether or not under a brand name ; or

(2) who exclusively supplies unmanufactured tobacco whether or not in a sealed container but not under a brand name ;

shall not be deemed to be a tobacconist for the purposes of this clause ;

(i) 'turnover of receipts' means the aggregate of the amounts of receipts of a tobacconist during a year in respect of the supply of tobacco by way of sale or otherwise ;

3. Levy of luxury tax.--(1) Every tobacconist shall be liable to pay luxury tax on his turnover of receipts at such rate, not exceeding twenty-five per cent, as the State Government may, by notification, specify and different rates may be specified for

different classes of tobacco :

Provided that a tobacconist who does not manufacture or receive tobacco from outside the State shall be liable to pay tax on his turnover of receipts from the date his. turnover of receipts exceeds two lakh rupees :

Provided further that in a chain of supply of tobacco, the tax shall be realised from the earliest of the tobacconists in the State and a successive tobacconist shall be exempt from payment of tax if he furnishes, in the manner prescribed, proof of payment of tax on such tobacco.

4. Exemption from tax.--Notwithstanding anything in this Ordinance, the State Government may, by notification, exempt any class of tobacco, or subject to such conditions and restrictions as it may impose, exempt from levy of tax any class of tobacconists.

6. Registration.--(1) Every tobacconist liable to pay tax under this Ordinance shall, within one month from the date on which he first becomes liable to pay tax, apply for registration to the assessing authorities in such form and manner and along with such fees, not exceeding one thousand rupees, as may be prescribed.

(6) No person who is not a registered tobacconist shall, in respect of supply of tobacco made by or through him by way of sale or otherwise, realise from any person any amount by way of luxury tax, or any amount in lieu of luxury tax by giving it a different name or colour.

(7) No registered tobacconist shall, in respect of any supply of tobacco made by or through him by way of sale or otherwise, realise from any person, other than a person to whom tobacco is supplied by him, any amount by way of luxury tax or any amount in lieu of luxury tax by giving it a different name, or colour.

9. Penalties in certain cases.--(1) If the assessing authority is satisfied that any tobacconist,--

.....

(d) being liable for registration under this Ordinance supplies or continues to supply tobacco by way of sale or otherwise without obtaining registration certificate ; or

(e) realises any amount as luxury tax where no luxury tax is legally payable or in excess of the amount of tax legally payable under this Ordinance ; or

(g) imports or transports or attempts to import or transport, abets the import or transport of tobacco in contravention of the provisions of Section 8 ; or

(h) fails to obtain authorisation for transit of tobacco or deliver the same in contravention of the provisions of Section 8 ; or

.....

it may, after such enquiry, as it may deem necessary, direct such tobacconist to pay, by way of penalty, in addition to tax, if any, payable by him :

.....

(vi) in a case referred to in Clause (g) or (h), a sum not exceeding forty per cent of the value of tobacco.

.....

24. Section 3 is the charging section. It taxes on the turnover of receipts of a tobacconist. The 'receipt' as defined under Section 2(e)(i) is in respect of supply of tobacco by a tobacconist made by way of sale is the amount of valuable consideration received or receivable by him for such sale and (ii) is in respect of supply of tobacco by a tobacconist made otherwise than by way of sale, its normal price at which such tobacco is sold, shall have the same meaning as assigned to it in Section 4 of the Central Excises and Salt Act, 1944. The 'tobacconist' is defined and it includes a manufacturer who supplies tobacco by way of sale or otherwise and any person, for the purpose of business who brings tobacco in the State or to whom tobacco is sent from any place outside the State and also includes any person who supplies tobacco from a place within the State to any place outside the State by way of sale or otherwise and also any person who does not buy or

otherwise obtain unmanufactured tobacco under a brand name, but supplies the same by way of sale or otherwise in a sealed container under a brand name. The definition of turnover of receipts refers to the receipt by a tobacconist during one year in respect of such supply of tobacco by way of sale or otherwise. The argument is looking to the charging section, and the various definitions under the definition clause, indicates that there is no nexus of the impugned tax co-relating with luxury, but it co-relates with the sale, with the manufacturer or consignment transactions in the course of business and trade. Even if it pertains to transaction of luxury goods, cannot be construed as luxury tax. In other words in pith and substance it is a tax on sale, on manufacturer as excise duty and on consignment transactions as consignment tax. Further Section 8 provides for establishment of barriers or checkposts. Section 9 provides for penalties. Section 10 provides for machinery to assess, reassess, collect and enforce payment of tax, interest, penalty, etc. have not only empowered same authorities created under the U.P. Trade Tax Act to perform duties under this Ordinance for the same purpose, but even its provisions and rules in this regard have been *mutatis mutandis* adopted. This also indicates that luxury tax is merely nomenclature and has been imposed in the guise of sales tax.

25. Similarly, referring to the definition of 'tobacconist' in Section 2(h)(i) it is urged it includes manufacturer, and in terms of charging Section 3 read with the definition of 'turnover of receipts' and 'receipts' indicates that, in fact, it is a tax on manufacturer and to this extent it is an excise duty which the State is incompetent to impose as it falls under entry 84, List I. Finally, referring to the definition of 'receipts', in Section 2(e)(ii) which pertains to the supply of tobacco by a tobacconist made otherwise than by way of sale, it is urged would be transactions of consignments, including stock transfer to that extent the Ordinance is *ultra vires* as consignment transaction falls under entry 92-B, List I read with Article 269(l)(h) of the Constitution hence State is not competent to legislate on this.

26. Repelling this part of the argument learned Additional Advocate-General for the respondents urged when the competence of a Legislature is challenged effort should not be made first to read a statute to be *ultra vires* but first to interpret for holding it constitutionally valid. Thus even if there be two possible interpretations,

then one which makes a provision intra vires be adopted. For this, one need not confine to the provision challenged but has to travel to the whole statute, viz., the preamble headings, marginal notes and other provisions, in order to find the true legislative intent and meaning. In substance, the argument is, first construe the impugned Ordinance, whether it in fact is imposing luxury tax, if it is, needless to go into other alternative interpretation that it is a tax on sales, manufacture or transaction of consignments. Further when challenge is on the ground of colourable exercise of legislative power then imputation to it of motive, mala fides, extraneous consideration is misconceived. What truly to be found is whether the State Legislature is or is not competent to legislate.

27. Before embarking to construe the impugned statute, it is pertinent to spell out, the principles of interpretation in this regard. In a Federal Constitution time and again in exercise of legislative powers, conflict arose between the Union and the State, transgressing into the field occupied by the other and question of its interpretation is often raised. Our Constitution has demarcated the field within which the Union and State exercise their powers to legislate. List I for the Union, List II for the States and List III for concurrent exercise of power by both. By Clause (1) of Article 246 Parliament has exclusive power to make laws in respect of any matter enumerated in List I. By Clause (3) State Legislature is given power to legislate exclusively in respect of any matter enumerated in List II but subject to power of Parliament as given in List I and List III under Clauses (1) and (2). In the Concurrent List III, Parliament and State both may legislate on matters enumerated therein. State power is subject to the power of Parliament in Clause (1). Where conflict is alleged, courts have evolved principles to resolve it, keeping in view Articles 245 and 246 of the Constitution. Well recognised principles are if an enactment substantially falls within its legislative field it cannot be held to be invalid merely because it incidentally or ancillary encroaches the field of other Legislature. In cases of conflict, the first attempt be made to reconcile. For doing so, if there be two possible interpretations, one which makes it ultra vires, and the other intra vires, then the latter should be accepted. In other words the courts should presume the wisdom of the Legislature that the impugned statute was validly made. It is only where reconciliation is not possible, the provision be held to be ultra vires.

28. Where challenge is to the legislative competence, to construe intent of Legislature and to find true meaning, in a fiscal statute, the court should first read the plain and simple meaning of the charging section. If still there be ambiguity, courts should scrutinise the whole statute, viz., the preamble, its heading and other provisions. In other words go to the pith and substance to find true intent of that statute. Further, in a given case, the court may have to give narrower and in other cases wider interpretation for upholding its validity, of course, not over stressing to make what is invalid as valid.

29. Let us examine some of the cases on these principles :

In Governor-General in Council v. Province of Madras , it was held :

'It is not the name of the tax but its real nature, its 'pith and substance' as it has sometimes been said, which must determine into what category it falls.'

In R.R Engineering Co. v. Zila Parishad, Bareilly : [1980]3SCR1 , it was held :

'The mere name of a tax does not bear on legislative competence and the absence of express enumeration of a tax by a particular name will not justify the tracing of legislative authority to the residuary entry. What is true in other jurisdictions is true in this branch of law also, namely, that one must have regard to the substance of the matter and not to the form or label.'

In Provincial Treasurer of Alberta v. C.E. Kerr [1933] AC 710 (PC), it was held :

'The identification of the subject-matter of the tax is naturally to be found in the charging section of the statute, and it will only be in the case of some ambiguity in the terms of the charging section that recourse to other sections is proper or necessary.'

In Ralla Ram v. Province of East Punjab , it was held :

'....In the first place, we have to look into the charging section of the statute,.... 'the identification of the subject-matter of the tax is only to be found in that section'..... It is true that we must look not to the mere form but to the substance of the levy, and the tax must be held to be invalid, if in the guise of a property tax it is really a

tax on income.....

The principles deducible from these pronouncements are, (1) that where there is an apparent conflict between an Act of the Federal Legislature and an Act of the Provincial Legislature, we must try to ascertain the pith and substance or the true nature and character of the conflicting provisions, and (2) that, before an Act is declared ultra vires, there should be an attempt to reconcile the two conflicting jurisdictions, and, only if such a reconciliation should prove impossible, the impugned Act should be declared invalid.'

In *Union of India v. Harbhajan Singh Dhillon* : [1972]83ITR582(SC) , the Supreme Court relying on the case of *Provincial Treasurer of Alberta* (1993) AC 710 (PC) also held to the same effect, viz., to find out true nature of the Wealth Tax Act one must look at the charging section to ascertain the exact scope of the legislation.

30. Another relevant principle to find the true nature of tax is to clearly demarcate what is incidents of tax and what is measure of tax. The incidence of tax is the subject on which tax is imposed, be on person, thing or activity, while measure of tax only gauges the method of calculation to quantify the tax payable. The incidence of tax must have direct nexus with the nature of tax. If incidence of tax has no nexus with purported tax designated by the nomenclature is itself an indication to go to the pith and substance to find what truly is the nature of tax. It would be that tax on which the incidence of tax has direct nexus.

In *Govind Saran Ganga Saran v. Commissioner of Sales Tax* : [1985]155ITR144(SC) , it was held :

'The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those

components of the levy will be fatal to its validity.'

31. Keeping these principles in mind, let us examine the contentions and cases relied on by counsel for the petitioners. In *Buxa Dooars Tea Co. Ltd. v. State of West Bengal* : [1989]179ITR91(SC) :

'The statute speaks of a levy 'in respect of a tea estate', and it says that the levy will not exceed Rs. 6 on each kilogram of tea on the despatches from such tea estate of tea grown therein..... Now, for determining the true nature of the legislation, whether it is a legislation in respect of tea estates, and therefore of land, or in respect of despatches of tea, we must, as we have said, take all the relevant provisions of the legislation into account and ascertain the essential substance of it..... If the levy is regarded as one in respect of tea estates and the measure of the liability is defined in terms of the weight of tea despatched from the tea estate there must be a nexus between the two indicating a relationship between the levy on the tea estate and the criteria for determining the measure of liability. If there is no nexus at all it can conceivably be inferred that the levy is not what it purports to be.....

'Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy.'

It is apparent that the standards laid down for measuring the liability under the levy must bear a relationship to the nature of the levy. In the case before us, however we find that the nexus with the tea estate is lost altogether in the provisions for exemption or reduction of the levy and that throughout the nexus is confined to despatches of tea rather than related to the tea estate..... It seems to us that having regard to all the relevant provisions of the statute..... in substance the impugned levy is a levy in respect of despatches of tea and not in respect of tea estates.'

Next reliance was placed in *India Cement Ltd. v. State of Tamil Nadu* : [1991]188ITR690(SC) , the question raised was, whether levy of cess on royalty pertaining to miners' right to mine is in pith and substance tax on land within entry 49, List II, it was held :

'In any event, cess on royalty cannot be sustained under entry 49 of List II being a tax on land. Royalty on mineral rights is not a tax on land but a payment for the user of the land..... Royalty is payable on a proportion of the minerals extracted..... Hence, there cannot be any doubt that the impugned legislation in its pith and substance is a tax on royalty and not a tax on land.'

