

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6379 of 2014

Food Corporation of India, 16-20, Barakhambha Lane, New Delhi having its Regional Office at Arunachal Bhawan, Exhibition Road, Bihar, Patna – 800 001 through Sri Amresh Kumar, Deputy General Manager ®, Bihar Region son of Sri Ranjit Singh resident of 104, Raj Enclave, Road No. 5C, North S. K. Puri, Patna – 800 013.

.... Petitioner

Versus

1. The State of Bihar through the Principal Secretary-cum-Commissioner, Department of Commercial Taxes, Bihar, Patna.
2. Dy. Commissioner of Commercial Taxes, Patliputra Circle, Pant Bhawan, Bailey Road, Patna.

.... Respondents

Appearance :

For the Petitioner : Mr. Jitendra Singh, Senior Advocate
Mr. Mrigank Mauli, Advocate
For the Respondents : Mr. Lalit Kishore, PAAG

CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

JUDGMENT AND ORDER

C.A.V.

(Per: HONOURABLE THE ACTING CHIEF JUSTICE)

Date: 19-07-2016

A State legislature, while enacting a law for imposition of tax in sale and purchase of goods by virtue of Entry 54 of List II of the Seventh Schedule of the Constitution of India, must conform to the restrictions put by the Constitution and must exercise its powers within the said limits. While imposing a tax on the *goods declared to be of special importance in the course of inter-State trade and commerce* under the Central Sales Tax Act, 1956, the State legislature has to comply with various restrictions and conditions imposed by

the Central Sales Tax Act, 1956, read with Article 286(3) of the Constitution of India. If the State legislature provides for levy of tax on sale and purchase of *declared goods* in violation of the provisions of Section 15 of the Central Sales Tax Act, 1956, read with Article 286(3) of the Constitution, the Writ court is bound to interfere and correct the position.

2. What is the nature and character of *additional tax* imposed on sale and purchase of goods under the Bihar Value Added Tax Act, 2005? Whether the term “*tax*”, as appearing in Section 16 of the Bihar Value Added Tax Act, 2005, will also include the *additional tax* imposed under Section 3AA of the Bihar Value Added Tax Act, 2005? Whether a State legislature, while enacting the law for levy of tax on sale and purchase of goods, can make provisions allowing *input tax credit* only in respect of the tax levied under the Act without giving *input tax credit* in respect of the *additional tax* paid under the Act of 2005? Whether the *additional tax*, paid on the purchase of *paddy* inside the State, shall be reduced not only from the *tax*, but *additional tax* leviable on the sale of *rice* inside the State procured from such *paddy* purchased within the State? Whether Section 16 of the Bihar Value Added Tax Act, 2005, is *ultra vires* and beyond the legislative competence of the State legislature for if (Section) **omits** to provide *set off* in respect of the *additional tax* paid on purchase of *paddy* inside



the State from the *tax* and *additional tax* payable on the sale of *rice* inside the State procured from the *paddy* purchased within the State? These are some of the important questions of law that arise for consideration in the present writ petition made under Article 226 of the Constitution of India.

3. Yet another question, which this writ petition raises, is : Whether the provisions of Section 3AA of the Bihar Value Added Tax Act, 2005, and Notification No. 81, dated 23.09.2007, providing for levy of *additional tax* on dealers having gross turnover of more than Rs. 250 crores is violative of the equality clause enshrined in Article 14 of the Constitution of India by discriminatory in nature.

4. The petitioner, Food Corporation of India, which is a statutory body incorporated under the Act of Parliament, has challenged, with the help of the present writ application, made under Article 226 of the Constitution of India, the validity of Section 16 of the Bihar Value Added Tax Act, 2005 (hereinafter referred at as "the Act of 2005") as *ultra vires* the provisions of Section 15 of the Central Sales Tax (CST) Act, 1956 (hereinafter referred to as 'CST Act') read with Article 286 of the Constitution of India inasmuch as the same does not allow credit of *additional tax* paid on *paddy* under Section 3AA of the Act of 2005, which, upon conversion into *rice*, was sold both within and outside the State of Bihar.

5. The facts of the case are capitulated as under:

(i) The petitioner is the largest food grain dealer and filed returns for the period 2007-08 to 2009-10. The gross turnover of the petitioner included the turnover from sales made within the State, sales made in course of inter-State trade and commerce and sale value of the *rice* converted from *paddy* purchased by the petitioner within the State of Bihar.

(ii) It is the case of the petitioner that the petitioner purchased *paddy* in the State of Bihar and paid 3% *additional tax* under Section 3AA of the Act of 2005. The petitioner gets the *paddy* milled into *rice* and, thereafter, affects sale thereof both within the State as well as outside the State by way of sale in course of inter-State trade and commerce.

(iii) Upon such sale of *rice*, the petitioner has to pay *additional tax* @ 3% under Section 3AA of the Act of 2005 and VAT @ 1% as per Section 4 read with Entry 82 of Schedule I attached to the Act of 2005. For the period 2007-08 to 2008-09, the petitioner claimed *set off* on the *additional tax* paid @ 3% on the purchase of *paddy* under Section 3AA of the Act of 2005 and claimed further *set off* of 1% of *purchase tax* paid on *paddy* under Section 4 of the Act of 2005.

(iv) The petitioner claimed the *set off* of the aforesaid tax and *additional tax* as *input tax credit* in the light



of Section 16(1) of the Bihar VAT Act, 2005, read with Section 15(c) of the Central Sales Tax Act, 1956. The Commercial Tax Authorities initially allowed the *set off*; but on objection of the office of the Comptroller and Auditor General of India, the same was reversed and a cumulative liability of Rs. 32,44,34,761.84 was raised including penalty for the three periods of *additional tax*. The said amount was realised from the petitioner by attachment of the bank account of the petitioner in exercise of the powers conferred by Section 47 of the Act of 2005.

