State Of Kerala And Others vs Fr.William Fernandez Etc Etc on 9 October, 2017

Author: Ashok Bhushan

Bench: Ashok Bhushan, A.K. Sikri

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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTGION

CIVIL APPEAL NOS.3381-3400 OF 1998

STATE OF KERALA AND OTHERS ...APPELLANT

VERSUS

FR. WILLIAM FERNANDEZ ETC.ETC. ...RESPONDEN

WITH

T.C.(C) No. 149/2013, C.A. No. 3720-3722/2003, C.A.No. 15957 of 2017 @ SLP(C) No. 6831/2008, C.A.No.15958 of 2017 @ SLP(C) No.7914/2008, C.A.No.15959 of 2017 @ SLP(C) No.8204/2008, C.A.No. 15960 of 2017 @ SLP(C) No.9227/2008, C.A.Nos. 15961-62 of 2017 @ SLP(C) No.12424-12425/2008, C.A. No. 15963 of No.15161/2008, C.A.No. 15964 of 2017 @ SLP(C) No.15540/2008, C.A.No. 15965 of 2017 @ SLP(C) No.15369/2008, C.A.No. 15966 of 2017 @ SLP(C) No.15551/2008, C.A.No. 15967 of 2017 @ SLP(C) No.17204/2008, C.A.No. 15969 of 2017 @ SLP(C) No. 19030/2008, C.A.No. 15971 of 2017 @ SLP(C) No.15579/2008, C.A.No. 15973 of 2017 @ SLP(C) No.15357/2008, C.A. No. 15974 of 2017 @ SLP(C) No.15700/2008, C.A. No. 15975 of 2017 @ SLP(C) No.16772/2008, C.A. No. 15976 of 2017 @ SLP(C) No. 17865/2008, C.A. No. 15977 of 2017 @ SLP(C) No.15623/2008, C.A. No. 15978 of 2017 @ SLP(C) No.15495/2008, C.A. No. 15979 of 2017 @ SLP(C) No.15934/2008, C.A. No. 15980 of 2017

@ SLP(C) No.15647/2008, C.A. No. 15981 of 2017 @ SLP(C) No. 16930/2008, C.A. No.

15982 of 2017 @ SLP(C) No.15496/2008, C.A. No. 15983 of 2017 @ SLP(C)

No.15491/2008, C.A. No. 15984 of 2017 @ SLP(C) No.16865/2008, C.A. No. 15985 of 2017

@ SLP(C) No.18346/2008, C.A. No. 15986 of 2017 @ SLP(C) No.15356/2008, C.A. No.

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@ SLP(C) No.15405/2008, C.A. No. 15992 of 2017 @ SLP(C) No.15684/2008, C.A. No.

15993 of 2017 @SLP(C) No.16832/2008, C.A. No. 15994 of 2017

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@SLP(C) No.15498/2008, C.A. No. 15997 of 2017 @ SLP(C) No.15493/2008, C.A. No.

15998 of 2017 @ SLP(C) No.16754/2008, C.A. No. 15999 of 20

No.16733/2008, C.A. No. 16000 of 2017 @ SLP(C) No.16689/2008, C.A. No. 16001 of 2017

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@ SLP(C) No.17233/2008, C.A. No. 16007 of 2017 @ SLP(C) No.17203/2008, C.A. No.

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C.A. No. 16076 of 2017@ SLP(C) No.30986/2013, C.A. No. 16081 of 2017@SLP No.33600/2013, C.A. No. 15970 of 2017@ SLP(C) No.33954/2012, C.A. No. 16083 2017@ SLP(C) No.29119/2014, C.A. No. 16086 of 2017@SLP(C) No.22349/2015, C.A. No. 16088 of 2017@SLP(C) No.72/2016, C.A. No. 16090 of 2017@ SLP(C) No.2057/2016, C.A. No. 16091 of 2017@SLP(C) No.86/2016, C.A. No. 16093 of 2017@SLP(C) No.16820/2016, C.A. No. 16029-33 of 2017@ SLP(C) No.18360-18364/2008, C.A. No. 16077-79 2017@SLP(C) Nos.27442-27444/2008, C.A. No. 16066-68 of 2017@SLP(C) Nos 16744-16746/2013, C.A. No. 16111 @SLP(C) No.11419/2010, C.A. No.3026 of 2012 , C.A. No. 3592/1998, C.A. No. 4651/1998, C.A. NO. 918/1999, W.P(C) No. 574/2003, C.A. NO. 5 6177/2010, C.A. NO. 6178/2010, C.A. No. 6179/2010, C.A. No. 15523 of 2017@SLP(C) No.18088/2007, C.A. NO. 6180/2010, C.A. No. 15524 of 2017@SLP(C) No.18044/2007, C.A. No. 15518-20 of 2017@ SLP(C) Nos. 17394-17396/2009, C.A. No. 15522 of 2017@SLP(C) No.25390/2009, C.A. No. 15525 of 2017@SLP(C) No.1820/2010, C.A. No. 15521 of 2017@SLP(C) No.19194/2010,C.A. No. 16157 of 2017@SLP(C) No.26543/2008, C.A. No. 16156 of 2017@SLP(C) No.11646/2009 & C.A. No. 16155 of 2017@SLP(C) No.7356/2010 & C.A. No. 16163 of 2017@SLP(C) No.1101/2007.

J U D G M E N T

ASHOK BHUSHAN, J.

Leave granted.

2. These appeals relate to entry tax levied on goods imported from different countries and brought into local area of a State. The legislative competence of the State Legislature to impose entry tax on the goods imported from outside the country entering into local area of the State is questioned. The State legislations are also questioned on the ground that the entry tax legislations do not contemplate levy of an entry tax on goods imported from outside the country. In this batch of appeals we are concerned only with entry tax legislations of States, namely, State of Orissa, State of Bihar, State of Kerala and State of Jharkhand, the relevant provisions of which statutes shall be noticed hereinafter.

3. A nine□Judge constitution Bench in Jindal Stainless vs. State of Haryana and another, 2016 (11) Scale 1, had answered several questions pertaining to entry tax legislations of different States, which has largely settled various issues relating to entry tax. However, the issue pertaining to levibility of entry tax on the imported/foreign goods was left to be answered by regular Bench. Answering the reference following was stated in answer No.10:

> "The questions whether the entire State can be notified as a local area and whether entry tax can be levied on goods entering landmass of India from another country are left to be determined in appropriate proceedings." (emphasis by us)

4. As noted above this batch of appeals consists of appeals from the judgments of Orissa High Court, Patna High Court, Kerala High Court and Jharkhand High Court. Large number of appeals have been filed questioning the different judgments rendered by different High Courts. For deciding this batch of appeals it is sufficient to notice facts of few of the appeals of each State. The parties shall be referred to as described in the High Courts.

State of Orissa

5. In the appeals arising out of the judgments of the High Court of Orissa, most of the appeals have been filed against judgments dated 18.02.2008 and 09.10.2012. Judgments of different dates were also delivered by the Orissa High Court following its judgments dated 18.02.2008 and 09.10.2012. There are appeals containing different facts and grounds which shall separately be noticed.

6. With regard to judgment dated 18.02.2008 delivered in bunch of writ petitions, we take up Civil Appeal arising out of SLP(C)No.18405 of 2008 – M/s. Steel Authority of India Ltd. vs. State of Orissa & Anr. The State of Orissa enacted Orissa Entry Tax Act, 1999 (hereinafter referred to as "1999 Act") to provide for levy of tax on entry of the scheduled goods into a local area for consumption, use or sale therein and matters incidental thereto and connected therewith.

7. The Steel Authority of India, a public sector undertaking of Government of India filed the writ petition challenging the legality and constitutional validity of Orissa Entry Tax Act, 1999 and Orissa Entry Tax Rules, 2000 in so far as it seeks to levy and collect entry tax on imported goods including scheduled goods when brought into the mines premises of the writ petitioner No.1 Company at Purunapani, Kalta, Barsua in the District of Sundergarh and Bolani in the District Keonjhar. The validity of the Act was challenged on various grounds including the ground that 1999 Act is ultra vires to the Constitution. It was further pleaded that provisions of 1999 Act do not provide for levying of tax on imported raw materials for its plants and machineries which is used/consumed at its factory for the

manufacture of its finished products. The grounds were also raised that levy is not compensatory.

8. The writ petition was heard along with the bunch of writ petitions raising some similar and some different grounds. The Division Bench vide its judgment dated 18.02.2008 upheld the vires of 1999 Act.

Civil Appeals arising out of SLP(C) Nos.12424–12425 of 2008 – M/s. Simples Infrastructures Limited vs. State of Orissa & Ors. also needs to be noted:

9. The writ petitioner is a company which carries on business on works contract for construction of different types of civil and piling works outside at various places in the State of Orissa. While executing the aforesaid work the writ petitioner purchases Sand, Bricks and Cements chips and boulders for civil constructions and are transported from the petitioner's construction site, either inside or outside the State of Orissa for being used in the work. The writ petitioner was directed to file returns by the Entry Tax Officer. Writ petitioner has challenged the constitutionality of Orissa Act, 1999 and prayed for restraining the respondent from realising any entry tax. The writ petition was also decided along with the bunch of writ petitions vide High Court's judgment dated 18.02.2008 as stated above.

10. Large number of civil appeals have been filed against the judgment dated 18.02.2008. It is not necessary to notice facts of different cases. The writ petitioners were using raw-material brought from different places including foreign countries, Coal was also used by the various writ petitioners and levy on it of entry tax was questioned therein. Several subsequent judgments were also delivered by the Orissa High Court following the judgment dated 18.02.2008 which have also been questioned in different appeals.

11. A subsequent judgment dated 9.10.2012 delivered by the Orissa High Court in Writ Petition No.15519 of 2010 and other connected writ petitions have given rise to large number of civil appeals. The leading writ petition in which judgment dated 09.10.2012 was delivered was writ petition No.15519 of 2010 –Tata Steel Limited vs. State of Orissa & Ors. We now proceed to notice the facts and pleadings in the aforesaid writ petition. The writ petitioner, Tata Steel is company which has its branches, divisions across the State of Orissa. The writ petitioner carries on business in mining as well as manufacturing of Ferro-Chrome and Ferro-Manganese at different plants in the State of Orissa. For the ready reference the pleadings in paragraph 3 of the writ petition needs to be extracted which is to the following effect:

> "3. That the relevant facts giving rise to the present writ application are inter alia are:-

(a) The petitioner in order to carry out its manufacturing activity both inside the state of Orissa as well as in factories located outside the state imports various raw materials from outside India.

(b) That for importing the said goods from outside India, the petitioner has obtained has obtained necessary licenses and permissions from appropriate authorities.

(c) That the petitioner is registered under OVAT Act, CST Act and Orissa Entry Tax Act, 1999, and has been allotted TIN number by the Sales Tax Officers of the State. The petitioner brings in various goods including scheduled goods for its plants, from within the state and also from outside the territory of India by way of import. The materials so purchased from various countries are duly supported by Bill of Entry and other documents which have duly been incorporated in the accounts of the petitioner company. A specimen copy of a few Commercial Bills/Bills of Entry representing import of materials is annexed hereto as Annexure□1."

12. The writ petitioner pleads that Legislature never intended to levy entry tax on the value of the goods imported from outside the country by Entry Tax Act, 1999. Article 286(1)(b) prevents a State from levying Sales Tax so as not to interfere with the Union's Legislative power with respect to the import and export across Customs Frontiers (Entry 41 of List I) and the duties of Customs including Export Duty (Entry 83 of List I).

13. The States never intended to levy entry tax on goods from outside the country. Referring to the definition of 'purchase value', it is submitted that the omission of "Customs Duty" in Section 2(j) was deliberate. It is impermissible for the State to enact a legislation purported to be under Entry 52 of List II, the incidence of which is on import of goods from outside India which is exclusively a matter for the Union under Entry 41 and 83 of List I.

14. Counter□affidavit was filed on behalf of the respondents justifying the entry tax. The State pleaded that levy of entry tax by the State is under Entry 52 of list II of the Seventh Schedule. The provision of Article 286 is available only in the case of sale of goods and not against the entry tax.

15. It is incorrect to suggest that the Legislature never intended to levy tax on imported goods coming from outside the country. The charge under Section 3 of the Orissa Act, 1999 would suggest that levy is on the basis of destination of scheduled goods. It is not the transaction of import which is sought to be levied with entry tax. The Division Bench vide

its judgment dated 09.10.2012 dismissed all the writ petitions except writ petition No.7 of 2008 of M/s. IFGL Refractories. Civil Appeal No.32256 of 2013 – M/s. National Aluminium Company Limited vs. State of Orissa & Ors.

16. The writ petitioner is the public sector undertaking and is running three units, namely, Aluminium Refinery Plant at Damanjodi in the District of Koraput, Aluminium Smelter Plant at Angul in the District of Angul and Captive Thermal Power Plant at Angul. The writ petitioner in order to carry out its manufacturing/mining activity imports various material and equipments including spares from outside India. For importing the said goods from outside India, the petitioner has obtained necessary licences and permission from appropriate authorities. The petitioner brings in various goods including scheduled goods for its business operation from within the State and also from outside the territory of India by way of import. The writ petitioner has filed the writ petition challenging the Orissa Entry Tax Act, 1999 and levibility of entry tax on petitioner. By a common judgment dated 09.10.2012 the writ petition has been dismissed. Aggrieved by which this appeal has been filed. Civil Appeal arising out of SLP(C) No.1426 of 2013 – Emami Paper Mills Limited vs. State of Orissa & Ors.

17. The petitioner has set up a large scale industry for manufacture of Paper, paper Board and newsprint in Orissa in the Industrial Estate of Balgopalpur, District Balasore. The petitioner had entered into an agreement with Global Equipment and Machinery Sales Inc., Montgomeryville, Pennsylvania, United States of America and placed orders for a Paper Plant and other machineries to be supplied by the said company to the petitioner. The petitioner imported into India a disassembled paper manufacturing plant in knock down condition with spares. The petitioner also imports other machineries from other countries and the said imported machineries and spare parts enter the Country through different ports and are cleared by the petitioner on payment of the import duty levied under the Customs Act, 1962. Once the said plants and machineries are unloaded and cleared upon payment of the Customs Duty the said plant and machineries are transported to the petitioner's factory at Balgopalpur, Orissa. Besides importing machinery from other countries the petitioner also has to purchase various machineries and spare parts from different manufacturers in other States in India. The petitioner was called upon to submit a statement showing the names of the goods imported by the petitioner. The respondent further threatened to resort to coercive measures if the petitioner failed to make payment of the entry tax on the import of plant and machinery. The petitioner made ad hoc payment under protest. Petitioner protested against the levy of entry tax on the plant and machinery imported from USA. The petitioner filed a writ petition No. 13978 of 2008 Orissa Act, 1999 questioning the levy of entry tax on import from outside the country, the constitutional validity of the Orissa Act, 1999 was also challenged. Counter□affidavit and rejoinder□ affidavits were filed to the writ petitions and vide judgment dated 9.10.2012 the High Court dismissed the writ petition.

Civil Appeal arising out of SLP(C)No.11060 of 2013 □ M/s. IFGL Refractories vs. State of Orissa and ors.

18. The writ petitioner has set up a factory at Sector 'B', Kalunga Industrial Estate as an 100% import substitution project. The petitioner commenced commercial production of special refractories and operating systems used by the producers of iron and steel. The petitioner has continually been expanding its production capacity by installing and erecting plant and machinery both indigenous and imported. For the manufacture of the refractory products, the petitioner requires imported raw materials, stores and spares, trading items and capital goods. Petitioner imports various materials from different countries. The materials are fused silica, lime stabilize fused zirconia, fused magnesia, sintered magnesia, silicon metal, natural PVC, refractory glaze, furfural alcolhol and micro silica. Generally, these goods are imported from either the Kolkata Port or the Kolkata Airport where from they are transported to the factory. Besides the raw materials imported from other countries, the petitioner also uses raw materials available in other States within the Union of India. The petitioner was under the bona fide belief that it was not required to pay entry tax on the goods imported from abroad. Further, the petitioner effected a payment under protest of Rs.37,08,682/□ towards entry tax. The petitioner filed writ petitioner No.7 of 2008 challenging the Entry Tax Act, 1999. The writ petition was filed basically on the following three grounds:

a. Entry tax is not leviable on goods imported from outside India as being violative of Article 286 read with Article 246 of the Constitution;

b. Entry tax is not leviable on goods purchased from other States when the same goods are not manufactured within the State of Orissa in terms of Article 304(a) of the Constitution.

c. In any case, the goods imported from outside India/purchased from other States by the petitioner are not specified in the schedule appended to the Act and therefore not exigible to entry tax.

