**C.O. Devassy Vs. State of Kerala**

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**Court** : Kerala

**Decided On :** Nov-14-1990

**Reported in** : [1991]81STC2(Ker)

**Judge** : K.S. Paripoornan and; K.P. Balanarayana Marar, JJ.

**Acts** : Kerala General Sales Tax Act, 1963 - Sections 17(3) and 19B; Kerala Sales Tax Appellate Tribunal Regulations, 1966 - Regulation 48(3) and 48(7)

**Appeal No.** : T.R.C. Nos. 109, 110, 111, 118, 124, 125, 126, 127, 128, 129, 130, 133, 134, 135, 138, 141, 142 and

**Appellant** : C.O. Devassy

**Respondent** : State of Kerala

**Advocate for Def.** : N.N. Divakaran Pillai, Special Govt. Pleader (Taxes)

**Advocate for Pet/Ap.** : K.C. Balagangadharan, Adv.

**Disposition** : Petition allowed

**Judgement** :

K.S. Paripoornan J.

1. This batch of 18 tax revision cases are filed by different dealers, who are assessees under the Kerala General Sales Tax Act, 1963. They relate to the

assessment year 1984-85. Except in T.R.C. No. 124 of 1990 and T.R.C. No. 151 of 1990, the revision-petitioners/ assessees were the appellants before the Sales Tax Appellate Tribunal. T.R.C. No. 124 of 1990 and T.R.C. No. 151 of 1990, revisions filed by the assessees, arise out of Tribunal Appeals Nos. 280 of 1987 and 513 of 1988--appeals filed by the Revenue before the Sales Tax Appellate Tribunal. The revision-petitioners/assessees are all dealers in arecanuts in Kokkalai market in Thrissur District. The returns submitted by them were rejected by the assessing authority holding that the purchases were undervalued with a view to lessening tax liability. The assessments were completed on best judgment basis adopting the average market rate of the goods as gathered by the assessing authority. In a few cases, the assessing authority invoked Section 17(3) of the Kerala General Sales Tax Act. In most of the cases, action was initiated under Section 19B of the Act. The assessments so made were taken in appeal before the Appellate Assistant Commissioner. He upheld the finding of the assessing authority that there was undervaluation. But, he reduced the rate adopted by the assessing authority in a few cases. The assessees filed appeals before the Sales Tax Appellate Tribunal and sought total deletion of the estimates made by the authorities below. The Revenue filed a few appeals, in cases where the Appellate Assistant Commissioner reduced the rates adopted by the assessing authority, and sought restoration of the assessment orders as a whole in those cases. Before the Sales Tax Appellate Tribunal much focus was laid on Section 19B of the Act and the assessments were sought to be sustained placing reliance on the said section.

2. The Appellate Tribunal considered the appeals filed by the assessees as well as by the Revenue and passed a common order dated 1st December, 1989. Before the Appellate Tribunal Shri A.U. Yacob, Deputy Director, Department of Economics and Statistics, Thrissur, was examined. The points that arose for consideration were dealt with generally by the Appellate Tribunal. The Appellate Tribunal held that there is compliance of Section 17(3) as also Section 19B of the Kerala General Sales Tax Act. There was no independent consideration of the cases, wherein Section 17(3) of the Act alone was invoked or cases in which Section 19B of the Act alone was invoked. The Appellate Tribunal upheld the best judgment assessments made by the assessing authority in toto, and to that extent,

reversed the modifications ordered by the Appellate Assistant Commissioner, in a few cases. It is thereafter, the 18 assessees have filed the above tax revision cases assailing the common order passed by the Appellate Tribunal dated 1st December, 1989.

