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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1321 OF 2015

- 1. The Tata Power Company Limited,**
a company incorporated &
registered under the Indian
Companies Act, 1913 & having its
registered office at Bombay House,
24, Homi Mody Street, Mumbai –
400 001.
- 2. Mr. Arun Bapat,**
Head-Corporate (Legal) and
Constituted Attorney of Petitioner
No.1 company, having office at
Trombay Thermal Power Station,
Mahul Road, Chembur, Mumbai –
400 074

...Petitioners

Versus

- 1. State of Maharashtra,**
Through Ministry of Finance,
Mantralaya, Mumbai-400021
- 2. The Commissioner of Sales Tax**
Maharashtra State, Mumbai,
having his office at 8th floor,
Vikrikar Bhavan, Mazgaon, Mumbai
– 400 010.
- 3. Maharashtra Sales Tax Tribunal,**
7th Floor, Vikrikar Bhavan,
Mazgaon, Mumbai – 400010.

...Respondents

WITH
MVAT APPEAL (LODG) NO. 20 of 2015

The Tata Power Company Limited,
Bombay House, 20, Homi Mody Street,
Mumbai- 400 001

...Appellants

Versus

State of Maharashtra & Ors.
Mantralaya, Mumbai – 400 032

...Respondents

WITH

MVAT APPEAL (LODG) NO. 21 OF 2015

The Tata Power Company Limited,
Bombay House, 20, Homi Mody Street,
Mumbai- 400 001

...Appellants

Versus

State of Maharashtra & Ors.
Mantralaya, Mumbai – 400 032

...Respondents

APPEARANCES

**FOR THE
PETITIONERS /
APPELLANTS**

Mr. R.A. Dada, Senior Counsel
*with Mr. V. Sridharan, Senior
Counsel, and Mr. P.C. Joshi, Mr.
Puneeth Ganapathy, Mr. Aniket
Ghosh, Mr. B.H. Antia, Mr. H.N.
Vakil, Mr. Piyush Shah i/b M/s.
Mulla & Mulla and Craigie Blunt
& Caroe.*

**FOR THE
RESPONDENTS**

Mr. V.A. Sonpal, Special Counsel
with Mr. B.B. Sharma, AGP

**CORAM : S.C.
Dharmadhikari
& G.S. Patel, JJ.**

JUDGMENT RESERVED ON : 2nd April, 2016

JUDGMENT PRONOUNCED ON : 2nd August, 2016

COMMON JUDGMENT:

[Per S.C. Dharmadhikari, J.]

1. The writ petition and the appeals were heard together. Since common questions of fact and law are raised therein, so also common submissions canvassed, that we dispose them off by this common judgment.

2. The essential relief sought in this writ petition is that this Court should declare that Low Sulphur Fuel Oil and Low Sulphur Waxy Residue brought from abroad are not liable to the levy of entry tax, and the levy and assessment thereof by the Maharashtra Tax on the Entry of Goods into Local Areas Act, 2002 (for short "The Maharashtra Entry Tax Act, 2002") is ultra vires the Constitution of India, being beyond the legislative competence of the State of Maharashtra.

3. We shall advert to the provisions of The Maharashtra Entry Tax Act, which are challenged in these proceedings, a little later. First, we shall briefly make a reference to the facts.

4. The writ petition is filed by the Tata Power Company Limited and its Head Corporate (Legal) who is also a shareholder of the company against the State of Maharashtra and the Commissioner of Sales Tax, Maharashtra State. It is contended that the 2nd respondent-Commissioner appointed under Section 10 of the Maharashtra Value Added Tax Act, 2002 (for short "MVAT Act") is responsible for administering the Maharashtra Entry Tax Act and reference is made in that regard to section 6 of the Maharashtra Tax Act, 2002.

5. The 3rd respondent is a Tribunal, which, though functional under the then Bombay Sales Tax Act, 1959 and its successor enactment MVAT Act, is also a Tribunal empowered to hear appeals under the Maharashtra Entry Tax Act.

6. It is contended that when the Maharashtra Entry Tax Act, 2002, was introduced, its constitutional validity was challenged by the petitioners in Writ Petition No.429 of 2003 before this Court. The question raised was that insofar as this Act purports levy of an entry tax on the entry of Low Sulphur Waxy Residue (for short, referred to as “**LSWR**”) and Low Sulphur Fuel Oil (for short, referred to as “**LSFO**”) into the local area in the State of Maharashtra for the consumption, use or sale therein, it is *ultra vires* the Constitutional provisions and some of the other laws referred therein.

7. The claim of the petitioners therein, as well as here, is that the raw material for their power plant at Chembur, Mumbai was imported from abroad through the Port of Mumbai. Writ Petition No.429 of 2003 was disposed of finally by a Division Bench judgment delivered on 16th January 2004. This Court, in paragraph 38 of its detailed judgment in the earlier petition, held that the levy of entry tax on furnace oil and low sulphur waxy residue oil created an imbalance between imported goods and local goods, and that this defeated the very purpose of enacting the Maharashtra Entry Tax Act. This Court also declared the levy of entry tax to be discriminatory and non-compensatory in nature. This Court relied upon an

earlier judgment of the Hon'ble Supreme Court of India in the case of *M/s. Jindal Strips Ltd. & Ors. vs State of Harayana & Ors.*¹ to reach this ultimate conclusion. Thus, Entry No.13 of the Schedule appended to the Maharashtra Entry Tax Act was declared as unauthorized and unconstitutional.

8. The 1st respondent-State preferred a Special Leave Petition before the Hon'ble Supreme Court of India being SLP NO.7468-7469/2004. At the time of hearing, the challenge was restricted to that part of the High Court judgment that held the levy to be discriminatory. In other words, the Petitioners' case to the extent of the nature of the levy being non-compensatory 'was not challenged. However, the Supreme Court dismissed the SLP as infructuous by an order dated 25th October 2004. We would prefer to reproduce the short order of the Hon'ble Supreme Court. It reads as under :

"Delay condoned.

Heard parties

In our view, by virtue of The Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2004, by which the levy of entry tax on furnace oil has been removed retrospectively, nothing survives in these Special Leave Petitions. The Special Leave Petitions are accordingly dismissed as infructuous.

We, however, clarify that the impugned order of the High Court shall not be used as precedent in any other matter."

¹ (2003) 8 SCC 60.

9. It is the case of the petitioners that, after this order of the Hon'ble Supreme Court, it was expected that the respondents would not proceed to levy the entry tax. However, the 2nd respondent in the writ petition and his subordinates passed orders of assessment for the financial years 2005-2006 and 2008-2009. The petitioners had, in writing, objected to this exercise by bringing to the notice of the 2nd respondent the order of the Hon'ble Supreme Court of India declaring the levy as being without jurisdiction, unauthorized and unconstitutional. Annexures C and C1 are copies of the letters.

10. It is the case of the petitioners that one of the objections to the assessment was of a time bar or limitation. In that regard, the attention of respondent No.2 was invited to Rule 8 of the Maharashtra Tax on the Entry of Goods into Local Areas Rules, 2002 (for short "Maharashtra Entry Tax Rules"). Since the stipulated three-month period had lapsed much earlier, the action proposed was, it was contended, beyond the period of limitation. The petition proceeds on the footing that the business of generating electricity in the State of Maharashtra requires the petitioners to comply with several laws, including environmental protection and anti pollution statutes. That is why the petitioners use imported LSWR and LSFO as raw materials . The judgment of the Hon'ble Supreme Court judgment and the provisions of Article 286 of the Constitution of India being clear, the above objections were raised. Even the bar of limitation was pleaded. However, overlooking all this, the

assessing authority passed orders of assessment on 29th June 2013, for the assessment year 2005-2006 and 30th March 2013, for the assessment year 2008-2009. Annexure D and D-1 are copies of the same. In both these orders, entry tax was levied at 12.5% along with interest under section 30(3) of the MVAT Act and penalty under section 29(3) of that Act read with section 6 of the Maharashtra Entry Tax Act, resulting in a very huge financial burden on the petitioners. The details of the demand are set out in paragraph 8 of the petition.

11. Aggrieved by the order of assessment, appeals were preferred before the First Appellate Authority. One of the grounds of appeal was that the order of assessment related to a period commencing from 1st April 2005 onwards. Entry No.13 was not on the statute book in view of the substitution of the Schedule by the Section 36 of the Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2006 with retrospective effect from 1st April 2005. The petitioner No.1 therefore pointed out that the entries under the said Schedule did not cover the goods imported by the petitioner No.1. Reliance was placed on several judgments of the High Courts and Supreme Court. These pleas are raised in writing and copies of the communications in that behalf are annexed as Annexures - G to L. The amount was paid under protest and without prejudice to the rights and contentions. Before the First Appellate Authority, written submissions on several occasions were submitted along with technical data and certificates of experts. Copies of all these are Annexures M and N to the writ petition. However,

brushing aside all this, the First Appellate Authority passed an order on 13th March 2014, rejecting the respective appeals and confirming the levy of entry tax as well as interest and penalty. Annexures-O and O-1 are copies of these orders dated 13th March 2014. Aggrieved by these orders, two second appeals, registered as Entry Tax Appeals Nos.6 and 7 of 2014, were preferred before the Tribunal. The copies of these appeals is Annexure-P collectively. The petitioners received the judgment dated 16th April 2015, delivered by the Tribunal. Aggrieved by these orders, the Petitioners filed the present writ petition. Since objections were raised to the maintainability of the writ petition on the ground that there is an alternative and equally efficacious remedy of appeal to this Court, the connected appeals have been filed.

12. The Memo of this writ petition was amended and to enable the amendment to be carried out, ad-interim orders passed by this Court on 7th May 2015, were directed to be continued. The amendment to the writ petition was carried out on 13th October 2015. The petitioners raised legal contentions. Paragraphs 9(a), 9(b), 9(c), 9(d), 9(e) and 9(f) of the writ petition read as under :

“9a) Petitioners submit that the definition of the term ‘import’ in section (2) (f) read as under:

“(f) ‘import’ with all its grammatical variations and cognate expressions means bringing or causing to be brought or receiving any goods into a local area from a place outside the State;”

Petitioners in that regard submit that the expression “brought or receiving into ‘any goods’ into a ‘local area’ from a place outside the State” does not include the goods imported from outside the country from abroad nor could it be inferred that the legislature was not aware about its limitation under Article 246 (3) read with Article 286 of the Constitution.

9b) The Petitioners submit that the definition of the term ‘value of the goods’ in section 2 (n) no reference is made to the customs and other duties that an importer of goods from other countries was required to pay before the clearance of the consignment out of the customs counter, itself support the submission that the goods imported from abroad was never intended to be covered within the scope of the Act.

9c) The Petitioners submit that the restrictions on the power of the State in respect of levy of tax provided under Article 286 squarely apply to the import of goods from abroad. The provisions of section 5 (2) of the Central Sales Tax Act, 1956 also support the above submission. The said provision of section 5 (2) read as under:

“5. When is a sale or purchase of goods said to take place in the course of import or export”.

(1)

“(2) A sale or purchase of goods shall be

deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India”

9d) Petitioners submits that currently stringent emission norms are enforced at Trombay Generating Units much more than strictness applied to thermal power utilities in developed countries in Europe. The limitations placed by the Maharashtra Pollution Control Board does not permit the use of coal in the generation of power. The Petitioners therefore were constrained to import extra Low Sulphur fuel oil and Low Sulphur Waxy Residue which the local refineries were unable to supply.

9e) Petitioners submit that Low Sulphur fuel oil and Low Sulphur Waxy Residue have significantly lower sulphur content than locally available low sulphur heavy stock. Even internationally low sulphur waxy residue is scarcely available from selected sources like Singapore, Indonesia and Malaysia. The Petitioners therefore submit that the goods imported from outside the country were not covered by the scope of the Act.

9f) Petitioners submit that the State legislature was not competent to levy the entry tax on Low Sulphur fuel oil and Low Sulphur Waxy Residue imported from abroad by the Petitioners. Such a levy therefore is

without jurisdiction, bad, illegal, unconstitutional and ultra vires the Constitution.”

13. These are the pleadings based on which the petitioners claim the declaration summarised above, together with the relief of quashing and setting aside of the assessment orders and the appellate orders.

14. An affidavit-in-reply to this writ petition is filed by the Additional Commissioner of Sales Tax. In this affidavit, apart from the preliminary objections on merits it is contended that in justifying taxing a transaction of the nature involved in this case, the respondents rely upon Entry 52 of List II of the VIIth Schedule to the Constitution of India. Therefore, there is no question of lack of jurisdiction. The petitioners have not made out any case of violation of any fundamental or constitutional rights. Then it is contended that it is true that there is an earlier round of litigation in which this Court held that Entry No.13 to the Schedule of the said Act insofar as it purports to levy entry tax on furnace oil and low sulphur waxy residue oil was unauthorised and unconstitutional. Although the tax was held to be non-compensatory, the reason for holding Entry No.13 as unauthorised was due to non-availability of the set off to such importers *vis-à-vis* those who purchased the goods locally from or within Maharashtra. This, according to the Division Bench of this Court, violated Article 301 of the Constitution of India. This judgment of the Division Bench was challenged in the Hon’ble Supreme Court of India. In the meantime, the State inserted sub-clause (iv) to clause (a) in sub-section

(1) of section 42 of the Bombay Sales Tax Act, 1959 with retrospective effect. This was deemed to have been added with effect from 1st October 2002, by Maharashtra Act No.13 of 2004 dated 29th January 2004. This amendment was effected to remove the basis of the judgment of this Court. The insertions in section 42 enabled granting set off to dealers liable to pay entry tax. It is in the light of this development that the Hon'ble Supreme Court of India observed that the Special Leave Petition of the State has been rendered infructuous. It was disposed of accordingly. It was also observed that the judgment of this Court shall not be treated as a precedent.

15. A similar provision for grant of set off under MVAT Act is to be found in section 48(1)(a)(iv). Reliance is placed thereon to urge that a level playing field has been created for the importer and the local dealers. It is, therefore, submitted that the present petition will have to be dealt with independently of the judgment of the Division Bench of this Court on which the petitioners rely.

16. The Affidavit in Reply then states that the proceedings for assessment are governed by section 6 of the Maharashtra Entry Tax Act. Section 6 refers to the provisions of the MVAT Act and applies them for the purpose of assessment and recovery of tax under the Maharashtra Entry Tax Act. Assessment proceedings are taken up by the authorities under section 23 of the MVAT Act, which also provides for limitation for completing the assessment. The present periods being from 1st April

2005 to 31st March 2006 and 1st April 2008 to 31st March 2009, in terms of section 23 (3A) the assessment would have had to be completed on or before 30th June 2013 for the year 2005-2006, and, as per the third proviso to section 23(2), on or before 30th June 2013 for the financial year 2008-2009. In paragraph 13 of the Affidavit in Reply it is urged that Rule 8 of the Maharashtra Entry Tax Rules, 2002 would not apply as the Act will prevail over the Rules. In any event, once the assessment has been done by the officers in accordance with the provisions of the MVAT Act, the provisions thereof, including the powers conferred thereunder, would govern the assessments in question. Therefore, there is no substance in the contention that the assessments are time-barred.

17. It is then urged that the challenge based on violation of Article 286 cannot be sustained. Article 286 provides for prohibition for levy of sales tax. It has nothing to do with entry tax. Reliance is placed on a judgment of the Orissa High Court in the case of *Tata Steel Limited vs. State of Odisha*.² With reference to the argument of no revenue loss, it is urged that the petitioners have not deposited the full entry tax amount in the Government Treasury. They will not be entitled to claim refund until such deposit is made. The details as per assessment order, including the break-up of the tax amount is provided in paragraph 15 of the Affidavit in Reply at page 339 of the paper-book. It is urged that only the sums of Rs.33,82,92,497/- and Rs.42,36,59,447/- for the

² AIR 2013 Orissa 54.

respective assessment years have been paid. This is far short of the tax component.

18. It is also urged that is false to suggest that Entry 13 of the Schedule to the Act was not on the statute book from 1st April 2005 to 31st March 2006. A summary of the legislative amendments relevant for the decision of this Court is set out in paragraph 15 of the Affidavit in Reply at pages 339 and 340 of the paper-book. Relying on that it is submitted that with effect from 1st April 2005, the goods in question attracted entry tax. At all material times, the goods in question were covered by the Schedule to the Act. The dispute about the goods of the petitioner not falling under any of these entries cannot be a substantial question of law to be entertained at this stage.

19. Then the grounds of the writ petition are dealt with and it is submitted that once the levy is of tax, then no question of any *quid pro quo* arises. In paragraph 17 of the Affidavit in Reply various provisions of the two enactments are relied upon. It is pointed out that the present case is not of import of motor vehicles and hence provisions of entry tax on motor vehicles cannot be used for challenging the Maharashtra Entry Tax Act. Attention is invited to the Schedule of the Act substituted by the Maharashtra Act No.XXXII of 2006. The entire Schedule was substituted retrospectively with effect from 1st April 2005. Entry No.12 reads “**Furnace Oil including heavy furnace oil and residual furnace oil**”. This is the description of the goods in question and it cannot be urged that when Entry No.13 was revived from 1st

October 2002 to 31st March 2005, the goods in question were not covered or liable to entry tax. Thus, at all material times, the goods which are subject matter of the petition were covered under Entry No.12 or 13 of the Schedule. The description of the Entry is material and not its number. Thus, it is submitted that the Legislature is fully empowered to alter or change the basis of the judgment of this Court. In other words, the law on which the judgment of this Court is based can always be amended. That would alter the basis of the judgment. This is not a case of the Legislature overruling a binding judgment of this Court; rather, this is a case of alteration of the basis on which this Court delivered its judgment. That is always a permissible Constitutional exercise. On that count, the levy cannot be declared as unconstitutional. The levy cannot be said to be discriminatory or arbitrary either. No reliance can be placed on the Articles in the Constitution of India relating to the levy of sales tax. It is in these circumstances, and when it is not shown that Articles 269, 286 and 301 have been violated, that the writ petition must fail and should be dismissed.

20. Petitioner No.2 has filed an Affidavit in Rejoinder. Apart from reiterating the averments in the petition, what has been attempted is to invite this Court's attention to Article 246(3) read with Article 286. It is also urged that apart from these Articles, the deponent of the Affidavit in Reply ignores sections 4 and 5(2) of the Central Sales Tax Act, 1956. The rejoinder affidavit also invites the attention of this Court to various other constitutional provisions

such as Article 246(1), 251, 254, 301 and 304. It is urged that respondents accept that the judgment of this Court is binding on them. The petitioners rely on various paragraphs of the Division Bench judgment of this Court delivered in the earlier writ petition to urge that the precedential value thereof is intact. A mere provision of set off by amending or inserting some words and phrases will not enable the respondents to overcome this binding judgment. It is urged that the absence of set off is not the only lacuna or defect pointed out by this Court in the Division Bench judgment. Once the levy of entry tax was held to be unauthorised and unconstitutional, then the Supreme Court order, one that is extremely brief, will not assist the State.

21. It is urged that Rule 8 of the Maharashtra Entry Tax Rules is a specific provision. That provides for a limitation of three months following the month for which the return was required to be furnished in the case of a registered importer like the petitioner. The order of assessment, though made by an officer under the MVAT Act, could not have ignored the Maharashtra Entry Tax Act and the Rules framed thereunder. If that enacts a bar of three months as provided in Rule 8(1)(ii) of the Maharashtra Entry Tax Rules, then the assessment was *ex facie* time barred. The State cannot erroneously assume that it would be the MVAT Act and the Rules framed thereunder which are the governing provisions. That would enable them to ignore Rule 8 of the Maharashtra Entry Tax Rules. This is a legally unsound and erroneous assumption. The respondents are, therefore, misleading this Court. Similar is the case with

regard to applicability of Article 286 of the Constitution of India. A plain reading thereof would reveal that it was equally applicable to transactions of sale or purchase of goods in the course of import into India. Levy of entry tax under Entry 52 of List II of the VIIth Schedule to the Constitution of India on the products and goods imported from abroad is plainly impermissible. If the levy of entry tax is subject to a Constitutional limitation, then tax cannot be recovered. There cannot be entry of goods without its purchase, both being two sides of the same coin.

22. The petitioners then rely upon Entry 52 of List II of the VIIth Schedule to submit that the levy thereunder will have necessarily to be for awarding specific services to the persons on whom tax is sought to be levied. In the present case, the State is admitting that the levy is non-compensatory. Therefore, the Tribunal should have taken this stand of the State to its logical conclusion and set aside the demand *in toto*. It is the petitioners' case that expert opinions would demonstrate that the raw material imported from abroad cannot be subjected to entry tax. That is not covered by the wording of the schedule entries. It is in these circumstances that the rejoinder affidavit asserts that there is an attempt to mislead this Court. The entries in the Schedule cannot be misread and misinterpreted. The judgments relied upon by the State and the respondents are of no avail. For these reasons it is submitted that the writ petition be allowed.

23. It is on this material that we must note the

submissions of the learned senior counsel appearing for the petitioners. Mr. R.A. Dada, learned senior counsel, would submit that the entire levy is unconstitutional being *ultra vires* Articles 286, 301 and 304. This Court should allow the writ petition. Mr. Dada has, for convenience sake, divided his submissions into several heads.

24. At the outset, he would submit that the entry tax was challenged by the petitioners and another entity M/s. Eurotex. Inviting our attention to the Division Bench judgment, a copy of which is at page 28 of the paper-book, Mr. Dada would submit that it was held that this tax is discriminatory and non-compensatory. The finding of the Division Bench insofar as the non-compensatory nature of the tax is concerned has gained finality. That cannot be revisited in any manner. As far as the discriminatory part of the levy is concerned, that is partially removed. Mr. Dada would submit that the validating law saved the levy for the period upto 31st March 2005. From 1st April 2005, onwards, even according to the Tribunal, there is no entry in the schedule to the Entry Tax Act under which the tax could be levied. Mr. Dada, therefore, submits that it is erroneous on the part of the Tribunal to hold that Entry No.13 exists. It is a non-existent entry on which the Tribunal has relied to uphold the assessment.

25. Then Mr. Dada would submit that as far as the effect of the Division Bench judgment on the levy being non-compensatory is concerned, that binds the State. Once it binds the State, then no attempt can be made to overrule

the binding judgment of this Court. An attempt *simpliciter* by the Legislature to reverse or overrule a binding judgment of this Court is constitutionally impermissible. Hence, the levy remains unconstitutional and unauthorized.

26. Mr. Dada then relies upon Rule 8 of the Maharashtra Entry Tax Rules to submit that the assessment is *ex facie* time-barred. He would submit that Rule 8 enacts a specific provision of limitation for assessment. This would govern the assessment of entry tax. That cannot be ignored on the specious footing that power of assessment is derived from the MVAT Act. Mr. Dada submits that the respondents are misreading and misinterpreting section 6 of the Maharashtra Entry Tax Act. There are specific powers conferred by the MVAT Act insofar as assessment is concerned. Thus, powers including the jurisdiction and competence of the officials thereunder can at best be read into the Maharashtra Entry Tax Act. However, a period of limitation is not just a time-bar, but acts as a fetter on the exercise of power: when the stated period ends, so does the power to assess. Once that is the legal position, then falling on section 23 of the MVAT Act would not save the bar of limitation. In other words, the period of limitation under the MVAT Act would not be the governing one, but the specific stipulation in Rule 8 must, therefore, hold the field. If that is applied for the two assessment years and the date of assessment, then the same was clearly time-barred. On the ground of limitation alone, the petition must succeed.

