A.V. Meiyappan vs Commissioner Of Commercial Taxes, ... on 8 March, 1967

Equivalent citations: AIR1969MAD284, [1967]20STC115(MAD)

JUDGMENT

Srinivasan, J.

1. In these writ petitions seeking the issue of appropriate writs, the validity of certain assessments to sales-tax made by the sales-tax authorities and the steps taken by them to revise assessments already made are brought into question. The case is somewhat out of the ordinary and to start with the following facts may be stated. The petitioner is a film producer, being the sole proprietor of Messrs. A. V. M. Productions. In or about 1962, the petitioner obtained for the copyright of a story in Hindi entitled "POOJA KE PHOOL" and on the basis of that story, he produced a cinematograph film. In 1964, a Hindi version of a popular Tamil picture was also produced. The petitioner entered into an agreement with Messrs. A. V. M. Limited, whereunder the petitioner leased to the latter entity the right to exploit the cinematograph film "POOJA KE PHOOL" for a period of 49 years on certain terms, which will be referred to in detail later. In respect of the second film, a similar agreement of lease was entered into in August 1963, with Messrs. Murugan Brothers and this lease comprised l/20th of the rights of the petitioner. Later by another agreement, a lease of 10/20th of the rights in that film for a period of 49 years, and a further agreement covering the balance of 9/20th of the rights, were granted to Messrs. A. V. M. Limited. In respect of the agreement for the first film, the petitioner received over Rs. 25 lakhs in 1964, and with regard to the second film, an aggregate of Rs. 19 lakhs and odd was received by the petitioner in 1965. For the assessment year 1964-65, the petitioner submitted his return which did not include the above sums. The assessing authority, the Deputy Commercial Tax Officer, however decided to include in the assessable turnover the two sums mentioned above, treating the sums as representing the turnover of sales of films liable to a single point tax at 10% under the 1st Schedule to the Madras General Sales Tax Act I of 1959. The contention of the petitioner broadly stated is that these are not sales of any goods but represented only realisations of the rights to exploit the films conferred upon him by the appropriate statute viz., the Copyright Act. It is claimed that such rights in the films are not corporeal or tangible rights, nor are the films goods which are the subject-matter of any sale; and that there was no transfer of property in these films. The view taken by the assessing authority that in effect what was contemplated was the sale of the films is attacked as wholly erroneous and unjustified. It was only the right of exploitation of the film, which, having regard to the nature of the industry, is the only method by which a producer can reap the results of his activities, that was tbe subject-matter of the lease agreement, and the petitioner contends that the transactions fall wholly outside the purview of the Madras General Sales Tax Act,

2. A second point has been taken that in any event the levy of tax at 10% under the First Schedule to Act 1 of 1959 is illegal. The First Schedule provides for a single point levy at 10% on certain specified goods (higher than the normal rate of tax on the turnover of sales or purchases of general goods); the petitioner claims to have paid tax at that rate at the time of the purchase of the raw films and it is said that even if the processed film is regarded as the subject-matter of the sale, it cannot be subjected to a tax over again under the First Schedule to the Act.

3. A third point relates to the levy of penalty. The assessing authority took the view that by reason of the failure of the petitioner to disclose in his returns these two sums of Rs. 25 lakhs and 19 lakhs as assessable turnovers, the penal provision of Section 12 (3) of the Act is attracted, and accordingly levied a penalty of Rs. 6,66,251/-, computed at one and a half times the quantum of tax on the amount not so disclosed. It is claimed by the petitioner that he is not bound to disclose these turnovers, for they are not turnovers relating to sales of goods and that the levy of penalty is illegal,

4. The above relates to the assessment for the year 1964-65. The next writ petition, W. P. No. 783 of 1966, relates to a notice issued by the assessing authority proposing to re-open and revise the completed assessment for the year 1963-64. Proceedings were launched by the assessing authority seeking to include in the taxable turnover a sum of Rs. 9,42,000 and odd received by the petitioner in respect of similar agreements relating to a lease of the exploitation rights of a tamil film "NANUM ORU PENN". For reasons similar to those which have already been indicated, the petitioner claims this amount is not assessable to tax. The assessing authority has in addition to proposing to include this amount, issued a notice proposing to levy a penalty as well. The petitioner seeks the issue of a writ of prohibition in this case.

5. W. P. No. 784 of 1966 raises the question of a provisional assessment made for the year 1965-66 based upon the assessment for 1964-65. The assessing authority proposed by the notice to fix the turnover at Rs. 44 lakhs and odd and called upon the petitioner to pay a tax of Rs. 4,48000 and odd thereon. In W. P. Nos. 782 of 1966 and 784 of 1966, the petitioner prays that the assessment orders, final in the first case and provisional in the second, may be quashed as illegal by the issue of writs of certiorari

6. In the counter-affidavit filed on behalf of the respondents, the statement of facts is not denied. But what the respondents say is that "it was found that the petitioner had effected a sale of negative prints of these pictures for consideration received, though the transaction was described as a lease of the above pictures for a period of 49 years." It is the contention of the assessing authorities that a scrutiny of the provisions of the documents of lease so-called clearly establishes that the property in the films had effectively passed from the petitioner to Messrs. A. V. M. Limited. It is claimed that the negative of a picture is brought into existence, by expenditure of money, labour and skill; and that the species of moveable property is created apart from the intangible rights residing in the producer; and that the property was in fact transferred for valuable consideration received. It is stated that the transaction is "in substance of transfer of property in goods for valuable consideration and therefore liable to tax." The respondents also seek to distinguish between a copyright, which the petitioner has in the product of his labour and skill, which are the pictures, and the actual transactions that were put through; the latter, it is claimed, still represent a transfer of property in goods irrespective of

whatever incorporeal rights might vest by the law of copyright in the transfer. It is alleged that the real nature of the transactions has been camouflaged and when once it is established that the ownership of the films has passed from one to the other by virtue of the transactions, it can evidence nothing more than a sale of goods.

A further point has been taken that in films of this kind, the value of a picture becomes completely wiped out by exhibition in the course of ten years or so, so that after the lapse of 49 years fixed in the agreements, the films, which are the subject-matter of tbe transactions have no surviving value at all. That is also relied upon to show that what passes under the documents is comprised of the entire rights of the lessor to the lessee, who are in reality the seller and the buyer respectively. Turning to the levy of tax at 10%, the Department contends that the relevant entry in the first schedule to the Act cannot be read in the manner claimed by the petitioner. It is true that the raw film is liable to tax at a single point at 10%. But a film which has been processed is, a different product but still a film and can once again fall within the scope of this entry. It is claimed that a processed film is not the same as the raw film and though a different object, continues to be a film, and when the sale of such a film takes place, it can be taxed under this entry; that is to say, the Department claims that in interpreting the expression 'film', a processed film must be regarded as different from the raw film, and though on the purchase of the raw film tax might have been paid, that fact cannot obviate the levy of tax on the sale of a processed film.

