



LAW COMMISSION OF INDIA

THIRTIETH REPORT

**(SECTION 5 OF THE CENTRAL SALES TAX ACT, 1956
—TAXATION BY THE STATES OF SALES IN THE
COURSE OF IMPORT)**

**(In view of the Supreme Court's decision in K.G. Khosla
and Co. vs. Deputy Commissioner of Commercial Taxes).**

FEBRUARY 1967

GOVERNMENT OF INDIA ● MINISTRY OF LAW

CHAIRMAN,
LAW COMMISSION,
5, Jorbagh, New Delhi—3,
Dated 4th March, 1967.

G. S. Pathak,
Minister of Law,
Government of India,
New Delhi.

MY DEAR MINISTER,

I have great pleasure in forwarding herewith the Thirtieth Report of the Law Commission on section 5 of the Central Sales Tax Act, 1956—Taxation by the States of Sales in the course of Import.

2. The subject was taken up by the Law Commission on a reference from the Government of India, after the decision of the Supreme Court in *Khosla's case*. Details of the reference are given in the first six paragraphs of the Report.

3. On receipt of the reference, a study of the subject was undertaken. Comments of the Ministries of the Government of India concerned, and of State Governments and High Courts, on the question referred to the Law Commission, were invited by a letter. Comments of the public on that question were also invited by a Press communique. A draft Report on the subject was prepared, discussing the case-law, the background of the Act of 1956, the sales-tax system, and other connected matters.

4. The papers concerning the Second Report of the Commission (Parliamentary legislation relating to Sales Tax), including the various notes circulated at that time and the minutes of the relative meetings, were studied. The comments received from the Ministries of the Government of India, State Governments, High Courts, interested persons and bodies (including several commercial bodies) were gone into.

(ii)

5. The materials referred to in paragraphs 3 and 4 above were considered at a meeting of the Commission held from 17th to 19th October, 1966. The draft Report was discussed and approved with certain modifications, but it was decided, that the conclusion on the specific point referred to the Commission may be reached at the next meeting.

6. A revised draft Report was prepared in the light of the decisions at the above meeting. The revised draft Report was considered at the meeting of the Commission held from 30th November to 1st December, 1966.

A note given by Member Shri Datar expressing his views was also considered at this meeting. The conclusion reached was, that section 5 should not be amended so as to exclude from the exemption (conferred by that section) transactions of the type in issue in *Khosla's case*.

The draft Report was again revised in the light of the decisions taken at this meeting, and prepared for signature.

[The draft Report was not circulated to State Governments etc. as the matter was urgent. The views of State Governments and others, received in response to the Commission's letter and press communique have, however, received the Commission's utmost consideration.]

7. Two Members of the Commission—Mr. K. G. Datar and Mr. R. P. Mookerjee—have signed the Report subject to separate dissenting notes.

8. I would like to mention the invaluable help the Commission received from Mr. P. M. Bakshi, Secretary of the Commission, at every stage of the preparation, discussion and finally drawing up of the report.

Yours sincerely,

J. L. KAPUR.

EXPLANATION OF ABBREVIATION USED

S. No. = Serial Number in the Law Commission's file.

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REPORT ON SECTION 5 OF THE CENTRAL SALES TAX ACT, 1956

1. This reference has been made to the Law Commission in the following circumstances:— Genesis of the Report.

On January 18, 1966, the Supreme Court, in *K. G. Khosla's case*,¹ laid down the boundaries of the ban under article 286(1)(b) of the Constitution on the imposition of sales tax on import sales. It also determined the extent and meaning of section 5 of the Central Sales Tax Act².

As that decision circumscribes the power of State Governments to impose sales tax, the State Government of West Bengal, by its letter dated June 18, 1966, drew the attention of the Government of India (Ministry of Finance) to the consequences of the decision on its revenues derived from sales tax on certain classes of sales and purchases—import-export sales and purchases—which, hithertofore, the State Government had been taking as being outside the ban of article 286(1)(b).

2. The State Government, requested the Government of India to look into the matter and to take steps for amending the Central Sales Tax Act, 1956, so as to exclude such sales from the purview of section 5 of that Act.

3. The Government of India, Ministry of Finance, after noting that the Central Sales Tax Act was passed after taking into account the recommendations of the Law Commission in the Second Report, and that that Report itself was based on two decisions of the Supreme Court, requested the Ministry of Law (Department of Legal Affairs), to refer the matter to the Law Commission for its consideration, in the light of the fact that existing section 5 of the Central Sales-tax Act embodies the principles recommended by the Law Commission in its Second Report. The Ministry of Finance, in particular, raised a query whether the decision in *Khosla's case* went beyond what the Law Commission in its Second Report intended. (In this connection, it referred to paragraph 9 of the Second Report). The Ministry of Law³ has referred the matter to the Law Commission for its consideration⁴.

That is the genesis of this Report.

1. *K.G. Khosla & Co. (Private Ltd.) v. Deputy Commissioner of Commercial Tax, Madras*, AIR. 1966 S.C. 1216; 17 S.T.C. 473.
2. The Central Sales Tax Act, 1956 (74 of 1956).
3. Ministry of Law, Department of Legal Affairs (Advice F Section), Note No. Nil, dated the 18th July, 1966, to the Law Commission.
4. For details of the question referred to the law Commission, see paragraph 5, *infra*.

Transactions
to be con-
sidered in
the Report

4. The transactions to be considered in the present Report may be gathered from the following passages in the Note of the Ministry of Law¹.

"Now, in *K. G. Khosla's case* (17 S.T.C. 473) which is a case under section 5(2) of the Central Sales Tax Act, 1956, the Supreme Court has held that before a sale could be said to have occasioned the import, it is not necessary that the sale should have preceded the import. The facts in that case were that the assessee entered into a contract with the D.G. S. & D., New Delhi, for the supply of axle box bodies. The goods were to be manufactured in Belgium according to specifications and the D.G.I.S. & D., London, or his representative was to inspect the goods at the works of the manufacturers and issue an inspection certificate. Another inspection was provided for at Madras. The assessee was entitled to be paid 90 per cent. after inspection and delivery of stores to the consignee and the balance of 10 per cent. was payable on final acceptance by the consignee. In the case of deliveries on f.o.r. basis, the assessee was entitled to 90 per cent. payment after inspection on proof of despatch and the balance of 10 per cent. after receipt of stores by the consignee in good condition. The assessee was entirely responsible for the execution of the contract and for the safe arrival of the goods at the destination. The contract also provided that notwithstanding any approval or acceptance even by an Inspector, the consignee was entitled to reject the goods if it was found that the goods were not in conformity with the terms and conditions of the contract in all respects. The manufacturer consigned the goods to the assessee in ships under bills of lading and they were cleared at the Madras harbour by the assessee's clearing agents and despatched for delivery to the Southern Railway in Madras and Mysore. The question arose, whether the sales by the assessee to Government Departments were in the course of import of goods within the territory of India and as such exempt from taxation under section 5(2)."

"The High Court of Madras held that before a sale can be said to have occasioned the import, it was necessary that the sale should have preceded the import. All the facts hereinbefore stated "serve to show that the terms of contract did not visualise a sale in the sense that there was to be a passing of property in the goods to the purchaser when the goods were under manufacture, or after the manufacture had been completed and the goods were packed ready for export from Belgium". All these stipulated conditions for the completion of the sale show that there could be such a

1. Ministry of Law, Department of Legal Affairs, Advice F Section, note dated 18th July, 1966 to the Law Commission.

transfer of property in the goods only after certain incidents had taken place in relation to those goods after the import of the goods into India. It seems illogical to conceive of a somewhat contradictory situation where, even in the absence of these incidents taking place, it could be deemed that the sale had taken place at Belgium and that such a sale had occasioned import of the goods'.

"This finding of the High Court was reversed by the Supreme Court....."

"The Government of West Bengal have stated in their letter of June 18, 1966, that in actual practice many cases of import of goods into India took place through the intermediaries of the Indian branch of the foreign manufacturers. The Indian purchaser places an order with the Indian branch of the foreign manufacturer for the supply of goods under a contract with him and the Indian branch. The goods are shipped from the foreign country not direct to the Indian purchaser but to the foreign manufacturers' branch in this country who clears the goods and then delivers them to the Indian purchaser. It is one of the terms of such contract that the goods can be rejected even after they have arrived in India if they are not according to the approved specifications. In the view of the State Government, therefore, in such cases, there is no sale of goods in the course of their actual import into India and precisely in the same facts the High Court of Madras has held in K. G. Khosla's case, discussed above, that there cannot be a sale in the course of import, because property in the goods passes only after certain incidents have taken place in relation to the goods after they have been imported into India. The Supreme Court has, however, ruled otherwise."

"The Government of West Bengal points out that following this decision of the Supreme Court the D.G.S. & D. and Indian Railway authorities have been refusing to pay sales-tax on their purchase of goods and have been threatening to claim refund of sales-tax so far paid on earlier purchases. Similar demands are apprehended from private traders."

5. Accordingly, the following question has been referred to us¹—

"Since the provisions of section 5 of the Central Sales Tax Act incorporate verbatim the principles recommended by the Law Commission on the basis of the earlier Supreme Court judgments in Travancore-Cochin Cases, the Commission is requested to examine the matter further and consider whether they would

Question referred to Commission.

1. Ministry of Law, Department of Legal Affairs, (Advice F Section), Note No. Nil dated the 18th July, 1966, to the Law Commission.

“recommend any amendments of the Act, so as to exclude transactions of the type hereinbefore discussed from the purview of section 5 of the Central Sales Tax Act.”.

Letter of the
Government
of West
Bengal.

6. The issue raised by the Government of West Bengal can be gathered from its letter¹. “Article 286 of the Constitution of India states, *inter alia*, that no law of the State shall impose a tax on the sale or purchase of goods where such sale or purchase takes place in the course of import of the goods into India. This provision of the Constitution prohibits the State Government from levying any sales tax on direct import of goods from out of India by Indian purchasers. However, in actual practice, in many cases such import of goods from out of India takes place through the intermediary of the Indian Branch of the manufacturers of foreign countries. What actually happens in such cases, is that the Indian purchaser places an order with the Indian Branch of the foreign manufacturer for supply of such goods. There is generally a contract between the Indian Branch of the foreign manufacturer and Indian purchaser, laying down the specifications of goods required and the source of their manufacture, etc. The goods are, however, shipped from the foreign countries not to the Indian purchaser directly but to the foreign manufacturer’s Branch in this country. That Branch clears the goods, stores them and then delivers such goods to the Indian purchaser. Usually in terms of the contract, the goods can be rejected even after they have arrived in India if they are not according to the approved specifications. In such cases, therefore, there is no sale of the goods in course of their actual import into India. The actual sale takes place with the Indian Branch of the foreign manufacturer and the Indian purchaser after the import of the goods are completed.

“In this view of the matter the State Governments have been levying State Sales Tax on such sales of imported goods by Indian Branches of foreign manufacturers to Indian purchasers. This view of the matter has, however, been set aside by the Supreme Court of India in the case of *K. G. Khosla & Co. Private Ltd. v. Deputy Commissioner of Commercial Taxes, Madras Division* (1966 S.T.C.—XVII—473) in which the learned Judges have been pleased to hold that the movement of goods from the foreign countries to India being incidental to the contract and goods being meant for use by the Indian purchaser, such sale should be held to have been made in the course of import into the territory of India.

1. Government of West Bengal, Finance Department, letter No. 2274-F.T. dated 18th June, 1966 to the Government of India, Ministry of Finance, Department of Revenue.

"Following the above decision the Director General of Supplies and Disposals of the Government of India and the Indian Railway authorities have been refusing to pay sales tax on their purchase of such goods and have threatened to claim refund of sales tax so far paid on such earlier purchases. The State Government have received representations from the East India Metal Merchants Association on this point. It is apprehended that private traders will also refuse to pay sales tax on their such purchases following the above-mentioned decision of the Supreme Court."

7. To answer the reference, it will be expedient to examine the constitutional provisions relating to taxes on sales and the history of those provisions, the relevant Parliamentary enactments and the leading cases in which those provisions and enactments have been discussed and interpreted and their true import determined. But, before going into those matters, we shall discuss *K. G. Khosla's* case, and what was decided therein.

8. In *K. G. Khosla's case*¹, the Supreme Court examined the scope of article 286(1)(b) of the Constitution and of section 5(2) of the Central Sales Tax Act, 1956, and determined the area of the constitutional ban on the imposition of sales tax on import-export sales and purchases. It was held to cover sales in which the movement of goods into and from the territories of India is the result of a covenant or incident of the contract of sale. Khosla's case.

9. The facts of *K. G. Khosla's case*² were these:

K. G. Khosla & Co., the assessee, entered into a contract with the Director General of Supplies & Disposals, New Delhi for the supply of "axle-box bodies". The contract provided for the manufacture of boxes in Belgium and the inspection of the manufactured articles at the works of the manufacturers by a representative of D.G.I.S.D., London who was to issue an inspection certificate. A second inspection by the Deputy Director of Inspectors, Ministry of W.H. & S., Madras was provided in the contract. He was to issue inspection notes on receipt of a copy of the inspection certificate from London after verification and visual inspection by him. The contract also provided that goods were to be manufactured according to specifications by M/s. La Brugeoises Et Nivelles, Belgium. *Khosla & Co.* were entitled to be paid 90 per cent. after inspection and delivery of the stores to the "consignee" and the balance of 10 per cent. was payable on final acceptance by the "consignee". It appears that "consignee" denoted the buyer or his nominee. In the case of deliveries on f.o.r. basis, the assessee was entitled to 90 per cent. payment after inspection on proof of despatch and balance 10 per cent. after receipt of the goods by the "consignee" in good condition.

1. *K.G. Khosla & Co. (Pvt. Ltd.) v. Deputy Commissioner of Commercial Taxes, Madras*, A.I.R. 1966 3.C. 1216; 17 S.T.C. 473.

2. Paragraph 8, *supra*.

The date of delivery, according to the contract, was "in 8 months ex-your principal's works from the date of receipt of order and the approved working drawings, i.e., delivery in India by 31st July, 1957, or earlier". The assessee was responsible for the execution of the contract in accordance with terms and conditions as specified in the tender and the Schedule attached thereto. The "purchaser", notwithstanding the approval by the inspector, could reject the stores on arrival if they were found to be not in accordance with the terms and conditions of the contract. Further, K. G. Khosla and Co., was responsible for the safe arrival of the goods at the destination. The D.G.I.S.D., London was to issue pre-inspection delay reports regularly to the D.G.S. & D., New Delhi. He was also to send copies of the inspection certificates to the Director of Inspection, Ministry of W. H. & S., Bombay. Under the bills of lading, the goods were consigned to be cleared by K. G. Khosla & Co to Madras Harbour. They were cleared by K. G. Khosla's clearing agents and despatched for delivery to the buyers thereafter.

10. The Sales Tax Officer, Madras found that the transaction was an intra-State sale and not in the course of import, because the sale was completed only when goods were delivered in Madras State and, therefore, it did not occasion the import. He also relied on the terms of the contract which gave to the purchaser the right to reject the goods if they were not in accordance with the terms and conditions of the contract. On appeal, the Appellate Tribunal held that the property in the goods had not passed to the buyers while the goods were with the Belgian manufacturers and that the sale had not occasioned the imports.

11. The matter was taken to the Madras High Court in revision. The High Court rejected the contention that the goods must be deemed to have passed to the buyers when the goods were approved in the factory of the manufacturers. It also rejected the contention that the sale by the assessee to the Government occasioned import. In the High Court's view it was necessary that the sale should have preceded the import, and as the sale had not taken place in Belgium, there was no question of the sale occasioning import of the goods.

12. Against this judgment, K. G. Khosla appealed to the Supreme Court. The Supreme Court held that the transaction was not liable for payment of sales tax, as it fell within the prohibition of article 286(1)(b) of the Constitution read with section 5(2) of the Central Sales Tax Act. In interpreting the words "occasions the movement of goods", the Supreme Court expressed the view that the words used in sections 3(a) and 5(2) of the Central

Sales Tax Act should have the same meaning in the two sections, and therefore relied on the interpretation of section 3(a) by Mr. Justice Shah in *Tata Iron and Steel Co. Ltd., Bombay vs. S. R. Sarkar*¹ where it was said:—

“In our view, therefore, within clause (b) of section 3 are included sales in which property in the goods passes during the movement of the goods from one State to another by transfer of documents of title thereto; clause (a) of section 3 covers sales, other than those included in clause (b), in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, and property in the goods passed in either State”.

The Court also relied on the observations of Mr. Justice Sarkar, as he then was, in *State Trading Corporation of India Ltd., v. State of Mysore*,² where it was stated:—

“In *Tata Iron and Steel Co. v. S. R. Sarkar*, (1961) 1 S.C.R. 379, 391, it was held that a sale occasions the movement of goods from one State to another within section 3(a) of the Central Sales Tax Act, when the movement “is the result of a covenant or incident of the contract of sale”.

13. After referring to various judgments which we shall deal with in the course of our report—it is not, therefore, necessary to deal with them at this stage,—the Supreme Court held, that the High Court was in error in holding that “before a sale could be said to have occasioned the import, it is necessary that the sale should “have preceded the import”.

14. The Supreme Court also held, that the movement of the axle-box bodies from Belgium into India (Madras) was the result of the covenant in the contract of sale and was an incident of such contract. The Supreme Court, lastly, observed:”

“It seems to us that it is quite clear from the contract that it was incidental to the contract that the axlebox bodies would be manufactured in Belgium, inspected there and imported into India for the consignee. Movement of goods from Belgium to India was in pursuance of the conditions of the contract between the assessee and the Director-General of Supplies. There was no possibility of these goods being diverted by the assessee for any other purpose. Consequently we hold that the sales took place in the course of import of goods within section 5(2) of the Act, and are, therefore, exempt from taxation.”

1. *Tata Iron Steel Co. Ltd. Bombay v. S.R. Sarkar*, (1961) 1 S.C.R. 379, 391; A.I.R. 1961 S.C. 65, 71, 72; 11 S.T.C. 655.

2. *State Trading Corporation of India v. State of Mysore*, (1963) 3 S.C.R. 792; A.I.R. 1963 S.C. 548, 549; 14 S.T.C. 188, (1964) 2 S.C.J. 131.

3. *Khosla's case*, A.I.R. 1966 S.C. 1216, 1220; 17 S.T.C. 473.

15. The Supreme Court, thus held the transaction to be one of import sale not liable to payment of sales tax, because of the ban of article 286(1)(b) which prohibits the imposition of taxes on sales or purchases where the importation of goods and their movement from one country into another is a consequence of the contract of sale or is an incident thereof.

16. The Supreme Court in *K. G. Khosla's case*, has determined the extent of the ban of article 286(1)(b) as follows:—

(1) Article 286(1)(b) exempts transactions from sales tax where the sale occasions the movement of goods from or to a foreign country into or from the territories of India, the movement itself being the result of a covenant or an incident of the contract of sale.

(2) It is an erroneous view of the law to think that before a sale could occasion the import, the sale should have preceded it.

(3) The contract itself showed that it was an incident of the contract that axle-box bodies would be (a) manufactured in Belgium, (b) inspected there, and (c) imported for the consignee (the buyer).

(4) Movement of goods from Belgium to India was in pursuance of the conditions of the contract.

(5) There was no possibility of the goods being diverted by K. G. Khosla for any other purpose or to any other contract.

(6) As in inter-State sales where property in the goods could pass in either State, the property could pass in either country.

Constitutional provisions-Pre-1950 Constitution.

17. It will be convenient now to deal with the constitutional provisions relating to the imposition of sales-tax, and their history.

In the Government of India Act, 1935¹ taxes on sales were adopted as a suitable form of taxation, and were introduced into the Provincial List (List II) as Entry 48—“Taxes on the sale of goods and on advertisement”. There was also an entry (Entry 45) in the Central List (List I), relating to the imposition of Excise on tobacco and other goods manufactured or produced in India.

18. The incidence of, and competition between, these two entries came up for interpretation by the Federal Court in *the matter of the Central Provinces and Berar Sales*.

1. The Government of India Act, 1935 (26 Geo. 5 Chap. 2).

of *Motor Spirit and Lubricants Taxation Act, 1938*,¹ and the *Province of Madras v. Boddu Paidana & Sons*,² and by the Privy Council in *Governor-General-in-Council v. Province of Madras*.³ In the Privy Council case, Lord Simonds explained the two taxes—Excise and tax on sales—thus :

"The two taxes, the one levied upon a manufacturer in respect of his goods and the other upon a vendor in respect of his sales may...in one sense overlap. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the existing authority imposing a duty of excise finds it convenient to impose that duty at the moment when the article leaves the factory or workshop for the first time upon the occasion of its sale. But that method of collecting the tax is an incident of administration; it is not of the essence of the duty of excise which is attracted by the manufacture itself."

19. The two duties, thus clearly demarcated, were continued in the Indian Constitution of 1950. At the same time, the Constitution of 1950 imposed a ban on the power of the States to impose taxes on sales and purchases in the course of inter-State sales or in the course of export or import. This was in the interest of the Union of India and for preventing the States from impinging upon the Union field of foreign trade and imposing tax on sales or purchases in the course of import or export under the guise of making laws with respect to taxes on sales or purchases under Entry 54 in the State List as it then existed. As the taxes on sale were perhaps the only variable, elastic and flexible tax within the jurisdiction of a State's power of taxation, and, therefore, a source of sizeable State revenue, they were readily put into operation in all the States of India.

The Constitution of India of 1950, as originally enacted, contained two articles—269 and 286—relating to sales tax, and one entry in List II of the Seventh Schedule—Entry 54—, relating to the power of the States to levy taxes. Article 269 gave power to the Union to levy and collect taxes which were to be assigned to the States in the manner provided in clause (2) of that article. Article 286 imposed restrictions on the imposition of taxes on the sale and purchase of goods.

20. Now, the Supreme Court, in one judgment⁴, held, *United Motors case*, that the State into which goods were sent from another

1. *In the matter of the Central Provinces and Berar Sales of Motor Spirit & Lubricants Taxation Act, 1938*, (1939) F.C.R. 18; A.I.R. 1939 F.C. 1.

2. *Province of Madras v. Boddu Paidana & Sons*, (1942) 4 F.C.R. 90; A.I.R. 1942 F.C. 33.

3. *Governor-General-in-Council v. Province of Madras*, 72 I.A. 91; A.I.R. 1945 P.C. 98. (P.C.)

4. *State of Bombay v. United Motors*, (1953) S.C.R. 1069, A.I.R. 1953 S.C. 252; 4 S.T.C. 133.

State, could tax the transaction of sale even though the sale took place in inter-State trade or commerce, and even though the person who sent the goods was outside the territory of the State, provided the goods were delivered in the importing State for the purpose of consumption there. One effect of this decision was, that a dealer situated in one State became amenable to the Sales-tax laws of the various States to which the goods were sent. This led to numerous hardships.

Report of
the Taxation
Enquiry
Commission.

21. The matter was considered by the Taxation Enquiry Commission¹. Dealing with Inter-State sales, the Commission observed, that the dichotomy adopted by article 286 (as then in force) amounted to a division of the sale of goods in India into—

(a) sale of goods delivered for consumption in a particular State; and

(b) other sales.

This dichotomy was imperfect from the point of view of tax administration. The Taxation Enquiry Commission, therefore, suggested, that all sales of goods should be divided into—

(a) those in the course of inter-State trade and commerce, and

(b) those not in the course of inter-State trade and commerce.

The former should, broadly speaking, be the sphere of the Union and the latter, the sphere of the States. But the responsibilities pertaining to the Union could be exercised through the State Governments, and the revenue in any case be devolved appropriately on them. This would ensure both co-ordination and adaptation to changing needs more effectively, than rigid constitutional provisions supplemented by occasional judicial interpretation².