(v) The *set off* of the *additional tax* was denied to the petitioner on the ground that Section 16(1)(a) allowed *input tax credit* only on taxes enumerated in Section 14 of the Act of 2005. The revenue authorities were of the view that *additional tax* is not a tax under Section 14 of the Act and, as such, the *additional tax* paid on purchase of *paddy* inside the State, cannot be *set off*, under Section 3AA of the Act of 2005, against the tax payable by the petitioner on the sale of *rice* procured from such *paddy*, the resultant view being that the *additional tax* paid, while purchasing *paddy*, cannot be claimed as *input tax credit* for adjustment against the tax payable on the sale of *rice* procured from conversion of the said *paddy* in view of the specific provisions of Section 16(1)(a) of the Act of 2005. The appeals preferred against the orders of assessment having been dismissed, the petitioner filed appeals before the Commercial

Taxes Tribunal, which are pending disposal. Since the validity of the provisions of the Act cannot be questioned in a statutory appeal, the petitioner filed the present writ application, under Article 226 of the Constitution of India, assailing the validity of Section 16 of the Act of 2005.

6. We have heard Mr. Jitendra Singh, learned senior Counsel, appearing on behalf of the petitioner and Mr. Lalit Kishore, learned Principal Additional Advocate General, appearing on behalf of the respondents.

7. Mr. Jitendra Singh, learned senior Counsel, appearing on behalf of the petitioner, has submitted that the effect of not allowing *set off* on *additional tax* paid under Section 3AA of the Bihar VAT Act, 2005, on the purchase of *paddy* from the output tax liability on sale of *rice* procured from such *paddy* would make the said goods of *special importance* be subjected to tax @ 7%, which will be *ultra vires* Section 15(a) of the Central Sales Tax Act, 1956, inasmuch as Section 15(a) prescribes the limit of the tax liability on goods of *special importance* to a maximum of 4%. Therefore, not providing *set off* of *additional tax*, paid on purchase of *paddy* from the output tax liability of the petitioner on the sale of *rice* procured therefrom, would make the said *declared goods* suffer *tax* twice making the same costlier as the petitioner would be paying 4% tax on the purchase of *paddy* (1% *purchase tax*

under Section 5 of the Act + 3% *additional tax* under Section 3AA of the Act of 2005) and would be further paying 4% tax on the sale of the *rice* procured from such *paddy* (1% sales tax under Section 4 of the Act + 3% surcharge under Section 3AA of the Act of 2005).

8. In the case at hand, points out Mr. Jitendra Singh, the respondents have failed to appreciate that refusal to allow *set off* of *additional tax*, imposed under Section 3AA of the Act of 2005, would make Section 16 of the Act *ultra vires* the provisions of Section 15(c) of the CST Act, 1956, read with Article 286 of the Constitution of India and, therefore, Section 16 of the Act of 2005 can only be saved from being declared to be *ultra vires* by reading down the same and by declaring the *additional tax* paid under Section 3AA of the Act of 2005 to be a tax covered by Section 16 of the Act of 2005 as otherwise, the provisions of Section 16 of the Act of 2005 is liable to be struck down as *ultra vires* and illegal.

9. Referring to Section 3AA of the Act of 2005, Mr. Jitendra Singh submits that Section 3AA was introduced in the year 2007 w.e.f. 31.02.2007 and has the effect of taxing the *rice, paddy* and wheat available through the public distribution system for the classes of people, who belong to the marginalized sections of the society. The introduction of the threshold limit of gross turnover of Rs. 250 crores, submits Mr.



Jitendra Singh, has the effect of making the petitioner involved in distribution of food grains throughout the country for Public Distribution System and ensuring National Food Security being the only dealer within the State liable to pay *additional tax*, while letting off huge majority of dealers indulging in profiteering from sale and purchase of *paddy* and *rice*. It is submitted by Mr. Jitendra Singh that Section 16 of the Act of 2005 is discriminatory, the same having no rational nexus with the object sought to be achieved and the same not being based on any intelligible differentia.

10. Referring to the decision of the Supreme Court in ***Satnam Overseas (Export) vs. State of Haryana, (2003) 1 SCC 561***, Mr. Jitendra Singh has submitted that Section 15 of the CST Act, 1956, puts restrictions and conditions on sale and purchase of *declared goods* within the State, which is defined in clause (c) of Section 2 of the CST Act, 1956, to mean the *goods declared* under Section 14 to be of *special importance in inter-State trade and commerce*. *Paddy* and *rice* are, points out Mr. Jitendra Singh enumerated in sub-clauses (i) and (ii) of sub-section (1) of Section 14 of the CST Act, 1956, and are, therefore, *declared goods*.

11. Relying on the decision of the Supreme Court in ***Satnam Overseas (supra)***, Mr. Jitendra Singh contends that the edict of clause (c) of Section 2 of the CST Act, 1956 makes

it clear that a State law, which imposes or authorises imposition of tax on sale or purchase of *rice* or *paddy* inside the State, has to be treated in the following manner:

"where a tax has been levied in respect of sale or purchase inside the State on paddy, the tax leviable on rice procured, out of such paddy, shall be reduced by the amount of tax levied on it."

12. Referring to the decisions of the Andhra Pradesh High Court in ***Dhanalakshmi Vilas Rice Mill Contractors Co. Vs State of Andhra Pradesh, (1988) 68 STC 46*** and ***Sri Laxmiganpathi Enterprises Vs. Commercial Tax Officer, (2000) 117 STC 338***, Mr. Jitendra Singh submits that a reading of Section 3(c) of the CST Act, 1956, along with Section 14 of the CST, 1956, discloses that although *paddy* and *rice* are different goods, the Parliament wanted to tax them only at one stage, because *rice* constitutes the staple food of the nation, the *price* of which should be maintained as low as possible and, therefore, Section 15(c) provides that where tax has been levied on the sale and purchase of *paddy* inside the State, the tax leviable on the *rice* procured, out of such *paddy*, shall be reduced by the amount of tax levied on such *paddy*.