7. The counter-affidavits have not however traversed the complaint of the petitioner with regard to the levy of penalty.

8. By a further affidavit filed on behalf of the petitioner, an additional ground has been taken that the definition of 'goods' embodied in the Madras General Sales Tax Act is ultra vires the powers of the State Legislature in so far as such definition goes beyond the definition of 'goods' as found in the Constitution. It would suffice to say at this stage that by a further counter-affidavit filed by the respondents, the validity of this attack is questioned, and it is claimed that the Constitution-makers were not unaware of the enlarged definition of 'goods' in the various Sales-tax Acts at the tune when "goods" was defined for purposes of the Constitution. It is urged therefore that the definition found in the Constitution is not exhaustive and the validity of the definition in the Sales Tax Act cannot therefore be questioned.

9. Mr. V.K. Thiruvenkatachari, learned Counsel for the petitioner, conceded in effect that copyright is a new form of property which has come to be recognised by law. This right was originally regarded as merely a negative right to prevent one person from appropriating the labour of another. It was undoubtedly only after the enactment of the Copyright Act in England that Copyright came to be regarded as a statutory right which right in the author of a work, for instance, was statutorily protected. Even earlier it was held in Smelting Company of Australia v. Commissioners of Inland Revenue, 1897-1 QB 175 that a share in a patent and a licence to use it are "property". An agreement for the sale of such share or licence was held liable to stamp duty under the relevant Act as if it were a conveyance on sale. Though the question arose in that decision more with regard to the location of the property that it was property does not appear to have been doubted at all. In Commissioners of Inland Revenue v. Muller & Co.'s Margarin Ltd., 1901 AC 217 goodwill was regarded as property, but

it was pointed out in this decision that its legal conception as property involved the additional legal conception of existence somewhere. Mansell v. Valley Printing Company, 1908-2 Ch 441, which was rendered prior to the enactment of the Copyright Act in England pointed out that the remedy of a person against piracy was an action at common law, a suit in equity for injunction founded on the, common law right. It was by common law that copyright or protection thereof existed in favour of works of literature, art or science; and the right of property of an author in his work was held to be incorporeal property. Copinger on "The Law of Copyright" (9th edition Page 1) points out that "Copyright Law is in essence concerned with the negative right of preventing copying a physical material existing in the field of literature and arts. Its object is to protect a writer and an artist from the unlawful re-production of his material. It is concerned only with the copying of physical material and not with the re-production of ideas, and it does not give a monopoly of any particular form of words or design. It is thus to be distinguished from the rights conferred by a patent, trade mark and design legislation ....." Sahnond in his jurisprudence 11th edition, refers to copyright as an example of a right over immaterial property, which has been raised to the level of a legal right by Statute (P. 269): Copyright is referred to as an immaterial form of property recognised by law, being the product of human skill and labour or of a man's brains (p. 462). In all the English text books and which it is unnecessary to refer at length, copyright has been regarded as incorporeal movable property and that view has been adopted in our country as well. It would be sufficient to refer to Savitri Devi v. Dwarka Prasad, AIR 1939 All 305.

10. Proceeding on the basis that copyright is incorporeal movable property, the further contention of Mr. V.K. Thiruvenkatachari, for the petitioner, is that in so far as Parliament provided for the legislative competence of the State Legislature to enact laws with regard to sale of goods, Parliament must, for reasons to be mentioned hereafter, have intended to restrict such competence only to concrete goods and not abstract goods or incorporeal goods such as property represented by copyright. The Madras General Sales Tax Act IX of 1939 defined 'goods' as meaning "all kinds of movable property other than newspapers, actionable claims, stocks and shares and securities". A like definition was incorporated in the Sales Tax Act I of 1959. The expression "all kinds of movable property" would necessarily take within its sweep, even intangible or incorporeal moveable property. The contention of the learned Counsel for the petitioner is that the legislative competency of the State Legislature in so far as the sale of goods is concerned roust be governed by the interpretation that can be given to the expression 'goods' as contemplated by the Constitution and the earlier Government of India, Act, 1935.

Entry 48, in the Seventh Schedule to the Government of India Act covers taxes on the sale of goods. Section 311 of that Act, which provides for the interpretation of the expressions used in that Act, defines 'goods' as "including all materials, commodities and articles". The Constitution of India also provides in Entry 54, of List II for "taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92 (A) of List I." Article 366 also defines 'goods' as "including all materials, commodities and articles". The rule of interpretation is that wherever a statute uses the word 'includes' in an interpretation clause, it intends thereby to add something to what the natural sense of the word normally conveys. If we turn to the dictionaries, goods are generally interpreted to mean immoveable property or merchandise, wares or things. When either the Government of India Act or the Constitution specified in the inclusive of the definition only the natural sense of the word,

it is claimed that notwithstanding ..... the use of the expression 'includes', it nevertheless becomes practically exhaustive and the Constitution intended only to specify particular things as coming within the scope of the definition of 'goods'. The words "materials, commodities and articles", must obviously connote only corporeal movable property and though there could be incorporeal movable property, the manner in which the word 'goods' has been defined leaves no scope for extending the meaning of that expression to include incorporeal movable property.

To put it differently, the argument is that the word 'includes' is employed in a definition to add to what the natural sense of the word conveys, but if the statute merely sets down only, that very natural sense, the statute cannot be intended to have added to that natural sense. It is said therefore that the very natural sense of the expression given as the interpretation cannot be regarded as an extension, for 'includes' is generally employed only for the purpose of extending the natural sense. In that view it is said the definition of 'goods' both in the Government of India Act and the Constitution must be regarded as being exhaustive.

11. In a decision of the Privy Council in Dilworth v. Commissioner of Stamps, 1899 AC 99 an analogous question arose. In the Charitable Gifts Duties Exemption Act, 1883, the term 'charitable purposes' was defined as "including devices, bequests and legacies of real or personal property. ....." The question arose as to what was meant by this definition. The Judicial Committee observed: (at pages 105 and 106) "It is not said in terms that "charitable bequest" shall mean one or the other of the things which are enumerated, but that it shall "include" them, The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or the expressions defined. It may be equivalent to "mean and include" and in that case it may afford an exhaustive explanation of the meaning which for the purpose of the Act, must invariably be attached to these words or expressions."

