

Vst Distribution, Storage and Vs. State of West Bengal and ors.

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Court : Sales Tax Tribunal STT West Bengal

Decided On : Nov-30-1995

Reported in : (2000)118STC515Tribunal

Judge : L Ray, S Mukherjee, P Balasubramanian

Appellant : Vst Distribution, Storage and

Respondent : State of West Bengal and ors.

Advocate for Def. : Mr. A.Mitra

Advocate for Pet/Ap. : Dr. Pal

Judgement :

1. This application under Section 8 of the West Bengal Taxation Tribunal Act, 1987, enacted under Article 423-B of the Constitution of India, is a substitute for one under Article 226 of the Constitution of India, and it is within the jurisdiction of this Tribunal to the exclusion of that of the High Court. The questions for decision are whether the provisions of the West Bengal Luxury Tax Act, 1994 (hereinafter mentioned as "Luxury Tax Act") are valid and constitutional in so far as they levy luxury tax on cigarettes, being: tobacco products. The challenge to constitutional validity is based on, inter alia, alleged want of legislative competence and contravention of Article 401 of the Constitution and Section 15 of the Central Sales Tax Act, 1956 and inconsistency with the Additional Duties of Excise Act, 1957.

2. For the sake of brevity, applicant No. 1 will be referred to as "company". It is actually a company under the Companies Act, 1956, which carries on the business of distribution and sale of cigarettes.

Applicant No. 2 is a share-holder of the company and is an Indian citizen. The case of the applicants is that the Luxury Tax Act enacted by the State Legislature levies a luxury tax on tobacco products at a rate not exceeding 20 per cent on manufacturers and importers of cigarettes and certain other tobacco products. The provisions are allegedly violative of articles 301, 304, 286, 265, 269, 245, 246, 19(1)(g) and 14 of the Constitution of India and ultra vires the Central Sales Tax Act, 1956 (hereinafter mentioned as "the 1956 Act").

The luxury tax is alleged to be nothing but a sales tax and hence it is in contravention of the legislative scheme for taxation of tobacco (vide paragraph 4 of the application).

3. According to the applicants, the legislative history of taxation of tobacco indicates that having regard to the importance of tobacco in inter-State trade and commerce and the fact that it was subjected to an unduly high level of taxation by the Centre, the States and the local bodies, a scheme was evolved under which the States surrendered their right to levy various taxes on tobacco, by whatever name called, and agreed to receive in lieu thereof a share in the additional excise duty on tobacco, following the report of the Taxation Enquiry Commission, constituted by the Ministry of Finance, Government of India, in April, 1953. Reference is made to Volume III, Chapter VIII of the report of the Commission relating to tobacco. Pursuant to the said report, it was agreed by the States and the Centre at a meeting of the National Development Council held in December, 1956 that sales tax levied by the States on mill-made textiles, sugar and tobacco including manufactured tobacco should be replaced by a surcharge on Central excise duty and the income, thus, derived would be distributed among the States on the basis of consumption. The Second Finance Commission recommended the method of apportionment of additional excise duty on the aforesaid goods. In order to implement the said agreement between the States and the Centre and the recommendations of the said Commissions, the Additional Duties of Excise Act,

1957 (hereinafter mentioned as "the 1957 Act") was enacted on December 24, 1957. Among other goods, tobacco including manufactured tobacco was declared as goods of special importance. The 1957 Act provided that in the event of a State levying a tax on the sale or purchase of tobacco, it will lose its proportionate share from the additional excise duty levied and collected by the Centre. In 1983-84, revenue obtained by the State of West Bengal from additional excise duty on cigarettes alone was Rs. 22.19 crores. In 1992-93, the same was to the tune of Rs. 69.47 crores and in 1993-94 the amount rose to Rs. 74.33 crores. Thus, in course of 10 years, the amount received from additional excise duty on cigarettes by the State of West Bengal increased more than three-fold. In 1994-95, the expected revenue from that source would be Rs. 78.17 crores.

4. The further case is that the company does not manufacture cigarettes, but purchases cigarettes manufactured by VST Industries Ltd. of Hyderabad, at its factory at Azamabad in Andhra Pradesh and also the cigarettes manufactured by NTC Ltd., at its factory at Agarpara, West Bengal, on a manufacturing contract basis on behalf of VST Industries Ltd. The procedure followed by the company is that it receives orders from main dealers in West Bengal and purchases cigarettes from VST Industries Ltd., by taking delivery at the factory gate at Hyderabad or at the factory gate of NTC Ltd., at Agarpara in West Bengal, as the case may be. Such sales are allegedly at arms' length and on a principal to principal basis, price being the sole consideration of sale. Then the company transports the stocks to its godowns at Siliguri, Boinchee and Calcutta in West Bengal, from where the goods are sold to 68 main dealers in West Bengal and other main dealers in neighbouring States. The main dealers sell the stocks to 4,245 secondary wholesalers, who sell the same to approximately 80,000 retailers throughout the State, from whom direct customers purchase cigarettes. Neither the company nor VST Industries Ltd., of which the company is a subsidiary owned by VST Industries Ltd., has a factory in West Bengal.

5. The further case of the applicants is that upon a combined reading of relevant provisions of the Constitution of India and 1956 Act and 1957 Act, the position which emerges is that all forms of manufactured tobacco including cigarettes are declared by Parliament to be goods of special importance in inter-State trade or

commerce. Since April 1, 1958, by virtue of 1957 Act manufactured tobacco including cigarettes are exigible to additional duties of excise in lieu of sales tax, If any State levies and collects a State tax on sale or purchase of tobacco, it will be disentitled to its share of additional excise duty during the relevant period, and any State legislation imposing tax on sale or purchase of any goods declared by Parliament by law to be of special importance in inter-State trade and commerce should conform to the restrictions and conditions imposed in Section 15 of the 1956 Act, namely, it must be a single point levy and the rate of tax must not exceed 4 per cent (vide paragraph 16).

6. Applicants contend that the entire field of legislation as far as cigarette industry is concerned, is fully occupied by the Parliament which alone possesses exclusive legislative power, authority and jurisdiction to enact law pertaining to or touching upon the cigarette industry, in view of the Tobacco Board Act, 1975 and the Industries (Development and Regulation) Act, 1951 (hereinafter referred to as "the 1975 Act and 1951 Act" respectively). The Luxury Tax Bill was introduced in the State Legislative Assembly without reserving it for assent of the President and without obtaining his prior consent for introduction of the Bill. It was passed by the Assembly on March 30, 1994 and the Act was published in the Calcutta Gazette (Extraordinary) on April 4, 1994. By a notification dated April 20, 1994, the first day of May, 1994 was appointed as the day of commencement of the Act. The Rules framed under the Luxury Tax Act were published in the said Gazette on the same day, bringing them into force from May 1, 1994. By another notification published in the same Gazette (Extraordinary) on April 20, 1994, the rate of luxury tax was fixed at 10 per cent.

Applicants maintain (paragraph 21 of the application) that such luxury tax is nothing but a sales or purchase tax on goods of special importance under Section 14 of 1956 Act, and it is violative of Section 15 thereof and also Article 286(3) of the Constitution, because it exceeds 4 per cent which is the limit. The Luxury Tax Act is allegedly a colourable legislation, as it imposes a sales tax in the guise of luxury tax, as will appear from Section 4 read with the definitions of "stock of luxuries", "turnover of stock of luxuries" and "value" thereof as given in Section 2(h), (l) and (m) respectively. By referring to the definition of "stockist" in Section

2(i), it is contended that the luxury tax has a direct nexus with sale or purchase of "luxuries". The imposition of luxury tax is termed as arbitrary, unenforceable and unconstitutional, because the measure of tax is based, in violation of the settled principle of fiscal law to the contrary, on allegedly vague and indifferent expressions like ex-factory price or invoice price--(vide paragraphs 22 and 23).

7. The applicants have put forward alternative cases to the effect that the impugned luxury tax is, in pith and substance, excise duty in disguise, or a tax on inter-State sales or purchases or consignments of goods. It is alleged that in the case of a manufacturer-stockist, the stock comes into being in his hands after the activity of manufacture is complete, Hence, the luxury tax is said to be a tax on manufactured goods or directly on manufacture. In support of this contention, reference is made to sections 6 and 7 of the Luxury Tax Act. The legislative power to levy excise duty being within the exclusive domain of the Union in terms of entry 84 of List I of the Seventh Schedule read with the Central Excises and Salt Act, 1944, the State has allegedly no power to levy such a tax. It is also called a tax on inter-State transactions, because an importer-stockist is liable to pay tax by merely receiving or producing "luxuries" and keeping them in his control or possession. It is contended that the Parliament is competent to levy such a tax under Article 246(1) of the Constitution read with entries 92-A and 92-B of List I, and the State Legislature has no such competence--(paragraphs 24 and 25). Since luxury tax is nothing but sales tax, applicants contend, the State of West Bengal has no competence to impose the tax on account of its continuing participation in the additional excise duty collected under 1957 Act. Allegedly, the tax directly impedes (paragraph 27) the free-flow of trade, commerce and intercourse, contravening articles 301 and 19(1)(g) of the Constitution. It is mandatory for a "stockist" to acquire a licence for trading in the scheduled goods. Since previous sanction of the President of India was not taken for the Luxury Tax Act, it is said to contravene Article 404(b). The restriction by way of luxury tax is allegedly unreasonable and not in the public interest. The rate of tax (10 per cent) is, according to applicants, inordinately high, having a direct and immediate impact on import of cigarettes into West Bengal.

The State is losing revenue to the tune of at least Rs. 64 crores (vide paragraph 32) on account of loss of the share in additional excise duty and due to large-scale smuggling of cigarettes. Hence, the tax cannot be claimed to be in the public interest. Exclusion of bidis from tobacco products which are subjected to luxury tax, allegedly amounts to hostile discrimination in contravention of Article 14 of the Constitution. By referring to the recommendation of the Second Finance Commission in respect of additional excise duty, applicants contend that knowing full well that no sales tax can be levied, the State has imposed a tax in the guise of luxury tax, by practicing fraud on the Constitution. They say that tobacco cannot be treated as "luxury" under entry 62 of List II, as it was declared by Parliament in 1957 Act to be a goods of special importance in inter-State trade and commerce. The tax has no nexus with consumption or enjoyment of "luxuries" and is levied simply on the existence of stock. Hence, it is really not a tax on "luxuries" within entry 62 of List II. It is claimed that as a result of the Luxury Tax Act, importation into and sales of cigarettes in West Bengal by applicants have suffered a serious setback to the extent of a fall from 360 million to 85 million per month on an average. The company's total turnover has fallen from Rs. 16.5 crores to Rs. 3.4 crores per month. The validity of similar taxes introduced in the States of Maharashtra and Kerala has been challenged in the respective High Courts which granted conditional stay. The present application, it is stated, was initially filed on May 18, 1994 in the High Court at Calcutta as a writ petition under Article 226 of the Constitution, but was subsequently withdrawn and filed in this Tribunal on the basis of the order of the Supreme Court of India suspending the judgment of the High Court in the case of Kesoram Industries Ltd., reported in AIR 1993 Cal 78, and also suspending operation of all similar orders of the High Court in all proceedings.

8. Respondent No. 2, Union of India, has not entered appearance.

Respondent Nos. 1 and 3 have resisted the application through an affidavit-in-opposition which is summarised below : The Luxury Tax Act was validly and competently enacted by the State Legislature under entry 62 of List II. All allegations of invalidity and unconstitutionality are denied. The State did not surrender the right to levy the various taxes on tobacco by whatever name called,

by agreeing to replace sales tax on tobacco including manufactured tobacco, by additional excise duty under 1957 Act. By referring to a letter dated May 4, 1957 from the late T.T. Krishnamachari, the then Finance Minister of India, addressed to the late Dr. B.C. Roy, the then Chief Minister of West Bengal, respondents contend that the decision taken in the meeting of the National Development Council on 8th and 9th December, 1956 was to levy an additional excise duty in replacement of only taxes on sales and purchases leviable under entry 54 of List II, and as such, tobacco including manufactured tobacco was to be exempted from tax on sales and purchases. The State has not been denuded of the authority to levy tax other than taxes under entry 54 of List II. The said letter of the Union Finance Minister had enclosed the relevant extract of the decisions taken in the meeting of the National Development Council, according to which : "The National Development Council agreed unanimously that sales taxes 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....." The incidence of taxation under the charging section, i.e., Section 4 of Luxury Tax Act, is neither on manufacture, nor on sale, nor on import, but it is on holding of stock of luxuries. Under the scheme of Luxury Tax Act, a stockist of luxuries is a taxable person irrespective of whether those are manufactured or imported. Reference is made to definitions of "turnover of stock of luxuries" and "value of stocks of luxuries" which are given in sections 2(l) and 2(m) respectively. The incidence of luxury tax is not on inter-State sales but is on stock of luxuries held within the State. Article 286 of the Constitution lays down restrictions on the State's power to legislate for imposing tax on sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce or of goods of the nature referred to in some of the clauses of Article 466(29A). Although tobacco has been so declared under 1956 Act, the restriction is no absolute bar to impose tax on sale or purchase, and, in any event, Luxury Tax Act does not provide for a tax on sale or purchase of tobacco, and hence the restriction of Article 286 does not affect or limit the State's power to levy luxury tax.