27. Then Mr. Dada brought in the plea of applicability of the Maharashtra Entry Tax Act and submits that the said Act does not apply to goods imported from out of the country; meaning thereby, imported goods brought in India cannot be subjected to entry tax. If the charging section is looked at very carefully, then the act of import from outside the State is not covered by the enactment in question. In the circumstances, once the petitioners are consuming the subject imported goods as raw materials, then those are out of the purview of the Maharashtra Entry Tax Act. Even if these imported goods are consumed within the local areas, yet their having been brought in from outside the country must be the determinative consideration. That would enable the petitioners to urge that the Legislature never contemplated any entry tax on such imported goods. However, if the law is construed otherwise, then it would mean it is beyond the legislative competence of the State; for the levy would then amount to the charging of a customs duty on imports, i.e., at the point where the goods cross the national border. This is entirely and solely within the legislative competence of the Centre, and not the State. It is, therefore, the contention that the goods imported from abroad and brought in for use as raw materials by the petitioners herein cannot be subjected to entry tax.

28. Even with regard to the classification of the goods of the petitioners, Mr. Dada relied upon pages 137, 138, 176 to 178 and 202 of the paper book to submit that the views of the experts would demonstrate as to how the products or goods in question have been understood by the trade.

Therefore, the attempt to bring them in the tax net is illegal and unconstitutional.

29. Mr. Dada has handed in two notes of written submissions. In these, after elaborating the above contentions, what is alleged is that the respondents invoke Entry No.13 of the Schedule as revised and reenacted in 2007 vide section 5 thereof. That view is incorrect. Entry No.12 of the Schedule has been referred for the goods in question in the written submissions of the State tendered before this Court. This is also incorrect. In that regard, reliance is placed on section 3 of the Maharashtra Entry Tax Act to submit that only goods expressly specified in the schedule are liable to a levy of entry tax. There is no residuary entry in the Schedule. Further, the burden of proof in respect of classification of the goods for taxation is clearly on the Revenue. Assailing the assessment orders, it is submitted that the assessing authority in the order dated 29th June 2013 for the period 2005-2006 has made no reference to the schedule entry under which the goods in question would fall. In the second order dated 30th March 2013, for the financial years 2008-2009, the assessing authority has merely made a passing reference to Schedule Entry 12 of the Act. Even the first order of the First Appellate Authority is assailed by the petitioners by pointing out that it fails to take note of the expert opinion and the relevant specifications of the Bureau of Indian Standards. The complaint is that none of the contentions of the petitioners have been dealt with by the First Appellate Authority. Therefore, the orders passed by that authority

and the Tribunal are assailed and challenged. It is urged that the Revenue relied on Entry No.13 of the schedule before the Tribunal and that has been accepted. However Entry 13 relied upon by the Tribunal reads as “**Petroleum Fuel Oil including (a) heavy furnace oil and (b) residue furnace oil**”. This Entry was deemed to be in force from inception of the Act but till 31st March 2005. Even the revival by the amendment as per section 5 of The Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2007 would denote that, in August 2007, the Act reintroduced Entry 13 retrospectively, but it did so only for the period upto 31st March 2005. This is stated expressly in the Amendment Act itself. Hence the amendment is not relevant to the present period. Even Entry 12 in force for the period post 1st April 2005, covers “**Furnace oil (including heavy furnace oil and residual furnace oil)**.” Now this is erroneously relied upon because the wording of Entry 13 for the period prior to 31st March 2005, and the entry post 1st April 2005, are obviously different. The very revival and recasting of Entry 13 by the Legislature retrospectively for the period prior to 1st April 2005, must be given some meaning. The words employed in the Legislation cannot be presumed to be superfluous. Thus, the Revenue has failed to discharge the burden.

29A. The petitioners have also submitted that the levy has already been held to be non-compensatory and non-regulatory. Consequently, it violates Article 301 of the Constitution of India. Reliance is placed upon the judgment of *Eurotex Industries & Exports Ltd. & Anr. vs.*

*State of Maharashtra & Anr.*³ Taxes that are compensatory or regulatory in nature do not retard free trade and commerce throughout the country of India. Instead, they promote them and, therefore, Article 301 is not violated. However, the State pleads applicability of Article 304(b). In that regard, it is submitted that the levy must be understood correctly. The impugned levy is on goods entering into a local area of the State from outside the State. It does not tax the entry into a local area from another local area *within* the State of Maharashtra. Therefore, the only way in which the impugned legislation can be saved is to establish that it does not violate Article 304(a) of the Constitution of India. The impugned tax is levied only on goods that enter the local area *from outside the State*. A similar tax on goods that enter into local area within the State from any place within the State is not imposed. This is violative of Article 304(a). In the absence of assent of the Hon'ble President of India, Article 304(b) is also not attracted. In such circumstances, the question as to whether the State law must fulfill the broad requirements of Article 304(a) and 304(b) simultaneously is under consideration before a larger bench of the Hon'ble Supreme Court of India and the referral order in the case of *Jindal Stainless Steels & Ors. vs. State of Harayana* (2010) 4 SCC 595 is relied upon.

30. In the additional written submissions, it is urged that a tax on entry of goods into a local area is patently in violation of Article 301 and no further burden is required to be discharged by the petitioners. When a tax falls

³ 2004 (125) Sales Tax Cases 25.

within the inhibition of Article 301 and is not compensatory or regulatory, then it can be saved only by taking recourse to Article 304. The requirement thereof is not admittedly satisfied. Further, the impugned levy is discriminatory. The Act cannot be saved by reading the impugned provisions thereof together with the MVAT Act. That would not enable this Court to hold that the same is Constitutional. Additionally it is submitted that if a levy is held to be non-discriminatory and thus meets Article 304(a), still it must satisfy the requirements of Article 304(b) as well. For all these reasons, it is submitted that the impugned levy must be declared as unconstitutional and *ultra vires* the abovenoted provisions or Articles of the Constitution of India.

31. In support of his contentions, Mr. Dada has placed reliance on a number of judgments and which can be taken in the order of his submissions as follows:

- 1) *Father William Fernandex v State of Kerala*.⁴
- 2) *Primus Imaging Pvt. Ltd. V State of Assam*.⁵
- 3) *Batliboi & Co. v. State of Maharashtra*.⁶
- 4) *Indian Oil Corporation v State of Bihar*.⁷
- 5) *Banarasi Devi v Income Tax Officer*.⁸
- 6) *Diwan Bros. v Central Bank of India Bombay*.⁹
- 7) *Sumitomo Corporation v State of Tamil Nadu*.¹⁰
- 8) *State of Andhra Pradesh v Andhra Pradesh*

⁴ (1999) 115 STC 591 (Ker).

⁵ (2007) 9 VST 528 (Gau.)

⁶ (1981) 47 STC 321 (Bom).

⁷ (2007) 10 VST 140 (Pat).

⁸ AIR 2964 SC 1742.

⁹ (1976) 3 SCC 800.

¹⁰ AIR 2000 Mad 296.

*Mining Corporation.*¹¹

- 9) *Hari Shankar Bagla v State of Madhya Pradesh.*¹²
- 10) *Joginder Singh v Deputy Custodian.*¹³
- 11) *Punjab Sikh Regular Motor Service v Regional Transport Authority.*¹⁴
- 12) *Collector of Central Excise v Raghuvar India Ltd..*¹⁵
- 13) *Ahmedabad Manufacturing and Calico Printing Co. v SG Mehta.*¹⁶
- 14) *S.S. Gadgil v Lal & Co..*¹⁷
- 15) *Hindustan Ferodo Ltd. vs. Collector of Central Excise.*¹⁸

32. On the other hand, Mr. Sonpal, learned Special Counsel appearing on behalf of the Revenue, submits that there is no substance in the challenge which is raised in the Writ Petition. Equally, there is no merit in the appeals. These proceedings do not raise any substantial questions of law. The dealer is repeatedly raising the contentions to avoid compliance with the liability to pay entry tax. Mr. Sonpal submits that in repeated rounds, the same contentions have been raised, though the petitioners / appellants are aware that they are covered and dealt with in the earlier round. The conduct of the petitioner would, therefore, demonstrate as to how they wish to avoid

¹¹ (1997) 106 STC 276 (A.P.)

¹² AIR 1954 SC 465.

¹³ AIR 1967 SC 154.

¹⁴ AIR 1966 SC 1318,

¹⁵ (2000) 5 SCC 299.

¹⁶ (1963) 48 ITR 154 (SC).

¹⁷ (1964) 53 ITR 231 (SC).

¹⁸ Bombay 1997 (89) E.T 16 (SC)

compliance with the Maharashtra Entry Tax Act.

33. Mr. Sonpal invites our attention to both the Affidavit in Reply to the writ petition and the orders passed by the Assessing Officer and the First Appellate Authority. He would submit that the assessment proceedings are governed by section 6 of the Maharashtra Entry Tax Act. That section specifically refers to the MVAT Act. The assessment is taken up by the authorities specified under section 23 of the MVAT Act. That provision also provides for limitation for completing the assessment. The period having been specified already, all that has to be noted is whether they are time-barred as contended. In that regard, it is submitted that the Maharashtra Entry Tax Rules and particularly Rule 8 cannot be the applicable provision. It cannot be the intention of the Legislature to only provide for a distinct time-period or limitation for the assessment proceedings under the Entry Tax Act when no separate machinery for assessing the tax was created by the Legislature under the Maharashtra Entry Tax Act. According to Mr. Sonpal, it would not be a correct and proper reading of the provisions of the Maharashtra Entry Tax Act. Chapter II of the Maharashtra Tax Act is titled "Registration, Levy of Tax and Establishment of Check Posts." Sections 3, 4 and 5 fall therein. Then comes Chapter III which is titled "Tax Authorities, Returns, Assessment, Payments, Recovery and Refund of Tax, Appeals and Review and Revisions." Therein appears section 6. The sub-sections of section 6 would have to be read together with other provisions of the Act and harmoniously. So read, they would reveal that if there is

any separate provision for assessing authorities, returns, assessments, payments recovery and refund of tax and other aspects dealt with by Chapter III, then those would apply, else the whole regime under the MVAT Act touching the above subjects and aspects would govern the proceedings under the Maharashtra Entry Tax Act. If one reads sub-section (1) of section 6 carefully, it would be clear that assessment will have to be done as per the procedure prescribed by the MVAT Act. That Act is specifically referred in sub-section (1) of section 6. Once such a comprehensive provision is made, then, it would be improper to read any embargo or period of limitation particularly in terms of Chapter III of the Maharashtra Entry Tax Rules.

34. In that regard it is submitted that returns, assessments, payment of tax refund, determination of turnover are matters dealt with by Chapter III of the Rules. Rule 5 deals with assessment of tax and by importer who is not registered or registered. Then follows Rule 6 which prescribes the method of payment of tax, interest and penalty. Then comes Rule 7 which deals with return-*cum*-challan. Rule 8 provides for assessment, rectification and review. According to Mr. Sonpal, the amount of tax due from an importer who is not registered shall be assessed by the assessing authority concerned within one month from the detection of his liability to pay the tax, and in case of a registered importer, this period would be three months running from the succeeding month for which return-*cum*-challan is required to be furnished. Therefore, Mr. Sonpal would submit that if by sub-rule (3) of Rule 8 it

is open to the Assessing Authority in the case of an assessment of an unregistered importer to fall back on the MVAT Act and the period for the assessment provided by the said Act, then, it is inconceivable that only in the case of a registered importer, if the assessment is not done within three months in terms of Rule 8(1)(ii), the same would be a fetter on the power to assess. There cannot be different periods of limitation for registered and unregistered importers. To say, therefore, that thereafter no tax can be assessed and collected is an extreme proposition for which no support can be found in the language of Rule 8. If the Legislature has not, in any manner, exhausted the power to assess by insertion of specific words, then, by an indirect and oblique process, the said power cannot be taken away. He would submit that such procedural provisions cannot be determinative or conclusive of the power to levy and collect tax, penalty and interest. Mr. Sonpal would, therefore, submit that the language of section 6 of the Maharashtra Entry Tax Act would prevail and not of sub-rule of Rule 8 of the Maharashtra Entry Tax Rules.

35. Then Mr. Sonpal brought to our notice the legislative amendments relevant for the decision of the present proceedings. He would submit that sub-clause (iv) in section 42 of the Bombay Sales Tax Act, 1979, was inserted retrospectively. It was deemed to have been added with effect from 1st October 2002 by Maharashtra Act No. 13 of 2004 dated 29th June 2004. He then submits that by Maharashtra Act No.XXXII of 2006, the entire Schedule was substituted retrospectively with effect from

1st April 2005. By Maharashtra Act No.XXV of 2007, the Schedule was revived with effect from 1st April 2005 to 31st March 2006. There was a modification of Entry No.13 of the Schedule to the Maharashtra Entry Tax Act. Mr. Sonpal submits that the goods brought by the petitioners were covered and entry tax was leviable thereon with effect from 1st April 2005. In fact, at all material points of time, the petitioners' goods were covered by this Schedule. In any event, the dispute about the goods not falling within the Schedule cannot be a "substantial question of law". It is a mixed question and, therefore, the challenge in that regard cannot be entertained.

36. Mr. Sonpal then relied upon the language of the Maharashtra Entry Tax Act to submit that the legal challenge also has no basis. He would submit that what this Court is dealing with in the present matter is an entry tax. That is a subject dealt with by Entry 52 of List II of the VIIth Schedule to the Constitution of India. Emphasizing the language of this entry Mr. Sonpal would submit that it provides for a tax on the entry of goods into a local area for consumption, use or sale therein. Mr. Sonpal submits that mere entry of the goods into a local area is not the taxable event. The taxable event is entry of the goods into a local area for consumption, use or sale therein. It is only in that event that liability to pay the tax arises and not otherwise. The import of goods into the local area is not prohibited. It is their consumption, use or sale therein which attracts the tax. Mr. Sonpal submits that the petitioners do not dispute that import *simpliciter* does not attract the levy. Accepting Mr. Dada's contentions would

be doing violence to the plain language of the statute. Once the levy is on the entry of goods specified in Column (II) of the Schedule to the Maharashtra Entry Tax Act into any local area for consumption, use or sale therein, then, it is not permissible to dilute the rigour of the provisions in that behalf. Mr. Sonpal submits that the three provisos to sub-section (1) of section 3 would clarify that the rate of tax to be specified by the Government in respect of any commodity shall not exceed the rate specified for that commodity under the MVAT Act and the tax payable by the importer under the Maharashtra Entry Tax Act shall be reduced by the amount of tax paid, if any, under the law relating to general sales tax in force in the Union Territory or the State in which the goods are purchased by the importer. Therefore, if the goods attract the above tax in the State in which they are purchased and thereafter they are imported into a local area, then, and to that extent, the liability to pay the entry tax is reduced. Lastly, Mr. Sonpal would submit that no tax is leviable or can be collected on specified goods entering into a local area for the purpose of such process as may be prescribed, if after such processing these goods are sent out of the State. Mr. Sonpal relies upon the explanation to this sub-section and thereafter sub-sections (2), (3), (4) and (5) of section 3 to submit that there is no liability to pay entry tax in the event the goods are brought for the purpose set out in sub-section (5) of section 3. He also relies upon the provisos to sub-section (5) of section 3 in that regard.

37. Mr. Sonpal would submit that the words and expressions used but not defined in the Maharashtra

Entry Tax Act but defined in the Maharashtra Value Added Tax Act or Maharashtra Value Added Tax Rules must have the meanings respectively assigned to them under that Act or the Rules. However, Mr. Sonpal would submit that the term “Assessing Authority” is defined in section 2(a). The words “Entry of goods” is also defined, and that would with all grammatical and cognate expressions, mean entry into a local area from any place outside the State for consumption, use or sale therein. Mr. Sonpal submits that the term “import” is defined in section 2(f) to mean bringing or causing to be brought or receiving any goods into a local area from a place outside the State, and the term “importer” is defined accordingly in clause (g) to section 2. The term “local area” is also defined, as also the terms “Schedule”, “State”, “Tax” and the term “Value Added Tax Act”. It is in these circumstances that Mr. Sonpal would submit that there is no qualification or restriction, and goods coming from any part of the world or any part of the country attract the entry tax. It is, therefore, improper to contend that levy of entry tax does not apply to imported goods. He would submit that Article 286 of the Constitution of India has no application simply because that imposes restrictions on tax as far as the sale or purchase of goods. We are not dealing with such a situation at all.

38. Mr. Sonpal submits that the Entry Tax Act is levy of tax on the entry of goods into a local area and is not qualified by words “from any other State”; goods coming from any part of world or from any country attract the Entry Tax. Hence to contend that entry of goods does not

apply to imports is incorrect. As stated earlier the provisions of Article 286 do not prohibit levy of Entry Tax when exclusive power of Entry Tax is earmarked for the State in List II.

39. He submitted that it is incorrect to contend that because the definition in Section 2(n) of the words “value of the goods” does not refer to customs and other duties, therefore this means that the levy of entry tax on imported goods is not provided by the Entry Tax Act.

40. Section 5(2) of the Central Sales Tax 1956 in no manner assists the petitioners’ contention that the imported goods are exempted or are out of purview of Entry Tax.

41. He would submit that any limitation imposed on use of coal for generating power under the Maharashtra Pollution Control Board’s norms does not imply or mean that the entry tax is not attracted on imported fuel raw materials. Hence it is not sound to contend that the mandate of using low sulphur waxy residue *ipso facto* exempts the entry tax on imports, much less to contend that levy is illegal, unconstitutional and *ultra vires* the Constitution of India.

42. It is equally incorrect to contend that the words ‘brought into a local area from place outside the State’ used in definition of “Import” cannot include the import from abroad, when the words in statute do not make any specific exclusion of import from abroad and thus would

include any goods from outside the State brought in local area whether coming from other States of Union or from outside India.

43. The contention that definition in section 2(n) of “value of the goods” does not include the customs duty is not sound, since the said definition includes “duties” except octroi and entry tax only.

44. The contention that the levy of Entry Tax on low sulphur fuel oil and low sulphur waxy residue is directly in conflict with Central Sales Tax Act 1956 is not sustainable inasmuch as both levies are under different entries of List II of VIIIth Schedule. Item 52 pertains to the Entry Tax and Item 54 pertains to the Sales Tax, and both operate in different and independent fields. The reference to Articles 245(1), 251 and 254 is misconceived and misplaced.

45. The revival of Entry 13 to the old schedule prior to 31st March 2005, i.e., from 1st October 2002 to 31st March 2005 is a validating provision due to retrospective insertion of in section 42 in the BST Act 1959. From 1st April 2005, the new schedule was substituted retrospectively from that date, where Entry 12 covers the products of the appellants, and which reads as “**Furnace oil including heavy Furnace oil and residual Furnace oil**”.

46. So far as concerns the ground that the first proviso to section 3(1) of the Entry Tax Act, which provides for a tax ceiling at the rate prescribed in local sales tax law,

means the MVAT Act 2002, it is submitted that the tax on such products is in accordance with residual Entry E-1 at 12.5%, and the Assessing Officer has correctly restricted the tax levy only to 12.5%.

47. Entry 12, viz., “*Furnace oil including heavy Furnace oil and residual Furnace oil*” of the Schedule, as also entry 13, “Petroleum furnace oil including****

a) Heavy furnace oil and

b) Residual furnace oil”,

both cover the products of the appellant. Therefore it is not correct to state that appellants’ products are not covered in the schedule’s entries. The definition of the term “Schedule” is inclusive, not exhaustive, as is the language of the entries, and hence it cannot be said that the appellants’ product is Furnace oil / residual Furnace oil. {some problem with this phrase; will discuss with SCD, J} The expert opinion is also inconclusive and vague. Even otherwise, the expert’s opinion is in favour of the revenue, since it is stated that the appellant is importing residual fuel oil.

48. In view of the above submissions, Mr. Sonpal submitted that there is no merit in the Appeal and, therefore, it is liable to be dismissed.

49. Mr. Sonpal submits that in the entire petition one does not find any averments of violation of any fundamental or constitutional rights of the petitioners. Some general challenge has been raised, though the petitioners are aware that in the earlier round they could

not succeed in doing away with the Entry Tax completely. Mr. Sonpal submits that the earlier judgment in the petitioners' case, if properly and completely read, would denote that Entry No.13 was declared as unauthorized due to non availability of the set off to such importers *vis-à-vis* those who purchase the goods locally in Maharashtra. In other words, importers suffered a distinct disadvantage and discrimination and that is how Article 301 was held to be violated. This judgment was carried in appeal to the Hon'ble Supreme Court of India by the State. However, after the amendment by insertion of sub-clause (iv) of clause (a) to sub-section (1) of section 42 of the Bombay Sales Tax Act, 1959, retrospectively, the defect was cured. Thus, the basis of the judgment has been altered. Once that has been done then this judgment is no longer a precedent for this case. The present matter will have to be decided independently of this judgment. Now even the Bombay Sales Tax Act, 1959, is replaced by The Maharashtra Value Added Tax Act. Therefore, the challenge to the legality and validity of the provisions of the Maharashtra Entry Tax Act must be decided on the touchstone of the MVAT Act. Mr. Sonpal has, in consonance with the affidavit filed in reply to the petition, prayed that the writ petition be dismissed.

50. For properly appreciating the rival contentions, we will have to refer to the Maharashtra Tax on the Entry of Goods into Local Areas Act, 2002. That Act was enacted by the State legislature to provide for levy and collection of tax on entry of certain goods into the local areas in the State of Maharashtra and for the matters connected

therewith or incidental thereto. Chapter I of the Act contains preliminary provisions. Section 2 therein contains the definitions, some of which are very relevant for our purpose and are reproduced hereinbelow:

“2. Definitions:- (1) In this Act, unless the context otherwise requires,—

(a)

(b) “entry of goods”, with all its grammatical variations and cognate expressions means entry of goods into a local area from any place outside the State, for consumption, use or sale therein;

(c) “General Sales Tax Act” means any Sales Tax Law in force in any State which provides for the levy of taxes on the sale or purchase of goods generally or on any specified goods expressly mentioned in that behalf or any class of transactions expressly specified in that behalf;

(d)

(e)

(f) “import”, with all its grammatical variations and cognate expressions means bringing or causing to be brought or receiving any goods into a local area from a place outside the State;

(g) “importer”, in relation to any goods, means,—

(i) a person who imports any goods whether on his own account or on account of a principal or any other person, into a local area for consumption, use or sale therein;

(ii) any owner of the goods at

the time of the import of such goods into a local area;

(h) “local area” means the area for the time being included within the limits of, -

(i) the Municipal Corporation of Brihan Mumbai, established under the Mumbai Municipal Corporation Act;

(ii) a Municipal Corporation, established under the Bombay Provincial Municipal Corporations Act, 1949;

(iii) the Corporation of the City of Nagpur, established under the City of Nagpur Corporation Act, 1948;

(iv) a Zilla Parishad, established under the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961;

(v) a Cantonment Board, established under the Cantonments Act, 1924:

Provided that, the areas within the limits of the Poona Cantonment Board and the Kirkee Cantonment Board, the Aurangabad Cantonment Board and the Ahmednagar Cantonment Board shall be deemed to be included in the limits of the Municipal Corporation of the City of Pune, the Municipal Corporation of City of Aurangabad and the Ahmednagar Municipal Council, respectively.

