KERALA HIGH COURT

Malabar Fruit Products Company

Vs

The Sales Tax Officer

(P Subramonian Poti, J.)

25.01.1972

JUDGMENT

P. Subramonian Poti, J.

1. The main question that arises in all these original petitions is one of validity and construction of Section 5A of the Kerala General Sales Tax Act, 1963. All the petitioners are assessees who have been assessed to tax on the purchase turnover of certain goods under Section 5A of the said Act. In some of the petitions, there are other questions also raised. I will first refer to and deal with common questions here.

2. Section 5 of the Kerala General Sales Tax Act, 1963 (hereinafter referred to as the "Act"), charges to tax the taxable total turnover of every dealer subject to certain conditions, "Total turnover" has been defined in Section 2(xxvi) of the Act to mean the aggregate turnover in all goods by a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax. The taxable turnover of a dealer is the turnover on which he is liable to pay tax as determined after making such deductions and in such manner as has been prescribed. Turnover may be purchase turnover or sales turnover. Section 2(xxvi) defines turnover as the aggregate amount for which goods are either bought or sold, or supplied or distributed by a dealer. The proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest, whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover. The tax under Section 5 may be on the taxable purchase turnover or the taxable sales turnover of a dealer. That sub-section itself provides that in the case of goods specified in the First or Second Schedule, it would be at such points against such goods as are specified in the schedule and in the case of other goods at all points of sales. Therefore, it is apparent that all goods (which is a term defined in the Act) are liable to tax under the Act either at all points of sale or a particular point specified in the First or Second Schedule. These specified points are either points of purchases or of sales.

The definition of a dealer indicates that it includes a casual trader and even a person who sells produce obtained by him from agriculture or horticulture or otherwise; though when he, a "dealer" within the definition of the term, sells those goods, it is not part of his turnover.

3. Section 5A of the Act was inserted in the Act by Section 3 of the Kerala General Sales Tax (Amendment) Act (Act 14 of 1970). Earlier, the corresponding section had been incorporated in the Act by Ordinance No. 9 of 1970 which was repealed by Act 14 of 1970. The object as apparent from the statement of objects and reasons of the Amending Act is stated to be "a measure for checking evasion of sales tax". The section itself runs as follows :

5A. Levy of purchase tax.-(1) Every dealer who in the course of his business purchases from a registered dealer or from any other person any goods, the sale or purchase of which is liable to tax under this Act, in circumstances in which no tax is payable under Section 5, and either-

(a) consumes such goods in the manufacture of other goods for sale or otherwise ; or

(b) disposes of such goods in any manner other than by way of sale in the State ; or

(c) despatches them to any place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce, shall, whatever be the quantum of the turnover relating to such purchase for a year, pay tax on the taxable turnover relating to such purchase for that year at the rates mentioned in Section 5.

(2) Notwithstanding anything contained in Sub-section (1), a dealer (other than a casual trader or agent of a non-resident dealer) purchasing goods, the sale of which is liable to tax under Section 5, shall not be liable to pay tax under Sub-section (1) if his total turnover for a year is less than ten thousand rupees :

Provided that where the total turnover of such dealer for the year in respect of the goods mentioned in Clause (i) of Sub-section (1) of Section 5 is not less than two thousand five hundred rupees, he shall be liable to pay tax on the taxable turnover in respect of those goods.

(3) Notwithstanding anything contained in the foregoing provisions of this section, a dealer referred to in Sub-section (1) who purchases goods, the sale of which is liable to tax under Clause (ii) of Sub-section (1) of Section 5, and whose total turnover for a year is not less than ten thousand rupees but not more than twenty-five thousand rupees may, at his option, instead of paying the tax in accordance with the provisions of Sub-section (1), pay tax at the rates mentioned in Clause (i) of Sub-section (1) of Section 7 in accordance with the provisions of that section.

4. It is evident from the provision in Section 5A that in cases where any dealer purchases goods, the sale or purchase of which is liable to tax under the Act in circumstances in which no tax is payable under Section 5, he is liable to tax relating to such purchases in case one of the three conditions is satisfied, namely, (1) the goods are consumed in the manufacture of goods for sale or otherwise, (2) the goods are disposed of in any manner other than by way of sale in the State, and (3) the goods are despatched outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce. Goods which are purchased by a dealer could either be used by him in the State itself or could be sent outside the State. In cases where goods are sent outside the State as a direct result of sale or purchase in the course of inter-State trade or commerce, there is no liability under Section 5A. But if the goods are sent for any other purpose outside the State whether it be for the purpose of consignment sale or for the purpose of consumption outside the State Section 5A is attracted. Within the State the goods purchased by the dealer could either be consumed by him or could be otherwise disposed of including by way of sale within the State. If it is disposed of inside the State by sale, Section 5A will not be attracted in regard to those purchases. But if the goods are disposed of in any other manner including consumption in the manufacture of other goods for sale he becomes liable to pay tax on the purchase turnover. The scheme apparently appears to be that if the goods are not available as such goods for being taxed in the State at some other subsequent point, the dealer is liable to tax on his purchase turnover though but for such a situation he would not be liable to tax on such purchase turnover. Viewed in this manner, the case of a sale inside the State in which case it could be taxed by the State and the despatch outside the State as a direct result of inter-State sale or purchase are not really exceptions. The object of Section 5A appears to be to tax the. goods which would normally have been taxed at some point in the State subsequent to their purchase by the dealer if they are not available for such taxation. This too, only if in regard to the purchase by the dealer the goods did not suffer tax at the purchase point or the sale point.