The Taxation Enquiry Commission, further, suggested³ that the Central legislation which would give effect to this recommendation should also deal with one important aspect, namely, the definition of the locale of sales for the purpose of defining in detail the relative jurisdictions, first, of the Union and the States, and secondly, of the States *inter se*. The Commission stated, that entirely irrespective of constitutional restrictions and the Central Government's powers of levy, it was obviously necessary

1. Report of the Taxation Enquiry Commission, (1953-54), Vol. 3, pages 48-62, paragraphs 8 to 3 22.
2. Taxation Enquiry Commission, (1953-1954), Report, Vol. 3, page 54, para. 14(iii).
3. Taxation Enquiry Commission, (1953-54), Report, Vol. 3, pages 58-59, para. 20.

that there should be a body of law which defines, with specific reference to the sales tax, the circumstances in which the sale becomes taxable by a particular State and by no other.

The relevant principles could only be formulated after expert examination, and the Commission recommended that it should be done and the principles adopted in the Central legislation. The Commission took care to emphasise, that it would not suffice only to define the jurisdiction *inter se* of individual States, but the Central legislation should also contain the definition in adequate detail of what constitutes a sale or purchase in the course of inter-State trade or commerce.

22. In support of the advantages of Parliamentary legislation the Taxation Enquiry Commission made these observations. "We realise, of course, that the legislation itself may have to be modified from time to time in the light of new circumstances not fully provided for, or of judicial interpretation of the original provisions. Parliamentary legislation, as distinguished from constitutional provision, will have the obvious advantage that these modifications can be made as required without undue delay or difficulty. It will not, of course, suffice to define the jurisdiction *inter se* of individual States. The other important aspect of Central legislation would be the definition in adequate detail of what constitutes a sale or purchase in the course of inter-State trade or commerce. In this matter too, the embodiment of the principles in an enactment of Parliament, and not in the Constitution itself, would have the advantage that the details of the law can, without undue rigidity, be modified to suit new facts or unforeseen circumstances. As we have stated, the Constitution itself would of course lay down the broad division of tax power between the Union and the States. The important fact would remain that all sales would fall under one or the other of these categories. The Union, which under the scheme would, of course, derive no revenue from the taxation of inter-State sales or purchases, would be solely interested, in the legislation which it promotes, in securing, from a practical angle, the maximum possible co-ordination between different States in regard to the operation of the inter-State sales tax and the maximum possible equity in the appointment of the relevant proceeds to the States in which the goods have been physically delivered and those from which the physical despatch has taken place. In the actual provisions of law, it will no doubt avoid the many pitfalls which have been a feature of the present constitutional provisions as they have been interpreted and implemented, and even if it does not fully succeed in doing so at the outset, the rele-

1. Taxation Enquiry Commission, Report, (1953-54), Vol. 3, pages 58-59, para. 20.

vant legislation, as we have emphasised, can be modified at subsequent stages in conformity with the administrative and other requirements as they arise from time to time."

23. Having, thus, recommended that sales in the course of inter-State trade or commerce should be regulated by Central legislation, and that principles for determining when sales took place in the course of inter-State trade or commerce should be laid down by Parliamentary legislation, the Taxation Enquiry Commission recommended an amendment of the Constitution for conferring the necessary legislative powers on Parliament.

24. Along with this recommendation, relating to inter-State trade or commerce, the Taxation Enquiry Commission recommended an amendment of article 286 so that Parliament may, by law, formulate principles for determining when a sale or purchase of goods takes place in the course of import or export¹⁻².

25. Thus, the Taxation Enquiry Commission's Report contemplated that the Central legislation should embody principles for determining when a sale or purchase of goods takes place (i) outside the State; (ii) in the course of import into, or export outside, the territory of India and (iii) in the course of inter-State trade and commerce.³

Earlier
Report of
the Law
Commission.

26. In pursuance of this recommendation of the Taxation Enquiry Commission⁴, the Central Government initiated proposals⁵ for amendment of the Constitution. The Central Government also took up examination of the form and contents of the proposed Central legislation⁶ recommended by the Taxation Enquiry Commission. The question of formulating the principles for determining when the sale of goods takes place—

- (i) outside a State;
- (ii) in the course of the import of the goods into, or export of the goods out of, the territory of India;
- (iii) in the course of inter-State trade or commerce.

1. Taxation Enquiry Commission, Report, (1953-54), Vol. 3, page 56 paragraph 15, sub-paragraphs-C.

2. The Taxation Enquiry Commission made certain other recommendations relating to essential goods and other matters, which are not relevant.

3. Taxation Enquiry Commission, Report, (1953-54), Vol. 3, page 61, para. 22(5), read with page 56, paragraph 15-C.

4. Paragraphs 23 to 25, *supra*.

5. The Constitution (Tenth Amendment) Bill, 1956 (introduced in the Lok Sabha on 3rd May, 1956).

6. Paragraphs 21-22, *supra*.

was referred to the Law Commission by the Central Government in 1956, and the Law Commission gave its Report on the subject in the same year¹⁻².

27. It may be noted, that so far as foreign trade (sale constituting import and export in terms of the country as a whole) was concerned, the Taxation Enquiry Commission³ regarded the position under the Constitution as interpreted by the Supreme Court (in the two Travancore-Cochin cases) as satisfactory; it also noted, that hardly any State had any complaint about the particular provision of the Constitution which concerned this aspect⁴.

However, the Taxation Enquiry Commission did suggest that the Constitution should empower Parliament to determine the principles for determining, *inter-alia*, when a sale takes place in the course of import or export.

28. In the meantime, the Supreme Court, in a later decision⁵ held, that no State could tax a transaction of sale of goods which took place in the course of inter-State trade or commerce. To this extent, it overruled the decision in the *State of Bombay v. United Motors*⁶. But, then, this decision led to temporary complications, as sales-tax on inter-State trade had already been realised by various States, relying on the decision in the *State of Bombay v. United Motors*. So far as the temporary complications were concerned, the matter was resolved by the promulgation by the President of an Ordinance⁷, followed by an Act of Parliament⁸. The validity of the Act was upheld by the Supreme Court⁹.

Bengal Immunity case.

29. Because (1) of the difficulty created in regard to the interpretation of what were called "inter-State sales" and of the applicability of *Explanation* to Article 286(1) and, particularly, in view of the decisions of the Supreme Court in *State of Bombay v. United Motors Ltd*¹⁰, and in *Bengal Immunity Co. v. State of Bihar*¹¹, (which were

Constitutional Amendment of 1956.

1. Second Report of the Law Commission, (Parliamentary Legislation relating to Sales-tax).
2. See paragraphs 34-36, *infra*, for details.
3. Report of the Taxation Enquiry Commission (1953-54), Vol. 3, page 48, paragraphs 6 and 7.
4. See paragraph 144, *infra*.
5. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603; A.I.R. 1955 S.C. 661; 6 S.T.C. 446.
6. *State of Bombay v. United Motors*, (1953) S.C.R. 1069; A.I.R. 1953 S.C. 252; 4 S.T.C. 133.
7. The Sales-tax Laws Validation Ordinance, 1956 (3 of 1956).
8. The Sales-tax Laws Validation Act, 1956 (7 of 1956).
9. *Sundaramier & Co. v. State of Andhra Pradesh*, (1958) S.C.R. 1422; 9 S.T.C. 293; A.I.R. 1958 S.C. 468, 479.
10. *State of Bombay v. United Motors Ltd.*, (1953) S.C.R. 1069; A.I.R. 1953 S.C. 252; 4 S.T.C. 133.
11. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603; A.I.R. 1955 S.C. 661; 6 S.T.C. 446.

referred to in the Statement of Objects and Reasons of the Constitution Amendment Bill relating to Article 286) and what was stated in *Ram Narain Sons Ltd., v. Assistant Commissioner of Sales Tax*¹, and (2) pursuant to the recommendations of the Taxation Enquiry Commission, amendments were made in both Article 269 and Article 286 by the Constitution (Sixth Amendment) Act, 1956, and an additional Entry 92A—was introduced in the Union List and Entry 54 in the State List was suitably amended. In Article 269, sub-clause (g) was added to clause (1), giving power of taxation of sale or purchase of goods in the course of inter-State trade or commerce. By addition of clause (3) of article 269, Parliament was authorised to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce.

In article 286 of the Constitution, the *Explanation* to clause (1) was omitted, and new clauses (2) and (3) were substituted, in place of the two clauses in the old Article clauses (2) and (3).

30. The relevant articles and entries of the Constitution, both before and after the Amendment, read as follows:—

ARTICLE 286 OF THE CONSTITUTION BEFORE AND AFTER
AMENDMENT.

<i>Before 11-9-65</i>	<i>After 11-9-56</i>
<p>286. (1) No law of a State shall</p> <p style="padding-left: 2em;">Restrictions as to imposition of tax on the sale or purchase of goods.</p> <p style="padding-left: 2em;">Impose, or authorise the imposition of, a tax on the sale or purchase of goods.</p> <p>where such sale or purchase takes place :—</p> <p style="padding-left: 2em;">(a) outside the State ; or</p> <p style="padding-left: 2em;">(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.</p>	<p>286. (1) No law of a State shall</p> <p style="padding-left: 2em;">Restriction as to imposition of tax on the sale or purchase of goods.</p> <p style="padding-left: 2em;">Impose, or authorise the imposition of a tax on the sale or purchase of goods.</p> <p>where such sale or purchase takes place :—</p> <p style="padding-left: 2em;">(a) outside the State ; or</p> <p style="padding-left: 2em;">(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.</p>

Ram Narain Sons Ltd. v. Assistant Commissioner, Sales Tax, (1955) 2 S.C.R. 483, 504; A.I.R. 1955 S.C. 765, 773; 6 S.T.C. 627.

2. Explanation to clause (1) was deleted by the Constitution (Sixth Amendment) Act, 1956.

Explanation :—For the purposes 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 direct result of such sale or purchase for the purposes 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.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or otherwise 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 :

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

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

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for

(3)² *Any law of a State shall, in so far as it imposes, or authorises the imposition of, a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, be subject to such restrictions*

1. Clauses (2) and (3) were substituted by the Constitution (Sixth Amendment) Act, 1956.

2. Clause (3) was substituted by the constitution (Sixth Amendment) Act, 1956.

the consideration of the President and has received his assent.

and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.

ARTICLE 269 OF THE CONSTITUTION BEFORE AND AFTER AMENDMENT

Before 11-9-1956

After 11-9-1956

286. (1) The following duties and

269. (1) The following duties and

Taxes levied and collected by the union but assigned to the States.

tax shall be levied and collected by the Government of India but shall be assigned to the States in the manner provided in clause (2), namely :—

Taxes levied and collected by the union but assigned to the States.

taxes shall be levied and collected by the Government of India but shall be assigned to the States in the manner provided in clause (2), namely :—

(a) duties in respect of succession to property other than agricultural land ;

(a) duties in respect of succession to property other than agricultural land ;

(b) estate duty in respect of property other than agricultural land ;

(b) estate duty in respect of property other than agricultural land ;

(c) terminal taxes on goods or passengers carried by railway, sea or air ;

(c) terminal taxes on goods or passengers carried by railway, sea or air ;

(d) taxes on railway fares and freights ;

(d) taxes on railway fares and freights ;

(e) taxes other than stamp duties or transactions in stock exchanges and future markets ;

(e) taxes other than stamp duties or transactions in stock exchanges and future markets ;

(f) taxes on the sale or purchase of newspapers and on advertisements published therein.

(f) taxes on the sale or purchase of newspaper and on advertisements published therein.

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- (g) *taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.*
- (2) The net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attributable to States specified in Part C of the First Schedule, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that duty or tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.
- (2) The net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attributable to Union territories, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which the duty or tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.
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- (3) *Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce.*

ENTRY 54, STATE LIST BEFORE AND AFTER 1956 AMENDMENT

<i>Before 1956</i>	<i>After 1956</i>
54. Taxes on the sale or purchase of goods other than newspapers.	54. Taxes on the sale or purchase of goods other than newspapers, <i>subject to the provisions of entry 92A of List I</i>

ENTRY 92-A, UNION LIST INSERTED BY THE 1956 AMENDMENT

<i>Before 1956</i>	<i>After 1956</i>
	92-A. (New) <i>Taxes on sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.</i>

Pre-amendment-article 286 interpreted.

31. Article 286, as it stood before the amendment, was discussed in four leading judgments of the Supreme Court; two dealing with inter-State trade or commerce, and two with import-export sales and purchases. In the former category, are the *State of Bombay v. United Motors*¹ and *Bengal Immunity Co. v. State of Bihar*², and in the later category are the *State of Travancore v. Bombay Co., Ltd.*,³ (First Travancore case), and the *State of Travancore v. Shanmugha Vilasa Cashewnut Factory*⁴ (Second Travancore case). These judgments will be discussed a little later.

Pre-1956 cases-Inter-state trade.

There were also two other judgments dealing with inter-State trade in *Ram Narain Sons Ltd., v. Assistant Commissioner of Sales-Tax*⁵ and *Mohan Lal Hargovind v. State of Madhya Pradesh*⁶. But, for the purpose of our discussion, it will not be necessary to deal with them at any great length. They were both decided after the *Bengal Immunity Co., Case*⁷, and followed it.

1956 Amendment.

33. As stated above⁸, after these decisions, the constitutional provisions relating to sales tax were amended in 1956 by the Sixth Amendment to the Constitution. By that Amendment, additions and substitutions were made in articles 269 and 286 and in entries in the Union and State Lists relating to taxes on the sale or purchase of goods.

These have already been quoted⁹.

Previous reference to the Law Commission.

34. The Law Commission, on March 23, 1956, was invited¹⁰ to offer its suggestion as for formulating principles for determining when a sale of goods takes place¹—

- (i) outside a State;
- (ii) in the course of the import of the goods into, or export of the goods out of, the territory of India;
- (iii) in the course of inter-State trade or commerce.

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1. *State of Bombay v. United Motors*, (1953) S.C.R. 1069; A.I.R. 1953 S.C. 252; 4 S.T.C. 133.
 2. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603; A.I.R. 1955 S.C. 661; 6 S.T.C. 446.
 3. *State of Travancore v. Bombay Co. Ltd.*, (1952) S.C.R. 1112, 1118, 1120; A.I.R. 1952 S.C. 366; 3 S.T.C. 434.
 4. *State of Travancore v. Shanmugha Vilasa Cashewnut Factory*, (1954) S.C.R. 53; A.I.R. 1953 S.C. 333; 4 S.T.C. 205.
 5. *Ram Narain Sons Ltd. v. Assistant Commissioner of Sales Tax*, (1955) S.C.R. 483, 504; A.I.R. 1955 S.C. 765, 773; 6 S.T.C. 627.
 6. *Mohan Lal Hargovind v. State of Madhya Pradesh*, (1955) 2 S.C.R. 509; A.I.R. 1955 S.C. 787, 788; 6 S.T.C. 687.
 7. *Bengal Immunity Co. v. State of Bihar*, (1955), 2 S.C.R. 603; A.I.R. 1955 S.C. 661; 6 S.T.C. 446.
 8. Paragraph 29, *supra*.
 9. See the text of articles 286 etc. quoted in paragraph 30, *supra*.
 10. See the letter of the Chairman of the Law Commission forwarding the Second Report.
 11. See paragraph 26, *supra*.

35. The Law Commission gave its Report on the subject¹, after taking into consideration—

(i) the two *Travancore-Cochin* cases above mentioned, in which article 286(1) (b) was discussed and interpreted;

(ii) The Report of the Taxation Enquiry Commission, in which it was stated that the position arising from the interpretation put by the Supreme Court on article 286(1) (b) was “preferably satisfactory so far as foreign trade is concerned”; and

(iii) the views of the Ministry of Finance which had mentioned that all the States had accepted the interpretation of the Supreme Court and no difficulties were reported to have arisen as a result of the judgment of that Court.

The Law Commission, further, referred to and took into account the dissenting judgment of Mr. Justice S. R. Das, as the then was, in the *Second Travancore Cochin case*². The view of the Ministry of Commerce and Industry in regard to the last purchase preceding the export was also taken into consideration.

36. After a careful review of all these different matters³, the Law Commission recommended as follows⁴:—

“Under this head, we therefore, recommend the acceptance of the principles laid down by the Supreme Court. We would express them in the following manner:—

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

1. Second Report of the Law Commission (Parliamentary Legislations relating to Sales Tax) (July, 1956).
2. *State of Travancore v. Shanmugh Vilasa Cashewnut Factory*, (1954) S.C.R 53; A.I.R 1953 S.C. 333. (Second Travancore case).
3. Second Report of the Law Commission, pages 2 and 3, para. 5 to 10.
4. Second Report of the Law Commission, page 3, para. 10.

The Law Commission, in its Report also dealt with inter-State sales, but, for the present purpose, we need not refer to its recommendations on that topic.

Central
Sales-tax
Act, 1956.

37. While the matter was under consideration of the Law Commission, the amendment to the Constitution had already been passed. After the submission of the Report of the Law Commission, the Central Sales-tax Bill, 1956 was introduced, and duly enacted¹.

Two provisions in the Act of 1956 are relevant; section 3, which deals with sales or purchase in the course of inter-State trade and commerce, and section 5, which deals with sales or purchases taking place in the course of import or export. These two provisions incorporate the recommendations of the Law Commission², and are as follows:—

“Section 3. A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce only if the sale or purchase—

(a) occasions the movement of goods from one State to another; or

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation 1.....

Explanation 2.....

“5. Section 5. (1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of the title to the goods after the goods have crossed the customs frontier of India.

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

Develop-
ments after
1956.

38. This finishes the survey of the constitutional and legislative developments on the subject. The developments after 1956 are mainly in the judicial field, and will be considered in detail at the appropriate place³.

1. The Central Sales-tax Act, 1956 (74 of 1956).

2. Paragraph 36, *supra*.

3. See paragraphs 51 to 120, *infra*.

39. Before dealing with the question referred to us¹, it would be advantageous to deal with the pattern of import trade. Import of most of the commodities is at present controlled. Import policy for items licensable to actual users, and for items licensable to "established importers", and list of items of which the import is canalised through an agency approved by Government, as well as list of items not licensable to both actual users and established importers, can be gathered from what is known as "The Red Book"².

Pattern of:
Import
Trade.

40. The quantum of Government imports has increased after independence; Government imports seem to comprise Defence imports, foodgrains, railway stores, capital goods and heavy electrical plants for public undertakings, and other departmental imports³.

41. The Government departments usually send their indents for imports to the Director General of Supplies and Disposals of the Ministry of Industry and Supplies, and that Ministry places the orders with the India Stores Department, London, or with the India Supply Mission, Washington. But, sometimes a Ministry of the Government places the order directly with the India Stores Department, London or with the India Supply Mission⁴, Washington.

42. The question of "established importers"⁵ was considered by the Import and Export Policy Committee⁶, which noted that with the severe import restrictions that had come about, the established importers had already ceased to enjoy a commanding position in the licensing system. The Committee, however, favoured the retention of the status-quo, because the small actual users had necessarily to secure their import requirements from the established importers⁷.

The figures of established importers etc. were given in an Appendix to the Report of that Committee⁸.

1. Paragraphs 4-5, *supra*.
2. Government of India, Ministry of Commerce, Import Trade Control Policy (The Red Book), for the year April, 1966 to March, 1967, pages 10, 96, 147 and 148.
3. Bepin Behari, Imports in a Developing Economy (1965), page 39.
4. Bepin Behari, Imports in a Developing Economy (1965), page 39.
5. Paragraph 39, *supra*.
6. The Import and Export Policy Committee (Government of India, Ministry of Commerce), Report (1962), page 19, para. 70.
7. The Import and Export Policy Committee (Government of India, Ministry of Commerce), Report (1962), page 19, para. 70.
8. The Import and Export Policy Committee, (Government of India, Ministry of Commerce), Report (1962), page 109, Appendix H.

43. For the present purpose, it is not necessary to discuss the various kinds of clauses¹ employed in contracts of sale, such as, *Ex works* or *Ex warehouse* or *Ex store*, *f.o.r* or *f.o.t.*, or *f.o.b.*, or *c.i.f.*, *f.a.s.*, etc. Nor does it appear to be necessary to discuss when the property passes in the case of the various categories of import sales².

44. Established importers are persons or firms actually engaged in the import trade of the articles at least for one financial year any time during the basic period specified for the article listed in the Import Trade Central Schedule³.

45. Then there are industrial undertakings which require raw materials, etc., for their own use. These are "actual users". These have to be registered or licensed under the Industries (Development and Regulation) Act, 1951⁴.

It is unnecessary to consider in detail the procedure which private importers have to comply with (regarding license, release of foreign exchange and other formalities). It is sufficient to say, that established importers have a specific place in the import structure, and even if their role may in the course of time become insignificant (as is sometimes stated)⁵, the problem with which we have to deal in this Report will for some time remain. Governmental agencies (like the State Trading Corporation), which import goods may also be faced with the same situation (taxation of sales).

47. What are known as the "intermediaries" are of two types—indent houses and managing agents. The work of indent houses has been thus described⁶.

Indent Houses: Indent houses operate both in the export and import trade and it is an important form of business in India. Under this system, the indentee, enters into an arrangement for delivering certain specified goods to the importer, foreign or Indian, at a specified price. One special feature of indent is that the indenting house, on accepting the order, has generally to purchase the goods at a favourable price so that it may be able to make a reasonable profit. Until the indentee is able to secure the goods at the stated price, he incurs no definite obligation for supplying

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1. These will be found discussed in Schimitthoff, *The Export Trade* (1962), pages 7 to 37.
 2. The matter is discussed in Schimitthoff, *The Export Trade*, (1962), pages 66 to 68.
 3. See Bepin Behari, *Imports in a Developing Economy*, (1965), page 39.
 4. See Bepin Behari, *Imports in a Developing Economy*, (1965), page 40.
 5. Dr. S.K. Verghese, *India's Foreign Trade* (Allied Publishers) (1964), page 48.
 6. Dr. S.K. Verghese, *India's Foreign Trade* (Allied Publishers) (1964) pages 102-103.

"the goods to the importer. If it is difficult to obtain the goods at the stated price, all that the indentee has to do is to notify the importer asking him to withdraw the order or raise the prices.

"The main advantage of conducting business on the basis of an indent is that the exporter is sure of a buyer on certain conditions. The indenter, on the other hand, can cancel the order only after hearing from the indentee that he is unable to execute the order. For all practical purposes the indentee conducts trade on his own account and not for a commission. There are special forms which the indentee fills up and the indenter signs. Apart from definite terms regarding the price and details of the goods, the indent form also stipulates conditions regarding shipment, delivery etc.

"Indent houses play a very important role in India's foreign trade. As, many of the indenting firms have wide foreign contracts, they constitute an integral link between the Indian and foreign traders. The indent houses in India spare the shippers the trouble of contracting a large number of importers. Moreover they enable Indian importers to obtain their requirements without elaborate foreign representations. Indent houses also assist in opening new markets for Indian goods.

"The bulk of indent business is in the hands of foreign firms, mainly British. Due to the acute competition among the various indenting firms, indent orders are accepted at very low rates and many of the indenting firms are working on very small margins. The policy of issuing import licences in favour of actual users has increased the importance of indent houses in our external trade. As many of the actual users have neither the experience nor the necessary foreign contracts to make their purchases from foreign markets, they increasingly rely on indent houses, which have wide foreign contracts and long experience, to obtain their requirements. Under the import control regulations, actual users are permitted to buy through indent houses."

48. We shall now deal with the existing laws relating to sales-tax¹. These laws fall under two categories. The power to levy a tax on the sale or purchase of goods (other than newspapers), is vested in the States; but, from this power, are excluded sales and purchase which take place

Two sets of sales-tax laws.