9. The further case of contesting respondents is that there was no necessity of obtaining previous sanction of the President of India for the impugned enactment, because levy of luxury tax in no way restricts the free-flow of trade, commerce and

intercourse, and it does not amount to a direct or immediate impediment to the free-flow of tobacco products. Entry 62, List II of the Seventh Schedule is the relevant entry for the purpose of this dispute, and the rest are irrelevant.

Similarly, according to respondents, reference to provisions of 1956 Act is of no significance. From the objects and reasons of 1957 Act it is allegedly clear that the additional duties of excise is levied in replacement of sales taxes leviable by the States on tobacco products and some other articles. Under the Luxury Tax Act, the incidence of the levy is neither on sale nor on purchase, and hence, by enacting that Act, the State does not lose its share of additional excise duties collected under 1957 Act. The Tobacco Board Act, 1975 was enacted by the Parliament under entry 52 of the Union List. That is a general entry, and hence 1975 Act did not cover the entire field of legislation concerning tobacco, not to speak of levy of tax on tobacco products. A Central enactment under a general entry, it is contended, cannot denude the State Legislature of its competence to enact taxing laws under a taxing entry. Under the constitutional scheme, there is no scope for a conflict of legislative competence between Parliament and a State Legislature in respect of a taxing law. The allegations as to the vires of the Luxury Tax Act are all denied, It is said to be never a colourable piece of legislation, or in any way unconstitutional or unenforceable. It is argued that ex-factory price is not the same thing as the actual sale price of luxuries. The actual sales price is not the basis of computation of the value of stock of luxuries, as defined in Section 2(m) of the Luxury Tax Act. The liability to pay luxury tax arises before a sale takes place. In respect of any stockist, who is a manufacturer, an ex-factory price features in computation of the value of stock of luxuries. Similarly, it is said, invoice price denotes the price of goods mentioned in the invoice by the consignor. Invoice price is an expression capable of definite ascertainment. For computing the value of stock of luxuries, the post-importation charges and costs, as mentioned in Section 2(m), are also added to the invoice price. It is denied that luxury tax is actually in the nature of excise duty or that it is levied on manufacture. The incidence of tax being on the holding of stock, the fact that earlier there had been manufacture of the goods does not change the nature of the impost. It will be clear, it is claimed, from Section 5(a) of the Luxury Tax Act that it is not a tax on manufacture, because under Section 5(a) the value of stock of luxuries

despatched to places outside West Bengal is not subjected to luxury tax. It shows that luxury tax is on the stocking of luxuries. It is not even remotely connected with manufacture of tobacco items. In the case of an importer-stockist, the incidence is even more remote. It is also denied that luxury tax is a tax on inter-State consignment or inter-State sale or purchase within the meaning of entries 92A and 92B of List I and Article 269 of the Constitution and 1956 Act. The luxury tax is imposed after termination of movement of goods from one State to another. It is clearly an impost on the holding of stock, and the State Legislature is well within its competence under entry 62 of List II to levy it. The expression--"sale in the course of inter-State trade or commerce"--has a definite legal connotation, and its meaning cannot be stretched to any event which takes place subsequent to termination of movement of goods from one State to another. Entries 92A and 92B of List I do not have any application, once the inter-State sale, purchase or consignment of goods from one State to another comes to an end. It is contended that where the field of legislation is reserved to a State Legislature under the State List in the Constitution, it is free to enact law within its competence, whether or not the neighbouring States enact similar laws imposing similar tax. If this encourages smuggling of tobacco items into the taxing States, the same can be dealt with under appropriate law. It is denied that levy of luxury tax is causing loss of revenue to the State in any manner. Even if any such event occurs, the State can tackle the situation. In any case, these points do not make the tax either unreasonable or against the public interest.

10. While imposing luxury tax on items specified in the Schedule to the Luxury Tax Act, bidis have been exempted from tax. The Legislature is, according to respondents, free to pick and choose commodities for the purpose of taxation and also to lay down different rates of tax for different types of commodities. By making such selection, the Legislature does not make any undue discrimination, provided the classification is reasonable. In the Luxury Tax Act, selection of commodities for taxation is based, inter alia, on the capacity of the consumers on whom the burden of taxation ultimately shifts. It is contended that declaration of any goods as of special importance in inter-State trade or commerce under Section 14 of 1956 Act does not ipso facto make such goods a non-luxury one. 1975 Act and 1951 Act were enacted by the Parliament under entry 52 of List I with the object of

regulating and controlling tobacco industry. Entry 52 of List I, being a general entry, the Parliament could not provide for imposition of tax under that entry. Thus, by such enactments of general nature, the competence of the State Legislature to enact law for levy of tax under a taxing entry in List II is not ousted. Under the constitutional scheme of distribution of legislative field, it is submitted by respondents, there is no scope for any conflict in the exercise of legislative power by the Union and the States. Contrary to the allegation made by the applicants, there is no provision in the Luxury Tax Act requiring a licence for manufacture of tobacco items. The licence under the said Act is only required for holding stock of luxuries in any premises, godowns, warehouses, etc., irrespective of whether the stockist is a manufacturer or not. The object of the provision for licence for such limited purpose is only to enforce luxury tax. The field of legislation for tax of the State Legislature comprehends within it ancillary and incidental matters including enforcement of the tax. Thus, the provision for the licence for the limited purpose of enforcement of tax does not encroach upon the field of legislation occupied by Parliament. As regards the luxury tax laws of the States of Maharashtra and Kerala, and the interim orders passed by the High Courts of those States, respondents have submitted that the provisions of the enactments have not been set out and, in any case, the interim orders of the High Courts are not relevant. When the applicants filed the writ petition earlier before the Calcutta High Court, no stay of operation of Luxury Tax Act was granted by the High Court, and thereafter applicants did not press the writ petition for hearing and hence the said writ petition stood disposed of without entering into the merits of the matter.

11. Applicants have used an affidavit-in-reply. They have reiterated their contentions in the main application. According to applicants, the contents of the letter of the Union Finance Minister dated 4th May, 1957 addressed to the Chief Minister of West Bengal have been misinterpreted. According to them, the correct interpretation will be that the principle of distribution of additional excise duty would be related to complete exemption from sales tax or purchase tax or any other impost by whatever name called, on certain commodities including tobacco. Hence, the State cannot take part in the proceeds of additional excise duty on tobacco, if there is any State impost on tobacco. It is contended that holding of stock is not the taxable event. Once the goods are manufactured, those

automatically become "stocks" in the hands of manufacturer. Hence, a tax levied on such an event is nothing but a tax on manufacture itself.

12. Apart from oral arguments, written notes of arguments were furnished by both the parties.

13. The West Bengal Luxury Tax Act, 1994 was enacted by the West Bengal State Legislature and it came into force with effect from May 1, 1994 by Notification No. 1057 F.T. dated April 20, 1994 issued on the authority of Section 1(3) of the Luxury Tax Act. The preamble declares it to be--"An act to provide for the imposition of tax on luxuries and for matters connected therewith or incidental thereto". Section 4 is the charging section. The marginal note of Section 4 is : "Incidence of luxury tax". It provides that every stockist shall be liable to pay a luxury tax on his turnover of stock of luxuries at such rate, not exceeding 20 per cent, as the State Government may by notification fix in this behalf, and different rates may be fixed for different class or classes of luxuries. By Notification No. 1060 F.T. dated April 20, 1994 issued on the authority of Section 4, the State Government fixed luxury tax at the rate of 10 per cent on luxuries, namely, cheroots, cigarettes, cigar, pan masala and smoking mixtures for pipes and cigarettes, Under Section 5, the luxury tax payable by a stockist shall be levied on that part of his turnover of stock of luxuries during any prescribed period which remains after deducting therefrom his such turnover representing the value of such stock of luxuries despatched to places outside the West Bengal to the satisfaction of the prescribed authority and the value of stock of luxuries of such class or classes or description as may be prescribed. It appears that no such prescription has yet been made. Under Section 6(1), no stockist shall, while being liable to pay luxury tax, hold any stock of luxuries in any premises, godown, warehouse or any other place in West Bengal, unless he obtains, on application, a licence. Failure to obtain a licence within the period specified in Section 6(2), makes a stockist liable to pay penalty under Section 6(2) or to be prosecuted under Section 19(2).

It is to be noted, however, that a licence is required to be taken when a stockist is liable to pay luxury tax, namely, when a stockist holds a stock of luxuries. Section 7 requires a licensed stockist to furnish returns of turnover of stock of luxuries and

to pay luxury tax. Section 8 relates to interest on luxury tax not paid within due time. Section 9 provides for assessment, penalty and determination of interest. Section 2 gives a few definitions. Clause (c) defines "luxuries" as commodities, specified in the Schedule, for enjoyment over and above the necessities of life. The Schedule to the Luxury Tax Act mentions cheroots, cigarettes, cigar, pan masala of various forms and descriptions and smoking mixtures for pipes and cigarettes. "Stock of luxuries" has been defined in clause (h) as quantity of luxuries that a stockist receives in, or procures for, his stock, or records or accounts for in his books of account, in West Bengal for stocking, vending, supplying or distributing to a wholesaler, dealer, retailer, distributor or any other person, but shall not include any quantity of such luxuries held by him for stock on the first day of the relevant prescribe period. According to clause (i), "stockist" means a person who has, in customary course of business, in his possession of, or control over, a stock of luxuries, whether manufactured, made or processed by him in West Bengal, or brought by him into West Bengal, either on his own account or on account of others, from any place outside West Bengal, for stocking, vending, supplying or distributing such luxuries in West Bengal. In clause (1), "turnover of stock of luxuries" means the aggregate of the values of stock of luxuries. In clause (m), "value of stock of luxuries" means, in respect of a manufacturer-stockist, the value of such luxuries at the ex-factory price at the time of receipt or entry in his stock, and in respect of an importer-stockist, the value of such luxuries calculated at the price thereof as per consignor's bill, invoice or consignment note or other documents of like nature, and in both the cases the value shall include certain other components, as mentioned in the said definition.

Other provisions of the Luxury Tax Act are not immediately necessary for adjudication of the present application.

14. Mr. A. Mitra, respondents' counsel, questioned the locus standi of applicants in challenging the validity of the Luxury Tax Act from the point of view of a manufacturer-stockist, since the company is admittedly not a manufacturer. He thought that the company was fighting a proxy war on behalf of a manufacturer. Dr. D. Pal, applicants' counsel, however, justified the stand on the ground that if the luxury tax is ultimately held to be an excise duty, and hence beyond the

legislative competence of the State, in that case the tax will be discriminatory and hit by Article 403 read with clause (a) of Article 404 of the Constitution. Dr. Pal relied on the cases of *Dwarkadas Shrinivas v. Sholapur Spinning and Weaving Co. Ltd.* AIR 1954 SC 119 and *Bombay Dyeing & Manufacturing Co. Ltd, v. State of Bombay* AIR 1958 SC 328, respectively. Mr. Mitra adverted to the case of *Charanjit Lal Chowdhury v. Union of India* AIR 1951 SC 41. The well-settled general principle of locus standi is that an application like the present one is maintainable by a petitioner who himself is prejudicially affected ; and except in a "public interest litigation", and except in the case of an aggrieved person who is handicapped in the matter of moving the court, no petitioner will be ordinarily allowed to enforce or defend someone-else's rights under Article 226. However, assuming that applicant-company has an indirect locus standi to challenge the luxury tax from a manufacturer's point of view, I am proceeding to examine the contention of applicants. It is true that if the luxury tax is a tax on manufacture, it will be beyond the State's legislative competence, because the excise duty under the Central Act of 1944 is exclusively within the competence of the Union. But, is the luxury tax a tax on manufacture, or is it tantamount to Central excise duty The following extract from page 12 of the applicants' "written submissions" will disclose their contention : "Once the tobacco products, say cigarettes, are manufactured, they immediately become stocks in the hands of the manufacturer without his having to do anything further. Thus, the possession of such products is inseparable and indistinct from the manufacture of the products. In such a situation, when the tax is levied on stocks which emerges from the process of manufacture of the product, it is directly and immediately connected with manufacture and is, therefore, a duty of excise," By referring to the two cases of *A.B. Abdul kadir* AIR 1962 SC 922 and AIR 1976 SC 182 (*A.B. Abdul Kadir v. State of Kerala*) and the case of *Hotel Balaji* [1993] 88 STC 98 (SC) ; AIR 1993 SC 1048, Dr. Pal argued that in order to hold that the luxury tax is in the nature of Central excise duty, the levy should be linked with production or manufacture.

According to him, the impugned tax is linked with manufacture for the foregoing reason. The counter-contention of respondents will appear from the following extract from pages 13--15 of their "Notes on written submission" : "The taxable event is stocking, vending, supplying or distributing of luxury items in the

circumstances mentioned in the West Bengal Luxury Tax Act. Stocking, vending, etc., except of natural resources, have to be either of goods manufactured or imported.