5. In the scheme of the section, it goes without saying that the purchase by the dealer who is taxed under the section becomes taxable in his hands only if the goods are consumed or disposed of in any manner other than by way of sale or despatch to places outside the State otherwise than as a result of inter-State purchases. These are all subsequent events and, therefore, the time at which tax is imposed is postponed to the happening of subsequent events, but by the very fact of purchase the dealer becomes liable to pay tax on the purchase. It depends upon subsequent contingencies and tax becomes payable when the event mentioned in the section happens. The main attack against the validity of the section is based upon legislative competence of the State to tax the purchases on the happening of such future contingencies. The contention of the counsel for the petitioners in all the petitions is that the Legislature of the State was not competent to impose a tax which does not arise on the occasion of the sale but is made to depend upon

subsequent consumption or use of the goods or dealing with the goods and which, therefore, according to counsel, renders it a tax other than a sales tax, possibly a tax on consumption or use, the imposition of which is beyond the competence of the State Legislature.

6. The power of the State Legislature to enact the sales tax law is derived from entry 54 in List II of the Seventh Schedule to the Constitution of India. That entry, as substituted by the Constitution (Sixth Amendment) Act, 1956, for the original entry 54 reads thus:

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.

7. Could it be said that a tax apparently imposed on the sale or purchase of goods cannot be justified with reference to entry 54 in List II because it is a tax which does not arise on the occasion of the sale ? The main attack against the validity of Section 5A is that the occasion for the taxation under that section is not the purchase by the dealer which event is ultimately sought to be taxed but subsequent dealing by him with the goods which may be long after the purchase itself. It is a contingency which may or may not happen. The goods purchased by a dealer can be sold within the State in which case he is not liable to tax under Section 5A. He may sell the goods in inter-State trade or commerce and despatch the goods outside the State as a result thereof. Then again the goods are not liable to be taxed. At the time when he purchases the goods it cannot be said whether he is going to deal with the goods in this manner or whether he is going to consume the goods in the manufacture of other goods for sale or otherwise. It is urged that in these circumstances, the tax liability is not one which arises on the occasion of the purchase sought to be taxed under Section 5A but it arises on a subsequent occasion when goods are used or consumed or otherwise dealt with. Therefore, according to counsel, it may appropriately be called a "use tax" or "consumption tax" and not a sales tax.

8. According to me, this contention is based on a misconception of the scope of taxation on the sale of goods. It is true that sales tax is a tax imposed on the occasion of the sale of goods. But it has no reference to the point of time at which the sale or purchase takes place. It refers to the connection with the event of purchase or sale and not the point of time at which such purchase or sale takes place. To read it otherwise would render any retrospective imposition of sales tax invalid as in every such case the tax would not be one which arises on the occasion of sale. By the same logic, it would not be possible to tax any goods at the last purchase point in the State, for the last purchase point in regard to any goods could be determined only when the goods are sold later and not when the goods are purchased. On the same reasoning as urged by counsel, one

should say in such a case that since the goods are taxed only when the goods are sold outside the State or are despatched for such sale outside the State and so the last purchases are taxed not on the "occasion" of the purchases and, consequently, it is beyond the competence of the Legislature. That certainly cannot be and the Supreme Court has held in the decision in State of Madras v. Narayanaswami Naidu [1968] 21 S.T.C. 1 (S.C.) that the goods are taxable in such cases in the financial year when they become the last purchases.

9. The petitioners seek inspiration for their contention in the decisions of the Federal Court of India in In re C.P. Motor Spirit Act A.I.R. 1939 F.C. 1 and in Madras Province v. Boddu Paidanna & Sons A.I.R. 1942 F.C. 33. The first of these cases was a reference by His Excellency the Governor-General of India to the Federal Court under Section 213 of the Constitution Act, 1935, and it concerned the vires of the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act (14 of 1938). Whether that legislation, which was by a Provincial Legislature which had power to tax sale of goods, could be sustained on the basis of its taxing power was the question that the Federal Court had to answer and this called for a consideration of the essential distinction between duties of excise and sales tax. Sulaiman, J., at page 22 of the report said thus :