1. Some of the points made in the paragraphs relating to State Sales-tax have been suggested by the Report of the Committee on Sales Tax (on commodities exported from India 1964), Government of India, Ministry of Commerce, pages 110 and 111, Chapter 3, paragraphs 1 to 4.

in the course of inter-State trade or commerce. Sales or purchases in the course of inter-State trade are within the field of the Union. Therefore, there are two kinds of taxes on the sale or purchase of goods, namely, the State sales-tax, levied under the sales-tax law of the particular State, and the Central sales-tax, imposed under the Central Sales Tax Act, 1956, in respect of sales in the course of inter-State trade or commerce.

49. Therefore, where an importer imports the goods, the sale by the foreign vendor to him is not liable to be taxed, but where he sells the goods to another, then that sale by him, unless it is regarded as falling under article 286(1)(b) of the Constitution read with section 5 of the Central Sales-tax Act, is subject to sales-tax—the State sales tax or the Central sales-tax as the case may be, i.e. depending on whether the sale by the importer is or is not in the course of inter-State trade or commerce. (This is the general position, unless a specific exemption is granted under the State or Central Act).

Brief Review of system of Sales-tax. 50. We give, in an Appendix, a brief review of the system of sales-tax in India¹.

Decision on Amended Article 286 and on the Act of 1956. 51. The amended article 286 and the Central Sales Tax Act, 1956, have been discussed and interpreted by the Supreme Court in some decisions, which we shall discuss presently. Of these, the most important ones are *Tata Iron & Steel Co. v. S. R. Sarkar*²; *Cement Marketing Co. of India v. State of Mysore*³; *State Trading Corporation of India v. State of Mysore*⁴; *Singareni Collieries Co. v. Commissioner of Commercial Taxes, Hyderabad*⁵.

There are some other decisions also, which also will be briefly discussed later.

Before we proceed to discuss the cases, we would like to deal in brief with the object of the constitutional provisions.

Object of Constitutional provision-protection of foreign trade. 52. The Constitution of India, by means of the various devices in the legislative, economic and executive fields, has endeavoured to preserve the unity of India. It has also demarcated the legislative and taxing powers of the Union and the States, and has canalised these powers in well defined channels. One of these provisions deals with the

1. See Appendix 2.

2. *Tata Iron & Steel Co. v. S.R. Sarkar*, (1961) 1 S.C.R. 379; A.I.R. 1961 S.C. 65, 71, 72; 11 S.T.C. 655.

3. *Cement Marketing Co. of India v. State of Mysore*, (1963) 3 S.C.R. 777; A.I.R. 1963 S.C. 980; 14 S.T.C. 175.

4. *State Trading Corporation of India v. State of Mysore*, (1963) 3 S.C.R. 792; A.I.R. 1963 S.C. 548; 14 S.T.C. 188; (1963) 2 S.C.J. 131.

5. *Singareni Collieries Co. v. Commissioner of Commercial Taxes, Hyderabad*, A.I.R. 1966 S.C. 563; 17 S.T.C. 197.

power of the States to impose sales tax, and another—Article 286—lays down the various bans on these powers so as to prevent the States from trespassing on the federal field of international trade.

53. In the *State of Travancore-Cochin v. The Bombay Co. Ltd.*,¹ the Chief Justice, after referring to *Boddu Paidanna & Sons case*², said:—

“Lest similar reasoning should lead to the imposition of such cumulative burden on the export-import trade of this country which is of great importance to the nation’s economy, the Constituent Assembly may well have thought it necessary to exempt *in terms* sales by export and purchases by import from sales tax by inserting article 286(1)(b) in the Constitution.”

54. In the *Second Travancore-Cochin case*³, the Chief Justice pointed out⁴—

“The foreign trade of this country thus already enjoys immunity from double tax burden and suffers only one tax, namely, the export or import duty as the case may be.”

Mr. Justice Das, as he then was, said⁵ that the purpose of the Constitutional provision was to foster foreign trade and to preserve Union revenues. The Constitution had imposed a ban on the State Legislature preventing it from impinging upon the Union field of foreign trade and from imposing a tax on sales or purchases made in the source of import or export. Again, he said⁶—

“The object of our Constitution apparent from the distribution of legislative powers and from article 286, is to place our inter-State trade and our foreign trade beyond the taxing power of the State.”

55. Again, in the *Bengal Immunity case*⁷. Acting Chief Justice Das, as he then was, pointed out that the dominant if not the sole purpose of article 286 was to place restrictions on the legislative powers of the States, and, with that end in view, article 286 imposed several bans on the taxing powers of the States.

1. *State of Travancore-Cochin v. The Bombay Co. Ltd.*, (1952) S.C.R. 1112; A.I.R. 1952 S.C. 366; 3 S.T.C. 434.

2. *Province of Madras v. Boddu Paidanna Sons.* (1942) F.C.R. 90 A.I.R. 1942 F.C. 33.

3. *The State of Travancore-Cochin & Others v. Shanmugha Vilasa Cashew Nut Factory and Others.* (1954) S.C.R. 53; A.I.R. 1953 S.C. 333; 4 S.T.C. 205.

4. (1954) S.C.R. 53, 54.

5. (1954) S.C.R. 53, 91.

6. (1954) S.C.R. 53, 105.

7. *Bengal Immunity Co. v. State of Bihar.* (1955) 2 S.C.R. 603, 648; A.I.R. 1955 S.C. 661; 6.S.T.C. 446.

Cases decided before 1956.

56. The Supreme Court has considered the extent of the ban under Article 286 in several cases. We shall first discuss the cases decided before the Amendment of 1956. Of these, the two earlier ones, deal with import and export sales, and interpret the phrase sales "in the course of" import and export.

Travancore cases-First Travancore case.

57. The two cases are the *State of Travancore-Cochin v. The Bombay Co. Ltd.*,¹ and the *State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory*².

In the former³, the dealings consisted of export sales of various commodities to foreign buyers on c.i.f. or f.o.b. terms. The sales-tax authorities levied tax on those sale, but, on a petition to the High Court under article 226, the assessment was quashed, and the High Court gave a very wide meaning to the expression "in the course of". On appeal to the Supreme Court, it was held, that whatever else may or may not fall within article 286(1) (b) of the Constitution, sales and purchases which themselves occasion the export or the import of the goods, as the case may be, come within the exemption of article 286(1) (b). In his judgment, Patanjali C.J. thus defined the ban:

"A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction. Of these two integrated activities which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other. Assuming without deciding that the property in the goods in the present cases passed to the foreign buyer and the sales were thus completed within the State before the goods commenced their journey as found by the Sales Tax Authorities, the sales must nevertheless be regarded as having taken place in the course of the export and are, therefore, exempt under article 286(1) (b). That clause, indeed, assumes that the sale had taken place within the limits of the State and exempts it if it took place in the course of the export of the goods concerned."

58. Dealing with the argument that on the above construction sale "in the course of export" will become anonymous with "export" and would make clause (b) redundant because of article 246(1) read with Entry 3 of

1. (1952) S.C.R. 1112.

2. (1954) S.C.R. 53.

3. (1952) S.C.R. 1112.

4. (1952) S.C.R. 1112, 1118.

List I which relates to duties of customs including export duties, the Chief Justice observed, that in the absence of a provision like clause (b) prohibiting in terms a levy of tax on the sale or purchase of goods effected through the machinery of export and import, both the powers of taxation, though exclusively vested in the Union and the States, could be exercised in respect of the same sale by export or purchase by import, the sales tax and the export duty being regarded as essentially of a different character.

"A similar argument induced the Federal Court to hold in *Province of Madras v. Boddu Paidanna and Sons*,¹ that both central excise duty and provincial sales tax could be validly imposed on the first sale of groundnut oil and cake by the manufacturer or producer as "the two taxes are economically two separate and distinct imposts". Lest similar reasoning should lead to the imposition of such cumulative burden on the export-import trade of this country which is of great importance to the nation's economy, the Constituent Assembly may well have thought it necessary to exempt *in terms of sales by export* and purchases by import from sales tax by inserting article 286(1) (b) in the Constitution."

59. The Court² dealt with the argument that no sale or purchase can be "in the course of" unless the property in the goods is transferred to the buyer during the actual movement, e.g., when the shipping documents are endorsed and delivered within the State by the seller to a local agent of the foreign buyer after the goods have been shipped or where such documents are cleared by the Indian buyer before the arrival of the goods. This view, it was said, laid undue stress on the etymology of the word "course", and formulated a mechanical test, and would thereby rob the exemption of much of its usefulness. The sales and purchases which themselves occasion the export or import of the goods, as the case may be, out of or into the territory of India, come within the exemption.

60. To summarise, the *first Travancore case* decided that—

(a) Sales or purchases which themselves occasion the export or the import are within the clause "in the course of", and are, therefore, exempt under article 286(1) (b).

(b) (i) Sale by export involves a series of integrated activities commencing from the contract of sale with a foreign buyer and ending with the delivery of goods to a common carrier.

1. *Province of Madras v. Boddu Paidanna and Sons*, (1942) 4 F.C.R. 90; A.I.R. 1942 F.C. 33.
2. (1952) S.C.R. 1112, 1129.

(ii) Sale and resultant export form part of a single transaction.

(iii) Of these two activities, whichever happens first can be regarded as happening in the course of the other.

(c) Even if the sale is in the State before the commencement of the journey, the sale is, nevertheless, in the course of export.

(d) It is erroneous to say that sales "in the course of" mean sales in which property passes during the actual movement, because, to put it that way would rob the exemption of its usefulness, i.e. exemption from a State levy.

Second Travancore case. 61. In the *Second Travancore case*¹ the respondents were dealers in cashewnuts in the State of Travancore-Cochin. Their business consisted in importing cashewnuts from abroad and the neighbouring State of Madras in addition to purchases made in the local market, and, after processing them, exporting the kernels to other countries, mainly America. The oil pressed from the shells was also exported. The respondents claimed exemption under article 286(1)(b) in respect of the purchases made after the coming into operation of the Constitution. This claim was rejected by the taxing authorities, but the High Court, in a petition under article 226, quashed the imposition of the tax. The State appealed to the Supreme Court. The Supreme Court held by a majority—(the minority gave a wider interpretation)—that—

(1) The sales and purchases which themselves occasion the export or import of the goods out of or into the territory of India, fall within article 286(1)(b) and are exempt from State taxation.

(2) But purchases in the State by the exporter for the purpose of export, as well as sales by the importer after the goods have crossed the customs barrier, are not within the exemption.

(3) Sales in the State by the exporter or importer by transfer of shipping documents while the goods are beyond the customs barrier, are within the exemption.

(4) The word "course" and the expression "in the course of" not only imply a period of time during which the movement is in progress, but postulate also a "connected relation".

(5) Therefore, the sale in the course of export out of the country should be understood as meaning a sale taking place not only during the activities directed to

1. *The State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory*, (1954) S.C.R. 53; A.I.R. 1953 S.C. 333.

the end of exportation of the goods out of the country, but also as part of or connected with such activities.

(6) Mr. Justice S. R. Das (as he then was) in minority judgment included the last purchase by the exporter and the first sale by the importer to be within the exception.

62. The Chief Justice said¹, that a sale "in the course of export" means a sale taking place not only during the activities directed to the end of exportation of the goods out of the country but also as part of or connected with such activities. The time factor alone was not determinative.

The phrase "integrated activities", used in the previous *Travancore case*², denoted such a sale, i.e. a sale which occasions the export which cannot be dissociated from the export without which it cannot be effectuated and wherein the sale and the resultant export form parts of a single transaction. It is in that sense that the two activities—the sale and the export—were said to be integrated. A purchase for the purpose of export like production or manufacture for export is only an act preparatory to export and cannot be regarded as an act done in the course of the export of the goods out of the territory of India.

63. Reference was next made to *Export Trade by Schmittoff*, 2nd Edn., page 3, where the author said:

"From the legal point of view it is essential to distinguish the contract of sale which has as its object the exportation of goods from this country from other contracts of sale relating to the same goods, but not being the direct and immediate cause for the shipment of the goods. . . . When a merchant shipper in the United Kingdom buys for the purpose of export goods from a manufacturer in the same country the contract of sale is a home transaction; but when he resells these goods to a buyer abroad that contract of sale has to be classified as an export transaction."

64. Mr. Justice S. R. Das (as he then was) said that the constitutional purpose of the provision was to foster foreign trade and to preserve Union revenue. The Constitution had imposed a ban on State Legislatures preventing them from impinging upon the Union field of foreign trade and from imposing a tax on sales or purchases made in the course of import,—or, export. According to him, the phrase "in the course of" means sales

1. (1954) S.C.R. 54, 62.

2. (1952) S.C.R. 1112.

3. (1954) S.C.R. 53, 91.

which themselves occasion the export and import. He explained the previous judgment of 1952 (*The first Travancore case*) by saying, that by adopting the principle of integrated activity the Court had included an agreement for sale to or purchase from the foreign merchant as taking place within the period connoted by that phrase. The agreement for sale or purchase which occasions the export or import is obviously in point of time anterior to the actual and physical handing over of the goods to the carrier. Nevertheless, such a sale or purchase has been held to have taken place "in the course of export" or import, and therefore exempted from sales-tax. The only point on which Mr. Justice S. R. Das differed with the majority was that he included the last purchase as an integrated activity of the export sale and the first sale after the import as an integrated activity of the import sale. He pointed out the economic consequences of double taxation, i.e., of the imposition of sales tax on the export and import sales as eventually hampering foreign trade. The objective of the Constitution was to place inter-State trade and foreign trade beyond the taxing powers of the State. Under the article as it then stood, in the case of inter-State trade power was given to Parliament to lift the ban, but in the case of foreign trade no such power was given.

Combined
result of the
Travancore
cases.

65. These two judgments, both dealing with export-import, declared the law to be this—

(1)(a) The Constitution had imposed a ban on the levying of sales-tax on inter-State and import-export sales, and had made either exempt from sales tax by enacting article 286(1).

(b) The ban in the former case could, under the unamended Article, be lifted by Parliament, but not in the latter case.

(2) "In the course of" means sales or purchases which themselves occasion the export or import.

(3) In the *first Travancore case*, the Court, by adopting the principle of integrated activity, had included agreement of sale or purchase as being within the period connoted by the phrase "in the course of", even though the agreement of sale is anterior to the actual handing over to the carrier.

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1. (1954) S.C.R. 53, 96.
 2. Page 105 in the S.C.R.
 3. Paragraphs 57 to 64, *supra*.

(4) Where the sale and resultant export form parts of a single transaction, such a sale is exempt, as it has been held to have taken place in the course of export.

(5) Mr. Justice S. R. Das, in his minority judgment, included the last purchase preceding the export and the first sale after the import as falling within the phrase "in the course of". These, according to the majority view, were without the exemption.

66. The two cases relating to inter-State sales and the ban under Article 286 are the *State of Bombay vs. The United Motors (India) Ltd. and others*¹ and the *Bengal Immunity Co. Ltd. v. The State of Bihar*². In the *State of Bombay v. The United Motors (India) Ltd. and others*³, the constitutionality of the provisions of the Bombay Sales Tax Act of 1952 was under challenge. The Explanation to clause (1) of article 286 was interpreted, and the difficulties arising from its interpretation are discernible from the three opinions given in the majority and minority judgments in that case. This difficulty of interpretation was reinforced by the opinion of Venkatarama Ayyar J. in the *Bengal Immunity Co. case*. It is also shown by the judgment in *Ram Narain Sons Ltd. v. Assistant Commissioner of Sales Tax*⁵, which was decided after the *Bengal Immunity case*⁶.

Pre-1956 cases regarding inter-State sales—
(i) United Motors case,
(ii) Bengal Immunity case;
(iii) Ram Narain case.

67. In the *Bengal Immunity Co. v. State of Bihar*/S. R. Das acting C.J. (as he then was) pointed out the various bans which the Constitution makers had put in the Constitution, in regard to different aspects of sales or purchases of goods and the various checks on the legislative powers of the State at "different angles". In article 286(1)(b), they had considered sales and purchases from the point of view of foreign trade, and placed a ban on the States' taxing power in order to make such trade free from interference by the States by imposing sales tax.

Bengal Immunity case

1. *The State of Bombay v. The United Motors (India) Ltd. others*, (1953) S.C.R. 1069; A.I.R. (1953) S.C. 252; 4 S.T.C. 133.
2. *The Bengal Immunity Co. Ltd. v. The State of Bihar*, (1955) 2 S.C.R. 603; A.I.R. 1955 S.C. 666; S.T.C. 446.
3. *The State of Bombay v. The United Motors (India) Ltd., Others*, (1953) S.C.R. 1069; A.I.R. 1953 S.C. 252; 4 S.T.C. 133.
4. *The Bengal Immunity Co. Ltd. v. The State of Bihar*, (1955) 2 S.C.R. 603, 790; A.I.R. 1955 S.C. 661; 6 S.T.C. 446.
5. *Ram Narain Sons Ltd. v. Assistant Commissioner of Sales Tax*, (1955) 2 S.C.R. 483, 504; A.I.R. 1955 S.C. 765, 773; 6 S.T.C. 627.
6. *The Bengal Immunity Co. Ltd. v. State of Bihar*, (1955) 2 S.C.R. 603, 790; A.I.R. 1955 S.C. 661; 6 S.T.C. 446.

68. After referring to the two Travancore cases, the Chief Justice said¹—

“It should further be remembered that the dominant, if not the sole, purpose of article 286 is to place restriction on the legislative powers of the States subject to certain conditions in some cases and with that end in view article 286 imposes several bans on the taxing power of the States in relation to sales or purchases viewed from different aspects. In some cases the ban is absolute as, for example, with regard to outside sales covered by clause (1)(a) read with the Explanation, or with regard to imports and exports covered by clause (1) (b).”

Bengal Im-
munity case.

69. In the *Bengal Immunity Company*² case, the Company was registered as a dealer under Bengal Finance (Sales Tax) Act. Its products were sold throughout India and abroad, and were despatched from Calcutta against orders accepted by the Company in Calcutta. The Company had no agent or manager in Bihar nor any office or laboratory in that State. Notice was issued to the Company under the Bihar Sales Tax Act, calling upon it to apply for registration and to submit returns showing its turnover over a particular period. The Company denied its liability on the ground, *inter alia*, that it was a non-resident and that, it did not carry on any business in Bihar, and that the notice was *ultra vires* as the notice was hit by the prohibition against taxation of inter-State trade or commerce. The Supreme Court, by a majority, held, that the sales or purchases made by the Company which were sought to be taxed, aptly took place in the course of inter-State trade or commerce, and as there was no Parliamentary enactment providing otherwise, the State law could not tax these sales or purchases. The Acting Chief Justice observed:—

“The truth is that what is an inter-State sale or purchase continues to be so irrespective of the State where the sale is to be located either under the general law when it is finally determined what the general law is or by the fiction created by the Explanation. The *situs* of a sale or purchase is wholly irrelevant as regards its inter-State character.”

“We find no cogent reason in support of the argument that a fiction created for certain definitely expressed purposes, namely, the purposes of clause (1) (a), can legitimately be used for the entirely foreign and collateral purpose of destroying the inter-State character of the transaction and converting it into an inter-State sale or purchase. Such metamorphosis appears

1. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603, 646; A.I.R. 1955 S.C. 661; 6 S.T.C. 446.

2. *Bengal Immunity Co. v. State of Bihar*, (1955) 2 S.C.R. 603, 650; A.I.R. 1955 S.C. 661; 6 S.T.C. 446.

“to us to be beyond the purpose and purview of clause (1) (a) and the Explanation thereto. When we apply a fiction all we do is to assume that the situation created by the fiction is true. Therefore, the same consequences must flow from the fiction as would have flown had the facts supposed to be true been the actual facts from the start. Now, even when the *situs* of a sale or purchase is in fact inside a State, with no essential ingredient taking place outside, nevertheless, if it takes place in the course of inter-State trade or commerce, it will be hit by clause (2). If the sales or purchases are in the course of inter-State trade or commerce the stream of inter-State trade or commerce will catch up in its vortex all such sales or purchases which take place in its course wherever the *situs* of the sales or purchases may be. All that the Explanation does is to shift the *situs* from the point A in the stream to point X also in the stream. It does not lift the sales or purchases out of the stream in those cases where they form part of the stream. The shifting of the *situs* of a sale or purchase from its actual *situs* under the general law to a fictional *situs* under the Explanation takes the sale or purchase out of the taxing power of all States other than the State where the *situs* is fictionally fixed.”

70. The majority also held that fetters had been placed on the power of the States to make levy by way of sales tax over—

- (a) sales and purchases outside the State;
- (b) sales and purchases in the course of import or export;
- (c) except in so far as Parliament may otherwise provide, sales and purchases in the course of inter-State trade or commerce; and lastly
- (d) essential goods.

71. Venkatarama Ayyar J., in his minority judgment, in interpreting the words “in the course of inter-State trade”, said:^{1,2}

“A sale could be said to be in the course of inter-State trade only if two conditions concur: (1) A sale of goods, and (2) a transport of those goods from one State to another under the contract of sale. Unless both these conditions are satisfied, there can be no sale in the course of inter-State trade.”

1. *The Bengal Immunity Co. v. The State of Bihar*, (1955) 2 S.C.R. 603.

2. The decision in *Endupuri Narasimham v. State of Orissa*, (1962) 1 S.C.R. 314, 319, expressly adopts this approach; A.L.R. 1961 S.C. 1344; 12, S.T.C. 292.

Cases decided by the Supreme Court of after the Amendment of 1956.

72. We shall now consider decisions of the Supreme Court after the constitutional amendment of 1956.

We shall take up the important cases first¹, (being cases relied upon in *Khosla's case*) and next deal with other cases.²

Tata Iron Company's case.

73. Of the cases decided by the Supreme Court after the amendment of Article 286 which deal with inter-State sales, the most important is *Tata Iron & Steel Co. vs. S. R. Sarkar*³, on which the decision of the Supreme Court in *K. G. Khosla's case* is primarily founded. In the *Tata Iron case*, the facts were, that the company had its registered office in Bombay and a Head Sales Office at Calcutta and its factory in Jamshedpur in the State of Bihar.

It was registered as a dealer under the Bihar Sales Tax Act, and also as a dealer in the State of West Bengal. For the period of assessment, the company submitted its return of taxable sales to the Commercial Tax Officer at Calcutta, disclosing its gross taxable turnover in respect of sales liable to Central sales tax in the State of West Bengal. The company was directed by the Commercial Tax Officer, Calcutta to submit a statement of sales from Jamshedpur for the period under assessment, documents relating to which were transferred in West Bengal and for any other sales which might have taken place in West Bengal under section 3(b) of the Central Sales Tax Act. The company denied its liability and the jurisdiction of the Calcutta Sales Tax Officer. Its contention was, that all sales from Jamshedpur were of the type mentioned in section 3 (a) of the Central Sales Tax Act, and some of them fell under the category in section 3(b) of the Act. The Commercial Tax Officer, under these circumstances, made a "best judgment assessment", and called upon the company to pay about 41 lacs rupees as tax under the Sales Tax Act. The total turnover in respect of inter-State sales, as shown in its return to the Bihar Taxation authorities, was about 26 crores rupees, on which the company had paid 71 lacs rupees and odd as advance tax under the Sales Tax Act. The Company impugned the validity of the order of the Commercial Tax Officer of Bengal, and that was how the matter came to the Supreme Court.