This decision is no doubt authority for the position that the word 'includes' may well be exhaustive in certain circumstances. The decision does not however go further and lay down the circumstances in which such an exhaustive meaning should be given to that expression. It is true that it lays down that the word 'includes' is generally employed for the purpose of extending the meaning of the expression over and above what the natural import of the word may be. That the word "includes" in a particular context may not extend the scope of the definition but really indicates "means and includes", which usually implies an exhaustive definition is also the effect of the decision of the Supreme Court in Singha Mall v. Parduman Singh C.A. No. 16 of 1959 (SC) in Reynold v. John, (1956) (1) All ER 306 the principle enunciated in the above Privy Council decision was applied. In that Act which was under consideration, the definition of the expression 'loudspeaker' as "including" amplifier or similar instrument came to be considered and the Queen's Bench decided that the word was used for the purpose of enlarging rather than restricting the meaning which might arise from the use of the word 'loud-speaker' simpliciter. But a closer perusal of this decision clearly shows that

that conclusion was reached by reason of the use of the words 'or similar instrument' occurring in the definition,

12. Mr. V.K. Thiruvenkatachari has endeavoured to pursue this line of argument, viz., that 'goods' as defined both in the Government of India Act and in the Constitution must mean concrete articles by reference to certain other provisions. In the Government of India Act, Section 137 provided for terminal taxes on goods carried by railway or air. Section 297 enacted a prohibition against discrimination between goods manufactured in a province and similar goods not so manufactured. The Constitution also refers to goods in Article 269 in providing for the levy of terminal taxes on goods carried by railway, sea or air, or taxes on the sale or purchase of goods, and by Article 304 to prohibition on restriction of trade in respect of goods manufactured within or without the State. The relevant schedules, the Seventh Schedule of the Government of India Act and the Seventh Schedule of the Constitution, in providing for matters in respect of which the Union or the State may make laws, refer to goods and in the context in which that expression is used, it is the contention of the learned counsel that only concrete goods could have been under contemplation. For instance, in List I of the Seventh Schedule to the Constitution, Entry 30 deal with carriage of goods by railway, sea or air, Entry 84 with duties of excise on goods manufactured; Entry 89 with terminal taxes on goods carried by railway, sea or air; and Entry 92 (A) with taxes on the sale or purchase of goods other than newspapers where such sale or purchase takes place in the course of inter-State trade or commerce. List II also provides by Entry 27 for the production, supply and distribution of goods; Entry 51 for duties of excise on goods manufactured; Entry 52 for taxes on the entry of goods into a local area; Entry 54 for taxes on the sale or purchase of goods Entry 56 for taxes on goods carried by road, etc. The Concurrent List mentions in Entry 32 the carriage of goods on inland waterways and provides by Entry 33 for trade and commerce in and the production, supply and distribution of Roods.

The argument proceeds that in all of these entries in the relevant sections of the Government of India Act or the Articles of the Constitution, concrete goods are contemplated. The very nature of these provisions shows that it cannot be otherwise and the word 'goods' cannot in the context include incorporeal movable property. It is also urged that in all sales tax legislation, the situs of the goods is a necessary element to be taken into consideration which in relation to incorporeal movable property would be more or less meaningless.

13. Proceeding on this line of argument Mr. V.K. Thiruvenkatachari urges that when Parliament was legislating on the subject, it could not have been unaware of the fact that the English Law had its own categories of goods such as chattels, chose in action, personal property and the like, but that in employing the word 'goods' while at the same time being aware that goods could embrace both corporeal and incorporeal movable property. Parliament deliberately restricted it to mean only corporeal movables as indicated by the instances cited above. The decision of the Supreme Court in Stale of Madras v. Gannon Dunkerley and Co.. (Madras) Ltd., has also been referred to, where the Supreme Court decided that the expression "sale of goods" in Entry 48 in the Provincial Legislative List in the Seventh Schedule to the Government of India Act, 1935, should not be construed in its popular sense but in its legal sense and proceeded to consider what that legal sense is. They observed thus: (at p. 712) (of SCJ) = (at p. 573 of AIR).

> "The ratio of the rule of interpretation that words of legal import occurring in a statute should be construed in their legal sense is that those words have in law, acquired a definite and precise sense, and that, accordingly, the Legislature must be taken to have intended that they should be understood in that sense. In interpreting an expression used in a legal sense, therefore, we have only to ascertain the precise connotation which it possesses in law."

They accordingly repelled the contention that it was open to the legislating authority to include in the expression "sale of goods" an agreement of sale relating to one kind of property and a sale as regards another, which in effect was the extended definition of 'sale' occurring in the Sales Tax Acts, whereby 'sale' was defined so as to include materials used in the construction, fitting out, improvement or repair of immovable property. But the more important part of this decision, 13, in so far as the arguments of the petitioner are concerned, that when Parliament enacts a statute, it should be deemed to have employed an expression in that statute which has acquired a legal as well as a settled meaning in law. The same argument is advanced as regards the meaning of the word 'goods',

14. The learned Advocate-General urges that the word includes' in the definition sections cannot be regarded as exhaustive. He points out that in Article 366 of the Constitution, wherein several expressions stand defined. Parliament has used both 'means' and 'includes' in various definitions. Parliament could not therefore have been unaware of the fact that normally 'means' is exhaustive, while 'includes' is not. Nor could Parliament have been unaware that long before the Constitution was enacted in 1950, there were several sales tax laws in the country where 'goods' was defined to mean all kinds of movable property. It should equally have been aware that movable property did include property of all description, that is to say, not only stocks and shares, but trade-marks, patent rights, goodwill and chooses in action, for 'goods' had been defined in an all-embracing manner as every kind of movable property in the Indian Contract Act before that part of it dealing with sale of goods was taken out and enacted separately.

It is claimed accordingly that read in the context of these features, Parliament could not have intended to exclude one type of movable property from the category of properties covered by the expression 'goods'. If, in fact, Parliament had decided to restrict the meaning of the expression 'goods' in any particular manner, would not Parliament have used the expression 'means' rather than 'includes'? It is urged that for all these reasons, the expression 'includes' cannot be regarded as embodying an exhaustive definition of the term sought to be defined and that it should be taken not to exclude other kinds of movable property, for 'goods' in effect means movable property in contra-distinction to immovable property.

15. Giving the matter our careful attention, we find it difficult to agree with the argument of the learned counsel for the petitioner that goods has been defined in the relevant article of the Constitution in an exhaustive manner. It may be that in so far incorporeal movable property is concerned, there might be difficulties in levying the appropriate tax, such as those contemplated in Entry 30, 84, 89 List I, or Entry 51, 52 or 56 of List II of the 7th Schedule of the Constitution. But that cannot control the definition in any way. Notwithstanding the fact that the expressions

employed in defining 'goods' embody only the natural sense of the word, we are unable to hold that 'goods' as defined has been restrictively defined and to comprise only materials, commodities and articles that is to say, concrete goods. We would require far stronger reasons before we can accept the contention that the Constitution has imposed a restriction on the power to legislate in respect of sales of one class of movable property. In as far as the argument purports to establish that the definition of goods in the Madras General Sales Tax Act as meaning all kinds of movable property goes beyond the meaning of the expression given to it by the Constitution and for that reason the legislation in respect of sales or purchase of goods other than concrete goods is ultra vires, we are unable to agree with that contention.