In *Venkateshwara Theatre v. State of Andhra Pradesh* : AIR 1993 SC1947 , while considering the question of the legislative competence of the State Legislature clearly made distinction between the subject of tax and measure of the tax, held :

'While considering the question as to legislative competence of the State Legislature, it is necessary to bear in mind that the impugned provisions provide for imposition of a tax and a tax has two distinct elements, viz., subject of the tax and the measure of the tax.'

32. What percolates from these decisions and catena of earlier decisions is, in case the language of the charging section is ambiguous or the challenge is, that the nomenclature is a misnomer for another tax, go to the pith and substance by scrutinizing other provisions to find the true nature of the tax and also find clearly the incidence of tax and the measure of tax. The incidence of tax should have direct nexus with the nature of tax which is the subject of tax.

33. For the respondents it is rightly urged that challenge on the ground of colourable exercise of power by the Legislature in effect, only is referable to the competence of the State Legislature. No mala fides, fraud or motive could be attributed to the Legislature.

34. Colourable legislation is spoken with reference to the Act of Legislature, with reference to two entries one to which it actually falls and to other which ostensibly is projected to fall. Once the Legislature enacts within the entry to which it is competent then the validity cannot be challenged of it being unjust or unequitable the doctrine of colourable legislation has no application where powers of a Legislature are not fettered by any constitutional limitations. The words 'giving colour' itself depicts covering or concealing the true nature of the object coloured. In other words, what is projected is different from what it truly is on account of its

colouring. It is here courts by proper examination, by lifting the veil of its colour should find its true nature to expose whether it is a mere pretence or disguise. When Legislature colours a statute, means it is purporting to act within limits of its power, though actually it has transgressed.

In K.C. Gajapati Narayan Deo v. State of Orissa : [1954]1SCR1 , it was held :

'The Orissa Agricultural Income-tax (Amendment) Act, 1950 is certainly a legislation on 'taxing of agricultural income' as described in entry 46, List II of the Seventh Schedule..... it purports to increase the existing rates of agricultural income-tax, the highest rate being fixed at 12 annas 6 pies in the rupee. This may be unjust or inequitable, but that does not affect the competence of the Legislature.'

In Hari Krishna Bhargav v. Union of India : [1966]59ITR243(SC) , the following observations made in the case of K.C. Gajapati Narayan Deo : [1954]1SCR1 approved :

'.....The doctrine of colourable legislation does not involve any question of bona fides and mala fides on the part of the Legislature.'

In R.S. Joshi, Sales Tax Officer v. Ajit Mills Limited : [1978]1SCR338 , the court while dealing with constitutionality of a legislation held that the duty of a court is not to substitute their social and economic beliefs for the judgment of legislative bodies. The presumption of constitutionality must colour judicial construction. The court further held :

'When examining a legislation from the angle of its vires, the court has to be resilient, not rigid, forward-looking, not static, liberal, not verbal. In interpreting the organic law of the nation,.....'

While expounding the colourable exercise of legislative powers, the court held :

'A thing is colourable which is, in appearance only and not in reality, what it purports to be. In Indian terms it is maya. In the jurisprudence of power, colourable exercise of or fraud on legislative power or, more frightfully, fraud on the

Constitution, are expressions which merely mean that the Legislature is incompetent to enact a particular law,....'

35. For the respondents it was strongly urged, while construing a provision to dispel colourable exercise of power scrutinisation of whole statute be made perusing the preamble, headings, the marginal notes should also be taken into consideration in aid of interpretation.

36. For taking aid from marginal notes reliance was placed in *Bengal Immunity Company Limited v. State of Bihar* : [1955]2SCR603 , wherein the court took help of the marginal note to interpret Article 286 of the [Constitution of India](#) for the purpose of finding out its true meaning.

37. Repelling this argument learned counsel for the petitioner pointed out that in this case the marginal note itself along with the other provisions of the Constitution was passed by the constituent assembly, hence reliance was placed.

See *Hotel Balaji v. State of Andhra Pradesh* : AIR 1993 SC1048 .

'In my opinion, there is considerable force in the substance of the contention of these States that these provisions only impose a tax on purchases. The marginal title to the provisions indicates that their direct purpose is to levy a tax on purchases effected in the State in certain circumstances. The tax is couched as a tax on all goods (in U.P.) and on raw or processing materials and consumable stores (in the State of Gujarat).'

In this case the marginal note was relied on for drawing inference in interpreting statute.

See *Bhinka v. Charan Singh* : 1959 CriLJ1223 :

'If there is any ambiguity--we find none--it is dispelled by the heading given to the section and also the description of the nature of the suit given in the Schedule. The heading reads thus :

'Ejectment of person occupying land without title.'

'Maxwell on Interpretation of Statutes', 10th Edn., gives the scope of the use of such a heading in the interpretation of a section thus, at p. 50 :

'The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statute but they may explain ambiguous words.'

If there is any doubt in the interpretation of the words in the section, the heading certainly helps us to resolve that doubt.'

38. This holds if there is any doubt in the interpretation of the words in the sections, the heading certainly helps to resolve that doubt. This is not a case on marginal note.

See *Frick India Ltd. v. Union of India* :

'It is well-settled that the headings prefixed to sections or entries cannot control the plain words of the provision ; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous ; nor can they be used for cutting down the plain meaning of the words in the provision. Only, in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision.'

This again is an authority that in case of ambiguity heading or sub-heading may be referred to as an aid in construing the provisions.

See *Kalawatibai v. Soiryabai* : [1991]2SCR599 :

'Support for interpreting words 'female Hindu' widely cannot be drawn from the marginal note of Section 14 as marginal note is usually not resorted to for construing meaning of a section, particularly, when the language is plain and simple.'

39. This again is an authority that in interpreting the word in a statute marginal note has not usually resorted to particularly when the language is plain and simple.

40. In *Maharashtra Tubes Ltd. v. State Industrial and Investment Corporation of Maharashtra Ltd* : [1993]1SCR340 , it was held :

'In support of his contention that the marginal note can be used as an aid to interpretation he invited our attention to a seven-Judge Bench decision of this Court in *Bengal Immunity Company Limited v. State of Bihar* : [1955]2SCR603 . In that case the marginal note to Article 286 of the Constitution was referred to and it was said that it furnished some clue as to the meaning and purpose of the article. But at the same time the court pointed out that unlike the marginal notes in the statutes of the British Parliament, the various articles of the Constitution were passed by the Constituent Assembly with the marginal notes and, therefore, the court considered it permissible to use the marginal note to understand the meaning and purport of the article. But so far as statutes are concerned this Court in the case of *Board of Muslim Wakfs v. Radha Kishan* : [1979]2SCR148 held in no uncertain terms that the weight of the authority was in favour of the view that the marginal note appended to a section cannot be used for construing the section.....'

41. This decision of the Supreme Court has clearly laid down that taking aid of the marginal note in interpreting the provisions is not permissible.

42. It is true in *Hotel Balaji v. State of Andhra Pradesh* : AIR 1993 SC1048 marginal note was taken as an aid to interpret provision of a statute though the question whether it could be used as such was not raised, while in *Kalawatibai v. Soiryabai* : [1991]2SCR599 it holds, marginal note not to be resorted to particularly when language is plain and simple. But in *Maharashtra Tubes Ltd. v. State Industrial and Investment Corporation of Maharashtra Ltd* : [1993]1SCR340 . Supreme Court in unequivocal words held, marginal notes appended to a section cannot be used for construing a section. In view of this we proceed to examine the statute without taking aid of the marginal notes.

43. Now coming back to the impugned Ordinance, Section 3 is the charging section which makes a tobacconist liable to pay luxury tax on his turnover of receipt. 'Turnover of receipt' is defined as aggregate of amount of receipts during a year and 'receipt' is defined in respect of supply of tobacco made by way of sale or

otherwise. For the petitioners argument is that the charging section merely uses the nomenclature for payment on luxury tax but in fact it is not to find true nature of tax one has to travel to the definition clause of 'turnover of receipt', 'receipt' and 'tobacconist'. By merely looking to the definition of 'receipt' clearly spells out under its Sub-clause (i) tax is in fact on the sale of tobacco and by Clause (ii) which is otherwise than by way of sale is in fact consignment transactions. Further in view of widening the definition of sale as incorporated in Article 366(29A)(f), where mere supply for consideration is to be sale, 'receipt' in Clause (i) by way of sale is clearly a case of sale. Thus, in effect, it is a tax on sale and consignment. Further, 'tobacconist' by definition in Section 2(h)(i) is also manufacturer, hence it really is a tax on manufacture hence excise duty. On the other hand, the argument for the respondent is that the charging Section 3 itself is very clear, that it is a tax on luxury, on the turnover of receipt of a tobacconist of the supply of the tobacco. But if Section 3 be found to be ambiguous then statute as a whole including preamble, headings, marginal notes be examined, which also indicates the nature of tax to be a luxury tax.

44. In view of the two contending interpretations, and in view of the principles of law well-settled, we proceed to examine the statute to find whether it is a luxury tax or a tax on sale, consignment or on manufacture. By bare reading of the charging section no doubt it denotes it is a tax on luxury on the turnover of receipt of a tobacconist. It is here the challenge is, in name it spells out to be a luxury tax but, in fact, looking to the definition clauses, actually it is a tax on sale, consignment and on manufacture, hence it is necessary to examine the entire statute.

45. The Ordinance is known as 'the Uttar Pradesh Tax on Luxuries (Second) Ordinance, 1994'. Its preamble is :

'.....to provide for levy and collection of luxury tax on tobacco and matters connected therewith or incidental thereto.'

The preamble was substituted for the earlier preamble which was in the earlier Ordinance No, 8 of 1994. Read as following :

'to provide for levy and collection of tax on supply of tobacco and matters connected therewith or incidental thereto.'

The words 'tax on supply of have been deleted and substituted by the words 'luxury tax on'.

46. The Act does not define 'luxury'. Section 2(c) defines 'luxury tax' to be a tax levied under Section 3 ; the first proviso of Section 3 dilutes the rigor of liability to pay by a tobacconist which is on his turnover of receipt of rupees one lakh under Section 2(h)(i) by increasing the taxable turnover of receipt to rupees two lakhs and above in the cases of tobacconist who does not manufacture or receive tobacco from outside the State. Further under second proviso liability to pay tax is fixed at one point only, viz., first supply in the chain of supply of tobacco. Both the provisos indicate that fixation of liability correlates, in the first proviso to the receipt of tobacco and in the second proviso to the supply of tobacco. Section 2(d) defines the 'place of business' refers it to a place which tobacconist uses for the supply of tobacco. Similarly, Section 2(e) the definition of 'receipt' refers in respect of supply of tobacco both under Clauses (i) and (ii). Similarly, in the definition of 'tobacconist' under Section 2(h)(i) referring to the liability of a manufacturer whose turnover of receipt in a year exceeds one lakh rupees, again refers such person who supplies tobacco by way of sale or otherwise. Clause (ii) referring to a person who brings into the State tobacco or to whom tobacco is despatched shows the emphasis is on tobacco brought or tobacco despatched within the State from outside the State which again is supply of tobacco. Clause (iii) refers to a person who exports tobacco from the State to outside by State or otherwise, again refers as 'who supplies tobacco' from a place within the State. Similarly Clause (iv) refers to a person who obtains unmanufactured tobacco under a brand name or in a sealed container. The reference again is on obtaining tobacco. Even in the Explanation to the definition of 'tobacconist' while excluding certain classes of persons from the definition of tobacconist again refers to a person who as an agriculturist exclusively supplies tobacco grown by himself and also person who exclusively supplies unmanufactured tobacco. By the substituted Ordinance there is some change in the Explanation to Section 2(h). Sub-clause (1) to the Explanation quoted earlier has been added to exclude agriculturist, and what was Clause (1)

by the earlier Ordinance was made Clause (2) to this latter Ordinance and Clause (2) to the earlier Ordinance has been deleted about which we are not concerned in this case. Finally, in the definition of 'turnover of receipt' under Section 2(i) again it refers in respect of supply of tobacco by sale or otherwise. We find not only the nomenclature of this Ordinance, but the preamble also refers it as levy and collection of luxury tax on tobacco and each of the aforesaid definition clause including the proviso of Section 3 refers that the incidence of tax is on the supply of tobacco. We further find Section 4 which empowers the State Government to exempt from tax, refers to exempt any class of tobacco. Here again, the emphasis is on the class of tobacco. Under Section 6(6) no person who is not a registered tobacconist shall, in respect of supply of tobacco realise from any person any amount by way of luxury tax. This shows that the impugned tax could be passed on to the consumer but only when a tobacconist is registered. Significantly, even this sub-Section refers to the supply of tobacco made by way of sale or otherwise. Again the emphasis is on the supply of tobacco. Even in Section 9(l)(d) the penalty clause refers that any tobacconist being liable for registration, supplies or continues to supply tobacco by way of sale or otherwise without obtaining registration certificate is liable for penalty. Here again, emphasis is on the supply of tobacco.