74. Mr. Justice Shah, in delivering the majority judgment, said that the effect of the various amendments made by the Constitution (Sixth Amendment) Act of 1956 was, to invest Parliament with exclusive authority to enact laws imposing tax on sales or purchases taking place in the course of inter-State trade, and that the liability of tax

1. Paragraphs 73 to 82, *infra*.

2. Paragraphs 83 to 107, *infra*.

3. *Tata Iron & Steel Co. v. S.R. Sarkar*, (1961) 1 S.C.R. 379; A.I.R. 1961 S.C. 65, 71, 72; 11 S.T.C. 655.

under the Central Sales Tax Act on inter-State sales was imposed upon all sales effected by any dealer in the course of inter-State trade or commerce. The liability to pay tax arises, as the inter-State Sales-tax, though collected by the State in which the sales take place, is due to the Central Government and is payable at the rates prescribed in respect of inter-State sales by the State in which it is collected.

75. In the opinion of the majority, the decision in the two *Travancore-Cochin* cases had no bearing on the interpretation of section 3, clauses (a) and (b). In those cases, the expressions "in the course of import and export" and "in the course of inter-State trade or commerce used in Article 286 fell to be determined. The Constitution did not define those expressions, and Parliament had, in the Central Sales Tax Act, sought to define by section 3 when a sale or purchase is said to take place in the course of inter-State trade or commerce and by section 5 to define when a sale or purchase is said to take place in the course of import or export, and by section 4(1) to define when a sale or purchase of goods is said to take place outside a State. In delivering the majority judgment, Mr. Justice Shah observed:—

"In interpreting these definition clauses, it would be inappropriate to requisition in aid the observations made in ascertaining the true nature and incidents without the assistance of any definition clause of "sale outside the State" and "sale in the course of import or export" and "sale in the course of inter-State trade or commerce" used in Article 286.

"In our view, therefore, within clause (b) of section 3 are included sales in which property in the goods passes during the movement of the goods from one State to another by transfer of documents of title thereto: clause (a) of section 3 covers sales, other than those included in clause (b), in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, and property in the goods passes in either State."

76. In his minority judgment, Mr. Justice Sarkar (as he then was) expressed the view that a sale cannot fall under both clause (a) and clause (b) of section 3. For, then, it would be liable to be taxed twice. Clauses (a) and (b) were mutually exclusive. Interpreting these two clauses, Mr. Justice Sarkar said, that clause (a) of section 3 contemplates a sale where the contract of sale occasions the movement of the goods sold, and clause (b), a sale where transfer of property in the goods sold is effected by a transfer of documents of title to them. Of course, in the first case, the movement of the goods must be from one State to another, and in the second, the documents of title must be transferred during such movement.

1. *Tata Iron etc. v. S.R. Sarkar*, (1961) 1 S.C.R. 379, 391; A.I.R. 1961 S.C. 65, 71, 72; 11 S.T.C. 655.

77. To sum up, in the *Tata case*, the Supreme Court held—

(1) That Parliament having defined the phrase “in the course of” in sections 3 and 5 of the Central Sales Tax Act, the decision in the two *Travancore cases* had become inappropriate in interpretation of the phrase “in the course of” and therefore in regard to the question before the Supreme Court.

(2) Sales included in clause (b) of section 3 of the Sales Tax Act were those where the property in the goods passed during the movement of the goods from one State to another by transfer of documents of title.

(3) Clause (a) of section 3 of that Act included sales where movement was a consequence of a covenant or an incident of the contract of sale.

Other cases
relied on
in Khosla's
case.

78. Two other decisions dealing with Article 286 which were relied upon in *K. G. Khosla's case* were also cases of inter-State sales. They were *Cement Marketing Co. of India Ltd. v. The State of Mysore*,¹ and the *State Trading Co. v. The State of Mysore*.² Reference was also made to *Singareni Collieries Co. Ltd. v. Commissioner of Commercial Taxes*.³

Cement
Marketing
Co.'s case.

79. In the *Cement Marketing Co. of India and another v. State of Mysore*,¹ there were two appellants: The Cement Marketing Co. Ltd. and the Associated Cement Co. Ltd. The former were Sales Managers of the latter, a manufacturing concern, which had a dozen factories in different parts of India, none of which was in the State of Mysore. The former, i.e., the Cement Marketing Co., had its Head Office at Bombay, and a branch office at Bangalore in Mysore State, and was a registered dealer under the Mysore Sales Tax Act. Cement was, at all material times, a controlled article and its sale could be effected only on the authorisation given to the buyers by a proper Government officer. This authorisation, mentioning, *inter alia*, the factory from where the supply was to be made, had to be produced before the Cement Marketing Co., which, in its turn, instructed its Bombay office to despatch the cement in accordance with the authorisation to the buyer. None of these factories was in the State of Mysore. The goods were received in the State of Mysore by the purchaser. The

1. *The Cement Marketing Co. of India Ltd. v. The State of Mysore*, (1963) 3 S.C.R. 777; A.I.R. 1963 S.C. 980; 14 S.T.C. 175.

2. *The State Trading Corporation of India v. The State of Mysore*, (1963) 3 S.C.R. 792; A.I.R. 1963 S.C. 548; 14 S.T.C. 188; (1963) 2 S.C.J. 131.

3. *Singareni Collieries Co. Ltd. v. Commissioner of Commercial Taxes*, A.I.R. 1966 S.C. 563; 17 S.T.C. 197.

4. *The Cement Marketing Co. of India vs State of Mysore*, (1963) 3 S.C.R. 777; AIR 1963 S.C. 980; 14 S.T.C. 175.

Sales Tax Officer held the sales to be intra-State sales and, therefore, liable to sales tax, a view which was upheld by the High Court. The Supreme Court, on appeal, held, that under the sales, the movement of goods was from one State to another as a result of a covenant or incident of the contract of sale, and the sales were in the course of inter-State trade or commerce, and consequently exempt from sales tax. In coming to this conclusion, the Supreme Court referred, *inter alia*, to section 3 of the Central Sales Tax Act, and to the observations of Shah J. in *Tata Iron and Steel Co. v. State of Bihar*,¹ which were also quoted in *K. G. Khosla's* case.

"As stated above under the contracts of sale in the present case there was transport of goods from outside the State of Mysore into the State of Mysore and the transactions themselves involved movement of goods across the border. Thus, if the goods moved under the contract of sale, it cannot be said that they were intra-State sales. It was not the volition of the first appellant, to supply to the purchaser the goods from any of the factories of the second appellant. The factories were nominated by the Government by authorisations which formed the basis of the contract between the buyer and the seller. Applying these tests to the facts of the present case we are of the opinion that the sales were in the nature of inter-State sales and were exempt from sales tax. In these circumstances the contracts of sale in the present case have been erroneously considered to be intra-State sales."

80. The decision in *Rohtas Industries Ltd. v. The State of Bihar*² was distinguished, because there the contract was different and it had been held by the Court that the relationship which existed between the two companies (*Rohtas Industries and Cement Marketing Co.*) was of seller and buyer, and not of principal and agent³.

Rohtas case distinguished.

81. Thus, the test laid down in the *Cement Marketing case* to bring a sale within inter-State sale was—

Test laid down in Cement Marketing Co. case

(1) There must be a movement of goods from one State to another; and

(2) it must be as a result of a covenant or incident of the contract of sale.

(3) The factory from which the cement was to be supplied was nominated by the Government, which

1. *Tata Iron and Steel Co. Ltd. v. State of Bihar*, (1961) 1 S.C.R. 379, 391

2. *Rohtas Industries Ltd. v. The State of Bihar*, A.I.R. 1963 S.C. 347; 12 S.T.C. 615, 620.

3. *Cement Marketing Company of India Ltd. vs. State of Mysore* (1953).. 3, S.C.R. 777, 790 AIR 1963 S.C. 980; 14 S.T.C. 175.

term formed the basis of the contract. The factory was not within the volition of the Cement Marketing Company.

State
Trading
Corporation's
case and
Singareni
Collieries
case.

82. Another case referred to in *K. G. Khosla's* case was *State Trading Corporation of India Ltd. v. The State of Mysore*,¹ and there the decision was dependent upon whether the sale "occasioned the movement" of cement from a State other than Mysore into the State of Mysore within the meaning of section 3 of Central Sales Tax Act. It was found, that the cement in the disputed State was actually moved from another State into Mysore, and it was contended that the movement was not a result of a covenant or an incident of the contract of sale. In that case also, the sale was under a permit and on the terms contained in it, and, in the permit, it was provided that the supply had to be made from one or other of the factories situated outside Mysore and, therefore, the contracts were held to have contained a covenant that the goods would be supplied into Mysore from a place outside its border. A sale under such a contract, it was held, clearly fell within the term "inter-State sale" as defined in section 3(a) of the Central Sales Tax Act, and, therefore, no sales-tax could be levied by the State of Mysore on such a sale.

The Supreme Court, in *Khosla's* case, lastly referred to the case of *Singareni Collieries*, which is dealt with later².

Other cases
under article
286, decided
after 1956.

83. Having dealt with the important cases after 1956³, we shall now deal with other cases decided by the Supreme Court, after 1956, in which the question of exemption under article 286 was raised and decided.

84. Out of these, seven are cases of export sales⁴, one is a case of import sale⁵, two are cases in which the sales were sought to be brought within export sales^{6,7}, and one, though an inter-State sale, is a case wherein the question of import sales was discussed^{8,9}.

1. *State Trading Corporation of India Ltd. v. The State of Mysore*, (1963) 3 S.C.R. 792; A.I.R. 1963 S.C. 548; 14 S.T.C. 188; (1963) 2 S.C.J. 131.

2. Paragraph 107, *infra*.

3. Paragraphs 72 to 82, *supra*.

4. The seven *Export* cases are enumerated below ; paragraph 85, *infra*.

5. *J.V. Cokal's case*.

6. *Burmah Shell Case*.

7. *State of Kerala v. Cochin Coal Co.*

8. *Endupuri's case*.

9. Some other cases are dealt with in paragraph 107, *infra*.

85. The seven cases in which the question of exemption of export sales was discussed and decided are— Cases of Export sales.

- State of Madras v. Gurviah Naidu*;¹
Kailash Nath v. State of U.P.;²
State of Mysore v. Mysore Spinning and Manufacturing Co. Ltd.;³
Gordhandas Lalji v. B. Bannerjee;⁴
B. K. Wadeyar v. Daulatram Rameshwar Lal;⁵
The East India Tobacco Co. v. State of Andhra Pradesh;⁶ and
Ben Gorm Nilgiri Plantation Co. v. Sales Tax Officer, Ernakulam.⁷

86. In the *State of Madras v. Gurviah Naidu*⁸, it was held, that purchases of skins for the purpose of implementing the orders of the foreign buyers were not purchases "in the course of export" within the meaning of article 286(1)(b), because such purchases did not themselves occasion the export. The two *Travancore cases* were followed. S. R. Das, Actg. C.J. observed, that an assessee who purchases goods after securing orders is not exempt under article 286(1)(b) from liability to pay sales tax in respect of purchases made by him, because the purchases do not themselves occasion the export. Goods were purchased for export, but that purchase did not occasion the export. Gurviah Naidu's case.

87. *Kailash Nath v. State of U.P.*⁹ was also a case in which an exemption in respect of export was claimed. The U.P. Government had issued a notification under section 4 of the U.P. Sales Tax Act,¹⁰ exempting sales of cotton cloth or yarn manufactured in U.P. with a view to export such cloth or yarn outside the territories of India, on the condition that the cloth, etc. is actually exported and proof of actual export furnished. The assessee sold quantities of cotton cloth to customers known as indentors: the indentors Kailash Nath's case.

1. *State of Madras v. Gurviah Naidu*, A.I.R. 1956 S.C. 158 ; 6 S.T.C. 717.
2. *Kailash Nath v. State of U.P.*, A.I.R. 1957 S.C. 790 ; 8 S.T.C. 358.
3. *State of Mysore v. Mysore Spinning & Manufacturing Co. Ltd.*, A.I.R. 1958 S.C. 1002 ; (1958) 9 S.T.C. 188.
4. *Gordhandas Lalji v. B. Bannerjee*, A.I.R. 1958 S.C. 1006 ; 9 S.T.C. 581.
5. *B. K. Wadeyar v. Daulat Ram Rameshwar Lal*, (1961) 1 S.C.R. 924 ; A.I.R. 1961 S.C. 311.
6. *The East India Tobacco Co. v. State of Andhra Pradesh*, (1963) 1 S.C.R. 404 ; A.I.R. 1962 S.C. 1733 ; 13 S.T.C. 529.
7. *Ben Gorm Nilgiri Plantation Co. v. Sales Tax Officer, Ernakulam*, (1964) 7 S.C.R. 706 ; A.I.R. 1964 (2) S.C. 1755, 1755, 1760 ; 15 S.T.C. 754.
8. *State of Madras v. Gurviah Naidu* A.I.R. 1956 S.C. 158 ; 6 S.T.C. 717.
9. *Kailash Nath v. State of U.P.*, A.I.R. 1957 S.C. 790, 791, 793, paras. 2 and 11 ; 8 S.T.C. 358.
10. U.P. Sales Tax Act, 1948 (U.P. Act 15 of 1948).

printed the cloth with hand-made apparatus, and exported them overseas as hand-printed cloth. The *modus operandi* was, that the indenter, after receiving the order for supply of hand-printed cloth from foreign merchants, obtained an export licence which permitted him to export the cotton piece-goods to be manufactured by a textile mill. The mill, after getting the order from the indenter, manufactured to cloth intended for export, and delivered it to the indenter. The indenter paid the excise duty, and removed the goods to his place of business. He, then, printed the cloth by hand-printing, and exported it. The sales during 1953-54 by the assessee were held to be within the notification. The argument that the commodity manufactured had changed was rejected,¹ because the cloth exported was the same. The only thing that varied was the colour, which had been changed by printing and processing.

Govinda Menon J., dealing with the nature of the transaction and its liability to sales tax, said²—

“The essential pre-requisite is that the sale must be made *with a view to export*” as the emphasis is on the word “sale” and its time and purpose and not the manufacture of the cloth at a particular time for a particular purpose. Three conditions are necessary to be fulfilled in order to attract the exemption under the notification. They are— (1) the cloth must be manufactured in U.P., (2) the sale should be on or after 1st December 1949 with a view to export; and (3) there should be actual export of such cloth.”

Mysore
Spinning
Co's case.

88. In *State of Mysore v. Mysore Spinning and Manufacturing Co. Ltd.*,⁴ goods were sold to a licensed exporter who sold the goods to a foreign purchaser. The first sale was held not to be “in the course of export”. The licensed exporter was not the agent of the first seller, the assessee, and the two sales could not both have occasioned the export. It was only the second sale which did that, the assessee not being a party to it. The court held, that for a sale to be “in the course of export”, it must be the one which occasions the export, and it must directly concern the assessee as an exporter.

Gordhandas
Lalji's
case.

89. In *Gordhandas Lalji v. B. Bannerjee*,⁴ the facts found were, that the property in goods (tea) purchased by the dealer in West Bengal, had passed to Bombay merchants before the goods were handed over to the common carrier. Soon after the goods were purchased by the dealer, they

1. The *Second Travancore case* (Cashewnuts) was distinguished on this point.
2. *Kailash Nath v. State of U.P.*, A.I.R. 1957 S.C. 790, 793; 8 S.T.C. 358.
3. We have employed the distinguishing phrase “with a view to export”.
4. *State of Mysore v. Mysore Spinning & Manufacturing Co. Ltd.*, 1959 S.C.R. 379; A.I.R. 1958 S.C. 1002; 9 S.T.C. 188.
5. *Gordhandas Lalji v. B. Bannerji*; A.I.R. 1958 S.C. 1006; 9 S.T.C. 581.

were appropriated to the contract by the Bombay parties. The Calcutta dealer, on advice from the Bombay parties, applied for and obtained the requisite licenses for export of the goods, but the licences were all in the name of the Bombay parties. Thereafter in the usual course of business, the Calcutta dealer handed over the goods to the common carrier—the Master of the Ship in this case—through the shipping agents, the goods being bound down for export overseas. Thus, the goods were shipped from Calcutta to outside countries. These transactions were held not to be within article 286(1)(b), because the property in the goods had passed to the Bombay parties as soon as they were appropriated, and the export of the goods outside Calcutta was not on behalf of the dealer but was by and on behalf of the Bombay parties. The dealer could not be entitled to claim the exemption, because the title to the goods had passed in favour of the Bombay parties long before the goods were entrusted to the carrier, and there was no *privity* between the dealer in Calcutta and the foreign merchants to whom the goods were ultimately exported. The Court relied on its previous decision,¹ where it was held, that all sales that precede the one that occasions the export are taxable even if the goods are manufactured with the main intention of export. The decision in *Kailash Nath v. State of U.P.*² was distinguished, as in that case a certain notification which used the words “with a view to export” were construed, and the sales made were exempted because of the notification.

90. In *B. K. Wadeyar v. Daulat Ram Rameshwar Lal*,³ Wadeyar's case. the sales by the assesseees to an Indian purchaser, who had agreed to sell them to a foreign buyer, “were of f.o.b. contracts under which they” (the assesseees) “continued to be owners” till the goods crossed the customs barrier and entered the export stream. There were two sales which resulted in export. The first sale by the assesseees was held to be immune, because the property passed to the Indian purchaser when the goods were in the export stream. The first sale was so inextricably connected with the export that it was regarded as a sale in the course of export.

91. In *East India Tobacco Co. v. State of Andhra Pradesh*,⁴ East India Tobacco Co.'s case. a local purchase by a firm doing export business in tobacco which preceded the export sale, did not fall within article 286(1)(b) though it was made for the purpose of or with a view to export.

1. *State of Mysore v. Mysore Spinning & Manufacturing Co. Ltd.*, A.I.R. 1958 S.C. 1002; 9 S.T.C. 188.
2. *Kailash Nath v. State of U.P.* A.I.R. 1957 S.C. 790; 8 S.T.C. 358.
3. *B.K. Wadeyar v. Daulat Ram Rameshwar Lal*, (1961) 1 S.C.R. 924; A.I.R. 1961 S.C. 311.
4. *East India Tobacco Co. v. State of Andhra Pradesh*, (1963) 1 S.C.R. 404; A.I.R. 1962 S.C. 1733; 13 S.T.C. 529.

Ben Gorm
Nilgiri
Plantation
Co.'s case.

92. A case in which the Supreme Court again demarcated the boundaries of the phrase "in the course of export" in the light of the principles formulated in section 5 of the Central Sales Tax Act, is *Ben Gorm Nilgiri Plantations Co., Coonoor v. Sales Tax Officer*.¹ In that case, the facts were these: The assesseees were carrying on the business of growing and manufacturing tea. They were the sellers, and the purchasers were the local agents of foreign buyers. The sales, which were by public auction at Fort Cochin, and conducted through tea brokers, were effected in accordance with the provisions of the Tea Act, 1953. The Sales Tax Officer assessed those sales for purposes of the sales tax, and a petition under article 226 filed against assessment in the High Court, was dismissed. An appeal against was taken to the Supreme Court. By a majority, the Supreme Court held these sales to be liable to sales tax. The difference between the majority and the minority was as regards the interpretation of facts *vis-a-vis* the law applicable to it.

93. Mr. Justice Shah, who delivered the majority judgment, laid down the principles applicable in such cases as follows²:—

(1) Before the Constitution Amendment of the 1956, there was no legislative guidance, but such cases were governed by the interpretation put on the constitutional provisions in the two *Travancore cases*.³⁻⁴

(2) After the amendment, guidance was provided in section 5 of the Central Sales Tax Act, which was "legislative recognition" of what was said by the Supreme Court in the two *Travancore cases*.

(3) There is a distinction between a sale "for export" and a sale "in the course of export".

(a) "In general where the sale is effected by the seller, and he is not connected with the export which actually takes place, it is a sale for export". As an example, where a foreign purchaser or his agent purchases goods within India and they or one of them export or exports the goods from out of India, the sale would be a sale "for export", but such a transaction is not "in the course of export" even though the Indian seller had the knowledge of intended export.

(b) Where the export is the result of a sale and the export is inextricably linked up with the sale, so that the bond cannot be dissociated without a breach

1. *Ben Gorm Nilgiri Plantations Co. Coonoor v. Sales Tax Officer*, (1964) 7 S.C.R. 706; A.I.R. 1964 (2) S.C. 1752, 1755, 1656; 15 S.T.C. 753.

2. *Ben Gorm Nilgiri Plantations Co. v. Sales Tax Officer*, (1964) 7 S.C.R. 706, 711, 712.

3. (1952) S.C.R. 1112 (*First Travancore Case*).

4. (1954) S.C.R. 53 (*Second Travancore case*).

of the obligation arising by statute, contract or mutual understanding between the parties arising from the nature of the transaction, the sale is "in the course of export".

(c) Etymologically, "in the course of export" contemplates an integral relation or bond between the sale and the export."¹.

(4) Two types of transactions were given as instances:

(a) Where the goods are purchased by a foreign buyer himself or his agent purchases goods in India and exports the goods. Such a sale by the Indian seller is not within the phrase "in the course of", even though the seller has knowledge of the goods being intended for export;

(b) a transaction under a contract of sale with a foreign buyer, under which the goods are to be delivered by the seller to the common carrier for transporting them to the purchaser. Such a sale would indisputably be one in the course of export², whether the contract and delivery to the common carrier are effected directly or through agents.

(5) No single test can be laid down as decisive for determining the question whether a sale is in the course of export. Each case must depend on its own facts.

94. In the majority judgment³, it was held that the knowledge that the goods purchased are intended to be exported, does not make the sale and export parts of the same transaction, nor does the sale of the quota with the sale of the goods lead to that result. There is no statutory obligation upon the purchaser to export the chests of tea purchased by him with the export rights. The export quota merely enables the purchaser to obtain an export licence, which the purchaser may or may not obtain. There is nothing in law or in the contract between the parties, or even in the nature of the transaction, which prohibits diversion of the goods for internal consumption. The sellers have no concern with the actual export of the goods. Once the goods are sold, they have no control over the goods. There is, therefore, no direct connection between the sale and export of the goods which would make them parts of an integrated transaction of sale in the course of export.

95. After referring to various decided cases⁴, it was held, that the sales in that case did not occasion the export of the goods, even though the assessee knew (i) that

1. *Ben Gorm Nilgiri Plantation Co. v. Sales-tax Officer*, (1964) 7 S.C.R. 706, 712; A.I.R. 1964 (2) S.C. 1752, 1755, 1756; 15 S.T.C. 753.

2. The judgment describes the sales as one "for export", but this is apparently a slip for "in the course of export".

3. (1964) 7 S.C.R. 706, 713.

4. (1964) 7 S.C.R. 706, 717.

the buyers, in offering the bids for chests of tea and the export quotas, were acting on behalf of their foreign principals, and (ii) that the buyers intended to export the goods. There was between the sale and the export, no such bond as would justify the inference that the sale and the export formed parts of a single transaction or that the sale and export were integrally connected. The assesses were not concerned with the actual exportation of the goods, and the sales were intended to be complete without the export, and as such it cannot be said that the said sales occasioned export. The sales were, therefore, for export, and not in the course of export.

96. The minority judgment did not lay down any different principles. As we have said above¹, the difference between the two was in the application of the law to the facts of that case. In the opinion of the minority, there was but one sale to the foreign buyers which occasioned the export and which was implemented in accordance with the terms of the contract by an actual export which is the *sine qua non* of "a sale in the course of export".

