NAGPUR HIGH COURT

Shriram Gulabdas

Vs

Board of Revenue

Misc. Civil Case No. 258 of 1951

(Hidayatullah and Choudhuri, JJ.)

25.04.1952

JUDGMENT

Choudhuri, JJ.

1. This miscellaneous civil case arises out of Sales Tax proceedings. The applicants are a partnership firm of bidi manufacturers. The firm is situated at Tumsar, tahsil and district Bhandara, and is a registered dealer for purposes of Section 10 of the Sales Tax Act. In the present proceedings before the Sales Tax Officer, Bhandara, for the assessment of the tax for the quarter ending with 12th November 1947 (the year of the applicants being from Divali to Divali) the applicants showed Rs. 1,29,279/12/- as the total turn-over of the firm. The firm claimed exemption for the whole of this sum on the ground (i) that they had goods worth Rs. 1,01,746/2/- to their own shop at Muzaffarpur in Bihar, and (ii) that they sold goods worth Rs. 27,533/10/- to registered dealers in Bihar.

2. This contention of the firm was not accepted and they were charged sales tax on the entire turn-over stated over. The applicants thereupon appealed to the Commissioner of Sales Tax, Madhya Pradesh, with no result. They also applied for revision of the order to the Board of Revenue, but without success.

3. The applicants then applied under Section 23 of the Central Provinces and Berar Sales Tax Act, 1947, requesting the Board to refer certain questions of law for decision by this Court. That application was rejected. The applicants moved this Court and the Honourable the Chief Justice directed the Board of Revenue to state the case and to refer the following questions for decision by this Court. The questions are as follows :

> " (i) Whether the sending of goods to Muzaffarpur shop belonging to the assessee constitutes a sale within the meaning of the Sales Tax Act?
> (ii) Whether the sending of goods to persons outside the limits of this State constitutes a sale within the meaning of the Act?
> (iii) Whether the sending of goods to customers outside this State, to whom railway

receipts were sent through a bank, constitutes a sale within the meaning of the Act?
(iv) Whether the sending of goods to salesmen out of the province amounts to a sale within the meaning of the Act? and
(v) Whether Explanation II to Clause (g) of Section 2, which makes an agreement of sale taxable even though the sale may have taken place outside the province, is ultra vires of the Provincial Legislature?

4. Before dealing with the questions involved in this reference, it is necessary to see how the Act is constructed. The Preamble to the Act states that it is an Act to levy a tax on the sale of goods in the Central Provinces and Berar. The Act begins by defining certain terms for the purposes of the Act. Of these we are concerned with the definitions of "dealer", "goods", "sale", "taxable quantum" and "turn over" in the present reference. It is not necessary to quote all the definition clauses relating to the above terms. "Dealer" has been defined to include both a principal and an agent in reference to the business of selling or supplying goods, whether on remuneration, commission or otherwise. "Goods" have been defined to include all kinds of moveable property other than actionable claims, stocks, shares or securities.

5. The definition of "Sale" will have to be considered in its various parts and it can be conveniently quoted here :

" "Sale" with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods made in course of the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge";
* * * *
"Explanation (II) : Notwithstanding anything to the contrary in the Indian Sale of Goods Act 1930, the sale of any goods which are actually in the Central Provinces and Berar at the time when the contract of sale as defined in that Act in respect thereof is made, shall, wherever the said contract of sale is made, be deemed for the purpose of this Act to have taken place in the Central Provinces and Berar."
Explanation II was amended by Act XVI of 1949 and now reads as follows :
"Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale or purchase of any goods shall be deemed for the purposes of this Act to have taken place in this Province wherever the contract of sale or purchase might have been made :
(a) If the goods are actually in this Province at the time when the contract of sale or purchase in respect thereof was made, or
(b) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced or found in this Province at any time after the contract of sale or purchase in respect thereof was made."

6. "Taxable quantum" means :

" (a) in relation to any dealer who himself manufactures or produces any goods for

purposes of sale by himself, five thousand rupees; or
(b) in relation to dealers not falling within Clause (a), such sum or sums as may be prescribed."
"Turnover" is defined as follows : "
"Turnover" means the aggregate of the amounts of sale prices and parts of sale prices received or receivable by a dealer in respect of the sale or supply of goods or in respect of the sale or supply of goods in the carrying out of any contract, effected or made during the prescribed period; and the expression "taxable turnover" means that part of a dealer's turnover during such period which remains after deducting there from : (here follow certain deductions.....)"

7. Section 3 establishes the Taxing authorities. Section 4 is the charging section. That section was amended in 1948 by Act No. 59 of 1948. We are concerned in this reference with the unamended section and the first sub-section of that section may be quoted here :

"4(1). Subject to the provisions of Section 6, every dealer whose turnover during the year preceding the commencement of this Act exceeded the taxable quantum shall be liable to pay tax under this Act on all sales effected after the commencement of this Act.
Provided that the tax shall not be payable on sales made in the course of the execution of a contract which is shown to the satisfaction of the Commissioner to have been entered into before the commencement of this Act."