Explanation.— For the purposes of sub-clause (iv), the local area within the limits of a District for which a Zilla Parishad

is established under the provisions of the Maharashtra Zilla Parishads and Panchayat Samities Act, 1961, shall, notwithstanding anything contained in sub-section (1) of section 4 of that Act, be deemed to include the area within the limits of every 'A' Class, 'B' Class and 'C' Class Municipal Councils, established under the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965, and a Village Panchayat established under the Bombay village Panchayats Act, 1958, falling within the area of such district;

- (i)
- (j)
- (k)
- (l) "State" means the State of Maharashtra;
- (m) "tax" means the tax payable under this Act;
- (m-1) "Value Added Tax Act" means the Maharashtra Value Added Tax Act, 2002 and includes the Maharashtra Value Added Tax Rules, 2005;

51. Chapter II of this Act contains the charging section. It is titled as Levy of Tax. Section 3 thereof requires reproduction and is reproduced hereinbelow:

"3. Levy of tax:— (1) There shall be levied and collected a tax on the entry of the goods specified in column (2) of the Schedule, into any local area for consumption, use or sale therein, at the rates respectively specified against each of them in column (3) thereof and different rates may be specified in respect of different goods or

different classes of goods or different categories of persons in the local area. The tax shall be levied on the value of the goods as defined in clause (n) of sub-section (1) of section 2. The State Government may, by notification in the Official Gazette, from time to time, add, modify or delete the entries in the said Schedule and on such notification being issued, the Schedule shall stand amended accordingly:

Provided that, the rate of tax to be specified by the Government in respect of any commodity shall not exceed the rate specified for that commodity under the Value Added Tax Act or, as the case maybe, the Maharashtra Purchase Tax on Sugarcane Act, 1962:

Provided further that, the tax payable by the importer under this Act shall be reduced by the amount of tax paid, if any, under the law relating to General Sales Tax in force in the Union Territory or the State, in which the goods are purchased, by the importer:

Provided also that, no tax shall be levied and collected on specified goods entering into a local area for the purpose of such process as may be prescribed, and if such processed goods are sent out of the State.

Explanation. — No tax shall be levied under this Act on entry of any fuel or other consumable contained in the fuel tank fitted to the vehicle for its own consumption while entering into any local area.

(2) Notwithstanding anything contained in sub-section (1), there shall also be levied a tax in addition to the tax leviable in accordance with sub-section (1) on the entry of Petrol and High Speed Diesel Oil in any local area for

consumption, use or sale therein at the rate of one rupee per litre.

(3) Any importer who is not liable for registration under this Act or rules made thereunder, shall not be liable to pay tax under this Act and any importer who during the course of any year becomes liable for registration under this Act shall not be required to pay the tax on any entry of goods effected by him into a local area immediately before the time he becomes so liable for registration.

(4) The tax levied under sub-section (1) or (2) shall be payable by the importer in such manner and within such time as maybe prescribed.

(5) Notwithstanding anything contained in sub-section (1) or (2), no tax shall be levied on the specified goods, imported by a dealer registered under the Value Added Tax Act, who brings such goods into any local area for the purpose of resale in the State or sale in the State or sale in the course of inter-State trade or commerce or export out of the territory of India:

Provided that, if any such dealer, after importing the specified goods, for the purpose of resale in the State or sale in the course of inter-State trade or commerce or export out of the territory of India, consumes such goods in any form or deals with such goods in any other manner except reselling the same, he shall inform the assessing authority before the 25th day of the month, succeeding the month in which such goods are so consumed or dealt with and pay the tax, which would have been otherwise leviable under sub-section (1) or (2).

Provided further that, a sale in the course of inter-State trade or commerce or resale in the

State shall not include a sale to which clause (b) of section 3 or, as the case may be, sub-section (2) of section 6 of the Central Sales Tax Act, 1956, (74 of 1956) applies.

(6) If any dealer having imported the specified goods, for the ostensible purpose of resale or, as the case maybe, sale, deals with such goods in any other manner or consumes the same and does not inform the assessing authority as provided in sub-section (5) or does not pay the tax as required under sub-section (5) within the specified period, the assessing authority shall assess the amount of tax which the dealer is liable to pay under sub-section (1) or (2) and also levy penalty equal to the amount of tax due.

(7) The tax levied and collected under sub-sections (1) and (2) shall be in addition to the tax levied and collected as octroi or entry tax by any authority including the local authority, specified in sub-clause (i) to (v) in clause (h) of sub-section (1) of section 2, in the State.”

52. Section 4 provides for registration. By sub-section (1) thereof it is stated that every importer who is liable to pay tax under this Act, shall, if he is a dealer registered or liable for registration under the Sales Tax Act, within such time as may be prescribed for the purpose of making an application in the prescribed form for registration under this Act to the Assessing Authority, make the application. The authority to whom that application is to be made on being satisfied that it is in conformity with the provisions of the Act and Rules, shall register the applicant and grant him a certificate of registration. Thus, a dealer registered or liable for registration under the Sales Tax Act and

termed as an importer can obtain the registration. Similarly, an importer liable to pay tax under the Maharashtra Entry Tax Act though not registered as a dealer under the Sales Tax Act or liable for such registration can seek registration. Then comes section 5 which enables setting up of check posts. Prior thereto, we must notice sub-section (3) of section 4 which enables cancellation of registration.

53. Since heavy emphasis has been placed on section 6 of the Act falling in Chapter III we reproduce the same hereinbelow:

“6. Levy and collection of tax, penalties and interest:-

(1) Subject to the other provisions of this Act and the rules made thereunder, the authorities for the time being empowered to assess, review, collect and enforce payment of tax under the Value Added Tax Act shall assess, review, collect and enforce payment of tax, including any interest or penalty, payable by an importer under this Act, as if the tax or interest or penalty payable by such dealer or importer under this Act is a tax or interest or penalty payable under the Value Added Tax Act; and for this purpose they may exercise all or any of the powers they have under the said Act and the provisions of that Act including provisions relating to returns, imposition of the tax liability of a person carrying on the business on the transferee of, or successor to, such business, transfer or liability of any firm or Hindu Undivided Family, to pay tax in the event of the dissolution of such firm or

partition of such family, recovery of tax from third parties, appeals, rectification, review, references, refunds, penalties, charging or payment of interest, inspection of business premises, seizure of documents, compounding of offences and treatment of documents furnished by a dealer as confidential, shall apply accordingly.

(2) All the provisions relating to offences, interest and penalties including provisions relating to penalties in lieu of prosecution for an offence or in addition to the penalties or punishment for an offence under the Value Added Tax Act shall, with necessary modifications, apply in relation to the assessment, review, collection and the enforcement of payment of any tax required to be collected under this Act, or in relation to any process connected with such assessment, review, collection or enforcement of payment as if the tax under this Act was a tax under the Value Added Tax Act.”

54. In Chapter IV, Offences and Penalties have been provided for, and by Chapter V miscellaneous provisions are enacted, including conferring power to make rules. The rate Schedule under this Act with effect from 1st April, 2005, insofar as is relevant for our purpose reads:

Sr.No.	Description of goods	Rate of tax
1		
12	Furnace Oil including heavy furnace oil and residual furnace oil	12.50%
13	Petroleum fuel oils including- (a) heavy furnace oil, and (b) residual furnace oil	15 paise in the rupee

55. The Statement of Objects and Reasons would indicate that for mobilising additional revenue and to achieve an equitable tax burden to the extent possible on the consumption of goods within the State, some States have levied entry tax on the goods imported from outside the respective States into local areas for consumption, use or sale therein. In this backdrop, there was a demand for such an enactment in the State of Maharashtra. That demand was examined and found to be genuine. That is how the State proposed to levy entry tax on the specified goods. The salient features of the law are also set out in the Statement of Objects & Reasons.

56. Thus the tax is on the entry of goods into a local area from any place outside the State for consumption, use or sale therein. The term “import” means bringing or causing to be brought or receiving any goods into a local area from a place outside the State.

57. The writ petition, which must contain the basic factual averments and lay a foundation for the challenge, states nothing except to refer to the orders of assessment for financial years 2005-2006 and 2008-2009. The Revenue issued a show-cause notice dated 11th June 2013, proposing to assess the entry tax from 1st April 2005 to 31st March 2006. The petitioners replied thereto and requested for discharging the same, but the record reveals that an order of assessment of tax was made, a copy of which is to be found at page 86 of the paper-book.

58. The Assessing Officer found that the petitioners filed

an application in Form-501 for the period 2005-2006 for Rs.70,13,19,318/-. Thereafter, the petitioners filed a revised application for refund in Form-501 dated 30th March 2009, for Rs.98,54,726/-. A partial refund was already granted on the date specified and in the manner set out at page 87 of the writ petition paper-book. However, for verifying the correctness of the claim made and the refund already granted, the Assessing Officer called upon the petitioners to appear before him. The Assessing Officer noted that the petitioner No.1 is engaged in generation, transmission and distribution of electricity. While verifying the purchases, it was noticed that the petitioner has purchased low sulphur waxy residue and low sulphur furnace oil from outside the State of Maharashtra. These goods are covered by the Maharashtra Entry Tax Act. Hence, to verify the correctness of the returns filed by the petitioners and to verify their tax liability under this Act, a notice was issued and in response to which the petitioners' senior Manager appeared and attended. He handed over a letter dated 20th June 2013, stating that the assessment is time-barred. Then the petitioners relied upon a judgment and order dated 16th January 2004, passed by this Court in Writ Petition No. 429 of 2004 and the order dated 26th October 2004, of the Supreme Court of India to urge that no entry tax is payable on the low sulphur heavy stock / low sulphur waxy residue. The Assessing Officer noted all these contentions and held that after amendment to section 42 of the Bombay Sales Tax Act and Rules 41D, 44D of the Bombay Sales Tax Rules, the judgment of this Court would not be applicable.

59. He referred to section 48 of the MVAT Act, which provides for grant of set-off of tax paid under the Entry Tax Act. The Assessing Officer also referred to Rule 52 of the MVAT Rules. He, therefore, concluded that the dealer is not justified in not paying entry tax on the import of low sulphur furnace oil and low sulphur waxy residue oil brought from outside the State for use in the local area by taking recourse to the above judgment. The Assessing Officer, therefore, held that the levy of entry tax at Rs.845,73,124,77/- is valid. He, therefore, determined the tax liability and directed issuance of demand accordingly. This order dated 29th June 2013, pertained to the period as noted above, namely, 2005-2006. For the period 1st April 2008 to 1st March 2009, the refund applications and the returns both were scrutinized and the Assessing Officer arrived at an identical conclusion. That order is to be found at pages 89 to 94 of the paper-book. It is dated 30th March 2013. Thereafter, appeals were brought before the First Appellate Authority and, in those, specific grounds were raised by the petitioners with regard to the constitutionality and legality of the levy. The petitioners appeared before the First Appellate Authority. They also tendered written submissions. The petitioners pointed out that they are registered under the MVAT Act, CST Act as well as the Entry Tax Act. They submitted that for generation of electricity, they require gas, coal, low sulphur heavy stock. These constitute raw materials. In the written submissions at page 107 of the paper-book it is stated that all these raw materials were purchased from local markets and, therefore, the occasion for levying entry tax on such purchases did not arise. There is other

raw material, namely, low sulphur waxy residue oil. That is entirely imported from abroad. It is not locally available. That is being used as fuel for generation of power at the petitioners' Trombay Plant. The petitioners relied upon the attempt of the respondents in seeking to levy entry tax and submitted that as the entry tax is being levied even on this imported raw material, in order to avoid litigation, the petitioners had sought clarification from the authority concerned as to whether any entry tax was payable on the goods imported from outside the territory of India. The Assistant Commissioner, by his letter dated 3rd January, 2003, directed the petitioners to make payment of entry tax on the imports effected from outside the territory of India. That is how the first writ petition was filed challenging this version. Then, the judgment and order dated 16th January, 2004, delivered in the writ petition is relied upon. We shall advert to this aspect a little later. The petitioners thus submitted that this judgment of the Bombay High Court binds the respondents. The petitioners also relied upon some other judgments to submit that the entry tax cannot be demanded. They tendered further written submissions. They also pointed out that a plain reading of the entries in the Schedule appended to the Act would reveal that none of the items dealt with by the petitioners are covered thereby. No specific Entry was pointed out in relation to the tax demanded from the petitioners. That is how it was submitted that the tax is demanded without any authority of law. It was also urged that low sulphur waxy residue is a different commodity, distinct and separate from heavy or residual furnace oil and so is the position of low sulphur

furnace oil. Then, the petitioners relied upon the amendments to the Schedule. It was pointed out that the two amended Acts, namely, Maharashtra Act No.XXXII of 2006 and Maharashtra Act No.XXV of 2007 would reveal that the Schedule contained only 12 entries while Entry No.13 was only for a limited period from 1st October 2002 to 31st March 2005. It is in these circumstances that the petitioners submitted that they were not liable to pay the entry tax as demanded. It is based on these materials, including what is termed as an expert opinion, that the petitioners submitted that the assessment orders be set aside.

60. With the assistance of Mr. Dada, we have perused the written submissions, copies of which are annexed to the writ petition and tendered during the course of proceedings before the Appellate Authority. We have also perused a copy of the opinion of Mr. S.S. Bhagwat at pages 137 and 138 of the paper-book. We have also perused the extracts of the Indian Standard Specification for Heavy Petroleum Stock.

61. The First Appellate Authority before whom the above materials were relied upon passed a detailed order on 13th March, 2014, a copy of which is at Annexure-O page 223 of the paper-book. The First Appellate Authority referred to several judgments of the Hon'ble Supreme Court of India and other High Courts on the entry tax and came to the conclusion that this Court struck down the levy earlier on the point of discrimination insofar as set-off being not provided for payment of entry tax. The First

Appellate Authority held that the enactment is a valid piece of legislation. It must, therefore, be enforced. The arguments on constitutionality and legality were thus negated. The First Appellate Authority also held that from the wording of the Act it is evident that goods which have been brought into a local area for consumption, use or sale therein are subjected to entry tax. The goods may be brought from any place outside the State. Merely because there is no express provision mentioning entry of goods from outside the territory of India does not mean that the demand is illegal. The words employed and particularly in the definition are wide enough to include even bringing of the goods from abroad. That is how the First Appellate Authority held that the levy is legal and valid.

62. Then, the First Appellate Authority referred to a judgment delivered in the case of UP Entry Tax Act, 2007, and concluded that it is permissible to demand and recover entry tax. Even if the goods are imported from outside the State, such a levy is contemplated. The assessment orders for both years insofar as the tax part is concerned were not, therefore, interfered with.

63. As far as the ground raised on the bar of limitation, the First Appellate Authority relied on section 6 of the Maharashtra Entry Tax Act in arriving at the conclusion that all the provisions of the MVAT Act *mutatis mutandis* apply to levy, assessment and collection of entry tax. Once this view is taken and Rule 8 cannot be pressed into service, then, the assessment is not time barred. The First

Appellate Authority concluded that there was no difficulty in upholding, therefore, the jurisdiction and authority of the Assessing Officer.

64. Some other contentions were considered and eventually the appeals came to be dismissed.

65. These orders of the First Appellate Authority were appealed in the Tribunal and even before the Tribunal we find that elaborate grounds were taken in the Memo of Appeal and detailed submissions came to be canvassed.

66. The Tribunal, in the impugned order dated 16th April, 2015, concluded that the Division Bench judgment of this Court held that the levy of entry tax was non-compensatory and discriminatory. It decided against the State and quashed the entry tax levied on the petitioners vide Entry No.13 to the Schedule on furnace oil and low sulphur waxy residue oil.

67. In paragraph 8 of the order of the Tribunal, the argument of the petitioners' counsel that the compensatory part of the order is not set aside has been dealt with. The State Government is stated to have admitted that they have not challenged the compensatory part of the the order. The amendment was carried out to the Act only to remove the discrimination and to provide a relief in the form of set off. The Tribunal concluded that by virtue of this amendment, the discrimination has been removed.

68. Then, in paragraph 9, the argument that according to the counsel for the petitioners still survives was pertaining to the levy of tax on imported raw material. The Revenue pointed out that the provisions for levy, assessment and collection are specific. Entry No.13 refers to both heavy furnace oil and residual furnace oil. The Entry has been reproduced in paragraph 9 of the order and the Tribunal held that in the face of its clear wording , the argument of the petitioners' counsel cannot be accepted.

69. Then, in paragraph 10, the Tribunal concluded that by virtue of the Amendment Act and the words and expressions therein, Entry No.13 is valid and it covers all periods, earlier as well as subsequent. Once the discrimination is removed, then the plea of the petitioners that entry tax cannot be levied must be rejected.

70. Then one finds reference to the argument based on Article 286 of the Constitution of India. The argument of the the Revenue has also been noted and the Tribunal concluded that there is no contravention of Article 286 of the Constitution of India. Thus, it understood the Article as prohibiting restrictions on imposition of tax on sale or purchase of goods. Then the other argument also has been dealt with, namely, based on Article 304 of the Constitution of India. The Tribunal concluded that a bare perusal of Article 304 would reveal that the restrictions referred therein are with regard to inter-State trade and not with regard to goods which are imported from outside the country. Hence it held that the petitioners' contention

did not deserve to be accepted. The Tribunal referred to a number of judgments to conclude that entry tax can be levied on such goods which crossed customs barriers by invoking the power conferred on the State Legislature vide Entry No.52 of List II of the VII Schedule to the Constitution of India. It held there was no encroachment on the powers of the Parliament. It has also been held by the Tribunal in paragraph 16 that all the goods which come from outside the State are liable to entry tax. The definition of the term “import” will have to be construed accordingly. The Tribunal then referred to all the definitions and the relevant provisions of the Maharashtra Entry Tax Act. It rejected, therefore, the argument of the petitioners that the raw materials imported from abroad do not attract entry tax.

71. On the plea of limitation as well, relying on section 23 of the MVAT Act, the Tribunal proceeded to reject the contentions of the petitioners. Thus, by the impugned order, the Tribunal dismissed both the appeals.

72. For appreciating Mr. Dada’s contentions on the controversy being covered substantially by the earlier judgment of this Court, it is necessary to refer to that judgment. The Division Bench judgment deals with the constitutional validity of the Maharashtra Entry Tax Act insofar as it purports to levy that tax on entry of furnace oil and low sulphur waxy residue oil into any local area in the State of Maharashtra for consumption, use or sale therein. In paragraph 2 of the judgment, the Division Bench clarifies that though the point of legislative

competence of the State to levy entry tax has been raised in the petition, that ground has not been pressed at the final hearing of the petition. The petitioners, namely, the present petitioners and one another entity, Eurotex Industries, restricted the challenge based on violation of Articles 14, 19(1)(g), 301, 304 and 286 of the Constitution of India. After referring to the primary facts and the Maharashtra Entry Tax Act, the Bombay Sales Tax Act and the Bombay Sales Tax Rules, the Division Bench noted the rival contentions. The judgment, upto paragraph 26 notes them *in extenso* and in paragraph 27, the Division Bench holds that imposition of entry tax on furnace oil and low sulphur waxy residue oil covered under Sr. No.13 to the Schedule of the Maharashtra Entry Tax Act cannot be sustained. The Division Bench in paragraphs 27, 28, 29, 30, 31, 32 and 33 held that by levy of entry tax on goods that enter the local area from outside the State while leaving out similar goods entering the local area from within the State, the State had in fact created a tax barrier in contravention of Article 301 which guarantees free flow of trade, commerce and intercourse throughout the territory of India. The tax barrier was created by the levy of entry tax hampering free flow of goods in the State and in that regard in paragraphs 33, 34 and 35 the Bench observed thus:

“33. By levy of entry tax on goods which enter the local area from outside the State while similar goods entering the local area from within the State do not bear sales tax, the State has in fact created a tax barrier in contravention of Article 301 which guarantees free-flow of trade,

commerce and intercourse throughout the territory of India. The fact that the tax barrier created by the levy of entry tax has hampered free flow of goods in to the State is established from the averments made in the additional affidavit in reply filed on behalf of the State on November 20, 2003. In the said affidavit in reply it is admitted by the State that after the introduction of entry tax, the sale of goods in question within the State has gone up considerably. This admission on the part of the State clearly establishes that on introduction of entry tax, the manufacturers have opted to purchase raw materials from within the State, because on account of the tax barrier created by the entry tax, bringing raw materials from outside the State works out to be costlier. In other words, by taxing the goods entering the local areas from outside the State while not taxing the goods entering the local area from within the state, free flow of trade, commerce and intercourse is hampered and, therefore, the entry tax is liable to be declared as unconstitutional.

34. In the present case, refund of sales tax paid on the raw materials used in the manufacture of a final product is a rule and not an exception. Where the State policy is not to tax the raw materials which are used in the manufacture of final products in a local area within the State, then, subjecting the raw materials which enter the local area from outside the State to tax to the exclusion of the raw materials entering the local area from within the State would be arbitrary. Where the raw materials entering the local area from outside the State are only

subjected to tax, then such levy directly discriminates between the imported goods and the goods which enter the local area from within the state. By taxing the imported goods while exempting the local goods, the State has sought to treat equals unequally which is not permissible in law.

35. It was contended on behalf of the State that because some States have levied entry tax on goods imported from outside their State, entry tax has been levied on similar goods entering the local areas in the State of Maharashtra so as to ensure a level playing field between the goods which enter the local area from within the State and those goods that enter the local area from outside the State. This contention of the State is without any merit because from the express words used in the Act it is seen that the entry tax is levied to ensure that the goods which enter the local area bear either the sales tax or the entry tax. Thus, from the provisions of the Entry Tax Act it is clear that the entry tax is not levied because some other States have levied entry tax on such goods. This reasoning is further fortified by the fact that the Entry Tax Act clearly provides that the rate of entry tax on any commodity shall not exceed the rate specified for that commodity under the BST Act, etc. Thus, by collecting entry tax on goods entering the local area from outside the State and refunding the sales tax on goods entering the local area from within the State instead of ensuring level playing field, the State has created uneven level playing field thereby discriminating between the imported goods and the local goods manufactured or produced in the State. A tax which discriminates between the

imported goods and the locally manufactured goods and hampers the trade between the States violates the constitutional mandate and is therefore, liable to be declared as unconstitutional.”

73. In paragraph 36, the Division Bench noted the contention of the State that the entry tax is levied to compensate its local areas which have abolished octroi and the entry tax collected has been used in meeting the expenditure on account of State road fund. However, relying on section 3(7) of the Maharashtra Entry Tax Act, the Division Bench concluded that it cannot be said that levy of entry tax is with a view to compensate the local area on account of abolition of octroi. Thus, this stand of the State was rejected so also the other one by referring to the undisputed factual position that the State Government has been allocating amounts towards State Road Fund even prior to the introduction of entry tax. The levy was thus held to be non-compensatory in nature. That is how in paragraph 36 the conclusion has been reached. Then, in paragraphs 37 and 38 the Division Bench held as under:

“37. The decision of the Apex Court in the case of **Bihar Chamber of Commerce (supra)** not support the contention of the State, because, firstly, in that case, the entry tax was levied to compensate the loss of revenue on cess due to the decision rendered by the Supreme Court and secondly, the Apex Court has held that in that case prior consent of the President was obtained by the State. In the present case, admittedly consent of the President had not been obtained

till date. Moreover, in the present case, entry tax is levied and collected at 15% on the footing that the sales tax is levied and collected on similar goods at 15% when in fact the sales tax collected thereon is refunded as per the exemption notification issued under the BST Act and Rules. In other words, by the impugned legislation, raw materials required for manufacture of electricity are subjected to entry tax if brought into the local area from outside the State even though similar goods when enter the local area from within the State do not effectively bear sales tax. Apart from above, the ratio laid down by the Apex Court in the case of **Bihar Chamber of Commerce (supra)** to the effect that for establishing the compensatory nature of tax, it is enough if some connection, direct or indirect, is shown to exist between the tax and the trading facilities provided by the State does not support the case of the State, because, in the present case, admittedly the entry tax is levied to ensure that the goods entering the local area bear either sales tax or entry tax. Once it is found that the specified goods entering local area from within the State do not bear sales tax then entry tax on similar goods entering the local area from outside the State cannot be levied. In these circumstances subjecting the goods imported from outside the State to entry tax becomes unauthorised, arbitrary, discriminatory and violative of Article 301 of the Constitution.