Luxury tax is on stock of manufactured goods. The difference between sales tax and excise duty is clearly spelt out in the decision of the Supreme Court reported in [1958] 9 STC 267 ; AIR 1958 SC 452 (Tata Iron & Steel Co. Ltd. v. State of Bihar), paragraphs 5, 9 and 10 [page Nos. 272, 275 and 277 of STC]. The real test as laid down by the Supreme Court in that judgment is to find out whether the tax is leviable on the producer or manufacturer qua a seller or qua a manufacturer or producer. Thus, where the tax is leviable neither qua seller nor qua manufacturer but qua a stockist, it is neither a sales tax nor an excise duty. Here the tax has no nexus or link with the manufacture.....The ratio laid down by the Supreme Court in AIR 1976 SC 182 (A.B. Abdul Kadir v. State of Kerala), paragraphs 9 and 10 clearly shows that the levy of luxury tax for stocking, vending, etc., of tobacco products, when such levy has no nexus with manufacture, cannot be an excise duty. It is a settled position of law that different facets of a transaction may be taxed differently. Thus same goods may be subjected to excise duty (at the stage of manufacture) and luxury tax (at the stage of stocking) and on sale of goods (at the stage of transfer of property). One is qua a manufacturer and the other qua a stockist and the third one qua seller. Section 5 of the West Bengal Luxury Tax Act excludes such stock of luxuries as is despatched to places outside West Bengal.

This provision also shows that the luxury tax is not a duty on manufacture." Mr. A. Mitra, appearing for respondents, argued that the luxury tax is levied on stocking of both imported and locally manufactured items of goods and is only related to stocking. It is not linked with manufacture or processing. He further pointed out that under Section 5(a) of the Luxury Tax Act no tax is leviable on stocks (whether imported or locally manufactured) "despatched to places outside West Bengal", and thereby even all the stocks of locally manufactured luxury items are not brought under the net of tax. Having considered the rival contentions of the parties on this question, I am of the opinion that the luxury tax is neither on manufacture or processing, nor in any way linked or connected therewith. It is solely related to stocking of luxury items within West Bengal, excluding the stocks despatched

outside the State. Clearly, stocking is a state which is subsequent to and distinct from manufacture or importation, and it comes into being after manufacture or importation comes to an end. There is no scope for treating the state of stocking as equivalent to manufacture or importation. That being the true position, it is not an excise duty, nor is it in the nature thereof. On behalf of respondents reliance was rightly placed on AIR 1976 SC 182 (A.B. Abdul Kadir v. State of Kerala) in which the provisions of Section 3 of the Kerala Luxury Tax on Tobacco (Validation) Act, 1964, creating a liability for payment of luxury tax on the stocking and vending of tobacco, having no nexus with production or manufacture, was held not to be a tax in the nature of excise duty. Hence, this contention of applicants is without any substance.

15. Among certain points included in the application, two small but relevant ones need a brief mention. First, no contention was advanced on behalf of applicants at the hearing about the treatment of cigarettes as "luxuries" in the Luxury Tax Act, and secondly, about exclusion of bidis, also a smoking device, from the purview of luxury tax. Dr. Pal fairly submitted that the Supreme Court had already ruled that cigarettes can be treated as "luxuries" under entry 62 of List II. He was obviously referring to the case of A.B. Abdul Kadir AIR 1976 SC 182. Dr. Pal did not oppose the submission of Mr. Mitra appearing for Revenue that cigarettes are validly differentiated from bidis, as the two classes of article though belonging to tobacco group, formed two separate classes on the basis of economic superiority of consumers of cigarettes.

16. One of the contentions of applicants is that the luxury tax is in the nature of a sales tax and is closely linked to sales of goods which are declared as goods of special importance in inter-State trade and commerce under Section 14 of 1956 Act. Hence, the State can impose tax not exceeding 4 per cent in terms of Section 15 of the same Act. The undisputed position is that at present there is no sales tax on the goods in question and the luxury tax is levied by notification at 10 per cent, and the two contentions of applicants equating the tax once to excise duty and again to sales tax are mutually exclusive, because if it is in the nature of one of the two taxes, it cannot resemble the second. I have already held that the luxury tax is not of the nature of excise duty. Applicants elaborate their present contention in

the "written submissions" in the following manner : "The liability to pay the luxury tax is upon the stockist on the turnover of his stock of luxuries.....defined under Section 2(1) to mean the aggregate value of the stock of luxuries. Section 2(m) defines the value of stock of luxuries to mean in the case of a stockist-manufacturer the value of such luxuries calculated at the ex-factory price at the time of receipt or entry thereof in his stock and in the case of a stockist being an importer on the value of such luxuries calculated at the price thereof as per the consignor's bill, invoice or consignment note or other documents of like nature.....'Price' has not been defined in the Act. Nor is there any provision in the impugned Act prescribing the method for determining the price. In the absence of any such definition or provision, 'price' is to be construed in the light of the definition of 'price' given under the Sale of Goods Act, 1930.

Section 2(10) of the Sale of Goods Act defines 'price' to mean the money consideration for a sale of goods. The consideration for the sale of goods can only be contemplated when there is either an agreement of sale or such agreement to sell becomes a sale on the fulfilment of conditions of the agreement of sale (Section 4 of the Sale of Goods Act). In other words, there cannot be any price until and unless there is a sale of goods. Therefore, the concept of price on which the liability under the Act is fixed is inextricably linked up with the transaction of sale.....(a comparison has been made with the Maharashtra Tax on Luxuries Act, 1987).....

It is significant to note that neither the impugned Act, nor the Rules, require the manufacturer to declare a price at the time of receipt of the goods in his stock. Thus, there is no obligation cast on the manufacturer to declare a price at that time. Further, at the time of the receipt or entry of such luxuries in the stock, it is inconceivable to refer to the price at that stage. When the goods are entered into the stock or are received, there is neither any agreement of sale nor any sale.....In the circumstances, ex-factory price can come into existence only when goods are removed from the factory pursuant to a contract of sale.

The tax, in reality, is not leviable except upon such removal in the course of sale, and, therefore, is nothing but a tax on sale. The tax is purported to be levied on all

stocks of tobacco imported into the State, apart from tobacco manufactured within the State. The import can be in any of the three following ways : If, in reality, the tax is capable of being levied only in case (a) and not in cases (b) and (c), it is clearly a tax on sale, and that too inter-State sale. Let us examine if under the terms of the Act, the tax could at all be determined in instances (b) and (c). 'Price' is the basis for the levy of the tax. 'Price' is essentially the bargain struck between a willing seller and a willing buyer, and can, therefore, emerge only when an agreement is arrived at between the two parties. Until such a consensus is arrived at, the goods may, if at all, have some 'value' in the opinion of a seller, but that is not the same as the 'price'. In instances (b) and (c), there is neither any concluded sale, nor an agreement for sale, and consequently, there is no requirement for any price to come into existence. In the case of *Gordon Woodroffe and Co. (Madras) Ltd. v. Shaik M.A. Majid and Co.*, reported in AIR 1967 SC 181, on the question whether a particular transaction of supply of goods was one by way of sale or pursuant to an agency, the Supreme Court came to the conclusion that it was a sale and not an agency, and observed : '.....if the defendants were simply acting as agents for the sale there was no need at all to fix the price in the contract.....The important point is that if the contract was one of agency, there was no need to mention the price at all as between the plaintiff and the defendants.' It is, therefore, clear that where goods are despatched by a principal to his agent, a price does not come into existence. In the case of stock transfer, there is not even an agent involved, for, the goods are despatched by the owner to his own godown and, therefore, there is much less a possibility of there being a price at the time of import. Therefore, in instances (b) and (c), the tax is incapable of being levied, leaving only instance (a), i.e., where the goods are imported in the course of inter-State sale. In other words, the tax is leviable only on sales. It is further to be noted that when the goods are brought into West Bengal from outside, this can happen only in either of the two ways, viz., the goods can be brought into West Bengal under a pre-existing contract of sale or a concluded sale. In that event, the movement of the goods from outside into West Bengal will be in the course of inter-State sale and it is the Central Government which can impose tax on such inter-State sale under entry No. 92A of List I. (This is in addition to the fact that such imposition will be subject to the restriction under Section 15 of the Central

Sales Tax Act, manufactured tobacco being one of the declared items under Section 14 of the Central Sales Tax Act). The State Legislature, therefore, has no power to impose a tax on sales which are in the course of inter-State trade and in any event, even if it is considered to be a tax on intra-State sales, the State Legislature cannot impose a tax beyond 4 per cent in view of sections 14 and 15 of the Central Sales Tax Act. If the goods are brought into West Bengal either by way of despatch by the principal to his agent in West Bengal or by way of despatch by way of stock transfer, it will be a consignment of goods in the course of inter-State trade and the Parliament alone is competent to impose tax on the consignment of goods under entry No. 92B of List I of the Seventh Schedule and the State Legislature has no power or competence to levy the impugned tax. This point is specifically taken in paragraph 25 and Ground No. V of the petition." 17. The contention of the Revenue on the question of nature of the luxury tax as that of sales tax will be found in the following extract from its "Notes on written submission" : "C. Whatever is accounted for in West Bengal is 'stock of luxuries', but a person is a 'stockist' only if the stock of luxuries is meant for stocking, vending, supplying or distributing in West Bengal.

This clearly appears from Section 2(h) and (i) of the West Bengal Luxury Tax Act. Section 4 is the charging section. The liability is on a stockist, in relation to stock, neither manufacture nor sale.

The taxable event is not sale, but holding of stock. Tax is payable not on sale or on agreement for sale, but qua a stockist, irrespective of sale. The tax under the West Bengal Luxury Tax Act therefore is not a tax under entry 54 of the State List in the Seventh Schedule to the Constitution. The expression 'for the purpose of stocking, vending, supplying or distributing in West Bengal' shows that the taxable event is not sale. Tax is chargeable under this Act at a point of a time when neither any sale nor any agreement for sale takes place and there is no transfer of property in goods. The luxury tax is not because one has sold the goods, but because he has stocked the goods. The expression 'value of stock of luxuries' occurring in Section 2(m) of the West Bengal Luxury Tax Act, 1994 refers to 'ex-factory price' or 'price'. The determination of the value under the Act is on the basis of a price. Here the price is a measure of taxation and not the taxable event itself.

In a legislation providing ad valorem tax, price as a measure of tax is judicially recognised. A measure of valuation based on 'ex-factory price' or 'price' in a taxing legislation does not necessarily postulate a concluded sale or the existence of an agreement for sale. In this connection the definition of the words 'price', and 'ex-factory price' as given in Black's Law Dictionary are reproduced below : Price.-- 'something one ordinarily expects voluntarily in exchange for something else. The consideration given for the purpose of a thing. The amount which a prospective seller indicates as the sum in which he is willing to sell, market value. The term may be synonymous with cost and with value as well with consideration, though price is not always identical either with consideration.' Factory price.-- 'Prices at which the goods may be bought at the factories, as distinguished from the prices of goods bought in the market after they have passed into hands of wholesalers or retailers'.

Ex.-- 'A Latin proposition meaning from, out of, by, on, on account of or according to.....'.

Meaning of price as given in Black's Law Dictionary is not in the context of any statute. It gives popular meaning of price. Thus the West Bengal Luxury Tax Act of 1994 is a legislation which properly comes within entry 62 of the State List in the Seventh Schedule to the Constitution of India. The subject of a tax is different from a measure of the levy. The measure of tax is not demonstrative of its essential character or of the competence of the Legislature ([1989] 74 STC 102 (SC) Federation of Hotel case). The contention that the rate of tax beyond 4 per cent is void as being contrary to sections 14 and 15 of the Central Sales Tax Act, 1956 is misconceived because luxury tax is not sales tax. Thus restriction regarding rate of tax is applicable only to legislation under entry 54 of the State List and not to a legislation under entry 62 of the State List. The reliance placed by the petitioners on the decisions in Hotel Balaji case reported in [1993] 88 STC 98 (SC); AIR 1993 SC 1048 and Devi Dass case reported in [1994] 95 STC 170 (SC) on the aspect of the nexus theory really supports the contention of the State that the levy of luxury tax has no nexus or link with sale and hence cannot be said to be a legislation under entry 54 of the State List. For the levy of sales tax by a legislation under entry 54 of the State List there must be actual transfer of property in goods, and

tax liability is incurred on transfer of goods. If there is no transfer, imposition of sales tax will be bad, [1961] 12 STC 429 (SC) ; AIR 1961 SC 1534 (J.K. Jute Mills Co. Ltd. v. State of Uttar Pradesh) paragraph 11 (page 436 of STC). The tax levied under the West Bengal Luxury Tax Act is irrespective of transfer of property in goods. Tax liability is incurred while goods are held in stock and not when transfer takes place. Hence it cannot be said to be a sales tax at all as contended by the petitioner." 18. According to Mr. Mitra, learned counsel for Revenue, definition of "value of stock of luxuries" given in Section 2(m) which refers to price, is a machinery provision which lays down the measure of a tax, which will not determine the character of the tax. By referring to Stroud's Judicial Dictionary, he submitted that price is the sum of money or its equivalent at which a thing is valued, or is the amount of money which the property would fetch if sold in the open market. By relying on Black's Law Dictionary, Mr. Mitra submitted that price is something which one ordinarily accepts voluntarily in exchange for something else. It is the consideration given for the purchase of a thing or the amount which a prospective seller indicates as the sum for which he is willing to sell the commodity. The term may be synonymous with cost, value, as well as consideration, though it is not always identical with either. Dr. Pal, learned counsel for applicants, relied on the case of Hotel Balaji [1993] 88 STC 98 (SO; AIR 1993 SC 1048, on the principle of linkage with price which, according to him, indicates a sale or an agreement for sale. In that manner, Dr. Pal wanted to convince that by using the medium of price for determination of value of stock of luxuries, luxury tax is linked not with stocking, etc., but with a sale or purchase. But Mr. Mitra for the Revenue relied on Federation of Hotel and Restaurant Association of India v. Union of India [1989] 74 STC 102 (SC), and submitted that Section 2(m) which refers to price is the measure of the tax, and hence it is not determinative of the essential character of the luxury tax or of the competence of the State Legislature. In my view, reference to ex-factory price or price as per consignor's bill, invoice or consignment note or other documents of like nature, in Section 2(m), is merely a measure for the levy of the tax and it is used only for determination of value of stock of luxuries for levy of the tax. It is neither determinative of the character or essential nature of the tax, nor is it linked with either taxability or the taxing event. It is true that under Section 2(h), stock of luxuries means quantity of luxuries

received in the stock of records or accounts of the stockist in West Bengal for the purpose of stocking, vending, supplying or distributing, but the taxing event is neither sale nor purchase, because the stock is created after the goods are already procured or received and before those are disposed of. The stage is in-between the receipt or procuring and disposal or sale. Even going by the nexus theory, as canvassed by Dr. Pal for applicants, which is of course more or less the same as the taxing event theory, there is no nexus of the levy of luxury tax with either receiving and procuring or sale and disposal. The purpose, as stated in Section 2(h) and Section 2(i), is stocking, vending, supplying or distributing in West Bengal without any reference to the ultimate disposal of the goods. According to the charging Section 4, every stockist shall be liable to pay luxury tax on his turnover of stock of luxuries, which means the aggregate of the values of stocks of luxury, irrespective of how the stocks are finally dealt with.