3. We heard counsel for the revision-petitioners as also counsel for the Revenue. The facts in these cases are in a narrow compass. The returns submitted by the dealers were rejected by the assessing authority as in his view the purchases were undervalued by the dealers with a view to lessening the tax liability. The assessing authority obtained information on a perusal of the records kept in the Office of the District Statistical Officer, Thrissur. On a comparison, the rate conceded by the various dealers was found to be much lower than the average market price compiled by the District Statistical Office. The assessing authority, therefore, came to the conclusion that the dealers undervalued the purchases with a view to lowering the tax burden. The assessing authority obtained information about four items of cured arecanuts dealt with in the Kokkalai market from the records kept in the Office of the District Statistical Officer, Thrissur, as is evident from his enquiry report dated 2nd August, 1985, available at page 57 of the assessment records in T.R.C. No. 124 of 1990. In cases where the best judgment assessments were made under Section 17(3) of the Act, the assessing authority informed the dealers that the price of certain varieties of arecanuts conceded by them is far below the market rate and, therefore, the accounts and returns submitted by the dealers cannot be accepted. The best judgment assessments were made on the basis of average market rate of different varieties of cured arecanuts as per the details gathered by the assessing authority. In cases where Section 19B of the Act was invoked, on a comparison of the price disclosed in the various accounts with the prevailing market price as gathered by the assessing authority, he was satisfied that the assessees had shown in their accounts transactions at price lower than the prevailing market price and that such practice was followed for the purpose of evading payment of tax and nothing else. There is no authentic record or communication of the Statistics Department available in the files to show the rate of four varieties of cured arecanuts dealt with in Kokkalai market. The only material available in the files, and which was brought to our notice by the learned Government Pleader, is the enquiry report dated 2nd August,

1985 of the Additional Sales Tax Officer-III, 4th Circle, Thrissur, which formed the basis for the rejection of the accounts of the dealers or for resorting to Section 19B of the Kerala General Sales Tax Act. The assessees were questioning the reliability and authenticity of the figures relied on by the Sales Tax Officer as gathered from the Office of the District Statistical Officer, Thrissur. It seems that request was made by the assessees before the first appellate authority to summon and examine the District Statistical Officer, which was declined. The request seems to have been repeated before the Appellate Tribunal by the assessee-appellant in T.A. No. 340 of 1987--revision-petitioner in T.R.C. No. 134 of 1990. The Appellate Tribunal granted the said request. In pursuance thereto, one A.U. Yacob, Deputy Director, Department of Economics and Statistics, Thrissur, was examined before the Appellate Tribunal. A summary of his evidence is extracted in paragraph 5 of the appellate order of the Tribunal. It is as follows :

'Data regarding price of arecanut is collected from the shops in Kokkalai market. It is collected by the Price Inspectors every Friday. It is done to compute the State income. Price in respect of items sold the most in the market is gathered. It is not the average. The witness does not know from which of the shops the data is collected. Sales Tax Department can get the details only from the Director of Economics and Statistics and not through the witness. Price position in respect of the dealings that take place only on Fridays is collected. In reply to the questions put by the State Representative, the witness said that the price collection is done as a part of discharge of his official duty and that it is done after careful enquiry. Price position thus collected is the true ruling price. It is true of Kokkalai market also. Market trend and living index are prepared on the basis of the above information. Price of items most sold in the market is gathered in order to get the average prevailing market rate. It is not that prices of isolated items sold at the highest and the lowest prices are taken. Only in case Friday happens to be holiday, survey is made on other days. Monthly average is worked out on the basis of such weekly reports. Replying to questions put by the counsel in T.A. No. 557 of 1988, the witness said he had no knowledge about the fact that there are different grades of cured arecanuts but the Price Inspector knew about it. Rates of such varieties as are collected the most on Fridays are gathered. His office records would show which of the varieties had collected. In order to prepare living index,

rates of cured arecanut are not essential. He does not dispute the suggestion of the Advocate that in Thrissur, cured arecanut shandy is held on every Tuesday. The collected details are confidential records and would not be divulged even to Sales Tax Department authorities. Only the published details are supplied.'