19. The writ petition filed by the petitioner has been partly allowed by a common judgment dated 09.10.2012. The High Court although upheld the levy of entry tax on goods imported from outside the country but invalidated the levy of entry tax on certain goods purchased/imported by the petitioner which were not mentioned in the schedule appended to the 1999 Act. Aggrieved by the said judgment, this appeal has been filed. Transferred Case No.149 of 2013 – M/s. Paradeep Phosphates Ltd. vs. State of Orissa and ors.

20. The Transfer Petition (C) No.530 of 2012 was filed by the petitioner, M/s. Paradeep Phosphates Ltd. praying for the transfer of Writ Petition No.16541 of 2007 pending in the High

Court of Orissa at Cuttack. The transfer petition was allowed by this Court on 23.07.2013 on which this T.C. No.149 of 2013 has been registered. The petitioner is engaged in manufacture of different types of chemical fertilizers like DAP, MOP, NPK. The petitioner has been importing raw materials through Paradeep Port wherein it has its Conveyor facility and the said raw materials are unloaded from the Ships and directly dispatched to petitioner's factory without using any infrastructure facility provided by the Government of Orissa. Petitioner has a plant at Paradeep under the Revenue District of Jagatsinghpur, Orissa. The petitioner has an adjoining township at Paradeep. The petitioner constructed its own approach roads from the State Highway, developed the plant and township site. The petitioner procures about 98% of its raw materials from outside the country. Petitioner has been paying entry tax on imported scheduled goods 'under protest'. Petitioner filed writ petition No.16541 of 2007 challenging the notice for assessment and payment of entry tax. Petitioner also prayed for a writ of mandamus directing the State of Orissa not to impose levy of entry tax on the goods imported from outside the territory of India.

21. There are few other appeals which are different from the above mentioned common judgment of the Orissa High Court. Civil Appeal Nos.3720□3722 of 2003 – National Aluminium Co.Ltd. vs. State of Orissa & Ors.

22. The writ petitioner is a Government of India Undertaking, engaged in production of alumina and aluminium. It has its captive Bauxite Mines and Alumina refinery factory at Damanjodi in the District of Koraput. The major raw material is bauxite. Petitioner has set up its own Captive Power Plant at Angul near its Smelter Plant. For production of electricity, the basic raw material is coal, which obtained from Mahanadi Coal Fields. The petitioner filed Original Jurisdiction Case No.72 of 2001 challenging the validity of 1999 Act on several grounds. The Division Bench of the High Court vide its judgment dated 13.11.2002 declined to strike down the 1999 Act. However, while declining to strike down the 1999 Act following directions were issued:

> "44. In the result, while declining to strike down the Orissa Entry Tax Act, 1999 as ultra vires, we direct that:□
>
> 1. Unless the basic ingredients, i.e. Entry of Scheduled goods for the purpose of Consumption, Use or Sale into a local area of the State are satisfied, the provisions of the Orissa Entry Tax Act, 1999 shall not be attracted;
>
> 2. The goods which enter into local area/areas only for the purpose of transit will not be subject to Entry Tax; and
>
> 3. Every manufacture of scheduled goods under Section 26 shall collect by way of Entry Tax amount equal to the tax payable on the value of the finished products under Section 3 of the Act from the buying

dealer either directly or through an intermediary only if the scheduled goods sold are intended for ENTRY into any local area of the State for the purpose of Consumption, Use or Sale."

23. Aggrieved by the said judgment, these civil appeals have been filed.

Civil Appeals arising out of SLP(C) Nos.16744□46 of 2013 – BRG Iron & Steel Co. Pvt. Ltd. vs. Joint Commissioner of Sales Tax, Angul, Orissa.

24. The petitioner company during the course of its business was required to purchase plants and parts of plants, machinery and parts & spares of all kinds of machinery for the purpose of setting up a manufacturing unit at Dhenkanal, Orissa. The petitioner was also required to purchase raw materials such as stainless steel and iron & steel goods. The company was also required to import and export goods particularly import of capital goods such as its plant and machinery from outside the country. The petitioner has been regularly filing return under the Orissa Entry Tax Act, 1999. However, vide letter dated 30.03.2010 entry tax was demanded. The judgment was delivered by the High Court on 09.10.2012 in Writ Petition No.15519 of 2010 holding that levy of entry tax on imported goods was within the purview of Orissa Act, 1999. An order dated 20.10.2010 has been passed by the Joint Commission of Sales Tax holding the petitioner liable to pay entry tax on the imported goods besides penalty. Petitioner has directly come to this Court against the assessment order passed by the Joint Commissioner of Sales Tax dated 20.10.2012. Civil Appeal arising out of SLP(C)No.36486 of 2010 – M/s. Bajrangbali Alloys Pvt. Ltd. vs. Commissioner, Sales Tax & Anr.

25. The petitioner carries on the business of manufacturing and sale of M.S. Ingots and M.S. Rod ITMT Bars) at Manguli in the District of Cuttack. The petitioner directly imports goods brought from outside the country into the local area. Petitioner filed Writ Petition No.16650 of 2010. In the writ petition, petitioner has attacked the correctness of the assessment order dated 23.02.2010 on the ground that assessment order under Section 9C of the 1999 Act has been made by way of Orissa Entry Tax (Amendment) Act, 2005 which came into force with effect from 19.05.2005. The writ petition has been dismissed by the Division Bench by its judgment dated 08.11.2010 on the ground that the petitioner is at liberty to seek its alternative remedy by filing an appeal within a period of two weeks, the writ petition was disposed of.

CIVIL APPEALS OF STATE OF KERALA

26. The civil appeals relating to State of Kerala have been filed both by State of Kerala as well as by its officers. State of Kerala has filed appeals against judgment dated 06.01.1998 and several others subsequent judgments following the judgment dated 06.01.1998.

Another judgment has been passed by High Court of Kerala on 18.12.2006. There is one writ petition filed by a company. It is sufficient to notice facts of few cases to decide the group of cases relating to Kerala.

Civil Appeal Nos. 3381□3400 of 1998 □ State Of Kerala & Ors Vs. FR. William Fernandez & Ors.

27. The State is in appeal against the Division Bench judgment dated 06.01.1998 of Kerala High Court delivered in a batch of writ appeals including Writ Petition No. 770/1997; Father William Fernandez & Ors. vs State of Kerala & Ors. The various petitioners imported motor vehicles from abroad after obtaining custom clearance and payment of custom duties and thereafter brought the vehicles in the State of Kerala. Some of the petitioners have also got their vehicles registered under the Motor Vehicles Act which have been given notice demanding entry tax under Kerala Tax on Entry of Goods into Local Areas Act, 1994 (hereinafter referred to as '1994 Act'). The writ petition was heard by learned Single Judge who vide its common judgment dated 20.2.1997 dismissed all the writ petitions holding that entry tax can be collected from the owners of the vehicles who brought them from abroad before granting them registration in the State for consumption, use or sale. Writ Appeals were filed against judgment dated 20.2.1997 which have been decided vide common judgment dated 06.01.1998. Although, the Division Bench held that there is no limitation upon the State's powers to legislate under Entry 52 List II of the VIIth Schedule of the Constitution but in case of goods, brought from abroad their entry into local area is outside the scope of 1994 Act, which Act is confined only to those goods brought from outside the State, that would not include the outside borders of the country. The Division Bench declared that vehicles bought from outside the country are not liable to pay entry tax.

Civil Appeal No. 6178 of 2010 □ State of Kerala & Ors. vs. Idea Cellular Ltd.

28. This appeal has been filed against the judgment dated 18.12.2006 of Division Bench of Kerala High Court by which judgment a bunch of writ petitions have been decided holding that the levy of entry tax under 1994, Act as discriminatory and violative of Article 14, 301 and 304 of the Constitution of India. The Division Bench followed the earlier Division Bench judgment of the Kerala High Court in Father William Fernandez case decided on 06.01.1998. Writ petition was filed by various assesses challenging the constitutional validity of 1994, Act and also questioning the entry tax on goods brought from outside the State or and goods brought from outside the country to the State of Kerala. The Division Bench held that levy of entry tax on goods imported from other States to the State of Kerala and from abroad is not compensatory in nature and such demand is illegal, unauthorised and violative of Article 301. Application for intervention has also been filed by various petitioners which applicants have also been heard. State has filed other appeals questioning subsequent judgments which have followed judgment dated 06.01.1998 and 18.12.2006.

Writ Petition (C) No. 574 of 2003 □Parisons Agrotech Private Ltd. & Anr vs. State of Kerala & Ors.

29. This writ petition has been filed under Article 32 of the Constitution praying for declaration that 1994, Act is ultra vires and unconstitutional and the Act also does not apply to the entry of goods imported in India from foreign country. The petitioner company is engaged in the import of crude palmolin, refining the same to make it edible and thereafter selling of palmolin oil. The petitioner imports crude palmolin oil in bulk from Malaysia, Indonesia and Singapore. Purchase of crude by the petitioner is in the course of import from foreign countries and imported through Cochin Port within the State of Kerala. The said sale & purchase in the course of import is exempted from the levy of tax under Article 286 of the Constitution of India read with Section 5(2) of the Central Sales Tax Act, 1956. The respondent directed the first petitioner to remit the entry tax of purchase price of crude palmolin imported by the petitioner. Petitioner has also relied on Division Bench judgment of the Kerala High Court delivered in bunch of writ appeals including Writ Appeal 770 of 1997 against which SLP/Civil Appeal has been filed being CA 3381 – 3400 of 1998 and is pending.

Civil Appeals relating to State of Bihar Civil Appeal arising out of SLP(C) No. 26543 of 2008 M/s ITC Ltd. vs. State of Bihar

30. This appeal has been filed against Division Bench judgment of Patna High Court dated 27.08.2008 by which the writ petition has been disposed of in terms of Para 69 Page 70 of the earlier decision in the case of M/s Indian Oil Corporation Ltd. (dated 09.1.2007 reported in 2007 10 BST 140 Patna). The petitioner is a company engaged in the business of manufacturing and selling of cigarettes and smoking mixtures. Company carrying on business of manufacturing paper, paper board, packaging materials and printing, thereon for said purpose Company has factories at different places all over the country including in Munger in the State of Bihar. For manufacturing of cigarettes smoking mixtures, the company causes entry of tobacco and other raw materials purchased from outside the State of Bihar into the local area of Munger. The State of Bihar has enacted the Bihar Tax on Entry of Goods into Local Areas Act 1993(hereinafter referred to as 1993, Act). The 1993, Act has been amended by Bihar Act, 9 of 2003, Bihar Act, 11 of 2003 and Bihar Act 19 of 2006. By Bihar Act 11 of 2003, an explanation has been added to the effect that entry of goods into local area for consumption, use or sale therein from any place outside the territory of India shall also be deemed to be an entry of goods for the purposes of the Act. Petitioner challenged the vires of the Act, as amended in 2003. Petitioner prayed for direction to remove, withdraw and cancel the collection of entry tax under the impugned Act. Civil Appeal arising out of SLP(C) No. 11646 of 2009□VST Distribution Storage v.The State of Bihar & Ors.

31. This appeal has been filed against judgment dated 28.08.2008 by which judgment the writ petition filed by the appellant has been disposed of in terms of the para 69 of the Division Bench judgment of Patna High Court, M/s Indian Oil Corporation Ltd. (supra).

Civil Appeal arising out of SLP(C) No. 7356 of 2010 ☐ITC Ltd vs State of Bihar

32. This appeal has been filed against judgment and order dated 15.02.2010 of the Division Bench of the Patna High Court by which writ petition filed by the petitioner has been dismissed. Petitioner has challenged the constitutional validity of 1993, Act thereby challenging the Section 4 of 1993, Act as inserted by Amendment Act 19 of 2006. It was prayed that Amendment Act be declared as ultra vires to the power of State Legislature. Petitioner has also challenged the demand notice dated 20.6.2009 issued by Joint Commissioner, Commercial Tax Bhagalpur and demand notice dated 03.07.2009 under the Amendment Act, 19 of 2006. It was noticed in the writ petition that in view of the judgment dated 09.01.2007 of the Patna High Court in Indian Oil Corporation Ltd. (supra) after the amendment by amending Act, 19 of 2006 the entry tax sought to be levied with effect from 29.08.2006, has become compensatory and constitutionally valid.

Civil Appeal of State of Jharkhand Civil Appeal arising out of SLP (C) 1101 OF 2007☐ State of Jharkhand & Ors.v.Tata Iron & SteelCo. Ltd.

33. State of Jharkhand filed an appeal against the Division Bench judgment dated 14.08.2006 delivered in Writ Petition(T) No. 5354 of 2004, Tata Iron & Steel Co. Ltd. Jamshedpur, Sinhbhumi vs. State of Jharkhand. The petitioner is engaged in manufacturing the iron & steel products by its integrated steel plant at Jamshedpur in the State of Jharkhand. For the purpose of manufacturing activities, company is importing coal from Australia and Newzealand in pursuant to several foreign contracts executed with foreign parties which comes to Haldia and Paradeep Ports in India and from there said coal is transported either by rail or road to Jamshedpur in the State of Jharkhand. 1993, Act was adopted in the State of Jharkhand after its creation from 15.11.2000. A Notification dated 23.03.2002 was issued under Sub section 1 of Section 2 by adding 10 new items to the schedule. Notification dated 23.03.2002 was issued levying the entry tax on imported coal. A memorandum was issued by Commissioner of Commercial Tax. Petitioner prayed for quashing a part of the Notification dated 23.3.2002 by which entry tax was sought to be levied by the State of Jharkhand on imported coal and other consequential reliefs have been claimed.

34. The Division Bench vide its judgment and order dated 14.08.2006 allowed the writ petition holding that provisions of 1993, Act as adopted by the State of Jharkhand do not satisfy the requirement of Article 301 read with Article 304. State Aggrieved by the said judgment have come up in the appeal. This appeal was heard by this Court on 29.08.2017 by which proceeding the impugned

judgment of the Jharkhand of High Court which rested on the Compensatory Theory has been set aside. It is useful to quote the last two paras of the proceeding dated 29.08.2017 which is to the following effect:

> "We need not comment upon this argument. Suffice is to state that insofar as the impugned judgment which is rested on the compensatory theory stands set aside, if any rights accrue in favour of the respondent/assessee or the respondent has any right to challenge the levy on the aforesaid ground which was taken before the High Court it would be open to the respondent/asseesee to pursue the same.
>
> The respondent/assessee had also raised the contention that coal was imported on which no entry tax was paid. On this aspect, we have heard the arguments and the judgment is reserved."
>
> 35. Thus in the present appeal, we have permitted the assessee to raise the only issue as to whether on imported coal entry tax could be levied.
>
> 36. We have heard large number of learned counsel for the writ petitioners including Shri Arvind P. Datar, Shri A.K. Ganguli, Shri S.K.Bagaria, Shri Jagdeep Dhankar, Dr. G.C. Bharuka, Shri Ashok Kumar Panda, Senior Advocates. Shri Rakesh Dwivedi, Senior Advocate has been heard on behalf of the State of Orissa and State of Bihar. Shri V.Giri, Senior Advocate has appeared on behalf of the State of Kerala. Shri Ajit Kumar Sinha, Senior Advocate has also been heard.