Obviously the power to tax the sale of goods is quite distinct from any right to impose taxes on use or consumption. It cannot be exercised at the earlier stage of import or manufacture or production, nor at the later stage of use or consumption, but only at the stage of sale. The successive stages of manufacture or production, sale, use or consumption are separate, and it is possible to impose duty at any of these stages. There is a fine distinction between taxes on the sale of goods and taxes on the goods themselves. The essence of a tax on goods manufactured or produced is that the right to levy it accrues by virtue of their manufacture or production. It is immaterial whether the goods are actually sold or consumed by the owner or even destroyed before they can be used. If duty is imposed on the goods manufactured or produced when they issue from the manufactory, then the duty becomes leviable independently of the purpose for which they leave it and irrespective of what happens to them later. On the other hand, a duty on the sale of goods cannot be levied merely because goods have been manufactured or produced. Nor can it be levied merely because the goods have been consumed or used or even destroyed. The right to levy the duty would not at all come into existence before the time of the sale. It cannot at all be levied unless the goods are actually sold, and may not be leviable if they are transferred in some other form. Thus a duty on goods manufactured or produced is distinct, separate and independent from a duty on their sale and, (except probably at the stage of the first sale) there seems to be no good reason why they may not co-exist without overlapping.

Later the validity of the Madras General Sales Tax Act, 1939, was called into question before the Federal Court. There again the question was whether the tax which was imposed was really in the nature of a duty of excise. Dealing with the question. Sir Maurice Gwyer, C. J., referring to the opinion given by the Federal Court in In re C.P. Motor Spirit Act [1939] F.C.R. 18 said thus :

The duties of excise which the Constitution Act assigns exclusively to the Central Legislature are, according to the Central Provinces case [1939] F.C.R. 18 duties levied upon the manufacturer or producer in respect of the manufacture or production' of the commodity taxed. The tax on the sale of goods, which the Act assigns exclusively to the Provincial Legislatures, is a tax levied on the occasion of the sale of the goods.... In the case of sales tax, the liability to tax arises on the occasion of a sale, and a sale has no necessary connection with manufacture or production.

That the Federal Court was not referring to the time of sale as determining factor in the matter of competence of the Legislature to tax by reason of the entry corresponding to entry 54 in List II of the Seventh Schedule of our Constitution is evident. The Supreme Court had to consider a more or less similar argument advanced in a case Where the challenge was made to the competency of the State Legislature to enact U. P. Sales Tax (Validation) Act, 1958. That validated an earlier notification of the State imposing the tax on the sale proceeds of jute which had been struck down. The contention before the Supreme Court was that, notwithstanding the Validation Act, the notification continued to be void and inoperative because it had not been in fact valid and the Act itself was ultra vires. Several grounds were urged and one of the main grounds was that the Act could not be said to be authorised by entry 54 in List II as it enabled the tax to be levied otherwise than on the occasion of the sale. Dealing with this question, the Supreme Court said in J.K. Jute Mills Co. v. State of U.P. A.I.R. 1961 S.C. 1534 thus :

But it is urged on the strength of certain observations in The Province of Madras v. Boddu Paidanna & Sons [1942] F.C.R. 90 that a sales tax is a tax on the occasion of sale, and that, therefore, it could not be imposed with retrospective operation. This contention is, in our judgment, wholly without substance. Now, the point for decision in that case was whether a tax imposed by a Provincial Legislature on the sale of oil by a person who manufactured it was bad on the ground that it was in essence an excise duty. While a sales tax could be imposed by a Provincial Legislature, an excise duty could be imposed only by the Federal Legislature. In holding that the tax in question was a sales tax and not an excise duty, the court observed as follows :

The duties of excise which the Constitution Act assigns exclusively to the Central Legislature are, according to the Central Provinces case, (In the matter of Central Provinces and Berar Sales

of Motor Spirit & Lubricants Taxation Act, 1938 1939 F.C.R. 18), duties levied upon the manufacturer or producer in respect of the manufacture or production of the commodity taxed. The tax on the sale of goods, which the Act assigns exclusively to the Provincial Legislatures, is a tax levied on the occasion of the sale of the goods. Plainly a tax levied on the first sale must in the nature of things be a tax on the sale by the manufacturer or producer; but it is levied upon him qua seller and not qua manufacturer or producer.' (p. 101 of F.C.R.) In the context, the words, 'on the occasion of the sale' have reference to the character of the transaction and not to the point of time at which the duty becomes leviable, and they have no bearing on the question as to when such a tax could be imposed.

10. These observations of the Supreme Court would be sufficient to answer the contention of the petitioners. Entry 54 in List II of the Seventh Schedule confers on the Legislature authority to enact laws imposing tax on sale or purchase of goods. When the competency of the Legislature in relation to a particular enactment is under challenge, the question would be whether there has been a sale. Of course, the Legislature cannot under the guise of taxing sales impose tax on transactions or incidents which are not sales. Attempt to tax an agreement to sell failed as held inSales Tax Officer v. Budh Prakash Jai Prakash A.I.R. 1954 S.C. 459 . Similarly, attempt to tax works contract failed as held in the case of Madras State v. Gannon Dunkerley & Co. A.I.R. 1958 S.C. 560. It was held by the Supreme Court that:

Where the transaction is one of sale of goods as known to law the power of the State to impose the tax thereon is plenary and unrestricted subject only to any limitation which the Constitution may impose and in the exercise of that power it will be competent to the Legislature to impose a tax on sales which are taken place prior to the enactment of the legislation.