After the amendment, the first sub-section reads as follows :

"Every dealer whose turnover during the year preceding the commencement of this Act exceeded the taxable quantum shall be liable to pay tax in accordance with the provisions of this Act on all sales effected after the commencement of this Act."

8. Section 5 gives the rates of tax. For this purpose, a schedule classifying the goods is appended, and Section 5 merely provides for different rates on different classes. Sections 6 and 7 deal with tax-free goods and other savings. Sections 8 and 8A deal with registration of dealers and Section 9 with the publication of lists of registered dealers. Section 10 provides for returns to be filed, and Sections 11 and 12 deal with assessment and payment, and the next two sections with refunds and accounts.
Sections 15 to 20 are machinery sections.

9. Section 21 provides for a bar to certain proceedings. It may be quoted here. It reads:

"Save as provided in Section 23, no assessment or order made under this Act or the rules made thereunder by the Commissioner or any person appointed under Section 3 to assist him shall be called into question in any Civil Court, and save as provided in section 22, no appeal or application for revision or review shall lie against any such assessment or order."

Section 22 deals with appeals and revisions to the Commissioner and the Tribunal respectively. Section 23 provides for the statement of a case to the High Court. It reads (with certain omissions) as follows :

> "23(1). Within sixty days from the passing by the Tribunal of any order under sub-section (5) of Section 22 affecting the liability of any dealer to pay tax under this Act, such dealer or the Commissioner may, by application in writing accompanied where the application is made by a dealer by a fee of one hundred rupees require the Tribunal to refer to the High Court any question of law arising out of such order, and where the Tribunal decides to make a reference to the High Court, it shall draw up a statement of the case and refer it accordingly.
> (2) If, for reasons to be recorded in writing, the Tribunal refuses to make a reference, the applicant may within thirty days of the refusal,
> (a) withdraw Ms application (and if he does so, the fee paid shall be refunded), or
> (b) apply to the High Court to require the Tribunal to make a reference.
> (3) If upon the receipt of an application under Clause (b) of sub-section (2), the High Court is not satisfied that the refusal was justified, it may require the Tribunal to state the case and refer it, and on receipt of such requisition, the Tribunal shall act accordingly.
> (4) If the High Court is not satisfied that the case stated is sufficient to enable it to determine the question raised, it may call upon the Tribunal to make such additions or alternations therein as the Court may direct in that behalf.
> (5) The High Court upon the hearing of a reference under this section shall decide the question of law raised thereby and shall deliver judgment thereon containing the grounds of decision and shall send to the Tribunal a copy of the judgment under the seal of the Court and the signature of the Registrar, and the Tribunal shall dispose of the case accordingly.
> * * * *
> (7) Tax ordered by the Tribunal to be paid by an order in respect of which an application has been made under sub-section (1) shall, notwithstanding the making of such application or any reference in consequence thereof, be payable upon the making of the order.
> * * * * "

10. Sections 24 and 25 provide for offences and penalties and compounding of offences. Section 26 gives protection to public authorities, and Section 27 makes the returns etc. confidential. Section 28 gives power to the Provincial Government to make rules. Since the rules were not questioned before us, it is not necessary to refer to the various clauses enabling the Provincial Government to make rules or to the rules themselves. Similarly, it is not necessary to refer to the schedule which classifies the commodities for purposes of section 5 of the Act.

11. Before we state the grounds on which the present Act is challenged as being beyond the competence of the Provincial Legislature, we wish to advert to certain principles connected with fiscal statutes and the general question of the validity of legislation and the Court's action in

pronouncing upon such validity. It is often said that fiscal statutes, in common with penal statutes, must be strictly construed. What this statement means was pointed out by one of us Hidayatullah, J., in *'Empress Mills, Nagpur V. Municipal Committee, Wardha[1]',* This is what was stated in that case :

> "It is a rule of construction that fiscal statutes in common with penal statutes, whose nature the fiscal statutes in some measure partake, must be construed strictly. This strict construction means only this much that if the words construed reasonably create a liability it is not for the Court to determine the wisdom of the enactment; but if the words do not indicate the liability of the subject, the tax must be disallowed. This does not mean that the words of the Act must be strained one way or the other, either to create a liability or to furnish a chance of escape or the means of evading the tax. All doubts must be resolved in favor of the subject, and in cases of ambiguity of the language a construction which is beneficial to the subject is to be favoured. Before however, the Courts will hold that a liability to pay the tax exists, the language of the statute must be found to impose clearly and unambiguously the obligation."