4. The basic fact to reject the returns of the dealers and to effect the best judgment assessments under Section 17(3) of the Act or to invoke Section 19B of the Act, is the information obtained by the Additional Sales Tax Officer-Ill, 4th Circle, Thrissur, as disclosed in his enquiry report dated 2nd August, 1985. In the enquiry report, the officer has stated that the records kept in the Office of the District Statistical Officer, Thrissur, reveal the rates of four varieties of cured arecanuts dealt with in Kokkalai market during the year 1984-85. The basic document or even an authenticated copy thereof of the District Statistical Officer is not available in the files, nor was it produced, at any time, before any of the statutory authorities. It is to bring out the manner and method by which the Statistical Department gathered details of Kokkalai market, further evidence by way of examination of the Deputy Director, Department of Economics and Statistics, Thrissur, was let in before the Appellate Tribunal. We are at a loss to understand as to why the original records showing the price of the dried arecanuts gathered by the Statistical Department were not obtained by the assessing authority. When the very basis and reliability of the figures stated to be appearing in the books of the Statistical Department was questioned, it would have been desirable and proper to investigate in depth as to who gathered the details regarding the price of arecanuts dealt with in Kokkalai market and in what manner, the persons or dealers from whom the prices were so gathered and the dates on which the prices were so gathered. This aspect assumes importance, in view of the peculiarity of the cured arecanut shandy held in Thrissur only on a specified day. The course of business in arecanuts in Kokkalai market, Thrissur, as stated by a Full Bench of the Court, in A.I. Manie v. State of Kerala [1963] 14 STC 657 is as follows :

'He (the petitioner) is acting as a commission agent for the sale of cured arecanuts. The curers bring the commodity to the market and entrust the same with the appellant (petitioner). Usually the appellant advances money to these curers sometimes before the goods are actually brought to the market and at other

times when the goods are brought and entrusted with him for sale. Appellant has a lien on the goods to the extent of the advances and has also a right to pledge or dispose of the same for realising the advances with interest and other charges agreed upon. Purchasers who are generally from outside the Kerala State go over to the market. According to the appellant either the purchaser or his broker will be present at the time of the transactions. In many cases the curers will also be present. Even if they are not present appellant will have authority to sell on their behalf at reasonable prices already intimated. The goods offered for sale will be inspected by the intending purchasers or their brokers and then offers and counter-offers by conventional and secret modes of communication by symptoms are made through the appellant and the final rate will be fixed. A cheetu will then be executed by the purchaser in favour of the appellant acknowledging the purchase and authorising him to pay off the curer. The goods are then weighed by the appellant and a bill is issued in favour of the curer showing the quantity, rate of price, total amount, commission, etc., and he will be paid off by the appellant. Appellant also draws an invoice on the purchaser for the price as also for other charges like drying, packing, etc., and brokerage if any and debits the purchaser for this amount. The goods are then transported to the purchasers' places outside the State or in some cases which are very few disposed of in this State itself if such a course is authorised by the purchaser.'

5. The assessees have got a specific case that cured arecanut shandy in Kokkalai market is held only on every Tuesday. Mr. A.U. Yacob, Deputy Director, Department of Economics and Statistics, Thrissur, who was examined before the Sales Tax Appellate Tribunal, has categorically stated that the Price Inspectors gathered the information only on one day in a week, i.e., on Friday. To a specific question, as to whether he could dispute the suggestion that in Thrissur cured arecanut shandy is held on every Tuesday, he stated that he does not know. He did not dispute it We are highlighting the above aspect only to show that whereas according to the various dealers cured arecanut shandy is held on every Tuesday and so the market price of arecanut could normally be collected only on such days, it has come out in evidence that the details gathered by the District Statistical Officer, Thrissur, is only on the basis of enquiries made by the Price Inspectors, on every Friday. If the shandy of cured arecanut is not held on Fridays,

how far the details regarding the price gathered on that day will be relevant or helpful, is of considerable importance. Moreover, when the very reliability of the figures gathered by the Sales Tax Officer from the Statistical Department is questioned, the persons who originally gathered the information could have been examined, or at least, the basic data like the reports furnished by them showing the particular persons or places from which the prices were ascertained, the dates on which they were ascertained and such other matters which formed the basic data to submit the reports by the various Price Inspectors, could have been ascertained and perused. No attempt was made on this score. The deposition of Mr. A.U. Yacob, Deputy Director, Department of Economics and Statistics, Thrissur, would show that such records are available. Even so, none of the above details were placed before the Tribunal. The deposition of Shri A. U. Yacob, recorded by the Appellate Tribunal, was placed before us. We are left with the impression that he is not sure about the peculiarity of arecanut trade in Kokkalai market, as to how and in what manner and from whom the Price Inspectors gathered the details, the office records maintained in that connection, etc. The deposition was recorded on 7th August, 1989, which is available at pages 281 to 287 of the files in T.A. No. 340 of 1987 (T.R.C. No. 134 of 1990). The evidence of Shri A.U. Yacob, Deputy Director, Department of Economics and Statistics is not properly recorded in conformity with regulation No. 48 of the Kerala Sales Tax Appellate Tribunal Regulations, 1966. Regulation No. 48 aforesaid deals with fresh evidence in appeal. Regulation No. 48(1), (3) and (7), which are relevant for our purpose, are as follows :