11. Before parting with the discussion on this question, I may refer to the decision of the Supreme Court in Andhra Sugars Ltd. v. State of A. P. A.I.R. 1968 S.C. 599 There the challenge was made to the validity of levy under Section 21 of the A. P. Sugarcane (Regulation of Supply and Purchase) Act, 1961. That section enabled taxation of purchase of sugarcane made under agreements. The attack to that section was that sugarcane was taxed on the purchases when it was required for use, consumption or sale in a factory, and on the wording of Section 21, there could be no purchase tax with reference to the subsequent use, consumption or sale. It was further contended that such a tax would be a use tax. The Supreme Court, dealing with these contentions, said thus:

Mr. Chatterjee submitted that the tax levied under Section 21 was a use tax and referred to McLeod v. Dilworth and Co. (1943) 322 U.S. 327 and Govindarajulu Naidu and Co. v. State of Madras. He argued that the State Legislature could not levy a use tax which was essentially

different from a purchase tax. The assumption of counsel that Section 21 levies a use tax is not well-founded. The taxable event under Section 21 is the purchase of goods and not the use or enjoyment of what is purchased. The constitutional implication of a use tax in American law is entirely irrelevant. The observation in the Madras case A.I.R. 1953 Mad. 116 at pp. 127-128 that the explanation to Article 286(1)(a) of the Constitution conferred a power on the State Legislature to levy a use tax is erroneous. The explanation fixed the situs of certain sales. It did not confer upon the Legislature any power to levy a use tax.

12. That Section 5A of the Act infringes Article 301 of the Constitution of India is the next attack. It is said that the imposition of tax is really in the nature of a restraint on trade and that for that reason, the freedom guaranteed under Article 301 is infringed. Of course, there is no case that if there is an infringement of Article 301, the law is validated by compliance with Article 304 of the Constitution. Therefore, what calls for consideration in this context is whether the impugned provision is in any way restrictive of the freedom of trade envisaged in Article 301 of the Constitution.

13. Though at one time there was considerable controversy as to whether the very imposition of tax would amount to a restriction within the meaning of Article 301 of the Constitution it could be said that the question is now well-settled by the decisions of the Supreme Court. In the decision in Atiabari Tea Company v. The State of Assam [1961] 1 S.C.R. 809 Gajendra-gadkar, J., observed thus :

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.

14. Dealing with Section 21 of the A. P. Sugarcane (Regulation of Supply and Purchase) Act, 1961, which I have adverted to in this judgment earlier, the Supreme Court dealt with the infringement of Article 301 of the Constitution by the measure of taxation under the said provision. As I mentioned earlier, that provision imposed a levy of tax on purchase of sugarcane for use and consumption and, therefore, it was contended that this provision impeded free trade, commerce and intercourse. The Supreme Court referred to its earlier decision in Firm A.T.B. Mehtab Majid & Co. v. State of Madras1, dealing with a similar contention in regard to import of hides and skins and quoted the following passage:

It is therefore now well-settled that taxing laws can be restrictions on trade, commerce and intercourse, if they hamper the flow of trade and if they are not what can be termed to be

compensatory taxes or regulatory measures. Sales tax, of the kind under consideration here, cannot be said to be a measure regulating any trade or a compensatory tax levied for the use of trading facilities. Sales tax, which has the effect of discriminating between goods of one State and goods of another, may affect the free flow of trade and it will then offend against Article 301 and will be valid only if it comes within the terms of Article 304(a).

The Supreme Court distinguished that case from the case before it. The case in Firm A. T. B. Mehtab Majid & Co. v. State of Madras A.I.R. 1963 S.C. 928 was one where there was discrimination between goods imported from other States and that of indigenous origin and this was found to impede the free flow of trade but the tax levied under Section 21 with which the Supreme Court was concerned did not discriminate against any imported cane. The same rate of tax was levied on purchase of cane required for use, consumption or sale in a factory. The Supreme Court, therefore, held thus :

A non-discriminatory tax on goods does not offend Article 301 unless it directly impedes the free movement or transport of the goods.

15. Of course, when a tax is imposed operating directly as a physical bar restricting free movement of goods, the position would be different. It would then be a tax, the effect of the imposition of which would be to act as an immediate restraint on the movement of goods within the territory of India. Taxation provisions such as the one impugned here do not impose any such restriction to the physical movement of the goods. The provision in Section 5A does not also discriminate between the goods imported and the goods of indigenous origin. Therefore, there is no scope for the plea that Section 5A operates in infringement of Article 301 of the Constitution.