12. In pronouncing upon the validity of legislation there are certain well observed rules and also there is need for caution. In '*Jackson V. Federal Commr. Of Taxation'[2],* it was stated that every enactment is primarily to be understood as limited to the jurisdiction of the Legislature which passes it, whether the limits be territory or subject matter. In an earlier case from the High Court of Australia, namely, *'Commissioner Of Stamps V. Wienholt'[3],* it was observed that to the statute of a limited legislature the principle, ut res magis valeat quam pereat has a strong application, as was observed in *'Macleod V. Attorney-General Of New South Wales[4]',* and by Lord Halsbury in *'Swifte V. Attorney-General For Ireland'[5],* It was further stated in the Australian case that when the Court is construing the enactment of a body whose powers are limited, it is material to bear in mind that the intention of the legislating body must have been to make its enactment effectual, and that it knew its efforts would be futile if those limits were transgressed; that a transgression, if any, might arise from inadvertence in expression or from a mistaken belief as to the extent of power, but in either case, the error must clearly appear from the language used and cannot be assumed.

13. It would follow, therefore, that there is a presumption in favor of the validity of statutes and in the case of limited legislatures there is a further presumption that the Legislature intends to keep within the four corners of its powers. To the same effect are the observations of Gwyer, C.J., in *In re 'Central Provinces And Berar Sales Of Motor Spirit And Lubricants Taxation Act[6],*

14. Apart from the presumption of validity, it is to be observed that the Courts should be reluctant to pronounce too readily that an enactment is invalid. The salutary rule to bear in mind was pronounced by Isaacs, J., (later Chief Justice) in '*The Federal Commissioner Of Taxation V. Munro[7]',* where that eminent Judge observed as follows :

[1] I.L.R (1950) Nag 403 At P. 423 (Fb) [3]20 Clr 539 At P. 540 [5](1912) Ac 276 At P. 278
[2](1920) 27 Clr 503 (Aus) [4](1891) Ac 455 [6]1938', AIR 1939 FC 1 at pp. 4,5
[7]38 CLR 153 (Aus.) at p. 180

> "It is always a serious and responsible duty to declare invalid, regardless of consequences, what the national Parliament, representing the whole people of Australia, has considered

necessary or desirable for the public welfare. The Court charged with the guardianship of the fundamental law of the constitution may find that duty inescapable. Approaching the challenged legislation with a mind judicially clear of any doubt as to its propriety or expediency - as we must, in order that we may not ourselves transgress the Constitution or obscure the issue before us - the question is: Has Parliament, on the true construction of the enactment, misunderstood and gone beyond its constitutional powers? It is a received canon of judicial construction to apply in cases of this kind with more than ordinary anxiety the maxim Ut res magis valeat quam pereat. Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislature in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will. Construction of an enactment is ascertaining the intention of the legislature from the words it has used in the circumstances, on the occasion and in the collocation it has used them. There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail. That is the principle upon which the Privy Council acted in *'Macleod V. Attorney-general For New South Wales[8]',* It is the principle which the Supreme Court of the United States has applied, in an unbroken line of decisions, from Marshall, C.J., to the present day (See *'ADKINS v. CHILDREN'S Hospital[9]', at p. 544.* It is the rule of this Court (see, for instance, per Griffith, C.J., in *'OSBorne v. Commonwealth[10]',.*"

15. We are examining an Act which allows a power to levy a tax on the proceeds of the sale of goods by certain dealers. It is impossible to find any solution in the meaning of the word 'tax', as has been done by the Board of Revenue in the case to which we shall refer later. A tax is no more than an imposition by Government for the purposes of the State. Frequently, the tax is imposed also by a Local Authority; but the principle is the same. The best definition of 'tax' is by Cooley in his Constitutional Limitations, Volume II, 8th edition, page 986, where he says that taxes are burdens or charges imposed by legislative power upon persons or property to raise money for public purposes. The power of a legislature to impose a particular tax, or in other words a burden upon all or some of the subjects, must necessarily depend upon the nature of the constitution to which the legislature owes its existence. If after the identification of the tax the power to impose it is found inhering in the legislature, the tax must be upheld; if it does not, then the tax must be disallowed, and any attempt to impose it must be declared as ultra vires the legislature.

16. There is only one method of finding out the nature of the tax. It is to find out the subject-matter which is to be burdened with the impost. To identify the subject-matter one has to go to what is called the charging section. In *'ALBerta Provincial Treasurer*

[8](1891) AC 455 [10](1911) 12 CLR 337

[9](1923) 261 US 525

v. C.E. Kerr[11]', their Lordships of the Privy Council stated that the identification of the subject-matter of the tax is naturally to be found in the charging section of the statute, and it is only in the case of some ambiguity in the terms of the charging section that recourse to other sections is proper or necessary.

17. Now, a tax being an imposition by Government or other authority, may be levied not only from persons or be laid upon their property, but may embrace a much wider field. A tax can be laid upon persons or property or possession, franchise or privilege or occupation right. In *'Govindram Laxman Prasad v. State Of Madhya Pradesh*[12]*',* the Board of Revenue referred to a Privy Council case reported in the *'Governor-general In Council v. PROVInce Of Madras*[13]*',* and observed as follows :

> "With great respect to their Lordships of the Privy Council I would carry forward the harmonizing or integrating process indicated in their decision and would say that all taxes are taxes on persons in respect of certain of their activities, actions or transactions concerning certain goods or other property."