Submissions

37. The following are the substances of submissions raised by different learned counsel for writ petitioners relating to State of Orissa attacking the provisions of 1999, Act:

> i. The legislature has not created any chargeability for levy of entry tax on goods imported from outside the country in Orissa Entry Tax Act, 1999. Entry of goods has been defined in Section 2(d) which contemplates entry of goods into a local area from any place (i) outside that local area or (ii) any place outside the State. The provision does not contemplate goods entering from any place outside the country. Putting a literal interpretation of the 1999, Act, it is clear that legislature never intended to cover the goods imported from outside the country. It is submitted that wherever legislature intended to impose entry tax on the imported goods coming from outside the country, the entry tax legislation specifically mentioned so in the legislation. The reference has been made to the provisions

of the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Act, 1993 (as Amended by Bihar Act 11 of 2003 and 19 of 2006) wherein an explanation and a new Section 2(c) to the following effect was inserted:□ "(iii) into a local area from any place outside the territory of India." Further in Uttar Pradesh Tax on Entry of Goods into Local Area Act, 2007 under Section 2(1)(c) following is specifically provided for "(iii) into a local area from any place outside the territory of India." Similar is the provision of Section 2(1)(c) of Uttarakhand Tax on Entry of Goods into Local Areas Act, 2009 and further Section 2(1)(h) of the West Bengal Tax on Entry of Goods into Local Area Act, 2012 where any place outside India is specifically mentioned.

ii. It is only Parliament which is empowered to make any law with regard to trade & commerce with foreign countries as well as with regard to levy of duties of customs thereon. Entry 41 covers "trade & commerce with foreign countries, import and export across custom frontiers; definition of custom frontiers" 'Entry 83 of List I covers "duties of custom including export duties". Entire field connected or related to trade & commerce with foreign countries is within the exclusive domain of the Union and beyond the legislative competence of the State Legislature. Entry 52 of List II can have no application in respect of goods, imported from outside India which continues to be imported goods in the course of import. The import movement in respect of imports continues till the goods reach the factory, which movement is an integral and inexplicable part of the import movement. From the above single taxing event and single import movement, the State Legislature cannot carve out any taxing event by seeking to term it as a tax from entry into local area for consumption, use or sale therein. The entry tax legislation imposing entry tax on the imported goods is thus beyond the competence of State Legislation. Article 286(1)(b) of the Constitution excludes the taxing power of the State in respect of goods in the course of import.

iii. The goods imported by actual users for their captive consumption and own use continues to remain in the course of import and continues to retain the character of imported goods. The Doctrine of Unbroken Package evolved by American Courts do supports the petitioners' case. The judgment of the US Supreme Court in Brown versus Maryland 6 L.Ed.

678 which laid down that the constitutional prohibition of State to tax the goods imported survives even after they have landed and cleared from custom, after payment of duties the protection continues till they are sold by importer, is still good law and has been followed subsequently.

iv. The impugned entry tax is not an entry under Entry 52 of List II of the VIIth Schedule of the Constitution. The tax covered by Entry 52 is nothing but the levy that is known as octroi, which is a tax levied by a local self authority on the entry of goods into the area administered by such local government. The expression 'local area' in Entry 52 signifies that tax in this entry is a local tax. The local authority into whose local area, the goods enters for consumption, use or sale therein can levy and collect the said tax. The tax refers to in Entry 49 of Provincial List under the Government of India Act, 1935 and Entry 52 of List II under the Constitution is 'octroi', which have been prior thereto, was levied by and for the benefit of local authorities and usurpation of this levy by State would thus be beyond the legislative power of the State under Entry 52.

v. The imported machineries which are imported in completely knocked out condition are not covered by Schedule of 1999, Act. A plant imported in knocked out condition is neither machinery nor equipment and is not covered by Part II of Schedule. Hence, no entry tax could have been levied on imported plants which are received in knocked out condition.
vi. Section 4 Of Bihar Act 1993 as inserted by Bihar Act 19 of 2006 is violative of Article 266 of the Constitution of India.

38. Shri Rakesh Dwivedi, learned senior counsel appearing for the State of Orissa and Bihar has refuted the above submissions. He submits that Section 3 of 1999, Act covers tax on imported goods. The definition section has two phrases (i) from any place outside that local area, (ii) or any place outside the State. Both the phrases on a plain and literal consideration would include the goods which are entering from outside the country. Foreign territory would be a place which is not only outside the local area but also outside the State.

39. The State Legislature is fully competent to levy entry tax under Entry 52 List II. The legislative field as included in Entry 52 List II has nothing to do with Entry 41 and Entry 83 of List I. Under the Indian Constitution, the distribution of powers with regard to tax has been done in a mutually exclusive manner in great detail and there is no overlapping in taxing power of the State and the Union. Duty of custom in Entry 83 List II is on import or export. The prohibition contained under Article 286 on the State Legislature are in reference to sale of goods and has nothing to do with entry tax on entry of goods for consumption, use or sale. Article 286 as well as Central Sales Tax, 1956 has no relevance with regard to Entry 52 List II.

40. The word 'import' means to bring in. The word 'imported goods' are defined in Customs Act, 1962. The above definitions clearly indicate that ones the goods have been cleared for home consumption then they ceased to be imported goods. The importation happens before clearance for home consumption and

after clearance the character as import ceases. The Doctrine of Unbroken Package as evolved by the US Supreme Court is not attracted in this country. The judgment of the US Supreme Court in Brown versus State of Maryland, 6 LED 678 has been discredited even in USA. In the subsequent judgments of US Supreme Court, the judgment of Brown vs. State of Maryland has been considerably diluted. The Federal Court as well as this Court has specifically held that the judgment of US Supreme Court in Brown vs. State of Maryland is not applicable in this country.

41. The submissions raised by one learned counsel of the petitioners that entry tax is not covered by Entry 52 List II is wholly fallacious. In the Constitution of India, there is clear demarcation of taxing power of Union and the State. When by Entry 52 List II, entry of goods in the local area for consumption, use or sale has been specifically provided the said entry has to be given its full meaning and content.

42. Learned counsel appearing for the writ petitioners in the State of Bihar in civil appeal arising out of judgment of Patna High Court as well as Jharkhand High Court has also adopted the above submissions raised on behalf of the petitioners. In reply thereto, learned counsel for the State of Bihar and Jharkhand has reiterated the same submissions as noted above.

43. Shri V. Giri, learned senior counsel appearing on behalf of the State of Kerala adopting the submission of Shri Rakesh Dwivedi contends that the judgment of Kerala High Court holding that entry tax cannot be levied on imported motor vehicles is fallacious. It is submitted that definition clause and charging section in the 1994, Act are clear enough to include goods entering from any place outside the State for consumption, use or sale therein including outside territory of India. Learned counsel appearing for the respondent in civil appeals of State of Kerala has reiterated the submissions raised on behalf of the writ petitioners in appeals arising out of judgment of Orissa High Court.

44. From the submission raised by learned counsel for the parties and material on record following issues arise for consideration in this batch of appeals: □i. Whether Section 2(d) read with Section 3 of Orissa Entry Tax Act, 1999, Section 2(d) read with Section 2(d) of Kerala Act, 1994 and Bihar Act, 1993 (before its amendment in 2003), never intended to levy any entry tax on the goods, entering into local area of State from any place outside the territory of India. ii. Whether Entry Tax Legislations in question intrude into exclusive legislative domain of Parliament as reserved under Entry 41 and Entry 83 List I. iii. Whether levy of entry tax on goods imported from outside territory of India is legislation trenching the field of “import and export”, “duties of custom” reserved to Parliament.

iv. Whether the importation of goods, imported from a territory outside the India continues till the goods reach in the premises/factory of the importer, during which period State at no point of time is legislative competence to impose any tax. v. Whether doctrine of unbroken package as evolved by the American Court are to apply with regard to imported goods of the petitioners prohibiting the State from levying any tax till the goods are first sold/dealt by the importer.

vi. Whether in the definition of purchase value as contained in Entry Tax Legislations in question, non-inclusion of custom duty is indicator of fact that the legislature never intended to levy entry tax on imported goods.

vii. Whether Entry Tax Legislations are not covered by Entry 52 List II since the Entry 52 is in essence entry of levying octroi which can be levied only by local authorities and the State has no legislative competence to impose entry tax under Entry 52 List II.

viii. Whether a plant, imported in knocked out condition is covered by the Part II of the Schedule of Orissa Act, 1999.

45. Before we proceed to consider the various issues as noted above, it is relevant to notice the statutory provisions relating to entry tax applicable in the above mentioned States.

46. The Orissa Entry Tax Act, 1999 (hereinafter referred to as "Orissa Act, 1999") was enacted to provide for the levy and collection of tax on the entry of goods into a local area for consumption, use or sale therein and matters incidental thereto and connected therewith. Section 2 contains definitions. Section 2(d) defines "entry of goods", Section 2(e) defines "importer", Section 2(f) defines "local area" as follows :

> "2. In this Act, unless the context otherwise requires,- xxx xxx xxx
>
> (d) "Entry of goods" with all its grammatical variations and cognate expressions, means entry of goods into a local area from any place that local area or any place outside the State for consumption, use or sale therein;
>
> (e) "Importer" means a dealer or any other person who in any capacity brings or causes to be brought any scheduled goods into a 1mal area for consumption, use or sale therein;
>
> (f) "Local area" means the areas within the limits of any-
>
> (i) Municipal Corporation,

(ii) Municipality,

(iii) Notified Area Council,

(iv) Grama Panchayat, and

(v) Other local authority by whatever name called, constituted or continued in any law for the time being in force and shall also include an Orissa Act industrial township constituted under section 4 of the Orissa 23 of 1930, Municipal Act, 1950;"

47. Section 3 relates to levy of tax. Section 3 sub-section (1) is as follows:

"3.Levy of Tax.

(1) There shall be levied and collected a tax on entry of the scheduled goods into a local area for consumption, use or sale therein at such rate not exceeding twelve percentum of the purchase value of such goods from such date as may be specified by the State Government and different dates and different rates may be specified for different goods and local areas subject to such conditions as may be prescribed." The Orissa Act, 1999 has been amended from time to time.

48. The Kerala Tax on Entry of Goods into Local Areas Act, 1994 (hereinafter referred to as 'Kerala Act, 1994) was enacted to provide for levy of tax on the entry of goods into the local area for consumption, use or sale therein. Section (2)(d) defines 'entry of goods', Section 2(g) defines 'importer', Section 2(h) defines 'local area' and 2(n) defines 'purchase value' are as follows:

"2.(d) "entry of goods into a local area" with all its grammatical variations and cognate expressions, means entry of (Substituted by Act 23 of 1996 w.e.f. 29-7-1996.) goods into a local area from any place outside the State for use (Inserted by Act 12 of 2003 w.e.f. 1-4-2003.) consumption or sale therein;

(g) "Importer" means a person who brings or cause to be brought any goods whether for himself or on behalf of his principal or any other person, into a local area, from any place outside the State for use, consumption, or sales therein or who owns the goods at the time of entry into the local area.

(h) "Local area" means the area of jurisdiction of a local authority;

(n) "purchase value" means the value of the goods as ascertained from the original invoice and includes insurance, excise duties, countervailing duties, sales tax, transport fee, freight charges and all other charges incidentally levied on the purchase of goods and in the case of a motor vehicle includes the value of accessories fitted to the vehicle;

Provided that, where the purchase value of the goods is not ascertainable on account of non-availability or non-production of the original invoice or when the invoice produced is proved to be false or if the goods are acquired or obtained otherwise than by way of purchase, then the purchase value shall be the value or price at, which the goods of like kind or quality is sold or is capable of being sold, in open market"

49. Section 3 is a charging Section which is as follows:

"Section 3 -Levy of Tax Substituted by Act 23 of 1996 w.e.f. 29-7-1996.) (1) Subject to the provisions of this Act, tax shall be levied and collected a tax on the entry of any goods into any local area for consumption, use or sale therein. (Inserted by Act 10 of 2005.) The Tax on such goods shall be at such rate or rates as may be fixed by Government by notification, on the purchase value of goods not exceeding the tax payable for the goods as per the (Substituted by Act 23 of 1996 w.e.f. 29-7-1996.) [Schedule to the Kerala General Sales Tax Act, 1963 or the Kerala Value Added Tax Act, 2003.

Provided that no tax shall be levied and collected in respect of any motor vehicle which was registered in any Union Territory or any other State under the provisions of Motor Vehicles Act, 1988 (Central Act, 59 of 1988), prior to a period of fifteen months or more from the date on which it is registered in the State:

Provided further that no tax shall be levied and collected in respect of any (Substituted by Act 23 of 1996 w.e.f. 29-7-1996.) goods which is the property of the Central Government or which is used exclusively for purposes relating to the defence of India.

(2) The tax shall be payable by the importer in such manner and within such time as may be prescribed."

50. Bihar Act, 1993 also defines entry of goods in Section 2(c), importer in Section 2(d), import value in Section 2(e) and local area has been defined in Section 2(f) which are as follows:

"2(d) "Importer" means a dealer or any other person who is any capacity effects or causes to be

effected the entry of any scheduled goods into a local area for consumption, use or sale therein."

(e) "Import Value" means the value of scheduled goods as ascertained from the purchase invoice/bills and includes insurance charges, [import duty, marine insurance charges, landing and whatfage and port charges] excise duties, countervailing duties, sales tax, transport charges, freight charges and all other charges incidental to the import of scheduled goods:

Provided that where the purchase invoice/bills are not produced or when the invoice/bills produced are proved to be false or if, the scheduled good are acquired or obtained otherwise than by way of purchase the import value shall be the value price at which the scheduled goods of like kind or quality is sold or capable of being sold in open market.

(f) "Local Areas" means the areas within the limits of a– (i) Municipal Corporation; (ii) Municipality; (iii) Notified Area Committee; (iv) Cantonment Board; (v) Town Board; (vi) Mines Board; (vii) Municipal Board; (viii) Gram Panchayat; (ix) Any other local authority by whatever nomenclature called, constituted or continued in any law for the time being in force."

51. Section 3 is a charging Section. Section sub-section (1) is as follows:

"3. Charge of Tax–"(I) There shall be levied and collected a tax on entry of scheduled goods into a local area for consumption, use or sale therein for the purpose of development of trade, commerce and industry in the State, at such rate, not exceeding twenty percent, of the import value of such goods, as may be specified by the State Government in a notification published in a official gazette subject to such conditions as may be prescribed: Provided different rates for different scheduled goods may be specified by the State Government.

Provided further, that if an importer claims that he imported goods notified under sub-section (1) not for the purpose of consumption, use or sale, the burden of proving that the import was for purposes other than for consumption, use or sale shall be on importer importing such goods and making such claim." ["Provided further, that if an importer claims that he imported goods notified under sub-section (1) not for the purpose of consumption, use or sale, the burden of providing that the import was for purposes other than for consumption, use or sale, shall be on importer importing such goods and making such claim." "(1A) The tax under sub-section (1) shall be continued to be levied till such time as is required to improve infrastructure within the State such as power, road, market, condition etc. with a view to facilitate better market condition for trade, commerce and industry and to bring it to the level of, National average."

52. The definition as given in Section 2(c) was amended by Bihar Act 19 of 2006. It was published on 9th August, 2006. Section 2(c) was substituted by the amendment to the following effect:

> "2(c)"Entry of goods, with all its grammatical variations and cognate expressions, means, entry of goods;
>
> (i) into a local area from any place outside such area,
>
> (ii) into a local area from any place outside the territory of India, for consumption, use or sale therein."

53. In the State of Jharkhand, Bihar Act, 1993 was adopted vide notification dated 18th December, 2000. The amendment has been made vide Jharkhand Act 2 of 2002 in Bihar Act 16 of 1993. In exercise of powers conferred by sub-section (1) of Section 3 of the Tax Act 1993 (Bihar Act 16' 1993) notification dated 23rd March, 2002 was issued specifying the conditions and rates of tax on the entry of scheduled goods. Whether Entry Tax Legislations contemplated levy of Entry Tax on Imported goods

54. We now proceed to consider ISSUE NOS.1, relating to the three States' enactments as noted. For answering the issue we notice the provisions of Orissa Act, 1999.