16. Yet another attack urged by counsel for the petitioners is that the provision in Section 5A is discriminatory and violative of Article 14 of the Constitution of India. The only point urged in this connection before me was that the State was discriminating between dealer and dealer in that taxes are imposed only on such purchases in the hands of the dealers of goods which are used in the manufacture or which are disposed of in any other manner otherwise than by its sale within the State. It is stated that there is no logical basis for this classification of dealings for the purpose of taxation. Counsel for the petitioners rely upon the observation in the decision of the Supreme Court in Bhawani Cotton Mills Ltd. v. State of Punjab [1967] 20 S T.C. 290 (S.C.). The Supreme Court observed thus :

It is not open to the State to urge that it is entitled, in the matter of levying tax on transactions by way of purchase, to tax only the category of purchases for use in the manufacture of goods for sale. Further, the State has not been able to satisfy us that there is any reasonable classification

made, which will enable this court to sustain the notification.

This observation has, according to me, no relevance to the cases here. Under Section 5A it is not only goods which are consumed in the manufacture or sale that are taxed on their purchase turnover in the hands of the dealer. The three categories mentioned in Section 5A exhausts all manner of dealirrg with the goods. The goods may be used inside the State or may be destroyed within the State. The goods may be sent outside the State, whether it be for the purpose of sale or whether as the result of the sale. All such cases are covered by the three classes in Section 5A(1). In all cases excepting those where sales take place within the State or sales take place in inter-State trade or commerce, tax is levied on the purchase turnover. In the case of sales which take place within the State, there is no question of any evasion of tax as goods are taxed at a subsequent point. But, when goods are used in the manufacture of other goods the goods as such lose their identity and become some other goods and, therefore, these goods as such are not available for taxation in the State any more. So is the case with goods being disposed of in any other manner which may include disposal by consumption or disposal by destruction. In all such cases, there is no scope of the State getting revenue by way of taxation in regard to such goods thereafter and if they have not suffered tax in the transaction of sale to the dealer, who is sought to be assessed under Section 5A, his purchase turnover is taxed. The classification is, therefore, evident and the purpose is to tax when the goods cannot otherwise be taxed in the State thereafter. The charge of discrimination must, therefore, fail.

17. Counsel, Sri T. L. Viswanatha Iyer, appearing in O.P. Nos. 688 of 1971 and 3958 of 1970, urged yet another attack to the section. According to him, the retrospective operation given to Section 5A is such as to violate the fundamental rights of the petitioner under articles 14, 19(1)(f) and 31 of the Constitution. This is founded on the plea that while all dealers are enabled to pass on the tax to the purchasers, those affected by Section 5A, like the petitioner, were not in a position to collect this new levy during the period 1st April, 1970, to 15th May, 1970, for which period the section has been made retrospective, for the reason that there was no such levy then. It is urged that the result of retrospectivity of Section 5A is that the petitioner has to pay very large amounts out of the capital investment in the business. In short, the argument is that the retrospectivity of a levy may operate as an unreasonable burden which is likely to make the carrying on of business of the dealer impossible and this is an unreasonable restriction on the right to carry on business. Reliance is placed by counsel on the decision in Rai Ramkrishna v. State of Bihar [1963] 50 I.T.R. 171 (S.C.). It is now well-settled that a taxation statute has also to satisfy the test of reasonableness. Taxing statutes are not beyond the purview of the constitutional limitations imposed by articles 14 and 19 of the Constitution or the test of reasonableness prescribed by Article 304(b). Taxing statutes should not be confiscatory, and it is open to the

courts to see whether the statute is really a disguise or a cloak to achieve confiscatory purposes. But mere retrospective operation of a taxing statute cannot give it the character of a confiscatory statute. This is the case even in regard to a tax which the person sought to be taxed is allowed to pass on to a third party like the consumer. In regard to taxing statutes the Supreme Court said in the above decision thus :

In other words, it may be open to a party affected by the provisions of the Act to contend that the retrospective operation of the Act so completely alters the character of the tax imposed by it as to take it outside the limits of the entry which gives the Legislature competence to enact the law ; or, it may be open to it to contend in the alternative that the restrictions imposed by the Act are so unreasonable that they should be struck down on the ground that they contravene his fundamental rights guaranteed under Article 19(1)(f) and (g).

Referring to the retrospective character of a tax legislation, the Supreme Court said thus :

The position, therefore, appears to be well-settled that if in its essential features a taxing statute is within the legislative competence of the Legislature which passed it by reference to the relevant entry in the List, its character is not necessarily changed merely by its retrospective operation so as to make (sic take) the said retrospective operation, outside the legislative competence of the said Legislatuie, and so, we must hold that the challenge to the validity of the retrospective operation of the Act on the ground that the provision in that behalf is beyond the legislative competence of the Bihar Legislature must be rejected.