38. The ratio laid down by the Apex Court in the case of **R. K. Garg (supra)** is distinguishable on facts. In the present case unlike the case before the Apex Court, the

Petitioners are not contending that the exemption granted to the raw materials purchased within the State should also be extended to the imported goods. What is contended by the Petitioners is that, the basis for levy of entry tax is the levy of sales tax on local goods and if local goods do not bear sales tax then the imported goods cannot be subjected to entry tax. Similarly, the decisions of the Apex Court in the case of **Associated Tanners (supra)** and **Shri Digvijay Cement (supra)** are also distinguishable on facts. In the present case, it is not the differential rate of tax which is questioned but what is questioned is the propriety of levying entry tax on imported goods entering the local area, when similar goods entering the local area from within the State do not bear the sales tax. Therefore, the decisions in the case of **Associated Tanners (supra)** and **Shri Digvijay Cement (supra)** do not support the case of the Petitioners. It is true that what should be the quantum of tax is the prerogative of the State and the same cannot be questioned in a court of law. However, when the State Legislature provides that the entry tax on a commodity shall not exceed the rate specified for that commodity under the BST Act, it would be open to the court to find out whether, effectively any sales tax is levied on that commodity. In the present case, the furnace oil and low sulphur waxy residue oil entering the local area from within the State do not bear sales tax and therefore, entry tax on those goods when enter the local area from outside the State cannot be levied. On the date on which entry tax was introduced on the goods in question, the

general exemption granted on those goods under the BST Act and Rules made thereunder were in existence. Therefore, it cannot be said that the levy of entry tax was to ensure that all goods entering the local area bear either the entry tax or the sales tax. Thus the entry tax on furnace oil and low sulphur waxy residue oil instead of striking a balance, in fact creates imbalance between the imported goods and the local goods and in fact has defeated the very purpose of enacting Entry Tax Act.”

74. The Division Bench judgment ends in paragraph 39 with a specific finding that Entry No.13 to the Schedule to the Maharashtra Entry Tax insofar as it purports to levy entry tax on furnace oil and low sulphur residue oil is unauthorized and unconstitutional.

75. We have already reproduced the short order of the Hon’ble Supreme Court of India rendered in the appeal / Special Leave Petition against this judgment. The Hon’ble Supreme Court of India clarifies that the Maharashtra Entry Laws (Levy, Amendment and Validation) Act, 2004, removes retrospectively the levy of entry tax on furnace oil and hence nothing survives in the Special Leave Petition. It was dismissed as infructuous. The impugned order of the High Court was held not be used as a precedent in any other matter.

76. The petitioners have understood the position accordingly, and have, therefore, raised several contentions. They are not merely relying on the earlier Division Bench, for they are aware of the above

clarification by the Hon'ble Supreme Court of India. Secondly, they are aware that now another statute has intervened, namely, the MVAT Act. Thirdly, after the judgment of the Division Bench, the present statute, namely, the Maharashtra Entry Tax Act, underwent some changes and amendments. For these reasons, they do not rest their submissions any longer only on the judgment of the Division Bench. We are, therefore, spared the effort of deciding as to whether this decision binds the respondents or otherwise. We are also spared the task of taking of any decision and rendering a conclusion as to whether the basis of the Division Bench judgment has been altered by the statutory amendments or otherwise.

77. Thus, we would proceed independent of this judgment of the Division Bench rendered in the case of the present petitioners and M/s. Eurotex Industries and Exports Limited.

78. We would first deal with Mr. Dada's contention with regard to the import of goods by the petitioners from outside India not attracting the levy.

79. We must first express our dissatisfaction with the inadequacy of pleadings. The burden on the petitioners when they challenge the constitutionality and legality of a levy is enormous. That burden has to be discharged by producing requisite material. The Hon'ble Supreme Court of India in several decisions has held that in a petition challenging the constitutionality of a statute, allegations regarding the violation of constitutional provisions should

be specific, clear and unambiguous, and should give relevant particulars. The burden is on the person who impeaches the law as violative of a Constitutional guarantee to show that the particular provision is infirm for all or any of the reasons stated by him. The Hon'ble Supreme Court has held that there is always a presumption in favour of the Constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the Constitutional principles. It must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It is permissible for the Court to take into consideration matters of common knowledge, matters of common report, the history of the times and the Court may assume every set of facts that can be conceived to be existing at the time of legislation in order to sustain the presumption of constitutionality [**See:** *Gauri Shankar vs. Union of India*,¹⁹ and *R.K. Garg vs. Union of India*.²⁰) Nowadays we have been noticing a growing tendency to file loosely-drafted petitions without necessary pleadings, adequate or relevant particulars or proper grounds. The importance of pleadings is lost simply because nowadays an insistence on proper pleadings is misconstrued as a Court being hyper-technical. What we look for and demand is not a slavish, mindless adherence to technicalities. We seek sufficiency of compliance with the law; and there is a sound, well-established rationale, one that is centuries

¹⁹ (1994) 6 SCC 349.

²⁰ AIR 1981 SC 2138.

old, for demanding that an assault on the constitutionality of an enactment is not lightly mounted, nor lightly entertained. The legal requirement is the jurisprudentially established presumption of constitutionality; to dislodge that presumption requires a very high standard. The material must be cogent, and it must be clear and unequivocal. After all, when a statute is attacked as unconstitutional, this is a frontal assault on legislative wisdom. If that wisdom is to be undermined by constant attacks based on feeble and flimsy grounds, then it is the rule of law that is threatened. Doctrines fundamental to our Constitutional framework also demand that *vires* challenges are not filed or entertained on slight cause. In the present petition we do not know how many consignments of the goods were imported, from which destination or country abroad, when and whether that import is at a particular port, viz., Mumbai and how the goods found their way to the petitioners' unit at Chembur, Mumbai. In the absence of such pleadings, it is not possible for us to assume that the entire quantity of the raw material has been imported or to ascertain whether it is procured partially from abroad and partially from domestic sources. We are concerned with a real challenge and not an academic one. However, without dwelling on this aspect any further, but warning parties like the petitioners who are advised by competent set of advocates and legal advisors to hereafter be cautious and careful when they raise such challenge, we proceed to consider the submissions of Mr. Dada. We consider them because the First Appellate Authority and the Tribunal has proceeded on the assumption that the entire quantity of

low sulphur waxy residue has been procured by the petitioners, to be used as raw material, from abroad.

80. In dealing with Mr. Dada's contentions we must not lose sight of the definition of the term "import" which is to be found in the Act under consideration. That definition we have reproduced above [Section 2(f)]. If the Act of bringing or causing to be brought or receiving any goods into a local area from a place outside the State is understood as an "import" for the purposes of the levy, then this definition together with the definition of the expression "entry of goods" makes it evident that what the petitioners have brought from abroad cannot be said to be left out of the purview of the Act. The Act specifically defines the entry of goods to mean entry into a local area from any place outside the State, for consumption, use or sale therein. That is the incident of tax. If the term "importer" is defined to mean a person who imports any goods, whether on his own account or on account of a principal or any other person, into a local area for consumption, use or sale therein then irrespective of the site of origin, and so long as the place from where they are brought is outside the State of Maharashtra, then that is an "import" for the purposes of the Act, and the person would be covered by the above expressions. It is not a levy on the mere entry of goods into a local area. It is a levy on the entry of goods into a local area from outside the State, for consumption, use or sale therein. The term "local area" is also defined in section 2(h) to mean the area for the time being included within the limits of the Municipal Corporation of Brihan

Mumbai, a Municipal Corporation established under the Maharashtra Provincial Municipal Corporations Act, 1949 and other areas as are defined to mean local areas within the meaning of clause (h) of section 2 of the Maharashtra Entry Tax Act.

81. In this regard, a reference to some of the decisions of the Hon'ble Supreme Court of India would be necessary. In a 5-Judge Bench judgment in the case of *The Central India Spinning and Weaving and Manufacturing Company Limited; the Empress Mills, Nagpur vs. The Municipal Committee, Wardha*,²¹ the Hon'ble Supreme Court had an occasion to consider the issue of applicability of C.P. and Berar Municipalities Act and the Terminal Tax Rules (Wardha) under that Act to the import of goods within the limits of the Municipality. The Hon'ble Supreme Court explained the difference between a terminal tax and a levy of that nature and an entry tax. Prior thereto, the Hon'ble Supreme Court was considering the contention of the Empress Mills, appellant before it, that the words "imported into" or "exported from" do not merely mean to bring into or to carry out or away from but also have reference to and imply the termination or the commencement of the journey of the goods sought to be taxed. The argument was that the goods in transit which are transported across the limits of a Municipal Committee are neither imported within the Municipal limits nor exported therefrom. The argument on the other hand was that a tax is leviable merely on the entry of the goods into the Municipal limits or their exit therefrom and

²¹ AIR 1958 SC 341.

the word “terminal” has a reference to the termini of the jurisdictional limits of the Municipality and not to the journey of the goods. The Hon’ble Supreme Court in paragraphs 6, 7 and 8 considered the ambit and scope of the words “import”, “export” and “transit”. It held thus :

“6. ‘Import’ is derived from the Latin word importare which means ‘to bring in’ and ‘export’ from the Latin word exportare which means to carry out but these words are not to be interpreted only according to their literal derivations. Lexico-logically they do not have any reference to goods in ‘transit’ a word derived from transire bearing a meaning similar to transport, i.e., to go across. The dictionary meaning of the words ‘import’ and ‘export’ is not restricted to their derivative meaning but bear other connotations also. According to Webster’s International Dictionary the word “import” means to bring in from a foreign or external source; to introduce from without; especially to bring (wares or merchandise) into a place or country from a foreign country in the transactions of commerce; opposed to export.

7. Similarly “export” according to Webster’s International Dictionary means “to carry away; to remove; to carry or send abroad especially to foreign countries as merchandise or commodities in the way of commerce; the opposite of import “. The Oxford Dictionary gives a similar meaning to both these words.

8. The word “transit” in the Oxford Dictionary means the action or fact of passing across or through; passage or journey from one place or

point to another; the passage or carriage of persons or goods from one place to another ; it also means to pass across or through (something) to traverse, to cross. Even according to the ordinary meaning of the words which is relied upon by the respondent, goods which are in transit or are being transported can hardly be called goods 'imported into or exported from' because they are neither being exported nor imported but are merely goods carried across a particular stretch of territory or across a particular area with the object of being transported to their ultimate destination which in the instant case was Nagpur."

82. True it is that this decision deals with a terminal tax. However, not only did the Hon'ble Supreme Court trace the history of the Constitutional entries by referring to the Government of India Act, 1935, and the Constitution of India, but also analysed the two levies, their meaning and object. By referring to the decision of the Federal Court in the case of *Punjab Flour and General Mills Co. Ltd. vs. Chief Officer, Corporation of city of Lahore*,²² it was held as under :

"33. The vires of the tax has not been assailed but the difference in the language of the two items in List I and II has been pressed before us for the purpose of showing that the word "terminal " implies the terminus of a journey and not the end of the jurisdictional limits of a Municipality. Terminal in item No. 58 of List I of the 1935 [Constitution Act](#) has reference to the terminus of carriage of goods. There is no reason

²²

AIR 1947 FC 14

to give to this word a different meaning in item No. 8 of Scheduled Tax Rules under the Government of India Act of 1915 or in clause (o) of [s. 66\(1\)](#) of the Act. The two sets of taxes in Lists I and 11 have different qualities. The “terminal tax” under item No. 58 of List I arises at the end of journey by railway wherever the end may be in relation to particular goods’ and under item No. 49 of List 11 the tax or cess on entry of goods whatever the nomenclature is imposable when the goods enter a local area for consumption, use or sale therein. The two sets of taxes are so distinct that they may be imposed simultaneously, one when they reach their destination at the end of a railway journey and the other when they enter the limits of a local area for the object above mentioned. But in both cases the activity in regard to the motion of the goods ends, in the one case as the goods are carried no further by railway and in the other as their entry is for consumption, use or sale. Keeping in view the terms and language and the legislative history of the [section 66\(1\)](#) we are unable to enlarge the terms of the section by mere construction so as to include within its operation goods which are in transit and are being transported across the jurisdictional limits of the Municipality.

34. The Federal Court in 1947 FCR. 17: (AIR 1947 FC 14) (S) considered the meaning of the word “ terminal” in a case which was brought from Lahore. There the Municipality of Lahore imposed a terminal tax in 1926 calculated on the gross weight Of Consignments or per tail as the case might be, at the rates and on the articles specified in the schedule, imported into the

Municipality by rail or by road. By a notification of 1938 the Municipality in supersession of that tax imposed a new tax called "Octroi (without refund)" which was to be similarly calculated on the gross weightage of the consignments imported into the limits of the Municipality. This in turn was replaced by the imposition of a new tax also called "Octroi (without refund)" on consignments imported into the limits of the Municipality. The appellant's contention in that case was that the tax imposed was a "terminal tax" on goods carried by railway and as such not imposable. The Municipality argued on the other hand that it was a tax within the provisions of Entry No. 49 of List II and as such could be imposed with the previous sanction of the Provincial Government under s. 61(2) of the Punjab Municipalities Act. The following passage from the judgment of Spens C. J. shows the meaning to be attached to the word "terminal":

"There appears to us a definite distinction between the type of taxes referred to as terminal taxes in Entry No. 58 of List I of Sch. 7 and the type of taxes referred to as cesses on the entry of goods into a local area in Entry No. 49 of List II. The former taxes must be (a) terminal (b) confined to goods and passengers carried by railway or air. They must be chargeable at a rail or air terminus and be referable to services (whether of carriage or otherwise) rendered or to be rendered by some rail or air transport Organisation. The essential features of the cesses referred to in Entry No. 49 of List II are on the other hand simply (a) the entry of goods into a definite local area and (b) the requirement that the goods should enter for the purpose of

consumption, use or sale therein... ..

...

In our judgment there is no limitation to be implied in Entry No. 49, List II, in regard to the manner in which goods may be transported into a local area. It follows that so far as rail-borne goods are concerned the same goods may well be subjected to taxation under Entry No. 58 of List I as well to local taxation under Entry No. 49 of List II. The grounds of taxation under the two entries are, as indicated above, radically different, and there is no case for suggesting that taxation under the one entry limits or interferes in any way with taxation under the other."

Therefore according to the Federal Court "terminal" has reference to the terminus of the railway or air i.e., the end of journey. The tax imposed in that case was held not to be a terminal tax but merely a cess on entry of goods into the local area within Entry No. 49 of List II even though it was imposed on railborne goods entering the municipal area.

35. It is a noticeable feature of [s. 66\(1\)](#) that apart from the terminal tax there are 14 other heads of taxation imposable by the Municipality and in the case of each one of these 14 heads the tax is on some activity which takes place within the jurisdictional limits of the Municipality. This supports the contention of the appellant that the terminal tax leviable under cl. (o) properly construed must have reference to some activity within the municipal area i.e., the entry for the purpose of remaining within that area or

commencement of journey from that area.

36. We are, therefore, of the opinion that the terminal tax under [s. 66\(1\)\(o\)](#) is not leviable on goods which are in transit and are only carried across the limits of the Municipality, and would therefore allow this appeal, reverse the decision of the Nagpur High Court. The appellant will have its costs in this court and in the High Court.

Appeal allowed.”

(*Emphasis added*)

83. In allowing the appeal, the Hon’ble Federal Court held that the goods which are in transit and are only carried across the limits of the Municipality would not attract terminal tax.

84. The decision of the Federal Court is throughout considered to be a *locus classicus* and a landmark decision.

85. Following it and applying it even to cases of octroi or entry tax, the Hon’ble Supreme Court held conclusively that entry tax is a tax on the entry of goods into any local area for consumption, use or sale therein. So long as the levy is of this nature it is wholly irrelevant as to from where the goods have been brought. The statute’s provisions must be given their plain and clear meaning. In other words, if the act of bringing in the goods is termed as an import and this is also defined, and if the particular act complained of falls within the definition, then there is no escape from the levy. It is in this context that we must

look at section 3 of the Act which also has been reproduced by us above. We are not in agreement with Mr. Dada that only those goods which have been brought within the local area from a place outside the State of Maharashtra but within the territory of India will attract the levy and not those goods which enter the local area after being imported from abroad. The argument of Mr. Dada is that the expression “outside the State” cannot mean outside the territory of India. We do not find any support for such an argument. The reported decisions seem to hold otherwise. Even otherwise, it is difficult to appreciate the implications of this argument. It would lead to needless complexity and incongruous and inconsistent results. For instance, if goods are imported into the port of Mumbai, and used in Mumbai, then, according to Mr. Dada’s formulation, such goods are not covered by the levy and entry tax is not attracted. But what might happen if the goods were imported into Kandla, Vishakapatnam or Kolkata, for instance, and transshipped from there, across other states, and then brought into Mumbai? Such an entry or bringing in would be, even on Mr. Dada’s formulation, subject to the levy, for the goods would be brought in from within the territory of India though from outside the State of Maharashtra. It surely cannot be suggested that all foreign imports are, by definition, exempt from the levy of all local entry taxes. What, therefore, Mr. Dada’s argument amounts to is saying that the local entry tax levy is not attracted where the port of entry from abroad is within the state itself; but if the port of foreign import is outside the state, then the entry tax levy is attracted. If this be so, then it is a self-

defeating argument and clearly shows that the mere importation from abroad is not a reason to deny the levy of the local entry tax. We find nothing in any judgment or the statute to support the proposition that the situs of the port of foreign importation within the state furnishes any point of exemption or escape from the local levy of entry tax.

86. In the case of *Burmah Shell Oil Storage and Distributing Company of India Ltd. Belgaum vs. Belgaum Borough Municipality, Belgaum*,²³ the Hon'ble Supreme Court was considering a situation where Burmah Shell, was dealing in petrol and petroleum products manufactured in its refineries situate outside the octroi limits of Belgaum Municipality, brought these products inside that area either for use or consumption by itself or for sale generally to its dealers or licencees who, in turn, sold them to others. The company also sold these products directly. The company had a Divisional Office and Depot in Belgaum and filed a writ petition in the High Court of Mysore seeking a writ of mandamus to prohibit the Municipality from charging octroi on its products brought inside the octroi limits for sale. Though the Supreme Court noted the division into four separate categories of the act of bringing in the goods, eventually it was dealing with the controversy as to whether the levy was attracted or not. It reproduced both the Schedules in the Government of India Act, 1935 and the Constitution of India, namely Entry 52 of List II of the VII Schedule in paragraph 11 of its decision and then held as under:

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AIR 1963 SC 906.

“12. It is pointed out that these Constitutional documents themselves indicate that octroi may be on goods (or animals) brought into a local area (a) for consumption (b) for use or (c) for sale, and the Boroughs Act, before the amendment, had selected only two, namely, consumption and use and left out the third that is, sale”. The tax was thus payable only when the goods or animals were brought for consumption or use, by the person who brought them in, but not when the goods or animals were brought in and sold and were consumed or used by the purchaser or someone else. It is conceded that after the amendment the tax was intended to be collected even in respect of goods brought for sale but here it is pointed out that the procedure under sections 75, 76 and 77 has not been followed as required by section 60 of the Boroughs Act and the imposition of octroi on goods and animals brought in, for sale fails to be effective. It is said that this amounts to a new tax and it needed to be imposed according to the provisions above- mentioned and reliance is placed ,upon *Burmah Shell Oil Storage and Dist. Co.v. Manmad Municipality* AIR 1958 Bom 43.

(12a) The Boroughs Act defines octroi in section 2 (12)-“octroi” shall include a terminal tax.” In clause (v) of section 73(1) terminal tax is mentioned separately and section 61 (1) (0) gives the power to fix terminal tax limits And stations and other ancillary matters. The proviso to section 73 (1) is material and it reads:

“ Provided that, save as provided in clause (xiv) no such tax shall be leviable in boroughs in which an octroi was not levied on or before the

6th July, 1917.”

Clause (xiv) says that the Municipality may impose any other tax “which under the Constitution the State Legislature has power to impose in the State.”

13. The entries in the Legislative Lists which have been cited from the Government of India Act 1935 and the present Constitution and the definition of octroi as including terminal tax need some explanation. The definition of octroi is subject to the context and may not apply to enlarge the ambit of octroi. But the reason underlying the extended definition gives us the true meaning of octroi as described in section 73 (1) (iv). The Boroughs Act was passed in 1925 and replaced the earlier Act of 1901. The Boroughs Act, therefore, was prior to the Government of India Act, 1935. Under section 80A (3) (a) of the Government of India Act, the Governor General-in-Council had framed rules; on December 16, 1920, which were known as the Scheduled-tax Rules. Schedule II of these Rules (1) A. I.R. 1958 Bom, 43. dealt with taxes for the benefit of Local Authorities and included :

7. Octroi

8. A terminal tax on goods imported into, or exported from a local area, save where such tax is first imposed in a local area in which octroi was not levied on or before 6th July, 1917.

(Entry No. 8 quoted above was substituted by dated January 24, 1924, for an entry which read formerly “A terminal tax on goods imported into a local area in which an octroi was levied on or

before July 6, 1917".)

14. The particular tax was 'octroi' and there was no description of the tax. The word 'octroi' comes from the word 'octroyer' which means "to grant' and in its original use meant 'an impost' or 'a toll' or (a town duty' on goods brought into a town. At first octrois were collected at ports but being highly productive, towns began to collect them by creating octroi limits. They came to be known as 'town duties'. These were collected not only on 'imports' but also on 'exports' see Beuhler: Public Finance (3rd Edn.) p. 426. Grice in his National and Local Finance p. 303 says that they were known as 'ingate tolls' because they were collected at toll gates or barriers. Normally, they were levied on goods meant for consumption but in Seligman's Encyclopaedia of Social Sciences Volume IX page 570, 'octrois' are described without any reference to consumption or use. This is how the editors describe octrois :-

" As compared with the facilities of the National Government the possibilities of raising revenue by local bodies are quite limited. All forms of indirect taxation are practically closed to local authorities. They are unable to levy customs duties, although they may collect the so-called octrois that is, duties levied on goods entering town."

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

Act the definition of octroi' includes Terminal Tax. Terminal Tax, as the Indian Statutory Commission points out, formerly meant in Indian fiscal terminology a tax which was levied at Railway Stations and collected by the Railway Administration on all goods imported or exported from the Station. It was also collected from passengers in some Municipalities. We also learn from the Report that on the recommendation of a Committee appointed in 1908 terminal tax took the place of octroi in a large number of Municipalities at first in the United Provinces and then in others. At first the Government of India were not in favour of such a change. Octrois were levied on goods brought into, a local area for consumption, use or sale and were indirect taxes but. terminal taxes were regarded as direct. On July 6, 1917, the Government of India by a Resolution reversed their former policy and agreed that the conversion was not a change from indirect to direct taxation. Terminal taxes were of the nature of octrois, but were not quite the same. The main differences were : that there was no system of refunds under the Terminal Tax Rules (Terminal taxes as Findlay Shiffas tells us were sometimes known as 'octrois without refunds'.) and for octroi to be levied the goods must be brought in for sale, use or consumption."