47. From all these, the irresistible conclusion is that the incidence of tax is on the supply of tobacco and not on sale, consignment or manufacture. The reference to sale in Section 2(a)(i), otherwise than sale in Section 2(e)(ii) as alleged to be consignment transactions is only to include comprehensively all forms of supply of tobacco. Similarly, the definition of tobacconist includes a manufacturer. But it is significant that incidence of tax is at point when such manufacturer makes supply of tobacco by way of sale or otherwise. This also clearly indicates that incidence of tax is not at the stage of manufacture but at a latter stage, viz., when the supply of tobacco is made. Only by the use of the word manufacture the tax would not be a tax on manufacturer. A commodity may be subjected to number of taxes, may be excise on its manufacture, sales tax on its sale, consignment tax on its consignment, octroi by the local bodies. A manufacturer selling his manufactured goods will be subject both on a goods manufactured by him, excise duty and tax on sale. Only because a manufacturer sells a goods cannot make a tax on sale to

be an excise duty. To have a nexus with the excise duty the incidence of tax must correlate to the manufacture. If it is at a later stage, when sale takes place, it would be in addition to excise duty a tax on sale. Similarly, the same goods if it is a luxury goods, if luxury tax is imposed and incidence of tax is on the supply of such goods, may be by a manufacturer, then the imposition of luxury tax on manufacturer cannot partake of the colour of excise duty. In the present case the incidence of tax has no nexus with the manufacture of the goods but direct nexus with the supply of tobacco. The argument for the petitioner is that collection of excise duty may be made at a later stage than manufacture, viz., at the time of removal of goods, its exportation, or may be at the stage of collection from the consumer but that would not change the nature of tax. Though at first instance this argument glitters but dissolves like a mirage on closer scrutiny. What is to be found is on which is the incidence of tax to reveal the true nature of tax. We have found there is no nexus of incidence of tax with the manufacture of goods but throughout in the statute the incidence of tax clearly is on the luxury goods, viz., supply of tobacco ; it cannot be a case of collection of excise duty at a later stage of its supply but in fact, it is a tax on luxury goods on its supply.

48. The petitioners further in support that it is a tax on sale, relied on Sections 8, 9 and 10 of the Ordinance refers to evasion of tax, penalty, to assess, reassess, collect and enforce payment of tax empowering the same authorities as in U.P. Trade Tax Act, and some of the provisions of that Act and Rules have been mutatis mutandis adopted. In our considered opinion this by itself does not and cannot change the nature of the tax. It is always open to a Legislature instead of creating separate authorities to entrust the duties on the authorities existing under some other statute. To the same effect, we find, even under the Expenditure Tax Act, 1987, wherein Sections 6 and 24 of that Act envisage and provide for authorities to administer Act, engrafts the machinery and procedure of the Income-tax Act.

49. In the case of Buxa Dooars Tea Co. Ltd. v. State of West Bengal : [1989]179ITR91(SC) , where the impugned provision speaks of levy or cess in respect of tea estates, but the court on scrutinizing the various provisions of said Act, held that the incidence of tax is on despatches of tea rather than on the tea

estate. We find to the same effect in the present case the incidence of tax is on supply of tobacco rather than on manufacturer, seller or other person.

50. The petitioner relied on *A.B. Abdul Kadir v. State of Kerala* : [1976]2SCR690 . The contention is that in that case though the court held the levy has no correlation with the production or manufacture, it only means in case it is on manufacture it would be excise duty. It is urged in the present case 'tobacconist' includes even a manufacturer. Hence, on the parity of reasoning the present impugned levy be held as an excise duty. The Supreme Court in this case held :

'Excise duty, it is now well-settled, is a tax on articles produced or manufactured in the taxing country. Generally speaking, the tax is on the manufacturer or the producer, yet laws are to be found which impose a duty of excise at stages subsequent to the manufacture or production.

The fact that the levy of excise duty is in the form of licence fee would not detract from the fact that the levy relates to excise duty. It is, however, essential that such levy should be linked with production or manufacture of the excisable article. The recovery of licence fee in such an event would be one of the modes of levy of the excise duty. Where, however, the levy imposed or tax has no nexus with the manufacture or production of an article, the impost or tax cannot be regarded to be one in the nature of excise duty.

The charging Section 3 creates a liability for payment of luxury tax on the stocking and vending of tobacco. There is no provision which is concerned with production or manufacture of tobacco or which links the tax with the manufacture or production of tobacco. The same is the position of the rules issued on August 3, 1950 and January 25, 1951.

It would, therefore, follow that the levy of tax contemplated by the provisions of Section 3 has nothing to do with the manufacture or production of tobacco and, as such, cannot be deemed to be in the nature of excise duty. Argument that the provisions of the Act fall under entry 84 of List I of the Seventh Schedule to the Constitution must, therefore, be held to be bereft of force.'

In this case the court holds before a levy could be said to be excise duty it is essential that such levy should be linked with the production or manufacture of the excisable article. Even applying this principle we find, as held above, there is no correlation with the incidence of tax with its production or manufacture. The taxable event, in the present case, is on the supply of tobacco which is a stage subsequent to the production and measure of tax is on its price received or receivable on its sale or normal price receivable assigned to it in Section 4 of the Central Excises and Salt Act, 1944. Even this indicates that there is no co-relation of the tobacco which is subject of tax with its manufacture.

51. This case further concludes, the tobacco is an article of luxury. In this regard it is held :

'The word 'luxury' has not been used in the sense of something pertaining to the exclusive preserve of the rich. The fact that the use of an article is popular among the poor sections of the population would not detract from its description or nature of being an article of luxury. The connotation of the word 'luxury' is something which conduces enjoyment over and above the necessities of life. It denotes something which is superfluous and not indispensable and to which we take with a view to enjoy, amuse or entertain ourselves. An expenditure on something which is in excess of what is required for economic and personal well-being would be expenditure on luxury although the expenditure may be of a nature which is incurred by a large number of people, including those not economically well-off.

The use of tobacco has been found to have deleterious effect upon health and a tax on tobacco has been recognised as a tax in the nature of a luxury tax.

A number of factors may have to be taken into account in adjudging a commodity as an article of luxury. Any difficulty which may arise in borderline case would not be faced in case of an article like tobacco, which has been recognised to be an article of luxury and is harmful to health.'

This case holds, difficulty may arise in respect of other goods which may be said to be a borderline case but it cannot be said to be a case like an article of tobacco which has been recognised to be an article of luxury. Thus, tobacco being an

article of luxury an expenditure on it would be expenditure on luxury even though it may be used by persons who are economically not well-off. Even from this angle tax on tobacco, a luxury goods, would be a tax on luxury and thus would be a luxury tax.

52. Next, it was urged, even if it could be said that the tobacco is an article of luxury, pan masala by no stretch of imagination could be brought within the definition of the word 'tobacco' for imposing tax on it as luxury tax. Alternatively, unless tobacco is consumed within this State, this State would be incompetent to impose luxury tax. Reference was made to the definition of 'tobacco' under Section 2(g) which includes pan masala with or without tobacco. The contention is that pan masala which is sold in the market without tobacco well-known in the commercial world could by no stretch of imagination be known or called a tobacco. This artificial definition enlarging the very concept of tobacco is ultra vires. It is open to a Legislature to give widest meaning to any word including all its by-products or its derivations, but it could not include any item which could not by any stretch of imagination be within the concept of such item. Further, even at common parlance pan masala is not known to people as tobacco. Reliance was made on *State of Orissa v. Titaghur Paper Mills Co. Ltd.* : [1985]3SCR26 , on the following findings :

'The court further held that any attempt, therefore, to give to the expressions 'sale', 'goods' or 'sale of goods' artificial meaning or an enlarged meaning or to bring within their scope what would not be comprehended within it would be ultra vires and unconstitutional.'

This would be of no help to the petitioners. The question arose regarding a transaction whether it could be treated to be a sale within the meaning of entry 54 of the provincial List. Earlier, in *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.* : [1959]1SCR379 , the Constitution Bench was called upon to interpret entry 48 under the Government of India Act, 1935, to the expression 'sale of goods'. Similarly, while interpreting entry 54 of the State List under the present Constitution relying on the meaning given in entry 48 of the Provincial List it was held that attempt by the State Legislature to enlarge the meaning of the expression 'sale', have been held to be beyond the legislative competence. This

was a case where the competence of the State Legislature qua a legislative entry was in question, when meaning is given in a legislative entry of a word and the State Legislature enlarges the well-settled meaning of that entry it would definitely be a case of incompetence of the State Legislature as it would amount to travelling beyond its legislative field. In fact, on account of this the definition of 'sale' was enlarged by amending Article 366 by the introduction of '(29A)' in it.

53. In the present case, the definition of 'tobacco' is not to be found in any legislative entry. This apart, it is always open to a Legislature to give an artificial meaning to a word, of course that has to be within its competence in relation to the field of legislation. Once it could be found that meaning given is within its competence then notwithstanding it being diverse from the meaning of a common parlance it cannot be struck down. The impugned Ordinance refers to tax on luxury and even if by artificial definition of a luxury goods, viz., tobacco, if another luxury goods, to which State is competent to levy is included in its definition it would not be ultra vires. From this angle let us examine pan masala. It being used both by tobacco and nontobacco consumers and is commonly known and is grouped together with the consumer of tobacco and betel and sold almost every retail shop where such goods are sold. Further, if it is a luxury goods, its inclusion in the definition of the word 'tobacco' cannot be held to be ultra vires. It cannot be denied, pan masala is commonly used by people either as mouth freshner or for self-enjoyment, but by no stretch of imagination it could be said to be a goods of necessity. It is nobody's case that the State Legislature has no competence to impose a tax on luxury. If it is so then by mere giving an artificial definition it would not distract from the competence of the State Legislature to impose tax on it. It is not uncommon, time and again the Legislature by deeming clause extended the meaning of a word through definition clause and by using the word 'including' has extended its meanings sometime beyond its comprehensive meaning or meaning in a dictionary for the purpose of that Act. The object of comprehensive definition clause in an Act sometimes is, to avoid repetition of various goods or things, to which various provisions of that statute intend to apply by using that one comprehensive word. Whenever the use of the word 'include' in defining a word in a definition clause is made it extends the meaning of the said words. By this it not only comprehends its natural meaning but enlarges its meaning beyond it, what

the interpretation clause declares. Similarly, legal fiction in a statute is also very common by using the words 'is deemed to include' is to bring in by a legal fiction something within it what its ordinary meaning does not include.

54. Applying this principle, we find under Section 2(g) tobacco has been defined to include pan masala. This may be treated to be an artificial meaning for the purpose of this Act to be a tobacco though commonly it is not as such. In the impugned Ordinance tobacco is subjected to tax exemptions, referred to as goods supplied, etc. Legislature taxing both tobacco and pan masala as luxury goods, brought under one meaning by the definition clause to be treated as tobacco. This may also be for convenience of subjecting it comprehensively under one nomenclature. Thus, instead of describing both separately every time, in the various provisions, gave this comprehensive meaning. Hence, for the purpose of this Ordinance including pan masala as tobacco would neither be said to be illegal or ultra vires.

55. Next question is whether 'pan masala' would be a luxury goods or not. It cannot be denied it is for self enjoyment for gratification of senses. It would never be construed as an article of necessity.

56. In Encyclopaedia Britannica the meaning of the word 'luxury tax' is set out thus :

'Luxury tax--A tax on commodities or service that are considered to be luxuries rather than necessities. Modern examples are taxes levied on the purchase of jewellery, perfume and tobacco.'