13. Lastly, the learned Counsel, appearing on behalf of the petitioner, relied on the decision of the Punjab & Haryana High Court in ***Food Corporation of India Vs. State***



of Punjab, (2006) 148 STC 312, wherein the Court was considering the writ petition filed seeking declaration of the provisions of Section 14 of the Punjab Value Added Tax Act, 2005, to be *ultra vires* the provisions of Section 15(c) of the CST Act, 1956, on the ground that credit of tax paid on *paddy* was not being allowed as *input tax credit*, while calculating the tax payable on *rice* procured out of it, contending that the clarification vide letter, dated August 23, 2005, that *input tax credit* would be available on sale of such *rice* was subsequently withdrawn on August 29, 2005, the Court held that Section 15(c) of the CST Act, 1956, has to be given effect from the date of commencement of the Punjab Value Added Tax Act, 2005 w.e.f. 1st April 2005.

14. Relying on the aforesaid case, the learned senior Counsel, Mr. Jitendra Singh submits that the case at hand is exactly similar to that in **Food Corporation of India Vs. State of Punjab** (supra) and, therefore, Section 16 of the Bihar VAT Act, 2005, is liable to be declared *ultra vires* and illegal and, in the alternative, the said provisions may be read down by declaring that *input tax credit* has to be allowed in respect of *additional tax* paid on purchase of *paddy* inside the State from the tax payable on the sale of *rice* inside the State procured from such *paddy*.

15. Controverting the submissions made on behalf



of the petitioner, Mr. Lalit Kishore, learned Principal Additional Advocate General, submitted that Section 3AA of the Act of 2005 provides for levy of *additional tax*, which cannot be considered to be a tax and, therefore, the same cannot be claimed as an *input tax credit* inasmuch as *input tax credit* can only be claimed in respect of *tax* imposed under the provisions of the Act of 2005 and cannot be claimed in respect of *additional tax*. The learned Principal Additional Advocate General submits that the restrictions imposed by Section 15(c) of the CST Act, 1956, governs only the tax and not *additional tax* and, therefore, the validity of Section 16 of the Bihar VAT Act, 2005, cannot be assailed on the ground that the same does not allow *set off* of *additional tax* paid as per Section 3AA of the Act of 2005 on purchase of *paddy* from tax and *additional tax* payable on sale of *rice* procured from such *paddy* purchased within the State.

16. In so far as the submission of the petitioner with regard to discrimination meted out by Section 3AA of the Act of 2005 and violation of Article 14 of the Constitution of India is concerned, learned Principal Additional Advocate General submits that in the matter of taxation, the legislature has greater latitude to give effect to its policy of raising revenue. Consequently, according to the learned Principal Additional Advocate General, classification, as provided in

Section 16 of the Act of 2005, cannot be assailed as violative of Article 14 of the Constitution of India inasmuch as the same is based on the taxation policy of the State.

17. A modern State, submits learned Principal Additional Advocate General, while exercising its sovereign power of taxation, has to deal with complex factors relating to the objects to be taxed, the quantum to be levied, the conditions subject to which the levy has been made and the social and economic policies, which the tax is designed to subserve. In these premises, learned Principal Additional Advocate General submits that the present writ petition has no merit and, therefore, the same is liable to be dismissed.

18. Before we proceed to deal with the rival submissions of the parties, it would be necessary to have a look at the relevant provisions of the Constitution of India as well as the CST Act, 1956.

19. Article 246 of the Constitution of India embodies the scheme of distribution of legislative powers between Union and State legislatures with regard to the different entries mentioned in the lists contained in the Seventh Schedule of the Constitution of India. Entry 54 of the State List empowers the State to frame laws imposing taxes on sales and purchases of goods other than newspapers subject to, however, Entry 92A of the Union List. According to Entry 92A of the Union

List, Parliament is vested with exclusive powers to make laws imposing taxes on sale and purchase of goods other than newspapers.

20. Article 286 of the Constitution of India, however, which puts restriction on the power of the State to enact legislation on tax of sale of goods, reads as under:

"286. Restrictions as to imposition of tax on the sale or purchase of goods – (1) *No law of a State shall impose, or authorize the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place_*

(a) outside the State; or

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

[* * * * *]

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

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

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

(b) a tax on the sale or purchase of goods, being a tax of the

nature referred to in sub-clause(b), sub-clause 9(c) or sub-clause(d) of clause (29-A) of Art. 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may be law specify –"

21. Clause (1) of Article 286 places restrictions on the legislative powers of the State relating to imposition of taxes by laying down to the effect that no tax shall be imposed on the sale and purchase, which may taken place outside the State or in the course of import and export out of India. Clause (2) of Article 286 vests in the Parliament the power to frame laws formulating principles for determining as to when a sale or purchase of goods, within the meaning of Article 286(1), can be held to have taken place outside the State or in the course of inter-State trade and commerce. Article 286(3) puts restrictions on the power of the State to impose tax on the sale or purchase of goods declared by Parliament by law to be of *special importance* in inter-State trade or commerce (commonly known as *declared goods*); or a tax on the sale or purchase of goods being a tax of the nature referred to in sub-clause (b), sub-clause (c) or sub-clause (d) of clause (29-A) of Article 366. Article 286(3) provides that such law must be subject to such restrictions and conditions, as the Parliament may by law specify, as regards the system of levy, rates and other incidents

of tax.

22. Thus, the mandate of the Constitution, as envisaged by Article 246 and Article 286, is that the power to frame laws for imposition and realization of taxes on sales and purchases of goods taking place, in the course of inter-State trade and commerce and in the course of export and import, is vested in the Union and, similarly, the power to frame laws for imposition as well as realisation of taxes on sales and purchases of goods, within the State, is vested in the State. The object of such distinction is obviously to prevent double taxation on single transaction.

23. In exercise of the power conferred by Clause (2) of Article 286 of the Constitution of India, Parliament has enacted the CST Act formulating principles for determining, when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import or export. Section 5 of the CST Act embodies the principles as to when a sale or purchase of goods is said to take place in the course of import or export.

24. Hence, taxes, on sales and purchases made in course of inter-State trade and commerce, can be imposed only under the CST Act, 1956, and not under any State legislation. In other words, no taxes can be imposed by the State on sales and purchases those goods, which are covered by the CST Act.