According to Section 5(a), the luxury tax is payable on that part of the turnover of stock of luxuries which remains after deducting therefrom such turnover representing the value of such stock of luxuries as have been despatched to places outside West Bengal. These provisions clearly indicate that levy of tax is not related to sale or disposal of the stock. Accordingly, in my opinion, the contention of the applicants on the basis of the term "price" used in Section 2(m) is without substance. The tax has no connection with sale or purchase of the luxury items. By referring to AIR 1967 SC 181 [Gordon Woodroffe and Co. (Madras) Ltd. v. Shaik M.A. Majid and Co.]. Dr. Pal submitted that the question of price does not arise, where there is no sale and where the contract is that of mere agency. But that decision does not assist the applicants. Even if the taxing authorities fail to determine the "value of stock of luxuries" under Section 2(m) and consequently fail to assess the tax in a particular case, "price" being clearly a measure of determination of value and nothing more, non-mention of price in the specified documents will not make the law ultra vires the Constitutional provisions, nor will it make the luxury tax, a tax on sale or purchase. Moreover, when we are considering the case of an importer-stockist under Section 2(m)(ii), the measure of determining value of stock of luxuries for the purpose of levy of luxury tax is the price as per consignor's bill, invoice or consignment note or other document which generally accompanies importation of goods, be it as a result of a prior sale or as a

result of despatch by a principal to his agent or as a result of mere a stock transfer. Section 3 of the Carriers Act, 1865 lays down that no common carrier shall be liable for the loss of or damage to property delivered to him for carriage exceeding in value of rupees one hundred unless the consignor or his authorised person expressly declares to such carriers or his agent the value and description thereof. In the course of arguments I drew the attention of Dr. Pal, learned counsel for Revenue, to this provision on the basis of which there is the trade practice of mentioning value or price of goods in the consignor's bill or consignment note or similar documents, when these are carried by a common carrier from one place to another irrespective of who is the consignee. Since Dr. Pal was chiefly arguing the case of an importer-stockist, the applicant-Company is obviously taking the help of common carriers for the purpose of importing the goods and hence there must be some documents where the price or value of the goods carried is mentioned. Section 2(m)(ii) merely recognises this trade practice and prescribes the measure of tax on that basis. It is too far-fetched to argue that mere mention of the word "price" turns luxury tax to be closely linked to a concluded sale or an agreement for sale, ignoring sections 4 and 5 of the Luxury Tax Act which clearly establish the taxing event as stocking and there is a close bond between the levy of tax and stocking of the goods. From that point of view also, the contention of Dr. Pal that luxury tax is nothing but sales or purchase tax, cannot be accepted, Since the impugned luxury tax cannot be termed as sales or purchase tax, there is no question of compliance of restrictions imposed by Section 15 of 1956 Act. A sale contemplates transfer of property in goods without which there can be no sale, and the "stocking" under the Luxury Tax Act has no concern with any transfer of property in "luxuries".

19. It was contended on behalf of applicants that the goods can be brought into West Bengal from outside only in two ways, namely, under a pre-existing contract of sale or a concluded sale, and in that event the movement of goods would be in the course of inter-State sale. It was argued that taxing an inter-State sale is beyond the legislative competence of the State and it is within the competence of the Central Government under entry 92A of List I. In case of an intra-State sale, it was argued, the State cannot levy a sales tax exceeding 4 per cent in terms of Section 15 of 1956 Act. Applicants' further contention is that in cases of stock

transfer and despatch by the principal to his agent, it will be a consignment of goods in the course of inter-State trade, and Parliament alone is the competent authority to impose a tax on consignment of goods under entry 92B of List I of the Seventh Schedule. As regards all these submissions, the contention of Mr. A.Mitra, learned counsel for respondents, was that the levy of luxury tax has no nexus with anything prior or subsequent to the event of stocking, nor any connection with sale of any description. If no goods are held in stock, there is no question of liability of luxury tax. The tax is exigible under Section 4 on "turnover of stock of luxuries" which is defined in Section 2(1) as "aggregate of the values of stock of luxuries". Mr. Mitra for respondents rightly argued that it is immaterial whether or not, the goods held in stock were acquired by purchase or subsequently those are sold away. In my opinion, the luxury tax does not depend upon the nature of transaction as a result of which the goods are brought into West Bengal or upon the manner of disposal thereof. Creation of stock by bringing the luxury items into West Bengal from outside is good enough. Hence, the impugned tax is neither linked to any kind of sale or purchase, nor linked to consignment of goods in the course of inter-State or intra-State trade or commerce.

Therefore, entries 92A and 92B of List I which are exclusive fields of legislation by Parliament, have nothing to do with stocks of luxury goods in West Bengal for the purpose of levy of luxury tax. The State Legislature is competent to levy the tax under entry 62 of List II on luxuries. Since the tax is simply on "luxuries" qua "luxuries" without any further condition attached to them, the provisions in the impugned Luxury Tax Act are unexceptionable. The luxury tax is not in the nature of sales tax. The attempt on the part of the applicants to link the levy of luxury tax to any activity prior or subsequent to stocking of luxuries is fruitless, because entry 62 of List II and the Luxury Tax Act do not have, even remotely, any linkage with any kind of sale. Any sale envisages a transfer of property in goods for consideration. Levy of luxury tax is totally detached from any such transfer. The exclusion of goods despatched out of the State from the net of taxation under Section 5(a) is significant. It proves that the tax has no linkage with inter-State transactions. "Stocking" which attracts the tax has nothing to do with transfer of property in goods at the pre-stocking or post-stocking stage. The incidence of

luxury tax is unmistakably on "stocking". Hence this contention of applicants also fails.

20. It is well-settled that the burden is on the party who challenges the validity of an enactment, to show and establish the invalidity thereof, because a law duly passed by a Legislature, is presumed to be valid. The Constitution of India being a rather elaborate written instrument of federal character, with three separate legislative Lists and specific taxing entries in Lists I and II, the Parliament and the State Legislature both are supreme and independent in their respective allotted fields, although the fields of general and taxing legislation allotted to the Union are greater and wider than those of the State.

Therefore, if the same goods or the same transactions are exigible to taxes imposable by the Union and the States, the taxes will be so levied, and there is no scope for argument that since a Central tax is imposed, no State tax can be levied. The aspects of such two taxes are obviously separate. This is the philosophy behind distribution of taxing powers. The Supreme Court has already ruled in *Federation of Hotel & Restaurant Association of India* [1989] 74 STC 102 ; AIR 1990 SC 1637, that it is the true nature and character of the legislation, and not its ultimate economic result that matters. The argument of applicants that cigarettes or tobacco products are being taxed, in substance, on their sales or purchases, has already been found to be without substance. In this context, I may refer to the case of *Express Hotels Private Ltd.* [1989] 74 STC 157 (SC) where the constitutionality of a few State Acts enacted under entry 62 of List II (regarding luxuries) was questioned. The West Bengal Entertainment and Luxuries (Hotels and Restaurants) Tax Act, 1972 was also involved in that case.

The court observed that the taxable event need not necessarily be the actual utilisation or the actual consumption, as the case may be, of the luxury. A luxury which can reasonably be said to be amenable to a potential consumption does provide the nexus. Section 4 of the said 1972 Act which envisages a tax on the mere existence of the means of providing the luxury was held to be within entry 62 of List II. Similar is also the case in the Luxury Tax Act under challenge before us, according to which mere stocking attracts the tax. A hint was given in the

application before us that though now the rate of impugned luxury tax on tobacco products is ten per cent, the State has taken the power in Section 4 to levy the tax up to the rate of twenty per cent. This point was concluded by the Supreme Court in the *Express Hotels case* [1989] 74 STC 157, by holding that mere excessiveness of a tax or that it affects the earnings cannot per se be held to be violation of Article 19(1)(g). In the same case, it was laid down that so long as the legislation has a reasonable nexus with the concept of "luxuries" in the broad and general sense in which the expressions in legislative Lists are comprehended, the legislative competence extends to all matters "with respect to" that field or topic of legislation.

21. Applicants' case is that luxury tax is attracted to the turnover of stock of luxuries, as defined in Section 2(1), and as soon as an importer brings goods from outside West Bengal and is in possession of the same within West Bengal, the levy is attracted. Hence, bringing of the goods and keeping them in possession of the importer is said to be immediately and inextricably linked. The imposition, therefore, directly impedes and interferes with the free-flow of trade and commerce, particularly when manufactured tobacco is a declared goods.

In the absence of compliance of the proviso to Article 404(b), applicants argue, levy of luxury tax is ultra vires Article 401. The contention of respondents is that there is no contravention of Article 401, because an importer can bring "luxuries" into the State of West Bengal without payment of this tax, and if the imported "luxuries" are despatched out of West Bengal, no tax is leviable under Section 5(a) of the Luxury Tax Act. Those who locally purchase and locally sell tobacco products in West Bengal are not also liable to pay the tax, which is payable only by an importer-stockist and a manufacturer-stockist. The levy is in no way linked with importation and is a single point tax.

The Revenue also invoked the protection of Article 404(a), as no discrimination has been made as to rate of tax between stock of goods imported and stock of goods locally manufactured. Relying on *Atiabari Tea Co. Ltd.* AIR 1961 SC 232, Dr. Pal for applicants submitted that even if the State Legislature was competent to enact the law, it must still stand the test of validity under Part XIII of the

Constitution which guarantees free-flow of trade and commerce. True, the question of legislative competence is different from the question of contravention of Article 401. Also true, in *Atiabari Tea Co. case* AIR 1961 SC 232, the Supreme Court quoted with approval the following observation of Cardozo, J., in the case of *Charles H. Baldwin* (1934) 79 Law Ed. 1032 at page 1038 involving a similar provision in the American Constitution : "This part of the Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together and that in the long run prosperity and salvation are in union and not division." "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 401." Dr. Pal referred to the case of *A.B. Abdul Kadir v. State of Kerala* AIR 1976 SC 182, in which it was held that luxury tax under the Kerala Act was violative of Article 401, but the Act was protected under Article 404(b), since the assent of the President of India had been obtained.

In that particular case, it was held that cigarettes are luxury items within the meaning of entry 62 of List II, Mr. A. Mitra, learned advocate for the Revenue, submitted that the provisions of the Kerala Act which were subject-matter of AIR 1976 SC 182 (*A.B. Abdul.Kadir v.State of Kerala*) were clearly different from those of the West Bengal Luxury Tax Act. The following extract from paragraph 15 of that judgment will clearly show the distinguishing features of the Kerala Act :
"..... 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.....Perusal of the rules shows that it was imperative for the A class licensees to pay the licence fee in advance before they could bring tobacco within the taxable territory. We agree with the learned Judges of the High Court that such levy directly impedes the free flow of trade and as such is violative of Article 401 of the Constitution." Though Dr. Pal invoked the above decision in favour of applicants, he did not submit that the provision in the Luxury Tax Act of West Bengal requiring a licence for a stockist is in any way similar to the licence obtainable under the Kerala Act. In fact, no grievance was made before us regarding Section 6 of the Luxury Tax Act, under which a licence is to be obtained, when a stockist becomes liable to pay the tax. It is by all means a mere regulatory

measure. The tax, as we have seen, is leviable on the stock held within the State of West Bengal. As regards the licence, a stockist is required to obtain it under Section 6(1), when he is liable to pay luxury tax under Section 4. That means, a stockist is not required to obtain a licence until there is a turnover of stock of luxuries held by him in terms of sections 4 and 5. In the Kerala Act, the licence fee was payable even before the importation was made, and it was held nothing but a tax directly and immediately impeding importation. That is the reason for holding that the provision was violative of Article 401. In view of the distinguishing features in West Bengal Act, the ratio in *A.B. Abdul Kadir v. State of Kerala* AIR 1976 SC 182 on this point does not apply to it. The impugned luxury tax cannot be held to be contravening Article 401, merely because it is leviable on imported goods also. It bears no such nexus with importation as to amount to a direct and immediate impediment.