55. The submission which has been pressed by the learned counsel for the writ petitioners is that the definition of entry of goods in Section 2(d) read with Section 3 levy of charge covers only the following:

> (i) Entry of goods into a local area from any place outside that local area;
>
> (ii) Entry of goods from local area or any place outside the State.

It is submitted that entry of goods into local area can be any of the following places:

> (i) from any place outside that local area that is from other local area within the State of Orissa itself;
>
> (ii) from any place outside the State that is from any place outside the State of Orissa.

The expression State here can only be the State of Orissa and cannot mean the country as a whole.

(iii) from any place outside the country.

56. The definition of Section 2(d) on its own term does not cover entry of goods into a local area from any place "outside the country". It is, however, submitted that expression "any place outside the local area" by itself would have been enough to cover the goods imported from anywhere outside the local area. Outside the local area would have been outside the State or outside the country but Legislature never intended to levy entry tax on goods imported from outside the country that is why entry of goods from local area, from outside the State was provided for. Reference of various other States' enactments have been made where any place outside the country has been expressly mentioned. Reference has been made to West Bengal Tax on Entry of Goods into Local Area Act, 2012, Section 2(h) which is to the following effect:

> "(h) "entry of goods", with all its grammatical variations and cognate expressions, means bringing of goods into a local area from any place outside that local area or any place outside the State or from outside India, for consumption, use or sale therein, whether by a dealer or an importer other than a dealer himself or by any other person;"

57. Section 2(1)(h) of Uttar Pradesh Tax on Entry of Goods into Local Area Act, 2007 and Section 2(1)(c) of the Uttarakhand Tax on Entry of Goods into Local Area Act, 2009 has been mentioned wherein the definition clause specifically includes "into a local area from any place outside the territory of India'.

58. The plain and literal construction when put to Section 3 read with Section 2(d) clearly means that goods entering into local area from any place outside the local area or outside the State are to be charged with entry tax. Foreign territory would be a place which is not only outside the local area but also outside the State. The writ petitioners are trying to introduce words of limitation in the definition clause. The interpretation which is sought to be put up is that both the phrases be read as:

> (1) "from any place outside that local area but within that State";
>
> (2) any place outside the State but within India.

59. It is well known rule of statutory interpretation that by process of interpretation the provision cannot be re-written nor any word can be introduced. The expression "any place" before the words "outside the State" is also indicative of vide extent. The words 'any place' cannot be limited to a place within the territory of India when no such indication is discernible from the provisions of the Act.

60. The Entry tax legislations are referable to Entry 52 of List II of Seventh Schedule of the Constitution. Entry 52 also

provided a legislative field, namely, 'taxes on the entries of goods into a local area for consumption, use or sale therein'. Legislation is thus concerned only with entry of goods into a local area for consumption, use or sale. The origin of goods has no relevance with regard to chargeability of entry tax. In this context reference is made to judgment of Federal Court reported in Miss Kishori Shetty v. The King, AIR 1950 FC 69 (1950 RLW 46). The question which was considered in the above case was as to whether Item No.31 of List II in the Seventh Schedule of Government of India Act, 1935 which provided "intoxicated liquor and narcotic drugs" whether included foreign liquors. The arguments that provincial legislature has no power to restrict or prevent the goods imported from foreign country, was repelled. In paragraph 4 of the judgment following has been held:

> "4. Now, under S. 100 of the Constitution Act the Provincial Legislature has, subject to the other sub-sections of that section, the exclusive power to make laws with respect to matters enumerated in List II in the sch. VII. Item 31 of that List comprises "Intoxicating liquor and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs"
>
> subject to certain reservations not material here. Prima facie, the offending provisions are within this legislative power. But counsel for the appellant drew attention to Item 19 of List 1 which covers "Import and export across customs frontier as defined by the Dominion Government", and argued that if "intoxicating liquors" in Item 31 of List II were held to include also liquors imported, from abroad, then the Provincial Legislature, by prohibiting possession of such liquors by all persons, whether private consumers, common carriers, or warehouse-men, could defeat the power of the Federal Legislature to regulate imports of foreign liquors across the sea or land frontiers of British India which are customs frontiers as defined by the Central Government and thus seriously jeopardize an important source of central customs revenue. As under S. 100, Constitution Act, the Provincial legislative powers under List II were subject to the exclusive powers of the Federal Legislature in List I, the Bombay Act to the extent to which it trenched upon the subject of Item 19 of the latter List must, it was submitted, be regarded as a nullity. We are unable to accede to this contention. As pointed out by this Court in Bhola Prasad v. Emperor, 1942 F.C.R. 17 : (A.I.R 1912 F.C. 17 : 43 Cr. L.J. 481 F.C.) the legislative power given to the Provinces under Item 81 of List II is expressed in wide and unqualified teems

> which in their natural and ordinary sense are apt to cover such an enactment as S. 14□B in its amended form, and we see nothing in the Federal Legislative List and more particularly in Item 19 to lead us to out down the fall meaning of the Provincial entry by excluding foreign liquors from its purview. There is, in our view, no irreconcilable conflict here such as would necessitate recourse to the principia of Federal supremacy laid down in S. 100, Constitution Act. Section 14□B does not purport to restrict or prohibit dealings in liquor in respect of its importation or exportation across the sea or land frontiers of British India. It purports to deal with the possession of intoxicating liquors which, in the absence of limiting words, must include foreign liquor. It is far fetched, in our opinion, to suggest that, in so far as the provision covers foreign liquors, it is legislation with respect to import of liquors into British India by sea or land."

61. To the same effect judgment of this Court in State of Bombay vs. S.F.N. Balsara, AIR 1951 SC 318 is referred. The submission which has been pressed by the learned counsel for the writ petitioners is that in a taxing statute one has to merely look into the text and there is no room for any intentment in deciding liability of the subject to tax regard must be had to plain and strict letter of law. Reliance has been placed on the judgment CIT v. Vatika Township (P) Ltd., (2015) 1 SCC 1. In paragraph 41.2 and paragraph 41.3 following has been held:

> "41.2. At the same time, it is also mandated that there cannot be imposition of any tax without the authority of law. Such a law has to be unambiguous and should prescribe the liability to pay taxes in clear terms. If the provision concerned of the taxing statute is ambiguous and vague and is susceptible to two interpretations, the interpretation which favours the subjects, as against the Revenue, has to be preferred. This is a well□established principle of statutory interpretation, to help finding out as to whether particular category of assessee is to pay a particular tax or not. No doubt, with the application of this principle, the courts make endeavour to find out the intention of the legislature. At the same time, this very principle is based on "fairness" doctrine as it lays down that if it is not very clear from the provisions of the Act as to whether the particular tax is to be levied to a particular class of persons or not, the subject should not be fastened with any liability to pay tax. This principle also acts as a balancing factor between the two jurisprudential theories of justice — Libertarian theory on the one hand and Kantian theory along with Egalitarian theory propounded by John Rawls on the other hand.

> 41.3. Tax laws are clearly in derogation of personal rights and property interests and are, therefore, subject to strict construction, and any ambiguity must be resolved against imposition of the tax. In Billings v. United States, the Supreme Court clearly acknowledged this basic and long□ standing rule of statutory construction: (L Ed p. 598) "Tax statutes ... should be strictly construed; and if any ambiguity be found to exist, it must be resolved in favour of the citizen."

62. Further, in Mathuram Agrawal v. State of M.P., 1999(8) SCC 667, in paragraph 12 following has been stated:

> "12....The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter."

63. There cannot be any dispute to the proposition as laid down by this Court in the above noted cases. Statutes which are in consideration are the statutes where clear charging provision has been enacted and charging of entry tax is on entry of the scheduled goods into a local area for consumption, use or sale. Thus, the charging event arises on entry of scheduled goods into a local area. Any goods which are entering into a local area of a State whether coming from another local area of State, any other State or outside the country, the charging event is same for all goods entering into local area. We, thus, are of the clear view that charging Section is clear, unambiguous and the provisions cannot be read to mean that the imported goods coming from outside the country are excluded from charge of entry tax. No such indication is discernible from any provision of the Act. Charging event is complete as and when goods enter into local area for use, sale or consumption irrespective of its origin. We, thus, are of the view that definition clause, Section 2(d)

read with Section 3 does not exclude the charging of the entry tax on goods entering into local area for consumption, use or sale from outside the country.

64. In so far as reference of Section 2(c) of the Bihar Act, 1993 as amended in 2003 by adding an explanation and as amended in 2006 by inserting a new Section 2(c), Section 2(1)

(c) of Uttar Pradesh Tax on Entry of Goods into Local Area Act, 2007, Section 2(1)(c) of the Uttarakhand Tax on Entry of Goods into Local Areas Act, 2009 as well as Section 2(1)(c) of the West Bengal Tax on Entry of Goods into Local Areas Act, 2012 which expressly includes entering into local area from any place outside the territory of India, we only say that the said inclusion of words 'from outside the India' is a provision made by way of abundant caution.

65. The Bihar Amendment Act, 2006 by which Section 2(c) was inserted by including clause (iii) is also by way of abundant caution and to provide it expressly which was already included in the definition of Section 2(c) read with Section 3.

66. Similarly when by Bihar Act 11 of 2003 Section 2 was amended in following manner:□ "2. Amendment of Section□2 of Bihar Act 16, 1993□

i)After the proviso to sub□section(e) of section□2 of the Act, the following explanation shall be inserted and shall be deemed always to have been so inserted□"Explanation□ Entry of goods into a local area for consumption, use or sale therein from any place outside the territory of India shall also be deemed to be an entry of goods for the purposes of this Act.

....." the intent and purpose of amendment was clear that it was clarificatory and explanatory. It did not introduce a concept which was not already there.

67. In Section 2(d) the word used is 'any place outside that local area or outside the State'. The word 'any' is a word of very wide meaning and use of word 'any' excludes any limitation. We, thus, are of the view that all the three legislations clearly did not exclude goods coming from outside the territory of India and the definition of entry of goods read with charging section clearly included all goods entering into a local area. Thus, the submissions of learned counsel for the petitioners that entry tax legislation did not include imported goods cannot be accepted.

Entry 41 & 83 of List I and Entry 52 of List II

68. Issue Nos. 2 and 3 being interrelated are being taken together. Entry tax legislation by the State Legislature are referable to Entry 52 List II as it exist prior to 101 st Amendment Act, 2016, which was as follows:□ "Taxes on the entry of goods into a local area for consumption, use or sale therein."

69. The submission, which has been pressed to impugn the State legislation is that the entry tax legislation intrude into the field which is reserved to Parliament under Entry 41 and Entry 83 of List I, which are as follows:□Entry 41– "Trade and commerce with foreign countries;

import and export across customs frontiers; definition of customs frontiers."
Entry 83 – "Duties of customs including export duties."

70. In so far as trade and commerce with foreign countries, import and export across the customs frontiers and definition of customs frontiers, it is the Parliament which has exclusive legislative competence to make a law under Entry 41 and under Entry 83 on duties of customs including export duties.

71. The Constitution of India, Part XI, Chapter I deals with legislative relations, legislative powers of Parliament and State Legislatures are clearly demarcated. Power to tax is an incidence of sovereignty and there is a clear demarcation of taxing field, which has been earmarked to the Parliament as well as to the State Legislatures. Taxing power of both Union and State Legislatures are mutually exclusive and has been clearly demarcated. This is further clear by the fact that in List III, i.e. Concurrent List, no taxing entry is included except the entry of stamp duty & levying of fee in respect of any of the matters in List III but not including fees taken in any Court.

72. Constitution Bench of this Court in Godfrey Phillips India Ltd. & Anr. Vs. State of U.P. & Ors., (2005) 2 SCC 515, had elaborately considered the entries in Seventh Schedule of the Constitution of India. Following was laid down in Paragraphs 44 and 45:□ "44. The Indian Constitution is unique in that it contains an exhaustive enumeration and division of legislative powers of taxation between the Centre and the States. This mutual exclusivity is reflected in Article 246(1) and has been noted in H.M. Seervai's Constitutional Law of India, 4th Edn., Vol. 1 at p. 166 in para 1A.25 where, after commenting on the problems created by the overlapping powers of taxation provided for in other countries with federal structures such as the United States, Canada and Australia, the learned author opined:

> "The lists contained in Schedule VII to the Government of India Act, 1935, provided for distinct and separate fields of taxation, and it is not without significance that the concurrent legislative list contains no entry relating to taxation but provides only for 'fees' in respect of matters contained in the list but not including fees taken in any court. List I and List II of Schedule VII thus avoid overlapping powers of taxation and proceed on the basis of allocating adequate sources of taxation for the federation and the provinces, with the result that few problems of conflicting or competing taxing powers have arisen under the Government of India Act, 1935. This

scheme of the legislative lists as regards taxation has been taken over by the Constitution of India with like beneficial results."

45. This view has also been reiterated in Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45: (SCC pp. 92□93, paras 75 & 76) "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.

... Thus, in our Constitution, a conflict of the taxing power of the Union and of the States cannot arise." (See also State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201.)"

73. This Court further held that in construction of a taxing entry, an interpretation which may lead to overlapping must be eschewed. If the taxing power is within a particular legislative field, it would follow that other fields in the legislative lists must be construed to exclude this field. In Para 46,following was held :

"46. Therefore, taxing entries must be construed with clarity and precision so as to maintain such exclusivity, and a construction of a taxation entry which may lead to overlapping must be eschewed. If the taxing power is within a particular legislative field, it would follow that other fields in the legislative lists must be construed to exclude this field so that there is no possibility of legislative trespass."

74. Entries in VIIth Schedule are not powers but fields of legislation. It is also well settled that in deciding whether any particular enactment is within the purview of one Legislature or the other, it is pith and substance of the legislation that has to be looked into. Whenever a State legislation is challenged as being under the competence of the State Legislature, the test, which has been laid down by this Court is that one must find out by applying the rule of pith and substance that whether the legislation falls within any of the List II, if it does, no further question arises. Attack on the ground of legislative competence must fail. This Court in State of A.P. & Ors. Vs. Mcdowell & Co. & Ors., (1996) 3 SCC 709 laid down following in Paragraph 36:□"36. In view of our finding that the impugned enactment is perfectly within the legislative competence of the State Legislature and is fully covered by Entry 8 read with Entry 6 of List II, it is not necessary for us to deal with the arguments based upon clause (3) of Article 246 of the Constitution except to say

the following: once the impugned enactment is within the four corners of Entry 8 read with Entry 6, no Central law whether made with reference to an entry in List I or with reference to an entry in List III can affect the validity of such State enactment. The argument of occupied field is totally out of place in such a context. If a particular matter is within the exclusive competence of the State Legislature, i.e., in List II that represents the prohibited field for the Union. Similarly, if any matter is within the exclusive competence of the Union, it becomes a prohibited field for the States. The concept of occupied field is really relevant in the case of laws made with reference to entries in List III. In other words, whenever a piece of legislation is said to be beyond the legislative competence of a State Legislature, what one must do is to find out, by applying the rule of pith and substance, whether that legislation falls within any of the entries in List II. If it does, no further question arises; the attack upon the ground of legislative competence shall fail...."