'48. Fresh evidence in appeal.--(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Tribunal, but if,

(a) the authority, from whose order the appeal is preferred, has refused to admit evidence which ought to have been admitted ;

(b) the party seeking to adduce additional evidence satisfies the Tribunal that such evidence, notwithstanding the exercise of due diligence, was not within his knowledge or could not be produced by him at or before the time the order under appeal was passed ; or

(c) the Tribunal requires any document to be produced or any witness to be examined to enable it to decide the case or for any other substantial cause ;

the Tribunal may allow such evidence or document to be produced or witness to be examined.....

(3) Where additional evidence is allowed or directed to be produced, the Tribunal shall record the reasons for its admission and shall specify the points to which the evidence is to be confined.....

(7) The evidence of every witness examined before the Tribunal shall be taken down in writing by or in the presence and under the personal direction and superintendence of the Tribunal.'

From the papers produced before us, it is not evident that the Tribunal has recorded reasons for the admission of additional evidence ; nor has it specified the points to which the evidence is to be confined, as is required by regulation No. 48(3). What is more, the witness alone has signed in the document, at page 287. There is no endorsement in the records to show that the evidence of this witness was taken down in writing by or in me presence and under the personal direction and superintendence of the Tribunal. Such an endorsement is required under regulation No. 48(7). The absence of such an endorsement is a serious irregularity. We are of the view that the evidence has not been recorded in accordance with law. No reliance could be placed on such a recorded deposition. We hold so.

6. The sheet anchor of the Revenue's case is based on the figures gathered from the District Statistical Office, Thrissur. We have already adverted to the fact that neither the original records kept in the District Statistical Office nor an authenticated copy of the same is available in the files. It is admitted that the Statistical Department gathered details from the market only on Fridays. It is not disputed by the Deputy Director of the Department of Economics and Statistics, Thrissur, that in Kokkalai market cured arecanut shandy is held on every Tuesday. As to how far the details gathered by the Statistical Department on a day other than the usual market day can represent the market price is anybody's guess.

It is based on the information so collected from the Statistical Department the Sales Tax Officer proceeded to reject the accounts and returns submitted by the dealers in cases where resort was made to Section 17(3) of the Act to make best judgment assessments. It is again by relying on the said figures provided by the registers of the Statistical Department, the Sales Tax Officer invoked Section 19B of the Act, in the majority of cases. As discussed in the earlier paragraphs, we are of the opinion that in view of the serious controversy regarding the vital issue in this case, namely, the market price of cured arecanuts in Kokkalai market during the relevant time, the rejection of accounts and effecting assessments on best judgment basis or pressing into service Section 19B of the Act, rests on very fragile foundation, in that, the basic or the vital fact necessary for making the assessments on best judgment basis or for invoking Section 19B of the Act has not been legally and factually established.

7. We are aware of the legal position that the Sales Tax Officer, when he holds an enquiry and effects the best judgment assessment, is not functioning as a court The proceedings before him are not judicial, but only quasi-judicial. But, he should proceed to decide the matter before him in a fair and reasonable manner upon properly ascertained facts and circumstances. In exercising the quasi-judicial function, the assessing authority' should conform to the principles of natural justice. He should act fairly and reasonably and afford proper and effective opportunity to the assessee to rebut the case of the department. It is true that the assessing authority has got very wide powers and can rely on any material provided the substance of the material gathered by him is disclosed to the assessee. He is not bound to disclose the source of his information. But, he should communicate the substance of the information obtained by him which will give the assesses sufficient and full particulars of the case he is expected to meet. Above all, the assessing authority has a duty to satisfy himself about the correctness or accuracy of the information which he has obtained before acting upon it. The above aspects should be borne out by the records.