22. By relying on *Bhailal Bhai* [1964] 15 STC 450 (SC) ; AIR 1964 SC 1006, it was contended on behalf of applicants that the impugned luxury tax directly impedes the freedom of trade and commerce guaranteed by Article 401, and even if it is saved under Article 404(a), non-compliance of the proviso to Article 404(b) should make it ultra vires Article 401. Relevant paragraphs in the case of *Bhailal Bhai* [1964] 15 STC 450 (SC) ; AIR 1964 SC 1006 are extracted below for due appreciation of the true ratio thereof : "(9) There can be no doubt that the tax payable at the point of sale by the importer in Madhya Bharat directly impeded the freedom of trade and commerce guaranteed by Article 401 of the Constitution. It is true that the import by itself would not bring in the liability to tax and that if the imported goods were not sold in Madhya Bharat no tax would be payable. Quite clearly however by far the greater part of the tobacco leaves, manufactured tobacco (for eating and smoking) and tobacco used for bidi manufacturing that would be imported into the State would be sold in Madhya Bharat. That a very considerable amount was so sold is clear from the very assessment orders made in these several cases. There can be no doubt therefore that even though it is the sale in Madhya Bharat of the imported goods that creates the liability to tax and not the import by itself, the trade and commerce as between Madhya Bharat and other parts of India is directly impeded by this tax. On the authority of this Court's decision in *Atiabari Tea Co. Ltd. v. State of Assam* [1961] 1 SCR 809 ; AIR 1961

SC 232 it must therefore be held that the tax contravenes the provisions of Article 401 of the Constitution, It may be mentioned that the later decision of this Court in Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan AIR 1962 SC 1406 which slightly modified the majority decision in Atiabari Tea Co.'s case [1961] 1 SCR 809 ; AIR 1961 SC 232 does not alter this position. If the tax could have been claimed to be regulatory or compensatory it would have got the benefit of the latter decision. There is however no scope for such a claim (See Firm A.T.B. Mehtab Majid and Co. v. State of Madras [1963] 14 STC 355 (SC) ; AIR 1963 SC 928).

(12) It may not be out of place to notice in this connection the distinction made by Section 3 of the Madhya Bharat Sales Tax Act between sales by a dealer who imports goods [clause (a)] and other dealers [clauses (b) and (c)]. It is not unreasonable to think that the Act itself contemplated the sales by an importer of goods as meaning only sales by him of goods imported by him into Madhya Bharat. Apart from this, it has to be noticed that admittedly the notification did not make dealers who dealt only in home grown or home produced tobacco liable to pay the tax. That by itself would be sufficient to bring in the vice of discrimination which is the purpose of Article 404(a) to prevent.

(13) There can therefore be no escape from the conclusion that similar goods manufactured or produced in the State of Madhya Bharat have not been subjected to the tax which tobacco leaves, manufactured tobacco and tobacco used for bidi manufacturing, imported from other States have to pay on sale by the importer. This tax is therefore not within the saving provisions of Article 404(a).

As already pointed out, it contravenes the provisions of Article 401 of the Constitution, The tax has therefore been rightly held by the High Court to be invalid. It is clear that the assessment of tax under these notifications was thus invalid in law." In the case of Bhailal Bhai [1964] 15 STC 450 (SC) ; AIR 1964 SC 1006, Section 3 of the Madhya Bharat Sales Tax Act, 1950 imposed tax on various dealers including importers and (also theoretically) manufacturers. Section 5 of the said Act laid down the rate of tax, empowering the Government to specify, by notification, the goods and the point of their sale at which the tax was payable. In the relevant notifications issued under Section 5, the point of sale of tobacco items

by dealers was "importer". In paragraph 8 of the judgment, the Supreme Court held that with effect from January 22, 1964 the point, at which the tax was payable, was the sale by an importer. On these facts, the High Court held that the said taxing provisions did not come within the special provisions of Article 404(a), because they imposed tax only on imported tobacco and not on home grown tobacco, and consequently there was infringement of Article 401 of the Constitution. The Supreme Court, however, held that although the import by itself was not liable to be taxed, and there would be no tax if the imported goods were not sold in Madhya Bharat, yet the tax payable at the point of sale by the importer in Madhya Bharat directly impeded the freedom of trade and commerce guaranteed by Article 401, because by far the greater part of imported tobacco items would be sold in Madhya Bharat. It is clear, therefore, that the Supreme Court found a direct nexus between importation and sale by importer in the context that the impugned notifications under Section 5 of the Madhya Bharat Act made only the importers liable to the tax, without extending the same tax liability to the manufacturers or producers. The other clinching factor, in my opinion, which weighed with the court was that the tax was payable by importers to the exclusion of others. The provisions of the Luxury Tax Act of West Bengal, however, are clearly distinguishable, because these provisions equally apply to importers as well as local manufacturers.

The point of taxation under the Luxury Tax Act is neither importation, nor sale, but stocking of goods, and the scheme of the Luxury Tax Act shows that it is a single point tax the incidence of which is on the first point of stocking by importation and manufacture for the purposes of stocking, vending, supplying or distributing, as mentioned in clause (h) of Section 2. When sections 4, 5 and 6 and various definitions in Section 2 are read together, it is clear that manufacturers within the State are included in the scheme of taxation together with importers.

In my opinion, this is the real distinguishing feature of the provisions of the West Bengal Act which is under our consideration vis-a-vis the provisions read with the notifications under the Madhya Bharat Act which were subject-matter of the case of Bhailal Bhai [1964] 15 STC 460 (SC) ; AIR 1964 SC 1006. Moreover, in terms of Section 5(a) of the West Bengal Act, the tax will not be exigible to the stocks (both

imported and locally manufactured) despatched out of West Bengal.

23. It is clear that in the case of Bhailal Bhai [1964] 15 STC 450 (SC) ; AIR 1964 SC 1006, there was no compliance of Article 404(a). Hence, the Supreme Court held that the High Court had rightly declared the tax invalid. In the present case, Mr. A. Mitra, learned advocate for the Revenue, contended that here, there is full compliance of Article 404(a), for which the question of contravention of Article 401 or non-compliance of the proviso to Article 404(b) does not arise at all.

He relied on Video Electronics [1990] 77 STC 82 (SC) ; AIR 1990 SC 820.

Dr. Pal, appearing for applicants, however, submitted that in spite of compliance of Article 404(a), non-compliance of Article 404(b) would make the Luxury Tax Act ultra vires Article 401, if there is a contravention thereof. In my opinion, the Luxury Tax Act does not contravene Article 401. Its provisions read together, leave no one in doubt that all manufacturers and importers are liable to pay the tax except for the stock despatched from the State of West Bengal to places outside the State, in view of Section 5(a). Section 5(a) indicates that neither all imported goods nor all manufactured goods are liable to luxury tax. It cannot, therefore, be said that the taxing event or stocking of "luxuries" is, in this sense, linked to importation.

Stocking is undoubtedly an event which is distinct from and subsequent to both importation and manufacture, and which comes into being after the conclusion of importation and manufacture.

24. According to Dr. Pal, the taxable event doctrine is now overshadowed by the nexus theory propounded by the Supreme Court in the cases of Abdul kadir involving the Kerala Luxury Tax Act, reported in AIR 1962 SC 922 and AIR 1976 SC 182 (Abdul Kadir v. State of Kerala) and in the cases of Hotel Balaji [1993] 88 STC 98 (SC) ; AIR 1993 SC 1048 and Devi Dass Gopal Krishan [1994] 95 STC 170 (SC) ; (1994) Supp 2 SCC 59. On behalf of respondents it was submitted by Mr. A. Mitra, learned counsel, that even on the ratio of Hotel Balaji [1993] 88 STC 98 (SC) ; AIR 1993 SC 1048 and Devi Dass [1994] 95 STC 170 (SC) ; (1994) Supp 2 SCC 59, it is clear that there is no nexus or link between importation and

sale, In this case, the tax is levied not on importation of or the transfer of property in "luxuries", but on the holding of the "luxuries in stock". It is contended on behalf of respondents that there are different facets of a transaction and such different facets may be taxed differently, Mr. Mitra appearing for the contesting respondents, distinguished the case of Abdul Kadir AIR 1976 SC 182 in respect of the Kerala Act by pointing out that in the Kerala Act there was a provision for payment of licence fee even before a person could become eligible to cause importation of tobacco products.

This particular provision was found by the court to cause an impediment in the free-flow of trade and commerce and therefore rendered the provision violative of Article 401. Mr. Mitra submitted that in the West Bengal Act there is no such provision creating an impediment on the importation itself. Without payment of luxury tax or obtaining any licence, an importer-stockist is free to bring luxury items into West Bengal. It is argued that stocking takes place after importation has been completed. Moreover, according to Mr. Mitra, the levy cannot be linked with either manufacture or importation, because all "luxuries" stocked within West Bengal, whether procured by manufacture or by importation, are subjected to it. He submitted that except for natural resources, a stock of goods can exist only through manufacture or importation. As regards the nexus theory, learned counsel for applicants relied on *Hotel Balaji v. State of Andhra Pradesh* [1993] 88 STC 98 (SC) ; AIR 1993 SC 1048, paragraph 9 (page 111 of STC). The question which arose in that case was whether the levy was one with reference to the sale or purchase of goods, There was some difficulty to identify the last purchase on which the tax was to be levied. In that context, the court observed : "The ambit of the power to levy a tax in respect of sale of goods is very wide and will cover any tax which has a nexus with the sale or purchase of goods including a last purchase in the State. This I think is a more appropriate test to be applied in these cases rather than the test of 'taxable event' which is somewhat ambiguous in the context." The case of *Hotel Balaji* [1993] 88 STC 98 (SC) ; AIR 1993 SC 1048 was followed in the case of *Devi Dass Gopal Krishan Pvt. Ltd.* [1994] 95 STC 170 (SC) ; (1994) Supp 2 SCC 59. In my opinion, on the aforesaid principle, there is no nexus between importation and levy of tax according to the provisions of the Luxury Tax Act of West Bengal. Dr.

Pal contended that the nexus with importation arises due to the fact that the stocking can be made only after importation. But, as already seen, stocking of "luxuries" attracting the luxury tax occurs not merely after importation, but also after manufacture or production within the State. In *Bhagatram Rajeev Kumar v. Commissioner of Sales Tax, M.P.* reported in [1995] 96 STC 654 (SC) ; (1995) 28 STA 291 (SC), relating to Madhya Pradesh Entry Tax Act, 1976, another three-Judge Bench of the Supreme Court held in paragraph 3 (page 656 of STC) of the judgment : "The levy was described in substance to be purchase tax leviable under the Sales Tax Act. But it appears to have been prompted by the latter part of the section which identifies the person who shall be responsible for paying the tax. The section is in two parts--one, levying the tax and other fixing the person from whom it shall be realised. The latter is more a part of machinery provision. It cannot control the main or the substantive part of the section. The taxable event is the entry of goods in a local area of the State by a dealer in course of business and not its purchase/To characterise it as purchase tax is ignoring the nature of levy." It will, thus, appear that the taxable event theory has not been given up for good. The incidence of luxury tax is laid down in charging Section 4 of the Luxury Tax Act. A stockist is liable to pay luxury tax on his turnover of stock of luxuries. Section 5 also lays down the same principle. "Turnover of stock of luxuries" has been defined in Section 2(1). The expression means the aggregate of the values of the stocks of luxuries, i.e., already existing stocks. Therefore, the luxury tax has no nexus with importation. Dr. Pal appearing for applicants argued about nexus of luxury tax with importation so as to make it an impediment under Article 401, but it was not shown how the tax levied for stocking of both imported and locally manufactured goods, might really work as an impediment.

25. In view of the finding to the effect that the Luxury Tax Act and the luxury tax levied under that Act do not contravene Article 401 of the Constitution, and in view of the fact that applicants have, in course of arguments, neither challenged the tax or the Act on the ground of violation of articles 303 and 304(a), nor disputed the contention of the Revenue that Article 404(a) has been complied with, there is no need to enter into the questions as to (i) whether compliance of Article 404(a) alone is an immunity against contravention of Article 401 (as argued by learned counsel for applicants) and (ii) whether the immunity will be operative when both

Article 404(a) and Article 404(b) together are complied with (as contended by the learned counsel for applicants). This question has no relevance in respect of stockists who manufacture "luxuries" within West Bengal.

26. The next contention of Dr. D. Pal, learned advocate for applicants, was that if the impugned luxury tax is really a tax on sales or purchases, then the State cannot levy the same in view of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (in short, "1957 Act"), and because the State of West Bengal has been actually receiving its allotted share of the additional excise duty collected by the Central Government in respect of tobacco products.