In our opinion - and we say this with due respect - the definition thus envisaged is too narrow, because a tax is not necessarily upon the 'activities', 'actions' or 'transactions' of people. One has only to think of the Bachelor Tax in Europe or the Estate Duty in England to see easily the refutation of this dictum. The former can be said to be a tax levied upon inactivity, and the latter upon a person after he has ceased to be active. In our judgment, the true nature of a tax is that it is an impost collected from people to raise money for public purposes. It can only be collected, however, if the Government or the Legislature has been given the power to make that imposition.

18. In making the imposition the Legislature sometimes chooses persons or property or the rights of persons or chooses what is called a 'taxable event', not necessarily connected with the actions of persons. The taxes are numerous and their name is legion. It is impossible to classify them, and it is equally difficult to apply the principles applicable to one tax to another. Suffice it to say that each tax must be examined in the light of the manner of the imposition and the taxable event which it seeks to choose as the foundation for the levy vis-a-vis the power of the Legislature to make that imposition or to use that taxable event.

19. Judging the matter from this angle, we have first to find out what is the nature of the tax and next to refer to the organic document by which the powers of the Legislature passing that enactment have been created. The Act has been analyzed by us above and we shall presently advert to the charging section to find out the nature and the incidence of the tax. The entry under which the Legislature purports to act is Entry No. 48 in List II in the Seventh Schedule appended to the Government of India Act, 1935. That entry reads :

> "Taxes on the sale of goods and on advertisements."

An examination of the charging section shows that every dealer whose turnover

[11](1933) AC 710 at p. 721 [13] AIR 1945 PC 98

[12]1951 Nag LJ 503

during the assessment year exceeds a fixed quantum is liable to pay the tax on all sales effected after the commencement of the Act in accordance with a particular schedule of rates. The tax is therefore upon the gross receipts or the turnover of a dealer from the sale of specified commodities and according to fixed rates.

20. *In re 'C.P. and Berar Sales Of Motor Spirit And Lubricants Taxation Act*[14]*',* the nature of Entry No. 48, Schedule 7, List II, was elaborately examined. The argument of the Central Government then was that the entry was confined to a "turnover tax" and did not embrace retail sales. This contention was negatived. Gwyer, C.J., pointed out that no useful definition of the term "turnover tax" existed, but that the phrase 'taxes on the sale of goods' was reasonably plain and meant a tax upon the event of sale or the proceeds thereof, whether taken individually or collectively. From this ruling, as also other rulings to which we need not refer because the point does not fall for our consideration, it is obvious that the charging section as it stands is within the competence of the Provincial Legislature. The fight is not over the charging section, but over an explanation which is appended to the definition of sale by which certain sales which would not normally be taxable are rendered so. We have quoted that Explanation in extenso above together with its modification in later years (See paragraph 5 above).

21. The attack against the Explanation is from various angles. It is contended that the Explanation enables the taxing authority to go beyond the territories over which the Legislature has jurisdiction; further, that it enables the Provincial Legislature to levy an excise duty rather than a tax on the sale of goods. It is also contended in relation to the amended Explanation that it does not validly affect a modification of the sale of goods and must, therefore, fail because the sanction of the Governor-General was not obtained to get over the non obstante clause in Section 100 of the Government of India Act, 1935. The amended Explanation was also challenged on the ground that it levies an excise duty rather than a tax on the sale of goods.

22. The assessee refers to Section 99 of the Government of India Act, 1935, to show that the powers of the Provincial Legislature extended in those days to the territory of the province and particular attention is drawn to the words "the Provincial Legislature may make laws for the province or for any part thereof." It is also contended that the Entry No. 48 gives power to all the provinces alike and other provinces may choose to tax the sale of goods taking place in their province. It is suggested that the intention was that all completed sales in a province could be the subject-matter of taxation in that province, but the province had no power to bring by a fiction sales taking place elsewhere for purposes of taxation, in the province. It is also argued that there would be a liability to multiple taxation on one transaction of sale because two provinces might by fiction bring the same transaction into their own jurisdiction to tax.

23. Certain principles here emerge. The power of taxation is indispensable to any orderly government and is justified on the assumption of an equivalent rendered to the tax-payer in the shape of protection of his person and property and the consequent addition to the value of his property. It is also justified on the assumption of a return in the shape of public conveniences in which he shares. A person trading in a manner

[14]1938', AIR 1939 FC 1

which requires the protection of more than one State cannot complain if he has to pay a price for governmental protection and maintenance in all the States in which he does business. He is liable to be taxed in all the States, provided every such State has the necessary power to do so. Multiple taxation is an evil, which may sometimes be necessary, and multiple taxation can only be disallowed if the power to impose the tax does not exist. Indeed, the Courts are not concerned with what is done elsewhere. As was observed in '*Henneford v. Silas Mason Co*[15]*.',*

> "A state for many purposes is to be reckoned as a self-contained unit which may frame its own system of burdens and exemptions without heeding systems elsewhere." If a

regulation preventing multiple taxation exists that can be invoked; but none has been pointed out to us here.