In Webster's Comprehensive Dictionary, International Edition, the word 'luxury' is defined :

'Luxury--1. A free indulgence in the pleasures that gratify the senses. 2. Anything that ministers to comfort or pleasure that is expensive or rare, but is not necessary to life, health subsistence, etc., a delicacy.'

The New Dictionary of thoughts has these thoughtful things to say of 'luxury'.

'On the soft bed of luxury most kingdoms have expired' --Young.

'Unless we are accustomed to them from early youth, spending chambers and elegant furniture had best be left to people who neither have nor can have any thoughts'--Goethe.

'War destroys men, but luxury destroys mankind, at once corrupts the body and mind.'--Crown.

57. In other words, luxury is something which is not necessary for life but connotes extravagance and indulges of the same point by habit or senses. Looking at pan masala in this background it cannot be said it is a necessity for life. Indulgence of this is nothing but gratification of senses connoting extravagance and would thus be grouped as luxury goods.

58. The second limb of the argument is, even if tobacco is classified as a luxury goods but the same which is exported outside the U.P. not consumed within the State would not be covered within the entry 'taxes on luxuries' in item 62, List II of the Constitution. Taxes on luxuries correlate with the individual enjoyment unless it is enjoyed by human being or consumed within the State the Legislature would have no competence to levy luxury tax. Further, in the same entry 'including taxes on entertainment, amusement, betting and gambling 'also correlates with the entertainment, amusements or enjoyment. Reliance was placed In re : Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Ac , on the following observations :

'Similarly, item 50 (List II) relates to taxes on luxuries. 'These luxuries' may be excisable under item 45-C (List I) ; yet, being objects of consumption within the Province, they appear to have been taken out of the purview of item 45 (List I) and allocated to the Provinces.'

This case pertains to the competence of the Provincial Legislature to impose tax on the sale of goods falling under item 48 of List II. This was under Government of India Act, 1935.

59. Entry 45 (List I) related to 'duties of excise on tobacco and other goods manufactured or produced in India'. Item 49 of List II relates to 'cesses on the entry of goods into a local area for consumption, use or sale therein'. Entry 50 (List II) relates to 'taxes on luxuries'. The court relying on the said entry held :

'The expression is, therefore, wide enough to include goods which fall under item 45 of List I. If so, cesses on commodities ordinarily excisable by the Centre under item 45 (List I) would be within the exclusive competence of the Provincial Legislature, if levied on the entry of the goods into the local area for the purpose of consumption, use or sale therein. Similarly, item 50 (List II) relates to 'taxes on luxuries'. These 'luxuries' may be excisable under item 45 (List I) ; yet being objects of consumption within the Province, they appear to have been taken out of the purview of item 45 (List I) and allocated to the Provinces.'

It is in this background the court further held :

'.....the scheme of taxation was intended to be that an excisable commodity is subject to the legislation of the Centre in respect of all taxes on or connected with its production, manufacture, etc., etc., but when such commodity enters the precincts of a Province and a tax has to be imposed on its sale within the Province for purposes of consumption therein and the tax is in no way connected with its production, etc., but it is imposed with respect to its sale merely as an existing article of trade and commerce, the power to do so is exclusively with the Province.'

The court was not called upon either to interpret entry 50 (List II) namely 'taxes on luxuries' or to decide extent of power of Legislature under it. In *Federation of Hotel & Restaurant Association of India v. Union of India* : [1989]178ITR97(SC) , reliance has been placed only on the quotation of Encyclopaedia Britannica as follows :

'Indeed, reference may be made to the following statement in Encyclopaedia Britannica (Vol. 14, page 459) on 'luxury tax' ;

A different approach to luxury taxation, much less frequently found, seeks to single out the luxury component of spending on a given object rather than taxing

specified goods and services as luxuries. One example of this is the Massachusetts 5 per cent tax on restaurant meal of \$ 1 or more.....'

In *Mumbai Grahak Panchayat v. State of Maharashtra* 1983 Tax LR 2770 (Bom), it was held :

'However, the liability to pay tax under the impugned Act does not arise in the case of a dealer in or manufacturer of television sets kept for the purposes of trade. The provisions of Section 5(4), which fix the liability to payment of tax in the case of a dealer in or manufacture of television sets kept for the purposes of trade to the extent of tax on three television sets, are consequentially ultra vires and invalid as the T.V. sets kept by a dealer in or manufacture of such sets for the purpose of trade cannot be said to be held by him either as an article of luxury or for the purpose of entertainment or amusement.'

In this case the Bombay High Court held, levy of luxury tax on three television sets on manufacturer or dealer for trade is ultra vires and invalid, as television sets kept by them cannot be luxury or kept for the purpose of entertainment or amusement, but was for trade only.

60. With respect we beg to differ with this decision. This in effect could amount to giving restricted meaning of the legislative entry 'taxes on luxuries'.

61. In *Western India Theatres Ltd. v. Cantonment Board* : AIR 1959 SC582 , it was held, in construing a legislative entry, the widest possible construction of its meaning be given. This decision while interpreting entry 50 (List II) further held :

'.....there can be no reason to construe the words 'taxes on luxuries or entertainments or amusements' in entry 50 as having a restricted meaning so as to confine the operation of the law to be made thereunder only to taxes on persons receiving the luxuries, entertainments or amusements. The entry contemplates luxuries, entertainments and amusements as objects on which the tax is to be imposed. If the words are to be so regarded, as we think they must, there can be no reason to differentiate between the giver and the receiver of the luxuries, entertainments, or amusements and both may, with equal propriety, be made

amenable to the tax.....'

The principle of *Mumbai Grahak Panchayat v. State of Maharashtra* 1983 Tax LR 2770 is contrary to the decision in *A.B. Abdul Kadir's case* : [1976]2SCR690 , where tax on luxuries as licences on stockist and vendors both wholesalers and retailers were held to be valid. It was only struck down for noncompliance of Article 304(b). In the case of vendors and stockists, if the above principle is applied there is no element of enjoyment but in effect they are also trader trading by stocking and vending the tobacco.

62. Similarly, *State of West Bengal v. Anal Chowdhury* 1984 Tax LR 2512, is a case where luxury tax imposed on the owner or the person who possesses television sets was upheld and its user or nonuser was held to be immaterial. It was further held that the tax is on the article, viz., a television set and not on the activity of telecasting programme.

63. In *Federation of Hotel & Restaurant Association of India v. Union of India* : [1989]178ITR97(SC) , it was held :

'In the light of the above entries and decisions, I think that the learned Attorney-General is right in urging that, merely because the 1987 Act as well as the State Acts levy taxes which have ultimate impact on persons who enjoy certain luxuries, the pith and substance of both cannot be considered to be the same. The object of a tax on luxury is to impose a tax on the enjoyment of certain types of benefits, facilities and advantages on which the Legislature wishes to impose a curb. The idea is to encourage society to cater better to the needs of those who cannot afford them. For instance, a luxury tax may, to cite a catchy example, encourage construction of 'janata' hotels rather than five star hotels. Such a tax may be on the person offering the luxury or the person enjoying it. It may be levied on the basis of the amount received for providing, or the amount paid for or expended for enjoying, the luxury.'

The court considered the legislative competence to impose expenditure tax, incurred in connection with the provisions of accommodation, food, drinks, etc., in hotels. It was held that this expenditure tax is covered by entry 97, List I and is not

a tax on luxuries falling under entry 62 of List II of the Seventh Schedule. It is in this context held that the object of a tax on luxuries is to impose a tax on the enjoyment of certain types of benefits, facilities and advantages on which Legislature wishes to impose a curb. This Court further in this decision held that such a tax may be on the person offering the luxury or a person enjoying it.

Finally, reliance was placed in *A.B. Abdul Kadir v. State of Kerala* : [1976]2SCR690 , that though tobacco is held as a luxury goods but the same was consumed within the State. The petitioners' reliance on three decisions, viz., *Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938* In re [1938] 1 STC 1 [PC], *Federation of Hotel & Restaurant Association of India v. Union of India* : [1989]178ITR97(SC) and *A.B. Abdul Kadir v. State of Kerala* : [1976]2SCR690 is not of much help as in none, the question was directly raised, whether in case luxury goods, if not consumed within the State, the Legislature would be competent to legislate over it.

64. It is well-settled in construing legislative entry widest possible meaning should be given, of course keeping it within permissible field. Taxes on luxuries would include all aspects of luxuries. One of the reasons for such taxations is to curb the activities of luxuries. To do so, if it is to be confined to only last stage, viz., consumption, measure to curb such activity has to be limited. To curb one has to take measure from the first stage, viz., when goods are manufactured, including within its folds the giver producers going down till the stage of consumption. If a producer or trader deals in luxury goods, earns profit on luxury goods, if taxation are made on it then such taxation would not be beyond legislative competence even if consumed outside the State. The petitioners' contention restricts the meaning of the words 'taxes on luxuries' by limiting taxes only if consumed or enjoyed within the territory of this State. If taxes on luxuries is truly and widely interpreted it would include all its aspects including supplier, producer, giver, provider, etc. The person who deals in luxury goods including manufacturers are all contributing towards luxury, they all would be persons who are providing luxury. A person earning large profits in dealing with luxury goods, profit may be by sending such goods outside the State. The State could if desires to curb such activities tax on such luxury goods. In case of sale one can say taxes on sales

mean incidence of tax is at the point of sale, not before that and in case it takes place outside the State this State would have no territorial means to tax. But in the case of tax on luxury it would include tax on luxury goods which is within this State, either sent from outside or is sent outside. Incidence of tax is on luxuries which would include luxury goods need not be restricted to unless consumed within the State.

65. It is also no more *res Integra* in view of the decision in *A.B. Abdul Kadir's case* : [1976]2SCR690 . It not only holds tobacco as an article of luxury but upheld luxury tax on stockist and vendor, who neither consume nor to such person there is any enjoyment but he actually traded in luxury goods. The tobacco being an article of luxury then every person, dealing in such goods, whether manufacturer, seller, supplier or receiver of goods for sale or otherwise are persons who are providing for the luxury. Once it is held that such persons are dealing in luxury goods then such goods would be covered within the entry 'tax on luxury' in item 62, List II irrespective of its consumption ; it cannot be restricted to cases where there is actual consumption within the State. The Legislature would be competent to impose such tax on persons, things or even activities dealing with luxury goods to impose tax on luxuries.

66. If argument of the petitioner is accepted then territorial nexus would only be in case consumption within the State. The tax on luxury as has been held in *Express Hotels Private Ltd, v. State of Gujarat* : [1989]178ITR151(SC) , would be both on corporeal things, viz., luxury goods and incorporeal like enjoyment of the hotel or restaurant.

See *Western India Theatres Ltd. v. Cantonment Board, Poona* : AIR 1959 SC582 :

'.....In view of this well-established rule of interpretation, there can be no reason to construe the words 'taxes on luxuries or entertainments or amusements' in entry 50 as having a restricted meaning so as to confine the operation of the law to be made there-under only to taxes on persons receiving the luxuries, entertainments, or amusements. The entry contemplates luxuries, entertainments, and amusements as objects on which the tax is to be imposed. If the words are to be so regarded, as we think they must, there can be no reason to differentiate

between the giver and the receiver of the luxuries, entertainments, or amusements and both may, with equal propriety, be made amenable to tax..... The concept of 'luxuries' as a subject of tax was not confined to those who received or enjoyed the luxury. It could be on those who provided it.'

67. In view of all these we hold State Legislature was competent to impose luxury tax on tobacco under entry 62, List II of the Seventh Schedule.

68. Accordingly, we hold that the impugned Ordinance is a tax on luxuries, not a tax on sale, manufacture or on transaction of consignment, hence ground No. (A) with all its sub-grounds is held as against the petitioners.

69. Before taking up ground No. (B) at the outset, learned Additional Advocate-General urged, in view of the notification dated September 24, 1994, issued under Section 4 of the Ordinance exempting with effect from September 25, 1994 levy of tax on tobacco priced at rupees one hundred and fifty or less per kilogram and pan masala whatever name called with or without tobacco, a large number of petitioners would now only be affected by this tax for a period from June 1, 1994 to September 25, 1994. Thus, applying the principle of *De minimis non curat lex* the court should not embark upon considering the challenge at it is for a short period for a small sum.