Any attempt, made to the contrary, would amount to double taxation and would, therefore, be contrary to not only the provisions of the Constitution, but the CST Act, 1956, and the Rules framed thereunder.

25. Clause (3) of Article 286 of the Constitution clearly provides that any law of the State in so far as the same imposes, or authorises the imposition of, tax specified in sub-clause (a) and (b) thereof shall be subject to such restrictions and conditions with regard to the system of levy, rates and other incidence of tax as Parliament may by law specify and the said law is the Central Sales Tax Act, 1956.

26. Section 14 of the Central Sales Tax Act, 1956, declares certain goods to be of *special importance in course of inter-State trade and commerce*. The relevant portion of Section 14 is reproduced below:

"14. Certain goods to be of special importance in inter-State trade or commerce.-

It is hereby declared that the following goods are of special importance in inter-State trade or commerce:-

[(i) Cereals, that is to say.-

(i) Paddy [Oryza sativa L];

(ii) Rice [Oryza sativa L];

(iii) Wheat [Triticum Vulgare, T.Compactum, T.Sphaerococum, T.durum, T.aestivum L, T.dicoccum];

(iv) Jowar or milo [sorghum vulgare pers];

(v) Bajra [Pennisetum typhodeum L];

- (vi) Maize [*Zea mays D*];
(vii) Ragi [*Eleusine Coracana gaertn.*];
(viii) Kodon [*paspalum scrobiculatum 1.*];
(ix) Kutki [*panicum miliare L.*];
(x) Barley [*Hordeum vulgare L.*];

**** ***** *****”

(Emphasis is supplied)

27. Section 14 merely enumerates the declared goods but does not lay down any rate of tax. It is Section 15 of the CST Act, 1956, which lays down the upper limit for the rate of tax and other restrictions and limitations on the tax levied thereon.

28. Section 15 of the CST Act, 1956, which puts restrictions and conditions on sale or purchase of *declared goods* within a State, reads as under:

"15. Restrictions and conditions in regard to tax on sale or purchase of declared goods within a State.-Every sales tax law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sale or purchase of declared goods, be subject to the following restrictions and conditions, namely-

(a) the tax payable under that law in respect of any sale or purchase of such goods inside the State shall not exceed [five per cent.] of the sale or purchase price thereof.

(b) Where a tax has been levied



under that law in respect of the sale or purchase inside the State of any declared goods and such goods are sold in the course of inter-State trade or commerce, [and tax has been paid under this Act in respect of the sale of such goods in the course of inter-State trade or commerce, the tax levied under such law] [shall be reimbursed to the person making such sale in the course of inter-State trade or commerce] in such manner and subject to such conditions as may be provided in any law in force in that State]

(c) where a tax has been levied under that law in respect of the sale or purchase inside the State of any paddy referred to in sub-clause (i) of clause (i) of section 14, the tax leviable on rice procured out of such paddy shall be reduced by the amount of tax levied on such paddy;]

(ca) where a tax on sale or purchase of paddy referred to in sub-clause (i) of clause (i) of section 14 is leviable under the law and the rice procured out of such paddy is exported out of India, then, for the purposes of sub-section (3) of section 5, the paddy and rice shall be treated as a single commodity;]

(d) each of the pulses referred to in clause (via) of section 14, whether whole or separated, and whether with or without husk, shall be treated as a single commodity

for the purposes of levy of tax under that law]”

29. A bare reading of Section 15 of the CST Act, 1956, shows that this Section (Section 15) is designed to override and control the State’s power to tax transaction of sale and purchase of *declared goods*. The twin purpose which is sought to be achieved by placing Section 15 on the statute book, is:

(i) To prescribe the maximum rate of sale or purchase tax under a State law, at one precise stage.

(ii) To prevent subjecting the same goods to tax under the State law and the Central law where the goods are, later, sold in course of inter-State trade or commerce.

30. The underlying object is to have uniformity in the rate and mode of tax levy on *declared goods* throughout India.

31. Section 15(a) ensures that in case of *declared goods*, the goods shall, in all circumstances, bear only a single burden at a specified stage and at the prescribed rate. The provisions of Section 15(a) make an inroad into the texture of the local law so that the charging provisions, in the State laws, be made to read subject to, and in conformity with, the provisions of Section 15(a) and the policy underlying therein.

32. In *Modi Spinning & Weaving Mills Co. Ltd.*

Vs Commissioner of Sales Tax, (1965) 16 STC 310, while examining the effect of the charging section in a State law prescribing rate of tax applicable to any *declared goods* at a higher rate than the rate figure prescribed by Section 15(a) of the CST Act, 1956, the Supreme Court held that the meaning or intention of clause (3) of Article 286 of the Constitution is not to destroy all charging sections in the Sales Tax Acts of the States, which are discrepant with Section 15(a) of the CST Act, 1956, but to modify them in accordance therewith. The law of the State has to be declared to be subject to the restrictions and conditions contained in the law made by the Parliament and the rate, in the State Act, of *declared goods* would *pro tanto* stand modified.

33. Section 15(b) of the CST Act, 1956, puts a further restriction on the State's power to the effect that the *declared goods* must not suffer State tax if they have later been subjected to an inter-State sales tax.

34. Section 15(c), which we are concerned with in the present case, was inserted in the CST Act by amending the Act of 103 of 1976 with effect from September 7, 1976.

35. Section 15(c) provides that where a tax has been levied under the State law in respect of the sale or purchase inside the State of any *paddy* referred to in Section



14(1)(i), the *tax*, leviable on the *rice* procured from such *paddy*, shall be reduced by the amount of *tax* levied on such *paddy*. Although *paddy* and *rice* are different commodities, Section 15(c) has clearly intended to tax the *paddy* and *rice* at one stage. Section 15(c) of the CST Act, 1956, has to be read as imposing restrictions on the State's power to impose tax on the sale and purchase of *declared goods* in the State. It provides for reduction of tax leviable on *rice* procured from *paddy*, it may have suffered tax under the State's law, and this reduction is only from the tax leviable on the sale of *rice* within the State. Hence, Section 15(c) of the CST provides reduction of tax on the sale of *rice* under the State's Sales Tax Act by the tax levied under State Act on *paddy* out of which such *rice* was produced.