24. In making an imposition a State is allowed a certain amount of extra-territorial operation for its taxing measures provided it can claim jurisdiction to levy the tax on the basis of possessions or actions elsewhere. Examples of such territorial operation are not infrequent. The Income-tax Act allows the world income to be taken into account for finding out the rate to be applied to a particular assessee. It has been held that such a power is not outside the competence of the Indian Legislature (See *'Wallace Bros. And Co. Ltd. V. Income-Tax Commr., Bombay*[16]*',* as also '*Wallace Bros. And Co. Ltd. V. Commissioner of Income Tax, Bombay, Sind And Baluchistan*[17]*',* The Gross Receipt Taxes in America also illustrate the same proposition, and numerous cases are to be found in Australia where extra-territoriality is allowed on the ground that a State may frame its laws so as to tax to full capacity an individual residing or trading in Australia. See The '*Wanganui Rangitikei Electric Power Board V. Australian Mutual Provident Society*[18]*',* and *'Broken Hill South, Ltd. V. Commr. Of Taxation, N.S.W*[19]*.',* One very noted application of extra-territorial powers is to be found in the doctrine mobilia sequuntur personam by which goods and chattels actually within a particular State are treated as not being there in the legal sense but where the owner of those goods or chattels actually resides. Fictions are common and the fiction to tax property situated elsewhere is justified on the maxim in fictione juris semper aequitas existit.

25. The power to tax extra-territorially is, however, subject to one condition precedent which is nowhere better stated than in '*Louisville And J. Ferry Co. V. Kentucky*[20]*',*

> "While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government, - namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government."

26. In all cases where a certain element of extra-territoriality creeps in, either inadvertently or advisedly, it is always necessary to find out whether the jurisdiction does or does not exist. That jurisdiction is found to exist if there is a sufficient

[15](1937) 300 US 577 at p. 587 [17] AIR 1945 Fc 9 [19]56 Clr 337 (Aus.) At Pp. 361, 375
[16] AIR 1948 Pc 118 [18]50 Clr 581 (Aus.) At P. 600 [20](1903) 188 Us 385 At P. 396

territorial connection between the person or the transaction sought to be charged and the country seeking to tax him or the transaction. These principles are necessary to be borne in mind because the Explanation creates a fiction, and the question is whether there are substantial grounds for holding that the fiction can be created and when created, establishes the necessary nexus.

27. The Explanation begins by referring to the Indian Sale of Goods Act and notwithstanding it, it provides that the sale or purchase of any goods shall be deemed for the purposes of taxation to have taken place in this province, wherever the contract of sale or purchase might have been made if the goods were actually in this province at the time when the contract of sale or purchase in respect thereof was made. It will be noticed immediately that the contract of sale of goods is dissected into its component parts and in so far as the goods were situated in the province, the necessary nexus was assumed and the rest of the transaction is deemed to have been brought in the province for purposes of taxation. In our judgment, unless this can be questioned, the taxation

must be upheld.

28. The rules enacted by the Sale of Goods Act on the subject of passing of property in goods sold need not detain us; nor is it profitable to refer to them because the intention is to abrogate them and to substitute in their place a fictional sale in the province itself. If this could be done, then the Explanation cannot be questioned. The rules in the Sale of Goods Act are not immutable; they are subject to legislative change and the change may come either at the instance of the Central or the Provincial Legislature, provided the latter takes the sanction of the Governor-General. In the instant case, at least for the unamended Explanation, the sanction of the Governor-General was in fact obtained. Thus the only bar to the competence of the Provincial Legislature was removed, and it cannot be asserted that the legislative change in this province was for that reason inoperative. That, of course, leaves over for consideration whether the Provincial Legislature could, even with the sanction of the Governor-General, create an extra-territoriality in this manner.