87. It is contended before us that this decision was dealing with a different controversy concerning consumption of goods within the Municipal limits. It was urged that the consumption could be beyond the Municipal limits but so long as the sale was within the

Municipal limits that attracted the levy and this is the ratio of the judgment. The other discussion on the interpretation of the entries etc will not be of any assistance.

88. We are unable to agree with this argument for the simple reason that even in the later judgments of the Hon'ble Supreme Court of India, *Burmah Shell* has been followed. In that regard, a useful reference can be made to two decisions of the Hon'ble Supreme Court of India.

89. In the case of *Jothi Timber Mart vs. The Corporation of Calicut & Anr.*²⁴ a 3-Judge Bench of the Supreme Court was dealing with validity of levy of timber tax by the Corporation of Calicut on the grounds, *inter-alia*, that the State Legislature was incompetent to impose that tax under Kerala Act 30 of 1961. The Hon'ble Supreme Court turned down the challenge in the following words:

“6. Entry of goods within the local area for consumption, use or sale therein is made taxable by the State Legislature: authority to impose a general levy of tax on entry of goods, into a local area is not conferred on the State Legislature by item 52 of List II of Sch. VII of the Constitution. The Municipality derives its power to tax from the State Legislature and can obviously not have authority more extensive than the authority of the State Legislature. If the State Legislature is competent to levy a tax only on the entry of goods for consumption, use or sale into a local area, the Municipality cannot under a legislation

²⁴ AIR 1970 SC 264.

enacted in exercise of the power conferred by item 52, List II have power to levy tax in respect of goods brought into the local area for purposes other than consumption, use or sale. The authority of the State Legislature itself being subject to a restriction in that behalf, s. 126 may reasonably be read as subject to the same limitations. When the power of the Legislature with limited authority is exercised' in respect of a subject-matter, but words of wide and general import are used, it may reasonably be presumed that the Legislature was using the words in regard to that activity in respect of which it is competent to legislate and to no other; and that the Legislature did not intend to transgress the limits imposed by the Constitution: see *In re Hindu Women's Rights to Property Act, 1937*(1). To interpret the expression "brought into the city" used in s. 126(1) as meaning brought into the city for any purpose and without any limitations would, in our judgment, amount to attributing to the Legislature an intention to ignore the constitutional limitations. The expression "brought into the city' in s. 126 was therefore rightly interpreted by the High Court as meaning brought into the municipal limits for purposes of consumption, use or sale and not for any other purpose."

90. The decision in *Burmah Shell's* case was sought to be questioned and a specific contention was raised that it requires reconsideration. Turning down that contention, the Hon'ble Supreme Court in the case of *M/s. Hiralal Thakorlal Dalal vs. Broach Municipality and Ors.*²⁵ held as

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AIR 1976 SC 1446.

under :

“3. In order to appreciate the controversy, it will be desirable to refer to the basic facts of the Burmah Shell’s case (supra). The Burmah Shell Oil Storage and Distribution Co. India Ltd., hereinafter referred to as the Company, was a dealer in petrol and other petroleum products which it manufactured in its refineries situated out-side the octroi limits of Belgaum Municipality. It brought these products inside that area either for use or consumption by itself or for sale generally to its dealers and licensees who in their turn sold them to others. According to the Company the goods brought by it within the octroi limits could be divided into four categories as follows:

1. Goods consumed by the Company;
2. Goods sold by the Company through its dealers or by itself and consumed within the octroi limits by persons other than the Company;
3. Goods sold by the Company through its dealers or by itself inside the octroi limits to other persons but consumed by them outside the octroi limits; and
4. Goods sent by the Company from its Depot inside the octroi limits to extra-municipal points where they are bought and consumed by persons other than the company.

This Court examined the scheme of taxation under the Act and the rules and the bye-laws made by the Municipality for the levy of octroi. It also took note of the fact that the words “use or sale” were substituted for the words “or use” by

Bombay Act 35 of 1954, which are the subject matter of a fresh controversy before us, and made a reference to the Legislative Lists in the Government of India Act, 1935 and the Constitution. After examining the history of octrois and terminal taxes, this Court held that “octrois were taxes on goods brought into the local area for consumption, use or sale”, and that “they were leviable in respect of goods put to some use or other in the area but only if they were meant for such user.” It was specifically clarified that the word “sale” was included only in 1954 in order to bring the description of octroi in the Act in line with the Constitution, and that the expression “consumption” and “use” together “connote the bringing in of goods and animals not with a view to taking them out again but with a view to their retention either for use without using them up or for consumption in a manner which destroys, wastes or uses them up.”

4. Looking to the trade of the Company, this Court held that sale by it directly to consumers or to dealers was “merely the means for putting the goods in the way of use or consumption” and that the word “therein” does not mean that all the act of consumption must take place in the area of the municipality. The Court therefore went to hold as follows.-

“In other words, a sale of the goods brought inside, even though not expressly mentioned in the description of octroi as it stood formerly, was implicit, provided the goods were not re-exported out of the area but were brought inside for use or consumption by buyers inside the area. In this sense the amplification of the description both in

the Government of India Act, 1935 and the Constitution did not make any addition to the true concept of 'octroi' as explained above. That concept included the bringing in of goods in a local area so that the goods come to a repose there. When the Government of India Act, 1935 was enacted, the word 'octroi' was deliberately avoided and a description added to forestall any dispute of the nature which has been raised in this case. In other words, even without the description the tax was on goods brought for 'consumption, use or sale'. The word 'octroi' was also avoided because terminal taxes are also a kind of octroi and the two were to be allocated to different legislatures.

In our opinion, even without the word 'sale' in the Boroughs Act the position was the same provided the goods were sold in the local area to a consumer who bought them for the purpose of use or consumption or even for resale to others for the purpose of use or consumption by them in the area. It was only when the goods were re-exported out of the area that the tax could not legitimately be levied....."

This Court categorically held that the Company was liable to pay octroi on goods brought into the local area (a) to be consumed by itself or sold by it to consumers direct, and (b) for sale to dealers who in their turn sold the goods to consumers within the municipal area irrespective of whether such consumers bought them for use in the area or outside it, but it was "not liable to octroi in respect of goods which it brought into the local area and which were re- exported."

5. The law on the subject matter of the present controversy has thus been laid down quite clearly in the *Burmah Shell's* case (supra) and the present case squarely falls to be governed by it. We are also in agreement with that interpretation of the law. It may be mentioned that the learned counsel have not been able to advance any new argument justifying a reconsideration of the decision."

91. Thus, there is no hesitation in concluding that in similar cases and which deal with the same question, assistance of this judgment of the Constitution Bench in *Burmah Shell's* case has been repeatedly taken.

92. In the case of *Man Mohan Tuli vs. Municipal Corporation of Delhi & Ors.*,²⁶ the Hon'ble Supreme Court of India underlined the difference between a terminal tax and octroi. In doing so, it referred to the Federal Court judgment in *Punjab Flour & General Mills*, the judgments in *The Central India Spinning and Weaving and Manufacturing Company Limited*, *Burmah Shell*, and others and then held as under:

"14. Thus, from a consideration of the cases cited above, the following propositions emerge:-

(1) Terminal tax and octroi are similar kinds of levies which are closely interlinked with (1) destination of the goods, (2) the user in the local area on arrival of the goods. Where the goods merely pass through a local area without being consumed therein the mere fact that the transport carrying the goods halt within the local

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AIR 1981 SC Delhi 144.

area for transshipment or allied purposes would not justify the levy of either the terminal tax or octroi duty. This is because the halting of the goods is only for an incidental purpose to effectuate the journey of the goods to the final destination by unloading, sorting and reloading them at a particular place.

(2) There is a very thin margin of difference between a terminal tax and octroi. In the case of the former (terminal tax) the goods reach their final destination and their entry into the area of destination immediately attracts payment of terminal tax irrespective of their user. In the case of octroi, however the tax is levied on goods for their use and consumption.

(3) But at the same time, the goods while halting at a local area should leave for their destination within a reasonable time which may depend on circumstances of each case and if the goods are kept within the area for such a long and indefinite period that the purpose of reaching the final destination lying in a different area is frustrated or defeated, they may be exigible to terminal tax.

(4) Where the goods enter into a local area which is also the destination of the goods either temporarily or otherwise, the terminal tax would be leviable. For instance, if A consigns goods from Patna in Bihar to Delhi in the name of X and X after having received the goods at Delhi re-books or reloads the same on a transport for Chandigarh in the name of Y, terminal tax would be leviable by the Corporation at Delhi because the goods in the first instance was Delhi and that by itself

would attract the imposition of terminal tax. The fact that X rebooks them to Chandigarh would not make any difference because the act of rebooking by X at Delhi would constitute a fresh transaction by which the goods after having been carried into Delhi are further exported to Chandigarh. On the other hand, when there is one continuous journey of the goods from Patna to Chandigarh without any break, the final destination would be halted in Delhi for the purpose of unloading, sorting and reloading and may have to be kept in Delhi for a reasonable time. In such a case terminal tax would not be exigible.”

93. Then, in the case of *Kunwar Ram Nath & Ors. vs. The Municipal Board, Pilbhit*,²⁷ a two-Judge Bench of the Supreme Court of India was considering a challenge to a complaint instituted under section 155 of the U.P. Municipalities Act, 1916. This complaint was filed by the Municipal Board of Pilbhit. It alleged that the N.H. Sugar Factory, Pilbhit had brought three wagon loads of sugarcane by railway into their godown at the railway siding in their Sugar Factory; the goods were for its own consumption and use; the godown and siding were within Municipal Board limits; and, therefore, octroi was payable under the bye laws of the Municipal Board published under a Notification dated 18th May 1960; yet, no octroi has been paid, and hence the complaint. This complaint was sought to be quashed by filing a Criminal Case No.3291 of 1972 in the High Court of Allahabad under section 561-A of the Code of Criminal Procedure 1898, which is akin to or on par with section 482 of the Code of

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AIR 1983 SC 930.

Criminal Procedure, 1973. Amongst several contentions raised before the High Court, it was found that the company admitted that it had brought into the Municipal area sugarcane by railway as pleaded by the Municipal Board without paying octroi, but submitted that octroi was not payable in view of the exemption granted by the State Government under section 157(3) of the U.P. Act.. The High Court rejected this argument and dismissed the petition. The aggrieved employees of the company carried the matter to the Hon'ble Supreme Court of India. In dealing with the rival contentions, particularly about the nature of the levy, the Hon'ble Supreme Court held as under :

“6. The first submission made before us is somewhat subtle and needs to be considered in some detail. It is argued that since the exemption had been given under the order dated November 20, 1936 on the ground that there was no justification for the continuance of the levy of taxes on rail-borne sugarcane as the municipalities were not rendering any service in regard to it, the levy from which exemption had been given by that order was either a terminal tax or a fee and not a tax. Since what is being levied as octroi from the year 1960 was a tax, the order of exemption would be inapplicable to it. In support of the first part of this argument that the tax referred to in the order of exemption could only be a terminal tax reliance was placed on a decision of the Federal Court in *The Punjab Flour and General Mills Co., Ltd. Lahore v. The Chief Officer, Corporation of the City of Lahore and the Province of the Punjab*.⁽¹⁾ In that case the Federal

Court had to construe the meaning of entry 58 of List I of the Seventh Schedule to the Government of India Act, 1935 which read as '58. Terminal taxes on goods or passengers carried by railway or air; taxes on railway fares and freights' and of entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935 which read as '49. Cesses on the entry of goods into a local area for consumption, use or sale therein'. The facts in that case were these: The Lahore Municipality had in the year 1926 imposed under its then existing power of taxation a tax called terminal tax calculated on the gross weight of consignments or per tail as the case might be at the rates and on the specified articles or animals, specified in the Schedule to the notification imposing the levy, imported into its municipal limits by rail or by road. This was superseded by a notification issued in the year 1938 by which the municipality gave notice of the imposition of a new tax called 'octroi (without refunds)' which was to be calculated on the gross weight of consignments and on animals per tail at the rates and on the articles specified in the Schedule to the relevant notification imported into its limits. This notification was superseded by a further notification of the year 1940 by which a tax called 'octroi (without refunds)' was to be charged at the new rates with effect from May 11, 1940 on consignments including grain, imported into its limits. The Punjab Flour and General Mills Co. Ltd., Lahore which was importing for use or consumption grain into its factory which was situated within the Lahore municipal limits contended that the tax in question was a terminal tax, by whatever name it might have been called, falling under entry 58 of

List I of the Seventh Schedule to the Government of India Act, 1935 and was not imposable in 1938 or in 1940 after the relevant provisions of the Government of India Act, 1935 had come into force. It was contended by the company that the tax in question did not fall under entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935. The Federal Court after explaining the difference between the terminal taxes and cesses which can be levied on goods imported into a local area for purposes of use, consumption or sale therein rejected the contention of the company with these observations:

“There appears to us a definite distinction between the type of taxes referred to as terminal taxes in entry No. 58 of List 1 of the Seventh Schedule and the type of taxes referred to as cesses on the entry of goods into a local area in entry No. 49 of List II. The former taxes must be (a) terminal (and) (b) confined to goods and passengers carried by railway or air. They must be chargeable at a rail or air terminus and be referable to services (Whether of carriage or otherwise) rendered or to be rendered by some rail or air transport organisation. The essential features of the cesses referred to in entry No. 49 of List II are on the other hand simply (a) the entry of goods into a definite local area and (b) the requirement that the goods should enter for the purpose of consumption, use sale therein. It is to be noted that there is no limitation on

the manner by which the goods to be subjected to such cesses may enter. There is no ground for suggesting that entry of goods by rail or air is any less contemplated than entry by waterway or road. It was argued by the appellant's counsel that because by entry No. 20 of List I Federal railways and the regulation of railways and so forth is included in the Central Government Legislative List and by List II the Provincial Government is mainly given powers of legislation over roads and internal waterways and transport thereon (entry No. 18), it should therefore be deduced that all taxation on rail and air borne goods must be imposed, if at all, under the powers conferred by entry No. 58 of List I and that powers of taxation conferred by entry No. 49 of List II must be confined to goods that enter by road or internal waterway only. We cannot accept this argument. It is not in our judgment justified by the wording of the various entries in the two Lists and would impose a limitation on local taxation under entry No. 49, in List II, which would often work most inequitably in practice between those importing goods by road or waterway and those who could import by rail or air. In our judgment there is no limitation to be implied in entry No. 49 List II, in regard to the manner in which goods may be transported into a local area. It follows

that so far as rail borne goods are concerned the same goods may well be subjected to taxation under entry No. 58 of List I as well as to local taxation under entry No. 49 of List II. The grounds of taxation under the two entries are as indicated above, radically different, and there is no case for suggesting that taxation under the one entry limits or interferes in any way with taxation under the other.”

7. It is true that in the course of the above decision it is observed that the element of service to be rendered is treated as an ingredient of a terminal tax but that does not mean that when tax is clearly laid on goods when they are brought into a local area for purposes of use, sale or consumption, it ceased to be a tax levied under [section 128](#) (1) (viii) read with entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935 merely because of the reason given for granting exemption under the order the Provincial Government dated November 20, 1936 issued under section 157 (3) of the Act. There is no doubt that the octroi which was being levied in 1936 when the exemption was granted and the subsequent levy imposed in the year 1960 are both taxes levied under the Act and fall within the State List both under the Government of India Act, 1935 and under the Constitution. It was not a terminal tax falling under entry 58 of List I of the Seventh Schedule to the Government of India Act, 1935. It does not also fall under entry 89 of List I of the Seventh Schedule to the Constitution now. The said levy came within entry 49 of List II of the Seventh Schedule to the Government of India Act,

1935 and now falls under entry 52 of List II of the Seventh Schedule to the Constitution. The exemption granted in the year 1936 should be construed as an exemption from all taxation by way of octroi leviable and levied under the Act on rail-borne sugarcane and that exemption would continue until it is either rescinded or modified or becomes inapplicable for any other reason. The second part of the above submission was that the levy was in the nature of a fee and not a tax as it had been described as a cess in entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935. There is no merit in this submission also. A cess may either be a tax or a fee. Whether a cess in a given context is a tax or a fee depends upon the purpose for which it is levied. The very decision relied on by the respondents in this connection, namely *The Hingir-Rampur Coal Co., Ltd. & Ors. v. The State of Orissa & Ors.*(1) substantiates the above view. In that case this Court held that the cess imposed by the Orissa Mining Areas Development Fund Act, 1952 was a fee relatable to entries 23 and 66 of List II of the Seventh Schedule to the Constitution having regard to the object and the scheme of that Act and the purpose for which the cess collected under it was to be used. There is no doubt that in entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935 the expression 'cesses' is used in the sense of 'taxes'. In entry 52 of List II of the Seventh Schedule to the Constitution, the expression 'taxes' is substituted in the place of the expression 'cesses' which was in the former entry 49 in the Government of India Act, 1935 but the nature and content of the legislative power under

both are the same. The decision of the Federal Court in the case of *the Punjab Flour and General Mills Co. Ltd.* (supra) itself shows that a cess levied in exercise of the power under entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935 was a tax irrespective of any refund allowed or not allowed by the Government as can be seen from the following observation made by the Federal Court at page 26 of the Report:

“We can see no cause whatsoever for holding that if cesses are imposed in pursuance of the powers conferred by entry No. 49 in List II, any provision need be made for refunds. Whether or not there should be any refunds in respect of such cesses appears to us to be a matter open for determination by Provincial or local taxing authority, and the existence or non-existence of a provision of system of refunds cannot affect the tax being or not being a cess within entry No. 49.”

8. It is also significant that the word ‘octroi in section 128 (1) (viii) of the Act is found in the group of taxes referred to in section 128. All sums received by a Municipal Board on account of the various levies made under section 128 have to be credited to the municipal fund under section 114 of the Act which can be utilised for the purposes of the Municipal Board as stated in section 120 of the Act. The sum received as octroi is also dealt with like any other tax. There is no element of quid pro quo between the person who pays the octroi and the Municipal Board. Hence octroi

being a tax it was competent to the Provincial Government to make an order under section 157 (3) of the Act exempting railborne sugarcane from payment of octroi.”

94. Then, in the case of *Indian Oil Corporation vs. Municipal Corporation Jullundhar & Ors.*,²⁸ a somewhat similar controversy was considered by the Hon’ble Supreme Court of India. There, the Indian Oil Corporation challenged the demand of octroi by filing a writ petition in the High Court of Punjab and Harayana. The IOC challenged the validity of section 113 of the Punjab Municipal Corporation Act, 1976, on the ground that it had authorized the levy of octroi on articles and animals imported within the Municipal limits of the Corporation without any reference to their use, consumption or sale of the said goods as being beyond the power of the State Legislature. Reliance was placed on Entry 52 of List II of Schedule VII of the Constitution of India in that behalf. The IOC disputed the authority in the Corporation to impose and demand the octroi on the petroleum products imported by it within the limits of the Corporation which was only exported to its dealers at their sale points situate outside the area of the Municipal Corporation. In turning down the challenge, the Hon’ble Supreme Court has held thus :

“6. The High court noticed that the parties were at variance as to whether the property in the goods is conditionally appropriated to the contract and passed on to the buyer at the depot of IOC at Jullundhar or at the dealers outlets and after

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AIR 1993 SC 844.

considering the submissions made and the pleadings of the parties held that the property in the goods passed on to the dealers as and when the goods were laden in the tank lorries and that the sale was complete at the depot of the IOC and that it did not take place at the respective places of business of the dealers and as such octroi duty was rightly levied and demanded.

7. The High Court after extracting the provisions of section 113 of the Municipal Act and Entry 52 of List II of the VII schedule, which read thus:

“113. Levy of octroi.- Except as hereinafter provided, the Corporation shall levy octroi on articles and animals imported into the city, at such rates as may be specified by the Government”. Entry 52 of List II provides: “Taxes on the entry of goods into the local area for consumption, use or sale therein.”

Opined that the words and phrases employed in section 113 of the Municipal Act were of wide content and general connotation and since the power of the state Legislature are circumscribed by List II of schedule VII the state Legislature could not empower the municipal committees to levy tax only on the entry of goods within the local area when those goods were not meant for consumption, use or sale within that area. It rightly held that the authority of the state Legislature in those matters is subject to the restrictions imposed by Entry 52 and since source of power of section 113 of the Municipal Act is traceable to Entry 52, the wide language

employed in section 113 of the Municipal Act had to be read down to mean that the Municipal corporation could levy octroi on articles and animals imported into a local area for consumption, use or sale therein and construing the provisions of section 113 in that manner held the same to be intra-vires.

8. We are in agreement with the High Court that the provisions of section 113 of the Municipal Act are not beyond the competence of the state Legislature and the same are to be read alongwith Entry 52 of List II of schedule VII of the Constitution.

9. Entry of goods within the local for area for consumption, use or sale therein is made taxable by the state Legislature on the authority of Entry 52 of List legislature and it obviously cannot have any authority more extensive than the authority of the state Legislature. since the state Legislature in view of Entry of goods for" consumption use or sale' into a local area, the municipality cannot under a legislation, enacted in exercise of the powers conferred by Entry 52 of List II, have the power to levy tax in respect of good brought into the local area for purposes other than consumption, use or sale. section 113 of the Act has, therefore, reasonably to be read subject to the same limitation as are contained in Entry 52 of to be read subject to the same limitation as are contained in Entry 52 of List II of schedule VII. The expression " imported into the city" used in section 113 of the Act, as meaning "imported into the city for any purpose and without any limitation", would amount to attributing to the legislature an intention to give a

go-by to the restrictions contained in Entry 52 of List II. That is not permissible. The expression “imported into the city” in section 113, therefore, has to be interpreted as meaning “imported into the municipal limits for purpose of consumption, use or sale” only. Thus, construed in the limited sense, section 113 of the Municipal Act is not ultra vires Entry 52 of List II of Schedule VII. In fairness to the learned counsel for the appellant, it must be recorded, that the finding the High court regarding vires of section 113 of the Municipal Act was not seriously questioned before us.

10. There is no dispute before us on the legal issue, namely, that no octroi is leviable on the goods re-exported by the IOC from its depot inside the octroi limits to outside such limits to its dealers where those goods are meant ‘for use, consumption or sale’ by the consumers outside the octroi limits.

... ..

18. In *Burmah-shell oil storage and Distributing Co. of India Ltd., Belgaum. v. Belgaum Borough Municipality, Belgaum*, AIR 1963 SC 906 a somewhat similar question arose. A Constitution Bench of this Court held that the company which dealt with petroleum products was liable to pay octroi tax on goods brought into the local area (a) to be consumed by itself or sold by it to consumers and (b) for sale to dealers who in their turn sold the goods to consumers within the municipal limits irrespective of whither such consumers brought him for use in the area or outside it but that the company was “not liable to octroi in respect of goods which it brought into the

local area and which were re-exported.”