8. In Chiranji Lal Steel Rolling Mills v. Commissioner of Income-tax , the court observed thus :

'In our opinion, the mere copy of the Uchanti Bahi supplied by the Sales Tax Department, in the circumstances of this case, was not a legal or admissible evidence on the basis of which the addition of Rs. 13,955 could be made to the income of the assessee-firm from undisclosed sources. Legal and admissible evidence means evidence on which a judicial mind can act by forming a belief that it is true although the assessee denies it. We agree with the learned counsel for the Revenue that the provisions of the Indian Evidence Act cannot be resorted to to judge the admissibility or legality of a particular piece of evidence on which the Income-tax Officer relies for the purpose of assessment. The Income-tax Officer has the power to collect evidence from any source but it is his duty to put it to the assessee before making it the basis of his assessment. If the assessee denies the information collected by the Income-tax Officer, it is the duty of the Income-tax Officer to satisfy himself by making independent enquiry from sources considered reliable by him so as to decide whether the information passed on to him is true or not. If, as a result of his own independent enquiry he comes to the conclusion that the information received by him is true, he is at liberty to act thereupon after disclosing it to the assessee and affording him a reasonable opportunity of rebutting it. But he has no right to burden the assessee with an extra amount of tax on a vague information given to him without himself verifying its truthfulness or reliability. In the present case, the Income-tax Officer made no independent enquiries and merely relied on the copy supplied by the Sales Tax Department.'

In the said case, the Income-tax Officer obtained the certified copy of a document of 'a firm' from the Sales Tax Department. The original of the said document was not to be found in the Sales Tax Department and it was not produced or shown to the assessee. It was also not shown as to who made the copy and who made the original document. The Income-tax Officer took the view that the transactions recorded in the document obtained by him from the Sales Tax Department pertained to the assessee, though the assessee denied, that he maintained any such document or had anything to do with the matters stated therein. The assessment was made relying on the said document. The first appellate authority held that the Income-tax Officer was not justified in giving undue weight to the document obtained from the Sales Tax Department. But, in second appeal, the Income-tax Appellate Tribunal restored the order passed by the assessing

authority. A reference was made to the High Court, at the instance of the assessee. It was in the said reference proceedings, the court took the view that a duty is cast on the assessing authority to verify the truthfulness or reliability of the document by independent enquiry, and without doing so, placing reliance on the copy of a document supplied by the Sales Tax Department was uncalled for. We concur with the above decision.

9. We are of the view that the ratio of the above decision is squarely applicable herein also. In these cases, the assessees were all along disputing the veracity and reliability of the facts culled out by the assessing authority from the books of the District Statistical Office. That is a basic fact which must be shown to exist in order to sustain the assessments under Section 17(3) or to invoke Section 19B of the Kerala General Sales Tax Act. The basic fact aforesaid could have been established by causing the original records of the Statistical Department to be produced showing the price of the dried arecanut gathered by the department. It would have been proper and fair to ascertain as to who gathered the details regarding the price of arecanuts and in what manner, the persons or dealers from whom the prices were so gathered and the dates on which the prices were so gathered for the Statistical Department. The Price Inspectors or any one of them available could have been examined to show the nature, manner and method of enquiries conducted by them. The statutory authorities have totally ignored the above factors. On the other hand, the final fact finding authority, the Appellate Tribunal, whose duty is to enter findings of fact, has proceeded as if the information obtained by the Additional Sales Tax Officer-Ill, 4th Circle, Thrissur, as disclosed in his enquiry report dated 2nd August, 1985, is decisive of the question. In the light of the stout dental by the assessees about the veracity and acceptability of the details so gathered from the Statistical Department, the Appellate Tribunal acted illegally and in an unreasonable manner in not caring to find out the truth and reliability of the materials which mostly formed the basis, for the assessing authority to resort to best judgment assessments or for invoking Section 19B of the Act. The Tribunal failed to pose the real question that arose for consideration.

10. As stated by us earlier, the deposition of Shri A.U. Yacob, Deputy Director, Department of Economics and Statistics, Thrissur, is not very helpful. On the crucial question regarding the persons or places from which the prices were ascertained, the details relating thereto as borne out by the records, etc., the deposition of the witness is evasive and vague. The assessments were sustained substantially on the basis of the enquiry report of the Sales Tax Officer dated 2nd August, 1985 and the evidence of Shri A.U. Yacob, who was examined before the Sales Tax Appellate Tribunal. The infirmities, stated above, are fundamental. Assessments based thereon are vitiated. They are not proper, legal or fair. We hold so. Most of the assessees were dealing only in four common items, out of 23. The price of the said items varied from Re. 1 to Rs. 17 per kg. The materials gathered by the Sales Tax Officer related to only four items. There was no independent evaluation of the items dealt with by each assessee. This is another vitiating factor. Ad hoc average rate is adopted for the 19 items, for which details were not gathered. This is unfair.