According to him, the expression--"tax on sale or purchase", appearing in 1967 Act, should be construed in the light of the Reports of the Taxation Enquiry Commission, 1953 and the Second Finance Commission and other relevant materials which led to the passing of 1957 Act. The arguments proceed to the effect that the task assigned to the Second Finance Commission was to recommend the principles of distribution of the collection of additional excise duty initially proposed to be levied on three declared goods, namely, sugar, tobacco and textiles.

For discharging this obligation, the said Commission had called for information from the States about the quantum of collection under the sales tax laws and other similar laws of the respective States. The Commission specifically sought for information on collection of all taxes on tobacco, not merely taxes on sale of tobacco. After considering the information received, the Commission recommended distribution of specified amounts as compensation in lieu of the income derived by the States from sales taxes, by whatever name called. The said recommendations were given statutory force by 1957 Act. Hence, the applicants' contention is that additional excise duty is in replacement of all State level taxes on tobacco. In course of dealing with State taxes, the Commission noted in paragraph 28 of the Report (see page 69 of the application) that "a tax on sale of tobacco" was being levied by various States in various forms, e.g., in the form of a Town Duty in the then State of Bombay, and a licence fee for dealing in tobacco in the States of Madhya Pradesh and Punjab, Having regard to the impact of such

taxes, the Commission recommended in paragraph 32 of the Report that there should be proper co-ordination between the Centre and the States in order to avoid the heavy burden of taxation on tobacco.

Pursuant to that recommendation, the Centre and the States agreed in a meeting of the National Development Council held in December, 1956, to replace sales taxes on tobacco by a uniform surcharge on excise duty, the proceeds of which were distributable among the States. According to Dr. Pal for the applicants, it is significant that additional excise duty was levied only on three items, sugar, tobacco and textiles, out of ten items of declared goods in order to make the levy of tax on those three items uniform by way of a Central tax. He contended that this being the object of levy of additional excise duty, levy of any State tax, whether called sales tax or luxury tax, is inconsistent with the object thereof. In this connection, he invoked really to no assistance the rule of construction that an interpretation which does not accord with the object of the enactment, and is inconsistent with it, should be avoided in preference to an interpretation which furthers its object. In order to justify the references made to the different Commissions and their Reports, Dr. Pal submitted that it is permissible to refer to the legislative history for interpretation of an Act, and relied on the case of K.P. Varghese [1981] 131 ITR 597 (SC) ; AIR 1981 SC 1922. It was held in K.P. Varghese [1981] 131 ITR 597 (SC) ; AIR 1981 SC 1922 that speeches of Members of the Legislature made during debate on the passing of the Bill are inadmissible for the purpose of interpretation, but the speech made by the mover of the Bill explaining the reason for introduction thereof is admissible. This was decided on the principle that everything which is logically relevant for the ascertainment of meaning of the statute should be admissible. The arguments on behalf of applicants on this question were rounded up by submitting that even though the impugned tax is called luxury tax, it is a sales tax in substance within the proviso to the Second Schedule to 1957 Act, and hence by levying such a tax, the State of West Bengal has lost the right to receive a share of the collection of additional excise duty, unless the Central Government directs otherwise by a special order, which has not yet been done.

27. The contention of the Revenue is that levy of additional excise duty by 1957 Act is in replacement of only sales tax on several goods including tobacco products in respect of only such States and Union territories as were parties to the agreement with the Central Government, on an understanding that they would not impose sales tax.

The non-participating States continue to impose sales tax on tobacco products, with the restriction that they cannot levy sales tax exceeding 4 per cent, because tobacco products are declared goods and because of Section 15 of 1956 Act. Revenue further argued that such an agreement does not denude the Legislature of a participating State of its power of legislation in respect of sales tax and other taxes on tobacco products. Mr. A. Mitra, learned counsel for the Revenue, referred to the Statement of Objects and Reasons to 1957 Act and to annexure "A" to the affidavit-in-opposition, being letter dated May 4, 1957 addressed to Chief Minister of West Bengal by the Finance Minister of India. In my opinion, there is a fallacy even in the way the history of legislation is sought to be projected. Eventhough here and there in the documents relied on by the applicants, there may be an apparent confusion as to whether additional excise duty was intended to replace only sales tax or all kinds of taxes on tobacco products imposed by the States, after due scrutiny there will be no doubt that it was intended to replace only sales taxes imposed by the participating States, and not other taxes. Dr. Pal referred to paragraph 2(a) of letter dated May 24, 1957 from Secretary, Finance Commission to the Finance Secretaries of all State Governments, at annexure "C", page 73 of annexures to the application. The Finance Commission wanted several information, one of which was "the rate at which the taxes are now levied on these commodities in your State under the State's Sales Tax Act or other similar law". Dr. Pal also referred to the memoranda presented by the Finance Department, Government of West Bengal to the Taxation Enquiry Commission in March, 1947, the xerox copy of which was furnished by him. At internal page 697 of the said memoranda under entry 50 relating to taxes on luxuries, etc., the following passage occurs : "The other part of the entry, namely, taxes on luxuries is essentially a variant of entry 48, namely, sales tax. For in most cases the most convenient method of levying a tax on an article of luxury is in the form of a tax on its sales. In some cases it might, however, be more convenient to levy it in the

form of a use tax, as for example, on motor vehicle, but there are few luxuries, the use of which appear to lend itself to such taxation." On the basis of such language, Dr. Pal contended that the additional excise duty was intended to replace not only sales tax but all kinds of State taxes on tobacco products. This is not correct, because we find from the letter of the Finance Minister of India addressed to the Chief Minister of West Bengal on which the Revenue has placed reliance, that it was intended to replace only taxes on sales or purchases, by whatever name called. Paragraph 3 of the said letter dated May 4, 1957, annexure "A" to the affidavit-in-opposition, is clear on this point. In the first paragraph of that letter itself, the Finance Minister of India stated that in the National Development Council Meeting held on 8th and 9th December, 1956, it was unanimously decided that sales tax levied on sugar, mill-made textiles and tobacco including manufactured tobacco should be replaced by a surcharge on Central Excise Duty. In that context, in paragraph 3, the Finance Minister said that the State Government should implement that part of the decision which relates to "levy of tax, by whatever name called, on the sale or purchase". In the last sentence of the paragraph 3, the Finance Minister clearly said that the State Governments should provide for exemption from tax on the sale or purchase of the commodities either by legislative or executive action under the States' sales tax laws. This letter preceded the enactment of 1957 Act. The Finance Department of the Government of West Bengal might have, in their own wisdom, treated luxury tax as a variant of sales tax, but that was done merely from the point of view of administrative exigency and over-all collection of various taxes, and not having regard to the constitutional and legal positions. Despite that, it is not possible to judicially approve that administrative view as sacrosanct about half a century thereafter, particularly after the Constitution of India came into force. That luxury tax is no substitute for sales tax is clear from the fact that while sales tax is imposed on sales of all commodities, barring only a few, luxury tax, by its nature, is leviable on only a few specified commodities considered by the Legislature as "luxuries". Whatever may be the history of a legislation, the express and unambiguous language used in the statute is conclusive. On the authority of K.P. Varghese [1981] 131 ITR 397 (SC) ; AIR 1981 SC 1922 for interpretation of the language of the statute, wherever necessary, resort may be had to the objects and reasons of

the legislation and speech made by the mover of the Bill in the Legislature. The following Statement of Objects and Reasons of 1957 Act is clear that the additional excise duty was in place of sales tax and no other State tax : "The object of the Bill is to impose additional duties of excise in replacement of the sales taxes levied by the Union and States on sugar, tobacco and mill-made textiles and to distribute the net proceeds of these taxes, except the proceeds attributable to the 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.....".

The preamble of 1957 Act was silent as to the question of replacement of any State tax. But the Second Schedule to 1957 Act which is a part of the statute, read with Section 4 thereof, provides that unless the Central Government by special order otherwise directs, no State which levies and collects a tax on sale or purchase of the declared goods shall be entitled to payment of any sum out of proceeds of additional excise duty. Therefore, levy of additional excise duty by 1957 Act was in replacement of only taxes on sales or purchases, and not in replacement of all kinds of taxes on tobacco products, as contended on behalf of applicants. I have already held that the impugned luxury tax is not a tax on sale or purchase of goods, nor a tax of such nature. It is a tax imposed by the State under entry 62 of List II of the Seventh Schedule to the Constitution. A tax on sale or purchase of goods, however, is leviable by the States under entry 54 of List II. The two are different powers under different fields of legislation. Moreover, the provisions of 1957 Act nowhere even prohibits the State from imposing a tax on sales or purchases of goods under entry 54 of List II, not to speak of a luxury tax under entry 62 of List II. In the case of *Anantapur Textiles Limited v. State of West Bengal*, reported in [1993] 91 STC 272, it was held by this Tribunal following the decision of the Supreme Court in the case of *State of Kerala v. Attesee (Agro Industrial Trading Corporation)* [1989] 72 STC 1, that 1957 Act is no bar to the exercise of the State's power to impose tax on sale or purchase of goods, even declared goods. But if it chooses to impose a tax on sale or purchase of declared goods, in view of Section 15 of 1956 Act, the rate of tax cannot exceed 4 per cent,

and there is a risk of losing its share in the collection of additional excise duty on the commodity or commodities in question. As regards a luxury tax which is imposed under entry 62 of List II, there is no such limitation on rate of tax, and the additional excise duty has no bearing whatsoever on levy of luxury tax. In fact, as long as entry 54 of List II remains in its present form, the Parliament cannot totally prevent the States from levying sales tax.

28. The next point canvassed on behalf of applicants on the question of legislative competence is on the theory of occupied field. The contention is that tobacco industry being a declared industry according to the provisions of the Tobacco Board Act, 1975, enacted under entry 52 of List I of the Seventh Schedule, the entire field of legislation in respect of it is occupied by the Centre, leaving no power to the States of legislate. Though in the application, the Industries (Development and Regulation) Act, 1951, was mentioned in this connection, that Act was not invoked in the course of arguments.

Relying on the case of *I.T.C. Ltd. v. State of Karnataka* (1985) Supp SCC 476, Dr. Pal argued on behalf of applicants that the State Legislature lost the jurisdiction to legislate in the same field on account of 1975 Act. Mr. A. Mitra, appearing for respondents, submitted that the Tobacco Board Act, 1975, was enacted under entry 52 of List I, which was a general entry as distinct from a taxing entry. So, that Act has nothing to do with levy of luxury tax under entry 62 of List II. Relying on the case of *Hoechst Pharmaceuticals Ltd.* [1984] 55 STC 1 (SC) ; AIR 1983 SC 1019 (paragraphs 73 to 76) ; (pages 38 and 39 of STC), he argued that there are both general and taxing entries in Lists I and II of the Seventh Schedule, and a legislation by Parliament under a general entry cannot denude the States of the legislative competence to enact taxing statutes. Mr. Mitra also referred to the case of *State of U.P. v. Synthetics and Chemicals Ltd.* [1992] 87 STC 289 (SC) ; (1991) 4 SCC 139 in this connection. He also distinguished the case of *I.T.C, Ltd.* (1985) Supp SCC 476. That, according to Mr. Mitra, was a case involving levy of a fee, not tax under any specific taxing entry in the State List. Mr. Mitra submitted that there can be no conflict of taxing power between the Union and the States, because each is supreme in its own field, and the field of taxing power of each is well-demarcated. He also referred to the case of *Behar Potteries Ltd. v. State of*

West Bengal, a judgment of this Tribunal dated October 9, 1991, relating to education cess and rural employment cess in respect of areas of coal mines in West Bengal.

29. The Tobacco Board Act, 1975, was enacted by Parliament under entry 52 of List I which reads as : "Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest". The preamble of the Act of 1975 is this : "An Act to provide for the development under the control of the Union of the tobacco industry". Section 2 declares that, "it is expedient in the public interest that the Union should take under its control the tobacco industry". Chapter II of the Act deals with constitution of the Tobacco Board and its functions, etc. Section 8 lays down the Board's functions, which are development of the tobacco industry, regulating production, curing and marketing of Virginia tobacco, ensuring to the growers of Virginia tobacco a fair and remunerative price without wide fluctuations, looking after marketing facilities, and the like. Chapter III of the Act relates to regulation of production and disposal of Virginia tobacco. Growers, curers, packers, auctioneers and dealers are to be registered. Chapter IV concerns finance, accounts and audit of the Tobacco Board. Chapter V deals with control by Central Government in such areas as export and import of tobacco and its products. Chapter VI, the last one, lays down miscellaneous provisions. Section 32 under Chapter VI incorporates the rule-making power. There is nothing in the whole of the Act, particularly in Section 32, in respect of levy of any tax on tobacco or tobacco products. From all this, it will be clear that the Tobacco Board Act, 1975 is a regulatory statute for the development of tobacco industry under the control of the Central Government ; but it is not a taxing statute, nor was it enacted under any taxing power assigned to the Union under List I, As regards the case of I.T.C. Ltd. reported in (1985) Supp SCC 476, learned counsel for Revenue rightly distinguished it, saying that it related to certain general entries under List I under which levy of market fee was the exclusive domain of the Union, and the State had no competence to levy such a fee by legislation. On the contrary, here the moot question is whether the impugned levy falls under the field of legislation assigned to the Union by entry 52 of List I under which the Tobacco Board Act, 1975 was enacted. The impugned luxury tax clearly comes under entry 62 of List II, and hence there is neither lack of legislative competence of the State, nor any

overlapping. The two fields are poles apart. In the case of *I.T.C. Ltd.* (1985) Supp SCC 476, the provision in the Karnataka Act relating to levy of a market fee which rests on *quid pro quo* was held *ultra vires* the Constitution, because the field of legislation on regulation of markets and providing marketing facilities was exclusively occupied by the Union by enacting the Tobacco Board Act, 1975, under entry 52 of List I. In the instant case, there is no such repugnancy, no such encroachment. The case of *I.T.C. Ltd.* (1985) Supp SCC 476 is no authority for the proposition that enactment of the Tobacco Board Act, 1975, has denuded the States of their competence to legislate for levy of permissible taxes on tobacco products.