29. A contract is an exceedingly difficult thing to accord a "seat". Savigny accorded a seat to every person, thing or transaction but failed to give a 'seat' to a contract. The reason is obvious. A person residing in, say, Madhya Pradesh may enter into a contract for the sale of goods in Madhya Pradesh with a person in Bombay. The goods then may, as a result of the contract, be deliverable in Madras. Where is the 'seat' to be given to the contract? A great deal of confusion has resulted because of this difficulty, sometimes the 'lex contractus', sometimes the 'lex solutionis', sometimes the 'lex situs' and sometimes the 'lex actus' being applied to such transactions. A contract which in its nature is spread over different territories may for the purposes of taxation be viewed at any of its ends; and if a necessary connection is established, it may be used as the foundation for the levy of a tax at either end. If the intention be to allow provinces to raise a revenue by taxing the sale of goods or the proceeds thereof if the province can substantially show the connection with these, the province will have the power to create a fiction by which it brings in the rest of the transactions into its own territory to levy a tax. Thus, if a dealer is registered in this province and the goods are also situated here in respect of which a sale has taken place, the liability to tax can be created by saying, as is done in the Explanation, that the entire transaction must be deemed to have taken place here. This power cannot be denied because a sufficient portion of the taxable event has taken place in the province, namely, the existence of the dealer and the existence of the goods, and the transportation of the goods to an extra-State point. In our judgment, the Explanation cannot be challenged on the ground of extra-territoriality because the entry gives the most extensive powers conceivable for purposes of taxation, including the power to create a fiction by which, if a substantial portion of the entire contract of sale of goods takes place in this province, the rest of the transaction can be brought in.

30. What we have stated here does not apply, however, to the amended Explanation, for which no sanction of the Governor-General was obtained. A reading of the amended Explanation would show that it trenches substantially upon the existing rules embodied in the Sale of Goods Act. To change effectively those rules was not within the unconditional competence of the Provincial Legislature. They could only do so if the Bill had been assented to by the Governor-General, as required by Sections 100 and 107 of the Government of India Act, 1935.

31. Admittedly, the amending Act was not so assented to and consequently it fails to work any change. Further, the rules have been amended to make the transaction complete when the goods

are produced in the province and not appropriated towards the contract already existing. That would be levying an excise duty from the manufacturer, because till the goods are appropriated towards the contract, the transaction of sale is not complete and a tax purporting to be "on the sale of goods" cannot be levied because no sale has taken place. This, however, does not arise in this case but is applicable to the other case which, for other reasons, we have decided to reject.

32. It was contended that the preamble to the Act clearly discloses that it was applicable to sales "in the province". A preamble is certainly a key to the interpretation of the Act, but has never been held to show the entire scope or intention of the Act as a whole. This was laid down on the authority of *'Deo V. Brandling'*[21], by Bose, C.J., and one of us (Hidayatullah, J.) in *'Om Prakash Mehta V. Emperor*[22]*',* and a similar proposition is also laid down in '*Rex V. Basudeva*[23]*',* From the mere fact that the preamble mentions sales in the province it cannot be held that the rest of the Act must be interpreted likewise.

33. One argument of the learned Advocate-General started a great controversy before us, which led to an examination of the question whether the present Act could be enforced after the inauguration of the present Constitution, including Article 286 thereof. The learned Advocate-General claims that the Act cannot be questioned because it has been validated by the proviso to Clause (2) of Article 288 of the Constitution and the Order of the President issued under that clause. That proviso, he contends, covers the entire Article and not merely Clause (2). In answer to this, Shri Engineer contended that the Act cannot be enforced in the manner claimed by the learned Advocate-General because the first clause of Article 286 renders the present Explanation unenforceable, there being a contrary method stated in that clause.

[21](1828) 108 Er 863 At P. 870 [23] AIR 1950 Fc 67 At P. 69

[22] I.L.R (1947) Nag 579

34. It is quite obvious that the intention in framing that article was to obviate disputes particularly those arising between one State and another. As we have already pointed out, it is difficult in any event "to give a seat" to an obligation and a contract is often between parties residing in different parts of the country. In such cases, it is difficult to decide where the contract really took place and which State is entitled to levy the sales tax. To avoid multiple taxation at the goods and the market ends it has been thought necessary to put the matter beyond all dispute. Clause (1) of Article 286 makes such a provision. It says :

> "No law of a State shall impose, or authorize the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place :
> (a) outside the State; or
> (b) in the course of the import of the goods into, or export of the goods out of the territory of India.
> Explanation : For the purpose of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State."

The Constitution prohibits the taxation of goods when the sale or the purchase takes place outside the State and makes the delivery of the goods for consumption the decisive factor in determining

which State is to have the fight of taxing such sales. There is nothing special in the use of the words "sale or purchase". The tax may take the shape of a sales tax or a purchase tax.

35. In the example quoted above, if A, the producer of goods in Madhya Pradesh, were to contract with B, a person residing in the Bombay Presidency, for the sale of certain goods, the goods to be ultimately delivered to C in Madras for consumption, the right to levy the sales tax would belong to the Madras State and not the other two States. If it were not so, the transaction is liable to be taxed three times by the three States concerned. In *'Freeman V. Hewit*[24]*',* certain suggestions for preventing multiple taxation were made and the present provision in the Constitution adopts the second suggestion.

36. Clause (2) of Article 286 reads as follows :

> "Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorize the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce."

Then follows the proviso on which reliance is placed by the learned Advocate-General and which reads as follows :

> "Provided that the President may by order direct that any tax on the sale or

[24](1947) 329 Us 249 At Pp. 256, 278

> purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March 1951."