70. Shri Sudhir Chandra, repelling this contention, argued that this principle would not be applicable as it is not a minor fraction of the imposition which is being affected. For this period the imposition of tax would run into lakhs and total may be crores. See Broom's Legal Maxims, Tenth Edition :

'*De minimis non curat lex*' (The law does not concern itself about trifles) : Courts of justice generally do not take trifling and immaterial matters into account, except under peculiar circumstances, such as the trial of a right, or where personal character is involved, they will not, for instance, take notice of the fraction of a day, except in cases where there are conflicting rights, for the determination of which it is necessary that they should do so, as, for instance, in a claim for demurrage of a ship, in which case it has been expressly held that a fraction of a day counts for a day.

.....

Where trifling irregularities or even infractions of the strict letter of the law are brought under the notice of the court, the maxim *de minimis non curat lex* is of frequent practical application. It has, for instance, been applied to support a rate, in the assessment of which there were some comparatively trifling omissions of established forms. So, with reference to proceedings for an infringement of the revenue laws, Sir W. Scott observed that 'the court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim, *de minimis non curat lex*. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked'.

71. This principle is applicable where there are trifling irregularities or omissions or for trifling deviations which would weigh very little in public interest may be overlooked. This would not be applicable where trial of one's right or claim is in issue affecting him. This principle of *de minimis non curat lex* would not be applicable on the facts of the present case. Not only is there a serious challenge of their claim based on constitutional rights but affecting amounts running into lakhs of rupees could by no stretch be held as trifling irregularity or omission or it affecting only fraction.

72. Next we take up ground No. (B). The argument is, the impugned levy impedes the freedom of trade, commerce and inter-course, hence is violative of Article 301 of the Constitution and the same having not obtained prior assent of the President under Article 304(b) is *ultra vires*. The petitioners deal in tobacco both within and outside the State by exporting out and importing into the State. Tobacco is a declared commodity of special importance by Parliament under Section 14 of 1956 Act and to bring uniformity, as far as possible its price, fixed Central sales tax at 4 per cent in the matter of its inter-State sale. Further history of tobacco taxation reveals, the anxiety to bring in control its price, for which, with the understanding of various States led to the passing of the 1957 Act, as a check for the States who

opt to get share under it, not to further subject this commodity to sales tax. The petitioner further referred to the letter of the Finance Minister in this regard. All these show, all traders in this commodity almost getting equal treatment hence there is uniformity in its trade. But now the imposition of tax on it at 15 per cent has affected their trade, as tobacco sold in this State, or outside the State, is bound to increase its price and thus will not be able to compete with the traders who directly sell it, within and without this State or who are not subjected to this tax. This results into two tier of prices for the same goods, petitioners' tobacco resulting into higher price, directly impedes its movement hence violative of Article 301 of the Constitution. The resultant effect is that now the petitioners have to close down their trade in this State.

73. To appreciate this argument let us look to the scheme of Part XIII of the Constitution. Article 301 not only applies to inter-State but to intra-State trade, commerce and intercourse as evident from words 'throughout the territory of India'. Freedom of trade under this, of course, is subject to the restrictions in other articles of this Part. Article 302 is an exception to Article 301, i.e., it can be imposed by Parliament in public interest. First paragraph of Article 303 is an exception to Article 302. It prohibits Parliament from making any law which gives preference to one State or discriminate between two States. The second part further limits the exercise of power by the Parliament only to situations referred to therein. Similarly, first part of Article 304(b) treats imported goods in the State on the same terms as similar goods manufactured in that State. Article 304(b) empowers the State Legislature to impose reasonable restrictions on the freedom of trade without or even in the same State subject to consideration that Legislature has to obtain prior sanction of the President by the proviso of Article 304.

74. The petitioners relied on *Atiabari Tea Co. Ltd. v. State of Assam* : [1961]1SCR809 :

'.....it certainly includes movement of trade which is of the very essence of all trade and is its integral part. If the transport or the movement of goods is taxed solely on the basis that the goods are thus carried or transported that, in our opinion, directly affects the freedom of trade as contemplated by Article 301. If the

movement, transport or the carrying of goods is allowed to be impeded, obstructed or hampered by taxation without satisfying the requirements of Part XIII the freedom of trade on which so much emphasis is laid by Article 301 would turn to be illusory. When Article 301 provides that trade shall be free throughout the territory of India primarily it is the movement part of the trade that it has in mind and the movement or the transport part of trade must be free subject of course to the limitations and exceptions provided by the other articles of Part XIII. That we think is the result of Article 301 read with the other articles in Part XIII....

Thus the intrinsic evidence furnished by some of the articles of Part XIII shows that taxing laws are not excluded from the operation of Article 301, which means that tax laws can and do amount to restrictions freedom from which is guaranteed to trade under the said Part. Does that mean that all tax laws attract the provisions of Part XIII whether their impact on trade or its movement is direct and immediate or indirect and remote? Thus considered we think it would be reasonable and proper to hold that restrictions, freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free-flow or movement of trade. Taxes may and do amount to restrictions ; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301.'

This holds that taxation laws are not excluded from ambit of Article 301. In other words, it may also amount to restrictions in freedom of trade as guaranteed under this article. However, it is held, such restrictions should be direct and immediate. See *Firm A.T.B, Mehtab Majid and Co. v. State of Madras* : AIR 1963 SC928 :

'It is now well-settled that taxing laws can be restrictions on trade, commerce and intercourse, if they hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulatory measures. Sales tax, of the kind under consideration here, cannot be said to be a measure regulating any trade or a compensatory tax levied for the use of trading facilities. Sales tax, which has the effect of discriminating between goods of one State and goods of another, may affect the free-flow of trade and it will then offend against Article 301.....'

See *A.B. Abdul Kadir v. State of Kerala* : [1976]2SCR690 :

'The learned Judges of the High Court were of the opinion that the levy of tax in question was violative of Article 301 of the Constitution, according to which subject to the provisions of Part XIII, trade, commerce and intercourse throughout the territory of India shall be free. The learned Judges in this connection took the view that the levy of tax as a condition preceding to the entry of goods into a place directly impeded the flow of trade to that place. The conclusion arrived at by the High Court in this respect, in our opinion, was correct and sound.'

Repelling the reliance of petitioners for the respondents it is contended that this was a case where a class of licence fee who desires to bring tobacco inside the State has to pay licence fees in advance before it is brought within the taxable territory.

See *Hansraj Bagrecha v. State of Bihar* : [1971]2SCR412 :

In this case Rule 31B of the Bihar Sales Tax Rules, 1959 was struck down as the operation of the rule was held not restricted only to transactions in the course of intra-State trade and commerce but also restricted on inter-State transactions. This decision further holds that imposition of tax may in circumstances impede free-flow of trade, commerce and intercourse but every tax does not have that effect.

See *Indian Cement Ltd. v. State of Andhra Pradesh* : [1988]2SCR574 :

'.....Thus, on a fair construction of the provisions of Part XIII, the following propositions emerge : (1) trade, commerce and intercourse throughout the territory of India are not absolutely free, but are subject to certain powers of legislation by Parliament or the Legislature of a State ; (2) the freedom declared by Article 301 does not mean freedom from taxation simpliciter, but does mean freedom from taxation which has the effect of directly impeding the free-flow of trade, commerce and intercourse ; (3) the freedom envisaged in Article 301 is subject to non-discriminatory restrictions imposed by Parliament in public interest (Article 302) ; (4) even discriminatory or preferential legislation may be made by Parliament for the purpose of dealing with an emergency like a scarcity of goods in any part of India [Article 303(2)] ; (5) reasonable restrictions may be imposed by the

Legislature of a State in the public interest [Article 304(b)] ; (6) non-discriminatory taxes may be imposed by the Legislature of a State on goods imported from another State or other States, if similar taxes are imposed on goods produced or manufactured in that State [Article 304(a)] ; and lastly (7) restrictions imposed by existing laws have been continued, except in so far as the President may by order otherwise direct (Article 305).'

75. The principle which emerges is that taxing law is not out of the purview of Article 301. Such imposition may amount to impeding movement of goods, but mere imposition of tax would not amount to impede trade, commerce and intercourse, unless it impedes its movement directly and immediately. Further, where imposition is merely compensatory or regulatory would not amount to impeding the movement of the goods within the meaning of Article 301.

76. Repelling this, learned counsel for the respondents urged firstly, tobacco, the consumption of which is hazardous to health and on the parity of liquor, gambling, adulterated foods contents trade in it cannot be permissible trade within the meaning of trade under Article 301 and be held that no citizen has any fundamental right to deal with it, secondly, even if it be a trade merely imposition of tax per se does not impede its free-flow, further this being merely regulatory in nature does not infringe Article 301.

77. For the first part of argument, it is urged, that liquor has been held to be injurious and hazardous to the health ; no person can claim a right to trade in it, nor fundamental right.

See Cooverjee B. Bharucha v Excise Commissioner and the Chief Commissioner, Ajmer : [1954]1SCR873 :

'That when the liquors are taken in excess the injuries are confined to the party offending is a fact which does not exist. The injury, it is true, first falls upon him in his health, which the habit undermines ; in his morals, which it weakens ; and in the self-abasement which it creates. But as it leads to neglect of business and waste of property and general demoralisation, it affects those who are immediately connected with and dependent upon him'

See *Nashirwar v. State of Madhya Pradesh* : [1975]2SCR861 :

'There is no fundamental right of citizens to carry on trade or to do business in liquor. There is the police power of the State to enforce public morality to prohibit trades in noxious or dangerous goods. There is power of the State to enforce an absolute prohibition of manufacture or sale of intoxicating liquor. Article 47 states that the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health. The history of excise law shows that the State has the exclusive right or privilege of manufacture or sale of liquor. Trade in liquor has historically stood on a different footing from other trades. Restrictions which are not permissible in other trades are lawful and reasonable so far as the trade in liquor is concerned. That is why even prohibition of the trade in liquor is not only permissible but is also reasonable. The reasons are public morality, public interest and harmful and dangerous character of the liquor.'

See *Har Shankar v. Deputy Excise and Taxation Commissioner* : [1975]3SCR254 :

'There is no fundamental right to do trade or business in intoxicants. The State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants-its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants.....'

To the same effect is the decision pertaining to gambling. Reliance has been placed on *State of Bombay v. R.M.D. Chamarbaug-wala* : [1957]1SCR874 :

'Gambling activities from their very nature and in essence are extra-commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Article 19(l)(g) or Article 301 of the Constitution. These activities which have been condemned in this country from ancient times appear to have been equally discouraged and looked upon with disfavour in England, Scotland, the United States of America and in Australia. It is

difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home could possibly have been intended by our Constitution makers to be raised to the status of trade, commerce or intercourse and to be made the subject-matter of a fundamental right guaranteed by Article 19(1)(g).'

To the same effect is also finding pertaining to adulterated foods. See *State of Uttar Pradesh v. Kartar Singh* : 1964 CriLJ229 ;

'We might in this connection add that the respondent cannot assert any fundamental right under Article 19(1) to carry on business in adulterated food stuffs.'

Strong reliance has been placed on the Full Bench decision in *T.K. Abraham v. State of Travancore-Cochin* : AIR1958 Ker129 :

'Tobacco is almost as deleterious as liquor and one of the earliest and more famous inditements is in Robert Burton's *Anatomy of Melancholy* where in dealing with its common abuse by most men he said :

'tis a plague, a mischief, a violent purger of goods, lands, health, helish, devilish and damned tobacco, the ruin and overthrow of body and soul ;'

With respect we beg not to concern with this view. Tobacco may be injurious to the health but it cannot constitute as deleterious as liquor. Liquor not only is an intoxicant, but almost derails a man of his senses with self-abasement degrading in morals, ruining the family. This cannot be said about tobacco.

78. So far decision on liquor the foundation was that the liquor is not only injurious to health but undermines one's moral. It is, in fact, self-abasement, leading to neglect of business and waste of property and general demoralising effect on his dependents. This is not attributable in the case of tobacco. Merely it is injurious to health would not per se constitute a ground for prohibiting trade pertaining to

tobacco or declaring a citizen has no right to trade in it. Thus there cannot be any parity between this and liquor. To the same effect gambling or adulterated food cannot be equated with tobacco. Of course, trade in gambling and adulterated food not only defaces social fibre but in no orderly society it could be conceived to permit trade in it. Hence, the first part of the contention has no merits. Thus trade in tobacco would constitute to be a trade within the meaning of Article 301.