97. In the minority judgment², Mr. Justice Ayyanger observed as follows :—

"As preliminary to the discussion of the question involved, we shall put aside certain types of transactions as regards which there is no dispute that they clearly fall on one side of the line or the other. On the one side of the line would be the case where a seller in pursuance of a contract of sale with a foreign buyer puts the goods sold on board a ship bound for a foreign destination. Such a sale would be an "export sale" which would undoubtedly be within the constitutional protection of article 286(1)(b). In regard to this type, however, we would make this observation. In such a case we consider that it would be immaterial whether or not with reference to the provisions of the Sale of Goods Act, read in conjunction with the terms and stipulations of any particular contract, the property in the goods passes to the buyer on the Indian side of the customs frontier or beyond it. In either event the sale would have occasioned the export, for the sale and the export form one continuous series of transactions, the one leading to the other—not merely in point of time but integrated by reason of a common intention which is given effect to. In such a case it would be seen that there is but one sale—to the

1. Paragraph 92, *supra*.

2. *Ben Gorm etc. v. Sales Tax Officer*, (1964) 7 S.C.R. 706, 719, 720; A.I.R. 1964 (2) S.C. 1752, 1755, 1656; 15 S.T.C. 753.

foreign buyer "which occasions the export", and which is implemented in accordance with the terms of the contract by an actual export which is the sine qua non of "a sale in the course of export".

"A case on the other side of the line would be one where the sale is effected to a resident purchaser who effects the export by sale of the goods purchased to a foreign buyer. Here the first sale to the buyer who enters into the export sale would not be a "sale in the course of export", for it would not be the particular sale which occasions the export, notwithstanding that the purchase might have been made with a view to effect the export sale, or to implement a contract of sale already entered into with a foreign buyer. That such a sale is not one "in the course of export" has been repeatedly held by this Court.^{1,2,3,4}

"This second type of case involves two sales—one to a resident purchaser who purchases it with a view to effect an export and the second, the export sale or sale in the course of export by the purchaser to a foreign buyer. The existence of the two sales and the consequent dissociation between the first sale and the export causes a hiatus between that sale and the export and destroys the integrality of the two events or transactions *viz.*, the sale and the factual export.

"The sales involved in the present appeals are not of the second type for here there is a single sale direct to a foreign buyer, the contract being concluded with and the goods sold delivered to his agent. It is hardly necessary to add that for purposes relevant to the decision of the question before us there could be no difference in legal effect between a sale to a foreign buyer present in India to take delivery of the goods for transport to his country and a sale to his resident agent for that purpose. Pausing here, we should mention that there is no dispute (1) that the persons who bid at the auction at Fort Cochin and purchased the teas of the assesseees were agents of foreign buyers or (2) regarding their having made these purchases under the directions of their foreign principals in order to despatch the goods to the latter—a contractual obligation that they admittedly fulfilled.

1. *State of Travancoor-Cochin v. Shanmugha Vilas Cashew Nut Factory*, (1954) S.C.R. 53; A.I.R. 1953 S.C. 333.
2. *State of Madras v. Gurviah Naidu and Co. Ltd.*, A.I.R. 1956 S.C. 158; 6 S.T.C. 717.
3. *State of Mysore v. Mysore Spinning etc. Co. Ltd.*, A.I.R. 1958 S.C. 1002; (1958) 9 S.T.C. 138.
4. *East India Tobacco Co. v. The State of Andhra Pradesh*, (1963) 1 S.C.R. 404; A.I.R. 1962 S.C. 1733; 13 S.T.C. 529.

"Under the sales here involved, though to foreign buyers and intended for export, the goods were not under the terms of the contract of sale placed by the seller on board the ship in the course of its outward voyage and that is the only reason why they do not conform strictly to the first type of an export sale which we have described earlier.

"But the question is, do not these sales also "occasion the export" and in that sense sales "in the course of export". The test which has been laid down by this Court for determining the proximity of the connection between the sale and the export so as to bring the sale within the constitutional exemption in article 286(1)(b) is the integrality of the two events—the sale and the export.

"The question to be answered is therefore whether the sales now under consideration do not form part and parcel of a single integrated transaction with the export or are they distinct distant and mediate, the sale and the export being related to each other only in the sense of one leading to the other or the one succeeding the other merely in point of time. If the former, the sales are within article 286(1)(b), but if the connection between the two is as described later, they are outside the exemption."

98. The minority was of the opinion, that even where there is no express term of the contract to export the goods, if the necessary intention is inferable, the sale would be in the course of export.

Mr. Justice Ayyangar said²:—

"If we are right, then what is of significance is the real and common intention of the two parties to the transaction—whether they contemplated the goods purchased being sold locally, or whether they intended the goods sold being only exported and not whether there is such a term in the contract between the parties."

99. The conclusion which the minority came to, was—

"If there was a contract or understanding between the buyer and seller by which the latter was to export the goods bought, it is conceded the sale of the assessee did occasion the export and in our view on the facts established, we consider this condition satisfied."

1. *Ben Gorm Nilgiri Plantations v. Sales-tax Officer*, (1964) 7 S.C.R. 706, 721; A.I.R. 1964 (2) S.C. 1752, 1755, 1756; 15 S.T.C. 753.
2. *Ben Gorm Nilgiri Plantations v. Sales-tax Officer*, (1964) 7 S.C.R. 706, 722; A.I.R. 1964 (2) S.C. 1752, 1755, 1756; 15 S.C.T. 753.

100. This decision of the Supreme Court shows, that if the integrated activity is such that the export is a necessary condition of the contract and there is no likelihood of diversion, the sale would be in the course of export. The minority view differed only in this, that it was prepared to extend that principle to a contract in which export could be taken to be intended and not necessarily where there was an express provision for the export of the goods purchased.

101. The case of sale in the course of import is *J. V. J. V. Gokal & Co (Private) Ltd. v. The Assistant Collector of Sales-tax (Inspection) and others*¹.

In that case, sale of foreign sugar to the Government by Gokal and Co., was by delivery of documents to the Government, while the goods were still outside the Customs barrier, and even the price was received during the period. This transaction was held to be a contract in which the sale took place in the course of import into India, and was therefore exempt from sales-tax under article 286(1) (b) of the Constitution.

102. The legal position vis-a-vis the import-sale was summarised thus by Mr. Justice Subba Rao J. (as he then was)²—

“(1) The course of import of goods starts at a point when the goods cross the customs barriers of the foreign country and ends at a point in the importing country after the goods cross the customs barrier;

(2) the sale which occasions the import is a sale in the course of import;

(3) a purchase by an importer of goods when they are on the high seas by payment against shipping documents is also a purchase in the course of import; and

(4) a sale by an importer of goods, after the property in the goods passed to him either after the receipt of the documents of title against payment or otherwise, to a third party by a similar process is also a sale in the course of import.”

In that case the sale was by delivery of shipping documents, and there was no intention to the contrary proved.

1. *J. V. Gokal & Co. (Pr.) Ltd., v. The Assistant Collector of Sales-tax (Inspection) and others.* (1960) 2 S.C.R. 852; A.I.R. 1960 S.C. 595.
2. *J.V. Gokal & Co. (Pr.) Ltd. v. The Assistant Collector of Sales-tax (Inspection) and others,* (1960) 2 S.C.R. 852, 861 (Subba Rao J.); A.I.R. 1960 S.C. 595.

‘Cases of sales sought to be brought within export sales.

103. The two cases where sales were sought to be brought within export sale, were—

(i) a case of sale of bunker coal to ocean going steamers¹, and

(ii) a case of sale of aviation spirit to international aeroplanes².

Cochin Coal Company's case.

104. In the *State of Kerala and others vs. The Cochin Coal Company Ltd.*,³ the question decided was, whether the sale of bunker coal was in the course of export. Bunker coal was stocked at Candle Island in the State of Madras. It was sold to steamers calling at the port of Cochin in the State of Travancore-Cochin, and delivered there. The assessee contended, that no sales-tax could be levied on these sales, since they were either sales “in the course of export” or “in the course of inter-State trade”, and therefore, exempt under article 286(1)(b) or article 286(2) of the Constitution, or under the Government notification under which sales falling within the Explanation to article 286(1)(a) made during a particular period were exempted from liability to pay a tax. It was held, that the delivery was for consumption within the State, and the sale fell within the Explanation to article 286(1)(a), and though the sales were in the course of inter-State trade falling within article 286(2), the tax was validated by the Sales-tax Validation Act, 1956. It was also held, that the sales were not made “in the course of export” and did not fall under article 286(1)(b), and that for article 286(1)(b) to apply, it was not sufficient that the goods merely moved out of the territory of India, but it was necessary that the goods should be intended to be transported to a destination beyond India.

Burmah Shell case.

105. A similar point was raised in *Burmah Shell Oil Storage and Distributing Co. of India Ltd. vs. The Commercial Tax Officer*,⁴ where the sale was of aviation spirit to international aeroplanes, and exemption was claimed on the ground that the sale was in the course of export. But such sales were held to be excluded from the phrase “in the course of export”, because there was no destination into which the aviation spirit could be said to be imported, the sale being for use on the journey.

1. *The State of Kerala v. The Cochin Coal Co.*, (1961) 2 S.C.R. 219; A.I.R. 1961 S.C. 408, 410.
2. *Burmah Shell Oil Storage & Distributing Co. of India Ltd. vs. The Commercial Tax Officer*, (1961) 1 S.C.R. 902; A.I.R. 1961 S.C. 415, 323, 324; 11 S.T.C. 764.
3. *The State of Kerala and others vs. The Cochin Coal Company Ltd.* (1961) 2 S.C.R. 219; A.I.R. 1961 S.C. 408, 410.
4. *Burmah Shell Oil Storage and Distributing Co. of India Ltd. vs. The Commercial Tax Officer*, (1961) 1 S.C.R. 902, 921, 923; A.I.R. 1961 S.C. 315, 323, 234; 11 S.T.C. 764.

Giving the judgment of the Court, Mr. Justice Hidayatullah said¹—

“From the views here expressed, it follows that every sale or purchase preceding the export is not necessarily to be regarded as within the course of export. It must be inextricably bound up with the export and a sale or purchase unconnected with the ultimate export as an integral part thereof is not within the exemption.”

“It may thus be taken as settled that sales or purchases for the purpose of export are not protected, unless the sales or purchases themselves occasion the export and are an integral part of it.”

Explaining the meaning of the word “export”, Mr. Justice Hidayatullah said that the test in the case of exports, is, that the goods must have a foreign destination where they can be said to be imported.

“If the goods are exported and there is a sale or purchase in the course of that export, and the sale or purchase occasions the export to a foreign destination, exemption is earned.....The crucial fact is the sending of the goods to a foreign destination where they would be received as imports. The two notions of export and import, thus, go in pairs.”

“Applying these several tests to the cases on hand, it is quite plain that aviation spirit loaded on board an aircraft for consumption, though taken out of the country, is not exported since it has no destination where it can be said to be imported, and so long as it does not satisfy this test, it cannot be said that the sale was in the course of export. Further, as has already been pointed out, the sales can hardly be said to occasion the export. The seller sells aviation spirit for the use of the aircraft, and the sale is not integrally connected with the taking out of aviation spirit. The sale is not even for the purpose of export, as explained above. It does not come within the course of export, which requires an even deeper relation. The sales, thus, do not come within article 286(1)(b)”.

106. The last case was *Endupuri Narasimham v. State of Orissa*². Although it was a case of inter-State sale under the unamended article 286, Venkatarama Aiyar J. expressed his opinion on both when a transaction of sale or purchase is within the phrase “in the course of inter-State trade or commerce” and when a transaction of sale

1. *Burmah Shell Oil Storage and Distributing Co. of India Ltd. vs. The Commercial Tax Officer*, (1961) 1 S.C.R. 902, 903; A.I.R. 1961 S.C. 315, 323, 324; 11 S.T.C. 764 (Reviews case law).

2. *Endupuri Narasimham vs. State of Orissa*, (1962) 1 S.C.R. 314; A.I.R. 1961 S.C. 1344; 12 S.T.C. 282.

or purchase is within the phrase 'in the course of export or import'. In regard to inter-State sales, the law was stated—

"that in order that it may be exempt it was essential that there is transport of goods from one State to another under the contract. A purchase of goods inside the State for a sale outside is not within the phrase "in the course of" and is, therefore, not exempt from sale¹".

And, in regard to import-export sales, Venkatarama Aiyar J. observed—

"..... it has been held by this Court that it is only a sale or purchase with occasions the export or import of the goods out of or into the territory of India or a sale in the State by the exporter or importer by transfer of shipping documents, while the goods are beyond the customs barrier, that is within the exemption, and that a sale which precedes such export or import or follows it is not exempted, *vide State of Travancore-Cochin vs. Shanmugha Vilas Cashewnut Factory*²."

Caltex case
and Singa-
reni case

107. Reference may also be made to a case decided by the Supreme Court in December, 1965³ where these were the facts. Pursuant to a contract between the Director General of Supplies, Delhi and the assessee for the supply of petrol to the State Mechanized Farm at Nandpur in the State of Jammu and Kashmir, the officer-in-charge of the Nandpur Farm placed indents with the assessee's depot at Pathankot in the Punjab State. The assessee transported petrol from Pathankot to Nandpur under the contract of sale. The petrol was kept in the storage depot of the assessee at Pathankot, and was carried in the assessee's truck and delivered to the farm at Nandpur. The price of the petrol so supplied was paid to the assessee at Delhi, by the Director General of Supplies. On these facts, the Supreme Court held, that there was a movement of goods from the State of Punjab to the State of Jammu and Kashmir under the contract of sale, and there was completion of sale by the passing of property to the purchaser. The transactions of sales between the parties were "in the course of inter-State trade". This was also the finding of the High Court, and it was not seriously challenged on behalf of the State of Jammu and Kashmir.

1 *Endupuri Narasimham vs. State of Orissa*, (1962) I.S.C.R. 314, A.I.R. 1961 S.C. 1344; 12 S.T.C. 282.

2 *State of Travancore-Cochin v. Shanmugh a Vilas Cashewnut Factory*, (1954) S.C.R. 53, A.I.R. 1953 S.C. 333 (Second Travancore case).

3 *State of Jammu and Kashmir v. Caltex India Ltd.*, (1966), 3 S.C.R. 149, 156; 17 S.T.C. 612 (Issue dated 15th June, 1966); A.I.R. 1966 S.C. 1350 (September issue), on appeal from A.I.R. 1962 J & K 89.

Therefore, under article 286(2) of the Constitution, as it stood before the amendment, sales-tax could not be imposed by the State of Jammu and Kashmir on the petrol so supplied by the assessee, under the Jammu and Kashmir Motor Spirit (Taxation of Sales) Act¹.

Thereafter, in a case of 1966², the test movement of goods being the result of a covenant or incident of the contract of sale was adopted, in relation to section 3 of the Central Sales-tax Act (inter-State Sales).

108. We shall also briefly refer to other cases where Article 286 was debated and decided.

Other decisions discussing article 286.

109. *The Commissioner of Sales-tax Eastern Division, Nagpur v. Huseinali Adamji and Co.*³ was not a case of an inter-State sale. But it was held on a proper construction of the contract, that the property in the goods sent did not pass to the buyer by mere delivery to the railways, but passed at Ambernath outside the State of C.P. when the goods were appropriated by the factory with the assent of the seller within the meaning of section 23 of the India Sale of Goods Act, 1930.

Huseinali's case.

110. In *Tobacco Manufacturers (India) Ltd. v. The Commissioner of Sales Tax, Bihar, Patna*⁴ the sale was an Explanation sale under the Explanation to article 286(1)(a), and, therefore, the case is not relevant for the purposes of our inquiry.

Tobacco Manufacturers case.

111. In *Indian Copper Corporation Ltd. vs. The State of Bihar and others*⁵, the property in the goods sold passed in the State of Bihar, but delivery was effected outside the State for consumption also outside the State. It was held, that this was an Explanation sale. This was a case under article 286(1)(a) read with the Explanation, being a pre-amendment sale.

112. To summarise what we have said above :

Summary of position.

(1) Under the Government of India Act of 1935, which introduced sales tax within the taxing powers of the Provinces of India, the tax was leviable at

1. The Jammu and Kashmir Motor Spirit (Taxation of Sales) Act, 2005 (1948).
2. *Signareni Collieries Co. v. Commissioner of Commercial Tax Hyderabad*, 17 S.T.C. 197; A.I.R. 1966 S.C. 563, 570, (April 1966 issue), on appeal from A.I.R. 1962 A.P. 75, 83, para 44 and 12 S.T.C. 765, 777.
3. *The Commissioner of Sales-tax, Eastern Division Nagpur vs. Huseinali Adamji & Co.*, (1959) Supp. 2 S.C.R. 702, 715 to 717; A.I.R. 1959 S.C. 887 (regarding appropriation of goods) (section 23, Sale of Goods Act); 10 S.T.C. 297.
4. *Tobacco Manufacturers (India) Ltd. vs. The Commissioner of Sales-tax Bihar, Patna*, (1961) 2 S.C.R. 106.
5. *Indian Copper Corporation Ltd. vs. The State of Bihar and others*, (1961) 2 S.C.R. 276; 12 S.T.C. 56.

the time of the sale which, for administrative reasons, was also the point at which Central Excise was leviable, though the two taxes were different and merely overlapped.

The Privy Council held, that the taxes on sales and duty of excise, though distinct, may be overlapping, because, for administrative reasons, both were leviable at the same point of time when the goods left the factory upon the occasion of sale¹.

(2) The Indian Constitution of 1950 continued the sales-tax as a tax on sales and purchases—entry 54 of List II (State List). But, at the same time, to prevent the imposition of the burden of double taxation, by Article 286 of the Constitution, a ban was imposed on the powers of the States to tax

- (i) sales and purchases outside the States,
- (ii) sales or purchases in the course of export and import of goods out of and into the territories of India,
- (iii) sales or purchases in the course of inter-State trade or commerce, and
- (iv) sale of goods declared by Parliament to be of special importance.

There was an Explanation in article 286(1), to determine the situs of inter-State sales.

(3) This ban was interpreted by the Supreme Court to apply to cases where the sale occasioned the movement of goods or the import or export or the sale took place during the movement by transfer of shipping documents or documents of title to the goods. The court also used the expression "integrated activities" meaning a sale (occasioning the export) which cannot be dissociated from the export without which it cannot be effectuated and the sale and the resultant export form part of a single transaction²⁻³.

In two other cases^{4,5}, which related to inter-State trade or commerce, the expression "in the course" was again interpreted. These four cases initially determined the extent of the ban under article 286 on the taxing powers

1. *Governor General-in-Council vs. Province of Madras*, 72 I.A. 91; A.I.R. 1945 P.C. 98.
2. *State of Travancore v. The Bombay Co. Ltd.* (1952) S.C.R. 1112, 1118, 1120; A.I.R. 1952 S.C. 366; 3 S.T.C. 434 (First Travancore Case).
3. *State of Travancore v. Shammuga Vilas Cashewnut Factory* 54) S.C.R. 53; I.A.I.R. 1953 S.C. 333 (Second Travancore Case).
4. *The State of Bombay vs. United Motors*, (1953) S.C.R. 1069; A.I.R. 1953 S.C. 252; 4 S.T.C. 135.
5. *The Bengal Immunity Co. vs. The State of Bihar* (1955) 2 S.C.R. 603; A.I.R. 1955 S.C. 661; 6 S.T.C. 446.

of the States in regard to taxes on sales and purchases in inter-State trade and export-imported sales and purchases.

These were the basic decisions, although there were two others^{1,2} following the Bengal Immunity case. The object of article 286, it was pointed out, was to prevent the States from trespassing on the federal field of international trade, by ensuring immunity from double tax burden on foreign trade. This was pointedly stated in the two Travancore cases above mentioned.

(4) This view of the law was adopted in latter cases also dealing with exports—*State of Madras v. Gurveyah Naidu and Co.*³ (sale and export of hides);

*Kailash Nath v. State of U.P.*⁴, (which was a case in which the words of notification "with a view to export" were interpreted);

*Gordhandas Lalji vs. B. Bannerjee*⁵, (where tea was exported by the sellers to a Bombay party on behalf of that party);

*State of Mysore v. Mysore Spinning etc. Co.*⁶

*B. K. Wadevar v. Daulat Ram Rameshwar Ltd.*⁷ (f.o.b. Contract);

*East India Tobacco Co. v. State of Andhra Pradesh*⁸, (export of Tobacco); and

*Ben Gorm Nilgiri Plantation Co. v. Sales Tax Officer, Ernakulam*⁹, (sale of tea).

(5) Owing to difficulties of and conflict in interpretation of the Explanation to article 286(1), and in pursuance of the recommendation of the Taxation Enquiry Committee¹⁰, article 286 of the Constitution was amended by the Constitution (Sixth Amendment) Act of 1956. The Explana-

1. *Ram Narain Sons Ltd. vs. Asstt. Commissioner of Sales Tax* (1955) 2 S.C.R. 483, 504; A.I.R. 1955 S.C. 765, 773.
2. *Mohan Lal Hargovind v. State of Madhya Pradesh* (1955) 2 S.C.R. 509; A.I.R. 1955 S.C. 787, 788.
3. *States of Madras vs. Gurveyah Naidu & Co.* A.I.R. 1956 S.C. 158 6 S.T.C. 717.
4. *Kailash Nath v. State of U.P.*, A.I.R. 1957 S.C. 790; 8 S.T.C. 358.
5. *Gordhandas Lalji v. B. Bannerjee*, A.I.R. 1958 S.C. 1006; 9 S.T.C. 581.
6. *State of Mysore v. Mysore Spinning & Mfg. Co. Ltd.*, (sales made for purpose of export), A.I.R. 1958 S.C. 1002;
7. *B.K. Wadevar v. Daulat Ram Rameshwar Lal*, (1961) 1 S.C.R. 924, A.I.R. 1961 S.C. 311.
8. *East India Tobacco Co. v. State of Andhra Pradesh*, (1963) 1 S.C.R. 404; A.I.R. 1962 S.C. 1733; 13 S.T.C. 529.
9. *Ben Gorm Nilgiri Plantation Co. vs. Sales Tax Officer*, (1964) 7 S.C.R. 706; A.I.R. 1964 (2) S.C. 1752, 1755, 1756; 15 S.T.C. 753.
10. Taxation Enquiry Committee Report (1953-54), Vol. 3, Page 48.

tion to article 286(1) was repealed, clause (2) of article 286 was replaced by a differently worded clause (2), and clause 268 was amended, the net effect being to give to Parliament the power to formulate principles for determining when the sale or purchase takes place in one of the modes specified in clause (1) of article 286.

(6) The Government of India sought the advice of the Law Commission as to legislation for formulating the principles contemplated in clause (2) of article 286. The Law Commission, by its Second Report, tendered its advice, which was adopted by the Legislature in verbatim in the third and fifth sections of the Central Sales Tax Act, 1956.

(7) This amendment and the operation of section 3 of the Central Sales Tax Act was considered by the Supreme Court case of inter-State sales, first in the *Tata Iron & Steel Co. vs. S. R. Sarkar*¹, then in *Cement Marketing Company of India v. State of Mysore*², and again in *State Trading Corporation of India v. State of Mysore*³.

(a) In Tata's case, it was held, that by enacting the Central Sales Tax Act the legislature had indicated how the expression "in the course of" inter-State trade or commerce was to be interpreted. It was said that—

(i) before 1956, there was no legislative guidance and the expression was governed by the interpretation put by the Supreme Court in two Travancore cases above referred to;

(ii) after 1956, the guidance was provided by the provisions of the Central Sales Tax Act—to be precise, section 3 dealing with inter-State trade or commerce. Those were cases of inter-State sales.

(iii) Clause (a) of section 3 covers cases where the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, irrespective of the State in which the property passes.

(iv) Clause (b) covers those cases where property passes during the movement of goods, from one State to another.

1. *Tata Iron & Steel Co. v. S.R. Sarkar*, (1961) 1 S.C.R. 379, 391; A.I.R. 1961 S.C. 65, 71, 72; 11 S.T.C. 655.
 2. *Cement Marketing Co. of India v. State of Mysore*, (1963) 3 S.C.R. 777; A.I.R. 1963 S.C. 980; 14 S.T.C. 175.
 3. *State Trading Corporation of India v. State of Mysore*, (1963) 3 S.C.R. 392; A.I.R. 1963 S.C. 548; 14 S.T.C. 188; (1963) 2 S.C.J. 131.