11. The Appellate Tribunal has casually stated that the sales tax authorities detected offences of tax evasion by means of 'undervaluation' in the case of a few similarly placed dealers in Kokkalai market, and the assessees admitted the 'detected undervaluation'. There is no basis for this statement. The learned Government Pleader could not substantiate the said plea. When questioned, about the basis of the aforesaid observation, the Government Pleader placed before us, the files in T.R.C. No. 109 of 1990--T.A. No. 229 of 1987 (pages 87 to 89) and T.R.C. No. 124 of 1990--T.A. No. 280 of 1987 (pages 37 and 38). In the said two cases, on surprise inspection, unaccounted stocks and irregularities or omissions in the accounts were found out. The compounding by the dealers related to such omission. They have stated so, only. We could not find any admission regarding 'undervaluation' in the above cases. We are at a loss to know as to how the Appellate Tribunal surmised that the sales tax authorities detected tax evasion by means of 'undervaluation'. This is a patent error. The infirmities and wrong assumptions stated above, are fundamental. We, therefore, hold that the order of the Appellate Tribunal dated 1st December, 1989, restoring the assessments effected on best judgment basis or by invoking Section 19B of the Act, is totally unauthorised, unfair, illegal and unreasonable. The order discloses an error of law.

On this ground, the order of the Appellate Tribunal deserves to be set aside. We do so.

12. Both sides argued at length about the scope and applicability of Section 19B of the Kerala General Sales Tax Act. Section 19B of the Act is as follows :

'19B. Assessment in case of undervaluation.--(1) If the assessing authority is satisfied that a dealer has, with a view to evade the payment of tax, shown in his accounts, sale or purchase of any goods at prices lower than the prevailing market price of such goods, it may estimate the value of each goods, on the basis of the prevailing market price and assess or reassess the dealer to the best of its judgment, after making such enquiry as it may consider necessary and after affording the dealer a reasonable opportunity of being heard.

(2) The provision of Sub-sections (2) to (4) of Section 19 shall apply to the assessment or reassessment under Sub-section (1).'

[It may be mentioned here that Rule 11B specifying the factors which should be taken into account by the assessing authority in making an assessment under Section 19B of the Act was inserted in the statute book by G.O. Ms. No. 188/88/TD dated 28th December, 1988, only. It may not be relevant for the assessment year 1984-85 with which we are concerned.]

The constitutionality of the above statutory provision came up for consideration before this Court in T.A.C.A. Association v.. State of Kerala [1988] 71 STC 332. A Bench of this Court, to which one of us was a party, upheld the legislation as valid. In doing so, it was observed as follows :

'It should be stated that the power to estimate is vested in very responsible officers of the department. The fact that the power vested in the assessing authority is discretionary cannot ipso facto lead to the conclusion that it is discriminatory. There are in-built safeguards in Section 19B of the Act. It is only when the sale or purchase price is shown lower than the prevailing market price, as a 'device' to evade the payment of tax, and the assessing authority is 'satisfied' about the same, on the basis of 'materials', then resort may be made to Section 19B of the

Act.'

Section 52 of the Income-tax Act, 1961, is a kindred provision. It is as follows :

'52. (1) Where the person who acquires a capital asset from an assessee is directly or indirectly connected with the assessee and the Income-tax Officer has reason to believe that the transfer was effected with the object of avoidance or reduction of the liability of the assessee under Section 45, the full value of the consideration for the transfer shall, with the previous approval of the Inspecting Assistant Commissioner, be taken to be the fair market value of the capital asset on the date of the transfer.