79. Coming to the second limb of argument that even if it is a trade the imposition of tax does not impede movement of goods and is merely regulatory in nature. Reliance was placed that it is regulatory measure on *Sri Srinivasa Theatre v. Government of Tamil Nadu* : [1992]2SCR164 :

'The instrument of taxation is not merely a means to raise revenue in India, it is, and ought to be, a means to reduce inequalities.'

This decision pertaining to entertainment tax on admission to cinema theatre. The court held, there is no reasonable restrictions upon the petitioners' fundamental right to trade. The question raised is not whether the restriction is reasonable, but whether the imposition of tax is regulatory in nature. This decision has no bearing on this point. Further, referring to the *A.B. Abdul Kadir v. State of Kerala* : [1976]2SCR690 for repelling petitioners' contention, it is urged, that the Supreme Court though held that imposition of luxury tax amounts to impediment to the movement of the goods affecting trade and commerce and intercourse, but that was because there was a pre-condition that 'A' class licensees have to pay licence fee in advance before they could bring tobacco within the taxable territory. The submission is, this is because of this pre-condition, it was held it directly and immediately impedes its trade, commerce and inter-course. This submission will not stand as in *Buxa's case* : [1989]179ITR91(SC) there was no such pre-condition yet imposition of tax was held impeding trade, commerce and inter-course.

See *State of Madras v. N.K. Nataraja Mudaliar* : [1968]3SCR829 .

'.....,We are unable to accept the view propounded by the High Court. The flow of trade does not necessarily depend upon the rates of sales tax ; it depends upon a

variety of factors, such as the source of supply, place of consumption, existence of trade channels, the rates of freight, trading facilities, availability of efficient transport and other facilities for carrying on trade. Instances can easily be imagined of cases in which notwithstanding the lower rate of tax in a particular part of the country goods may be purchased from another part, where a higher rate of tax prevails. Supposing in a particular State in respect of a commodity, the rate of tax is 2 per cent, but if the benefit of that low rate is offset by the freight which a merchant in another State may have to pay for carrying that commodity over a long distance, the merchant would be willing to purchase the goods from a nearer State, even though the rate of tax in that State may be higher. Existence of longstanding business relations, availability of communications, credit facilities and a host of other factors--natural and business--enter into the maintenance of trade relations, and the free-flow of trade cannot necessarily be deemed to have been obstructed merely because in a particular State the rate of tax on sales is higher than the rates prevailing in other States.

.....

'.....The rate which a State Legislature imposes in respect of inter-State transactions in a particular commodity must depend upon a variety of factors. A State may be led to impose a high rate of tax on a commodity either when it is not consumed at all within the State or if it feels that the burden which is falling on consumers within the State will be more than offset by the gain in revenue ultimately derived from outside consumers. The imposition of rates of sales tax is normally influenced by factors political and economic. If the rate is so high as to drive away prospective traders from purchasing a commodity and to resort to other sources of supply, in its own interest the State will adjust the rate to attract purchasers. Again, in a democratic constitution political forces would operate against the levy of an unduly high rate of tax. The rate of tax on sales of a commodity may not ordinarily be based on arbitrary considerations, but in the light of the facility of trade in a particular commodity, the market conditions--internal and external--and the likelihood of consumers not being scared away by the price which includes a high rate of tax. Attention must also be directed to Sub-section (5) of Section 8 which authorises the State Government, notwithstanding anything

contained in Section 8, in the public interest to waive tax or impose tax on sales at a lower rate on inter-State trade or commerce. It is clear that the Legislature has contemplated that elasticity of rates consistent with economic forces may be maintained.'

The decision held that merely rate of sales tax in a particular State would affect the free-flow of trade and commerce but would depend on other factors as enumerated therein. It is true that merely imposition of tax by itself would not constitute to infer impeding the trade, commerce and intercourse. This has to depend on facts and circumstances of each case which, of course, in this case, has to be examined for arriving at this conclusion. To the same effect is the decision in the State of Kerala v. A.B. Abdul Kadir : [1970]1SCR700 :

'Imposition of a duty or tax in every case would not be tantamount per se to an infringement of Article 301. Only such restrictions or impediments which directly or immediately impede the free flow of trade, commerce and intercourse fall within the prohibition imposed by Article 301. A tax may in certain cases directly and immediately restrict or hamper the flow of trade, but every imposition of tax does not do so. Every case must be judged on its own facts and in its own setting of time and circumstance.'

Lastly, reliance is placed in Video Electronics Pvt. Ltd. v. State of Punjab : AIR 1990 SC820 :

'It is necessary to bear in mind that taxes may and sometimes do amount to restrictions but it is only such taxes as directly and immediately restrict trade that would fall within the mischief of Article 301. Mr. Salve, however, rightly reminded us that regulatory measures or measures imposing compensatory taxes for using trading facilities do not come within the purview of restrictions contemplated under Article 301.....It is true that if a particular provision being taxing provision or otherwise impedes directly or immediately the free flow of trade within the Union of India then it will be violative of Article 301 of the Constitution. It has further to be borne in mind that Article 301 enjoins that trade, commerce and intercourse throughout the territory of India shall be free. The first question, therefore, which one has to examine in this case is, whether the sales tax provisions (exemption

etc.) in these cases directly and immediately restrict the free flow of trade and commerce within the meaning of Article 301 of the Constitution. We have examined the scheme of Article 301 of the Constitution read with Article 304 and the observations made by this Court in *Atiabari's case* : [1961]1SCR809 , as also the observations made by this Court in *Automobile Transport (Rajasthan) Ltd.'s case* : [1963]1SCR491 . In our opinion, Part XIII of the Constitution cannot be read in isolation. It is part and parcel of a single constitutional instrument envisaging a federal scheme and containing general scheme conferring legislative powers in respect of the matters relating to List II of the Seventh Schedule on the States. It also confers plenary powers on the States to raise revenue for their purposes and does not require that every legislation of the State must obtain assent of the President.....'

'It has to be examined whether difference in rates per se discriminates so as to come within Articles 301 and 304(a) of the Constitution. It is manifest that free flow of trade between two States does not necessarily or generally depend upon the rate of tax alone. Many factors including the cost of goods play an important role in the movement of goods from one State to another. Hence the mere fact that there is a difference in the rate of tax on goods locally manufactured and those imported would not amount to hampering of trade between the two States within the meaning of Article 301 of the Constitution.'

This case again holds that the tax per se would not constitute impeding ones trade, commerce and intercourse within the meaning of Article 301 but would depend on other factors.

80. *Nataraja Mudaliar case* [1968] 22 STC 376 ; AIR 1969 SC 147 spelt out what would be other relevant consideration to find what impede trade and commerce. It held it would, depend upon source of supply, place of consumption, the rate of freight, etc. It also referred as an exemplar that in a particular State the tax may be low but its price may be raised on account of its freight for bringing the goods from long distance from another States. A merchant in such a case may be willing to purchase from a State where the rate of tax may be higher but the cost of freight being low its total cost be less. In other words, the consideration has to be whether

by imposition of tax, in effect, affects its price to the extent that in competition with similar goods the viability of its penetration in the commercial field qua the purchasing consideration of the consumers becomes difficult. Therefore, the question is whether the imposition of luxury tax in this State, which is not in other States, keeping in view the commodity being declared as a commodity of special importance under Section 14 of the 1956 Act, limiting imposition of sales tax at 4 per cent in inter-State sales coupled with the 1957 Act preceded by Taxation Inquiry Commission reports including letter of the Finance Minister, affects the free-flow of this commodity or it impedes its movement within the meaning of Article 301.

81. It is also relevant to point out in this context that rights and obligations are the two sides of the same coin. In proportion of the obligatory contributions, proportionate right is receivable. If obligations overflow receivable right overflows. If obligations dry up, the rights dry up. Wealth of a nation is gauged by the degree of obligations by individuals, social organs, Government and Constitutional functionaries. When one has to claim a right, it is that right which is obstructed, what otherwise belongs to him. Right may be branded, as inherent right, human right, social right, legal or constitutional right, etc. These rights are protected by protectors, given to one entitled. In contributing towards social, economical and political justice a conscientious citizen, social organisation, juristic persons of even State, have to give up or not to enforce any of their recognised rights in the larger interest for contribution towards true justice. Ultimate spirit of law and justice through all the layers of procedural and subjective law is to reach the goal for all by satisfying their legitimate urge through justice and fairplay even by sacrificing, adjusting, contributing ones right for the good of others. This is the spirit of love, respecting and acting in unison being complementary to each other. Every act even when within sphere of one right, has to be weighed, if by not exercising or enforcing the right, it contributes towards social, economical or political justice, restraint should be exercised. This objective should always be kept in mind even in enforcing ones right which would be in consonance with the spirit of the preamble. This in no way curtails any ones constitutional or statutory right. This is readable only through the pedestal of preamble of our Constitution. The question today be not confined to the enforceability of rights but to the spirit and jurisprudence behind

every legal enforceable action. Jurisprudence is defined as :

'It is the eye of law. It gives the law the expression. It relates the law to the spirit of the time and richer the jurisprudence of a given system in a given era, the nearer will be the law of that system to the need of its time.....Justice has to satisfy the urge of the society.'--By Laski.

Executive, Legislature and Judiciary are three Constitutional pillars of the citadel of democracy. Even while exercising their rights, within the permissible limits, each must have, one and the only goal to give justice through the spirit of preamble, to reach social justice to its people. These three constitutional functionaries have to act in unison, being complementary to each other, aiding and assisting to secure to its citizen, social, economical and political justice. Though, functioning in diverse fields but for common objective, as resolved in the Preamble. As spirit in an individual lies in his integrity, character, reverence and inspiration, is equally applicable to the Executive, Legislature and Judiciary. Thus these constitutional functionaries should not only act in unison as complementary to each other but should quench its thirst for power some times by restrain-ing to exercise its right for attainment of social justice.

82. These observations were made, as we find subject-matter of taxation is tobacco. Entire gamut of tobacco taxation history does indicate, right from last four decades, it is drawing attention of not only Union but all the States of this country in taking measures in dealing in the trade, taxation and movement of this article. The purpose, reason and measures taken have to be kept in mind even when one acts within limit of its powers. Otherwise this may in a given case amount to defeating social justice by legal justice. Thus while imposing tax may be within its competence, the burden of tax, effect of it on trade of a particular goods, effect of industrial development of that goods these all have to be weighed as against collection of revenue,

83. Now, advertng to the facts, we find in paragraph 14 of the rejoinder affidavit in Civil Misc. Writ Petition No. 628(T) of 1994 while denying the averments made in the counter-affidavit it is averred under Standards of Weights and Measurement Package Rules, 1976, the petitioner has to declare and print the maximum retail

sale price of the commodity on the package. This price is to be uniform for whole of India inclusive of all local taxes. Relevant rule 2(r) is quoted below :

' 'Retail sale price' means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer and where such price is mentioned on the package, there shall be printed on the packages the words 'maximum (or Max) retail price', inclusive of all taxes.'

In view of this, the 'retail sale price' of tobacco, which the petitioner has to print is to be increased by 15 per cent which is bound to be higher in price than the traders of other States. Consumers will inevitably be purchasing tobacco priced at lower rate. This directly and immediately impedes in the movement of tobacco. Thus the price of the same goods would vary both within and outside the State ; the tobacco sent outside would be priced more in comparison to tobacco of the other State not subjected to tax and tobacco coming from outside without any luxury tax would be priced at lower rate. The inevitable effect would be the same goods would be available at two prices.

84. Learned Additional Advocate-General for the respondents objected of raising this as this being brought only in the rejoinder affidavit. It has not been denied that the rejoinder affidavit was served on 30th August, 1994. In fact, by this time hearing of this case did not start. The respondent brought in fresh/substituted Ordinance and notification pertaining to exemption as late as on 24th September, 1994. There was no difficulty if the respondents desired to have filed affidavit in rebuttal. Further, we find what is relied in the rejoinder affidavit is only with reference to Weights and Measures Rules. In *Sri-la Sri Subramania Desika Gnanasambanda Pandarasannidi v. State of Madras* : [1965]3SCR17 , it was held :

'That takes us to the consideration of the question as to whether the two reasons given by the High Court in support of this decision are valid. The first reason, as we have already indicated, is that the High Court thought that the plea in question had not been raised by the appellant in his writ petition. This reason is no doubt, technically right in the sense that this plea was not mentioned in the first affidavit filed by the appellant in support of his petition ; but in the affidavit-in-rejoinder filed

by the appellant this plea has been expressly taken. This is not disputed by Mr. Chetty, and so, when the matter was argued before the High Court, the respondents had full notice of the fact that one of the grounds on which the appellant challenged the validity of the impugned order was that he had not been given a chance to show cause why the said notification should not be issued. We are, therefore, satisfied that the High Court was in error in assuming that the ground in question had not been taken at any stage by the appellant before the matter was argued before the High Court.'