36. In the light of the discussions of the different provisions of the Constitution and the CST Act, 1956, let us, now, turn to the provisions of the Bihar VAT Act, 2005.

37. The Bihar VAT Act, 2005, was enacted to consolidate and amend the law relating to levy of tax on sales and purchases of goods in the State of Bihar and to provide for matters connected therewith or incidental thereto.

38. Section 2(q) of the Act of 2005 defines "*input*" as under :

"(q) *Input means goods*
(excluding goods specified in Schedule IV)

purchased in the course of business –

(a) for re-sale.

(b) for use in manufacture of goods including packing materials.

(c) for use as capital goods as defined in clause (e)."

39. "Input Tax" has been defined by Section 2(r) as under :

"(r) Input Tax means the amount paid or payable by a registered dealer, by way of tax under this Act, in respect of purchase of any taxable goods."

40. "Input Tax" has been defined by Section 2(v) as under :

"(v) Output Tax means the tax charged or chargeable in respect of sale or supply of goods made by a registered dealer."

41. Section 3 is the charging section. As per the charging section, every dealer, who is registered under the Bihar Finance Act, 1981, as it stood before its repeal by Section 94, shall be liable, on or after the commencement of this Act, to pay tax under the Act on sale or purchase made by him. Sub-section (2) of Section 3 provides that in respect of a dealer, who was not registered under the Bihar Finance Act, 1981, and whose gross turnover of sales calculated from the commencement of the year ending on the day immediately

before the commencement of the Act, exceeds the specified quantum, as applicable to him as per the Bihar Finance Act, 1981, as it stood before its repeal by Section 94, on the last day of such year, shall, in addition to the tax, if any, payable by him under any other provision of this Act, be liable to pay tax under this Act on all his sales.

42. Section 14 of the Act of 2005 prescribes the rate of tax that is payable on the goods sold and purchased within the State of Bihar. Section 14 reads as under :

"14. Rate of Tax.- (1) *Tax shall be payable on the sale price of —*

(a) the goods specified in the Schedule II, at the rate of one percent.;

(b) the goods specified in the Schedule III, at the rate of ⁴(five) percent.;

(bb) the goods specified in the Schedule IIIA, at the rate of four percent.;

(c) the goods specified in the Schedule IV, at the rate not below 10 percent and not exceeding fifty percent and, subject to such conditions and restrictions, as the State Government may, by notification, specify.;

(d) any other goods, not specified in the Schedules I, II, III, IIIA and IV, at the rate of thirteen and a half percent.

(2) The State Government may,

by notification, alter any Schedule to this Act."

43. Section 3AA was inserted, in the Act of 2005, by Act 8 of 2007, w.e.f. 31.02.2007, providing for levy of *additional tax*. Section 3AA is reproduced below :

"Section 3AA. Additional tax.-

(1) Notwithstanding anything contained in this Act, every dealer whose gross turnover exceeds rupees two hundred and fifty crores shall, on sales or purchases of such goods as the State Government may, by notification published in the official Gazette specify, also pay additional tax, in addition to the tax payable by him, at such rate, not exceeding four per centum of the aggregate value, as may be fixed by the State Government in the said notification.

Explanation – For the purposes of this sub-section, the expression "aggregate value" shall mean the aggregate value (excluding the tax paid or payable under this Act) of the sales, of the goods so notified, at the first point in a series of sales within the State.

(2) All provisions of this Act relating to the payment, assessment, recovery and refund of tax shall apply to the payment, assessment, recovery and refund of additional tax.

(3) Notwithstanding any thing to the contrary contained in this Act, every dealer liable to pay additional tax shall be

entitled to collect the amount of this additional tax."



44. From a plain reading of Section 3AA, it is clear that Section 3AA provides for levy of *additional tax* on every dealer, whose gross turnover exceeds Rs. 250 crores, on sales or purchase of goods as the State Government shall notify. In exercise of the powers so conferred by Section 3AA of the Act of 2005, the State Government, vide Notification S.O. 81, dated 13.09.2007, declared *paddy, rice* and *wheat* to be notified goods for levy of *additional tax* @ 3%. In view of the aforesaid notification, S.O. 81, dated 13.09.2007, read with Section 3AA of the Act of 2005, the petitioner, which is distributing food grains through public distribution system, became the only dealer, in the entire State, to be saddled with the liability of *additional tax* on purchase of *paddy* as well as on sale of *rice* and *wheat* within the State.

45. The Bihar VAT Act, 2005, imposes value added tax, which is a tax on the value added to a commodity at each stage and production and distribution process or chain. VAT is a multi-stage tax, which is levied every time a commodity changes hand, but only on the incremental value added to each stage. VAT is a multi-point sales tax with *set off* of tax paid on purchases. Taxing on a value added ensures that each input going into the final consumer output is taxed only once. In view

of the fact that VAT is a multi-point sales tax with *set off* of tax paid on purchases, Section 16 of the Act provides for *input tax credit* which can be claimed by a *registered dealer*. The relevant provisions, embodied in Section 16 of the Act, is reproduced below :

“16. Input Tax Credit.- (1) Subject to the provisions of this Act, an input tax credit as provided in this section shall be claimed by a registered dealer, subject to such conditions and restrictions as may be prescribed, on sales of goods in the following circumstances, namely: -

(a) when a registered dealer purchases any input within the State of Bihar from another registered dealer after paying him the tax as specified under section 14, he shall claim credit of the input tax in the manner prescribed, if the goods are sold within the State or in the course of inter-State trade and commerce;

(b) when a registered dealer —

(i) purchases any input within the State from another registered dealer after paying him the tax under section 14, or

(ii) purchases any input and pays tax on such purchase under section 4 of the Act, and consumes such goods in the manufacture of any goods mentioned in clauses (a), (b) and (d) of section 14,



he shall claim credit of the said input tax in the manner prescribed, if the goods so manufactured are sold within the State of Bihar or in the course of inter-State trade and commerce;

(c) xxx xxx xxx

(d) xxx xxx xxx

(2) xxx xxx xxx

(3) xxx xxx xxx

(4) xxx xxx xxx

(5) xxx xxx xxx

46. From a plain reading of Section 16 of the Act of 2005, it becomes transparent that *input tax credit* is available in respect of the payment of *tax* as specified in Section 14 of the Act of 2005.