Thus, these cases interpreted the phrase "in the course of" to mean movement of goods in pursuance of a covenant or as an incident of the contract of sale. These expressions were used in the majority judgment by Mr. Justice Shah in *Tata's case*¹.

(8) Then come the cases where the language was elaborative and more explanatory. Of these, two are the *Burmah Shell case*² and *Ben Gorm Nilgiri Plantation Company's case*.³ These two cases used the expression "integral connection" between the sale and the export.

(i) In the latter decision⁴, a distinction was drawn between sale "for export" and sale "in the course of export". Mr. Justice Shah once again emphasised the legislative guidance, this time of section 5 of the Central Sales Tax Act. "In the course of export" comprised those sales in which the export is the result of the sale and is inextricably linked up with the sale, which bond cannot be dissociated without a breach of the obligation under a statute, contract or mutual understanding between the parties arising from the nature of the transaction. The concept, therefore, is that each link follows one from the other and there is an integral relation between the sale and the export, and between the seller and the export.

(ii) According to the majority view, which follows from above, the buyer's right to export the goods purchased or to divert them for a sale in India is a relevant consideration.

(iii) The view of the law as laid down by the minority in *Ben Gorm Nilgiri Plantation Co. v. Sales Tax Officer*⁵ was not substantially different.

(iv) In the *Burmah Shell case*⁶, Mr. Justice Hidayatullah emphasised, that for the sale to be exempt, an integral connection between the sale and the export was an essential requisite.

The emphasis in these two cases was on the integrality of the sale and the export, and, therefore, in the absence of one or the other, the ban of article 286 is inapplicable.

1. *Tata Iron & Steel Co. v. S.R. Sarkar*, (1961) 1 S.C.R. 379, 391; A.I.R. 1961 S.C. 65, 71, 72; 11 S.T.C. 655.

2. *Burmah Shell Oil Storage Co. v. Commercial Tax Officer*, (1961) 1 S.C.R. 902; A.I.R. 1961 S.C. 315, 323, 324; 11 S.T.C. 764.

3. *Ben Gorm Nilgiri Plantation Co. v. Sales Tax Officer*, (1964) 7 S.C.R. 706; A.I.R. 1964 (2) S.C. 1752, 1755, 1756; 15 S.T.C. 753.

4. *Ben Gorm Nilgiri Plantation Co. v. Sales Tax Officer*, (1964) 7 S.C.R. 706; A.I.R. 1964 (2) S.C. 1752, 1755, 1756; 15 S.T.C. 753.

5. *Ben Gorm Nilgiri Plantation Co. v. Sales Tax Officer*, (1964) 7 S.C.R. 706; A.I.R. 1964 (2) S.C. 1752, 1755, 1756; 15 S.T.C. 753.

6. *Burmah Shell Storage Co. v. Sales Tax Officer*, (1961) 1 S.C.R. 902; A.I.R. 1961 S.C. 315, 323, 324; 11 S.T.V. 764 (Reviews case law).

(9) Next the Supreme Court defined the area of the constitutional ban of article 286 (1)(b) in *K. C. Khosla's*¹, which was a case of import. There again, the Supreme Court relied on the language of Mr. Justice Shah in *Tata's case*² i.e. movement of goods as a result of a covenant or incident of the contract of sale and the integrality of the sale and the movement. And the inability to divert the goods covered by the sale to any other contract or to any other party was taken as a relevant consideration.

(10) (a) The decided cases show, that the Supreme Court has all along treated the sale and the movement whether by way of import or export under a contract of sale to be determinant of the applicability or the non-applicability of the ban. The language has varied from "occasioning the movement" to "the import or export being a consequence of a covenant or incident of the contract of sale."

(b) The Supreme Court has also held that integrality of the sale and export or import,—

(i) the movement or export must directly concern the assessee i.e. the seller³;

(ii) or there must be privity between the dealer and the foreign merchant⁴; or

(iii) the seller must be connected with the export and there should be an integral relation or bond between the sale and the export⁵;

(iv) or there must be a direct connection between the sale and export, so that the sale would not be completed without the export. Only then can a sale occasion an export⁶.

The minority in *Ben Gorm Nilgiri case*⁷ put the matter thus, (1) Do the sales form part and parcel of a single transaction with the export; or (2) Are they *distinct, distant and mediate*? If they are (1), they are in "in the course of" (export), and if (2), they are not.

1. *K.C. Khosla & Co. Private Ltd. v. Deputy Commissioner of Taxes, Madras*, A.I.R. 1966 S.C. 1216; 17 S.T.C. 473.

2. *Tata Iron & Steel Co. v. S.R. Sarkar*, (1961) 1 S.C.R. 379; A.I.R. 1961 S.C. 65, 71, 72; 11 S.T.C. 655.

3. *State of Mysore v. Mysore Spinning & Manufacturing Co. Ltd.*, A.I.R. 1958 S.C. 1002; (1958) 9 S.T.C. 188.

4. *Gordhandas Lalji v. B. Bannerji*, A.I.R. 1958 S.C. 1006; 9 S.T.C. 581.

5. *Ben Gorm Nilgiri Plantation v. Sales Tax Officer*, (1964), 7 S.C.R. 706; A.I.R. 1964 (2) S.C. 1752, 1755, 1756; 15 S.T.C. 753.

6. *See Ben Gorm Nilgiri Plantation Co. v. Sales Tax Officer*, (1964) 7 S.C.R. 706; A.I.R. 1964 (2) S.C. 1752, 1755, 1756; 15 S.T.C. 753.

7. *Ben Gorm Nilgiri Plantations v. S.T.O.*, (1964) 7 S.T.C. 706; A.I.R. 1964 (2) S.C. 1752, 1755, 1756; 1759; 15 S.T.C. 753.

In cases like the *Burmah Shell*¹ case, the ban was not applied, (1) because the spirit was for use *en route* and was not integrally connected with the export, and (2) there was no *destination* for import.

113. Therefore, the Supreme Court has interpreted the expression "in the course of" in terms of an integrated activity and the sale occasioning the movement or import or export as the case may be, or being a consequence of a covenant or incident of the contract incapable of being diverted to any other contract or party. The language used may have varied, but the words used all point to the same notion of integrality of the sale and movement of goods and inextricability of the bond between the sale and the movement.

Notions of integrality inextricable bond and non-divertibility emphasised.

114. Further, between the sale and the export or import, there was to be an integral relation or bond, so that the sale would not be complete without these operations. To put it differently, sales form part and parcel of a single transaction with the export or import, as the case may be, or they are so related to each other, one belonging to the other.

If the transaction is such that the seller cannot divert the goods to another contract or to any other party, that would be a relevant factor indicative of the sale being in the course of import.

115. In order to obtain a clear picture of the way in which the law as laid down by the Supreme Court has been understood and applied, to various combinations of facts, one can refer to various decisions of the High Courts². It is not necessary to discuss all those decisions in detail here. But a few may be referred to.

Decisions of High Courts

116. The facts in a *Calcutta case*³ are almost similar to those in the case of *Khosla*. That was a direct decision under article 286(1)(6) of the Constitution read with section 5(2) of the Central Sales Tax Act. The terms of contract in that case were, that the assessee was to import and supply electrical equipment to the Government of Punjab; that the equipment supplied was to be manufactured in England by a specified firm; that, after import, the equipment would be coordinated by the assessee and the assessee would be responsible for the transport, insurance and handling of the material up to the Indian port of entry and also beyond the port of entry, if so

Associated Electricals case.

1. *Burmah Shell Oil Storage Co. v. Commercial Tax Officer*, (1961) 1 S.C.R. 902; A.I.R. 1961 S.C. 315, 323, 324; 11 S.C.T. 764 (Reviews case law).
2. Some illustrative cases are summarised in Appendix 4.
3. *Associated Electrical Industries (Delhi) Ltd. v. Commercial Tax Officer*, 68 C.W.N. 776; A.I.R. 1965 Cal. 236, 238, 239, 241, paras 4, 11, 14, 25, 23 (D. Basu J.)

required; and that the Government also reserved to itself the right to inspect the goods during the course of the manufacture as well as afterwards. The price of the equipment to be supplied by the firm was detailed per item as f.o.b. price plus extra for c.i.f. and the Government was described as the purchaser. The assessee was also to supply the services of competent Engineers, who would supervise and be responsible for the erection of the plant, and for paying for these purposes. As regards the price, 90 per cent of the price was payable (in instalments) on arrival of the goods at the Indian port of entry, and the balance was payable "after completion of the acceptance tests and the commissioning of the plant."

117. On these facts, the High Court of Calcutta held the sale to be a sale which had occasioned the movement by way of import. The High Court observed:—

".....it is now settled that a sale will come within the expression when the movement of the goods from abroad into the territory of India is caused by a covenant in the contract between the seller and the buyer and that it is to be distinguished from the first sale effected by an importer after he has imported the goods into the territory of India."

It was pointed out, that from the terms of the contract entered into between the assessee and the purchaser, it was clear that the import of the materials by the assessee from the manufacturers in the United Kingdom and the sale to the purchase were parts of the same transaction, and that it was because of the contract of the sale between the parties that the materials had their movement from U.K. to India.

Bengal
Corpora-
tion's case
(Madras).

118. In this connection, we may also refer to a Madras case. We quote the facts from the judgment of Ramakrishnan J.²

"The terms of the contract indicate that the seller, Messrs Bengal Corporation Pr. Ltd. Netaji Subhas Road, Calcutta, had undertaken that the goods would be manufactured outside India, would conform to the specifications in the Schedule, that goods, after such manufacture, would be shipped between June 1957 and December 1957 to the Madras Port and that before shipment the nominee of the buyer namely, D.G.I.S.D., London, should inspect the goods to satisfy himself that the materials were in conformity with the specifications. He had also the right to be present during

1. Decisions in the *Second Travancore case and Cement Marketing Co. v. State of Mysore*, referred to.
2. *Bengal Corporation Private Ltd. v. State of Madras*, (1965) 16 S.T.C. 62, 90, 01. (Madras) (Ramakrishnan J.) (Decided 29 September 1964. (The Madras High Court's judgement in *Khosla's case*, dated August 1963 was not cited.)

the stages of manufacture of the goods outside India, and the expenses for his inspection would be paid by the seller and later on reimbursed by the buyer. It is, therefore, clear, that the contract had to be executed, by the Bengal firm, by securing a manufacturer in the U.K. to manufacture the goods according to the specifications and then get them shipped to the Madras Port before a specified date. The buyer—the department of the Government of India—had nothing to do with the contract between the Bengal firm and the manufacturer in U.K. At the same time, the manufacture in U.K. and the shipping from U.K. after the manufacture, *formed essential parts of the contract between the buyer and the seller*".

After noting the Supreme Court decisions relating to the word "occasions" in the Central Sales Tax Act (*Tata Iron Case etc.*), the High Court observed—

"This meaning of the word "occasions" as use in section 3(a) will apply also to the same word in section 5(2) of the Act. In the present case, it is an essential part of the contract of sale that the goods should be manufactured according to the specifications by a manufacturer outside India and that the goods had to be inspected by the nominee of the buyer at all stages of the manufacture to satisfy himself that even the manufacture was in accordance with the specifications. It will not suffice if the seller, to satisfy the contract, buys from the market in India goods of the specifications in the Schedule. The goods had necessarily to be manufactured in U.K. Nor would it satisfy the condition in the contract if the seller arranged for the manufacture of such goods in India. If that were to satisfy the requirements of the contract, there would not be any clause about inspection during the stage of manufacture by D.G.I., S.D., London, or for shipment after manufacture. It is, therefore, clear that the buyer proposed, and the seller accepted that for the execution of the contract the goods should be manufactured in the United Kingdom, and shipped from the United Kingdom to the Madras Port. Such shipment was also an essential feature of the contract, because, in the event of non-shipment between June, 1957 and December, 1957, the buyer was free to place orders for similar goods elsewhere and claim from the seller damages for non-fulfilment of the contract. Therefore, this is a very clear case where the movement of the goods from the U.K. to the Madras Port was the result of a covenant as well as an incident of the contract of sale; therefore the sale was in the course of import into the territory of India, and is not taxable by the Madras State."

The materials sold in that case were, as soon as they were received in the Jetty, to be delivered *Ex. jetty* to the Deputy Controller of Stores, Integral Coach Factory, Madras, and no demurrage incurred at the port upto the point of landing was to be reimbursed by the consignee. If the consignee so wished, the steel received was to be booked by rail, "freight to pay".

Bengal
Corporation's case
(Madras).

119. The judgment of Mr. Justice Ramamurti, on this point, was even more specific:—

"The learned Government Pleader contended that this transaction should be split up into two component parts; import of the goods by the assessee from London on his own initiative and then a subsequent sale in the State of Madras. This contention, in our opinion, is not correct on facts. There is no evidence in this case regarding the arrangement entered into between the assessee and the London manufacturer and there is no evidence as to when title to the goods passed from the manufacturer to the assessee. The assessee may enjoy some credit with the foreign manufacturer and title to the goods might have passed in London itself before or at the time of the shipment. But these are all matters not germane to the issue as the question is whether the sales tax is leviable on the transaction of sale entered into between the assessee and the Government. Even if the property in the goods passed inside the State after the steamer arrived, that would not make any difference as the passing of property inside the State is no longer of any relevance in determining the true character of a sale or purchase.

Common
thread.

120. To use an expression so explanatory of the English Criminal Law, throughout the web of the post Constitution Law in India relating to State taxation of inter-State and import-export sales and purchases, one common thread is always to be seen, that such taxes as impinge on foreign trade or impede the free movement of goods from one State to another are not within the State's powers of taxation.

Whether
decision in
Khosla's case
goes beyond
previous
cases.

121. The next question is, does the decision in *K. G. Khosla's case*² go beyond the two decisions on which the Second Report was based? As has been pointed out by Mr. Justice Shah in the *Ben Gorm case*³, the Legislature has, in section 5 of the Central Sales Tax Act, given

1 *Bengal Corporation Pr. Ltd. v. State of Madras* (1965) 16 S.T.C. 62, 63; (Madras) (per Ramamurthi J.).

2. *K.G. Khosla and Co. Private Ltd. v. Deputy Commissioner of Taxes, Madras*, A.I.R. 1966 S.C. 1216; 17 S.T.C. 473.

3. *Ben Gorm Nilgiri Plantations v. S.T.O.* (1964) 7 S.C.R. 706, 710; A.I.R. 1964 (2) S.C. 1752, 1755, 1756; 15 S.T.C. 753.

legislative recognition to the interpretation of the Supreme Court. The Second Report of the Law Commission had adopted the language used in the cases decided by the Supreme Court, which was, in *verbatim*, adopted by the legislature in the Central Sales Tax Act.

122. The question can be viewed in another way: was the import in *K. G. Khosla's* case inextricably linked up with the sale, so that the bond between the sale and the import could not be dissociated without a breach of the obligation arising under the contract or the mutual understanding between the parties arising from the nature of the transaction?

The contract, or the dealing between the parties, or the understanding between them, formed one integral whole, and were inextricably linked together. If it could be said that there was an integral bond or relation between the sale and the import even *steymologically* the sale was "in the course of import".

123. What are the essential covenants of the contract in *K. G. Khosla's* case? These are¹:—

- (i) manufacture in Belgium by a named manufacturer;
- (ii) inspection in Belgium by D.G. I.S.D., London;
- (iii) inspection again by Deputy Director of Inspections on the arrival of the goods in India and after clearance by *K. G. Khosla*;
- (iv) delivery of the goods to the consignee (the Railway), and inspection by the consignee to see whether the goods are in accordance with the conditions of the contract;
- (v) payment of price at various stages to *K. G. Khosla*; and
- (vi) right of the consignee (the Railway) to reject the goods if not in conformity with the terms and conditions of the contract, irrespective of the Inspector's certificate that they were according to specifications

Now, all these are integral links of the covenant in the contract in pursuance of which the goods moved from Belgium to India, and there was no likelihood of the goods being diverted by *K. G. Khosla* for any other purpose.

1. Paragraphs 8 to 16, *supra*.

124. The import was occasioned by, or was in pursuance of, the covenants in the contract, the various conditions and terms in which were the supply of properly fabricated goods in good condition to the Railway, for whose use these goods were to be supplied and for whose benefit the stringency of conditions was introduced in the contract. This, indeed, was one of the cases in which there was a direct connection between the sale and the import of goods, "which would make them parts of an integrated transaction of sale in the course of..."¹ The assessee "was connected with the actual importation" of the goods, and the sale was not intended to be complete without the import and therefore the sale was "in the course of import". We have adopted the language of Mr. Justice Shah in the *Ben Gorm Nilgiri* case.²

Situs of sale. 125. Some emphasis is placed in the letter of West Bengal Government on the *situs* of the sale. It states, that in such cases the "actual sale" takes place between the Indian branch and the Indian purchaser *after the import is complete*³.

We may, in this connection, refer to the observations of Mr. Justice Rutledge in an American case, which, though relating to inter-State sales, are apposite⁴:—

If the only thing necessary to sustain a State tax bearing upon inter-State commerce were to discover some local incident which might be regarded as separate and distinct from "the transportation or intercourse which is" the commerce itself and then to lay the tax on the incident, all inter-State commerce could be subjected to State taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an inter-State transaction taking place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All inter-State commerce takes place within the confines of the States and necessarily involves "incidents" occurring within each State through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as "separate and distinct" or "local", and thus achieve its desired result.

1. *Ben Gorm Nilgiri Plantations v. Sales tax Officer*, (1964) 7 S.C.R. 706, 712, 713; A.I.R. 1964(2) S.C. 1752, 1755, 1756; 15 S.T.C. 753.
2. *Ben Gorm Nilgiri Plantations v. Sales-tax Officer*, (1964) 7 C.S.R. 706, 712, 713; A.I.R. 1964 (2) S.C. 1752, 1755, 1756; 15 S.T.C. 753.
3. Paragraph 6, *supra*.
4. *Nippert v. Richmond*, (1946) 327 U.S. 416, 423, 2424, 90 L. Ed. 760, 764, 765 (licence tax on persons for soliciting orders for garments manufactured by a company outside the State).

'It has not yet been decided that every State tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable "local incident" may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the State would be sufficient in itself for striking down the tax on the process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax. But beyond the presence of a sufficient connection in a due process or "jurisdictional" sense, whether or not a "local incident" related to or affecting commerce may be made the subject of State taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce.....'

26. In this connection, the observations made by Das, Ag. C. J. in the *Bengal Immunity case*¹, (though made in relation to inter-State sales) may be referred to. He observed:—

"The truth is that what is an inter-State sale or purchase continues to be so irrespective of the State where the sale is to be located either under the general law when it is finally determined what the general law is or by the fiction created by the Explanation. The *situs* of a sale or purchase is wholly irrelevant as regards its *inter-State* character.... Now, even when the *situs* of a sale or purchase is in fact inside a State, with no essential ingredient taking place outside, nevertheless, if it takes place in the course of inter-State trade or commerce, it will be hit by clause (2). If the sales or purchase are in the course of inter-State trade or commerce the stream of inter-State trade or commerce will catch up in its vortex all such sales or purchases which take place in its course whatever the *situs* of the sales or purchases may be."

This aspect of the matter was also dealt with in the first *Travancore case*² where it was pointed out, that article 286(1)(b) "indeed assumes that the sale had taken place within the limits of the State and exempts it if it took place in the course of the export of the goods".

1. *Bengal Immunity Co. Ltd. v. State of Bihar*, (1955) 2 S.C.R. 603; A.I.R. 1955 S.C. 661; 6 S.T.C. 446, 481, (Das Actg. C.J.)

2. (1952) S.C.R. 1112, 1118.

127. Further, it should be pointed out, that what may be called the "non-local" incidents in *Khosla's case*¹ were so overwhelming that they more than counterbalanced the "local incidents". Chief amongst these were the stipulation that the manufacture shall take place outside India by a specified firm, and as per prescribed specifications, and that the goods shall be inspected there and imported for the consignee. Import rings through every word of the contract. The contract of sale could not have been carried without import. Conversely, but for the contract, the import would not have taken place. Integrality of the import and the sale is writ large on the face of the contract. Such being the facts, a narrower view would stultify the spirit of the immunity granted by the constitutional provisions (not to speak of the letter of those provisions as interpreted by the Courts). It should be remembered, that what is immune is not an import, but a sale in the course of import.

Transactions referred to in the letter of the Government of West Bengal. 128. We now address ourselves to the question whether the transactions dealt with the letter of the Government of West Bengal² should be regarded as taxable. The letter states, that generally there is a contract between the Indian Branch of the foreign manufacturer and the Indian purchaser, laying down the specifications of the goods required and the source of their manufacture, and that the goods are shipped to the foreign manufacturer's branch, which clears them, stores them³, and then delivers them to the Indian purchaser. It also states, that usually there is a provision in the contract for rejection of the goods (if found not to be in accordance with the contract). Now, these facts are not identical with those in *Khosla's case*. As was pointed out in the *Ben Gorm case*⁴ no single test can be laid down for all cases, and each case must depend on its own facts. Therefore, even if there is a movement of goods in pursuance of a contract, the sale would not necessarily fall within the decision in *Khosla's case*, if the "storage" is of such a nature as to detract from the integrality of the import and the sale.

Therefore, the assumption that such transactions would necessarily be exempt or fall within the rule laid down in *Khosla's case*, may not be correct. This being the position, we do not embark on a consideration of the question whether any amendment is required as to such transactions.

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1. Paragraphs 8 to 16, *supra*.
 2. Paragraph 6, *supra*.
 3. Storage is specifically mentioned in the letter of the West Bengal Government; paragraph 6 *supra*.
 4. Paragraphs 92 to 100, *supra*.

129. We would also like to point out, that it does not follow from *Khosla's case* that *other transactions* involving no such obligation as was involved in its facts would necessarily be regarded as immune from taxation. Cases where orders are placed with the agent or branch of a foreign producer or manufacturer, for goods of foreign origin, may or may not contain such an obligation. At the time of the contract of sale, the goods may be already in India with some other dealer, or they may be a type of goods which the agent has already in stock, being goods in which the agent deals usually. In the absence of a contractual obligation requiring the movement of the goods and followed by such movement, the sale by the foreign manufacturer's agent to the purchaser in India would be taxable, as it would not be a sale "in the course of import", not having occasioned the import,—unless there are any circumstances of a special character linking the import with the sale.

130. We have carefully considered the question whether a change in the law is required. Our conclusion is that the propositions emerging from *Khosla's case* are consistent with the two *Travancore* cases on which the Second Report of the Law Commission was based, and do not go beyond the intendment of those decisions. The particular situation involved in *Khosla's case* was, no doubt, not in issue at that time, but there is nothing in those decisions, which is inconsistent with the test of contractual obligation applied in *Khosla's case*. As we have attempted to show, as early as 1955, the test was referred to by the Supreme Court¹, and it has been applied and expounded in several decisions under the Act of 1956 as also under article 286².

Whether
change in
the law
required.

As new facts came up, naturally the principles laid down in earlier decisions had to be elaborated, and their various aspects and implications made more manifest. But this is a familiar process. In a matter pertaining to the Constitution or relating to a status purporting to formulate principles for applying constitutional provisions, judicial exigencies cannot be avoided.

131. It is, no doubt, true that the object of conferring a power on Parliament to lay down the principles for determining when a sale takes place in the course of import, etc., was to enable Parliament to deal with developments from time to time on the subject.^{3,4,5} It is,

Police mat-
ters not dealt
with.