(2) Without prejudice to the provisions of Sub-section (1), if in the opinion of the Income-tax Officer the fair market value of a capital asset transferred by an assessee as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer of such capital asset by an amount of not less than fifteen per cent, of the value so declared, the full value of the consideration for such capital asset shall, with the previous approval of the Inspecting Assistant Commissioner, be taken to be its fair market value on the date of its transfer :'

Considering the above section, the Supreme Court of India in K.P. Varghese v. Income-tax Officer : [1981]131ITR597(SC) held that a mere difference between the market value and the 'consideration declared' by the assessee will not be sufficient to invoke Section 52 of the Act. But, it must be shown by the Revenue that the assessee received more than what is declared or disclosed by him as consideration. The court farther held that the burden of proof is on the Revenue. At page 606 of the Report, the court declared the law thus :

'We think that, having regard to this well-recognised rule of interpretation, a fair and reasonable construction of Section 52, Sub-section (2), would be to read into it a condition that it would apply only where the consideration for the transfer is understated or, in other words, the assessee has actually received a larger consideration for the transfer than what is declared in the instrument of transfer and it would have no application in the case of a bona fide transaction where the

full value of the consideration for the transfer is correctly declared by the assessee.....'

Later, at page 609, the court again stated thus :

'We must, therefore, accept as the underlying assumption of Subsection (2), that there is an understatement of consideration in respect of the transfer and Sub-section (2) applies only where the actual consideration received by the assessee is not disclosed and the consideration declared in respect of the transfer is shown at a lesser figure than that actually received.'

Proceeding further, the court observed at page 610, as follows :

'.....there is inherent evidence in Sub-section (2) which suggests that the thrust of that sub-section is directed against cases of understatement of consideration. The crucial and important words in Sub-section (2) are : 'the full value of the consideration declared by the assessee'. The word 'declared' is very eloquent and revealing. It clearly indicates that the focus of Sub-section (2) is on the consideration declared or disclosed by the assessee as distinguished from the consideration actually received by him and it contemplates a case where the consideration received by the assessee in respect of the transfer is not truly declared or disclosed by him but is shown at a different figure.'

Concluding the discussion, at pages 614 and 615 of the Report, the court stated the law thus :

'.....it is not enough to attract the applicability of Subsection (2), that the fair market value of the capital asset transferred by the assessee as on the date of the transfer exceeds the full value of the consideration declared in respect of the transfer by not less than 15% of the value so declared, but it is furthermore necessary that the full value of the consideration in respect of the transfer is understated or, in other words, shown at a lesser figure than that actually received by the assessee. Subsection (2) has no application in the case of an honest and bona fide transaction where the consideration in respect of the transfer has been correctly declared or disclosed by the assessee, even if the condition of 15%

difference between the fair market value of the capital asset as on the date of the transfer and the full value of the consideration declared by the assessee is satisfied. If, therefore, the revenue seeks to bring a case within Subsection (2), it must show not only that the fair market value of the capital asset as on the date of the transfer exceeds the full value of the consideration declared by the assessee by not less than 15% of the value so declared, but also that the consideration has been understated and the assessee has actually received more than what is declared by him. There are two distinct conditions which have to be satisfied before Sub-section (2) can be invoked by the revenue and the burden of showing that these two conditions are satisfied rests on the revenue. It is for the revenue to show that each of these two conditions is satisfied and the revenue cannot claim to have discharged this burden which lies upon it, by merely establishing that the fair market value of the capital asset as on the date of the transfer exceeds by 15% or more the full value of the consideration declared in respect of the transfer and the first condition is, therefore, satisfied. The revenue must go further and prove that the second condition is also satisfied. Merely by showing that the first condition is satisfied, the revenue cannot ask the court to presume that the second condition too is fulfilled, because even in a case where the first condition of 15% difference is satisfied, the transaction may be a perfectly honest and bona fide transaction and there may be no understatement of the consideration. The fulfilment of the second condition has, therefore, to be established independently of the first condition and merely because the first condition is satisfied, no inference can necessarily follow that the second condition is also fulfilled. Each condition has got to be viewed and established independently before Sub-section (2) can be invoked and the burden of doing so is clearly on the revenue.'

The above decision was relied on in a later decision of the Supreme Court in Commissioner of Income-tax v. Shivakami Co. P. Ltd. : [1986]159ITR71(SC) .

13. Section 14-B of the Andhra Pradesh General Sales Tax Act, 1957, is a provision substantially similar to Section 19B of the Kerala General Sales Tax Act.