47. Since Section 14 of the CST Act does not embrace within itself the *additional tax* levied under Section 3AA of the Act of 2005, before we proceed to examine the question, as to whether the provisions of Section 16 of the Act of 2005, in not allowing *input tax credit* in respect of *additional tax* paid on *paddy* used for conversion to *rice* and when such *rice* is sold within the State of Bihar and *tax* as well as *additional tax* is leviable on such sale, is in violation of Section 14 and Section 15(c) of the CST Act, 1956, read with Article

286 of the Constitution of India or not, it will be necessary to examine the nature and concept of *additional tax* imposed under Section 3AA of the Bihar VAT Act, 2005.

WHAT IS AN ADDITIONAL TAX :

48. *Additional tax* is really a *tax* on the sale of the goods. The *additional tax*, in its true nature and character, is a further tax to raise the revenue for general purposes and is imposed on the dealer depending on their capacity to bear the additional burden. The object of Section 3AA of the Act of 2005, as it is clear from the provisions, is to increase the tax net on the sale and purchase of certain specified goods if the gross turnover of a particular dealer exceeds Rs. 250 crores. It is in reality a tax on the aggregate of the sales affected by a dealer, whose gross turnover exceeds Rs. 250 crores. The *additional tax*, therefore, is an enhancement of the rate of sales tax, when the gross turnover of a dealer exceeds Rs. 250 crores.

49. In fact, sub-section (2) of Section 3AA of the Act of 2005 makes it very clear that *additional tax* is also a *tax* imposed under the Act of 2005 inasmuch as the same provides that all provisions of the Act, relating to payment, assessment, recovery and refund of tax, shall apply to payment, assessment, recovery and refund of *additional tax*. The Act of 2005 has been enacted by virtue of Entry 54 of List II of the Seventh Schedule of the Constitution of India and the *additional*

tax is also a part of the Act of 2005 and, therefore, the same is referable to Entry 54 of List II of the Seventh Schedule of the Constitution of India, which refers to tax on sale and purchase of goods.

50. Hence, the *additional tax* is also a tax on the sale and purchase of the goods, although the same has been imposed only on the dealers, whose gross turnover exceeds Rs. 250 crores. The effect of Section 3AA of the Act of 2005 is that the tax rate, on the sale and purchase of the goods to be specified by the State Government by way of notification in respect of the dealers, whose gross turnover exceeds 250 crores, is increased and thereby the effective tax paid by a dealer, falling under Section 3AA of the Act of 2005, is the rate of tax payable under Section 14 of the Act to be increased by the *additional tax* payable under Section 3AA of the Act.

51. A similar issue came up before the Supreme Court in ***M/S Kodar vs State of Kerala, (1974) 4 SCC 422***, when the issue of the nature of *additional tax* imposed under the Tamil Nadu Additional Sales Tax Act, 1970, fell for consideration before the Constitution Bench. The validity of the said Act was subject matter of challenge, firstly, on the ground that the same is not a tax on the sales, but on the income of a dealer and, secondly, that the said tax is discriminatory inasmuch as the same is imposed on a dealer, whose total

turnover for the year exceeded Rs. 10 lakhs and, therefore, a dealer, beyond a certain limit, is obliged to pay higher tax, whereas others bear lesser tax liability. Both the contentions were rejected by the Supreme Court by holding follows:

"As regards the contention that the State Legislature has no power to pass the measure, we are of the view that additional tax is really a tax on the sale of goods. The object of the Act, as is clear from its provisions, is to increase the tax on the sale or purchase of goods imposed by Tamil Nadu General Sales Tax Act, 1959 and the fact that the quantum of the additional tax is determined with reference to the sales tax imposed would not alter its character. It may be noted that additional tax is to be imposed only if the turnover of a dealer exceeds Rs. 10 lakhs. It is in reality a tax on the aggregate of sales affected by a dealer during a year. The additional tax, therefore, is an enhancement in the rate of sales tax when the turnover of a dealer exceeds Rs. 10 lakhs a year and it is a tax on the aggregate of the sales affected by a dealer during the year."

52. In ***M/S Kodar vs State of Kerala*** (supra), the Supreme Court further held as under:

"Entry 54 in List II authorises the state legislature to impose a tax on the sale or purchase of goods. So, the contention of the appellants that the additional sales tax is not

a tax on sales but on the income of the dealer is without any basis."

53. In ***M/S Kodar vs State of Kerala*** (supra), the Supreme Court approved the view taken by the Kerala High Court in ***Ennakulam Radion Company vs. State of Kerala*** as well as by the Andhra Pradesh High Court in ***A.S. Ramachandra Rao vs. State of Andhra Pradesh***. Dealing with the question of discrimination as regards rate of tax, the Apex Court held as under:

"The last contention namely that the provisions of the Act impose different rates of tax upon different dealers depending upon their turnover which in effect means that the rate of tax on the sale of goods would vary with the volume of the turnover of a dealer and are, therefore, violative of Article 14 is also without any basis. Classification of dealers on the basis of their respective turnover for the purpose of graded imposition so long as it is based on differential criteria relevant to the legislative object to be achieved is not unconstitutional. A classification, depending upon the quantum of the turnover for the purpose of exemption from tax has been upheld in several decided cases. By parity of reasoning, it can be said that a legislative classification making the burden of tax heavier in proportion to the increase in turnover would be reasonable. The basis is that just as in taxes upon income or



upon transfers at death, so also in imposts upon business, the little man, by reason of inferior capacity to pay, should bear a lighter load of taxes, relatively as well as absolutely, than is borne by the big one. The flat rate is thought to be less efficient than the graded one as an instrument of social justice. The large dealer occupies a position of economic superiority by reason of his greater volume of his business. And, to make his tax heavier, both absolutely and relatively, is not arbitrary discrimination, but an attempt to proportion the payment to capacity to pay and thus to arrive in the end at a more genuine quality."