19. Again, in *Municipal Council, Jodhpur v. M/s Parekh Automobiles Ltd. and ors.*, [(1990) 1 SCC 367], the precise question which was involved was as to whether octroi was leviable on the goods imported within the municipal limits, stored in its depot there and exported therefore for use or consumption of the ultimate consumer outside the municipal limits. That case related to the sale of petroleum products by the IOC from its depot within the municipal limits of Jodhpur, Rajasthan, to its dealers outside the municipal limits. After considering the facts and circumstances of the case and various clauses of the agreement (which is identical to the agreement in the present case) Sabyasachi Mukharji, J. (as is Lordship then was) dealt with the case put by the Indian oil Corporation Respondent No. 2 and noticed:

“According to respondent 2, it had allotted the retail outlets to various dealers under dealer’s agreement. Under the terms of the said agreement, respondent 2 was obliged to transport petroleum products out of its depots and supplied petroleum products to its dealers at the destination in its own truck tankers or the tankers of its contractors and obtained the signatures of the dealers of the retail and obtained the signatures of the dealers of the retail outlet in token of the delivery of the goods and till the supplies were made at the destination the goods were at the risk of respondent 2. It was further alleged by

respondent 2 that the pump tank and other outfits which were fitted at the retail outlets belonged to it and these were its property. It was, therefore, alleged that the goods supplied at retail outlets situated outside the limits of Municipal Council, Jodhpur were sold at the retail outlets where the deliveries were made and not at Jodhpur although the dealers were required to deposit the price of the petroleum products in respondent 2's account in the bank unless they were allowed credit facilities but the sale took place only when respondent 2 delivered its products at the dealers retail outlets outside the municipal limits as per the terms of the dealer's agreement. The appellant, Municipal Council, had, however, disputed the aforesaid position. It contended that whenever the sale was made at the Jodhpur depot at Jodhpur, octroi was chargeable irrespective of the fact where it was consumed or used.."

20. The Court then referred to the finding of the High court that the Municipal Corporation had no jurisdiction levy octroi on the goods so exported and accorded its approval of that finding. It upheld the order of the High court restraining the Municipal Corporation to levy octroi on goods re-exported by IOC to its dealers or agents for the use of ultimate user outside the octroi limits of Municipal Corporation."

95. Having understood the controversy in the above

terms, we think that so long as the import for consumption, use or sale within the local area attracts the levy, it is immaterial whether the goods originally arrived from outside the country or from another state within the country. The expression “any place outside the State” must, therefore, receive an interpretation consistent with the object and purpose of the Act. The levy being on entry of certain goods into local areas in the State of Maharashtra for consumption, use or sale therein, we have no hesitation in concluding that the first submission of Mr. Dada has no merit. In the case at hand, the imported raw material was brought in by the petitioners for consumption within the local area. That is undisputed. The argument is that the goods were brought in for consumption not from outside the State but rather from outside the country and hence they do not affect the levy. For the reasoning in *Burmah Shell and Punjab Flour (supra)*, this argument must fail. It is apparent that the above submission overlooks the Constitutional entries and the nature of the levy. The levy is on entry for consumption, use or sale within the local area irrespective of whether the goods are brought from within the territory of India or from abroad. Mr. Dada’s submissions overlook the intrinsic evidence in the Entry Tax Act. It is well-settled that all the provisions of the Act will have to be read together with the Schedule and the language thereof cannot be ignored. In the instant case, the wording of Entry Nos.2, 3 and 5 of the Schedule demonstrates the insertion of the words “duty paid” in Sr. No.2, 3 and 5 and “Bonded” is with reference to acts of bringing in the goods from abroad. Thus, considering the wide definitions

and even the Schedule entries the acts and deeds of the petitioners fall within the charging provision of the Entry Tax Act.

96. Finally, the decision in the case of *Tata Engineering & Locomotive Company Limited & Anr. vs. Municipal Corporation of the City of Thane & Ors.*,²⁹ would also clinch the issue. It was held as under:

“9. The legislative entry relating to the constitutional power to levy this tax is found in List II Entry 52 of the 7th Schedule to the Constitution which reads:

“52. Taxes on the entry of goods into a local area for consumption, use or sale therein”.

10. The Bombay Municipal Boroughs Act, 1925 which was in force prior to the enactment of the Maharashtra Municipalities Act, 1965 also contained a similar provision in section 73 enabling the Municipalities covered by that Act to levy “Octroi on animals or goods or both brought within the octroi limits for consumption or use therein”. This provision was amended by Amending Act 35 of 1954 by substituting the words “use or sale” for the words “or use” with effect from May 5, 1954. In other words before 1954 the word “sale” was not included in the provision of octroi on goods which the Municipality was authorised to impose. After the amendment the Municipality could levy octroi on goods brought within the octroi limits “for consumption, use or sale therein”. This provision

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AIR 1992 SC 645.

came up for consideration in *Burmah Shell case* (supra). Two of the categories of transactions which were considered in this case related to transactions under which (1) goods were sold by the Company through its dealers or by itself and consumed within the octroi limits by persons other than the Company and (2) goods sold by the Company through its dealers or by itself inside the octroi limits to other persons but consumed by them outside the octroi limits. The Company contended that the tax could not be collected on goods which were merely sold but not consumed inside the octroi limits. In connection with this contention this Court considered the meaning of words “consumption, use or sale therein” and observed (at pp. 911-12 of AIR):

“It is not the immediate person who brings the goods into a local area who must consume them him-self, the act of consumption may be postponed or may be performed by someone else but so long as the goods have been brought into the local area for consumption in that sense, no matter by whom, they satisfy the requirements of the Boroughs Act and octroi is payable”.

“ The goods must be regarded as having been brought in for purposes of consumption when a person brings them either for his own use or consumption, or to put them in the way of others in the area, who are to use and consume”.

And concluded holding (at p. 912 of AIR) :

“In our opinion, the Company was liable to pay octroi tax on goods brought into local area (a) to be consumed by itself or sold by it to consumers direct and (b) for sale to dealers who in their turn sold the goods to consumers within the municipal area irrespective of whether such consumers bought them for use in the area or outside it. The Company was, however, not liable to Octroi in respect of goods which it brought into the local area and which was re-exported”.

The ratio is thus not a mere sale inside that attracts octroi but a sale intended for consumption of the goods inside the octroi area though ultimately the person to whom it was sold for consumption does not consume the goods inside but does the same outside the limit.

11. After consideration of the judgment in *Burmah Shell Company's* case (supra) the Gujarat High Court in one of the cases arising for refund of octroi duty paid, took the view that octroi leviable on goods brought within the octroi limits ‘for consumption, use or sale therein’ and that the word ‘sale’ could not be given the narrow meaning of a sale for consumption to the ultimate consumer within the octroi limits. Accordingly if the goods were sold within the octroi limits by the importer even if it resulted in export and consumption was also outside the octroi limit, octroi duty paid is not refundable. This decision came up in appeal before this Court and the

decision of this Court is reported in *Hiralal Thakorlal Dalai v. Brash Broach Municipality*, 1976 (Suppl.) SCR 82 : (AIR 1976 SC 1446). On facts that case related to a consignment sale and the goods were despatched to destination outside octroi limits for consumption there. A plea for review of the decision in *Burmah Shell Company's* case (*supra*) was also made in this case. However a Constitution Bench rejected the request for reconsideration and held that the word "sale" in the colloquium of the words "consumption, use or sale therein" means sale for consumption within the octroi limits. The ratio of these two decisions was considered by the Bombay High Court in *Khandelwal Traders Akola's* case (AIR 1985 Bombay 218) (*supra*), which was referred to in the Judgment under appeal. It was held in this case also that where a dealer imports goods within the octroi limits not for ultimate consumption or sale for consumption within the limits but for the purpose of export and obtain permission for export he is not liable to pay octroi on such goods notwithstanding that in the larger sense for purposes of export he sells the goods within the octroi limits, that is to say even where the situs of the sale could be fixed within the octroi limit. The matter is now put beyond any pale of doubt by the latest decision of this Court in *Municipal Council, Jodhpur v. M/s. Parekh Automobiles Ltd. & Ors.*, (1990) 1 SCC 367. Rule 13 (4) of the Rajasthan Municipal Octroi Rules, 1962 which was one of the provisions considered in this case provided that:

"In cases provided for in sub-rule (3) (that is who is given the account current facility) amount of octroi duty

payable shall be based on the total amount of the octroi as shown by the entry passes less the total amount of goods transported outside the municipal limits as shown by the transport passes:

Provided that in computing the octroi duty payable under subsection (4), the goods transported outside the municipal limits shall be lessened only if such goods have not been sold within the municipal limits and if they have been exported out of such limits within a period of six months from the date of their import in such limits”.

97. Mr. Dada has placed reliance on the judgment of this Court in the case of *Batliboi & Co. Pvt. Ltd. (supra)*.

98. A careful perusal of this decision becomes necessary. In Batliboi’s case, it had entered into a contract with M/s. Kirloskar Brothers Limited who sold certain goods / articles complete with standard equipment and electrical equipment manufactured in Czechoslovakia. Batliboi had an import licence for import of this machinery. Prior to their contract with Kirloskars, Batliboi placed an order with the Czech manufacturer of the machine for the import of the machine in question. Batliboi also had filled in a tender with the Defence Department under which, inter-alia, they were required to supply this machine to that department. Thereafter, they made this offer to M/s. Kirloskar to sell the same machine. In the letter addressed to Kirloskars, they had mentioned

that the machine would be sold provided the Defence Department releases the same. The terms of delivery are referred in the Division Bench judgment. After the order was placed with Batliboi for purchase of this machine, which stipulated erection and commissioning with the help of the Erection Engineers from the works in Czechoslovakia, a further stipulation was added in the purchase order to the effect that the property in the machine shall stand transferred to Kirloskars as soon as it is ready-packed in crates for shipment from Czechoslovakia. This was confirmed by Batlibois. Thereafter, the machine was shifted by the Czech manufacturers to Bombay and it arrived in Bombay. The shipment was cleared in July / August 1972 and it was sent to the Kirloskars by rail. The railway receipts were relied upon. It is in these circumstances that Batlibois made an application under section 52 of the Bombay Sales Tax Act, 1959, for the purpose of determining whether the transaction between them and Kirloskars was a sale within the State of Maharashtra as defined under section 2(28) of the Bombay Sales Tax Act, 1959 and whether sales tax was payable under that Act in respect of this transaction. The Deputy Commissioner on this application concluded that the sale in question had taken place in the State of Maharashtra. It was, therefore, a sale within the State of Maharashtra and falls under section 2(28). The matter was carried in appeal before the Tribunal and that appeal was dismissed. At the instance of the dealer, the Tribunal referred a question formulated by the Division Bench at page 323 of the report.

99. It is in that context that we must notice the reliance placed by Mr. Dada on paragraph 7 of this decision. The argument there noted was that a State in India cannot levy sales tax on sales in the course of inter-State trade or commerce, sales outside the State and sales in the course of import or export. Reliance was placed on Article 286 of the Constitution of India and other constitutional stipulations. The Division Bench clarified that it is not concerned in this case with the Central Sales Tax Act and what we have noted from this decision and the paragraphs relied upon that no assistance can be derived by the petitioners before us by these observations. They cannot be read out of context. The Division Bench clarified that the State Government would have no power to levy sales tax when the sale or purchase of the goods takes place in the course of inter-State trade or commerce or outside the State in the course of import or export. However, it also turned down the reliance placed on section 4 of the Sales Tax Act by Batlibois. A careful reading of paragraph 7 would denote as to how all the contentions of Batlibois have been rejected.

100. This judgment, therefore, cannot be of any assistance to Mr. Dada. It is apparent from a perusal of this decision that it does not support the argument canvassed before us nor it is a decision on the point at all for the levy of sales tax was in question and not entry tax. Secondly, on facts it was held that levy was on sale within the State of Maharashtra.

101. Then, reliance is placed on judgments of the Kerala

and Gauhati High Court and the Patna and Jharkhand High Court.

102. Insofar as the Kerala judgment is concerned, we have carefully perused it. There the appellants were non-resident Indians who imported to India motor vehicles which they had used abroad. They had obtained customs clearance on payment of customs and levies as due. Some of them had their vehicles registered under the Motor Vehicles Act but a demand was raised for payment of entry tax. The other appellants were contractors who had brought in certain equipments manufactured abroad for the purposes of their business within the State of Kerala. The common question was whether the Kerala tax on Entry of Goods into Local Areas Act, 1994, would apply to such imports.

103. Upon noticing this contention, the Division Bench adverted to the provisions of the Act and the rival contentions.

104. The Division Bench, in paragraph 3, referred to another judgment, once again of a Division Bench by which the Act was held to be *intra-vires* the powers of the State. In that judgment, certain observations were made which have been reproduced in the judgment of the Kerala High Court in the case of *Fr. William Fernandez (supra)*, relied upon by Mr. Dada.

105. Thereafter, the Division Bench extensively referred to the statement of objects and reasons leading to be

enactment and observed that it could be relevant for the purpose of construing and interpreting the provisions of the Act.

106. Pertinently, the Division Bench did not find any substance in the complaint of the appellants that the Act as such is beyond the competence of the State or that the entry tax and imposition of that nature violates the mandate of Article 286 of the Constitution of India. After reproducing Article 286, the Division Bench held that the said Article refers to levy of sales tax. That is a distinct levy and the limitations in that Article will not be of any assistance and on that score the entry tax cannot be struck down. In paragraph 12 this specific contention was negatived. The constitutional entries have been referred and it has been held that entry tax is referable to item 52 of List II of Schedule VII and which levy is not covered by the limitations under Article 286 of the Constitution of India. Yet, the Division Bench held that in cases of goods brought from abroad, their entry into local areas is outside the scope of the Act and the Entry Tax Act is only confined to those goods brought from outside the State. Thus, the goods brought from outside the borders of the country are not covered by the levy.

107. With greatest respect to the Division Bench of the Kerala High Court, we are unable to agree. Having held that Article 286 cannot be pressed into service, then all that was required was presence of words of restriction or limitation in the Entry Tax Act which would rule out coverage of goods brought from outside the borders of

the country. In *pari materia* provisions, once the words employed by the Legislature are outside the State and with no further prescription, then, with great respect it is not possible to read any such limitation, much less a restriction in the Entry Tax Act. Therefore, and may be in peculiar facts of some cases, it is possible to hold that the entry tax cannot be sustained. However, upon a clear perusal of the provisions of the Act and merely relying upon a definition of the term “value of the goods”, with respect, it is difficult to agree with the view of the Division Bench. It is in these circumstances, with greatest respect to the Hon’ble Division Bench of the Kerala High Court, that we differ.

108. If this view is taken, then, there is no difficulty in disagreeing with the single Judge judgment of the High Court of Gauhati in the case of *Primus Imaging Private Limited (supra)*. There as well, after negating the challenge to the applicability of Article 286 and holding that this Article does not permit States to levy tax on the sale or purchase of goods which takes place in the course of import into or export out of the territory of India and would not cover the entry tax which levy is derived from Entry 52 of List II of Schedule VII of the Constitution of India, all that the learned single Judge does is to follow the view taken by the Division Bench of the Kerala High Court with which we have already expressed our respectful disagreement. For the same reasons, we do not think that we can agree with the view taken by the High Court of Gauhati.

109. As far as the view taken by the Patna High Court is concerned there the issue was somewhat different. There, the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993, was challenged. The 1993 Act was declared *ultra vires* Articles 301 and 304 of the Constitution by the Patna High Court in the case of *Bihar Chamber of Commerce vs. State of Bihar*. The matter was carried in appeal before the Hon'ble Supreme Court which held that this Act was constitutionally invalid. Thereafter, the controversy again arose by virtue of the Amendment Act 2001 and the Amendment Act 2003. The Indian Oil Corporation, relying upon the judgment of the High Court of Kerala, contended as noted in paragraph 13 of the judgment.

110. The petitioners before us have relied upon only the observations at page 83, para 60 to urge that the introduction of the goods imported from other countries in the definition of "Entry of Goods" was bad both for its retrospectivity and for want of previous sanction by the President. This argument has been upheld but, with great respect, we do not find anything in this judgment which would indicate that the said High Court opined in any manner that an Entry Tax Act despite a wide definition of the term "Entry of Goods" would not cover goods imported from abroad. The Division Bench judgment of the Patna High Court, therefore, does not carry the point any further.

111. In the compilation Volume IV, additional cases are referred on this very point. In the case of *Central Coal*

Fields Limited vs. State of Jharkhand,³⁰ the Jharkhand High Court was considering an identical argument as was noted by the Patna High Court, but we do not find anything in paragraphs 27, 28 and 29 of this judgment which would enable us to hold that the definitions of the above noted term or expression can be interpreted otherwise. For the same reasons as we have assigned for respectfully distinguishing the judgment of the Patna High Court we also distinguish the judgment of the Jharkhand High Court.

112. For the above reasons, we are unable to agree with Mr. Dada that contextually the expression “Entry of goods from outside the State” would not include entry from outside the territory of India. Given the nature of the levy, we do not think that contextually or otherwise any restrictive or prohibitive prescription can be read into the Act. The provisions of the Act read together as a whole so also harmoniously lead to the conclusion that the State is not denuded of its power to impose entry tax on the import of goods from outside the country. The words “outside the State” cannot be restricted in their application to the boundaries or territory of a State. That would mean entry tax is not leviable on goods imported from abroad but brought within the local area for consumption, use or sale therein though such a tax is leviable on the goods brought in from other States within the territory. The latter Act of bringing the goods from other parts of the country or from other States within the same country is also an import within the meaning of the

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(2007) 6 Value Added and Service Tax Cases 614.

Act. We cannot, therefore, restrict the definition of the words “import” and “importer” in the manner suggested by Mr.Dada. His second contention must, therefore, fail.

113. Now we come to the next contention of Mr. Dada and that is that the levy in the present case is only to neutralize difference between sales tax in the importing State and the sales tax in the originating State. In that behalf reliance is placed on the Maharashtra Tax on Entry of Motor Vehicles into Local Areas Act, 1987, which imposes an entry tax on the entry of motor vehicles. The statement of object and reasons of the said Act has been relied upon. We do not see any purpose in making a detailed reference to the submissions of Mr. Dada made orally and in writing on this point simply because by this process we cannot strike down the levy. It is not even suggested that the levy of entry tax in the present case can be struck down as unconstitutional by the process desired by the petitioners. In other words, by referring to the Maharashtra Tax of Entry of Motor Vehicles into Local Areas Act,1987, and considering the object and purpose of that Act, we cannot strike down the levy. The purpose of the levy will not assist us in holding that the entry tax on goods imported from abroad is not leviable.

114. Similarly we cannot refer to any legislative practice of other States regarding levy of entry tax. We are concerned here with the levy of entry tax by the competent legislature, namely, the Maharashtra Legislative Assembly and the implementation of the said enactment by the Maharashtra State. We do not think that

any legislative practice can be of such assistance as would enable us to hold that the levy in the present case is unconstitutional.

115. Then the argument is that the second proviso to section 3 of the Maharashtra Entry Tax Act conclusively establishes the requirement of entry only from another State or Union Territory in India and not entry on goods imported from abroad.

116. We have, with the assistance of the learned senior counsel, perused section 3 and the proviso thereto carefully. Section 3 sub-section (1) sets out the levy of tax. The levy and collection is on the entry of goods specified in column 2 of the Schedule into any local area for consumption, use or sale therein at the rates respectively specified against each of them in column 3 thereof. The tax shall be levied on the value of the goods as defined in clause (n) of sub-clause (1) of section 2. The first proviso only states that the rate of tax to be specified in respect of any commodity shall not exceed the rate specified for that commodity under the Value Added Tax Act or the Maharashtra Purchase Tax on Sugarcane Act, 1962. The second proviso states that the tax payable by the importer under this Act shall be reduced by the amount of tax paid, if any, under the law relating to general sales tax in force in the Union Territory or the State in which the goods are purchased by the importer. With greatest respect to the senior counsel, this proviso does not dilute or read down the definition of the terms “entry of goods”, “import” and “importer”, but it only

clarifies that if the import is by the importer who has purchased the goods in another State or Union Territory of the country and in that area these goods when purchased attract general sales tax, then, the amount of such tax shall be reduced from the levy of entry tax. Beyond that, we do not see how the proviso controls the definition of the above terms and expressions. It rather reinforces our conclusion. Our conclusion is also reinforced by the language of sub-section (5) of section 3 which states that no tax shall be levied on the specified goods by the dealer registered under the Maharashtra Value Added Tax Act who brings such goods into any local area for the purpose of resale in the State or sale in the course of inter-state trade or commerce or export out of the territory of India. This would cover the import by such dealer of goods into any local area and ordinarily that would have been subjected to the levy, but for the fact that they have been brought in for the purpose of export out of the territory of India. Therefore, if they are imported from abroad but are not consumed, used or sold within the local areas after being brought in, then, the entry tax is not leviable. Therefore, we do not see any substance in the contentions based on the language of the second proviso to sub-section (1) of section 3 of the Maharashtra Entry Tax Act.

117. We are then concerned with a very small contention which is based on the judgment of the Division Bench of this Court in *Batliboi's* case. The contention is that the interpretation by this Court in *Batliboi (supra)* of the phrase "outside the State" is presumed to be the sense in

which the Legislature of the State of Maharashtra has subsequently employed the very same expression in the present Act. For the reasons which are already assigned hereinabove and for distinguishing *Batliboi (supra)*, we do not find any substance in this contention. The paragraph which Mr. Dada reads from *Batliboi's* judgment cannot be read in isolation and totally out of context. The observations therein must be read in the backdrop of the essential factual controversy. *Batliboi* lost the matter. *Batliboi's* contentions have been rejected. It was held categorically in *Batliboi's* case that a sale which is inside one State is deemed to be outside all other States. In observing thus and rejecting the contention based on applicability of the Central Sales Tax Act, 1956, and particularly section 4 thereof that the observations relied upon by Mr. Dada have been made. Once the context is understood and the levy, then, the judgment is clearly distinguishable. This contention need not detain us any further. For these reasons, we do not see that any word of doubtful meaning or interpretation has fallen for interpretation before us. Once such is the position, then, we need not consider the reliance by Mr. Dada on the judgment in *Batliboi's* and *Diwan Brother's* case (*supra*).

118. We are now left with another contention and namely that a tax on entry of goods into a local area is patently in violation of Article 301 and no further burden is required to be discharged by the petitioners.

119. We must at once clarify that in the entire petition we have not noticed any plea based on violation of the

mandate of Article 301 of the Constitution of India. The entire petition is silent as far as such challenge is concerned. In the petition there is no plea as to how the petitioners' act of bringing the goods in the local area for consumption, use or sale therein is interfered with contrary to the constitutional mandate. Even in the grounds from para 15 of the petition, there is not a single ground which would enable us to consider this plea. The petition has been amended and the riders are added. Even by the amendments, no such plea is raised. The plea is raised on the basis that in the Annexures to the writ petition, while furnishing a reply to the show cause notice and elsewhere during the course of arguments before the Assessing Authority, the First Appellate Authority and the Tribunal, there is specific reference to this constitutional provision. There as well, we have found that in the grounds of appeal and the Memo presented before the First Appellate Authority there is absolutely no reference to Article 301. There is a reference indeed to Articles 246, 265 and 286. However, in the written submissions which were presented before the First Appellate Authority and possibly during the course of oral hearing such pleas were raised. That is how in the order passed by the First Appellate Authority one finds a reference to the same and at pages 238 and 239 of the paper-book. In the impugned order of the Tribunal, however, the argument is noted and particularly in paragraphs 13, 14 and 15. Therefore, to be fair to the learned counsel and to the petitioners, we have allowed extensive arguments to be canvassed and even written submissions to be tendered on this point. For appreciating the contentions, we must refer to Article 301

of the Constitution of India. That Article appears in Part XIII of the Constitution titled as “Trade, Commerce and Intercourse within the territory of India”. Article 301 reads as under :

“301. Freedom of trade, commerce and intercourse.—Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.”