The said provision is as follows :

'Section 14-B. Assessment of sales shown in accounts at low prices.--(1) If the assessing authority is satisfied that a dealer has, with a view to evade the payment of tax, shown in his account sales or purchases of any goods at prices which are abnormally low compared to the prevailing market prices of such goods, it may, at any time within a period of four years from the date on which any order of assessment was served on the dealer, assess or reassess the dealer to the best of the judgment on the turnover of such sales or purchases after making such enquiry as may be necessary and after giving the dealer a reasonable opportunity to show cause against such assessment.

(2) The provisions of Section 14 including penalty shall apply to assessment and reassessment of escaped turnover under this section.'

The said provision came up for consideration before a Bench of the Andhra Pradesh High Court in Delux Wines v. State of Andhra Pradesh [1990] 77 STC 373. In the said case, a plea was put forward on behalf of the assessees that for invoking Section 14-B(1) of the Act, the Revenue should show that the assessee collected more than the ostensible sale consideration charged in the bill, with a view to evade payment of sales tax. Placing reliance on the decision of the Supreme Court in K.P. Varghese v. Income-tax Officer : [1981]131ITR597(SC) , the Division Bench observed as follows :

'.....principle laid down by the Supreme Court equally governs Section 14-B(1) of the Act. It therefore follows that the authorities cannot in any event invoke Section 14-B(1) of the Act unless they had material to show that the assessees collected more price than what was shown in their accounts. It is admitted in all the impugned notices that the authorities could not collect any evidence or material of any secret payments to the assessees. The impugned notices of reassessment cannot therefore be sustained having regard to the ratio of the decision of the Supreme Court in the aforesaid case.'

14. In the light of the above decision of the Supreme Court and of the Andhra Pradesh High Court, a duty was cast on the Revenue to prove that the assessees factually collected more than the ostensible consideration shown in the accounts. There is no finding in any of the orders of the statutory authorities that the revision-

petitioners/assessees factually collected or obtained more than the amount shown in the accounts or bills. Such a finding is essential to sustain the assessments under Section 19B of the Act. In the absence of such a finding, we hold that reliance placed on Section 19B of the Act was misplaced. On this ground as well, the assessments made by invoking Section 19B of the Act are illegal. The Appellate Tribunal was in error in sustaining the assessments under Section 19B of the Act without entering a definite finding that the assessees in fact collected or obtained more than the amount shown in the accounts or bills.

15. The above discussion will be sufficient to set aside the decision of the Appellate Tribunal in sustaining the best judgment assessments made by the assessing authority. Counsel for the assessees put forward before us certain other pleas as well to show that reliance placed on Section 19B of the Act was uncalled for and unjustified. It was argued that there are 23 varieties of cured arecanuts which are dealt with in Kokkalai market, that the department has if at all collected statistics only for four varieties, that an ad hoc price has been adopted for the other 19 varieties dealt with by the assessees, that no market price was available or ascertained and only an average price was arrived at on the basis of incomplete and unreliable data furnished from the books of the Statistics Department, that the Statistics Department collected random data only on Fridays to prepare living index and that it may not really reflect the market price of the commodity in question which was dealt with on Tuesdays in market, that an average market price based on the said insufficient data is not what is contemplated by Section 19B of the Act and these aspects were totally ignored by the Appellate Tribunal in sustaining the assessments under Section 19B of the Act.

16. It is not necessary for us to finally adjudicate the various pleas, put forward by the assessees. Suffice it to say that these are arguments which necessarily fall to be considered in applying Section 19B of the Act. Since in this batch of cases we are setting aside the common order of the Appellate Tribunal on the broad aspects, about the absence of prerequisites to invoke Section 17(3) or 19B of the Act, to hold that the purchases of the assessees were undervalued with a view to lessening tax liability, we are not pronouncing on the various other pleas that were urged before us.

17. The tax revision cases are allowed. The common order of the Tribunal dated 1st December, 1989, is set aside. A few other points, other than those based on Section 17(3) or Section 19B of the Act, were also argued. We have annulled the common order of the Appellate Tribunal on the major issues. Some aspects stressed therein, have impact on the other points. So, we leave open the other points raised in the revisions and remit these cases to the Sales Tax Appellate Tribunal, to consider afresh the appeals and pass fresh orders, in accordance with law and in the light of our findings and observations herein. A direction is issued in these cases to that effect. It shall be so done within three months from today.