16. What appears to us to be a more vital part of the argument is whether even assuming that the transaction in question amounts to a transfer of some kind of property, it nevertheless comes within the scope of the definition of "sale of goods" under the Madras General Sales Tax Act. In order to examine this contention, we have firstly to refer to the arrangement entered into between the assesses (lessor) and the lessee, with whom the agreement was entered into. We have to scrutinise the terms of the agreement and examine also the interpretation placed upon these terms by the sales tax authorities. In the agreement which is relevant to W. P. No. 782 of 1966, (the other agreements are similar), the following provisions find place, The assessee is admittedly the sole owner of the entire property in the film which was the subject-matter of the agreement. The agreement was that the assessee should make over to the lessee "the outright lease of the world negative rights of the said film for a period of 49 years. . . . for a consideration amounting to the declared cost of production of the film plus 15% thereon as profit to the producer, subject in any case to a minimum price of Rs. 10,00,000/- payable by the lessee to the producer," Thereafter, the conditions upon which the lease was to operate are set out. Clause 4 (c) provides that as the lessee had undertaken unconditional liability to pay the basic price of Rs. 10,00,000/- the lessee was entitled to hold until the expiry of the period of the lease the entire world negative rights without any lien thereon to the producer, that is, the assessee. Clause 4 (d) indicates the nature of the rights so given to the lessee as "the rights shall comprehensively include during and throughout the period of the lease all such rights and privileges as are given or reputed to be given by the proprietor of the world negative rights of a film to the sole and exclusive distributor of the world negative rights of the film." Under Clause 4 (c), the right of the producer assessee is limited only to recovery of the unpaid consideration stipulated and excludes any right on his part to get back or claim possession of the positive copies or copy of the negative. The sub-clause is amplified by the following Sub-clause 4 (f), which, in view of the special reliance placed thereon on behalf of the respondents, is set out in full below:

> "The positive prints of the film shall throughout the period of the lease be the property of the lessee and it agrees to use them only in the manner authorised, expressly or impliedly, by this agreement, and the lessee agrees to return at the determination of the lease to the producer all the concerned positive prints then remaining with it in their then condition. The negative of the film shall remain in the custody of the producer throughout the lease period exclusively as the agent and the custodian of the lessee free of any charge for keeping custody and it is expressly understood that the producer cannot during the continuance of this agreement make

> use of the negative in any manner whatsoever other than for the purpose of taking out extra prints as and when required by the lessee against its paying the producer the entire charges for such prints or supplying the requisite raw film and paying charges for taking the prints as the producer may ask at the time."

It is seen from this clause that the negative of the film from which positives are made for the purpose of projection in the cinemas is kept with the producer. That the property in the negative vests in the lessee during the continuance of the lease is made clear herein, for the producer maintains custody of the negative only as the agent and the custodian of the lessee and is prohibited from making use of the negative except for certain stated purposes. There is also the obligation cast upon the lessee to return to the lessor on the determination of the lease "all the positive prints then remaining with it". It also appears from this clause that notwithstanding the lessee's ownership of the film negative during the period of the agreement, the lessee undertakes to take the requisite copies made only in the laboratories of the lessor, undertaking also to pay the charges thereof. That appears to be a special term of the contract apparently for the reason, that the lessor maintains laboratories in which the films both negatives and positives are processed and carries on a business of that description apart from the production of films.

17. It is the contention of the Department that this agreement operates in effect as an outright sale of the film in question by the assesses to the so-called lessee. The order of the Deputy Commercial Tax Officer, which dealt with the contentions of the assessee is, in its operative part, very short, and is extracted below:

> "A negative of a film is goods and is movable property. Thus, the transfer of film has to be considered as sale. There are two parties to the transaction as they are Sri A. V. M. Production and Sri A. V. M. Limited. The ownership is also transferred to Sri A. V. M. Limited, as the material clauses of the agreement would indicate that the alleged lessor will not be entitled to get back or claim possession of the negative copy and the lessee's liability shall be only for unpaid purchase money as agreed. Further, the lessor, while the film is in his custody, will be only the agent and custodian of the film. Thus the producer has transferred the ownership of the film to the other party of the agreement.
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> "Further, the normal life of a film being less than three years, the period of 49 years mentioned in the agreement does not appear to conform to facts."

On this reasoning, the sales tax authority held the consideration stipulated in the agreement to represent a sale of goods within the meaning of the Sales' Tax Act.

18. It will be thus seen that the principal features relied upon by the Department in holding the transaction to represent a sale of goods are: (1) the fact that the lease is for a period of 49 years, while the normal life of the film is only three years, so that the lease is in effect en illusory colour given to the transaction; (2) that the negative has become the property of the lessee, the lessor not being entitled to obtain the return thereof; (3) though this reason does not find place in the order

impugned, the learned Advocate-General, in the course of his argument, contended that the consideration stipulated being based en the declared cost of production of the film plus 15% thereon as profit to the producer subject to a minimum also, indicates that it was an outright sale that was contemplated and not only a lease.

19. Before examining these contentions, we feel it is necessary to examine the rights which the producer of a film gets under the law.

20. It is well recognised that such rights in relation to cinematograph productions are governed by the statute at the present time, in whatever manner they may have been characterised in the past. Section 2(d)(v) of the Copyright Act 14 of 1957 defines 'author' to mean in relation to a cinematograph film the owner of the film at the time of its completion A cinematograph film includes the sound track. The further parts of this section define what an 'exclusive licensee', and an 'infringing copy' or a 'performance' mean in relation to cinematograph films. Under Section 13 of the Act, 'copyright' is declared to exist throughout India in works, such as cinematograph films and records. Section 14 lays down what is meant by copyright. It means in the case of literary dramatical or musical work the exclusive right by virtue of the provisions of the Act to make any cinematograph film or a record in respect of the work. In the case of the copyright in a cinematograph film, it means the exclusive right to cause a film, in so far as it consists of visual images, to be seen in public and in so far as it consists of sound to be heard in public.

There are other rights comprehended in the copyright in the case of a cinematograph film, which find place in Section 14(1)(c) and (d), to which we shall refer later in due course. Section 17 states that the author of a work shall be the first owner of the copyright, 'work' in this connection meaning the cinematograph film. There is no doubt that in the circumstances of this case, the lessor, assessee is the author of the work, viz., the cinematograph film in question. Section 18 provides for assignment of copyright. The owner of the copyright in an existing work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of of the copyright or any part thereof. Upon such assignment being made, under Section 18(2) the assignee becomes the owner of the copyright as respects the rights so assigned and the assignor continues to be the owner in respect of the rights not assigned. Section 19 requires an assignment of copyright in any work to be in writing signed by the assignor. Section 26 provides the life-time of the copyright to be 50 years. Apart from assignment of copyright which is provided by Section 18, Section 30 enables the owners of the copyright to grant "any interest in the right of licence" in the work. Chapter XII provides for civil remedies in cases of infringement of copyright.

21. Section 57 of the Act reserves the right of an author independently of the author's copyright and even after he has assigned such copyright wholly or in part, to prevent distortion, mutilation or modification of the work or any action in relation to that work, which might affect the author's reputation.