It is clear that the proviso is meant to govern only what is described as "this clause".

37. The learned Advocate-General contends that the proviso must be taken to qualify the whole of the article and not merely the second clause. If it was the intention to make all existing legislation subsist till Parliament by law otherwise provided, notwithstanding the repugnance of such a law to clauses (1) and (2) of the article, the Constitution has neither said so nor can it be taken to have expressed it by necessary implication. We cannot refer to the debates which took place in the Constituent Assembly over this clause. The intention of the legislature must be taken from what it has enacted, and not from what the legislators said while discussing the Bill.

38. It is clear that the word "this" in the Proviso refers to the next preceding clause, and that is clause (2). A similar scheme is followed in Articles 311, 356 and others. It would be impossible to contend that the provisos in those two articles cover the entire article. Where the proviso is meant to cover more than one clause, the Constitution itself says so. (See, for example, Articles 19 (5), 22 (3)). The definition of 'clause' given in Article 366 does not also lead to any contrary conclusion.

39. It is, no doubt, true that the President issued an Order (the Sales Tax Continuance Order,

1950) on the inauguration of the Constitution; but that would have effect only to save existing legislation from the operation of clause (2) of the Article. It is significant that the President's Order also refers to clause (2) of the Article, and it is manifest that the President also considered the matter in the same light.

40. The second clause of the Article cannot be read in isolation. It is bound up with Articles 301 and 302. The intention of the framers of the Constitution was to incorporate in our Constitution a 'commerce clause' such as is to be found in the Constitutions of America and Australia. In a Federation of States, which India is under the Constitution, it is necessary that there should be free movement of goods from one part of the country to another and barring license fees and etc., there should be no burden or clog upon inter-State trade and commerce. Article 301 therefore provides that trade, commerce and intercourse throughout the territory of India shall be free, and Article 302 gives the power to Parliament to impose restrictions on the freedom of trade, commerce or intercourse between one State and another if required in the public interest.

41. The disputes which have led to enormous litigation in the United States of America are sought to be avoided by modifying the notions underlying the 'commerce clause' in the American Constitution. This is achieved by allowing that the States may tax goods imported from other States to the same extent as the goods produced or manufactured in that State and also impose reasonable restrictions on the freedom of trade, commerce or intercourse in the public interest and by providing for the prior sanction of the President to the introduction of a Bill or Amendment for this purpose.

42. It is clear that it was impossible to comply in advance with the provisions of Article 286 and parliamentary legislation to validate the taxing measures of some of the States was not possible at least for some time. It was, therefore, thought necessary to take the existing laws out of the operation of the 'commerce clause' as embodied in clause (2) of Article 286 read with Part XIII of the Constitution. The proviso and the President's Order, therefore, save the existing laws from the operation of the 'commerce clause' only, and not from the operation of clause (1) of Article 286 which determines the venue for the imposition of a sales tax in India.

43. The learned Advocate-General contended that the word "lawfully" in the proviso denotes that this Court is not competent to question the legality of the Sales Tax Act at all. For one thing, the word "lawfully" cannot be read as equal to "unlawfully". If the law which imposed the tax was bad at its inception, the proviso would not save it; and, secondly, we are not estopped from questioning the validity of any existing law on the ground that it conflicts with the provisions of the Constitution.

44. Reference was made by the learned Advocate-General to Article 372. It provides that notwithstanding the repeal by the Constitution of the Government of India Act, 1935, all the law in force in the territory of India immediately before the commencement of the Constitution shall continue in force until altered or repealed or amended by a competent Legislature or other competent authority. This article itself is 'subject to the other provisions of the Constitution' as clause (1) of Article 372 itself says. It is, no doubt, true that a machinery is provided by which the President can make adaptations and modifications, whether by way of repeal or amendment, as may be necessary or expedient to make the existing laws conform to the present Constitution. The question that requires to be answered is whether the bar of Article 286 has been removed by the President and whether, if the President has not done so, it is open to the Courts to question the

validity of any existing law.

45. This question does not strictly arise for our decision in the present case because we are required in this case to give our opinion on the questions posed. But it was raised in the other case and as we have already indicated, the two cases were argued together and for convenience we have discussed certain matters here.

46. The phrase "subject to the other provisions of this Constitution" has not been defined, and it is necessary therefore to see what it means. It is also to be borne in mind that the Constitution does not provide any express direction that all laws contrary to the Constitution should be taken to be void, as is done in Article 13 of the Constitution in relation to laws repugnant to Part III. We have first to determine whether any law which conflicts with the present Constitution is rendered null and void on the inauguration of the Constitution, unless the President modifies it by adapting it to the changed situation. The second question, as we have stated above, is whether we should assume that the law is valid because the President has made no adaptations or modifications in it.