54. The Supreme Court, while rejecting the contention as regards the discrimination between the dealers whose turnover exceeds certain limit and the dealers whose turnover does not exceed the certain limit for the purpose of levy of *additional tax*, held as under:

"As we said, a large dealer occupies a position of economic superiority by reason of his volume of business and to make the tax heavier on him both absolutely and relatively is not arbitrary discrimination but an attempt to proportion the payment to capacity to pay and thus arrive in the end at a more genuine equality. The capacity of a dealer, in particular circumstances, to pay tax is not an irrelevant factor in fixing the rate of tax and one index of capacity is the quantum of



turnover. The argument that while a dealer beyond certain limit is obliged to pay higher tax, when others bear a less tax, and it is consequently discriminatory, really misses the point namely that the former kind of dealers are in a position of economic superiority by reason of their volume of business and form a class by themselves. They cannot be treated as on a par with comparatively small dealers. An attempt to proportion the payment to capacity to pay and thus bring about a real and factual equality cannot be ruled out as irrelevant in levy of tax on the sale or purchase of goods. The object of a tax is not only to raise revenue but also to regulate the economic life of the society."

(Emphasis is added)

55. In view of the decision of the Supreme Court, in ***M/S Kodar vs State of Kerala*** (supra), Section 3AA of the Act of 2005 cannot be held to be discriminatory being violative of Article 14 of the Constitution. Further, in view of the aforesaid decision of the Supreme Court, it is clear that *additional tax*, imposed by Section 3AA of the Act of 2005, is nothing but an increase in the rate of tax prescribed by Section 14 of the Act of 2005.

56. Having, however, regard to the provisions of Article 286 of the Constitution and Section 15(c) of the CST Act, 1956, it is clear that in respect of sale and purchase of *paddy*,



where *tax* has been levied in a State through tax leviable on the *rice* procured out of such *paddy*, shall be reduced by the amount of tax levied on such *paddy*. In other words, *input tax credit*, in respect of tax paid on *paddy*, shall be allowed from the tax leviable on *rice* procured out of such *paddy*. This is to ensure that *paddy* and *rice*, being *declared goods* and considered to be of special importance in the course of inter-State trade and commerce, do not suffer the burden of tax separately. Consequently, Section 16 of the Act of 2005 cannot be so interpreted as to override the provisions of Section 15(c) of the CST Act, 1956, read with Article 286 of the Constitution of India and deny thereby the benefit of reduction of the amount of tax levied on *paddy* from the amount of tax leviable on the sale of *rice* procured from such *paddy*. In this regard, we find force in the submission of Mr. Jitendra Singh, learned senior Counsel, appearing on behalf of the petitioner, that in case Section 16 of the Act of 2005 is so interpreted that *input tax credit* of the tax paid on the sale of *paddy*, inside the State, is not allowed from the tax leviable on the sale and purchase of *rice* purchased from such *paddy*, then, Section 16 of the Act of 2005 would be *ultra vires* Article 286(3) of the Constitution read with Section 15(c) of the CST Act, 1956.

57. In the case in hand, the petitioner has specifically pleaded that *paddy* has suffered *additional tax @3%*



and also purchase tax @1%. Further, it has been pleaded that the sale of *rice* procured from such *paddy* is taxable @1% in terms of Schedule I read with Section 14 of the Bihar VAT Act, 2005, and is also liable for *additional tax* @3% subject to the fulfilment of the conditions laid down in Section 3AA of the Act of 2005.

58. In view of Section 15(c) of the CST Act, 1956, the *tax* and the *additional tax* paid on purchase of *paddy* is liable to be reduced and/or *set off* against the tax payable on the sale of *rice* procured from such *paddy* and such *set off* cannot be denied by taking the plea that Section 16 of the Act of 2005, only allows *input tax credit* in respect of the *tax* leviable and paid under Section 14 of the Act of 2005 in respect of *paddy* and rice.

59. We must clarify that *Paddy* and *rice* are different goods for the purpose of both the enactments. The State Act taxes them separately and if a dealer purchases *paddy*, then, he has to pay tax at the purchase point and *additional tax* under Section 3AA of the Act if his gross turnover exceeds 250 crores. Again, if such dealer converts such *paddy* into *rice* and sells the *rice*, such *rice* is, again, taxed at the point of sale @ 1% and the said dealer is also liable to pay *additional tax* @ 3% if his gross turnover exceeds Rs.250 crores. However, Section 15(c) of the CST Act, 1956, steps in

and provides relief to such a dealer. The underlying idea is that only 4% tax shall be levied on these two goods, i.e., *paddy* and *rice* put together. On this aspect of the case, the decisions, relied upon by learned Senior counsel, appearing for the petitioner, in ***Satnam Overseas*** (supra), ***Dhanlakshmi Vilas Rice Mill Contractors*** (supra), and ***Sri Laxmiganpathi Enterprises*** (supra), cannot be said to be misplaced.

60. Before we proceed further, another submission, made by learned senior Counsel, appearing for the petitioner, needs to be considered. It has been submitted that prior to enactment of the Bihar VAT Act, 2005, the Bihar Finance Act, 1981, contained a similar provision for charging of *additional tax*. However, in the said Act, Section 6 of the said Act specifically took care that while levying the *additional tax* on *declared goods*, there should be no violation of provisions of Section 15 and CST Act, 1956. No wonder, therefore, that the said Section 6 of the Bihar Finance Act, 1981, read as under:

"Section 6. Charge of additional tax – (1) *****

Provided that *****

Provided further that in case of declared goods, as defined in Central Sales Tax Act, 1956 (Act LXXIV of 1956)-

(i) Where the tax payable under section 3 or section 4 equal the maximum amount of tax permissible under section 15 of the Act, no additional tax shall

be payable under this section.