1. See paragraph 71, *supra*.
2. Paragraphs 75 and 78-82, and 92 to 100, *supra*.
3. Cf. Taxation Enquiry Commission, Report, (1953-54), Vol. 3, pages 58-59, para 20.
4. See paragraph 22, *supra*.
5. See the Statement of Objects and Reasons to the Constitution (Tenth Amendment) Bill 1956, dated 30th April, 1956.

thus, permissible to bring about a suitable modification of the existing position in such manner as may be legally appropriate. That, however, is a matter involving several considerations, legal as well as others. With matters of policy, we do not profess to deal.

Suggestions
received.

132. We shall now summarise the suggestions received by us¹. (Vide paragraph 133 to 138).

133. Many persons and commercial bodies have stated that there is no need to amend the law as laid down in *Khosla's case*².

It has been pointed out in one of the suggestions³, that the exemption (as interpreted in *Khosla's case* does not mean a loss of tax, but the liability for tax is transferred to the other party, if the other party is at all liable to tax. If the Director General of Supplies and Disposals had imported the goods in his own name, there was no question of tax. *Khosla and Co.* were merely acting as indent agents, and should not be called upon to pay tax.

In another suggestion sent by a Cotton Association⁴, it has been stated, that cotton is an essential commodity and is being specifically imported into India only against "mills orders who alone was given import licenses and hence ought to get the benefit of section 5 as in the course of import into India".

In one suggestion it has been emphasised that⁵ the import of goods is subject to rigorous control by Government; that since devaluation, import has become costlier, and that in the context of rising industrial production and maintenance of the same at reasonable levels, it becomes necessary to import capital goods not available in India and spare parts for machinery for preventive maintenance, as well as essential raw materials to keep production at reasonable levels. If sales tax were to be charged on imported goods, it certainly adds to the cost of the end products and this element can scarcely be ignored in the context of inflationary tendencies.

In a suggestion sent by a Textile Mills in Bombay⁶, it has been stated that any change in the law, to impose tax on cotton imported by foreign trading agents, will cause disorder in the whole business sector of cotton import.

1. These suggestions were received in response to the Press Communique issued by us inviting views on the question referred to us. Views of State Governments were also invited by a separate letter.

2. S. Nos. 21, 29, 36, 44, 46 and 78.

3. S. No. 21.

4. S. No. 36.

5. S. No. 44 (A Chamber of Commerce).

6. S. No. 46.

In one article¹, it has been emphasised that *Khosla's case* merely follows previous rulings, in *Tata Iron Co. etc.*, namely, movement of goods as a result of a covenant or incident of the contract of sale; that if protection to export and import trade was needed in 1950, there is even a greater need today, and that transactions in which movement is not the result of a contract or in which there is a possibility of diversion, are still taxable.

134. A few suggestions are to the effect that the propositions laid down in *Khosla's case* should be codified².

One suggestion is to amend section 5(2) of the Central Sales Tax Act, 1956, as follows³:—

“A sale or purchase of goods shall be deemed to take place in the course of import of the goods into the territory of India, if incidental to the *contract to import the goods* the sale or purchase occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.”

A Chamber of Commerce⁴ has suggested that an *Explanation* should be added to section 5, to clarify that the following types of transactions should be regarded as sales/purchases having taken place in the course of import—

(a) supplies of goods to Government Departments, where the goods are imported on the strength of an import licence granted to the suppliers on the specific recommendation of the Government Department concerned, and are handed over by the suppliers to the Government Department concerned; and

(b) goods imported by suppliers at the request of holders of Actual Users' licenses and on the strength of a letter of authority obtained by them in favour of the suppliers and handed over to license holders after clearance.

135. Some of the suggestions even go further and desire an extension of the exemption not only to situations covered by *Khosla's case* but to others⁵.

Thus it has been pointed out⁶ that a sale by transfer of documents of title is not practicable now since import licenses are usually not transferable and therefore the

1. Article by Shri R.V. Patel, in *Sales Tax Review 1966* (September) pages 118 to 121 (Enclosure to S. No. 78).

2. S. Nos. 30 and 43.

3. S. No. 30 (from an Industrial concern in Bombay).

4. S. No. 43.

5. S. Nos. 28, 37, 52 read with 57, 53.

6. . No. 28.

transfer documents is not recognised by customs authorities. As such goods can be cleared only by the licensee or his agent and customs duty is paid in his name and delivery is taken only in his name. If the view that because the importer (license holder) has control over the goods until clearance therefore the sale is not in the course of import is upheld—(a view stated to be taken by Bombay Sales Tax authorities) then no sale can be said to have taken place during the course of import. It has, therefore, been suggested, that section 5(2), in so far as it relates to "occasioning the import", should be amplified to cover forward transactions whereunder the holder of an import license, before or after ordering out the goods, enters into a "forward contract" for sale with, say, B, and B deposits, with the license holder, some security and on receipts of shipping documents in the Bank, B pays the amount to the license holder, who pays it in the Bank and gets the documents released, and then,—

(a) (i) the license holder passed the documents to B to pay customs duty and to take delivery, or

(ii) B pays the duty to the license holder, who takes delivery, and

(b) thereafter the license holder issues his bill to B for sale of the goods as per terms of the contracts, and settles the account finally by recovering the balance of the sale price or by refunding the excess, as the case may require;

It has been stated, that in the above case, the sale has taken place much before the goods are cleared from customs, and even the sale price is paid by the buyer to the seller before clearance. Merely because the customs duty is paid in the seller's name because he had the import license, the sale is not recognised by the Sales tax authorities in Maharashtra as a sale in the course of import; but if this view is correct, no sale can be said to have taken place during the course of import. It is also stated, that practically no sale (of imported goods) can be made without license, and bona fide transactions of "forward sale", where the contract is made in advance, and the value of the goods is also paid in advance, should be treated as sales in the course of import.

Another suggestion is¹, that the first sale after import should be exempted, and, to compensate the States for loss of revenue, a customs duty surcharge or similar levy could be introduced. Individual States may agree to such amendment if, for instance, revenues collected as part of

1. S. No. 37 (Indo-German Chamber of Commerce).

customs in lieu of sales tax are allocated for export promotion schemes. Such an amendment, it is stated, would be a great advantage, for the following reasons—

(a) Economy in collection would be achieved, since individual contracts need not be scrutinised.

At present, it is stated, thousands of contract documents are verified by trade, sales tax authorities and tribunals etc. to determine taxability.

(b) Revenues would be paid on clearance through customs.

(c) Undue accumulation of tax on same material will be avoided, and there will be no dislocation of normal import trade channels.

At present, it is stated, numerous contracts are artificially placed to suit sales tax requirements, with corresponding disadvantages to the purchaser and the trade. The suggestion further, urges, that it is the wording "in the course of import" which has caused various interpretations, and that these complications are, unfortunately, not removed by the judgment in *Khosla's case*, because it will be very difficult to find a more precise wording.

In the suggestion of a Millowners Association¹, it has been stated, that there is every need for enlarging the area of transactions covered not only by section 5(2), but also by section 5(1). It is stated, that the sub-sections, as at present worded, do not encompass several other situations which could be genuinely described as sales or purchases taking place in the course of import or export in the true spirit of article 286. A good example of liberal extension, it is stated, is the exemption for two sales prior to export under the Bombay Sales Tax Act, 1959². It is also urged, that it is a widely prevalent practice in the import trade of India to import one's requirements through the local agent of the overseas manufacturers; and the local agents' presence has obvious advantages (obtaining quotations quickly and correctly, financing, helping in clearing, etc.). In essence, it is stated, imports by local agents for subsequent sale are no different from direct imports by the Indian customers from the overseas manufacturers.

The suggestions of one Chamber of Commerce³ is, that if section 5 is amended so as to exclude transactions of the type in issue in *Khosla's case*, then, further complications would arise in interpretation of the section, lead-

1. S. No. 52, read with S. No. 57.

2. The reference seems to be to section 12, Bombay Sales Tax Act, 1959 (Bombay Act 51 of 1959).

3. S. No. 53.

ing to further disputes, proceedings and harassment of dealers. It states, that the scope of section 5 should be enlarged so as to apply the section not only to the cases of the nature specified in *Khosla's case*, but also to other like transactions, in particular cases in which the licenses are issued for the import of particular kinds of goods, *whether manufactured or not for a particular purpose*. If the scope of section 5 is so enlarged, then, it is stated, it would certainly put an end to the uncertainty in the construction of the section.

136. A few replies¹ are in favour of restricting the exemption in a manner which would, in effect, nullify the decision in *Khosla's case*.

One suggestion² is, that section 5 requires substantial amendment so as to exclude the transactions of the type in issue in *Khosla's case*.

The suggestion of a State Government³ is, that an *Explanation* should be inserted in section 5, to clarify that, for the purpose of this section, where there takes place more than one sale in the course of a single movement of goods from a foreign country to India, the exemption admissible under this section will be confined only to the first of such sales. The proposed *Explanation*, it is stated, may also apply to a sale by transfer of documents of title.

The suggestion of the Administration of a Union territory⁴, is, that a provision should be made, either by amending section 5(2) or by inserting an *Explanation*, that only sales or purchases, arising from contracts between a seller exporting the goods from a foreign country and a person purchasing the goods from such seller or purchasing the goods by transfer of documents of title to the goods before the goods have crossed the customs frontiers of India, shall be deemed to take place in the course of import.

One State Government⁵ has suggested, that only cases where movement (inter-State or by way of import) is a *direct result* of a covenant in the contract of sale, should be covered. Its letter makes a distinction between movement occasioned by a covenant and movement incidental

1. S. Nos. 32, 45, 90, 102.

2. S. No. 32.

3. S. No. 45.

4. S. No. 90.

5. S. No. 99 (A State Government).

to the contract. We quote the amendment suggested by it in section 5:—

‘Amendment of section 5:—In section 5 of the principal Act, the following *Explanation* shall be added at the end, namely,—

“*Explanation.*—Where the movement of goods is merely incidental to but not a direct result of a covenant of the contract of sale, it shall not be deemed to be the movement occasioned by such sale or purchase.”¹.

137. Some of the suggestions² have emphasised the need for legalising the collection of tax by dealers before the decision in *Khosla's* case.

Thus, it has been suggested³, that for the tax already charged by dealer and deposited with Sales Tax Authorities claims should be against the State and not against dealer. It has been stated, that the tax received by the dealers from the D.G.S. & D. has already been deposited by the dealers with the Sales Tax Authorities concerned, in terms of the State laws. Now, the D.G.S. & D. are deducting the amounts of Sales Tax, even in cases where the supplies were completed before 18th January, 1966, (date of the judgment in *Khosla's* case). It is, therefore, suggested, that while considering an amendment of section 5, a provision should be made in the Act, if necessary, that in cases of sales made prior to 18th January, 1966, for which sales-tax has been already deposited, the sales tax should not be realised from the parties (dealers), and any realisation made on that account should be refunded to them. The trade should not be allowed to suffer.

Another suggestion⁵ is, that an Ordinance to confine the application of the judgment in *Khosla's* case to subsequent transaction is advisable, in order to save State Governments from refund claims on past transactions.

138. The Finance Ministry⁶ has in its reply to the Law Commission's request for comments as to the need for amendment of section 5, stated, that its views are those expressed in the papers which led to the reference to the Law Commission.

1. Similar amendment in section 3 has been suggested, in the same letter.

2. S. No. 55, S. No. 66, S. No. 29.

3. S. No. 66.

4. S. No. 55.

5. S. No. 29.

6. S. No. 89.

Those papers¹ raise a query whether the Act of 1956 was intended to cover transactions of the type in issue in *Khosla's case* or the transactions referred to the Government of West Bengal's letter. In those papers emphasis was laid on paragraph 9 of the earlier Report², where the suggestion to exempt the first sale following import was not accepted.

It is stated, that there is nothing in the printed Report of the Law Commission to suggest that it was the Law Commission's intention that transactions of the nature described in the judgment in *Khosla's case* should fall within the scope of "sale in the course of import". The papers seek the advice of the Law Ministry as to whether any amendment to section 5(2) of the Act is called for, if the judgment in *Khosla's case* goes beyond the intention of Law Commission, and also whether (if the object cannot be achieved by amending the Act), the Constitution should be amended for the purpose.

139. We have already stated³, that we do not consider any change in the law to be necessary. For the purpose of the present Report, it is not necessary to consider the question of *codification* of the propositions laid down in *Khosla's case*, or *enlargement* of the existing exemption in any other manner. We bring those the various suggestions to the notice of the Government, for such action as may be considered proper.

Debates in
the Constituent Assembly.

140. Before reaching our conclusion on the subject, we wished to satisfy ourselves whether there was anything in the debates in the Constituent Assembly which might throw light. Article 264A of the draft Constitution⁴, was discussed in detail before the Constituent-Assembly on the 16th October, 1949⁵. A clue to the intent of the Constitution-makers is furnished by the following observations of Dr. Ambedkar⁶:—

"Sir, as everyone knows, the sales tax has created a great deal of difficulty throughout India in the matter of freedom of trade and commerce. It has been found that the very many sales taxes which are levied by the various Provincial Governments either cut into goods which are the subject matter of imports or exports, or cut into what is called inter-State trade or commerce. It is agreed that this kind of chaos ought

1. Ministry of Finance, Dept. of Revenue & Insurance, U.O. No. 3(3)-ST/66, dated 2nd July 1966 to Ministry of Law, Deptt. of Legal Affairs.
2. Second Report of the Law Commission (Parliamentary legislation relating to Sales tax), paragraph 9.
3. Paragraph 130, *supra*.
4. Article 264A corresponded to present article 286.
5. Constituent Assembly Debates 325 to 340.
6. C.A.D. 326.

not to be allowed and that while the Provinces may be free to levy the sales tax there ought to be some regulations whereby the sales tax levied by the Provinces would be confined within the legitimate limits which are intended to be covered by the sales tax. It is, therefore, felt that there ought to be some specific provision laying down certain limitations on the power of the Provinces to levy sales tax.

"The first thing that I would like to point out to the House is that there are certain provisions in this article 264A which are merely reproductions of the different parts of the Constitution. For instance, in clause (1) of article 264A as proposed by me, sub-clause (b) is merely a reproduction of the article contained in the Constitution, the entry in the Legislative List that taxation of imports and exports shall be the exclusive province of the Central Government. Consequently so far as sub-clause (1) (b) is concerned there cannot be any dispute that this is in any sense an invasion of the right of the Provinces to levy a sales tax.

Similarly, sub-clause (2) is merely a reproduction of Part XA which we recently passed dealing with provisions regarding inter-State trade and commerce. Therefore so far as sub-clause (2) is concerned there is really nothing new in it. It merely says that if any sales tax is imposed it shall not be in conflict with the provisions of Part XA.

With regard to sub-clause (3) it has also been agreed that there are certain commodities which are so essential for the life of the community throughout India that they should not be subject to sales tax by the province in which they are to be found. Therefore it was felt that if there was any such article which was essential for the life of the community throughout India, then it is necessary that, before the province concerned levies any tax upon such a commodity, the law made by the province should have the assent of the President, so that it would be possible for the President and the Central Government to see that no hardship is created by the particular levy proposed by a particular Province."

One of the Members of the Constituent Assembly¹ referring to the provision proposed to the effect that the State law shall not impose a tax, etc., which takes place in the course of import of goods into, or export of the goods out of, the territory of India, made this criticism:—

"Now, this gives a great loop-hole to the businessman to escape taxation. In all cases of export, there

1. Shri Amiyo Kumar Ghosh, speech in the Constituent Assembly, 9 C.A.D. at page 333.

are various transactions before the commodity is actually exported from the country. But under this clause, all these transactions—the intermediate transactions which take place—are exempted from sales-tax. I could have understood the position if it was that at the point of export, that is to say, the last transaction, wherefrom it is actually exported, the sales-tax will not be realisable at that point. But this clause as it stands means that all transactions which take place in the course of sending the goods outside the territory of India will be exempted from sales-tax. Now, how can you check the nature of these transactions? A buys a commodity saying that he will export it. But he does not export it, but sells to B, and B purchases it saying that he will export it, and in this manner the commodity passes on from one hand to other and from one Province to another without payment of any tax, and it may be that in the end it is not exported at all. How can you check up this process? There will be a lot of difficulty and confusion, if this clause is passed as it stands. So my humble submission is that here, export and import should be clearly defined, and we must say that export means the last transaction and import means the first transaction, and only at the point of these two transactions commodities will be exempted from sales tax, and at no other point.”

141. His desire for clarification was supported by another member¹. In his reply to the debate, Dr. Ambedkar² stated, that he knew that some friends did not like the phraseology “in the course of export”, etc., But he added, that the Drafting Committee had spent a great deal of time in order to choose the exact phraseology. The Drafting Committee was satisfied that the phraseology was as good as could be invented, but he stated that the Committee would further examine this particular phraseology, in order to see whether some other phraseology could not be substituted, so as to remove the criticism which had been made against this part of the article.

142. The Drafting Committee did not, however, make any change after this debate³.

Observations
in Bengal
Immunity
Co.'s case.

143. The observations in the *Bengal Immunity Case*⁴ may be usefully referred to:

“It should be noted that these are four separate and independent restrictions placed upon the legisla-

1. Shri Jagat Narain Lal, 9 C.A.D. 334.

2. 9 C.A.D. 340.

3. The Report of the Drafting Committee dated 3rd November, 1949 does not deal with this point.

4. *Bengal Immunity Co. Ltd. v. The State of Bihar*, (1955) 2 S.C.R. 603; A.I.R. 1955 C.S. 661, 6 S.T.C. 446, 471.

tive competency of the States to make a law with respect to matters enumerated in Entry 54 of List II. In order to make the ban effective and to leave no loop-hole the Constitution-makers have considered the different aspects of sales or purchases of goods and placed checks on the legislative power of the States at different angles. Thus, in clause (1) (a) of Article 286, the question of the situs of a sale or purchase engaged their attention and they forged a fetter on the basis of such situs to cure the mischief of multiple taxation by the States on the basis of the nexus theory. In clause (1) (b) they considered sales or purchases from the point of view of our foreign trade and placed a ban on the States' taxing power in order to make our foreign trade free from any interference by the States by way of a tax impost. In clause (2) they looked at sales or purchases in their inter-State character and imposed another ban in the interest of the freedom of internal trade. Finally, in clause (3) the Constitution-makers' attention was rivetted on the character and quality of the goods themselves and they placed a fourth restriction on the States' power of imposing tax on sales or purchases of goods declared to be essential for the life of the community. These several bans may overlap in some cases but in their respective scope and operation they are separate and independent. They deal with different phases of a sale or purchase but, nevertheless, they are distinct and one has nothing to do with and is not dependent on the other or others".

144. It is true that the Taxation Enquiry Commission¹ made these observations regarding import and export sales:—

Taxation
Enquiry
Commission
and foreign
trade.

"In regard to foreign trade, i.e., sales which constitute import and export in terms of the country as a whole, the present position under the Constitution may be regarded as satisfactory. As interpreted by the Supreme Court, this position is briefly that those sales and purchases which themselves occasion the export or import, and those sales in the State which are effected by the importer by transfer of shipping documents while the goods are still beyond the customs frontier are excluded from the sales tax jurisdiction of the States. Purchases in the State by the exporter for the purpose of export and sales in the State by the importer after the goods have crossed the customs frontier are held to be not within the exemption. Hardly any State has complained about the particular provision of the Constitution which concerns this aspect. We consider the position under the Constitution to be perfectly satisfactory so far as foreign trade is concerned."

1. Taxation Enquiry Commission Report, (1953-54), Vol. 3, page 48, para 7.

145. But, again, those observations were not addressed with reference to a sale which stipulates movement. Rather, the test of "occasions the movement" was approved, and that is exactly the test embodied in section 5 of the Central Sales Tax Act, 1956.

Export Sales exemption from sales tax.

146. We find, that the Import and Export Policy Committee¹ stated, that the expression "in the course of export" was rather ambiguous. That Committee noted that there were suggestions that a liberal view should be taken of the expression "in the course of import or export", and that the Central Sales Tax Act should be suitably amended. In fact, that Committee recommended that the Central Government should assume responsibility for remission of sales-tax entering into export costs, and that the Central Government may either "recover the due amount from the State Government, or make such financial re-adjustments with the State Governments, as they may deem appropriate". Thereafter, a Committee was appointed by the Government of India to study the incidence of State and Central Sales taxes on commodities entering the export trade of India, and to indicate the quantum of relief².

147. The latter Committee made detailed recommendations for relief in respect of two sales prior to the sale in the course of export³.

No recommendation in the past for import sales.

148. So far as we could ascertain, no such recommendation has been made with reference to *imports*, apparently because the question of *promoting* imports could hardly have been taken up in the present economic condition of the country.

Law in other countries.

149. Before reaching our conclusions, we made an endeavour to study the position in some of the other Federations,—Australia, U.S.A. and Canada.—as well as in England. We found that it was not possible to state *very precisely* the law on the subject in those countries. We made a long and detailed study of the constitutional provisions, case law and literature on the subject in those countries. The exact problem with which we are dealing has not arisen in the Federations mentioned above in the form in which it was presented in *Khosla's case*, and we therefore thought it unsafe to draw any conclusions as to the legal position in those Federations with reference to the problem dealt with in this Report.

1. Report of the Import and Export Policy Committee, Government of India, Ministry of Commerce (1952), pages 36-37, Chapter 4, paragraphs 63 to 67 and footnote on page 36.
2. Report of the Committee on Sales-tax (on commodities exported from India), (1964), Government of India, Ministry of Commerce, page 8 and 9, Chapter 3, paragraphs 13-14.
3. Report of the Committee on Sales-tax (on commodities exported from India), Government of India, Ministry of Commerce (1964), pages 26 to 31, Chapter 5, paragraphs 9 to 19.

100. Appendix I summarises certain decisions of High Courts which illustrate how the law has been understood and applied to various combinations of facts. Appendix 2 deals with the sales tax system in India. Appendices

1. J. L. KAPUR.
Chairman.
2. K. G. DATAR¹.
3. S. S. DULAT.
4. T. K. TOPE.
5. RAMA PRASAD MOOKERJEE².
Members.

P. M. BAKSHI,
Joint Secretary and Legislative Counsel.

NEW DELHI,
The 2nd February, 1967.

1. Shri Datar has signed the Report subject to the note appended.
2. Shri Mookerjee has signed the Report subject to the note appended.

APPENDIX 1

CERTAIN DECISIONS OF HIGH COURTS ILLUSTRATING THE
APPLICATION OF THE LAW

(Only a few illustrative cases have been selected. The collection is not intended to be exhaustive)

Introductory

A few decisions of High Courts which deal with the subject of *inter-State* sales and *import* and *export* sales are summarised below, in order to show how the law has been understood and applied at various times.

The test of the time when the *property has passed* was adopted in some cases.¹ Passing of property.

In a Madras case², the assessee obtained from Government a licence to import foreign cotton "G" to whom a letter of authority was also issued by the appropriate authority imported that cotton, cleared the goods from the customs, railed the goods and sent the Railway Receipt to the Bank. The assessee took delivery of the Railway receipt from the bank, on payment of 90 per cent. of the value, and cleared the goods from railway. The cotton bales were weighed in the presence of a representative of "G", and the final bill adopting the contracted rate was then drawn up. The sales-tax authorities treated the transaction as purchase of cotton by the assessee from "G", and included its purchase value in the taxable turnover of the assessee under the Madras General Sales-tax Act, 1959.

The question arose whether the sale was in the course of import. The High Court answered the question in the negative, on the ground that the import became completed after 'G' took delivery of the consignment and cleared the goods from the harbour, and the *sale was subsequent to the taking* of the delivery and was effected after the goods were taken out of the customs barrier. The question whether there was a contractual obligation to import does not, however, seem to have been considered, and, in fact, the Supreme Court decisions in *Tata Iron & Co., etc.*, do not seem to have been cited.