The retrospective operation of the statute with which the Supreme Court was concerned in the above case was for the period between 1st April, 1950, and 23rd September, 1961. Based on this, it was contended in that case that any such retrospectivity for more than 10 years must be held to be a relevant test to determine the reasonableness of the statute. Dealing with this question, the Supreme Court said that they did not think that such a "mechanical test can be applied in determining the validity of the retrospective operation of the Act". The learned Judges further said thus :

It is conceivable that cases may arise in which the retrospective operation of a taxing or other statute may introduce such an element of unreasonableness that the restrictions imposed by it may be open to serious challenge as unconstitutional ; but the test of the length of time covered by the retrospective operation cannot, by itself, necessarily be a decisive test. We may have a statute whose retrospective operation covers a comparatively short period and yet it is possible that the nature of the restriction imposed by it may be of such a character as to introduce a serious infirmity in the retrospective operation. On the other hand, we may get cases where the

period covered by the retrospective operation of the statute, though long, will not introduce any such infirmity. Take the case of a validating Act. If a statute passed by the Legislature is challenged in proceedings before a court and the challenge is ultimately sustained and the statute is struck down, it is not unlikely that the judicial proceedings may occupy a fairly long period and the Legislature may well decide to await the final decision in the said proceedings before it uses its legislative power to cure the alleged infirmity in the earlier Act, In such a case, if after the final judicial verdict is pronounced in the matter the Legislature passes a validating Act, it may well cover a long period taken by the judicial proceedings in court and yet it would be inappropriate to hold that because the retrospective operation covers a long period, therefore, the restriction imposed by it is unreasonable. That is why we think the test of the length of time covered by the retrospective operation cannot by itself be treated as a decisive test.

18. Counsel would contend that on the facts of the case the retrospective levy must be held to be bad. This levy is said to be such a heavy burden on the business that it practically destroys the right to carry on the business. Necessarily this would depend upon the enormity of the burden imposed by the retrospectivity of the statute. The mere fact that it is not possible to pass on the levy to the consumer has been held to be not sufficient to affect the competency of the Legislature to impose the tax. That is because by its very nature the tax is on the sale or purchase and not on the consumer and it is not obligatory that it should be permitted to be passed on to the consumer though the statute may enable this. Therefore, unless it is shown that the effect of the levy for a period prior to the enactment of the amendment creates such a burden that thereafter business will not be possible, it is not for this court to say that there has been an infringement of Article 19(1)(f) or Article 31 of the Constitution. On the facts of this case, it has not been shown that by the retrospectivity for the short period there has been any such situation here. It has also not been shown with reference to the facts that the business is likely to suffer so heavily as to render the tax confiscatory. It is not the counsel's case that the Legislature is not competent to pass a taxing statute of the nature of the Act before me to operate not only prospectively but retrospectively too.

19. Having therefore found that the attack on the validity of Section 5A of the Act is without merit, I will have now to proceed to consider the contention raised in each one of these petitions. That again in most of the cases involves the construction of Section 5A for the purpose of application to the facts of each case. This is because there is a controversy as to the meaning and scope of Section 5A.

20. In 0. P. No. 145 of 1971, the petitioner is a dealer in pineapple preparations and in the

course of his business he purchases pineapples from growers and produces canned pineapple slices and also pineapple juice and jam. According to him, the pineapples are sliced, canned and exported. Besides this, pineapple juice is extracted from the pineapple and that too sold. Trimmings are crushed and pineapple jam is prepared. He would say that the purchase from the growers of pineapple for the purpose of "conversion" into pineapple slices, juice and jam cannot attract Section 5A. He has also a contention that pineapple is a vegetable and, therefore, at any rate, it is not liable to be taxed as it is one of the articles exempted from taxation under Section 10 of the Act. Therefore, the question, raised is whether pineapple is a vegetable and further whether by conversion of pineapple into slices, jam and juice, there is a process of manufacture of goods so as to attract Section 5A of the Act. In this connection, I may notice the contention of Sri C. K. Viswanatha Iyer, counsel for the petitioner, that if it is not so used in manufacture, it continues to retain its identity in which case there is no scope for applying Section 5A.

21. The Third Schedule to the General Sales Tax Act enumerates goods exempted from tax under Section 9 thereof. That section provides that a dealer, who deals in the goods specified in the Third Schedule, shall not be liable to pay any tax under this Act in respect of the sale or purchase of such goods subject to such restrictions and conditions as may be prescribed. Item 10 in the Third Schedule is vegetables and that item runs as follows:

10. Vegetables (other than green ginger), whether roots, green fruits or leaves, used for human consumption including tapioca, yam potatoes, lime, sabola and tomatoes, except their manufactured products.

Explanation.-The term 'vegetables' shall not include any goods of the description specified in the First or Second Schedule.

This indicates that roots, green fruits and leaves may be vegetables if such are used for human consumption. According to the petitioner, pineapple should be considered a vegetable. That it is not a vegetable has been held by this court in Deputy Commissioner v. Mammootty 1970 K.L.T. 142. This is because the term vegetable in a taxing statute should be understood as in common parlance. Normally, the housewife who seeks to purchase vegetables or any person who goes to

the market to purchase vegetables does not intend pineapple to be included in that term. In common parlance, pineapple is a fruit and not a vegetable. In the light of the Bench decision of this court, I do not think that I need go into this question further.