75. The distribution of power between Union and States is done in a mutually exclusive manner as is reflected by precise and clear field of legislation as allocated under different list under the Seventh Schedule. No assumption of any overlapping between a subject allocated to Union and State arises. When the field of legislation falls in one or other in Union or State Lists, the legislation falling under the State entry has always been upheld. The Scheme of distribution of legislative power between Union and States in the Constitution of India relies on the distribution of legislative power between the Federal Government and Provincial Government as contained in Seventh Schedule of the Government of India Act, 1935. The Government of India Act, 1935 has been referred to as Constitution Act by the Privy Council. In this context, reference is made to a judgment of Federal Court reported in AIR 1942 FC 33, The Province of Madras Vs. Messrs. Boddu Paidanna and Sons.(1942 FCR 90), the Madras Legislature has enacted Madras General Sales Tax Act, 1939. The respondent was carrying on business which consists of purchase of ground nuts for the purpose of extracting oil from the kernels of the nuts and the making of groundnut cake out of the residue was assessed to tax under the 1939 Act. The levy of tax was challenged by the respondent before the District Munsif and the High Court of Madras on the ground that first sale of goods manufactured in the Province was a duty of excise, which is not within the competence of Provincial Legislature. The High Court accepted the challenge and held that State Legislature was not competent to tax. In the Government of India Act, 1935, the Federal Legislature, under List I Entry 45, has an exclusive power to impose duties of excise whereas the Provincial Legislature, under List II Entry 48, has an exclusive power to impose taxes on the sale of goods. CHIEF JUSTICE GWYER reversing the judgment of the High Court held that duties are levied upon the manufacturer or producer in respect of manufacturer or production of the commodity taxed whereas tax on the sale of goods is levied as qua seller and not qua manufacturer. Federal Court held that there is no overlapping in law. Following observations were made:□"The duties of excise which the Constitution Act assigns exclusively to the Central Legislature

are, according to the Central Provinces Case, duties levied upon the manufactory or producer in respect of the manufacture or production of the commodity taxed. The tax on the sale of goods, which the Act assigns exclusively to the Provincial Legislatures, is a tax levied on the occasion of the sale of the goods. Plainly a tax levied on the first sale must in the nature of things be a tax on the sale by the manufacturer or producer ; but it is levied upon him qua seller and not qua manufacturer or producer. It may well be that a manufacturer or producer is sometimes doubly hit ; but so is the taxpayer in Canada who has to pay income-tax levied by the Province for provincial purposes, and also income-tax levied by the Dominion for Dominion purposes: see Caron v. The King [1924] A.C. 999; Forbes v. Att.-Gen. for Manitoba [1937] A.C. 260. If the taxpayer who pays a sales tax is also a manufacturer or producer of commodities subject to a central duty of excise, there may no doubt be an overlapping in one sense ; but there is no overlapping in law. The two taxes which he is called on to pay are economically two separate and distinct imposts...."

76. Federal Court further laid down that manufacture and sale has no necessary connection and both are independent. It was further held that :-"....It is the fact of manufacture which attracts the duty, even though it may be collected later; and we may draw attention to the Sugar Excise Act in which it is specially provided that the duty is payable not only in respect of sugar which is issued from the factory but also in respect of sugar which is consumed within the factory. In the case of a sales tax, the liability to tax arises on the occasion of a sale, and a sale has No. necessary connexion with manufacture or production. The manufacturer or producer cannot of course sell his commodity unless he has first manufactured or produced it ; but he is liable, if at all, to a sales tax because he sells and not because he manufactures or produces; and he would be free from liability if he chose to give away everything which came from his factory.

In our opinion the power of the Provincial Legislatures to levy a tax on the sale of goods extends to sales of every kind, whether first sales or not; and we regret that we are unable to agree with the contrary opinion which has been expressed by the High Court...."

77. The above judgment of Federal Court was upheld by Privy Council in The Governor General in Council Vs. The Province of Madras, reported in 58 L.W. 228. LORD SIMONDS held that in event a controversy should arise whether one or other Legislature is not exceeding its own, and encroaching on the other's, constitutional legislative power, and in such a controversy it is a principle, that it is not the name of the tax but its real nature, its "pith and substance", which must determine into what category it falls. After referring to the provisions of Madras General Sales Tax Act, 1939, Lordship opined that its real nature, its pith and substance is that it imposes a tax on the sale of goods. The Privy Council further observed that the Indian Constitution (The Government of India Act, 1935) contains what purports to be an exhaustive enumeration and division of legislative powers between the Federal and the Provincial Legislatures. Upholding the Legislative power of the

Provincial Legislature, the Privy Council laid down following:□ "....An exhaustive discussion of this subject, from which their Lordships have obtained valuable assistance, is to be found in the judgment of the Federal Court in re the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act No. 14 of 1938 ('39) 26 A.I.R. 1939 F.C. 1. Consistently with this decision, their Lordships are of opinion that a duty of excise is primarily a duty levied upon a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax upon goods not upon sales or the proceeds of sale of goods. Here again their Lordships find themselves in complete accord with the reasoning and conclusions of the Federal Court in the Boddu Paidanna case. Province of Madras v. Boddu Paidanna and Sons. Reported in ('42) 29 A.I.R. 1942 F.C. 33 The two taxes, the one levied upon a manufacturer in respect of his goods, the other upon a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the exercisable article leaves the factory or workshop for the first time upon the occasion of its sale. But that method of collecting the tax is an accident of administration: it is not of the essence of the duty of excise which is attracted by the manufacture itself...."

78. This Court in the case of Ram Krishna Ramnath Agarwal of Kamptee Vs. Secretary, Municipal Committee, Kamptee, AIR 1950 SC 11 had occasion to consider the levy of octroi on the entry of excisable goods. The appellant, on 30.11.1945 brought to Kamptee, from outside tobacco to make bidis. Municipality directed for recovery of the octroi duty under Section 66(1)

(e) of the Central Province Municipalities Act, 1922. The appellant challenged the leviability of octroi on the ground that tobacco is excisable goods under Central Excises and Salt Act, 1944. It is only Central Government, who is entitled to recover the excise duty and the octroi is not payable. The High Court had rejected the contention and the appeal was dismissed by this Court holding that levy of excise duty is not in conflict with the levy of an impost on the entry of the goods. In Para 10 of the judgment following has been held:□"10. This discussion clearly shows that the relevant question is what is the nature of the tax. Excise duty is a tax on manufactured goods. Octroi duty is a tax levied on the entry of goods within a particular area. Under the Excise Act, tobacco becomes excisable goods within the meaning of Item 9 in the Schedule. The subsequent use of such manufactured goods in making different articles only affects the rate of tax.

Therefore, tobacco becomes subject to excise duty when it reaches the stage of manufacture mentioned in Item 9 of the Schedule to the Excise Act. Even before it is converted into bidis or any other article mentioned in the entry it has become excisable goods and liable to pay excise duty. The levy of such duty is therefore not in conflict with the levy of an impost on the entry of the goods within a

certain area."

79. Another judgment which needs to be noticed is Jiyajeerao Cotton Mills Ltd., Birlanagar, Gwalior Vs. State of Madhya Pradesh, AIR 1963 SC 414. The appellant was a textile mill generating electricity for the purpose of running its mills. State of Madhya Pradesh imposed electricity duty under Central Provinces and Berar Electricity Duty Act, 1949. The imposition of duty was challenged on the ground that Provincial Legislature has no competence to impose electricity duty since on manufacture of electricity, it is Central Legislature under Entry 84 List I has competence. This Court repelling the contention laid down following in Paragraph 6:□"6. It is difficult to see how the levy of duty upon consumption of electrical energy can be regarded as duty of excise falling within Entry 84 of List I. Under that Entry what is permitted to Parliament is levy of duty of excise on manufacture or production of goods (other than those excepted expressly by that entry). The taxable event with respect to a duty of excise is "manufacture" or "production". Here the taxable event is not production generation of electrical energy but its consumption. If a producer generates electrical energy and stores it up, he would not be required to pay any duty under the Act. It is only when he sells it or consumes it that he would be rendered liable to pay the duty prescribed by the Act. The Central Provinces and Berar Electricity Act was enacted under Entry 48□B of List II of the Government of India Act, 1935. The relevant portion of that Entry read thus:

> "Taxes on the consumption or sale of electricity" Entry 53 of List II of the Constitution is to the same effect.....The language used in the legislative entries in the Constitution must be interpreted in a broad way so as to give the widest amplitude of power to the legislature to legislate and not in a narrow and pedantic sense. We cannot, therefore, accept either of the two grounds urged by Mr Viswanatha Sastri challenging the vires of the Act."

80. This Court in the above case further held that language used in the legislative entries in the Constitution must be interpreted in a broad way so as to give the widest amplitude of power to the legislature to legislate and not in a narrow and pedantic sense. Constitution bench judgment in D.G. Gose and Co. (Agents) Pvt. Ltd. Vs. State of Kerala & Anr., (1980) 2 SCC 410 also need to be noticed. The Kerala Building Tax Act, 1975 imposing tax on building under List II Entry 49 "tax on land and buildings" whereas List I Entry 86 "Taxes on the capital value of assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies."

81. Referring to the aforesaid two taxes under List I and List II, this Court laid down that two taxes are separate and distinct imposts and they cannot be said to be over□lap each other and shall be within the competence of the Legislatures concerned. In Para 9 of the judgment, following has been held:□"9. It has to be appreciated that in almost all cases, a tax has two elements which have been precisely stated by Seervai in his

"Constitutional Law of India", 2nd Edn., Vol. 2, as follows, at p. 1258:

> "Another principle for reconciling apparently conflicting tax entries follows from the fact that a tax has two elements: the person, thing or activity on which the tax is imposed, and the amount of the tax. The amount may be measured in many ways; but decided cases establish a clear distinction between the subject-matter of a tax and the standard by which the amount of tax is measured. These two elements are described as the subject of a tax and the measure of a tax." It may well be that one's building may imperceptibly be the subject-matter of tax, say the wealth tax, as a component of his assets, under Entry 86 (List I); and it may also be subjected to tax, say a direct tax under Entry 46 (sic 49)(List II), but as the two taxes are separate and distinct imposts, they cannot be said to overlap each other, and would be within the competence of the legislatures concerned."

82. Nine Judges Constitution Bench in Jindal Stainless Ltd. & Ors. Vs. State of Haryana & Ors., (2016) 11 SCALE 1 has also held that taxing power of the Union and the States are mutually exclusive. Approving the findings expressed by H.M. Seervai in its treatise Constitutional Law of India, following was observed:-

"……The celebrated author, in our opinion, was right in saying so for the taxing power of the Union and the States are mutually exclusive. While the Parliament cannot legislate on the subjects reserved for the States, the States cannot similarly trespass onto the taxing powers of the Union. If the Constitutional scheme does not allow the Parliament to usurp the taxing powers of the State Legislatures, such process of usurpation cannot also be permitted to take place in the garb of making Union executive's concurrence an essential pre-requisite for any taxing legislation. The following passage from Seervai's book (Vol. 3, Page 2607) is in this regard instructive:

> 23.43. Thirdly, the whole scheme of taxation in our Constitution would be completely dislocated if Article 304(b) included a tax. The taxing powers of the Union and the States have been made mutually exclusive so that Parliament cannot deprive the States of their taxing powers as has happened in countries where the powers of taxation are concurrent. It would be surprising if the Union legislature, i.e. Parliament could not take away the taxing powers of the State legislatures and yet it would be open to the Union executive Under Article 304(b) to deprive the State legislatures of their taxing powers."

83. As noted above, although, Nine Judges Constitution Bench had left the question open of validity of entry tax on goods imported from countries outside the territories of India, the two Hon'ble Judges, i.e. Justice R. Banumathi and Justice Dr. D.Y. Chandrachud while delivering separate judgment have considered the leviability of entry tax on imported goods in

detail. Both Hon'ble Judges have held that there is no clash/overlap between entry levied by the State under Entry 52 List II and the custom duty levied by the Union under Entry 83 List I. We have also arrived at the same conclusion in view of the foregoing discussions. We thus hold that entry tax legislations do not intrude in the legislative field reserved for Parliament under Entry 41 and under Entry 83 of List I. The State Legislature is fully competent to impose tax on the entry of goods into a local area for consumption, sale and use. We thus repel the submission of petitioner that entry tax legislation of the State encroaches in the Parliament's field.

Concept & Extent of Import

84. Now, we come to Issue No.IV relating to import and its extent. Import and export are concepts which denote trade between different countries. The term "import" signifies etymologically "to bring in". To import goods into the territory of India means to bring them into the territory of India from abroad. Black's Law Dictionary, Tenth Edition, defines import as follows:-"1. A product brought into a country from a foreign country where it originated imports declined in the third quarter. See parallel imports. 2. The process or activity of bringing foreign goods into a country the import of products affects the domestic economy in significant ways. Cf. Export, n. 3. Meaning; esp., implied meaning the court must decide the import of that obscure provision. 4.

Importance; significance time will tell the relative import of Judge Kozinski's decisions in American law."

85. In Advanced Law Lexicon, by P. Ramanatha Aiyar, 3rd Edition, import has been defined in following words:-"The term "import" means to bring into a country merchandise from abroad, and is the direct converse of the term "export" which means to carry from a state or country, as wares in commerce."

86. The Customs Act, 1962 defines the terms "import", "imported goods" and "importer" in Sections 2(23), 2(25) and 2(26) respectively, which are as follows;-"2(23) "import" with its grammatical variations and cognate expressions, means bringing into India from a place outside India;" 2(25) "Imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;

2(26) "importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes [any owner, beneficial owner] or any person holding himself out to be the importer;"

87. This Court had occasion to consider the concept of import and export in context of Article 286 of the Constitution of India in State of Travancore-Cochin & Ors. Vs. Shanmugha Vilas Cashewnut Factory, Quilon, AIR 1953 SC 333. Travancore-Cochin

General Sales Tax Act, Section 3 provided for levy of a tax on the total turnover of every dealer for each year. Facts of the case have been noted in Para 3 of the judgment, which are as follows:□"3. The respondents are dealers in cashewnuts in the State, and their business consists in importing raw cashewnuts from abroad and the neighbouring districts in the State of Madras in addition to purchases made in the local market, and, after converting them by means of certain processes into edible kernels, exporting the kernels to other countries, mainly America. The oil pressed from the shells removed from the cashewnuts was also exported. The Constitution having come into force on January 26, 1950, the respondent in each appeal claimed exemption under Article 286(l)(b) in respect of the purchases made from that date till May 29, 1950, the end of the account year. The Sales Tax authorities having rejected the claim, the respondents applied to the High Court under Article 226, and that court upheld the claim and quashed the assessments in so far as they related to the said period. The State has preferred the appeals."

88. This Court while considering the exemption under Article 286(1)(b) has laid down the following in Para 10:□"As regards the first mentioned category, we are of opinion that the transactions are not within the protection of clause (1)(b). What is exempted under the clause is the sale or purchase of goods taking place in the course of the import of the goods into or export of the goods out of the territory of India. It is obvious that the words "import into" and "export out of" in this context do not mean the article or commodity imported or exported. The reference to "the goods" and to "the territory of India" make it clear that the words "export out of" and "import into" mean the exportation out of the country and importation into the country respectively. The word "course" etymologically denotes movement from one point to another, and the expression "in the course of" not only implies a period of time during which the movement is in progress but postulates also a connected relation...."

89. The purchase for the purpose of import and similarly, the sale after import were held to be distinct legal transactions, it was held:□ "10. The phrase "integrated activities" was used in the previous decision to denote that "such a sale" (i.e. a sale which occasions the export) "cannot be dissociated from the export without which it cannot be effectuated, and the sale and the resultant export form parts of a single transaction". It is in that sense that the two activities — the sale and the export — were said to be integrated. A purchase for the purpose of export like production or manufacture for export, is only an act preparatory to export and cannot, in our opinion, be regarded as an act done "in the course of the export of the goods out of the territory of India", any more than the other two activities can be so regarded. As pointed out by a recent writer:

> "From the legal point of view it is essential to distinguish the contract of sale which has as its object the exportation of goods from this country from other contracts of sale relating to the same goods, but not being the direct and immediate cause for the

> shipment of the goods.... When a merchant shipper in the United Kingdom buys for the purpose of export goods from a manufacturer in the same country the contract of sale is a home transaction; but when he resells these goods to a buyer abroad that contract of sale has to be classified as an export transaction." This passage shows that, in view of the distinct character and quality of the two transactions, it is not correct to speak of a purchase for export, as an activity so integrated with the exportation that the former could be regarded as done "in the course of" the latter. The same reasoning applies to the first sale after import which is a distinct local transaction effected after the importation of the goods into the country has been completed, and having no integral relation with it. Any attempt therefore to invoke the authority of the previous decision in support of the suggested extension of the protection of clause (1)(b) to the last purchase for the purpose of export and the first sale after import on the ground of integrated activities must fail."