22. That the owner of a cinematograph film is an author within the meaning of the Act, who acquires a copyright in his production which ensures for a period of 50 years, is thus beyond question. He is competent to assign that copyright and all the bundle of rights which that expression connotes to

any other person wholly or in part with or without limitations for a term or for the full period. That bundle of rights includes something more than the mere exhibition of the film to the public is apparent from Section 14, which states that in, the case of a cinematograph film, the expression "copyright" includes the right to make a copy of the film, to cause the film to be seen in public and to be heard in public, to make a record embodying the recording in any part of the sound track associated with the film by utilising such sound track, to communicate the film by radio-diffusion; and in the case of a record, whether made originally or as part of the right included in the making of the cinematograph film, to make any other record embodying the same recording, to cause the recording embodied in the record to be heard in the public and to communicate the recording embodied in the record by radio diffusion. It will be seen that out of this bundle of rights, the conferment of a lease for the purpose of the distribution, which is what is contemplated in the leases in the present cases, covers only part of the several rights which the owner has. Notwithstanding the lease that has been granted in these cases, it would be open to the owner to make a separate record of the sound track in the film or to communicate the film by radio diffusion, that is to say, television, and the like. The only right which the lessor assessee has granted to the lessee in the instant cases would appear to be the right to have the film exhibited as a distributor together with the ancillary right of making or causing to be made positive prints for purposes of exhibition and no further right is given to him.

23. The question that we have to examine is whether the grant of the lease for exploiting the film by distribution for purposes of exhibition to the public amounts, in what are claimed to be special circumstances of the case by the Department, to a sale of goods. Before adverting to these special circumstances relied upon by the Department, we may turn to the terms of the agreement. What purports to be granted by way of lease are "the entire world negative rights" of the film and those rights are defined in the relevant Clause 4 (D) of the contract in this manner:

> "The rights ... shall comprehensively include during throughout the period of the lease all such rights and privileges as are given or reputed to be given by the proprietor of the world negative rights of a film to the sole and exclusive distributor of the world negative rights of the film."

A further Clause 4 (d) enables the lessee with effect from the date of the agreement to be at liberty to make with third parties agreements and contracts of sublease, distribution, etc., in respect of the said film, but no such contracts can enure beyond the period of the lease covered by this agreement. The terms of the contract have to be interpreted in the light of what is generally understood in the trade. It does not appear to be in dispute that normally speaking the proprietor of a film enters into engagements with other parties for exhibition of the film. Such arrangements may be by way of an outright conferment of the sole and exclusive right to exhibit the film in any area, or the proprietor may enter into different engagements with different parties covering the exhibition in different areas. The other contracting party either exhibits the film himself in his own theatres or enters into subcontracts of a similar nature. If the lease granted covers only the distribution rights, what incident there is in a contract of that description which would convert it into a sale of goods is exceedingly difficult to conceive. Instead of the owner or the proprietor exhibiting the film himself, he confers that right of exhibition upon another party. If the matters stood there, there can be no

dispute that no sale of any goods is involved notwithstanding that for the purpose of enabling exhibition of the film, positive prints of the film would have to be provided by the proprietor to the exhibitor. It is obvious that a contract of that description would call for the supply of positive prints and it is here that the Department claims that what is really a sale takes place and not a mere lease of the right to exhibit. The contention is advanced in this manner based upon certain clauses of the agreement.

24. For the consideration of the lease of the entire world negative rights, the distributor agrees to abide by the following conditions. One is that "the positive prints of the film shall throughout the period of the lease be the property of the lessee and it agrees to use them only in the manner authorised expressly or impliedly by this agreement and the lessee agrees to return at the determination of the lease to the producer all the concerned positive prints then remaining with it in their then condition. The negative of the film shall remain in the custody of the producer throughout the lease period exclusively as the agent and the custodian of the lessee free of any charge for keeping custody and it is expressly understood that the producer cannot during the continuance of this agreement wake use of the negative in any manner whatsoever other than for the purpose of taking out extra prints as and when required by the lessee against its paying the producer the entire charges for such prints or supplying requisite raw film and paving the charges for taking the prints as the producer may ask at the time." This clause envisages that the negative of the film, which is the master copy from which positive prints are taken from time to time, shall remain in the custody of the producer only as the agent and custodian of the lessee. From this clause, the learned Advocate-General, for the Department, contends that the the property in the negative regarded as goods has passed to the lessee.

We do not think that this is a proper construction of the clause, and in putting forward this argument we feel that the learned Advocate-General is not taking the clause as a whole and examining the purpose for which such a condition was put in. This has to be read along with the other parts of the clause which clearly show that the producer is prohibited from making use of the negative for purposes other than that of making copies for the benefit of the lessee for the carrying out of the agreement with regard to the distribution and exhibition. It also appears that the lessor as a film producer has laboratories for the purpose of processing films and making prints and what may be called a separate incident of the contract is included herein, namely, that notwithstanding that the lessee has acquired the world negative rights, he cannot go to any other laboratory for the purpose of making prints. The producer lessor has accordingly imposed a condition that the benefit arising from making positive prints shall go to him. This is probably for the purpose of enabling the lessor's other part of the business, namely, running of the cinematograph laboratory to function.

The apparent transfer of ownership of the negative of the film during the period of the lease read in the light of the prohibition upon the lessor that he should not make use of the negative in any manner other than for the purpose of fulfilling the terms of the agreement and the further fact that this part of the clause is also expressly intended to operate only during the lease period indicates to our minds that the property in the film regarded as goods did not stand transferred to the lessee. This clause only reiterates the scope of the respective rights, the right of the lessee to demand and obtain positive prints as and when he requires and the prohibition upon the lessor not to deal with

the negative of the film in any manner whatsoever except for the purpose of providing the lessee with copies of the positive films during the currency of the lease. It is also not denied by the Department that a positive print of a film when used for the purpose of exhibition in the theatres has a very short span of life and after the film has run for a certain number of times, it is worn out and has to be replaced, and it is to secure such number of copies as the lessee may require on payment of the charges that this clause has been introduced. It does not to our minds connote the sale of the negative at all.

25. That after the expiry of the lease period the lessee will have no further rights even with regard to the negative is clear from this clause. If the intention of the parties was to transfer the property in the negative to the lessee, the wording of the clause is singularly inappropriate for the purpose.

26. Another Clause 4 (E) reads thus:

> "Any failure or default on the part of the lessee in the carrying out of this agreement shall not entitle the producer to get back or claim possession of the positive copies or copy of the negative; but the lessee's liability shall be only for the unpaid consideration money as agreed to and above stated."

The Department relies upon this clause as well and urges that if the producer cannot get back or claim possession of the positive copies or copy of the negative but can only demand from the lessee the unpaid consideration stipulated, it should follow that the property in the positive copies or the copy of the negative has become that of the lessee. Here again, it seems to us that to look at a single clause of a comprehensive agreement and to arrive at the intention of the parties is not a proper method of interpretation of a contract. The earlier clauses specify for a stipulated consideration and that consideration, which is in the nature of a guaranteed minimum of Rs. 10,00,000/-, is to be paid thus. Taking the agreement in respect of the film 'Pooja ke Pool' entered into on the 26th November, 1962, the relevant clause states that a sum of not more than Rs. 2,00,000/- shall be paid before the end of 31st of December, 1962, and thereafter not more than Rs. 1,00,000/-during any calendar month and the balance, if any, out of the Rs. 10,00,000/-, to be paid on the date of the censor certificate. It would appear therefore that this guaranteed minimum is expected to be paid even before the lessee is in a position to exhibit the film.