30. Mr. A. Mitra, learned counsel for Revenue, finds support from paragraphs 73 to 76 of the judgment in *Hoechst Pharmaceuticals Ltd.* [1984] 55 STC 1 (SC) at pages 38 and 39 ; AIR 1983 SC 1019, at pages 1043 and 1044. In that case, it was held, *inter alia*, that : "Taxation is considered to be a distinct matter for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative entry as an ancillary power. Further, the element of tax does not directly flow from the power to regulate trade or. commerce in and the production, supply and distribution of essential commodities under entry 33 of List III although the liability to pay tax may be a matter incidental to the Centre's power of price control". It was further observed : "A scrutiny of Lists I and II of the Seventh Schedule would show that there is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States. Following the scheme of the Government of India Act, 1935, the Constitution has made the taxing power of the Union and of the States mutually exclusive and thus avoided the difficulties which have arisen in some other Federal Constitutions from overlapping powers of taxation". The exposition of this tricky question continues as under : "It would therefore appear that there is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group.This mutual exclusiveness is also brought out by the fact that in List III, the Concurrent Legislative List, there is no entry relating to a tax, but it only contains an entry relating to levy of fees in respect of matters given in that list other than court-fees. Thus, in our Constitution, a conflict of the taxing power of

the Union and of the States cannot arise....." Mr. Mitra quite aptly referred to the ease of Synthetics and Chemicals Ltd. [1992] 87 STC 289 (SC) ; (1991) 4 SCC 139, wherein it was held that legislative competence of State Legislature to levy purchase tax on industrial alcohol under entry 54 of State List was only subject to entry 92-A of Union List and Article 286, and control of industries by Union under entry 52 of List I is distinct and separate from levy of tax in matters provided in entry 54 of List II. Unless State Legislature transgresses substantially on field occupied by Parliament, there is no repugnancy. By applying the, pith and substance test, it was held that control exercised by Central Government under the Industries (Development and Regulation) Act, 1951, or Price Control Orders issued thereunder would not fetter the power of State Legislature to legislate on tax matters under entry 54 of List II. There is enough similarity of that case with the present one, the entry in question here being entry 62 of List II, Mr. A. Mitra, learned counsel for Revenue also relied on the case of Federation of Hotel and Restaurant Association of India [1989] 74 STC 102 (SC) ; AIR 1990 SC 1637. A five-Judge Bench of the Supreme Court was seized of the question whether the Parliament was competent to enact the Expenditure Tax Act, 1987, in view of the State's power to levy tax on "luxuries" under entry 62 of List II. While upholding the legislative competence of the Parliament, the court made the following observations which apply to the present case : "Wherever legislative powers are distributed between the Union and the States, situations may arise where the two legislative fields might apparently overlap. It is the duty of the courts, however difficult it may be, to ascertain to what degree and to what extent, the authority to deal with matters falling within these classes of subjects exists in each Legislature and to define, in the particular case before them, the limits of the respective powers. It could not have been the intention that a conflict should exist ; and, in order to prevent such a result, the two provisions must be read together, and the language of one interpreted, and, where necessary modified by that of the other." (paragraph 12 of the judgment).

Again : "There might be overlapping ; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects." (Paragraph 14 of the judgment) The Supreme Court quoted with

approval a passage from the case of Governor-General in Council v. Province of Madras [1945] 1 STC 135 (PC) at page 141, wherein Lord Simonds pointed out that excise duty and sales tax in respect of the same goods did not produce any overlapping "in law", because the two imposts were distinct and separate and related to different "aspects". Mr. Mitra appearing for Revenue emphasised this "aspect" doctrine in the course of submitting that the impugned luxury tax, sales tax or excise duty are all distinct and separate, and the control of an industry envisaged in entry 52 of Union List has nothing to do with the taxation aspect. I agree with the contentions of the Revenue, and hence Dr. Pal's contentions on this score on behalf of applicants cannot be accepted. Therefore in spite of the Tobacco Board Act, 1975, the State Legislature of West Bengal was competent to enact the impugned Luxury Tax Act and to levy the tax on "luxuries" which are, in this case, cigarettes and tobacco products.

31. These are all the points urged by the applicants' counsel by way of oral arguments as well as written submissions. No other point was pressed, All the contentions of applicants, thus, fail. As regards the challenge under Article 401, it may be added that the Supreme Court held in Express Hotels [1989] 74 STC 157 that the restrictions must stem from the provisions of the law imposing the tax which could be said to have a direct and immediate effect of restricting the free-flow of "trade, commerce and intercourse", and it is not all taxes that have this effect. The Luxury Tax Act under our instant consideration, does not, as already held, give rise to any such restriction. The fundamental ratio of a recently reported decision of the Supreme Court in the case of Goodricke Group Ltd. v. State of West Bengal [1995] 98 STC 32 upholding the validity of education cess and rural employment cess on tea estates as units, levied under the West Bengal Primary Education Act, 1973 and the West Bengal Rural Employment and Production Act, 1976, is well-applicable to the instant dispute. In that case, inter alia, the following points were held : (i) that the levy of a duty of excise or cess on tea under Section 25 of the Tea Act, 1953, was altogether different and distinct in character from the impugned cesses relatable to entry 49 of List II. The Central Government's power under the Tea Act, 1953, regarding levy of excise duty or cess on tea and for control of cultivation of tea did not affect the competence of the State Legislature in as much as the State Legislature did not seek to control the cultivation of tea,

but sought to levy the tax on the land comprised in a tea estate ; (ii) in our constitutional system, where all the important legislative heads are assigned to the Centre, courts should be slow to adopt an interpretation which tends to deprive the States of the few powers assigned to them under the Constitution ; and (iii) the "measure of a tax is not determinative of its essential character". "The same transaction may involve two or more taxable events in its different aspects" and "the fact that there is overlapping does not detract from the distinctiveness of the aspects." 32. It has been argued orally as well as in the penultimate paragraph at page 26 of Dr. Pal's written submissions that the State of West Bengal has disentitled itself to its share of the proceeds of the additional excise duty. In view of the finding that the luxury tax is neither a sales tax, nor a tax of that nature "by whatever name called", it has no conflict with the provisions of 1957 Act. As there is no such conflict, no further finding is called for as to whether the State has disentitled itself to its share of additional excise duty.

33. In the result, the application is dismissed. The interim order dated April 28, 1995 stands vacated. No order is made for costs.

35. What is under challenge in this application is the imposition of "luxury tax" on tobacco products under the West Bengal Luxury Tax Act, 1994 (in short, "the Act") under sections 4 and 5 of the Act. The applicant-company is engaged in the purchase of cigarettes manufactured by VST Industries Limited, Hyderabad in the State of Andhra Pradesh and also VST brands of cigarettes manufactured by NTC Ltd., at its factory in Agarpara, West Bengal, which are sold in West Bengal and neighbouring States through its sales distribution net work.

Admittedly, the applicant-company is not a manufacturer of cigarettes but is, nonetheless, a "stockist" in terms of the second part of the definition of "stockist" in Section 2(i) of the Act inasmuch as stock of cigarettes which have been defined under the Act as luxury are brought by it from a place outside West Bengal for stocking, vending, supplying or distributing such luxuries in West Bengal. The applicant-company, as a stockist under the Act, is liable to pay a luxury tax on its turnover of stock of luxuries as provided in the Act in sections 4 and 5 thereof, The applicant-company has challenged these provisions as being unconstitutional on

various grounds including, inter alia, the lack of legislative competence of the State Legislature and the violation of Article 401 read with Article 404 of the Constitution of India. It is the case of the applicant-company that the luxury tax imposed under the Act is in fact anything other than what is purports to be. It has been alleged that the impugned tax is in pith and substance in the nature of an excise duty in relation to a manufacturer-stockist as defined in the first part of the definition of "stockist" in Section 2(i) of the Act and the State Legislature is not competent to levy such an excise duty, besides being inconsistent with the Additional Duties of Excise Act, 1957, The impugned tax is also a tax on sale or purchase of goods of special importance in inter-State trade and commerce and is, therefore, violative of Section 15 of the Central Sales Tax Act, 1956, read with Article 286(3) of the Constitution. The impugned tax can also be viewed as a tax on the movement of goods into West Bengal in the course of inter-State sales or on consignment of goods on transfer falling within entry No. 92A or 92B of List I and hence the State Legislature has no competence to levy such a tax.

36. Let us first examine the ground of violation of Article 401 read with Article 404 of the Constitution of India on which great stress was laid by Dr. D. Pal appearing for the applicant-company.

37. Dr. Pal submitted that according to the scheme of the Act, when an importer brings his goods from outside the State of West Bengal into West Bengal and is in possession of such luxury goods, the levy under the Act is immediately attracted since tax is payable on the turnover of stock of luxuries. Stock of luxuries, having been defined as the stock received by a stockist or procured by him for the purposes mentioned in Section 2(i), the bringing of the goods into West Bengal and keeping them in possession are immediately and inextricably linked and connected. Since goods brought by a person into West Bengal from any place outside West Bengal, have necessarily to be in the possession of the person who has brought it and instantly become a part of his stock, such importer becomes liable to the imposition of luxury tax under the Act. Hence, he contended that when the imposition is made under the Act on such possession of the goods which have been brought from outside West Bengal, the imposition directly impedes and interferes with the free-flow of trade and commerce. He submitted that, even

assuming though not admitting for the sake of argument that the imposition of luxury tax under the Act is within the State's legislative competence, the legislation being violative of Article 401 is liable to be struck down unless it can be protected under Article 404 of the Constitution. Article 404 lays down that notwithstanding anything in Article 401 or Article 403, the Legislature of a State may by a law (a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so however, as not to discriminate between goods so imported and goods so manufactured or produced; and (b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest, provided that no Bill or amendment for the purposes of "clause (b)" shall be introduced or moved in the Legislature of a State without the previous sanction of the President. Accordingly, if a State legislation violates Article 401, it can be protected only if the requirements of clauses (a) and (b) along with the proviso are complied with. It is his case that if a State legislation imposes discriminatory taxes, it is liable to be struck down even under Article 404(a) and the other requirements of Article 404(b) need not be investigated. If, however, a State legislation complies with the requirements of Article 404(a), it has still to satisfy the requirements of Article 404(b) and the previous sanction of the President is required to be obtained before the introduction or moving of such a Bill. Since, in the present case, the admitted position is that the sanction of the President has not been obtained before the introduction or moving of the Bill in the State Legislature, the impugned Act suffers from the infirmity of non-compliance with the constitutional mandate laid down in the proviso to Article 404(b) of the Constitution, It is not also the fact that the requirement of Article 255 has been complied with by obtaining Presidential assent subsequently. Hence he has argued that the impugned Act should be struck down as being violative of these constitutional provisions. In support of his arguments he has relied on the decisions of the Supreme Court in the case of *Atiabari Tea Co. Ltd. v. State of Assam* AIR State of Madhya Pradesh v. Bhailal Bhai [1964] 15 STC 450 (SC) ; AIR 1964 SC 1006 and *A.B. Abdul Kadir v. State of Kerala* AIR 1976 SC 182.

38. Mr. A. Mitra, appearing on behalf of the respondents, namely, the State of West Bengal and others, has submitted that there cannot be any dispute about

classification of cigarettes as a luxury item and the competence of the Legislature to do so. Further, a State Legislature is competent to enact legislation for imposition of tax on luxuries under entry 62 of the State List in the Seventh Schedule of the Constitution.

The luxury tax imposed on cigarettes under the Act is in exercise of this power and is, therefore, within its legislative competence. The taxable event under the Act is the stocking, vending, supplying or distributing of luxury items in the State of West Bengal under the circumstances mentioned in the Act. The tax is on the stock of manufactured goods and not on manufacture of goods and hence it cannot be called an excise duty. The luxury tax under the Act is leviable on a stockist as defined in Section 2(i) of the Act, and not a tax on a producer or manufacturer qua seller or manufacturer or producer. Since the tax is leviable neither qua seller nor qua manufacturer but qua a stockist, it is neither a sales tax nor an excise duty. On the question of violation of Article 401 of the Constitution in the case of an importer-stockist, it has been contended that there is no provision in the Act creating any impediment on the importation of tobacco products from outside the State of West Bengal unlike in the Kerala Act decided by the Supreme Court in the case of *Abdul Kadir v. State of Kerala* AIR 1976 SC 182. In the Kerala Act, there was a provision of payment of licence fee before a person could become eligible to cause importation of tobacco products which was held to be a cause of impediment in the free flow of trade and commerce and violative of Article 401. Under the provisions of the Act in West Bengal, it is open to an importer-stockist to bring luxury items into West Bengal without payment of luxury tax and hence there is no obstruction to the free-flow of trade and, consequently, there cannot be any violation of Article 401. It is also not correct that importation and physical possession of stock are inextricably linked up. Since there is no provision in the Act for payment of luxury tax as a condition precedent for being eligible for importation of tobacco products into West Bengal, there cannot at all be any question of violation of Article 401.