Therefore, this technical objection raised on behalf of the respondents has no merit.

85. Further, we find the basic facts, that the impugned tax increases the price of this commodity affecting the trade, were taken in the main petition. The petitioners have averred by illustration that the price of pan masala is Rs. 100 the petitioners have to pay Rs. 50 as Central excise duty and sales tax of Rs. 10 including surcharge on that the luxury tax would be payable at which may be up to 25 per cent. In paragraph 21 this averment made by one of the petitioners in Writ Petition No. 628(T) of 1994 is when the petitioners transfer by way of inter-State sale or on consignment basis or by way of stock transfer under the Ordinance they are liable to pay luxury tax on the total gross receipt irrespective whether the same has been sold in U.P. or which has been sent to other States. In both the cases the estimated liability of the petitioner comes to a huge amount of Rs. 5 crores per annum. It is further averred that the business in pan masala is highly competitive and the petitioner will be forced to close down its business in this State and shift its manufacture and sale to the adjoining States like Delhi, Madhya Pradesh, Haryana, etc., where there is no luxury tax. Therefore, it is not only in the rejoinder affidavit but its foundation has been laid in the main writ petition itself. In the light of these facts and keeping in mind the principles as laid down in the various decisions we come to the irresistible conclusion, by imposition of this luxury tax the movement of tobacco by the manufacturer, seller or trader both within and outside the State would be affected as the same commodity would be available at a lower price than what petitioners would be selling. Thus, in both the contingencies, there is no escape but to draw a conclusion, on the disparity of prices, especially in such

goods for which repeated attempts were made to keep within control its price that it directly and immediately impedes from flow of this tobacco within the aura of Article 301. Further, we do not find the impugned levy in any way to be regulatory in measure. Nothing has been pointed either in the statute or in the argument nor any foundation laid in the counter-affidavit to justify this levy as regulatory in nature. On the contrary, we find the imposition of tax is solely for collecting revenue for the State, hence cannot be held to be for regulatory measures.

86. We are not embarking to consider whether this levy is for a reasonable cause in the public interest. Once it is held it is violative of Article 301, then it is for the State to show at least compliance of Article 304(b) by getting prior assent of the President of India. Having found impugned impedes movement of tobacco it is held impugned Ordinance is violative of Article 301 of the [Constitution of India](#). Admittedly, in the present case, which is not in dispute, there is no assent from the President of India. Thus, impugned levy is held to be ultra vires of Article 301.

87. The next ground of challenge is that it is violative of Article 14 of the Constitution, inter alia, on the following grounds :

A. The definition of the word 'tobacconist' in Section 2(h) read with proviso to Section 3 exhibits treating the two classes of tobac-conists one less favourably than other. The tobacconist who does not manufacture or brings tobacco from outside the State, the liability to tax is only when turnover of his receipt exceeds rupees two lakhs while other tobacconist who is manufacturer or brings tobacco from outside, the liability is when his turnover of receipt is rupees one lakh only.

B. The definition of 'tobacco' in Section 2(g), cigarettes priced at Rs. 5 or less per packet of ten and biris has been excluded from the definition though pan masala, which are also priced at Rs. 1.50 to Rs. 2 per pouch is admittedly less than Rs. 5 has not been exempted which clearly exposes differential treatment by the State, which is not ba'sed on any intelligible differentia.

C. Similarly, khaini which is consumed by poorest of poor being sold for 25 to 50 paise per packet is included in the definition of tobacco but cigarettes priced at Rs. 5 or less per packet often and biris being excluded. Both, such cigarettes and such

khaini, belongs to the same class. There is no rational for this differential treatment and it has no co-relation with the object sought to be achieved, hence is arbitrary.

D. Levy of luxury tax upon branded unmanufactured tobacco while keeping unbranded unmanufactured tobacco outside its scope in view of definition of 'tobacconist' in Section 2(h)(iv) is irrational, discriminatory, thus hit by Article 14.

88. In support of these, the petitioners made the following pleadings. For sub-ground A, it is pleaded that the impugned Ordinance is discriminatory between the tobacconist who are manufacturer and importers as against tobacconist who are not manufacturer or does not import tobacco from outside by making unfavourable treatment to one against favourable to another.

For sub-ground B it is averred that the impugned Ordinance excludes cigarettes priced at Rs. 5 or less per packet of ten or biris, but includes pan masala sold in pouches and packages priced at Rs. 2 of 25 gr., which is hostile discrimination and is violative of Article 14.

For sub-ground C it is averred that the tobacco known as khaini/tambakoo used by the poorest of poor priced at 50 paise for one puria being taxed while excluding from its ambit cigarettes priced at Rs. 5 or less and biris shows hostile discrimination as there is no intelligible differentia in excluding cigarettes, as aforesaid, while including khaini. It has further been averred that one packet of khaini of 50 paise costs 1/10th of the price of the packet of ten cigarettes priced at Rs. 5 and 1/8th of the costs of a bundle of biri.

For sub-ground D it is averred that there is no rational to differentiate between branded and unbranded unmanufactured tobacco. Thus, excluding unbranded unmanufactured tobacco by Section 2(h)(iv) exhibits irrational and discriminatory treatment, hence violative of Article 14 of the Constitution.

89. In the matter of hostile discrimination the doctrine of equal protection, is equally applicable to the fiscal statutes though a wider latitude is made available to the Legislature in the matter of classification of objects, persons and things for the purpose of taxation though the classification, if made, should not be arbitrary.

However, two conditions must be fulfilled ; the classification must be founded on an intelligible differentia and the differentia must have a rational nexus with the object sought to be achieved. It is significant to quote from the case of Sri Srinivasa Theatre v. Government of Tamil Nadu : [1992]2SCR164 . This decision approved the following observations made earlier in the case of S.K. Dutta, Income-tax Officer v. Lawrence Singh Ingty : [1968]68ITR272(SC) :

'It is not in dispute that taxation laws must also pass the test of Article 14. That has been laid down by this Court in Moopil Nair v. State of Kerala : [1961]3SCR77 . But as observed by this Court in East India Tobacco Co. v. State of Andhra Pradesh : [1963]1SCR404 , in deciding whether the taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some person or objects and not others ; it is only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification, that it would be violative of Article 14. It is well-settled that a State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably.'

And in another case Elel Hotels and Investments Ltd. v. Union of India : [1989]178ITR140(SC) , the following passage has been relied :

'It is now well-settled that a very wide latitude is available to the Legislature in the matter of classification of objects, persons and things for purposes of taxation. It must need be so, having regard to the complexities involved in the formulation of a taxation policy. Taxation is not now a mere source of raising money to defray expenses of Government. It is a recognised fiscal tool to achieve fiscal and social objectives. The differentia of classification presupposes and proceeds on the premise that it distinguishes and keeps apart, as a distinct class, hotels with higher economic status reflected in one of the indicia of such economic superiority.'

90. The petitioners relied on Shashikant Laxman Kale v. Union of India : [1990]185ITR104(SC) , on the following findings :

'It is first necessary to discern the true purpose or object of the impugned enactment because it is only with reference to the true object of the enactment that the existence of a rational nexus of the differentia on which the classification is based, with the object sought to be achieved by the enactment, can be examined to test the validity of the classification. In Francis Bennion's Statutory Interpretation, 1984 Edition, the distinction between the legislative intention and the purpose or object of the legislation has been succinctly summarised at page 237 as under :

'The distinction between the purpose or object of an enactment and the legislative intention governing it is that the former relates to the mischief to which the enactment is directed and its remedy, while the latter relates to the legal meaning of the enactment.'

There is thus a clear distinction between the two. While the purpose or object of the legislation is to provide a remedy for the malady, the legislative intention relates to the meaning or exposition of the remedy as enacted. While dealing with the validity of a classification, the rational nexus of the differentia on which the classification is based has to exist with the purpose or object of the legislation so determined.....'

However, in applying this principle it is also necessary to see the following passage of the same judgment which has bearing in deciding the question raised by the petitioner :

'It is well-settled that the latitude for classification in a taxing statute is much greater ; and in order to tax something it is not necessary to tax everything. These basic postulates have to be borne in mind while determining the constitutional validity of a taxing provision challenged on the ground of discrimination. One has to look beyond the ostensible classification and to the purpose of the law and apply the test of 'palpable arbitrariness' in the context of the felt needs of the times and societal exigencies informed by experience to determine reasonableness of the classification. For this, it is first necessary to discern the true purpose or object of the impugned enactment because it is only with reference to the true object of the enactment that the existence of a rational nexus of the differentia on which the

classification is based, with the object sought to be achieved by the enactment, can be examined to test the validity of the classification.'

'The scope for permissible classification in a taxing statute was once again considered in a recent decision of this Court in P.H. Ashwathanarayana v. State of Karnataka : AIR 1989 SC100 . After a review of earlier decisions, it was stated therein as under (para 30 of AIR) :

'It is for the State to decide what economic and social policy it should pursue and what discriminations advance those social and economic policies. In view of the inherent complexity of these fiscal adjustments, courts give a larger discretion to the Legislature in the matter of its preferences of economic and social policies and effectuate the chosen system in all possible and reasonable ways....."

Next, reliance was placed on Arya Vaidya Pharmacy v. State of Tamil Nadu : 1989(40)ELT273(SC) :

'We think that the appeals are entitled to succeed. Item No. 95 mentions the rate of 7 per cent (now 8 per cent) as the tax to be levied at the point of first sale in the State. Item No. 135 provides a rate of 30 per cent in respect of arishtams and asavas at the point of first sale. We see no reason why arishtams and asavas should be treated differently from the general class of ayurvedic medicines covered by item No. 95. It is open to the Legislature, or the State Government if it is authorised in that behalf by the Legislature, to select different rates of tax for different commodities. But where the commodities belong to the same class or category, there must be a rational basis for discriminating between one commodity and another for the purpose of imposing tax..... So long as there is good reason for making the distinction from other commodities no complaint can be made. What the actual rate should be is not a matter for the courts to determine generally, but where a distinction is made between commodities falling in the same category a question arises at once before a court whether there is justification for the discrimination. In the present case, we are not satisfied that the reason behind the rate of 30 per cent on the turnover of arishtams and asavas constitutes good ground for taking those two preparations out from the general class of medicinal preparations to which a lower rate has been applied.....'

In this case the rate of tax imposed on arishtams and asavas, the two ayurvedic medicines were challenged which was higher than the other general class of ayurvedic medicine. The court held the commodity belongs to the same class of category, viz., the ayurvedic medicines. There was no rational basis for discriminating between one commodity from the other. The petitioners relied in the case *Banner & Co. V. Union of India* : 1994(70)ELT181(Cal) , which held :

'.....denying exemption benefit to goods manufactured by small-scale manufacturers but bearing brand name of a large scale manufacturer unconstitutional since not passing the test of reasonable classification. Stated objectives of amending notification not justify-ing the denial since still open to large scale manufacturer to get his goods manufactured from SSI units without brand name and then affix the brand name himself without having to pay duty.....'

This was a case pertaining to tax on manufacture in which exemption notification denying exemption to goods manufactured by small-scale manufacturers bearing brand name of large scale manufacturer, was held unconstitutional. It was held that amending notification did not justify since it was open to a large scale manufacturer to get his goods manufactured from small-scale industrial units without brand name and then affix the brand name himself without having to pay duty. It was further held that the excise duty is payable on manufacture and a process is not manufacture if it does not change the character of the goods manufactured. Putting the brand name on specified goods does not change the goods and cannot amount to manufacture. Thus this case pertains to excise duty, and the question was whether brand name makes any difference or makes a different article for excise duty.

In *East India Tobacco Company v. State of Andhra Pradesh* : [1963]1SCR404 , the question was whether imposition of tax on the sale of Virginia tobacco and not on other kind of tobacco was discriminatory and, obnoxious to Article 14 of the Constitution. It held :

'In our judgment the differences which exist between the Virginia and 'Nattu' country tobacco, as found by the learned Judges, are materials on which the State could treat Virginia tobacco as forming a class by itself for purpose of taxation, and

the impugned legislation must be held to be not obnoxious to Article 14 of the Constitution.'