It is clear from the other terms of the agreement as also from the rules under the Cinematograph Act that a film cannot be exhibited before a censor certificate is obtained and another clause of the agreement provides that the producer shall obtain the necessary censor certificate and deliver over to the lessee such certificate along with a positive print of the film within two years from the date of the agreement. On the producer's failing to do so, the lessee is entitled at his discretion to treat the agreement as cancelled without prejudice to his rights to claim damages etc. But even before the producer obtains the necessary censor certificate, the lessee is enabled as from the date of the agreement itself to enter into agreements or contracts of sublease, distribution etc., with third parties. It is in the light of these provisions that the clause extracted earlier has to be understood. The failure of the lessor or the lessee in carrying out the agreement cannot obviously endanger the other contracts which the lessee might have entered into with third parties for the purpose of

distribution and it is only in order to safeguard such third parties' rights that the above clause lays down that solely for the reason that the lessee might have failed to pay an instalment of the consideration or on account of some other failure, the producer cannot back out of the contract and obtain possession of the positive copies or the copy of the negative. The producer accordingly agrees that he will restrict his right to the recovery of the guaranteed minimum consideration and shall not interfere with any other arrangements which the lessee might in the usual course of his business have entered into, This clause is again related to an earlier clause, which states:

> "It is hereby expressly agreed that in consideration of the lessee's unconditional liability to pay as the basic minimum price Rs. 10,00,000/-, the lessee has become and is entitled to hold forthwith and to continue to hold until the expiry of the period of the lease, the entire world negative rights as aforesaid without any lien thereon to the producer."

Clearly, what is contemplated is that having once conferred the right of distribution and exhibition to the lessee and having permitted the lessee to enter into other engagements of a like nature, the lessor is prevented from claiming any lien on the world negative rights and his rights are restricted only to recovery of the consideration money. In the nature of things and particularly in view of the nature of the trade, it seems to us that these clauses do not establish the contention of the Department that they connote an outright sale of the negative of the film regarded as goods along with the other rights connected with it by way of distribution or exhibition.

27. Nextly, it was urged that the manner in which the consideration was arrived at, itself indicates an outright sale. The relevant clause states that the consideration shall be computed as "the total of (a) the amount of the producer's declared cost of the film plus (b) the profits to the producer of 15% of the declared cost, subject in any case to a minimum price....." The expression 'declared cost' has been defined. It is claimed by the Department, that when the producer seeks to obtain a certain specified percentage of his cost of production as his profit, it is more or less in keeping with the idea of a sale of manufactured goods and from this feature, the concept of sale is sought to be spelt into the transaction. We are unable to agree. Once again, we have to consider the nature of the trade. One is well aware that films have a more or less chancy career depending upon the popular taste at the time. It may well happen that film produced at an enormous cost proves a flop and the risk attendant upon catering to the public taste is minimised by the producers of films by distributing the risk as it were by entering into arrangements of this kind. The aim of any producer is to recover the amount which he has sunk into the production of the film and if he guarantees it by entering into an arrangement of this nature by providing a return of a percentage in addition to the cost that went into the making of the film, can one say on that ground alone that what was intended was a sale of the film itself? We are not satisfied that this view pressed before us by the Department is a reasonable interpretation to place upon a transaction of this kind.

28. In buttressing this argument that what is really contemplated is not a lease of a right to exploit but an outright sale of the copyright in the production regarded as incorporeal movable property, reliance is placed by the Department upon its assertion that what may be called the marketable value of the film becomes nil at the end of three years. In the counter affidavit, it is said that "the

value of a film is completely wiped out by exhibition in the course of ten years or so". The impugned order says that the normal life of a film is less than three years. If the film as an exploitable commodity has no value beyond a period of three years, the apparent tenor of the transaction as a lease to exploit the right of the owner of the copyright is in substance only an outright gale of all such rights of the owner so it is argued.

In support of this argument, reliance is placed upon the fact that under the Income-tax Law, depreciation of the value of the film as an income-earning asset is allowed over a period of three years only and thereafter the Income-tax Department treats the book value of the asset as having been completely exhausted by such depreciation. It seems to us that the procedure adopted by the Income-tax Department for a particular purpose cannot give any clue to the real nature of the transaction between the lessor and the lessee. On the other side, it is equally emphatically urged that where a statute recognises a right in the owner of a copyright to enure for as long a period as fifty years and in fact provides for the protection of such a right, it would be illogical to claim that the value of the property becomes nil at the end of a much lesser period. Virtually, this argument of the Department would equate the right of the owner of the copyright to the actual material that is produced by him. What is contemplated by the arrangement between the parties is only the supply of certain material to the lessee in order to serve the exploitation of the right of the owner in the copyright of the film. If the argument of the Department is accepted, any lease transaction such as mere hire even for as short a period as say five years must be regarded as a sale, solely for the reason that that period is in excess of the period of three years, which the Department alleges is the normal life of a film, It is also easy to see that the mere sale of a film regarded as material to another person by the owner of the copyright would count for nothing at all unless there is the conferment of a right to exploit the film. In a transaction of this kind, it is this latter right which is more valuable and the supply of the film is ancillary to the exercise of that right. We are therefore unwilling to accept this argument based upon income-tax procedure as leading to any positive conclusion. It seems to us therefore that even if copyright is regarded as a species of movable property, the transactions in question do not connote sales at all.

29. Since no element of sale is involved, the taxing provisions of the General Sales Tax Act have no application at all.

30. Though the above conclusions would serve to dispose of the main question raised in these writ petitions we may nevertheless deal with the subsidiary question which relates to the quantum of tax. What the Department has done is to impose a tax on the basis of the entry in the first Schedule to Act I of 1959 at the rate of 10%. Brief reference to certain provisions of the Act is necessary in order to appreciate the contention. Under Section 3 of the Act, levy of tax on the turnover of sales or purchases of dealers is provided for in respect of the general mass of goods at 2% (since raised to 2 1/2) of the total turnover of an assessee, which is not less than Rupees 10,000/-. The levy of tax provided under Section 3 (1) of the Act as above is a multiple point levy, that is to say, on every occasion when the same goods suffers sale or purchase at the hands of a dealer, tax is leviable on the turnover, subject to a certain minimum turnover which stands exempted. Section 3 (2) of the Act, however, specifies a class of particular goods in respect of which the tax is leviable from the dealer only at a single point and at the rate specified in the First Schedule to the Act. The rate of tax in the

case of these goods is higher, standing at present after the latest amendment at 11% of the turnover.