47. The omission to state in specific words, as is done in Article 13, that the provisions of law in conflict with the Constitution would be void, is not material because the same result would follow even if the Constitution has not said so. Article 13 is included 'ex abundante cautela in Part III which is not subject to change, at least in the manner in which other provisions of the Constitution are. By making all laws in conflict with fundamental rights void and by placing the article providing for that end in the chapter of fundamental rights, laws in conflict with fundamental rights cannot be validated by any authority in India. Article 372 gives the power to the President to adapt the laws to the changed conditions, but that power itself is subject to the provisions of the Constitution. The Constitution speaks in no uncertain terms, and if any provision of law is repugnant to the Constitution, the Constitution as the supreme law must prevail. That law can only be sustained if the Constitution says so or gives the power to some authority to sustain it by modifications, amendments or necessary repeals. We have already shown above that the provisions of the first clause of Article 286 conflict with the scheme under which the sales tax is collected under the impugned Act. There is no doubt whatever that it does conflict with the provisions of that clause and to that extent the clause must prevail and as from the date of the Constitution the collection of sales tax must be within the State where the goods are delivered. This opinion which we have given with considerable hesitation does not really arise in the present case where we are required only to answer certain questions which have been referred on the case stated. However, since the argument of the learned Advocate-General led to this controversy and we were invited by either party to express our view on this matter, at least in so far as the other case is concerned, we have done so and we leave the matter at that.

48. It now remains to consider the various questions which have been formulated for our opinion. We have already shown that a necessary connection must be established between the taxing State and the subject-matter of the tax. The subject-matter of the tax here being the sale of goods, there must be some nexus between Madhya Pradesh and the sale as such. That connection must be sufficient, or in other words, substantial. Adverting to the questions which have been formulated, it is obvious that where the dealer merely sends his goods to his shop in another province, there being no contract of sale in furtherance of which the goods are dispatched, the transportation is merely for business purposes, unconnected with any sale such as is contemplated in entry No. 48.

The State Government cannot impose a transportation or export duty and therefore there can be no question of a sales tax in such circumstances. The first question, therefore, is answered in the negative.

49. The second question whether the sending of goods to persons outside the limits of this State constitutes a sale within the meaning of the Act, would depend upon whether the goods are sent in furtherance of a contract of sale. We assume that the question really means this and we are of opinion that the circumstances justify the importation of the fiction created by the Explanation to cover such facts. The mere sending of the goods to a person outside the State would not per se constitute a sale, but where there is already a dealer registered in this State who transports the goods to an extra-State point in furtherance of a contract of sale, though not entered into by the dealer but by the head office situated at an extra-State point, the transaction may for the purposes of the sales tax be regarded as one in the State, on the strength of the Explanation which, as we have shown above, has been validly framed. Modifying therefore the question somewhat to cover only the latter facts, namely, where the goods have been sent to persons outside the limits of this State by a registered dealer in furtherance of a contract of sale outside the State, we answer the question in the affirmative.

50. The third question is clearly covered by the Explanation and there is sufficient nexus to apply the Explanation to such a case. The question, therefore, must be answered in the affirmative.

51. The fourth question, whether the sending of goods to salesmen outside the province amounts to a sale within the meaning of the Act, would be answered in the affirmative if there is already a contract of sale entered into in respect of the goods which the registered dealer supplies from this State. It would not be so if the sellers merely are stockists, who have not purchased the goods but to whom the goods have been sent for dealing by them as they think best. In other words, if the goods are merely exported but not sent in furtherance of a contract, then the tax cannot be levied. But if the goods are sent on a Bijak to salesmen outside the State, then the tax can be validly levied on the registered dealer on the assumption that the whole of the transaction must be deemed to have taken place in the State. Our answer to the fourth question would, therefore, depend on the circumstances of each case.

52. As regards the fifth question, we have already shown that the second Explanation to Clause (g) of Section 2, which makes an agreement of sale taxable even though the sale may have taken place outside the province, is not 'ultra vires' the Provincial Legislature. We must make it clear that our answer to this question is in the affirmative, free from considerations arising under Article 286. We have shown that the necessary power to make the unamended Explanation did exist in the State Legislature; but we have also made it clear that by virtue of Article 286 the Explanation can no longer be enforced because under the present Constitution the sales tax can only be collected at the market and where the goods are delivered for consumption. We may also state that the amended Explanation II is not validly enacted because it makes drastic changes in the rules as found in the Sale of Goods Act, without obtaining the assent of the Governor-General. The effect of the amended Explanation going out would be to rehabilitate the old Explanation as it existed because the amendment being unconstitutional, will fail to work any change in the law (See the opinion given by one of us) Hidayatullah, J., in '*Laxmibai V. State Of Madhya Pradesh*[25]',

53. In view of the fact that the decision is against the assessee, the assessee must bear the entire costs of this reference. The opinion will now be sent to the Board of Revenue for dealing with the case according to law. Counsel's fee Rs. 100/-.

Reference answered.

[25] I.L.R (1951) Nag 563 (Fb) At Pp. 608, 610