90. The writ petitioners have also placed reliance on the contents of Article 286 of the Constitution especially Article 286(1)(b) read with Article 286(2). Article 286(1) and (b) are as follows:

> "Article 286. Restrictions as to imposition of tax on the sale or purchase of goods:☐
> (1)No law of a State shall impose, or authorise the imposition of, a tax on the supply of goods or of services or both, where such supply takes place☐
>
> (a)... ... ...
>
> (b) in the course of the import of the goods or services or both into, or export of the goods or services or both out of, the territory of India."

91. It is supported that though Article 286 deals with the restriction on the State legislative power qua imposition of tax on the sale or purchase of goods nevertheless the formulation of the principle by the Parliament with regard to "in the course of the import or export" clearly shows that the legislative domain in this regard is with Parliament and not with States. In point of fact, any legislation relating to the "course of import or export" has to relate to Entry 41 read with Entry 83 of List I and it cannot relate to any other Entry and definitely not to any Entry in State List. Reliance was also placed on Section 5(3) of the Central Sales Tax Act, 1956. On the strength of Section 5, it is sought to be contended that on parity of logic the first sale after the import be treated as in the course of import.

92. Article 286 of the Constitution provides for restrictions as to the imposition of the tax on the sale or purchase of goods. The subject-matter of laws made by Parliament and legislatures of the States as per Article 246 read with Seventh Schedule and Article 245 are subject to the provisions of the Constitution. Legislative power as contained in List II is thus subject to express restrictions as imposed by Article

286. Article 286 sub-clause (1) uses the expression "in the course of the import of the goods". The concept "in the course of import of goods" as used in Article 286(1) can very well be implied while considering the concept of the import of goods. In so far as Section 5 sub-section (3) of Central Sales Tax Act, 1956, the said provision provides that last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export. Section 5(3) is with regard to the export of the goods out of the territory of India and has not been used with regard to the concept of import. Section 5(1), (2), (3) are relevant which are to the following effect:

> "Section 5. When is a sale or purchase of goods said to take place in the course of import or export.-
> (1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.
>
> (2) A sale or purchase of good shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.
>
> (3) Not withstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export."

93. The submissions of the writ petitioners on the strength of Section 5(3) that even first sale after the import should be treated during the course of the import is not supported by

the concept as contained in Section 5 of the 1956 Act and the reliance on the said provision is wholly misplaced.

94. As noted above, the restriction in the legislative power of the State as contained in Article 286 is with regard to taxing on sale or purchase of goods which takes place outside the State or in the course of import of the goods or services or export of goods or services. The restriction of Article 286 does not ipso facto can be placed while considering the legislative field of the State under Entry 52 and by virtue of Article 286 no restriction can be put on the legislative competence of the State in the field as defined under Entry

52. However, the concept underlined in "the course of import of the goods" as in Article 286(1)(b) can very well be applied to find out as to when the import of goods come to an end. We thus proceed to examine certain cases/judgments of this Court which were delivered in the context of Article 286.

95. The term import again came for consideration before this Court in J.V. Gokal & Co. (Private) Ltd. Vs. Assistant Collector of Sales Tax (Inspection) & Ors., AIR 1960 SC 595. This Court explained the word import and the phrase "in the course of the import of the goods into the territory of India". In paragraphs 9 and 11, following has been held:□ "9. What does the phrase "in the course of the import of the goods into the territory of India" convey? The crucial words of the phrase are "import" and "in the course of". The term "import" signifies etymologically "to bring in". To import goods into the territory of India therefore means to bring into the territory of India goods from abroad. The words "course" means "progress from point to point". The course of import, therefore, starts from one point and ends at another. It starts when the goods cross the customs barrier in foreign country and ends when they cross the customs barrier in the importing country. These words were subject of judicial scrutiny by this Court in State of Travancore□Cochin v. Shanmugha Vilas Cashew Nut Factory1. Construing these words, Patanjali Sastri, C.J., observed at p. 62:

"The word 'course' etymologically denotes movement from one point to another, and the expression 'in the course of' not only implies a period of time during which the movement is in progress but postulates also a connected relation." As regards the limits of the course, the learned Chief Justice observed at p. 68:

"It would seem, therefore, logical to hold that the course of the export out of, or of the import into the territory of India does not commence or terminate until the goods cross the customs barrier." Das, J., as he then was, in his dissenting judgment practically agreed with Patanjali Sastri, C.J., on the interpretation of the said

words. The learned Judge expressed his view at p. 92 thus:

> "The word 'course' conveys to my mind the idea of a gradual and continuous flow, an advance, a journey, a passage or progress from one place to another. Etymologically it means and implies motion, a forward movement. The phrase 'in the course of' clearly has reference to a period of time during which the movement is in progress. Therefore, the words "in the course of the import of the goods into and the export of the goods out of the territory of India 'obviously cover the period of time during which the goods are on their import or export journey'." We respectfully agree with the aforesaid observations of the learned Judges. The course of the import of the goods may be said to begin when the goods enter their import journey i.e. when they cross the customs barrier of the foreign country and end when they cross the customs barrier of the importing country." "11. The legal position vis□a□vis the import□sale can be summarised thus: (1) The course of import of goods starts at a point when the goods cross the customs barrier of the foreign country and ends at a point in the importing country after the goods cross the customs barrier; (2) the sale which occasions the import is a sale in the course of import; (3) a purchase by an importer of goods when they are on the high seas by payment against shipping documents is also a purchase in the course of import, and (4) a sale by an importer of goods, after the property in the goods passed to him either after the receipt of the documents of title against payment or otherwise, to a third party by a similar process is also a sale in the course of import."

96. Learned counsel for the petitioners has placed much reliance on Nine Judges Constitution Bench in re Sea Customs Act Case, AIR 1963 SC 1760. This Court in the aforesaid case had answered a reference made under Article 143(1). Three questions to be answered were as follows:□"(1) Do the provisions of Article 289 of the Constitution preclude the Union from imposing, or authorising the imposition of, customs duties on the import or export of the property of a State used for purposes other than those specified in clause (2) of that article?

(2) Do the provisions of Article 289 of the Constitution of India preclude the Union from imposing, or authorising the imposition of, excise duties on the production or manufacture in India of the property of a State used for purposes other than those specified in clause (2) of that article?

(3) Will sub□section (2) of Section 20 of the Sea Customs Act, 1878 (Act 8 of 1878), and sub□section (1□A) of Section 3 of the Central Excises and Salt Act, 1944 (Act 1 of 1944) as amended by the Bill set out in the annexure be inconsistent with the provisions of Article 289 of the Constitution of India?"

97. In the above context, this Court had examined the distribution of legislative power between the Union and the States. This Court held that there is no overlapping in the matter of taxation between the two Lists, i.e., List I and List II. This Court held that all customs duties including export duties are within the powers of Parliament with which States are not concerned. In Para 9 of the judgment, following observations are made:□"…..All customs duties, including export duties, relating as they do to transactions of import into or export out of the country are within the powers of Parliament. The States are not concerned with those. They are only concerned with taxes on the entry of goods in local areas for consumption, use or sale therein, covered by entry 52 in the State List. Except for duties of excise on alcoholic liquors and opium and other narcotic drugs, all duties of exercise are leviable by Parliament. Hence, it can be said that by and large, taxes on income, duties of customs and duties of excise are within the exclusive power of legislation by Parliament."

98. It is relevant to notice that this Court clearly noticed the power of States to levy entry tax on entry of goods in local area for consumption, sale or use. The above observations made by the Constitution Bench clearly support the submission of learned counsel for the State that power of State under Entry 52 was recognised while considering the Union's power to levy the customs duty. This Court further laid down that in the case of levy of customs duty, the taxable event is the import of goods within the customs barriers. In paragraph 26 of the judgment, following was stated:□"(26) Similarly in the case of duties of customs including export duties though they are levied with reference to goods, the taxable event is either the import of goods within the customs barriers or their export outside the customs barriers. They are also indirect taxes like excise and cannot in our opinion be equated with direct taxes on goods themselves. Now, what is the true nature of an import or export duty? Truly speaking, the imposition of an import duty, by and large, results in a condition which must be fulfilled before the goods can be brought inside the customs barriers i.e. before they form part of the mass of goods within the country. Such a condition is imposed by way of the exercise of the power of the Union to regulate the manner and terms on which goods may be brought into the country from a foreign land…."

99. Learned counsel for the writ petitioners has laid much emphasis on the observations made by nine □Judge Constitution Bench in paragraph 26 as quoted above. The above observations were made by the nine□Judge Constitution Bench while considering the nature of import and export. It was held that the imposition of import duty results in a condition which must be fulfilled before the goods can be brought inside the customs barriers i.e. before they form part of mass of goods within the country. When the goods land in the custom area of the Indian territory and released for the home consumption, it forms part of the mass of goods within the country and the importation is complete. We, thus, do not find any inconsistency in the constitutional concept of import as envisaged in Article 286(1)(b) and the concept of import as is contained in Customs Act, 1962.

100. This Court had also occasion to consider the issue as to when import would be completed in the case of Kiran Spinning Mills Vs. Collector of Customs, (2000) 10 SCC 228, following was held in paragraph 6:□"....The import would be completed only when the goods are to cross the customs barriers and that is the time when the import duty has to be paid and that is what has been termed by this Court in Sea Customs case (SCR at p. 823) as being the taxable event. The taxable event, therefore, being the day of crossing of customs barrier, and not on the date when the goods had landed in India or had entered the territorial waters, we find that on the date of the taxable event the additional duty of excise was leviable under the said Ordinance and, therefore, additional duty under Section 3 of the Tariff Act was rightly demanded from the appellants."

101. Similar view was expressed in the case of Garden Silk Mills Ltd. & Anr. Vs. Union of India & Ors., (1999) 8 SCC 744, in paragraph 18, which is to the following effect:□"18. It would appear to us that the import of goods into India would commence when the same cross into the territorial waters but continues and is completed when the goods become part of the mass of goods within the country; the taxable event being reached at the time when the goods reach the customs barriers and the bill of entry for home consumption is filed."

102. The law relating to customs has been consolidated by the Customs Act, 1962. The definitions of "import", "imported goods" and "importer" have already been noticed above. The definition of imported goods as given in Section 2(25) is □ any goods brought into India from the place outside India but does not include goods, which have been cleared for home consumption. The provision clearly contemplates that once the goods are released for home consumption, the character of imported goods is lost and thereafter no longer the goods could be called as imported goods. The import transit is only till the goods are released for home consumption. The taxing event for entry tax under Entry 52 List II is entirely different and has nothing to do with the customs duty. The State by imposing entry tax in any manner is not entrenching in the power of the Parliament to impose customs duty. The goods are released for home consumption only after payment of the customs duty due to the Central Government. The goods which are imported cannot be held to be insulated so as to not subject to any State tax, any such insulation of the imported goods shall be a protectionist measure which will be discriminatory and invalid. When all normal goods are subjected to State tax no exemption can be claimed by goods, which have been imported from payment of entry tax. To take a common example, all goods, which pass through a toll bridge are liable to pay toll tax, can it be said that the imported goods which after having been released from customs barriers and are passing through a toll bridge, are not liable to pay the toll tax, the answer has to be in No. Thus, the event for levy of customs duty, which is in the domain of the Parliament, is entirely different from that of event of entry tax. The liability to pay State entry tax arises only when goods enter into a local area for consumption, use and sale,

which event is entirely different and separate from the levy of a customs duty, which is on import.

103. Learned counsel for the petitioner has contended that the definition given in the provisions of the Customs Act, 1962 cannot control the scope and ambit of the Constitutional entries. It is submitted that Constitutional entries have to be read giving widest possible amplitude and have to be given wide meaning and their scope and ambit cannot be controlled by a Parliamentary Legislation or by the definitions given in a Parliamentary Legislation. In the case of ITC Ltd. Vs. Agricultural Produce Market Committee & Ors.(2002) 9 SCC 232, the Constitutional Bench in paragraph 32 laid down as under: □ "32. In State of A.P. v. McDowell & Co. also it was held that the ambit and scope of a constitutional entry cannot be determined with reference to a parliamentary enactment. If it is otherwise, it would result in Parliament enacting and/or amending an enactment thereby controlling the ambit and scope of the constitutional provision. That cannot be the law. The power to legislate with which we are concerned is contained in Article 246. The fields are demarcated in the various entries. On reading both, it has to be decided whether the legislature concerned is competent to legislate when its validity is questioned. The ambit and scope of an entry cannot be determined with reference to a parliamentary enactment."

104. There cannot be any dispute to the proposition as laid down by this Court in the above case that the scope and ambit of the Constitutional entries have to be given a wide meaning and scope. There is no inhibition on the Parliament in exercising its legislative power under Entry 41 List I to define customs frontiers and further legislate with regard to duties of customs. Even if we do not confine to the definition of imported goods as given in the Customs Act, 1962, the generally accepted meaning and definition of import as has been laid down in cases as noted above is that import commences when the goods leave the customs frontiers of the country from where the goods are imported and continue when the goods enters into the customs frontiers of imported country and ends when goods are released for home consumption. Till the event of import is over, Parliamentary Legislation, the control of Union continues for ensuring the realisation of the customs duties.

105. In view of the foregoing discussions, we are of the clear opinion that taxing event with regard to levy of customs duty by Parliament and levy of entry tax by States under Entry 52 List II are entirely different and separate. The taxing event pertaining to levy of entry tax occurs only after the taxing event of levy of customs duty is over. Thus, the State Legislation imposing entry tax in no manner encroaches upon the Parliamentary Legislation under Entry 41 and Entry 83. There is no invalidity in levy of entry tax by the States.

Original/Unbroken Package Theory

106. The Original Package/ Unbroken Package is a theory which was evolved by U.S. Supreme Court in reference to the imported goods. The genesis of the theory is from the Chief Justice Marshall, in the case of Brown Vs. The State of Maryland, 6 L.Ed. 678. State of Maryland has enacted a law that all importers of foreign articles or commodities shall, before they are authorized to sell, take out a license for which they shall pay fifty dollars. The above provision of the State of Maryland was challenged by Brown on the ground that the provision is repugnant to following two provisions in the Constitution of the United States:-

"1. To that which declares that 'no State shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'

2. To that which declares that Congress shall have power 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.'"

107. Chief Justice Marshall in above context has laid down following:-

".....It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

108. The Original Package theory is propounded from the aforesaid judgment. Another judgment of the U.S. Supreme Court, which relied on the case of Brown Vs. The State of Maryland and further formulated the doctrine is C. Adolph Low V. Alexander Austin, 20 L.Ed. 517. The facts and issue which arose in the aforesaid case had been noted in the beginning of the judgment, which is to the following effect:-

"The plaintiffs have been for several years past, and still are, importing, shipping and commission merchants, in the city of San Francisco, in the state of California. In 1868, they received, on consignment from parties in France, certain champagne wines of the value of $10,000, upon which they paid the duties and charges at the custom-house. They then stored the wine in their warehouse in San Francisco, in the original cases in which the wines were imported, where they remained for sale. While in this condition they were assessed as the property of the plaintiff, for state, city and country taxes, under the general revenue law of California, which subjects all property, real or personal, in the state, with certain exceptions to an ad valorem tax. The defendant was at the time the tax collector of the city and country of San Francisco, and as such officer levied upon the cases of wines thus stored, for the amount of the tax assessed and was about to sell them, when the plaintiffs paid the amount and the charges incurred, under protest, and then brought the present action in one of the district courts of the state, to recover back money paid. The district court gave judgment for the plaintiffs; the supreme court of the state reversed the judgment and the case is brought here on writ of error.