22. More relevant argument of counsel is that only if the pineapple is either used in the manufacture or disposed of otherwise, would tax liability under Section 5A arise. According to him, when pineapple is sliced and canned for the purpose of sale, there is no process of manufacture at all, and the goods remain the same. I need not go into this question because even assuming that the contention of the petitioner is true, Section 5 A will be attracted if the goods are either consigned for sale outside the State or otherwise consumed in the State. If they are sold in the State or moved out of the State as a result of sale or purchase in the course of inter-State trade or commerce, Section 5A will not be attracted. If it is disposed of otherwise tax liability under Section 5A would arise, if, at the point of sale to the petitioner, it has not suffered tax even though the goods are such as should suffer tax. The petitioner admittedly purchases -pineapple from growers and he has no case that they paid tax on the sales to the petitioner. In fact, if they are liable there is no question of application of Section 5A at all. If this is a case where there has been no such liability to tax, though sale of pineapple is taxable because the sale took place under such circumstances that it was not liable to be taxed, then Section 5A will arise for application irrespective of the question whether the goods have been used in the manufacture of other goods and exported or whether the goods have been sent outside the State for sale in the same form or as the same goods. Therefore, I have to consider whether the construction that I have sought to put on Section 5A is correct.

23. In order to attract Section 5A the following elements are necessary:

(1) a dealer must purchase goods in the course of his business;

(2) the purchase must be from a registered dealer or from any other person ;

(3) the purchase must be of any goods, the sale or purchase of which is liable to tax under the Act; and

(4) the purchase must be in circumstances in which no tax is payable under Section 5.

Now, to illustrate this, supposing B purchases goods from A and deals with the goods in one or other of the ways specified in Clauses (a) to (c) to Section 5A(1), for determining the liability of B under Section 5A the following questions will have to be asked :

(1) Whether B is a dealer who is making purchases in the course of his business ?

(2) Is the purchase of goods, the sale or purchase of which is liable to tax under the Act ?

(3) Is the purchase from a registered dealer or from any other person ?

(4) Is the purchase under circumstances under which no tax is payable under Section 5 ?

24. The first of these requirements should be satisfied if B happens to be a dealer who is making the purchases in the course of his business and not casual purchases otherwise than in the course of his business.

25. That the purchase by B should be of goods, the sale or purchase of which is liable to tax under the Act is the next requirement. The term "goods" is denned in Section 2(xii) of the Act as follows :

(xii) 'goods' means all kinds of movable property (other than newspapers, actionable claims, electricity, stocks and shares and securities) and includes live-stock, all materials, commodities, and articles (including those to be used in the fitting out, improvement or repair of movable property), and all growing crops, grass or things attached to, or forming part of, the land which are agreed to be severed before sale or under the contract of sale.

The term "goods" is exhaustive enough to include all kinds of movable property and growing crops, grass or things attached to or forming part of the land. Therefore, what is the purpose of

the further qualification to the term "goods", namely, the sale or purchase of which is liable to tax ? The qualification can possibly refer only to the provisions for exemption such as that in Section 10 of the Act. Section 10 provides that Government may, if they consider it necessary in the public interest, by notification in the gazette make an exemption or reduction in rate, in respect of any tax payable under the Act on the sale or purchase of any goods, at all points or at a specified point or points in the series of sales or purchases by successive dealers. Several goods have been exempted at all points of sale or purchase in the State by any person, as, for example, vegetables. They are no doubt goods as the term is defined, but are not goods liable to tax under the Act because of the exemption under Section 10. If this clause "the sale or purchase of which is liable to payment of tax" is not read in this manner, the entire clause becomes redundant as otherwise all goods are brought within the scheme of taxation under Section 5 of the Act. All movable properties included in the definition of the goods are automatically within the scheme of taxation at some point or other under Section 5(1) of the Act. If that be the case the qualification of the term "goods" by the words "sale or purchase of which is liable to tax under this Act" if intended as a qualification can only refer to such provisions of Section 10 of the Act. Such a construction is evidently reasonable because in regard to such goods which are exempted at all points there is no reason to think that tax should be levied under Section 5A as there could not be any idea of checking of evasion in regard to sales tax on such goods.

26. In order that Section 5A may apply, the next requirement is that purchase by B must be from a registered dealer or any other person. The sale can be effected by a registered dealer, a non-registered dealer or a non-dealer. These three categories, so far as I could see, must exhaust the categories of sellers. Therefore, the words "any other person" may refer to a non-registered dealer as well as a non-dealer. A registered dealer is liable to pay tax on his sales under Section 5(1) of the Act. A dealer even though not registered is also liable to pay tax under the Act on his turnover. But in both cases, there is a minimum turnover prescribed as a condition to attract the liability for payment of tax. A non-dealer is not made liable under the Act and sales by him, therefore, is not within the purview of Section 5. One instance of such sales by non-dealers will be casual sales. These casual sales are to be distinguished from sales by casual traders, a term which is denned in the Act itself.