(ii) Where the additional tax under this section together with the tax payable under section 3 or section 4 would exceed the maximum amount of tax permissible under section 15 of the Act, the additional tax shall stand reduced to such amount as, together with the tax payable as aforesaid, equals the said maximum amount."

61. However, while enacting the Bihar VAT Act, 2005, which is a value added tax, Section 16 of the Act of 2005, has not taken care of the *additional tax* imposed under Section 3AA of the Act of 2005. It appears that Section 3AA of the Act of 2005 was inserted in the statute in the year 2007; whereas Section 16 of the Act of 2005 was there in the statute from the date the statute came into force. Strangely enough, however, after the insertion of Section 3AA on the Act of 2005, necessary amendments were not made in Section 16 of the Act of 2005 to take care also of the *additional tax* levied under Section 3AA of the Act of 2005.

62. Having held that *additional tax* is also a *tax* imposed under the Act of 2005 and has the result of enhancing the rate of tax levied under Section 14 of the Act of 2005 and also that in view of Section 15(c) of the CST Act, 1956, read with Article 286 of the Constitution of India, the tax, levied on the sale the purchase of *paddy* inside the State, shall have to



be reduced from the tax leviable from the sale of *rice* procured from such *paddy* and if Section 16 of the Act is so interpreted as to deny *input tax credit* of the tax as well as *additional tax* paid on *paddy* inside the State from the *tax* and *additional tax* leviable on *rice* procured from it, the same shall become *ultra vires* Article 286 of the Constitution of India read with Section 15(c) of the CST Act, 1956, unless the provisions of Section 16 of the Act of 2005 are *read down* to save it from being unconstitutional.

63. The doctrine of reading down, or of recasting a statute, can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible — one rendering it constitutional and the other making it unconstitutional — the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation, which summons its aid, is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provisions occurs and the purpose for which the provisions are made.

64. Situated thus, it becomes amply clear that if any of the provisions of the Act of 2005 is found to be unconstitutional, the same can be read down to make it constitutionally valid by interpreting it in such a fashion as to make it constitutionally valid and within the jurisdiction of legislature which passed the said enactment.

65. The Constitution of India is the highest law of the land and no statute can violate it. If there is a statute, which violates the Constitution, we can declare it unconstitutional or read it down to make it constitutional. The first attempt of the Court shall be to sustain the validity of the statute by reading it down. As observed by the Apex Court in ***Kedar Nath vs State of Bihar, AIR 1962 SC 955***, every effort should be made by the Court to uphold the validity of the statute as invalidating the statute is a grave step. The Federal Court, ***in Hindu Women's Rights to Property Act, 1937, (AIR 1941 FC 22)***, held as under:

"There is a general presumption that a legislature does not intend to exceed its jurisdiction ... and there is ample authority for the proposition that general words in a statute are to be construed with reference to the powers of the legislature which enacts it."

66. The rule of reading down was also applied by the Supreme Court in ***Kedar Nath*** (supra), which constructing



Section 124A of IPC. In ***New India Sugar Mills Ltd vs. CST, (AIR 1963 SC 1207)***, the wide definition of the word "sale", in the Bihar Sales Tax Act, 1947, was restricted by the Apex Court by constructing to exclude transactions, in which property was transferred from one person to another without any previous contract of sale, since a wider construction would have resulted in attributing to the Bihar Legislature an intention to legislate beyond its competence.

67. Similarly, in ***Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, (AIR 1963 SC 1638)***, the constitutional validity of the Rajasthan Nathdwara Temple Act (13 of 1959), was raised, the words "affairs of the temple", occurring in Section 16 of the said Act, were construed by the Apex Court as restricted to secular affairs as on a wider construction, the Section would have violated Articles 25 and 26 of the Constitution.

68. The Supreme Court in ***Delhi Transport Corporation vs. D.T.C. Mazdoor Congress***, reported in **1991 Supp(1) SCC 600**, held as under:

"It is convenient to mention here the meaning and scope of the word 'reading down' and 'severance' dealt with on page 7, para B in Australian Federal Constitutional Law by Colin Howard which reads as follows:

"The High Court presumes the validity of legislation to the extent that it will

not of its own motion raise questions of constitutionality. Legislation is treated as valid unless the parties to litigation challenge it on constitutional grounds. The techniques of construction known as reading down and severance are corollaries of this presumption.

Reading down puts into operation the principle that so far as it is reasonably possible to do so, legislation should be construed as being within power. It has the practical effect that where an Act is expressed in language of a generality which makes it capable, it read literally, of applying to matters beyond the relevant legislative power, the court will construe it in a more limited sense so as to keep it within power.

It does not necessarily follow that because a statute cannot be read down it is wholly invalid. The presumption of validity leads naturally to the view that where a statute cannot be held wholly valid it should be held valid at least to the extent that it is reasonably possible or practicable to do so. Where reading down is not available the court next decides where there is a case for severing the invalid parts of the statute from the parts which, standing alone, are valid. If this can be done the court declares only the invalid parts to be beyond power and leaves the remainder operative.”

69. In the backdrop of the position of law as

discussed above, there can be no escape from the conclusion that in order to save a statute from being unconstitutional, the Court may have to *read down* the provisions of a statute to make it constitutional.

70. In order to, therefore, save Section 16 of the Bihar VAT Act, 2005, from being rendered unconstitutional, we have no other alternative, but to read down the provisions of Section 16 of the Act of 2005, and, therefore, we hold that Section 16 of the Act of 2005 shall be read so as to allow *input tax credit* of not only the *tax levied*, but also *additional tax levied* under Section 3AA of the Act of 2005.

71. In the result and for the reasons discussed above, the *tax* as well as *additional tax*, paid by the petitioner on purchase of *paddy* in the State of Bihar, shall be liable to be reduced from the *tax* as well as *additional tax* on the sale of *rice* procured from such *paddy* inside the State.

(I. A. Ansari, ACJ)

Chakradhari Sharan Singh, J : I agree.

(Chakradhari Sharan Singh, J)

Pawan/-

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