The simple question presented in this case for our consideration is whether imported merchandise, upon which the duties and charges at the custom-house have been paid, is subject to state taxation, whilst remaining in the original cases, unbroken and unsold, in the hands of the importer"

109. Justice Field relied on the statement made by Chief Justice Marshall in the case of Brown Vs. The State of Maryland as quoted above. Relying on the said judgment, Justice Field laid down following:-"....But the obvious answer to this position is found in the fact, which is in substance, expressed in the citations made from the opinions of Marshal and Taney, that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them in any shape, is within the constitutional prohibition....."

110. The law laid down in the above two cases is relied upon by the counsel for the petitioner to contend that original import package continues till the goods reaches to the premises/factory of the petitioner and during such continuance of import under original package, State has no jurisdiction or authority to levy any tax including the impugned entry tax.

111. We now proceed to first examine the subsequent judgments of the United States Supreme Court, which deal with the above mentioned two decisions of the United States Supreme Court. Michelin Tire Corporation Vs. W.L. Wages, Tax Commissioner, 46 L.Ed. 2d 495 is the case which is relied upon by the counsel for the State. In the above case, respondent has imported tires and tubes from France and Nova Scotia. Thus, articles were included in an inventory maintained in a wholesale distribution warehouse in the county. The Tax Commissioner and Tax Assessors of Gwinnett County assessed ad valorem property taxes against inventory of imported tires and tubes. The petitioner challenged it on the ground that State taxes were prohibited by Art. I, § 10, cl. 2, of the Constitution. The State Supreme Court held against the respondents that the tyres were subject to ad valorem property tax. The appeal was taken to the U.S. Supreme Court questioning the decision of the Georgia Supreme Court. Referring to the judgment of Low Vs. Austin as well as Brown Vs. The State of Maryland, the U.S. Supreme Court observed as under:-"Low v. Austin, supra, is the leading decision of this Court holding that the States are prohibited by the Import-Export Clause from imposing a nondiscriminatory ad valorem property tax on imported goods until they lose their character as imports and become incorporated into the mass of property in the State. The Court there reviewed a decision of the California Supreme Court that had sustained the constitutionality of California's nondiscriminatory ad valorem tax on the ground that the Import-Export Clause only prohibited taxes upon the character of the goods as imports and therefore did not prohibit nondiscriminatory taxes upon the goods as property. See 13 Wall., at 30-31 20 L Ed 517. This Court reversed on its reading of the seminal opinion construing the Import-Export Clause, Brown v. Maryland, 12 Wheat.

419, 6 L.Ed. 678 (1827), as holding that "(w)hilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition." 13 Wall., at 34 20 L Ed 517.

Scholarly analysis has been uniformly critical of Low v. Austin. It is true that Mr. Chief Justice Marshall, speaking for the Court in Brown v. Maryland, supra, at 442, 6 L Ed 678 said that "while (the thing imported remains) the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." Commentators have uniformly agreed that Low v. Austin misread this dictum in holding that the Court in Brown included nondiscriminatory ad valorem property taxes among prohibited "imposts" or "duties," for the contrary conclusion is plainly to be inferred from consideration of the specific abuses which led the Framers to include the Import□Export Clause in the Constitution. See, e. g., Powell, State Taxation of Imports When Does an Import Cease to Be an Import?, 58 Harv L Rev 858 (1945);

Note, The Supreme Court, 1958 Term, 73 Harv L Rev 126, 176 (1959); Early & Weitzman, A Century of Dissent: The Immunity of Goods Imported for Resale From Nondiscriminatory State Personal Property Taxes, 7 Sw U L Rev 247 (1975); Dakin, The Protective Cloak of the Export□Import Clause: Immunity for the Goods or Immunity for the Process?, 19 La L Rev 747 (1959).

Our independent study persuades us that a nondiscriminatory ad valorem property tax is not the type of state exaction which the Framers of the Constitution or the Court in Brown had in mind as being an "impost" or "duty" and that Low v. Austin's reliance upon the Brown dictum to reach the contrary conclusion was misplaced."

112. U.S. Supreme Court further held:□"Nothing in the history of the Import□Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are no longer in import transit was the type of exaction that was regarded as objectionable by the Framers of the Constitution. For such an exaction, unlike discriminatory state taxation against imported goods as imports, was not regarded as an impediment that severely hampered commerce or constituted a form of tribute by seaboard States to the disadvantage of the inferior States.

It is obvious that such nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the Clause's prohibition. By definition, such a tax does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation."

113. It was further held:

> "....The Import□Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies....."

114. Referring to Brown Vs. The State of Maryland, it was further held:□"The Court stated that there were two situations in which the prohibition would not apply. One was the case of a state tax levied after the imported goods had lost their status as imports. The Court devised an evidentiary tool, the "original package" test, for use in making that determination. The formula was: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." Id., at 441□442 6 L Ed 678. "It is a matter of hornbook knowledge that the original package statement of Justice Marshall was an illustration, rather than a formula, and that its application is evidentiary, and not substantive . . . . Galveston v. Mexican Petroleum Corp., 15 F2d 208 (SD Tex 1926)."

115. The U.S. Supreme Court concluded by holding:□"Thus, it is clear that the Court's view in Brown was that merely because certain actions taken by the importer on his imported goods would so mingle them with the common property within the State as to "lose their distinctive character as imports" and render them subject to the taxing power of the State, did not mean that in the absence of such action, no exaction could be imposed on the goods. Rather, the Court clearly implied that the prohibition would not apply to a state tax that treated imported goods in their original packages no differently from the "common mass of property in the country"; that is, treated it in a manner that did not depend on the foreign origins of the goods."

116. Only one more judgment of U.S. Supreme Court needs to be noticed is Joanne Limbach Tax Commissioner of Ohio Vs. The Hooven & Allison Company, 80 L.Ed. 2d 356. This Court referring to C. Adolph Low Vs. Austin (supra), Brown Vs. The State of Maryland (supra) and Michelin Tire Corporation Vs. W.L. Wages Tax Commissioner (supra) made following observations:□"In Low v. Austin, supra, this Court, in an opinion by Justice Field, unanimously enunciated the "original□package" doctrine, although perhaps not for the first time, see Brown v. Maryland, 12 Wheat 419, 442, 6 L Ed 678 (1827). It held that, under the Import□Export Clause, goods imported from a foreign country are not subject to state ad valorem property taxation while remaining in their original packages, unbroken and unsold, in the hands of the importer.

In Michelin Tire Corp. v. Wages, supra, an importer challenged the assessment of Georgia's nondiscriminatory ad valorem property tax upon an inventory of imported tires and tubes

maintained at a wholesale distribution warehouse. This Court rejected the challenge to the state tax on the imported tires.1 It found that in the history of the Import□Export Clause, there was nothing to suggest that a tax of the kind imposed on goods that were no longer in import transit was the type of exaction that was regarded as objectionable by the Framers. The tax could not affect the Federal Government's exclusive regulation of foreign commerce since it did not fall on imports as such. Neither did the tax interfere with the free flow of imported goods among the States. The Clause, while not specifically excepting nondiscriminatory taxes that had some impact on imports, was not couched in terms of a broad prohibition of every tax, but prohibited States only from laying "Imposts or Duties," which historically connoted exactions directed only at imports or commercial activities as such. The Court concluded that its reliance a century earlier in Low v. Austin "upon the Brown dictum . . . was misplaced." 423 US, at 283, 46 L Ed 2d 495, 96 S Ct 535.

Chief Justice Taney's opinion in the License Cases, 5 How 504, 12 L Ed 256 (1847), was carefully analyzed, with the Court concluding that that opinion had been misread in Low.

> "Precisely contrary" to the reading it was given in Low, Chief Justice Taney's License Cases opinion was authority "that nondiscriminatory ad valorem property taxes are not prohibited by the Import□ Export Clause."

423 US, at 301, 46 L Ed 2d 495, 96 S Ct 535. It followed, this Court concluded, that "Low v Austin was wrongly decided" and "therefore must be and is, overruled."....."

117. Justice Blackmun delivering the judgment in the above case clearly noticed the departure in the opinion of U.S. Supreme Court and abandonment of Original Package Doctrine, it is useful to quote following observations of the Court:□ "To repeat: we think it clear that this Court in Michelin specifically abandoned the concept that the Import□Export Clause constituted a broad prohibition against all forms of state taxation that fell on imports. Michelin changed the focus of Import□Export Clause cases from the nature of the goods as imports to the nature of the tax at issue. The new focus is not on whether the goods have lost their status as imports but is, instead, on whether the tax sought to be imposed is an "Impost or Duty." See P. Hartman, Federal Limitations on State and Local Taxation, § 5:4 (1981); Hellerstein, State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?, 75 Mich L Rev 1426, 1427□1434 (1977). Cf. Montana v. United States, 440 U.S. 147, 59 L Ed 2d 210, 99 S Ct 970 (1979).

Hooven I held that, under the Clause, a nondiscriminatory state ad valorem personal property tax could not be imposed until the imported goods had lost their status as imports by being removed from their original packages. This decision was among the progeny of Low v. Austin for it, too, was decided on the original□package doctrine. Thus, Hooven I is inconsistent with the later ruling in Michelin that such a tax is not an "Impost or Duty" and

therefore is not prohibited by the Clause. Although Hooven I was not expressly overruled in Michelin, it must be regarded as retaining no vitality since the Michelin decision. The conclusion of the Supreme Court of Ohio that Hooven I retains current validity in this respect is therefore in error. A contrary ruling would return us to the original-package doctrine. So that there may be no misunderstanding, Hooven I, to the extent it espouses that doctrine, is not to be regarded as authority and is overruled."

118. From the above, it is clear that the U.S. Supreme Court itself has abandoned the Original Package theory and it has been held that imported goods are not immuned from non-discriminatory ad valorem taxes imposed by the State.

119. Now, we come to the judgment of Federal Court and this Court wherein the aforesaid doctrine has been considered and specifically departed with.

120. Federal Court in the case of The Province of Madras Vs. Messrs. Boddu Paidanna and Sons.(supra) has noticed the case of Brown Vs. The State of Maryland (supra). The Federal Court held that in our Constitution no such question arises and made the following observations:-"....In the Indian Constitution Act no such question arises; and the right of the Provincial Legislatures to levy a tax on sales can be considered without any reference to so formidable a power vested in the Central Government. Lastly, the prohibition in the American Constitution is against the laying of "any imposts or duties on imports or exports"; the prohibition is not merely against the laying of duties of customs, but is expressed in what we conceive to be far wiser terms ; and it does not appear to us that it would necessarily follow from the principle of the Maryland decision that in India the payment of customs duty on goods imported from abroad or the payment of an excise duty on goods manufactured or produced in India can be regarded as conferring some kind of licence or title on the importer or manufacturer to sell his goods to any purchaser without incurring a further liability to tax. That was the view which commended itself to the Court in the Maryland Case and it was a view adopted and argued before us. The analogy with the American case is an attractive one; but for the reasons which we have given we are wholly unable to accept it."

121. In State of Bombay & Anr. Vs. F.N. Balsara, AIR 1951 SC 318, this Court has clearly held that Original Package Theory has no application in this country. In Paragraph 23, following has been held:- "23. I find considerable force in the opinion thus expressed by Gwyer, C.J. and agree that the "original package" doctrine has no application to this country. In the United States, the widest meaning could be given to the Commerce clause, for there was no question of reconciling that clause with another clause containing the legislative power of the State. Under the provisions of the Government of India Act, a limited meaning must be given to the word "import" in Entry 19 of List I in order to give effect to the very general words used in Entry 31 of List II."

122. One more judgment of this Court, which needs to be noticed is Gramophone Company of India Ltd. Vs. Birendra Bahadur Pandey & Ors., (1984) 2 SCC 534,in which again Original Package doctrine has been disapproved. In Paragraph 30, following has been laid down: "…..We must however say that the "original package doctrine" as enunciated by Chief Justice Marshall on which reliance was placed was expressly disapproved first by the Federal Court in the Province of Madras v. Boddu Paidanna and again by the Supreme Court in State of Bombay v. F.N. Balsara….."

123. In view of the foregoing discussions, we conclude that goods imported after having been released from customs barriers are not immuned from any kind of State taxation, which fall equally on other similar goods and the submission of the learned counsel for the petitioner that immunity from State taxation shall continue till it reaches in the premises where it is to be taken for consumption, sale and use cannot be accepted.

NON-INCLUSION OF CUSTOM DUTY IN PURCHASE VALUE

124. The petitioners referring to definition of purchase value as given in Section 2(j) of the Orissa Act, 1999 and other entry tax enactments contends that the definition of purchase value having not included "custom duty" legislature intended that no entry tax be levied on the purchase value. For ready reference Section 2(j) is reproduced below: "2(j). "Purchase value" means the value of scheduled goods as ascertained, from original invoice or bill and includes insurance charges, excise duties countervailing charges, sales tax, transport charges, freight charges and all other charges incidental to the purchase of such goods:

> Provided that where purchase value of any scheduled goods is not ascertainable on account of non-availability or non-production of the original invoice or bill or when the, invoice or bill produced is proved to be false or if the scheduled goods are required or obtained otherwise than by way of purchase, then the purchase value shall be the value or the price at which the scheduled goods of like kind or quality is sold or is capable of being sold in open market;"

125. From the definition of purchase value given in 2(j) three aspects are noticeable. Firstly, purchase value means the value of scheduled goods as ascertained from original invoice or bill. Secondly, it includes insurance charges excise duty and other charges mentioned therein. And thirdly, other charges incidental to the purchase of such goods. The original invoice or bill of scheduled goods, generally include the entire value including the import duty or custom duty and in any event the inclusion of 'all other charges incidental to the purchase of such goods' has to necessarily mean all charges including custom duty which is incidental to the purchase. Thus, non-inclusion of custom duty specifically in definition of purchase value in

2(j) is inconsequential and cannot lead to mean that the legislature never intended to include the imported goods under the entry tax legislation. This Court had occasion to consider a provision in Maharashtra Municipalities (Octroi) Rules, 1968 which contained provision to determine the value on which octroi is leviable. In Garware Nylons Ltd. vs. Pimpri Chinchwad Mahanagar Palika and Ors, (1995) 3 SCC 345 Rule 17 came for consideration. The facts were given in para 2 of the judgment in following manner:

> "2.The appellant is a public limited company. It manufactured nylon and polyester yarn. Between September 1983 and August 1984 it imported goods liable to octroi. The Corporation authorities claimed that the appellant was liable to include the customs duty paid by it in the valuation of the goods as it was a component of the value of the said goods for the purpose of Rule 17(a). The appeal filed by the appellant before the Civil Judge failed. The order was challenged by way of writ petition under Article 226 of the Constitution. The High Court negatived the claim. Rule 17(a) is extracted below :
>
> "17: Provisions to determine value where octroi is leviable ad□valorem. □ (a) If the original invoice is produced by the importer and accepted by the Octroi Officer the value of the goods means the value made up of the cost price of the goods as ascertained from that invoice plus freight charges, carrier charges, shipping dues, insurance, excise duties, sales tax, vend fee and all other incidental charges incurred by the importer till the arrival of the goods within the octroi limits".

Since the words “custom duty” are not mentioned in the rule, it gave rise to an argument before the High Court and in this Court whether it could be included while determining the value under Rule 17. The High Court relying basically on the decision of this Court in Shroff & Co. v. Municipal Corpn of Greater Bombay, 1989 Supp(1) SCC 347 held that even though the customs duty was not mentioned in the rule yet it was liable to be included while determining the value under Rule 17. The learned counsel for the appellant urged that since the words “custom duty” do not find place in Rule 17, they could not be included for determining valuation under the rule. Reliance was also placed on Goodyear India Ltd. v. State of Haryana, (1990) 2 SCC 71 and McDowell & Co. Ltd. v. CTO, (1977) 1 SCC 441 and it was urged that in case the provision in taxing statute was susceptible to two constructions, then the one favouring the assessee should be accepted.”