27. Though normally a sale by a registered dealer or by a dealer attracts tax, there may be circumstances under which the seller may not be liable as, for example, when his turnover is below the specified minimum. In such cases the "goods" are liable to be taxed, but the sales take place in circumstances in which no tax is payable at the point at which tax is levied under the Act. If the goods are not available in the State for subsequent taxation by reason of one or other of the circumstances mentioned in Clauses (a), (b) and (c) of Section 5A(1) of the Act, then the

purchaser is sought to be made liable under Section 5A. Yet another instance is where, in the hands of the seller, whether he be a registered dealer or non-registered dealer, the tax is not due on the sales. This may be the case where some particular classes of sellers are exempted in regard to the sale of certain goods though persons of other class may not be entitled to the same exemption on the sales of the same commodity. As an example may be cited, the case of a turnover relating to sale of goods other than those specified in the First or Second Schedule to the Act by wholesale co-operative societies in the State to the primary co-operative societies who are members of the wholesale co-operative societies. The goods sold may be taxable at multi-point of sales, the turnover of the seller may exceed the minimum but the sales by the wholesale co-operative societies are exempted under the notification made under Section 10. This is a case where the goods are taxable, but in the hands of the seller A it is not taxable and, therefore, in the hands of B it could be taxed at the point of purchase provided other conditions to attract Section 5A(1) are present.

28. Another instance I can conceive of is a case of a dealer selling agricultural or horticultural produce grown by him or grown in any land in which he has interest, whether as owner, usufructuary mortgagee, tenant or otherwise. From the definition of "turnover" in Section 2(xxvii) of the Act it is evident that the proceeds of such sale would be excluded from the turnover of a person who sells goods produced by him by manufacture, agriculture, horticulture or otherwise, though merely by such sales he satisfies the definition of a "dealer" in the Act. Thus, such a person selling such produce is treated as a dealer within the meaning of the Act and the sales are of goods which are taxable under the Act but when he sells these goods, it is not part of his turnover. Therefore, it is a case of a dealer selling goods liable to tax under the Act in circumstances in which no tax is payable under the Act. In such a case, the purchaser is sought to be taxed under Section 5A provided the conditions are satisfied. The case of growers selling goods to persons to whom Section 5A thus applies is covered by this example.

29. Yet another possible case is where casual sales are made by persons who are not dealers as the term is defined in the Act. The goods may be such as to attract tax on their sales, but the sales are under circumstances which would not attract the levy on account of the character of the seller. The conditions to attract Clauses (a), (b) or (c) of Section 5A(1) may be present. The transactions of sales are not taxable in the circumstances in which they were effected because the person who effected the sales was not a dealer liable to tax under the Act and the circumstances indicate that at no subsequent point the goods would suffer taxation in the State. It is then sought to be taxed in the hands of the purchaser under Section 5A. This, according to me, is the scheme of Section 5A of the Act "and bearing this in mind, I am proposing to resolve the questions of tax liability of the various petitioners whose petitions are before me.

30. In O. P. No. 145 of 1971, it is evident that the petitioner is purchasing from growers goods which are taxable under the Act but are not taxed because the persons who sell the goods to the petitioner are not dealers within the meaning of the Act. Goods are no longer available in the State and one or the other circumstance provided in Section 5A(1)(a), (b) or (c) happens to the goods. If it does not happen, there is no scope for taxation. That has happened here and, therefore, the assessment made on the petitioner must stand.

31. Petitioners in O. P. Nos. 1690, 1700, 1704 and 1706 of 1971 are all persons who purchase timber in the course of their business. All the petitioners in these petitions are running match factories and they purchase timber for the purpose of manufacture of splints for their match industries. It is not stated in the petitions that at the point of sale to the petitioners the goods are liable to tax in the hands of their sellers. The department has apparently proceeded on the basis that Section 5A is attracted as there has been no liability to taxation at that point. If the petitioners have a case that the goods have already suffered tax in the hands of sellers or are liable to be taxed in their hands and, therefore, Section 5A does not apply, it is for them to set up such a case. Having not set up such a case, I do not think that there is any reason to hold that Section 5A will have no application. The petitions have, therefore, to be dismissed.

32. Same is the case with O. P. No. 4734 of 1971. That again is a case of a person conducting a match factory purchasing timber. There is no averment in the petition that the sale to the petitioner was taxed in the hands of the seller or was liable to be taxed. Hence, Section 5A would apply.

33. In O. P. Nos. 4843, 4852 and 4866 of 1971, the petitioners are dealers in timber. The first two of them are running saw mills and the third is apparently a dealer in timber. It is stated that the petitioners purchase timber logs and get them cut and sawn into planks and sell them. It is not averred here also, just as in the other cases, that the sale to the petitioners had suffered tax or was liable to tax. This is the case also with the petitioner in O. P. No. 4866 of 1971, who also is a dealer in timber. Hence, these petitions have no merit.

34. In O. P. Nos. 3958 of 1970 and 688 of 1971, the petitioners purchase copra and oil and deal in oil and oil-cakes. I need not examine whether their purchases are from persons who are liable to tax under Section 5. That is because in both these cases, assessments have only been proposed and no assessment orders have been passed. So this is not a matter which requires investigation now.

35. In the result, all the original petitions are dismissed. In the circumstances of the case,

parties are directed to suffer costs.