Atiabari Tea Co. Ltd. v. State of Assam AIR 1961 SC 1472; *State of Madhya Pradesh v. Bhailal Bhai* [1964] 15 STC 450 (SC) ; AIR 1964 SC 1006, relied on by the applicant are also inapplicable to the present case. In any event, the Act is protected by Article 404(a) which permits

a State Legislature to impose on goods imported from other States or Union territories any tax to which similar goods manufactured or produced in that State are subjected, so however, as not to discriminate between goods so imported and goods so locally manufactured or produced. Under the Act, luxury tax is also leviable at the same rate on a manufacturer's stock produced within the State and hence the Act does not discriminate between imported goods and locally manufactured goods.

A reference was made in this connection to the decision of the Supreme Court in the case of Video Electronics reported in [1990] 77 STC 82 ; AIR 1990 SC 820 ; (1990) 3 SCC 87 where the provisions in a State legislation for exemption of sales tax for a limited period for newly set up establishments in the State was held to be valid and not violative of Article 401. The other contentions of the applicant have also been denied.

39. The primary point, therefore, for determination is whether the provisions in the Act constitute any impediment to free-flow of trade and commerce and Intercourse as envisaged in Article 401. Only if it is found that there is such a violation, it will be necessary to examine whether the Act is protected by provisions of Article 404. It is in this light that the decisions of the Supreme Court referred to by both sides need to be considered with reference to the provisions of the Act. *Atiabari Tea Co. Ltd. v. State of Assam* AIR 1961 SC 232, the constitutional validity of the Assam Taxation (on Goods carried by Road or on Inland Waterways) Act (Assam Act 13 of 1954) which was passed by the Assam Legislature under entry 56 in List II was under consideration. Since the purpose and object of the Act was to collect taxes on goods solely on the ground that they are carried by road or by inland waterways within the area of the State, it was held that it put a direct restriction on the freedom of trade and since, in doing so it had not complied with the provisions of Article 404(b) it was declared to be void and struck down. In dealing with this case, the Supreme Court has spoken at length on the paramount significance and scope of Article 401. It was held that Article 401, read in its proper context and subject to the limitations prescribed by the other relevant articles in Part XIII of the Constitution, must be regarded as imposing a constitutional limitation on the legislative power of Parliament and the Legislatures of the States and that

wherever it is held that Article 401 applies, the legislative competence of the Legislature in question will have to be judged in the light of the relevant articles of Part XIII. It was held that the content of freedom of trade provided for by Article 401, whatever else it may or may not include, includes movement of trade which is of the very essence of all trade and is its integral part. Further, the restrictions, freedom from which is guaranteed by Article 401, would be such restrictions as directly and immediately restrict or impede the free-flow or movement of trade.

While taxes may and do amount to restrictions, it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 401. It went on further to hold that it is not as if no restrictions at all can be imposed on the free movement of trade and that when it is said that the freedom of the movement of trade cannot be subject to any restrictions in the form of taxes imposed on the carriage of goods or their movement, all that is meant is that the said restrictions can be imposed by the State Legislatures only after satisfying the requirements of Article 404(b). *State of Madhya Pradesh v. Bhailal Bhai* [1964] 15 STC 450 (SC) ; AIR 1964 SC 1006, the sales tax imposed by the notifications issued under the Madhya Bharat Sales Tax Act (30 of 1950) on tobacco leaves, manufactured tobacco (for eating, smoking and snuffing) and tobacco used for bidi manufacturing payable at the point of sale by the importer in Madhya Bharat was under challenge as directly impeding the freedom of trade and commerce guaranteed by Article 401 of the Constitution. It was held that even though it was the sale in Madhya Bharat of the imported goods that created the liability to tax and not the import by itself, the trade and commerce as between Madhya Bharat and other parts of India was directly impeded by the tax and hence the tax contravened the provisions of Article 401.

The tax was held to be invalid, since similar goods manufactured or produced in the State of Madhya Bharat were not at any point subjected to the tax which such goods imported from other States had to bear on sale by the importer, and being thus discriminatory was not within the saving provisions of Article 404(a).

42. The point for consideration in the case of *A.B. Abdul Kadir v. State of Kerala* AIR 1976 SC 182, was the validity of Kerala Luxury Tax on Tobacco (Validation)

Act (9 of 1964), creating a liability for payment of luxury tax on the stocking and vending of tobacco. While holding that the impugned tax was in fact a luxury tax and not an excise duty falling under entry 84 of List I of the Seventh Schedule, as contended by the appellants, it was at the same time noted by the court that the levy directly impeded the free flow of trade and, as such, was violative of Article 401 of the Constitution. Since, however, the levy of tax was protected by Article 404(b) of the Constitution, inasmuch as the assent of the President was given subsequent to the passing of the Bill by the Legislature in terms of Article 255 of the Constitution, the validity of the enactment was upheld.⁴³ The case of Video Electronics Pvt. Ltd., cited on behalf of the respondents [1990] 77 STC 82 (SC) ; AIR 1990 SC 820 ; (1990) 3 SCC 87 related to the validity of the provisions for exemption, encouragement/incentives given by different States to boost up or help economic growth and development in those States and in the process, giving preferential treatment to the goods manufactured or produced in those States. The question was whether it amounted to a violation of Article 401. It was held that difference in rate of tax on goods manufactured within the State and those imported from other States is per se not discriminatory so as to be violative of articles 301 and 304(a). Since Article 404 is an exception to Article 401, the need for taking resort to the exception will arise only if the tax is hit by Article 401 or 303. Only such taxes as directly and immediately restrict trade would fall within the mischief of Article 401 and sales tax has only an indirect effect on trade and commerce. Moreover, if a taxing provision in respect of intra-State sale does not offend Article 401, logically it would not affect the freedom of trade in respect of free flow and movement of goods from one part of the country to the other under Article 401 as well. In the result, such provisions do not amount to a violation of Article 401.

44. From the above pronouncements of the Supreme Court, it becomes clear that for a violation of Article 401, the tax has to have the effect of directly or immediately restricting or interfering with the free movement of trade and commerce. If there is no violation of Article 401, Article 404 which provides the exceptions to Article 401, has no manner of application. However, if, on the other hand, Article 401 is violated and there is a direct or immediate restriction on free movement of trade and commerce, for the enactment in question to be valid, it

must come under the exceptions of Article 404. The basic and crucial question to be decided, therefore, is whether there is a violation of Article 401 by the imposition of the luxury tax in the instant case before us.

45. The question of violation of Article 401 and non-compliance with Article 404(b) has been raised in the case before us only in 60 far as it relates to the liability to luxury tax imposed on an importer-stockist as defined in the second part of the definition of "stockist" in Section 2(i) of the Act. It is the case of the applicant that even assuming though not admitting that the impugned luxury tax is within the State's legislative competence falling under entry 62 of the State List, it is violative of Article 401 since the liability to the tax accrues directly and simultaneously with the import of the cigarettes from outside the State, becoming his stock of luxuries for the purposes of the Act. Hence, even if the taxing event is purported to be the stocking of luxuries within the State of West Bengal, the liability to tax of the importer's stock is a direct and immediate consequence of the import of the cigarettes into the State. It has, therefore, a direct bearing on the free flow of trade and commerce in cigarettes. On behalf of the State, it has been contended that the liability to tax is on the stock of luxuries after the import has been completed and there is no nexus whatsoever between the import of the luxuries into the State and the tax on the stock of luxuries held within the State. It is open to an importer-stockist to bring luxury items into West Bengal even without payment of luxury tax and hence there is no restriction placed on the free flow of such luxury goods into the State.

46. Mr. A, Mitra, appearing for the State, sought to make the point that the decision of the Supreme Court in the case of Abdul Kadir AIR 1976 SC 182, relied on by the applicants in support of their contention of a violation of Article 401, would not hold good in the present case.

According to him, in the case of the Kerala Act which was the subject-matter of consideration in the Abdul Kadir case AIR 1976 SC 182, there was a provision for payment of licence fee before a person could become eligible to cause importation of tobacco products which was found by the court to cause impediment, Since there is no such provision in the Act in West Bengal creating such impediment on

importation of tobacco products from outside the State of West Bengal, Article 401 is not violated and the decision of the Supreme Court in the case of Abdul Kadir AIR 1976 SC 182 would not be attracted. It is true that in the facts of the Kerala case it was found that the provision for levy of luxury tax in the shape of licence fee was a condition precedent to the entry of goods to the State and hence held to be directly impeding the free flow of trade and, consequently, a violation of Article 401. However, it would not be correct to presume or suggest from the above that there would be a violation of Article 401 if the tax is levied as a condition precedent prior to the entry of goods and there would be no violation of Article 401 if the tax is levied on the goods after they have entered the State. For the purposes of Article 401, what is important is not the taxing event or the legislative competence or the point of levy and collection of the tax but whether the tax acts as a direct impediment to the free movement and flow of trade. It is immaterial whether the tax is levied prior to the movement or subsequently. This is borne out by the decision of the Supreme Court in the case of Bhailal Bhai [1964] 15 STC 450 ; AIR 1964 SC 1006. In that case, it was the sale in Madhya Bharat of the imported goods that created the liability to tax and not the import by itself.

The tax was payable by an importer in Madhya Pradesh at the point of sale when the movement of goods into the State had long since been completed. Even so, it was held that there was a violation of Article 401. The only difference between that case and the case before us is that, in the case of Bhailal Bhai [1964] 15 STC 450 (SC) ; AIR 1964 SC 1006, it was a liability to sales tax at the point of sale by the importer in Madhya Bharat whereas in the present case the liability of the luxury tax is on the importer-stockist as a stockist of imported luxuries and even prior to sale. This cannot alter the fact that though the liability to tax is created by the stocking of goods within the State, the liability itself is occasioned by the fact of import or movement of goods from outside the State. Hence, the fact of liability to tax being attracted only after the movement of the goods into the State has been completed cannot be a ground for not holding that the tax acts as and can be a direct and immediate impediment to the free flow of trade and violates Article 401 of the Constitution as held in the Bhailal Bhai case [1964] 15 STC 450 (SC) ; AIR 1964 SC 1006.

47. It was also argued on behalf of the State that, in any event, the Act is protected by Article 404(a). It was pointed out that the stock of luxury goods manufactured within the State by a manufacturer-stockist were also subject to the luxury tax and there was no discrimination between the imported goods of the importer-stockist and the locally manufactured goods within the State on the rate of tax.

While the locally manufactured goods were subject to the tax even at the manufacturer's hands, as a manufacturer-stockist, the imported goods were taxed at the importer-stockist level. However, this contention cannot be sustained for two reasons. For one, it was not even the case of the applicant as argued by Dr. Pal that there is any discrimination in the levy of tax as between the imported stocks and the locally manufactured goods within the State. For another, for the Act to be protected by Article 404, it is absolutely necessary as we have already noted from the decision of the Supreme Court in the case of *Atiabari Tea Co. Ltd.* AIR 1961 SC 232, where also there was no question of the tax being discriminatory that Article 404(b) has to be complied with and previous sanction of the President has to be obtained for introduction of any Bill in the Legislature affecting freedom of trade and commerce as enshrined in Article 401. Admittedly, no such previous sanction of the President was obtained nor has this infirmity been cured by recourse to Article 255 of the Constitution. As a matter of fact, no argument was advanced or case made out on behalf of the State as regards non-compliance with Article 404(b). In the circumstances, it has to be held that the provisions of the Act violate the visions of Article 401 and though the impugned tax levied under the Act meets with the requirement of Article 404(a), the Act suffers from the lacuna that neither prior Presidential sanction nor his subsequent assent has been obtained in terms of Article 404(b) or Article 255.

48. In the result, it is held that the West Bengal Luxury Tax Act, 1994, has put a direct and immediate restriction on the freedom of trade of an importer-stockist as defined under Section 2(i) of the Act in violation of Article 401. Since in doing so, it has not complied with the provisions of Article 404(b) or Article 255 it is declared to be void. As such, it is not necessary to go into the other points urged in support of the challenge against the validity of the Act.

In view of the judgment of the majority, the application is dismissed and the interim order dated April 28, 1994 stands vacated. No order is made for costs.

After the judgment is delivered, Mr. Asit Chakraborty, Advocate, submits on behalf of Mrs. Chandrima Bhattacharjee, learned advocate for the applicants, that the operation of the judgment and order may be stayed for four weeks for preferring an appeal. Mr. J.K. Goswami, learned State Representative appearing for respondents, opposes the prayer for stay, After hearing both sides, we grant the stay of operation of the judgment and order for four weeks from now.

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