126. Similar argument was raised before Court that custom duty having not mentioned in Rule 17, no octroi is leviable on import of goods. The argument was repelled by this Court in para 4 of the judgment which is to the following effect:

> "4. Rule 17 provides for determination of value of goods brought inside the Corporation or Municipal Board for consumption, use or sale. The use of various words in the rule widens its scope. It provides for inclusion of cost price, charges such as freight, carrier, customs duties and then all other incidental charges, dues etc. The mention of various charges and duties is more illustrative than exhaustive. It only indicates that it is not only the expenses which are usually incurred in normal course of commercial activity, but any incidental expenditure shall constitute the value of the goods. The rule has to be understood in broad sense. No goods can be imported from outside without payment of customs duty unless it is exempt. There appears to be no reason to exclude it while determining the value of the goods. In any case, if duty countervailing could be considered to be incidental charges for importation, there is no valid reason to exclude custom duty from it."

127. We thus do not find any substance in the submission of petitioner that non□ inclusion of custom duty in definition of purchase value leads to conclusion that entry tax is not payable on entry tax.

Whether entry tax legislations are not covered by Entry 52 List II?

128. Shri Ajay Agarwal one of the learned counsel for the writ petitioners has emphatically submitted that entry tax is ultra vires of Entry 52. Elaborating his submission, he contended that on proper interpretation of Entry 52, the tax described therein is to be levied only by a local authority. The tax leviable in Entry 52 is nothing but octroi. The entry tax was imposed by the several States in 1990, up to which date local bodies continued to impose octroi. He submits that tax is not covered by Entry 52. Learned counsel for the petitioner referring to a definition of tax in Article 366(28) contends that Constitution itself contemplates local taxes and tax under Entry 52 is nothing but local tax to be levied by local authorities for purpose of local area. The history of entry tax and legislative practice also leads to the same conclusion. The Government of India Act, 1935 included in the Provincial List Item No. 49 to the effect that 'Cesses on the entry of goods into a local area for consumption, use or sale'.

129. Neither the Government of India Act, 1935 nor the Constitution of India has used 'octroi'. Constitution of India consciously avoided to use the term 'Octroi'. List II Item No. 52 provided tax on the entry of goods in local area for consumption, use or sale. List I Entry 89 contained another tax, namely, 'terminal tax on goods and passengers carried by railway, sea or air, tax on railway fair and freight'. This court in Burmah□Shell Oil Storage and Distributing co. of India Ltd. Belgaum vs. The Belgaum Borough Municipality, Belgaum, AIR 1963 SC 906, had addressed

the history of octroi and the constitutional entry regarding entry of goods. This Court has stated that Constitution has avoided the word 'octroi', in para 15 following has been mentioned:

> "15. It will be noticed that in the Government of India Act 'octroi' was named but not described and now the Constitution avoids the word 'octroi', as did the Government of India Act 1935 before, and gives a description...."

30. In para 17 & 18 following has been held:

> "17. Octrois and terminal taxes were different taxes though they resembled in one respect, namely, that they were leviable in respect of goods brought into a local area. While terminal taxes were leviable on goods 'imported or exported' from the Municipal limits denoting thereby that they were connected with the traffic of goods, octrois, according to the legislative practice then obtaining were, leviable in respect of goods brought into a Municipal area for consumption or use or sale. It is not necessary to cite the Municipal Acts prior to 1935 but a reference to them will amply prove that such was the tax which was contemplated as octroi." "18. When the Government of India Act 1935 was enacted terminal taxes became a central subject, vide entry No. 58 of List I, which reads as follows:□"58. Terminal taxes on goods or passengers carried by railway or air."

At that time, it was suggested by Sir Walter Leyton that both octrois and terminal taxes should be provincial subjects and that it would perhaps be possible to fuse the two. The Joint Committee, however, recommended otherwise and terminal taxes were separated from octrois and included in the central list. The proceeds of the terminal taxes, however, were to be distributed among the provinces. In allocating 'octrois' to the Provinces, the word itself was avoided because terminal taxes are also octroi in a sense and instead a description of the tax was mentioned in entry No. 49, which has been quoted already, and which read "Cesses on the entry of goods into a local area for consumption, use or sale". This scheme has been repeated in the Constitution with the difference that the entry relative to terminal tax now reads "terminal taxes on goods and passengers carried by railway, sea or air", and the word "taxes" replaced the word "cesses" in the entry relative to octrois."

131. The distribution of legislative power between Union and State is a Constitutional Scheme included in the Constitution of India after great deliberation. Different tax entries in List I and List II are fields of legislation which have to be widely interpreted and no restricted meaning of an entry has to be taken to fetter the legislative power of the Union or State.

132. It is well settled that the nomenclature or form of a tax is not a decisive factor to find out the nature of the tax. It

is the matter of legislative policy as to how the tax is to be collected. The definition of taxation as given in Article 266 (28) that tax includes general or local tax does not in any manner support the contention of the petitioner that tax under Entry 52 is only a local tax which ought to be collected through local bodies. It is the matter of legislative policy that whether a tax is collected as a general tax or a local tax. The nature of tax, measure of tax and machinery for tax collection are all different aspects. The submission of the petitioner that tax in Entry 52 should be collected by local authorities and State has no legislative competence to levy such tax is fallacious. It is well within the jurisdiction of the legislature to formulate its policy regarding levy of tax and its collection. Entry 52 of List II has to be given its wide and full meaning and no limitation in the legislative power of the State can be read as contended by counsel for the petitioner.

133. The Constitution framers have abandoned the use of word 'octroi' which has to be given a meaning and purpose. While interpreting a taxing entry no shackles can be put nor use of any expression in the Constitution of India, referring to a tax can be tied up to any pre-constitutional tax or levy. Further, any pre-constitutional tax practice cannot put any fetter on Constitution farmers to define any tax, to elaborate the concept of tax or to move away or forward from any kind of earlier levy. This Court in Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi and Anr, 1968 (3) SCR 251 has laid down the following:

> "To insist that the legislature should provide for every matter connected with municipal taxation would make municipalities mere tax collecting departments of Government and not self-governing bodies which they are intended to be. Government might as well collect the taxes and make them available to the municipalities. That is not a correct reading of the history of Municipal Corporations and other self governing institutions in our country."

134. Thus, taxes which are to be used by the local authorities can be collected by the local authorities as well as by the State Government. It is the matter of legislative policy as to how the tax is collected and distributed. Under List II Entry 5, the State has legislative power to lay down powers of the Municipal Corporation by legislation. It is again legislative policy that as what machinery is to be provided by the State legislature regarding collection of taxes on the entry of goods into a local area for consumption, use or sale. No capital can be made on the submission that since tax is not being collected by local authorities it is beyond the power of the State under Entry 52 List II.

135. We thus do not find any substance in the submission of the learned counsel for the petitioner that entry tax legislation is not covered by Entry 52 List II.

EXPRESSION "MACHINERY AND EQUIPMENT" AS USED IN THE SCHEDULE OF ORISSA ACT 1999

136. Part II of the Schedule to the Orissa Act, 1999 provides Item 9 as follows:

> "Item 9. Machinery and equipments [including earthmovers, excavators, bulldozers and road□rollers] [and spare parts and components] used in manufacture, mining, generation of electricity, or for execution of works contract or for any other purposes."

137. The submission which has been pressed by learned counsel for the petitioner is that the plant which is imported by petitioners in completely knocked out condition is not covered by expression machinery and equipments. It is submitted that plant and machinery are two different concept and when plant is imported in a knocked out condition Item No. 9 of Part II of Schedule is not applicable.

138. The Advance Law Lexicon of P Ramanatha Aiyar 3 rd Edition defines 'Plant' as follows:

> "Plant" means the fixtures, machinery, tools, apparatus, appliances etc., necessary to carry on any trade or mechanical business, or any mechanical operation or process.
>
> Webster defines the word "plant" to be "the fixtures and tools necessary to carry on any trade or mechanical business." The word is defined by Worcester to be "The machinery, apparatus or fixtures by which a business is carried on". The word is not equivalent to the word "undertaking", which is defined by Webster as "any business, work or project which a person engages in or attempts to perform; enterprise"."

139. The Plant in a knocked out condition is nothing but a collection of machineries. The plant being a wide term including machinery also, we fail to see how a knocked out plant shall not be covered by Item No. 9 of Part II of the Schedule. Machinery and equipments are wide words which shall also cover plant in a knocked out condition. We thus reject the contention of the counsel for the petitioner that a plant which is imported in knocked out condition is not covered by the Part II of Schedule of Orissa Act, 1999.

140. One more submission raised by one of the learned counsel for the writ petitioners also needs to be noted. Section 4 of

Bihar Act, 1993 as inserted by Bihar Act 19 of 2006 was also challenged on the ground that it violates constitutional provision of Article 266. Section 4 deals with "utilization of the proceeds of the levy under the Act". Section 4 sub□ section (1) provides that the proceeds of the levy under the Act shall be appropriated to the fund and shall be utilised exclusively for the development of trade, commerce and industry in the State of Bihar. Presumably, the said amendment was brought by the State Legislature to support the State's claim that levy is compensatory in nature. The submission of the writ petitioners is that Section 4 indicates that the tax levied under the Act would be collected and kept in a separate fund which according to the writ petitioners is contrary to the constitutional mandate of Article 266 of the Constitution, which specifically mandates that all public money must be credited to the Consolidated Fund of respective States. There are two reasons due to which the above submissions cannot be accepted. Firstly, Section 4 relates to creation of fund and utilisation of funds received from the collection of entry tax. The creation of fund and its utilisation can in no manner effect the levy of the entry tax and the compensatory tax theory having already negated by nine□Judge Constitution Bench of this Court in Jindal Stainless (supra), the inquiry as to whether tax is compensatory or not is not relevant. Secondly, this Court in Jaora Sugar Mills(P) Ltd. v. State of Madhya Pradesh and Ors., 1996 (1) SCR 523 while considering Article 266 of the Constitution of India has already held that it is difficult to understand how the Act can be said to be invalid because the cesses recovered under it are not dealt with in the manner provided by the Constitution. Following observations were made by the Court:

> "It is doubtful whether a plea can be raised by a citizen in support of his case that the Central Act is invalid because the moneys raised by it are not dealt with in accordance with the provisions of Part XII generally or particularly the provisions of Article 266. We will, however, assume that such a plea can be raised by a citizen for the purpose of this appeal. Even so, it is difficult to understand how the Act can be said to be invalid because the cesses recovered under it are not dealt with in the manner provided by the the Constitution. The validity of the Act must be judged in the light of the legislative competence of the Legislature which passes the Act and may have to be examined in certain cases by reference to the question as to whether fundamental rights of citizens have been improperly contravened, or other considerations which may be relevant in that behalf. Normally, it would be inappropriate and indeed illegitimate to hold an enquiry into the manner in which the funds raised by an Act would be dealt with when the Court is considering the question about the validity of the Act itself."

141. Although learned counsel for the writ petitioners sought to distinguish the above decision on the ground that the said observations were made while the Court was considering the entirely different issue that is an issue relating to interse transfer of money from Consolidated Funds of respective States to Consolidated Fund of India. As per aforesaid judgment the challenge to the validity of the Act on the ground that it is violative of Article 266 was repelled. What was held by this Court as quoted above clearly negates the submissions raised by the learned counsel for the writ petitioners on the basis of Article 266. In any view of the matter, the said ground has no relevance with regard to levy of entry tax on imported goods.

142. Learned counsel appearing for the various petitioners relating to civil appeals from State of Orissa in the end has sought for liberty from this Court to urge grounds of discrimination under Article 304(a) of the Constitution of India. Learned counsel for the petitioners have relied on order of this Court in Civil Appeal No. 4756 of 2017, M/s Bharati Airtel Ltd vs. Assessing Authority Orissa Entry Tax & Anr dated 29.03.2017 as well as order of this Court in Civil Appeal Nos. 997-998 of 2004, State of UP and Ors vs. M/s Indian Oil Corporation Ltd. & Etc dated 21.03.2017. It is submitted that this Court has granted liberty to petitioner to file fresh writ petition in order dated 29.03.2017 to raise question of discrimination under Article 304(a) as per law laid down by Nine Judges Bench in Jindal Stainless Ltd & Anr vs. State of Haryana & ors.

143. Learned counsel appearing for the State of Orissa has opposed the prayer of the petitioner seeking liberty to raise the issue. It is contended that petitioners have not raised the relevant issues nor pleaded in support of the plea of discrimination under Article 304(a). The parameters under which entry tax can violate the Article 304(a) has now been conclusively laid down by Nine Judges Bench in Jindal Stainless Ltd.(supra). We are thus of the view that liberty be given to petitioners to raise the plea of discrimination under Article 304(a) in accordance with the law as laid down by Nine Judges Bench in Jindal Stainless Ltd.(supra). We, however, are of the view that for the above purposes, it is not necessary to grant any liberty to file a fresh writ petition at this stage and at this distance of time. The ends of justice shall be served, if liberty is granted to the petitioners to revive their writ petitions by making a proper application before the High Court. In the writ petitions which have been dismissed by the Orissa High court against which present appeals are decided, the liberty to revive such petition and to urge ground under Article 304(a) is granted which can be availed only within the period of 30 days from the date of this judgment.

144. In view of foregoing discussion, we arrive at the following CONCLUSIONS:

(i) Orissa Entry Tax Act, 1999, Kerala Tax Act, 1994 and Bihar Tax on Entry of Goods in Local Area for Consumption, Use or Sale, 1993 (before its amendment by Bihar Act, 2003 and 2006) do not exclude levy of entry tax on the goods imported from any place outside

territories of India into a local area for consumption, use or sale.

(ii) All the Entry Tax Legislations questioned in these appeals are legislations which are within the legislative competence of the State legislatures and do not intrude the legislative domain of Parliament as reserved in Entry 41 & Entry 83 of List I.

(iii) The import of goods from any territory outside India comes to an end when the goods enter into the custom frontiers of India and are released for home consumption.

(iv) After import of goods comes to an end the State legislature has full legislative competence to levy entry tax under Entry 52 List II.

(v) The Original Package Theory as developed by the American Supreme Court in case of Brown vs. State of Maryland(supra) is not applicable in this country and the imported goods are not exempted from entry tax till it reaches to the factory premises/destination of its consumption, use or sale.

(vi) Non inclusion of custom duty in the definition of purchase value in the statute of entry tax is not an indicator of the fact that legislature never intended to levy entry tax on imported goods.

(vii) Entry tax legislation are fully covered by Entry 52 List II and the submission that essence of Entry 52 is octroi which can be levied only by local authorities and State has no legislative competence to impose entry tax under Entry 52 List II is fallacious.

(viii) A plant imported in knocked out condition is fully covered with the definition of machinery and equipment under Part II of Schedule of the Orissa Act, 1999.

145. In view of our foregoing discussion and conclusion, we decide all the appeals in this batch of appeals in following manner:

(i) All the appeals filed against the judgments of Orissa High Court are dismissed. The Transfer case is also dismissed.

(ii) All the appeals filed against the judgment of Patna High Court are dismissed.

(iii) The civil appeal filed against the judgment of Jharkhand High Court stands allowed.

(iv) The appeals filed by the State of Kerala are allowed.

The judgment of the Division Bench holding that no entry tax was leviable on the vehicle imported from territories outside the country is set aside, restoring the judgment of the learned Single Judge.

(v) Writ Petition 574 of 2003, Parisons Agrotech Pvt. Ltd vs. State of Kerala & Ors. is dismissed.

(vi).In Civil Appeals filed against judgment of Orissa High Court, appellants who were writ petitioners before the High Court are given liberty to file an application within 30 days from today to revive their writ petitions and urge ground of discrimination under Article 304(a) as per law laid down by Nine Judges Bench in Jindal Stainless Ltd.(supra).

146. Parties shall bear their own costs.

147. Before we close, we record our deep appreciation for the valuable assistance rendered by various learned counsel appearing in this batch of Civil Appeals which has immensely benefited us in coming to correct conclusion on various issues involved in these cases.

.....J. (A.K. SIKRI) .....J. (ASHOK BHUSHAN) NEW DELHI, OCTOBER 09, 2017.