The contention advanced by the petitioner in these cases is that photographic films are listed in the Schedule as goods in respect of which single point tax is leviable under Section 3 (2) of the Act, Obviously, when the film is purchased by the petitioner, it would have suffered tax under this entry. It is a matter for verification, if necessary, whether any particular purchase has so suffered tax or not, For the purpose of the argument we shall assume that the purchase by the petitioner, which involves a sale to him by the dealer, has attracted levy of tax under this provision. If an article listed in the Schedule has so become liable to tax, then the law protects from imposition of tax every subsequent transaction in respect of that article by way of sale or purchase by a dealer. What the Department has done however is, that treating these lease transactions as sales of the film for the consideration stipulated in the lease arrangements, it has sought to impose tax at the rate specified in the Schedule in disregard of the fact that it has suffered tax under the First Schedule as a sale of the raw film. Objection is taken to this and it is contended that having regard to the underlying intent and the scope of the entry in the Schedule, exposed films cannot be brought within the scope of taxation contemplated by Section 3 (2) of the Act. Either it remains a film even after having been exposed, in which event having been already subjected to tax at the point of first purchase or sale as a raw film a subsequent sale is not taxable under the Schedule; or the entry in the I schedule relates only to raw film, having regard to the underlying intent of the enactment, in which event also, the processed film is no longer film within the meaning of the entry and liable to be taxed under the Schedule. It is urged that this view is preferable, for on a contrast of similar provisions in the preceding Act of 1939, it would appear that only 'raw film was intended to be taxed Under the single point system. We may however mention that the pattern of taxation of similar articles under Act IX of 1939 was different and we cannot interpret the provisions in Act 1 of 1959 by any reference to the earlier Act.

31. The word 'film' occurs in two entries in the Schedule, Entry No. 6 reads: "Cinematographic equipment including cameras, projectors, sound recording and reproducing equipment, lenses, films and parts and accessories required for use therewith." Entry No. 7 reads: "Photographic and other cameras and enlargers, lenses, films, plates, paper, cloth and other parts and accessories required for use therewith". It is difficult, we have to concede, to draw any inference of a conclusive nature from the contents of the two entries. In Entry No. 7, where the word 'films' is used in connection with photographic and other cameras, one may well feel that the word 'film' herein might sensibly denote the raw film. But when the word 'film' is used along with the expression "Cinematographic equipment including cameras and projectors" it may equally denote the positive print of a film which is required to be exhibited by means of the cinematographic equipment. The learned Advocate-General presses this view for our acceptance. According to him, the raw film is entirely different from the exposed film and is a different commodity altogether, but nevertheless it continues to be a film. The raw film may be taxable under the single point system as a film. The positive film also would continue to be a film and would still fall within one or the other of the two entries. But it is no longer the same film that had undergone tax earlier, so that it cannot be said that the principle of the single point taxation is outraged by taxing the exposed film again under the Schedule.

He has referred to decisions which have dealt with tobacco in its raw and manufactured state and urged for our acceptance the view that since the manufactured object is different from the original object, the taxation of the sale of a manufactured object, though may still fall within the same category once again under the single point system, is not opposed to law. In Gokaldas and Co. v. State of Gujarat, (1966) 17 STC 138 (Guj) a similar question arose with regard to taxation of tobacco and its manufactured form as beedi tobacco. Again in State of Madras v. Swasthic Tobacco Factory, tobacco had been manufactured into chewing tobacco and sold; and the claim was made that the excise duty paid on the raw tobacco should be allowed on a deduction with turnover of sale of chewing tobacco. The Supreme Court held the goods sold to be different from the goods on which excise duty was paid and that the deduction was not allowable. In contrast we may refer to Tungabhadra Industries Ltd. v. Commercial Tax Officer, Kurnool . That was no doubt not a case of the levy of tax. But the question arose whether when the manufacturer of Vanaspathi sold Vanaspathi, he was entitled to a deduction of the value of the groundnut of Kurnool purchased by him and upon which he had paid tax, from his gross turnover of the sales of oil. The Department's contention in that case was that Vanaspati was a different object altogether and that it was only when coconut oil was sold as such that the manufacturer was entitled to the deduction contemplated by the rules. But the Supreme Court pointed out that though by a process of manufacture coconut oil might have been converted into Vanaspathi, it still remained coconut oil for all purposes and that the deduction was available to him. We have already indicated our reasons for holding that an exposed film is in the light of the entries in the First Schedule to Act I of 1959 a different article from a raw film.

32. Mr. V.K. Thiruvenkatachari has invited our attention to the report of Dr. P.S. Lokanathan based upon which the old Act of 1939 was replaced by Madras Act I of 1959. In this report, in recommending certain commodities for single point levy, the learned expert has listed cinematographic, photographic and other cameras, projectors, etc., and films, plates, paper and cloth required for use therewith and noted:

> "These commodities are now taxed at multi point with an additional single point at 2%. The dealers in this commodity could be located easily. Hence these could be brought under the single point system. There are about ten wholesale dealers, and importers in these goods in the State."

It is urged by Mr. V.K. Thiruvenkatachari that when the law was amended on the basis of the recommendations contained in this report, it was obviously intended that the articles suggested for single point levy should suffer tax at the hands of wholesale dealers pr importers when they sold the goods and thereafter be free of any tax in respect of any subsequent transaction. If we could have any assurance that the recommendations made by the learned expert were followed without any deviation, this argument would no doubt be sound. We are however unable to hold either on the basis of that report or on the basis of the actual form which the legislation took with regard to films that an exposed film was not intended to be taxed solely for the reason that the raw film was liable to a single point levy.

33. One further question of considerable importance is the levy of penalty under Section 12 (3) of tbe Act. In the order of the Deputy Commercial Tax Officer relevant to 1964-65 assessment, which is the subject-matter of W. P. No. 782 of 1966, after overruling the objections that the transaction was not liable to tax as a sale of goods, the Officer proceeded to say:

> "A penalty of Rs. 6,66,251/- being 1 1/2 times the tax due under Section 12 (3) of the Act for not disclosing a turnover of Rs. 44,41,674.14 in the A-1 return is also levied as proposed."

On behalf of the petitioner, the validity of Section 12 (3) itself is brought into question. There are two provisions in the Act which enable the taxing authorities to levy a penalty. Section 12 of the Act by Sub-section (1) provides that the assessment of a dealer shall be on the basis of the prescribed return relating to his turnover submitted in the prescribed manner within the prescribed period. Sub-section (2) states that if no return is submitted by the dealer or if the return submitted by him appears to the assessing authority to be incomplete or incorrect, the assessing authority, shall, after making such enquiry as it may consider necessary, assess the dealer to the best of its judgment There is a proviso which requires the assessing authority to give a reasonable opportunity to the assessee. Sub-section (3) reads thus:

> "When making any assessment under Sub-section (2), the assessing authority may also direct the dealer to pay in addition to the tax assessed, a penalty not exceeding 1 1/2 times the amount of tax due on the turnover that was not disclosed by the dealer in his return, or in the case of failure to submit a return, 1 1/2 times the tax assessed, as the case may be."