The respondent relied on this that though Virginia tobacco and 'Nattu' country tobacco are both tobacco yet it was held Virginia tobacco as forming a separate class for the purpose of taxation.

91. Once classification of goods could be said to be based on intelligible differentia it is always open to leave out one and to include other. To this extent the State can pick and choose persons, goods, or even fix different rate of tax so long it is based on intel-ligible differentia having direct nexus with the object sought to be achieved. Thus even fiscal statute are not outside the ambit of Article 14, but enjoys a wider latitude in the matter of selection of goods, persons, subject, etc. In other words, the rigor of discrimina-tion while testing in a taxation statute is less rigorous. If there is equality among each group it would not be held to be discriminatory.

92. In a fiscal statute within the same class of goods, viz., tobacco, as in the present case, it is permissible to make further classification of its commercially known commodity like, cigarettes, zarda, khaini, snuff gul, etc. It is open to a State to include all or any within the purview to tax or gradually bring them under it in a phased way or to prescribe different rate of tax. Inclusion of any one or some and exclusion of other would not per se amount to discriminatory treatment. Similarly same principle applies while exercising power of exemption but this has to be based on some reasonable criteria. In case a criteria, not to include for taxation, up to a priced level, not to affect consumption by the poor, then State has further to satisfy based on intelligible differentia with the object sought to be achieved by the impugned State as to why similar group of commodity subjected to tax falling under the same criteria has been left out. In other words what was reason of choosing one and leaving out other similarly placed. If there be no reasonable criteria with the object sought to be achieved, it would be arbitrary, unreasonable and would amount to dissimilar treatment of similarly placed person or goods hence violative of Article 14 of the Constitution.

93. With these principles let us examine the various sub-grounds raised by the petitioner.

Sub-ground A : We find 'tobacconist' is defined to include a manufacturer whose turnover of receipt in a year exceeds Rs. 1 lakh. By proviso to Section 3 the taxable turnover of receipt has been increased to Rs. 2 lakhs in cases of a tobacconist who is not a manufacturer or receives tobacco from outside the State. Argument is creation of two groups within tobacconist, one under Section 2(h), other under proviso to Section 3 is discriminatory in nature as one group of tobacconist falling under proviso to Section 3 is favourably placed than one falling under Section 2(h).

It cannot be doubted, persons who are manufacturers and those who are not are clear two classes of traders. Similar is the case of those who are importers and those are not. If tobacconists who are manufacturers and importers are grouped as one class of persons and non-manufacturers and non-importers into another, the classification could not be held either to be discriminatory or unreasonable. Giving favourable treatment to non-manufacturer or non-importer cannot be said to be unreasonable. It is always permissible to further classify class of persons even among the same class of persons so long the classification is reasonable. Hence no question of favourable treatment to one set of person against other in the same class of persons. Accordingly, we hold this classification to be reasonable and not discriminatory.

94. Next coming to sub-ground B we find, even though for the purpose of impugned Ordinance, pan masala is treated to be tobacco, but pan masala is a distinct and separate class of article. It not only have a distinct and separate character but in common parlance known as such and is even used by persons who do not take tobacco. If treatment of pan masala is differently made for taxation, exemption even for rate than tobacco or its derivation, it cannot be held to be discriminatory. Discriminatory means dissimilar treatment among same class or group of persons or things. There cannot be dissimilar or discriminatory treatment if person or thing subjected to tax falls under separate class or group. Thus, exclusion of cigarettes of Rs. 5 or less per packet of ten cannot be said to

be discriminatory to pan masala when it is sold in small packets as they are two separate and distinct commodities in itself falling under separate class or group. Hence, no discrimination.

95. Coming to sub-ground D, the discrimination alleged is by including unmanufactured tobacco under the branded name and excluding unmanufactured tobacco not under branded name for taxation by virtue of Explanation to Section 2(n). It is urged there is no difference between the two as both are tobacco. Hence, it is discriminatory and violative of Article 14. Reliance is placed in the case of *Banner & Co. v. Union of India* : 1994(70)ELT181(Cal) . In this amended notification denying exemption benefit of goods manufactured by small-scale manufacturer under brand name of a large scale manufacturer was challenged. It was held, mere putting a brand name on the commodity already manufactured there is no manufacture. The commodity remains the same. For the purpose of excise of course placing brand name does not make it to be a different commodity, it does not amount to manufacture. But this would not be applicable where luxury tax is imposed. The same goods while being sold without a brand name will have different value or field of marketability than if it is with a branded name. Every brand name has a goodwill, which creates its own field depending upon the degree of goodwill. The very commodity in a commercial field is saleable at different value one under a branded name and other without it. Thus we find the classification between branded and unbranded unmanufactured tobacco falls under clear two categories for the purposes of luxury tax. But before it is upheld it has to be seen whether it has any reasonable nexus with the object sought to be achieved. The object of the impugned Ordinance is to augment State resources by increasing its revenue. Branded name is known to have increased value of the same goods, hence its inclusion for taxation and exclusion of unbranded unmanufactured tobacco, which falls under different strata in terms of value of goods directly co-relates to the object sought to be achieved. Hence it cannot be held to be discriminatory or arbitrary.

96. Coming to sub-ground C we find some, substance in the contention raised on behalf of the petitioners. Petitioners are sellers of khaini. Both cigarette and khaini are in essence tobacco, though both are two distinct commodities sold in the

market and also recognised as a distinct item under the Central Excises and Salt Act, 1944. In this respect, see Federation of Hotel & Restaurant Association of India v. Union of India : [1989]178ITR97(SC) :

'It is now well-settled that though taxing laws are not outside Article 14, however, having regard to the wide variety of diverse economic criteria that go into the formulation of a fiscal policy, the Legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc., for taxation. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous. In examining the allegations of a hostile, discriminatory treatment, what is looked into is not its phraseology, but the real effect of its provisions. A Legislature does not, as an old saying goes, have to tax everything in order to be able to tax something. If there is equality and uniformity within each group, the law would not be discriminatory. The Legislature can exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes.'

After enunciating this principles that a wide latitude is given to the Legislature in the fiscal statute in making class among subject of persons, subject-matter, event, etc. It further held :

'But, with all this latitude, certain irreducible desiderata of equality shall govern classifications for differential treatment in taxation laws as well. The classification must be rational and based on some qualities and characteristics which are to be found in all the persons grouped together and absent in the others left out of the class. But this alone is not sufficient. The differentia must have a rational nexus with the object sought to be achieved by the law. The State, in the exercise of its Governmental power, has, of necessity, to make laws operating differently in relation to different groups or class of persons to attain certain ends and must, therefore, possess the power to distinguish and classify persons or things. It is also recognised that no precise or set formulae or doctrinaire tests or precise scientific principles of exclusion or inclusion are to be applied. The test could only be one of palpable arbitrariness applied in the context of the felt needs of the times and societal exigencies informed by experience.

Classifications based on differences in the value of articles or the economic superiority of the persons of incidence are well recognised. A reasonable classification is one which includes all who are similarly situated and none who are not. In order to ascertain whether persons are similarly placed, one must look beyond the classification and to the purposes of the law.'

97. Thus, even in a fiscal statute classification must be rational and based on some quality and characteristic and differentia must have a rational nexus with the object sought to be achieved. Further in order to ascertain, whether persons, things or goods are similarly placed, one must look beyond the classification ; scrutinising from this in the definition of tobacco we find under Section 2(g), it excluded from the ambit of the taxation, cigarettes priced at Rs. 5 or less per packet of ten and biris. It is also permissible to exclude from its purview, any class of goods and even in the same class of goods up to a point of any value of that goods. Biri, cigarettes, khaini, jarda and other goods coming within definition of tobacco being distinct class of goods it is open to exclude any one of them and include the other, that by itself would not be held to be discriminatory. The question still remains what is the rationale of picking from one of the derivative of tobacco, viz., cigarette to exclude from its ambit based on its value or price but not to exclude similarly placed derivatives or other form of tobacco, viz., khaini. Is this differential treatment by arbitrary choosing one and not the other or whether it has any nexus with the object sought to be achieved. For this we have to see beyond the classification. The question is what is the rationale behind exclusion of cigarettes priced at Rs. 5 or less per packet of ten and its nexus with the object sought to be achieved. The object of the Legislature is to raise revenue by imposing luxury tax on tobacco, which is a luxury goods. With this object when exclusion is made of cigarette priced at Rs. 5 or less per packet often the only criterion for classification could be and no other raised, not to bring within its tax purview such class of cigarette which is consumed by person, who are economically not well off. No other rationale has been argued by the respondent. If that be so, question does arise what is intelligible, differentia of differentiating it from khaini sold at 25 paise to 50 paise per packet which is also consumed by persons who are not economically well off. If the rationale was not to tax cigarettes, which are low priced then khaini, which is also sold in small packets for

25 paise to 50 paise should also have been excluded from the purview of tax. Petitioners' case is that khaini chewing tobacco costs 25 paise to 50 paise per packet of 10 grams. We do not find any rationale behind such classification nor any nexus is decipherable with the object sought to be achieved. It clearly shows arbitrariness and also differential treatment among similarly placed goods. It is not a case of choosing one class of goods and leaving other but visualising beyond the classification, we find among derivatives of tobacco similarly placed dissimilar treatment is meted out. It is a case of arbitrary choosing one from among other similarly placed. Accordingly, we hold definition of tobacco by excluding from its ambit cigarettes of Rs. 5 or less per packet of ten, but including khaini (another form of tobacco) which is being sold at 25 paise to 50 paise per packet is discriminatory and is violative of Article 14.

98. It is not possible for the court to either add something or delete something from the definition clause to make it valid. This would amount to legislation to which this Court has no power. Hence we have no option but to hold this provision violative of Article 14 of the Constitution.

99. The last argument pertains to Ground No. D was formally pressed only by the petitioners in Writ Petition No. 730(T) of 1994, viz., the Tobacco Dealers Association. The argument, is, once the Parliament has passed Tobacco Boards Act, 1975 by virtue of Section 2 the entire tobacco industry has been taken over by the Central Government. The State Legislature is not competent to legislate in respect of any matter relating to tobacco industry. Except this, there is no other averment in the petition, Field of legislation, when tobacco industry is taken over under an Act of Parliament and that of State to impose luxury tax, is different. Right to impose luxury tax by the State is not in dispute and unless this field in any way overlaps, to erode, or comes in conflict with the power exercised by the Parliament, it cannot be held to be void. Unless it is averred and shown that this imposition, in fact, makes inroads into the tobacco industry taken over under the Tobacco Boards Act, 1975, merely passing of the said Act by itself does not restrict the State Legislature from imposing tax within its permissible field under the State List. Hence, this contention has no force.

100. In view of the aforesaid findings, on the grounds raised by the petitioners, we finally hold as follows :

On Ground No. (A)(a)(i) and (ii) the impugned Ordinance is not 'a tax on sale or purchase' of tobacco falling within the definition of 'tax on sale or purchase of goods' under Article 366(29A) of the Constitution. Hence, question of the impugned tax being violative of Section 15 of the [Central Sales Tax Act, 1956](#) read with Article 286(3) of the Constitution does not arise. Further, in view of this, the question raised whether the State can levy sales tax on tobacco in view of Additional Duties of Excise (Goods of Special Importance) Act, 1957, does not arise. On Ground (A)(b) we hold that the impugned levy is not a levy of excise duty falling under entry 84, List I, hence there is no question of it being ultra vires of Articles 245 and 246 of the Constitution. Similarly, on Ground No. (A)(c) we hold, the impugned levy is not a tax on consignment, hence no question of it falling under List I, entry 92-B read with Article 269(l)(h) arises. We hold that the impugned Ordinance, in fact, is imposition of luxury tax on tobacco and imposition of the same is not a colourable exercise of power.

On Ground No. (B) we hold that the impugned levy is violative of Article 301 and is not saved by Article 304(b) of the Constitution, thus, is ultra vires. We further hold on Ground No. (C), the impugned Ordinance is violative of Article 14 of the Constitution. On Ground No. (D) we hold, the impugned Ordinance is not void on account of passing of the Tobacco Boards Act, 1975, by the Parliament.

101. In view of the aforesaid findings, and declarations made by us we hold the impugned Ordinance to be void and ultra vires in view of it being violative of Articles 14 and 301 of the Constitution. The writ petitions are accordingly allowed with costs.

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