120. A bare perusal thereof would indicate that subject to the other provisions of this Part, namely Part XIII, trade, commerce and intercourse throughout the territory of India shall be free.

121. This, therefore, enables imposition of restrictions on this freedom enunciated in Article 301. Articles 303 and 304 read as under :

“303. Restrictions on the legislative powers of the Union and of the State with regard to trade and commerce.— (1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any

discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

304. Restrictions on trade, commerce and intercourse among States —Notwithstanding anything in article 302 or article 303, the Legislature of a State may by law—

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.”

122. A bare perusal of Article 303 and particularly clause (1) would indicate that notwithstanding anything contained in Article 302, neither Parliament nor State Legislature shall have power to make any law giving or authorising the giving of any preference to one State over another or making or authorising the making of any discrimination of one State by another by virtue of any entry relating to trade and commerce in any of the lists in the VIIIth Schedule. Therefore, preference and discrimination is ruled out. Preference to one State over

another or making or authorising the making of any discrimination of one State by another by resorting to any of the entries in the Lists in the VII Schedule is impermissible. Yet, by clause (2) the Parliament is not prevented from making any law, giving, or authorising the giving of any preference or making or authorising the making of any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. By Article 304, the Legislature of a State can by law impose on goods imported from other States or the Union Territories any tax to which similar goods manufactured or produced in that State are subjected, so, however as not to discriminate between goods so imported and goods so manufactured or produced and impose such reasonable restrictions on the freedom envisaged by Article 301 as may be required in the public interest. However, proviso to Article 304(b) states that this shall not be permissible unless previous sanction of the President is obtained.

123. When the freedom guaranteed by Article 301 is impeded or interfered with and when can the mandate thereof be held to be violated has been a subject matter of several decisions rendered by the Hon'ble Supreme Court of India. In a three-Judge Bench decision in the case of reported in *The State of Kerala vs. A.B. Abdul Kadir & Ors.*³¹ the parameters required to be satisfied and only then can the Court inquire into the question have been succinctly laid down. Paragraphs 6, 7 and 8 of the

³¹ AIR 1970 SC 1912.

decision are relevant for our purpose. They are reproduced hereinbelow:

“6. It is necessary at this stage to set out the relevant Articles in Part XIII of the Constitution as it stood at the material time:

“Article 301:

Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

Article 302:

“Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.”

Article 304: ‘ “Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law:

(a) impose on goods imported from other States (or the Union territories) any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and ‘goods so manufactured or produced and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the

public interest;

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the (1) [1966] 1 S.C.R. 865. Legislature of a State without the previous sanction of the President."

7. The true scope and effect of those Articles was the subject matter of consideration in *Atiabari Tea Co. Ltd. v. The State of Assam* (1961) 1 SCR 809 = (AIR 1961 SC 232). The majority view was expressed by Gajendragadkar J. at p. 860 as follows:

"In construing Article 301 we must, therefore, have regard to the general scheme of our Constitution as well as the particular provisions in regard to taxing laws. The construction of Article 301 should not be determined on a purely academic or doctrinaire considerations; in construing the said Articles we must adopt a realistic approach and bear in mind the essential features of the separation of powers on which our Constitution rests. It is a federal Constitution which we are interpreting, and so the impact of Article 301 must be judged accordingly. Besides, it is not irrelevant to remember in this connection that the Article we are construing imposes a constitutional limitation on the power of the Parliament and State Legislatures to levy taxes, and generally, but for such limitation, the power of taxation would be presumed to be for public good and would not be

subject to judicial review or scrutiny. Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld. If the said argument is accepted it would mean, for instance, that even a legislative enactment prescribing the minimum wages to industrial employees may fall under Part XIII because in an economic sense an additional wage bill may indirectly affect trade or commerce. We are, therefore, satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be: Does the impugned restriction operate directly or immediately on trade or its movement ?” (1) [1961 1 S.C.R. 809.

In the *Automobile Transport (Rajasthan) Ltd v. The State of Rajasthan* (1963) 1 SCR 491 = (AIR 1962 SC 1406) the view of Gajendragadkar, J., was accepted as correct by the majority of the Judges. The principle was reiterated by this Court in

Andhra Sugars Ltd. v. State of Andhra Pradesh AIR 1968 Andh Pra 599. In that case the question which arose was whether s. 21 of the Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act which authorised the State Government to levy a tax at such rate not exceeding five rupees per metric tonne as may be prescribed on the purchase of cane required for use, consumption or sale in a factory Was constitutionally valid. It was held by this Court that normally a tax on the sale of goods-did not ,directly impede or hamper the flow of trade and Section 21 was no exception and was not violative of Article 301 of the Constitution. A similar view was expressed in the *State of Madras v. K. Nataraja Mudaliar* AIR 1969 SC 147 in which the question at issue was whether sections 8(2) and 8(5) of the Central Sales Tax Act, 1956 were intra vires of Arts. 301 and 303 of the Constitution. It was pointed out that an Act which was merely enacted for the purpose of imposing tax which was to be collected and to be retained by the State did not amount to a law giving or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, merely because of varying rates of tax prevailing in different States. At p. 150 of the report Shah, J., speaking. for the Court observed:

“The flow of trade does not necessarily depend upon the rates of sales tax: it depends upon a variety of factors, such as the source of supply, place of consumption, existence of trade channels, the rates of freight, trading facilities, availability of efficient transport and other facilities for carrying on trade. Instances can easily

be imagined of cases in which notwithstanding the lower rate of tax in a particular part of the country goods may be purchased from another part, where a higher rate of tax prevails. Supposing in a particular State in respect of a commodity the rate of tax is 2 per cent, but if the benefit of that low rate is offset by the freight which a merchant in another State may have to pay for carrying that commodity over a long distance, the merchant would be willing to purchase the goods from a nearer State even though the rate of tax in that State may be higher. Existence of long-standing business relations, availability of communications, credit facilities and a host of other factors — natural and business — enter into the maintenance of trade relations and the free flow of trade cannot necessarily be deemed to have been obstructed merely because in a particular State the rate of tax on sales is higher than the rates prevailing in other States.

8. On behalf of the appellant it was contended that the High Court was not right in holding that the ratio of *Kalyani Stores case* (1966) 1 SCR 865 = (AIR 1966 SC 1686) applied to the present case and, that, Kerala Act 9 of 1964 was violative of Article 301 of the Constitution. The view taken by the High Court was that in the absence of any production of tobacco inside Kerala State it was not competent for the Kerala Legislature to enact the impugned Act under Article 304(a) of the Constitution. In support of this view the High Court relied upon the following passage from the

judgment of this Court:

“Exercise of the power under Article 304(a) can only be effective if the tax or duty imposed on goods imported from other States and the tax or duty imposed on similar goods manufactured or produced in that State are such that there is no discrimination against imported goods. As no foreign liquor is produced or manufactured in the State of Orissa the power to legislate given by Art. 304 is not available and the restriction which is declared on the ground of trade, commerce or intercourse by Article 301 of the Constitution remains unfettered.”

124. Thus, the test that must be satisfied is that the restrictions should directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions, but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301, whether or not their impact on trade is immediate, direct or even remote is an extreme approach, one that the Hon'ble Supreme Court of India has not upheld. We have already held in the foregoing paragraphs that in the present petition, such pleadings as might enable us to inquire further into this issue are hopelessly lacking. We have not been shown any material on which we can hold that the imposition of entry tax affects the movement of goods. The petitioners themselves have stated that the imported goods /

commodities have been brought within the local area and for their own use and consumption. The goods are but a part of the raw material said to have been brought from abroad. The petitioners do not claim that the movement of these goods into the local area was restricted. However, the argument is that by its very nature entry tax impedes the free flow and movement of goods. It has been repeatedly held by the Hon'ble Supreme Court that judicial review would centre around the question of an impedance or impediment to free flow or movement. In this regard, before the Tribunal as also before the First Appellate Authority the only contention raised was that the State is discriminating between those goods which are locally procured, meaning imported from within the State or outside the State, and those goods imported from abroad. However, we have not been shown any materials which would enable us to hold that the petitioners' business is adversely affected. The argument is that the petitioners' imported raw material is made to suffer multiple levies and, therefore, there is discrimination. Barring the reliance on the judgment in *Eurotex Industries and Exports Limited* no material is produced. As far as that is concerned, the Division Bench judgment has been relied upon. The Division Bench judgment was also rendered because the argument was that entry tax creates a tax barrier, which affects the free flow of goods from outside Maharashtra into Maharashtra on account of the differential rates. The tax burden that furnace oil would have to bear depending from where it is purchased creates a discrimination between persons similarly placed. That is only by virtue of the fact that the

petitioners purchase furnace oil outside Maharashtra. The argument then was that there is a direct 12% to 15% difference in the pricing / cost of production in favour of the person who purchases furnace oil in Maharashtra for manufacture of electricity because of the provisions of section 42 read with Rule 41D of the Bombay Sales Tax Act and Rules. The Division Bench in dealing with all these contentions, as observed above, eventually concluded that the imposition of entry tax on furnace oil and low sulphur waxy residue oil covered under Sr. No. 13 cannot be sustained in law. The Division Bench held that the rate of entry tax on a commodity shall not exceed the rate specified for the commodity under the Bombay Sales Tax Act. The rationale in levying entry tax is to ensure that all goods which enter the local area for consumption, use or sale must bear either the entry tax or sales tax and that the entry tax levied does not exceed the sales tax levied on the commodity under the Bombay Sales Tax Act. However, the absence of any provision by which a refund / rebate / set off of the liability to pay entry tax *vis-à-vis* the sales tax enabled the Division Bench to hold that even though goods entering the local area from within the State do not bear sales tax, goods entering the local area from outside the State are subject to entry tax. That is how it proceeded to summarize the controversy in paragraphs 28, 29 and 30. Eventually, after the entire discussion on the subject of absence of refund / rebate / set off, what the Division Bench holds is that by levying an entry tax on goods which enter the local area from outside the State, while exempting from sales tax similar goods entering the local area from within the State, the

State has, in fact, created a tax barrier in contravention of Article 301's guarantee of free flow of trade, commerce and intercourse throughout the territory of India. This is the understanding of the Division Bench of the tax barrier created by the levy of entry tax. On introduction of entry tax, manufacturers opted to purchase raw materials from within the State because the entry tax barrier made bringing materials from outside the State costlier. Then, in paragraph 34, it is held that refund of sales tax paid on the raw materials used in the manufacture of a final product is a rule and not an exception. Where the State policy is not to tax raw materials which are used in the manufacture of final products in a local area within the State, then, subjecting the raw materials which enter the local area from outside the State to tax to the exclusion of the raw materials entering into the local area from within the State would be arbitrary.

125. We have not been shown anything from this judgment to enable us to hold that by mere levy of entry tax the mandate of Article 301 is violated. Further, the petitioners have not anywhere pleaded that even after the State amended the statutes and provided for a scheme of refund / rebate / set off, the so-called barrier still continues, or another barrier has been created. Thus, merely on the strength of the judgment in the case of *Eurotex Industries* it would not be possible to consider the question. It would really be a discussion in the abstract. In the additional written submissions tendered, all that is stated is that a tax on entry of goods into a local area is patently in violation of Article 301 and no further burden

is required to be discharged by the petitioners. With greatest respect, this understanding of the law is erroneous. None of the judgments that have been referred by the learned senior counsel enable us to conclude that nothing more is required to be pleaded and demonstrated. The understanding of the petitioners appears to be that their forensic burden is discharged by simply demonstrating that there is a tax on entry of goods into a local area. We do not think that this is a correct or proper understanding of the question. Ultimately, if the transport or movement of goods is taxed solely on the basis that the goods are carried or transported, that, in the opinion of the Hon'ble Supreme Court of India directly affects the freedom of trade as contemplated by Article 301. The petitioners have reproduced a part of the judgment in the case of *Atiabari Tea Company Limited (supra)*. We have reproduced the relevant paragraphs of this judgment in their entirety. We do not think that such reliance in bits and pieces would carry the case of the petitioners any further. We would be, therefore, justified in not probing this aspect any further. What we have thus before is no pleading, no materials but a general submission. It would be too risky and improper on our part to consider the issue in further details.

126. We are also taking the above view because the affidavit that is filed in reply by the State to the writ petition contains a specific statement of fact that this Court has earlier held that Entry No.13 to the Schedule to the Maharashtra Entry Tax Act insofar as it purports to levy entry tax on furnace oil and low sulphur waxy residue

oil to be unauthorized and unconstitutional. Although the tax was held to be non-compensatory, according to the respondents, the main reason for holding Entry No.13 as unauthorized was due to non-availability of set off to such importers of the raw materials who utilized it for manufacture of final product in the local area *vis-à-vis* those manufacturers of final product who purchased the raw material locally, namely, within Maharashtra and that according to the Division Bench violated the mandate of Article 301. The State inserted sub-clause (iv) of clause (a) of sub-section (1) of section 42 of the Bombay Sales Tax Act, 1959, retrospectively and it was deemed to have been added with effect from 1st October 2002, by Maharashtra Act No.13 of 2004 dated 29th June 2004. This section reads as under:

“42. Drawback, set-off, refund etc.—(1) The State Government may by rules provide, that—

(a) in such circumstances and subject to such conditions as may be specified in the rules a drawback, set-off or refund of the whole or any part of the tax—

(i)

(iv) paid or levied under the Maharashtra Tax on Entry of Goods into Local areas Act, 2003 be granted to a dealer.”

127. It is the specific case of the respondents that this clause / sub-clause was inserted to grant set-off to dealers liable to pay entry tax. A similar provision for grant of set-off under the MVAT Act is found in section 48(1)(a)(iv).

That clause enables claiming set-off of entry tax paid by the dealer. The sub-clause specifically refers to the Entry Tax Act. If, according to the petitioners, the earlier judgment of this Court has precedential value and with the above alteration and amendment in the statutes there is still an impediment or interference with the freedom granted by Article 301 of the Constitution of India, then that should have been specifically averred and established. If the burden is on the petitioners to prove and establish this fact, then, they have miserably failed to discharge it. We do not think that we should assist them despite such failure on their part. We say nothing more.

128. Two contentions remain to be considered. The first is with regard to the time-bar.

129. We have already reproduced the relevant sections of the statute. The specific case of the respondents is that the proceedings for assessment are governed by section 6 of the Entry Tax Act. However, that section refers to the provisions of the MVAT Act. Those are the applicable provisions. If section 23 of the MVAT Act provides for limitation for completing the assessment, then that would be the governing provision and Rule 8 of the Entry Tax Rules is irrelevant according to the respondents.

130. The choice of the word “irrelevant” may be faulted and criticized. However, the argument appears to be that one must look at the Act and particularly section 6 of the Maharashtra Entry Tax Act to decide the question. The Rules would not override the Act and do not do so

ordinarily.

131. Admittedly, in this case, the periods of assessment are 1st April 2005 to 31st March 2006 and 1st April 2008 to 31st March 2009. According to Mr. Sonpal, by virtue of section 23(3A) of the MVAT Act, the assessment has to be completed on or before 30th June 2013, for the year 2005-2006 and as per the third Schedule to section 23(2) on or before 30th June 2013, for the year 2008-2009. The assessment for 2005-2006 is completed on 29th June 2013 and for 2008-2009 on 30th March 2013.

132. On the other hand, Mr. Dada has contended that we cannot ignore and brush aside Rule 8, for what we are dealing with is an assessment of entry tax. It is the liability to pay entry tax which is in issue. If the machinery for assessment under a distinct statute has to be resorted to for assessing the liability to pay entry tax, that does not mean a substantive provision in the Entry Tax Act must be ignored or termed as irrelevant.

133. What is important to note is that the Tribunal in the impugned order has endorsed the view of the respondents. It relies on section 6 to hold that the Assessing Authority under the MVAT Act has authority to assess the entry tax. The Tribunal has emphasized “for this purpose they may exercise all or any of the powers they have under the said Act and the provisions of that Act, including provisions relating to returns”. These are, according to the Tribunal, the crucial words. That is how in preference to Rule 8 and relying upon the language of

section 6 it rejected the argument of the petitioners.

134. Sub-section (1) of section 6 starts with the words “subject to the other provisions of the Entry Tax Act and the Rules made thereunder”. Therefore, it is not proper to ignore other provisions of the Act and the Rules made thereunder. However, we have not been shown any provision in the Entry Tax Act which would specify the authorities who are for the time being empowered to assess, review, collect and enforce payment of tax, namely, entry tax. That is why the Legislature has chosen the preexisting framework under the MVAT Act. The predecessor enactment of the MVAT Act was the Bombay Sales Tax Act, 1959. There was a ready framework and the authorities were specified and clearly demarcated for the purpose of assessing, reviewing, collecting and enforcing payment of tax under the Sales Tax Act. Those authorities have been chosen and they are now empowered to assess, review, collect and enforce payment of tax, including any interest or penalty payable by an importer under the Entry Tax Act. That is on the footing as if the entry tax or interest or penalty payable by the dealer or importer under the Entry Tax Act is a tax or interest or penalty payable under the Maharashtra Value Added Tax Act. If, for this purpose the preexisting authorities can exercise all or any of the powers they have under the Value Added Tax Act and the provisions of that Act, including relating to returns, imposition of a tax liability of a person carrying on the business of the transferee or successor etc. to pay tax have been made applicable including provisions relating to appeals,

rectification, review, references, refunds, penalties, then they have to apply accordingly. Equally, all provisions relating to offences, interest and penalties, including provisions relating to penalties in lieu of prosecution for an offence or in addition to the penalties or penalty for the offence under the Value Added Tax Act shall, with necessary modifications, apply in relation to the assessment, review, collection and the enforcement of payment of any tax required to be collected under the Entry Tax Act. The exception with regard to the offences and penalties are to be found in sections 7 and 8 of the Entry Tax Act. However, we have noted from the arguments of Mr. Sonpal that Chapter III of the Entry Tax Rules deals with payment of tax, namely, the procedural provision regarding filing of returns, and payment into Government Treasury and/or method of payment of tax, interest and penalty are incorporated in the Rules (See Rules 5 and 6). The return-*cum*-challan has to be filed in the form specified. A registered importer shall furnish the return-*cum*-challan under sub-rule (1) of Rule 7 within 25 days immediately succeeding the month for which the return-*cum*-challan is required to be filed. By sub-rule (3) of Rule 7, an importer may furnish revised return-*cum*-challan in the same Form within three months from the date prescribed for submission of the original return.

135. Then comes Rule 8 and which states that the amount of tax due from an importer shall be assessed by the concerned Assessing Authority within one month from the date of detection of his liability to pay the tax. This is the stipulation regarding unregistered importer and for a

registered importer, the amount of tax due from him shall be assessed by the concerned Assessing Authority within a period of three months immediately succeeding the month for which the return-*cum*-challan is required to be furnished.

136. The submission of Mr. Dada, is that the assessment orders in question are beyond this three months' period, and which has to be construed as a period of limitation.

137. Now, to consider this submission what is required to be assessed is the amount of tax due from the importer. That can be done provided the return-*cum*-challan under sub-rule (1) of Rule 7 is furnished by the registered importer within 25 days immediately succeeding the month for which the return-*cum*-challan is required to be furnished. The return-*cum*-challan is, therefore, required to be filed for the month. The period for filing is within 25 days immediately succeeding that month. If the amount of tax due has to be assessed based on this return, then, what Rule 8(1)(ii) specifies is that the said assessment shall be made by the concerned Assessing Authority within a period of three months immediately succeeding the month for which the return-*cum*-challan is required to be furnished. Thus, without waiting for this return-*cum*-challan, the assessment will have to be made in the case of a registered importer by the concerned Assessing Authority.

138. We will have to find out if there is a conflict between the rules and the substantive sections.

139. Section 23 of the Maharashtra Value Added Tax Act, 2002, reads as under:

“23. Assessment

(1) Where a registered dealer fails to file a return in respect of any period by the prescribed date, the Commissioner may assess the dealer in respect of the said period to the best of his judgment without serving a notice for assessment and without affording an opportunity of being heard:

Provided that, if after the assessment order is passed, the dealer submits the return for the period to which the said order relates then, the order passed as aforesaid shall stand cancelled and after such cancellation, the dealer may be assessed in respect of the same period under other provisions of this section:

Provided further that, such cancellation shall be without prejudice to any interest or penalty that may be levied in respect of the said period:

Provided also that, no order under this subs-section shall be passed after three years from the end of the year containing the said period.

(2) Where the return in respect of any period is filed by a registered dealer by the prescribed date and if the Commissioner considers it necessary or expedient to ensure that return is correct and complete, and he thinks it necessary to require the presence of the dealer or the production of further documents, he shall serve on such dealer, a notice requiring him on a date and at a place specified therein, either to attend and produce or cause to

be produced all documents on which such dealer relies in support of his return, or to produce such documents or evidence as is specified in the notice.

On the date specified in the notice, or as soon as may be thereafter, the Commissioner shall, after considering all the documents or evidence which may be produced, assess the amount of tax due from the dealer:

Provided that, if a registered dealer fails to comply with the terms of any notice issued under this sub-section, the Commissioner shall assess, to the best of his judgment the amount of tax due from him:

Provided further that, no order of assessment under this sub-section shall be made after the expiry of four years from the end of the year containing the period to which the return relates.

Provided also that in respect of the period commencing on or after the 1st April 2008 and ending on or before the 31st March 2009, an order of assessment under this sub-section may be made on or before the 30th June 2013.

(3) Where a registered dealer has not filed the return in respect of any period by the prescribed date, then the Commissioner may serve on the dealer a notice requiring him to attend on a date and at a place specified therein and after giving the dealer a reasonable opportunity of being heard, proceed to assess, to the best of his judgment, the amount of tax due from him;

Provided that, no order of assessment under the sub-section shall be made after the

expiry of five years from the end of the year containing the said period.

(3A) Notwithstanding anything contained in sub-section (2) or sub-section (3), an order of assessment in respect of any period ending on or before the 31st March 2008, may be made under the respective provisions within a period of seven years from the end of the year containing the said period.

Provided that, in respect of the period commencing on or after the 1st April 2005 and ending on or before the 31st March, 2006, an order of assessment under the respective provisions may be made on or before the 30th June 2013.

(4) Where the Commissioner has reason to believe that a dealer is liable to pay in respect of any period, but has failed to apply for registration or has failed to apply for registration within the time as required by or under this Act, the Commissioner may after giving the dealer a reasonable opportunity of being heard, proceed to assess, to the best of his judgment, where necessary, the amount of tax, if any, due from the dealer in respect of that period, and any period or periods subsequent thereto:

Provided that, no order of assessment under this sub-section shall be made after the expiry of eight years from the end of the said financial year containing the said period.

(5)(a) Where the prescribed authority has reason to believe that the tax has been evaded or sought to be evaded or the tax liability has not been disclosed correctly or excess of set-off has been claimed by any dealer or person in respect of any period or periods by not recording or recording in

an incorrect manner, any transaction of sale or purchase, or that any claim has been incorrectly made, then, in such a case, notwithstanding that any notice for assessment has been issued under other provisions of this section or any other section of this Act, the prescribed authority may, after giving such dealer or person a notice in the prescribed form and a reasonable opportunity of being heard, initiate assessment of the dealer or person in respect of such transaction or claim.