It is seen from this provision that if a dealer fails to submit a return, the assessing authority may assess him to the best of its judgment. In such case, in addition to the tax imposed, the assessing authority may impose a penalty of 1 1/2 times the tax. But in a case where the assessment appears to the assessing authority to be incomplete or incorrect, the authority gives the dealer an opportunity of proving the correctness or completeness of the return, and after a hearing of that nature, if the assessing authority finds that any part of the turnover was not disclosed by the dealer in his return, a penalty not exceeding 1 1/2 times the amount of tax due on such undisclosed turnover may be imposed. This provision accordingly requires the assessing authority to determine the quantum of the turnover that was not so disclosed by the assessee.

Turning now to Section 16 of the Act which deals with assessment of escaped turnover, certain vital differences are seen to exist therein. Under Sub-section (1), where any turnover in whole or in part has escaped assessment or has been assessed at a rate lower than that at which if is assessable, the assessing authority has jurisdiction to assess the tax payable after service of notice on the dealer and after making such enquiry as is necessary. That he could do within a period of five years from the expiry of the year to which the tax relates. Sub-section (2) provides for the imposition of a penalty and a penalty not exceeding 1 1/2 times the tax so assessed is leviable in case the assessing authority is satisfied that the escape from assessment is due to wilful non-disclosure of assessable turnover by the dealer. The mere fact that the turnover, has escaped assessment does not invite the imposition of

the penalty. Under this provision, the assessing authority has to find that there has been an evasion of the tax due to wilful non-disclosure of turnover which should have been disclosed. Section 12 (3), on the other hand, does not appear to require any such finding of wilful non-disclosure in the return. The mere fact that some item of turnover has failed to be included in the return would appear to confer upon the assessing authority the jurisdiction to impose a penalty.

It seems to us that even in the case covered by Section 12 (3) of the Act, a 'deliberate non-disclosure is really contemplated. The section refers to the imposition as a penalty and a penal provision of this nature cannot have been intended to apply to cases other than where a deliberate concealment by nondisclosure is involved. But, on the question whether such a provision is unconstitutional, we are unable to agree with learned counsel. It is well recognised that a power to penalise evasion of tax which is lawfully due is ancillary to the taxing power and the provision cannot therefore be struck down. On the further part of the argument of the learned counsel that mere non-disclosure cannot invite the levy of penalty, we agree. Having regard to the underlying intent of the section, it is still necessary for the assessing authority to be satisfied that the non-disclosure is wilful and is designed to evade the tax. It can hardly be that the Legislature thought that an innocent omission by oversight or some such reason should still invite penal consequences,

34. The question that we have to turn to now is whether the order of assessing authority imposing the penalty in this case is a proper exercise of the judicial discretion of that authority. It is contended on behalf of the petitioner that till these impugned orders were passed, both the Department and the assessee doing business of this description were rightly under the impression that such transactions did not involve any sale element. It appears that the question of an assessment of a like nature came before the Sales Tax Appellate Tribunal in 1956. In that case, the assessee who was a producer of films received a sum of Rupees 2,85,000/- in connection with the assignment of the distribution rights of a cinema picture. He was assessed to tax as on a sale of goods. He took the matter in appeal to the Sales Tax Appellate Tribunal which examined the matter and came to the conclusion that arrangements of that kind contemplated in substance an assignment of incorporeal rights "and that the portion of it, if any, relating to the transfer of movable property for valuable consideration is relatively very insignificant,"

> It is common ground that subsequent to the decision of the Tribunal the Department has not been bringing to tax literally hundreds of transactions of this nature. The Sales Tax Appellate Tribunal is a body constituted under the Sales Tax Act and its appellate powers are outlined in Section 36 of the Act. It is the competent authority which determines appeals arising from the subordinate taxing authorities. Sub-section (9) of Section 36 states that every order passed by the Appellate Tribunal under Sub-section (3) shall, subject to the provisions of subsection (6) of Section 38, be final Section 38 provides for a revision to the High Court on a question of law from the order of the Appellate Tribunal and in the absence of such revision, the law expressly confers finality upon an order of the Appellate Tribunal. We are not saying that solely for the reason that the Appellate Tribunal took a certain view in certain appeals before it in 1956, the Department is not competent to levy tax on a transaction of a similar nature in another case. It may be that the particular order of

> the Tribunal may not have been carried in revision to the High Court and in so far as the assessee in that particular case is involved, the Department may have no alternative but to accept the decision of the Appellate Tribunal. But it is a point worthy of note that between 1956 when the Sales Tax Appellate Tribunal rendered its decision and the date on which these impugned orders were passed, everyone concerned, including the Department, was under the view that turnovers of this description were not liable to be included in the turnover of the dealer. It is in that context that we have to examine whether the levy of the penalty for non-disclosure of the alleged turnover in the return is justified,

35. From what we have stated above, it is clear that the power to impose a penalty in respect of what the law considers a punishable shortcoming on the part of the assessee must necessarily be coupled with a duty to determine the nature of the fault sought to be penalised. Indeed, Section 12 (3) itself contemplates that the penalty to be imposed is dependent upon the quantum of the turnover which was not disclosed by the dealers. There may be cases where there is a genuine dispute whether a particular part of the turnover is or is not liable to be included. For instance, where a dealer has a turnover both under the local sales-tax law and under the Central Sales-tax Act, he may have brought a particular turnover under the return relating to one and not the other. But the assessing authority may determine that the turnover is liable to be included in the other return. That would be clearly a case Where the assessing authority would not be justified in imposing a penalty for the non-disclosure of that turnover in one of the returns, unless he finds some material to show that it was disclosed in the other return for certain ulterior purposes. There may also be cases where the very nature of the turnover as a sales turnover is disputed and so long as the dispute is based upon reasonable grounds which induced the dealer not to include that turnover in the return, no one can say that a penalisable fault was committed by the dealer by reason of the non-disclosure, The power to impose the penalty for non-disclosure of any part of the turnover is not a routine act on the part of the assessing authority but one which invites the exercise of a proper judicial discretion on his part. When we look at the circumstances in which the assessing authority imposed the penalty or has issued notice to show cause why penalty should not be imposed in these cases, we find in the background the undeniable fact that turnovers relating to transactions of this kind were not being included in the several preceding years, obviously due to the decision of the Sales Tax Appellate Tribunal, and it is further seen that the sales-tax authorities did not in the preceding years insist upon the inclusion of such turnovers. In these circumstances, we have no doubt at all in our minds that the action under Section 12 (3) of the Act is wholly unjustified. In any event since we have held that no sales turnover is involved, no scope for levy of penalty at all exists.

36. It follows that the petitioner is en titled to succeed in so far as the turn over relating to these lease transactions are concerned, as also the imposition of the penalty. To that extent, the rule will be made absolute in W. P. 782/1966. There will be a writ of prohibition in W. P. 783/1966 quashing the proceedings in so far as the assessing authority has set on foot proceedings proposing to include similar turnovers, and a similar prohibition in respect of the notice proposing to levy penalty. For like reasons, the pro visional assessment will also be quashed.

The petitioner will be entitled to his costs. Counsel's fee Rs. 250/-. (one set).