(b) During the course of any proceedings under section 64, if the prescribed authority is satisfied that the tax has been or is sought to be evaded, as provided under clause (a) by any dealer or person, the said authority may, after issuing a notice in the prescribed form and after giving a reasonable opportunity of being heard to such dealer or person, proceed to assess such dealer or person as provided in clause (a) in respect of any such transaction or claim relating to any period or periods and such authority shall, notwithstanding anything contained in section 59, be deemed to have the requisite jurisdiction and power to assess such dealer or person in respect of such transaction of sale or purchase or claim, covered by clause (a) and such assessment proceedings shall, for all purposes of this Act, be deemed to have been transferred to such authority.

(c) The assessment proceedings under this subsection shall be without prejudice to the assessment proceedings in respect of the said period or periods under any other provisions of this Act by any authority who otherwise has the jurisdiction to assess such dealer or person in respect of other transactions of sale or purchase or any other claim which are not covered by clause

(a) and clause (b).

(d) The assessment under this sub-section shall be made separately in respect of the transaction or claim relating to the said period or periods to the best of the judgment of the prescribed authority where necessary and irrespective of any assessment made under this sub-section, the dealer may be assessed separately under the other provisions of this section in respect of the said period or periods:

Provided that, once the dealer or person is assessed under this sub-section, no tax from such transaction or claim and penalty and interest, if any, consequent upon such tax shall be levied or demanded from such dealer or person, at the time of assessment to tax under the other provisions of this section in respect of the said period or periods relating to such transaction or claim.

Provided further that, in case a notice is issued under this sub-section or after the expiry of six years from the end of the year, containing the transaction, or, as the case may be, claim.

Explanation.—For the purposes of this sub-section, “prescribed authority”, the said authority”, “such authority and “any authority” shall mean the Commissioner or, as the case may be, the authorities appointed under section 10 and other officers or persons to whom the Commissioner has delegated his powers in this behalf.

(6) If the Commissioner is of the opinion that, in respect of any period covered by a return, any turnover of sales or of purchases has not been disclosed, or that tax has been paid at a lesser rate, set-off has been wrongly claimed, or

deduction has been wrongly claimed, then, notwithstanding anything contained in the other provisions of this section, the Commissioner may serve a notice in the prescribed form on the dealer and proceed to assess him in respect of the said period after giving him a reasonable opportunity of being heard:

Provided that, the assessment order shall be passed, by the Commissioner to the best of his judgment, where necessary, within six years from the end of the year containing the said period.

(7) Where a fresh assessment has to be made under this section to give effect to any finding or direction contained in any order made under this Act including an order made by the Tribunal or the High Court or the Supreme Court, then, notwithstanding anything contained in this section, such assessment shall be made within a period of thirty-six months from the date of communication of such finding or, direction contained in the order, as the case may be, to the Commissioner:

Provided that, if a certified copy of the said order is supplied by the dealer concerned to the Commissioner earlier than the said date of communication, then the period of thirty six months shall be counted from the date of the said supply.

(8) The Commissioner may call for the record of any matter and conduct an examination in respect of the same, in the manner as provided in subs-section (2), call for the books of accounts and other evidence in such matter and after hearing the dealer concerned pass an appropriate order of assessment in the matter notwithstanding the fact that in a similar matter, the Tribunal has given a

decision against the State Government or the Commissioner, if in such matter the State Government or the Commissioner has already filed an appeal before the appropriate forum against the order of the Tribunal and such appeal is pending before such appropriate forum:

Provided that, no order of recovery of the dues including the penalty or interest or forfeiture shall be passed by the Commissioner or the State Government in such case, pending decision by such forum, in the matter, and on decision of the appropriate forum, the Commissioner shall modify the order in accordance with the order of such forum after giving the dealer concerned, an opportunity of being heard.

(9) ***

(10) A dealer or a person may be assessed under a single notice and by a single order of assessment in respect of more than one period covered by a return so long as all such periods are comprised in one year.

Provided that in respect of the period commencing on or after the 1st April 2011, in case a dealer is required under the Rules, to file more than one return in different forms prescribed, then, such dealer may be assessed separately for each form of return for the said period.

(11) Where a dealer has been assessed under sub-section (2), (3), (4) or, as the case may be, (5) and he makes an application in the prescribed form to the Commissioner within thirty days of the date of service of the assessment order, for cancellation of the assessment on the ground that he had not been able to attend or remain present

before the Commissioner at the time of hearing when the assessment order has been passed, the Commissioner shall, after verifying that the contention of the applicant is correct and that the prescribed conditions have been fulfilled, cancel, by order in writing, within three months from the end of the month in which such application is made the said assessment including any penalty or interest levied in relation to or in consequence of the said assessment and shall make a fresh assessment in accordance with the provisions of sub-section (2), (3) (4) or, as the case may be, (5), including levy of interest or penalty, as the case may be:

Provided that , only one application for cancellation shall be entertained under this sub-section in respect of any period of assessment.

Provided further that if no order is passed within the aforesaid period of three months, then the assessment order shall be deemed to be cancelled.

(12) Notwithstanding anything contained in sub-section (2), (3) (4) or, as the case may be, (5), the fresh order of assessment as provided under sub-section (11) may be passed before the expiry of a period of eighteen months from the date of service of the cancellation order or, as the case may be, from the date on which the assessment order is deemed to have been cancelled under the second proviso to sub-section (11).

(13) Notwithstanding anything contained in this section, in case of a dealer, who undertakes the construction of flats, dwellings or buildings or premises and transfers them in pursuance of an agreement, along with land or interest underlying the land and in whose case, the limitation for

making an order of assessment, for any of the periods, expires on the 31st March 2014, then the order of assessment, for such periods, may be made on or before the 30th September 2015.”

140. A perusal of this section would indicate that it is a code by itself for assessment. There, sub-section (1) provides that if the registered dealer fails to file the return in respect of any period by the prescribed date, the Commissioner may assess the dealer in respect of the said period to the best of his judgment without serving a notice for assessment and without affording an opportunity of being heard. By the first proviso to sub-section (1), if the dealer submits the return for the period to which the order of assessment relates but after the order of assessment is passed, then that order shall stand cancelled and after such cancellation the dealer may be assessed in respect of the same period under other provision of section 23. The second proviso states that such cancellation shall be without prejudice to any interest or penalty that may be levied in respect of the said period and the third proviso states that no order under sub-section (1) of section 23 shall be passed after three years from the end of the year containing the said period.

141. As far as the present matter is concerned, what we find is that the Assessing Authority proceeded on the footing that the dealer filed an application in Form-501 for the period 2005-2006 and thereafter filed revised application for refund. To verify the correctness of the claim raised and refund already granted, a notice in Form-

301 was issued to the dealer in response to which the books of account etc. were produced. This is not only a case of an assessment pursuant to any return. What appears from the record is that the application in Form-501 for the period 2005-2006 was filed and revised application for refund in the same form was filed. The dealer was already granted refund under VRS scheme as per Circular No.37A of 2007 and the date in that regard has been specified at page 87 of the paper-book. The dealer in this case filed these applications and raised the claim which was duly verified and considered. On a scrutiny it was discovered that the dealer purchased low sulphur waxy residue and low sulphur oil from outside the State of Maharashtra. These goods are covered under the Entry Tax Act. To verify the correctness of the returns filed by the dealer and to verify the tax liability of the dealer under the Entry Tax Act, notice for assessment of entry tax in Form-5 was issued on 11th June 2013 and served. In response to that, it was stated by letter dated 30th June 2013, that the matter under consideration is time-barred.

142. Now, a perusal of the requisite forms would reveal as to how they deal with distinct sections. Form-501 is traceable to Rule 17A(2) and Rule 60(1) of the Maharashtra Value Added Tax Rules, 2005. The same is a form in which application for refund under section 51 of the Maharashtra Value Added Tax Act, 2002, has to be filed.

143. In the present case, section 51 was invoked by the petitioners and which deals with grant of refunds. There

we must notice that this section as a whole was substituted by Maharashtra Act No.32 of 2006. Where the registered dealer under the MVAT Act has in any return, fresh return or revised return, shown any amount to be refundable and has not undertaken to adjust such amount against the amount due as per any return in accordance with section 50, then, the Commissioner shall, on an application made by the dealer and subject to Rules and other provisions of the Act grant refund of such amount to the dealer. How that application has to be dealt with and how refund has to be granted is specified in the further sub-sections of section 51. The order of assessment does not indicate nor it is the petitioners' case that they have filed any returns. They have raised the plea of time-bar without indicating as to in what situation the plea has been raised. It is apparent from the reply, copy of which is at page 79 of the paper-book, that a show cause notice dated 11th June 2013, with regard to assessment of entry tax for the period, namely, 1st April 2005 to 31st March 2006 was received.

144. That show cause notice alleges that the Deputy Commissioner of Sales Tax wishes to satisfy himself that the return-*cum*-challans filed by the petitioners in respect of the aforesaid period are correct and complete. The show cause notice also alleges that in respect of the aforesaid period, the petitioners are liable to pay tax under the Maharashtra Tax on Entry of Goods into Local Areas Ordinance, 2002. Pertinently, this show-cause notice alleges that the petitioners had not furnished the return-*cum*-challan in respect of the said period by the

prescribed date. It calls upon the petitioners to produce any evidence on which they wish to rely upon in support of the return-*cum*-challan and furnish or cause to be furnished all books of account and presumably records pertaining to the entry tax; and lastly to show cause why penalty should not be imposed.

145. The order of assessment, however, also refers to the communication / letter from the petitioners, copy of which is at page 83 of the paper-book dated 22nd March 2013. The date of the returns has not been mentioned. What we have noted from a perusal of Chapter III of the Entry Tax Rules is that the return-*cum*-challan has to be filed in Form No.4. This return-*cum*-challan / revised return-*cum*-challan under section 23(4) of the Maharashtra Entry Tax Act has to be filed in quadruplicate and must give all the details. Form No.5 is the form in which notice for assessment has to be given by the Assessing Authority. Section 3(4) of the Maharashtra Entry Tax Act states that the tax levied under sub-section (1) of section 2 shall be payable by the importer in such manner and within such time as may be prescribed. The term 'prescribed' means prescribed by Rules. However, sub-section (3) of section 3 states that any importer who is liable for registration under the Entry Tax Act or Rules made thereunder shall not be liable to pay tax under the Entry Tax Act and any importer who during the course of any year becomes liable for registration under this Act shall not be required to pay the tax on any entry of goods effected by him into a local area immediately before the time he becomes so liable for registration. This is a provision specifically

referring to the importer and sub-section (4) of section 3 deals with payment by the importer.

146. The burden of payment of tax falls on the entry of goods into a local area from any place outside the State for consumption, use or sale therein. Since import means bringing or causing to be brought or receiving any goods into a local area from a place outside the State, and importer means person who imports any goods into a local area for consumption, use or sale therein, it is apparent that the import to a local area for consumption, use or sale therein would be taken as entry of goods for that purpose and that is how the importer would be obliged to register himself. The registration is contemplated by section 4 of the Maharashtra Entry Tax Act and every importer who is liable to pay tax under this Act shall, if he is a dealer registered or liable for registration under the Sales Tax Act, within such time as may be prescribed for the purpose of making an application in the prescribed form for registration under this Act to the Assessing Authority apply accordingly. The Rules, namely, the Entry Tax Rules provide for certificate of registration and that application for registration under section 4 of the Entry Tax Act shall be made by an importer to the Assessing Authority in Form-1 with a fee as mentioned in Rule 16 and that he is to comply with the stipulations in Rule 3 of Chapter III of the Entry Tax Rules. Therefore, the application for registration under section 4 ought to be made. As far as the importer is concerned, if he is not liable for registration, he shall not be liable to pay tax; if he obtains the registration on the basis that he

is liable to pay tax thereafter, the other provisions would apply.

146A. We do not think that on the vague pleas of the petitioners which do not indicate with clarity and precision as to how the assessment is time-barred that we must consider this question. More so, given the nature of the proceedings before the Assessing Authority. Merely because the petitioners terms the order as an assessment order or the proceeding as assessment or the order of assessment referring to the returns filed, we cannot hold that this was a case of a registered dealer and who has registered himself upon admitting the liability to pay tax, namely, entry tax that we must consider this plea of the bar of limitation. The petition does not aver in specific words that the petitioner registered themselves for the purposes of the Entry Tax Act and that being liable to pay the entry tax, they filed their returns-*cum*-challans. Thus, returns-*cum*-challans were to be verified and scrutinized for the purpose of amount of tax due from the petitioner-importer. Since the petitioner no. 1 is a registered importer that rule 8(1)(iii) would be the applicable rule.

146B. In any event, we do not find that it is open to the petitioner to raise the bar of limitation because the notice for assessment under the Entry Tax Act in Form No. 5 to the Entry Tax Rules was issued to the dealer-petitioner on 11th June 2013. A copy of that notice is termed by the petitioner No.1 itself as a show-cause notice. The notice is in Form No. 5 and must refer to the returns-*cum*-challans filed by the petitioner. However, if

the order of assessment is carefully perused and though made in Form No. 9 it does not refer to the details of the return.

146C. It in these circumstances that we are unable to uphold the argument of Mr. Dada that the proceedings are time-barred. The return-*cum*-challan duly filed and as indicated in the notice was not the only issue dealt with by the Assessing Officer. Rather, the proceedings were to verify the correctness of the returns filed by the petitioners and to verify the tax liability of the dealer coupled with an application in Form-501 to the MVAT Rules filed by the petitioners for refund. The application for the period 2005-2006 and the revised application for refund in Form-501 of the MVAT Rules was dated 30th March 2009. Partial refund was already granted. The dates thereof are specified. However, the petitioner were not satisfied with this partial refund and made a revised application for refund. The petitioners, therefore, invoked the Maharashtra Value Added Tax Act, 2002, the Maharashtra Value Added Tax Rules, 2005 and all the the prescriptions thereunder enabling seeking refund. The petitioner could not have filed any application for refund after the prescribed time-limit for the same and if indeed there is one. Therefore, it is too late in the day to raise the plea of a time-bar. Having taken a partial refund and then seeking to challenge the denial of the balance or remainder sum of refund, revising that claim as well, it is not open to the petitioners to question on the issue of time-bar or limitation a composite exercise concluded by the impugned order. In such circumstances, even

otherwise, the governing period in this case could have been the one specified by Section 23 of the MVAT Act. The petitioner No. 1 was aware that it is the jurisdiction of the authorities under the MVAT Act which is being invoked by it and that is for the purposes of seeking refund. Once a composite issue or matter had been dealt with and in the above manner, then we do not think that it was open for the petitioners to raise the issue of time-bar. In the peculiar facts and the circumstances of this case, the view taken by the Assessing Authority and affirmed by the First Appellate Authority and the Tribunal concurrently cannot be said to be perverse or vitiated by an error of law apparent on the face of the record, leave alone perversity. It is a possible view.

147. Once that view is possible and in the given facts and circumstances, then, we do not think any larger controversy is required to be addressed and decided. Which would be the governing provision and which would prevail and override can be decided in an appropriate case. Meaning thereby, whether Rule 8 can be given a go-by as contended by the respondents or whether that cannot be given a go-by because of the language of sub-section (1) of section 6 can be decided in an appropriate case. Though we are *prima facie* construing the language of sub-section (1) of section 6 as above, still, our view was based on only the reading of the section. It cannot be said to be decisive in any manner. Once we approach the controversy in a overall perspective and manner, then we do not think that the issue of time-bar or limitation needs to be decided in this case.

148. We, therefore, do not wish to express any opinion on the rival contentions, particularly on the wider question and controversy. Once we take this view it is not necessary to refer to the decisions relied by the parties.

149. The only surviving contention is whether the Schedule Entry can be invoked so as to levy, assess and recover the entry tax from the petitioners. In that regard the contention of the petitioners' senior counsel is that the Assessing Authority in its order dated 21st June 2013, for the period 2005-2006 made no reference to the relevant Schedule Entry whereas in the second assessment order dated 30th March 2013, for the financial year 2008-2009, a passing reference has been made to the Schedule Entry No.12. The Revenue submitted that the goods were covered under Entry No.13 and this has been accepted by the Tribunal.

150. The argument further is that Entry No.13 relied upon by the Tribunal read as petroleum fuel oil, including heavy furnace oil and residual furnace oil. The argument is that this entry was deemed to be in force from the inception of the Act till 31st March 2005. By way of revival the amendment of the Schedule as per section 5 of the Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2007, which was enacted in August, 2007, Entry No.13 was revived retrospectively but only for the period prior to 31st March, 2005. This amendment is not relevant to the period in question. So far as Entry No.12 is concerned, that is relied upon by the respondents in the present case, namely, the writ petition.

151. To appreciate these contentions of the petitioners, we must also advert to the stand of the Revenue. The stand of the Revenue is that the petitioners are deliberately confusing the issue. The Schedule to the Act was substituted by Maharashtra Act No.32 of 2006. The entire Schedule was substituted retrospectively with effect from 1st April 2005, where Entry No.12 read as “furnace oil, including heavy furnace oil and residual furnace oil”. This is the description of the product of the petitioners and it cannot be said that when Entry No.13 was revived from 1st October 2002 to 31st March 2005, there was no entry to cover the products of the petitioners.

152. We have already reproduced above the relevant Schedule Entries 12 and 13. What is important to note is that the Schedule with effect from 1st April 2005, to date, has been set out in the relevant private publication. The footnote to that clarifies that the Schedule as such and as a whole was substituted and shall be deemed to have been substituted with effect from 1st April, 2005 by Maharashtra Act No.XXXII of 2006 dated 5th August, 2006. Thereafter, the footnote refers to specific entries and their substitution.

153. As far as the subject entries are concerned, Entry No.12 states ‘furnace oil, including heavy furnace oil and residual furnace oil’. That entry has not been touched. Entry No.13 was revived and reenacted by Maharashtra Act No.XXV of 2007 dated 6th August, 2007, with effect from 15th August, 2007. The relevant Amendment Acts

are also being referred by the parties. Chapter V to the Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2006, refers to amendments to the Maharashtra Tax on Entry of Goods into Local Areas Act, 2002. As far as the substitution of the Schedule is concerned, it states that for the Schedule appended to the Entry Tax Act the Schedule to this Amendment Act shall be substituted and shall be deemed to have been substituted with effect from 1st April 2005. Entry No.12 there also refers to furnace oil, including heavy furnace oil and residual furnace oil. As far as the Maharashtra Act No.XXV of 2007 is concerned, that is Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2007. That states in Chapter IV by section 5 titled as Revival and Enactment of the Schedule to Maharashtra Act IV of 2003 as it existed on 31st March 2005, that during the period commencing from 1st October 2002 and ending on 31st March 2005, the Schedule to the Maharashtra Entry Tax Act, 2002, as it existed before 1st April 2005, shall be deemed to have been revived and reenacted in the same form as it then existed with certain modifications and that is petroleum fuel oil, including heavy furnace oil and residual furnace oil. Thus, furnace oil, including heavy furnace oil and residual furnace oil is common in the description of goods. It is a substantive entry by itself (Entry No.12) and it is also part and parcel of the petroleum fuel oils (Entry No.13).

154. The Tribunal in this case has held that the attempt of the petitioners to demonstrate as if there was no Schedule Entry during the relevant period must fail. We

also agree with the Tribunal in that regard. This is an attempt of desperation. An argument of this nature and though canvassed in different form before us has been noted by the Tribunal and in paragraphs 9 and 10 of its order it states that the entries referred to furnace oil are also inclusive of residual furnace oil. Entry No.13 covers furnace oil and low sulphur waxy oil. If the Schedule Entry No.13 mentions petroleum fuel oil, inclusive of heavy furnace oil and residual furnace oil, then, the attempt of the petitioners to demonstrate that their product or raw material low sulphur furnace oil and low sulphur waxy oil imported from abroad are not covered by the Schedule Entry cannot be accepted and deserves to be rejected. The Tribunal, in paragraph 9 has held that petroleum fuel oil does cover the above products.

155. Then, in paragraph No.10, the argument was that amendment revived earlier period 2002-2005 and subsequent amendments are also made in the year 2006-2007. Therefore, this Entry No.13 is valid till date. It may be that there is a validating law. However, the amendments made by the two Amendment Acts referred above deal with other aspects as well. As far as the Schedule Entries are concerned, they have not been done away with. The respondents in this case have rightly held that when the entire Schedule was substituted retrospectively and there is also Entry No.12 which deals with furnace oil, including heavy furnace oil and residual furnace oil which is also included in petroleum fuel oil, then, we cannot enter into this factual controversy. It involved and included the product of the petitioners and if

there is entry which takes care of it, then whether it is Entry No.12 or 13 should not be a matter of concern for us. The entries in the Schedule could describe the product as furnace oil and include therein heavy furnace oil and residual furnace oil, but to rule out any confusion or doubt even in relation to petroleum fuel oils so long as the description of a particular product or goods is of that category, then it would also include heavy furnace oil and residual furnace oil. In our view, therefore, this is not a controversy which should detain us.

156. We are of the view that the assessment of the petitioners' products as done by the Assessing Authority and the order in that behalf stands confirmed throughout, then that concurrent view on facts cannot be termed as perverse, particularly when we notice the Schedule to the entries therein. Eventually, this is a matter wherein in writ jurisdiction we must not interfere. The view taken by the authorities who are implementing the Act and levying, assessing and recovering the tax should not ordinarily be interfered with. The conclusions assailed must be demonstrated to be palpably erroneous, arbitrary and such as no reasonable person placed in their position would arrive at. Such is not the position emerging from the record. We do not think that in the extraordinary, equitable and discretionary jurisdiction of this Court, we should, therefore, interfere with the concurrent findings of fact.

157. As a result of the above detailed discussion, we do not find any merit in the Writ Petition and the Appeals.

158. In the view that we have taken, we think that unless the petitioners discharge their tax liability at their instance, we have no reason to consider their plea of revenue neutrality. It is demonstrated that they have failed to discharge the tax liability and in full. The figures in that regard are pointed out in the affidavit-in-reply and which emerge from the record of the taxing authorities. We have no reason to discard them. Therefore, other pleas need not be examined at the instance of the petitioners and particularly when justice does not lie on their side.

159. In the view that we have taken, we need not make any reference to the decisions cited by Mr. Sonpal and further details. Equally, once we have negatived the contentions of Mr. Dada on the main issue, then, we need not examine whether the mandate of Article 301 is complied with. That issue would arise only if it is found that the guarantee under Article 301 of the Constitution of India has been interfered with or impeded by the respondents. Once it is not found so, then the applicability of Article 304 and the decisions relied upon in that behalf need not be examined.

160. As a result of the above discussion, Rule is discharged in the Writ Petition. For the reasons assigned in taking the view in the Writ Petition, the Appeals fail. All the appeals are dismissed. There shall be no order as to costs.

161. At this stage Mr. Dada, learned senior counsel appearing for the petitioner and the appellants prays that for a period of twelve weeks from today, the respondents be restrained from taking any coercive means to recover the taxes.

162. Mr. Sonpal, learned special counsel submits that it is only during the pendency of this petition and the appeals that the respondents did not take any measures of recovery. Now that the writ petition and appeals are dismissed, a huge sum outstanding should be permitted to be recovered. He also submits that after dismissal of the constitutional challenge, recovery of tax cannot be stayed.

163. Having heard both sides on this point and finding that we have decided the larger issue and based on some earlier decision of this Court and the amendments to the statute, interest of justice would be served if for a period of twelve weeks no coercive means be initiated for recovery of taxes.

G.S. PATEL, J.

S.C. DHARMADHIKARI, J.