In a Patna case,³ these were the facts. The assessee having its head office in Calcutta, supplied machineries to the Damodar Valley Corporation. The assessee contended that the sales were exempt under article 286(1)(b) of the Constitution, inasmuch as the machineries were earmarked by the manufacturers outside India for sale to the Corporation. On these facts, the court held as follows:—

It was submitted by learned counsel for the assessee that there was privity of contract between the Damodar Valley Corporation and the manufacturers, and the assessee was merely an agent for the manufacturers with regard to the sale of machineries. It is not possible for us to accept this argument as correct. The contract of agency between the assessee and the manufacturers has not been produced before the taxing authorities, and in the absence of the documents of the contract it is not possible for us to say whether there was privity of contract between the Damodar Valley Corporation and the manufacturers or not. It

1. *Abdul Wahab v. Government of Madras*, A.I.R. 1962 Mad. 250, 251, para 45.
2. *Rajeswari Mills Ltd. v. State of Madras*, (1964) 15 S.T.C. 1, 8; (1964) 2 M.L.J. 84 (Madras).
3. *Blackwood Hodge (India) Ltd. v. State of Bihar*, (1960) 11 S.T.C. 41 (Ramaswami C.J. and Choudhry J.) (Patna).

was also submitted on behalf of the assessee that the machineries were *earmarked* by the manufacturers for the sale to the Damodar Valley Corporation. There is no finding of the Sales Tax Authorities on this question of fact; but even assuming that the submission of learned counsel for the assessee is factually correct, it does not necessarily follow that the sale of machineries to the Damodar Valley Corporation was made "in the course of import" within the meaning of article 286(1)(b) of the Constitution. It has been pointed out by the Supreme Court in *State of Mysore and another v. Mysore Spinning and Manufacturing Company Ltd. and others*,¹ that even if the goods were manufactured and marked "for export", nevertheless the ban on article 286(1)(b) was not attracted and sales made "for the purpose of export" are not protected unless they themselves "occasion the export". In other words, *all* sales that precede the one that occasions the export are taxable, even if the goods are manufactured with the *main intention for export*. We reject, therefore, the argument of learned counsel for the assessee on this point. In our opinion, the present case is governed by the principle laid down by the High Court in *Mahadeo Ram Bali Ram vs. State of Bihar*,² and in view of the principle laid down in that case we hold that the provisions of article 286(1)(b) do not apply to this case and the first question of law referred by the Board of Revenue to this Court must be answered against the assessee and in favour of the State of Bihar.

The place of passing of property has been emphasised in certain other decisions. Thus, in one case³, on the ground that the sale was completed within the State which sought to tax it before the goods were moved from that State, the sale was held to be taxable by the State. It was observed that in the transport of the goods themselves, which was subsequent to the sale, there was no element of sale, and such subsequent transport did not entitle the purchaser to the benefit of article 286(2) of the Constitution (as it stood before the amendment).

In a Madras⁴ case, the assessee, who was carrying on the business of importing milk-powder, took delivery of the documents of title on payment of the value to the Bank, and handed them over to the clearing agent. In the meantime, the assessee entered into contracts of sale with buyers, and issued delivery orders to them. On behalf of the assessee, the clearing agents cleared the goods, received the full value from the buyers (in whose favour the delivery

1. *State of Mysore v. Mysore Spinning and Manufacturing Co. Ltd.* (1958) 9 S.T.C. 188 : A.I.R. 1958 S.C. 1002.

2. *Madrahadeo Ram Bali Ram v. State of Bihar*, (1958) 9 S.T.C. 173 (Patna)

3. *India Coffee Board v. State of Madras*, A.I.R. 1956 Mad. 449, 452, para 19.

4. *Arun (1952) Pr. Ltd. v. State of Madras*, (1960) 11 S.T.C. 723, 726 (Rajagopalan and Ramchandra Iyer (J.J.) (Madras H.C.)

orders had been issued), and delivered the goods to the buyer. The question arose whether the sales were exempt from sales-tax as sales "in the course of import" under article 286(1)(b) of the Constitution. The High Court emphasised the facts, namely—that out of a fairly large mass of imported milk-powder, a portion was sold to given buyers, and that portion had to be appropriated before the sale could be effected in favour of the given buyer. What was sold was "an unascertained and unappropriated portion of a mass of goods yet to arrive in this country", and, therefore, mere issue of delivery orders did not suffice to transfer title. The appropriation was only at the point of delivery, and that delivery was effected only after the goods had been cleared by the assessee's clearing agents i.e. after the goods had crossed the customs frontiers. The transaction fell under section 23(1) of the Sale of Goods Act, whereunder in the case unascertained goods, it was only at the point of delivery that the property passed and the goods were ascertained. This was, therefore, a sale after the import had been completed, and a sale which was within the State. Hence, it was not exempt under article 286(1)(b).

In some of the decisions, the test adopted was absence of privity (of privity between the foreign buyer and the Indian seller) or the foreign seller and the Indian buyer, as the case may be.^{1,2,3,4}

In a Calcutta case,⁵ it was recognised that if the Government, by reason of the Colliery Control Order, 1945, directed the assessee, who was dealing in coal, to sell coal, to parties outside India, and if the assessee delivered the goods to shipping agents as directed by the Government, then that would be a sale "in the course of export". On the other hand, if the assessee was directed to deliver the goods to the Government, and then the Government was to deliver the goods to the shipping agents, then the Government would become the owner and the purchaser, and the sale would not be a sale "in the course of export".

The mere intention to export is not sufficient. Thus, it was held in a Mysore case,⁶ that a purchase which precedes such a sale does not fall under article 286(1)(b), even though it is made for the purpose of or with a view to export. In that case, the assessee's contention was, that the purchase

1. *Gandhi Sons v. State of Madras*, A.I.R. 1955 Mad. 722, 725, para. 15; 6 S.T.C. 694.

2. *Haji Abdul Gaffoor Saib & Co. v. State of Madras*, A.I.R. 1958 Mad 314, 316, para. 6; 9 S.T.C. 208.

3. *State of Madras v. India Coffee Board*, A.I.R. 1956 S.C. 631.

4. *Mohiudeen Thamby & Co. v. State*, A.I.R. 1962 Mad. 323, 325, para 8

5. *Sunil Kumar Roy v. Commercial Tax Officer*, (1959) 10 S.T.C. 14, 17 (Calcutta).

6. *Hind Mercantile Corporation Private Ltd. v. Commissioner of Commercial Taxes*, (1966) 17 S.T.C. 175 (Mysore).

was made by him in the course of export outside India, to fulfil antecedent contracts with foreign buyers. [The Supreme Court decisions, in which the aspect of contractual obligation to export was emphasised (e.g. the B.G.N. Plantations case), do not seem to have been cited.]

Object of export not relevant.

In one case,^{1,2} it was held, that if a dealer in a State, in order to perform a contract for sale entered into with a foreign buyer, purchases goods which he subsequently exports, then the purchase is not in the course of export.

Integrity.

It was recognised in many decisions, that the test is whether the transaction of sale is an integral part of the activity of its exporting.³

Test of contractual obligation adopted.

One comes across several decisions of High Courts, where the test of contractual obligation to move the goods was applied. Thus, in Punjab case,⁴ where on the facts the sale was held to be in "course of export", it was recognised that even if the contract of sale is entered into between a foreign buyer on the one hand and the assessee through its agent on the other hand in India, such a sale would be in the course of export if it occasions or results in, the export of goods outside India.

In *Janki Das's case*,⁵ the facts were these. The assessee was carrying on the business of purchasing cotton in the State of Punjab. He sent cotton by rail to Bombay, and the railway receipt taken in favour of "self", was sent to his bankers at Bombay. The assessee's commission agents obtained the railway receipt after depositing with the bank 75 per cent. of the price by way of security. After taking delivery of the cotton, the commission agents kept it in their godown, and when they got an offer of purchase from a foreign buyer, they obtained the assessee's consent for its sale, and then sold it to the foreign buyer on behalf of the assessee. The commission agents remitted the sale proceeds to the assessee, after adjusting the security already given and deducting their commission on the sale. The assessee was charged godown and other incidental charges plus the interest on the amount given as security. On these facts, it was held, that the sale of cotton to the foreign buyer by the commission agents on behalf of the assessee was a sale "in the course of export", and therefore

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1. *State of Madras v. K.H. Chambers Ltd.*, A.I.R. 1955 Mad. 314, 321, para. 15 and 16.
 2. See also *Govindarajulu v. State of Madras*, A.I.R. 1953 Mad. 116 (reviews American case).
 3. See *Mahadev Ram v. State* 9 S.T.C. 173; A.I.R. 1959 Pat. 30, para 3.
 4. *Janki Das v. Excise and Taxation Officer*, 67 Punjab Law Reporter 69, noted in the Yearly Digest, April, 1965, cols. 764 and 765; 16 S.T.C. 542, 551, 552, Harbans Singh and Jindra Lal JJ.)
 5. *Janki Das v. Excise and Taxation Officer*, 67 Punjab Law Reporter 69, para.

the assessee was entitled to deduct the purchase price of cotton from the gross turnover under section 5(2)(a)(vi) of the Punjab General Sales-tax Act,¹ which authorised deduction from turnover in respect of "purchase of goods which are sold.....in the course of export out of the territory of India". Applying the test of "occasioning the export", the High Court of Punjab held, that even though the contract of sale was entered into between the foreign buyer on the one hand and the assessee through its agent at Bombay etc. on the other hand, such a sale would certainly be in the course of export, if it occasions, or results in, the export of goods outside the territory of India.

We may refer to the facts in another Punjab case.² The assessee in that case was engaged in the export of iron ore to Japan, but, by reason of control on the commodities, the export had to be made through the State Trading Corporation. The State Trading Corporation appointed "S" as its broker. In the agreement of sale between the assessee and S. the assessee was specified as the seller, and S was specified as the buyer. Regarding payment, it was provided that a certain sum (Rs. 25,000) should be arranged as an advance to be paid to the seller after signing the contract, and the balance was paid to the seller "against actual weight of iron ore loaded by the sellers when iron ore is either weighed at Kandla Port or by draft weight of the ship at the time of shipment to the foreign countries as per bargain by the buyer or by the State Trading Corporation of India". The account was to be finally settled when the shipment was made and satisfactory report received from the foreign buyers, or the State Trading Corporation approved the material for foreign countries where iron is extracted out of it. In a letter sent by "S" to the assessee, it was made clear, that the Government of India was dealing with foreign countries on Government level in the export of iron ore; that the State Trading Corporation was the business organisation on Government level, and S were the brokers who passed on the terms directed by the State Trading Corporation; that iron ore shall be shipped to Japan and the assessee was solely responsible "for the quantity and quality till the material is delivered to Japanese firm"; that "they test the material for extraction of iron, before they pass the pay orders", and that while S got the agreed brokers, in fact the assessee were the sellers and the Japanese firms were the buyers through the State Trading Corporation.

The question that fell to be considered, was, whether the sale by the assessee was "in the course of export" under article 286 of the Constitution read with section 5 of the

1. Punjab General Sales Tax Act, 1948 (Punjab Act 46 of 1948).

2. *New Rajasthan Minerals Syndicate v. State of Punjab* (1965) 16 S.T.C. 534, 536, 540; 67 Punjab Law Reporter 165 (S.T.C. issue dated 1st and 15th July, 1965) (D.K. Mahajan J.)

Central Sales Tax Act. The High Court of Punjab, after considering the various decisions, pointed out, that the assessee were engaged in export, that by reason of control, the export had to be through the State Trading Corporation, that at no point of time, the property passed to State Trading Corporation or S; and that after the goods were rejected either at the port or by the foreign buyers, the loss must fall on the assessee. The sale was not by the petitioner to S. It was a sale "in the course of export", and was therefore not taxable. (The court seems to have held that the sale was by the assessee to Japanese buyers, though there is no express statement to that effect in the judgment).

The following observations in another Punjab case¹ may be cited :

The sale in the course of export predicates an inextricable connection or bond between the sale the export, leaving no option to the purchaser of not exporting without committing a breach of the contract in question. In order to attract the exemption, there must also in addition be the resultant export. The sale, in other words must itself occasion export, or what is the same thing, the export must be made under the sale. To occasion export, there must accordingly exist between the contract of sale and actual exportation a bond so that each link is inseparably connected with the one immediately preceding it. The two activities of the sale and the export must be so integrated as to leave no possibility of a voluntary interruption without entailing a breach of the contract or an obligation arising from the nature of the transaction. It would thus postulate common intention on the part of the contracting parties to export the goods which must be actually followed by export and this, in my view, appears to be essential in order to constitute a sale in the course of the export of the goods. There must necessarily come into existence an obligation to export and there must also be an actual export pursuant to such obligation. Merely because a sale has been followed by the export of the goods sold does not by itself clothe the sale with the quality of its being in the course of their export.

'As I understand the argument of the learned counsel for the petitioner, he wants us to grant exemption to his client merely because goods purchased have been later exported from Bombay. This, as has been repeatedly explained by the Supreme Court, is not enough; not is mere intention to export without an actual exportation, sufficient to constitute a sale in the course of export, because a sale by export involves

1. *Mohan Lal Moti Lal v. Assessing Authority*, A.I.R. 1965 Punjab 391-394, para 6; 16 S.T.C. 553, 559 (Punjab).

a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods for the purpose of export. Such a sale cannot be dissociated from the export without which it cannot be effectuated because the sale and resultant export form but parts of a single transaction. This, as I construe the various Supreme Court decisions, is the true meaning of the expression "sale in the course of export". The decisions of this Court to which reference has been made do not, in my opinion, take a different view of law'.

On the facts, however, the Court expressed no considered opinion, leaving it to the assessment authority.

In a Kerala case¹, the principle was accepted (in relation to inter-State trade), that even where the transaction is complete in the State, yet, if it has caused the goods to move, it would be an inter-State sale. In that case, no final assessment had been made, and, therefore the court merely directed the Sales Tax Authorities to make a fresh assessment in the light of its decision. The court followed the decision of the Supreme Court in *Tata Iron & Steel Co.*, where Shah J. had, delivering the majority judgment, held, that section 3(a) of the Central Sales Tax Act covered sales in which the movement of goods from one State to another was the contract of sale and property in the goods passed in either State.

Similarly, in a Patna case², it was held that the fact that the delivery of the goods took place in India was not conclusive, and since the goods were actually exported to Nepal in pursuance of the contract of sale between the parties, the sale was held to be a sale in the course of export and, therefore, not taxable.

That a sale cannot be said to be inter-State sale unless there is a movement of goods from one State to another under the contract of sale was a proposition which was elaborated in a Gujarat case³. The High Court observed, "The contract of sale must itself provide as an integral part of it that the goods shall be transported from one State to another. If the contract of sale provides for movement of goods from one State to another as a necessary incident of its performance, the sale would be a sale in the course of inter-State trade or commerce. In such a case, it would not be relevant to inquire where the property passes. The property may pass within the State

1. *Mulji Ratanshi & Co. v. State of Kerala*, (1961) 12 S.T. C. 657, 661—(Kerala), case under section 3(a), Central Sales-tax Act, 1956.

2. *Duli Chand v. State of Bihar*, A.I.R. 1963 Pat. 359, 361, para 3 (Ramaswami C.J. and Untwalia J.)

3. *Bharatkhand Textile Manufacturing Co., Ltd. v. State of Gujarat*, (1964) 15 S.T.C. 885, 891 (Shelat C.J. and P.N. Bhagwati J.)

which seeks to tax the sale, but this sale would nevertheless be an inter-State sale, and, therefore, beyond the taxing power of the State." Applying this test to the facts of the case, the High Court held, that it was not an essential term of the contract of sale that the goods shall necessarily cross the border of the State of Bombay and go to another State. The goods might, under the contract of sale, be taken delivery of by the buyers at their godowns within the State of Bombay, and if the buyers so instructed the assessee, the goods might be despatched to other destination which again might be within the State or outside the State. The buyers had thus an option under the contract of sale either to take actual delivery of the goods at their godowns within the State of Bombay or to direct the assessee to despatch the goods to destinations within or outside Bombay. The contracts of sale were entered into by the buyers with the assessee irrespective of the fact whether the buyers had received any previous indents from upcountry merchants. It was, therefore, impossible to hold on the facts and circumstances of the case that it was an integral part of the contracts of sale that the goods shall necessarily be transported from the State of Bombay to another State or that the movement of the goods from the State of Bombay to another State was a necessary incident of performance of the contracts of sale.

The principle that a movement of goods across the State border, if involved under the transaction, may convert it into an inter-State sale, was recognised in a Mysore case¹, where the various decisions of the Supreme Court were also noted.

In a *Bombay case*², the contractual test was applied. We quote a passage from the judgment, which shows both the facts of the case and the conclusion. After referring to the *Burmah Shell case*, the High Court stated:—

"In the light of these aforesaid principles laid down by their Lordships the facts of this case will have to be approached. It cannot be said, and indeed it has not been urged, that the sale has taken place while the ship was on high seas. On the other hand, the contention is that the sale has occasioned export. Therefore, it will have to be seen whether, on the material on record, the sale effected by the applicant is inextricably connected with taking the ship from the shores of Bombay to Costa Rica as an integral part thereof. We have already reproduced the terms of the contract. There was an agreement between the applicant agreeing to sell the ship and the Costa Rica

1. *P.M.M. and Minerals v. State of Mysore*, A.I.R. 1965 Mysore 240, 243, 244, paragraph 6 and 8.

2. *A. Ebrahim & Co., v. State of Bombay*, (1962) 13 S.T.C. 877, 891, 892 (Tambe and V.S. Desai JJ.)

Company purchasing it at a price of Rs. 4,52,547. The contract was to take effect on the Government of India granting permission to the sale of the ship and to the transfer of the flag from Indian flag to Costa Rican flag. Some time before 15th April, 1954, Government of India had granted permission to both these things. The transaction of sale was completed while the ship was in Bombay docks, and the delivery of the ship was taken up behalf of the purchasers by Messrs Madhavial & Co., in the Bombay harbour. The ship thereafter on 15th April, 1954 sailed on the high seas. These being the facts of this case, in our opinion, it is not possible to say that the sale itself was so inextricably connected with the export as an integral part thereof, that the sale itself has occasioned export. On the other hand, the only inference that can be drawn from these facts is that the sale preceded the export and thereafter the applicant ceased to have any connection with the ship. The purchaser under the terms of the contract had option either to take the ship abroad or to break it up. In taking the ship abroad, the purchaser has only exercised his option, and the sale itself had no connection therewith. It is, however, the contention of Mr. Ganatra that the contract of sale provided that granting of permission by the Government of India to transfer the ship's flag was a condition precedent to the validity of the contract. The Government of India has granted the permission, and, therefore, the necessary consequence is that foreign destination was given to the ship, and the ship was put in the stream of its export. Had Mr. Ganatra been able to show us that as a necessary consequence of the grant of permission by the Government of India to the transfer of the flag of the ship, it was obligatory on the purchaser to take the ship to Costa Rica, we might have been persuaded to hold that the sale was inextricably connected with the export of the ship and that the sale itself had occasioned export. To enable Mr. Ganatra to look into this matter, we adjourned the case and granted Mr. Ganatra two days' time. Mr. Ganatra has been unable to show us any provisions of law or any rules which would have the force of making it obligatory on the purchaser to take the ship from the Bombay docks to Costa Rica Port. The position then is that even though the Government of India granted permission for the transfer of the ship's flag, the purchaser was free to deal in any manner with the ship as envisaged in the contract. He could have either taken the ship at his sweet will as provided in the contract and could even have broken the ship in the Bombay docks. Taking the ship to Costa Rica by the purchaser, therefore, cannot in any manner be connected much less inextricably be connected with the sale".

Decision
contrary to
test of con-
tractual obli-
gation.

There are very few decisions which take a position directly contradictory with the contractual obligation. The under-mentioned case seems to be one such¹. In that case, import of cotton was made by certain dealers of Bombay (for selling to the assessee), and the shipping documents were in the names of the Bombay dealers. The assessee intimated the Bombay dealers about his requirements, and then the Bombay dealers placed orders with suppliers in Africa. The shipments were directed from African ports to Cochin. In the meantime, the assessee obtained the necessary transport licence, and the Bombay dealers sent the shipping documents to their clearing agents at Cochin, who, after getting the goods cleared through the customs, despatched the goods to the assessee, and sent the railway receipts to the Bank of Baroda or other Bank. The assessee paid the price into the Bank, against delivery of railway receipts. On these facts, the High Court held, that the purchases were not purchases "in the course of import", but were purchases effected *after the import* had been completed. The following observations in the judgment seems to go against the contractual obligation theory:—

"It is no doubt true the dealer in Bombay ordered the cotton from his vendor abroad only to carry out the importer's contractual obligations to sell the cotton so imported to the assessee. The assessee provided the facilities by arranging for the grant of the import licence to the dealer in Bombay, even as the assessee provided further facilities for the transport of the cotton by rail in this country after the cotton had been imported and after it had been cleared through the customs. The relationship between the assessee and the importer at Bombay was that of buyer and seller, both being principals, and the sale was only after the import of the goods, even where the contract to sell preceded the order to the exporter abroad to ship the goods in India."

The facts in an earlier *Calcutta case*² were peculiar. In that case, an order for the manufacture of wagons was placed by the Railway Board from New Delhi, and was accepted by a letter posted in Calcutta by the manufacturing company. Payments were to be made in Calcutta, and the wagons were to be delivered f.o.r. at the company's work siding situated in West Bengal. The wagons were meant for the Western Railway situated outside the State of West Bengal, having its headquarters at Ajmer. The company only delivered the wagons at its work siding (in-

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1. *Dhanalakshmi Mills Ltd. v. State of Madras*, A.I.R. 1961 Mad. 87, 88, paragraph 4; 11 S.T.C. 306.
 2. *Indian Standard Wagon Co. v. Commercial Tax Officer*, A.I.R. 1960 Cal. 25; 11 S.T.C. 47.

West Bengal), and claimed deductions in respect of the price of these wagons. It was held, that as the *contract* contemplated that the rolling stock would be moved beyond the boundaries of the State, the transaction constituted an inter-State trade. It was also pointed out, that delivery was made to the common carriers who themselves were the purchasers¹. (As, however, the sale was within the period covered by the Sales-tax Laws Validation Act, 1956, it was held to be taxable).

In the appeal from the decision, this point was not challenged².

In a later case,³ it was stated, that the facts of the earlier case were peculiar, because the sale was in respect of railway wagons which were admittedly required for purposes elsewhere. In the later case, it was held, that the mere fact that the words "for onward despatch to consignee" were used did not throw any burden on the seller, and did not convert the sale into an inter-State transaction. The later decision, however, recognises the principle of *contractual* obligation to transport the goods as a test to be employed under section 27(1)(b), West Bengal Finance Sales Tax Act, 1941, which exempts from tax a sale or purchase which "takes place in the course of inter-State trade or commerce".

On the other hand, if there is no *contractual* obligation to export or to transport, then the mere fact that after purchase, the assessee transports the goods across the State does not bring the case under section 3(a), Central Sales Tax Act^{4,5}.

Subsequent transport not material.

In a decision of the Calcutta High Court in 1963,⁶ the matter has been discussed exhaustively, and it has been pointed out, that the question whether a sale is to be regarded as an inter-State sale is to be determined on an interpretation of the facts on the point whether the *transport was a part of the contract for sale* or whether the transport was made after the completion of the sale independently of the contract. "The question is, whether the transport of the movement under the contract is a part of

1. Paragraphs 25 and 26 in the A.I.R.

2. *Indian Standard Wagon Co. v. Commercial Tax Officer*, 11 S.T.C. 47; A.I.R. 1960 Cal. 424, 427, para. 10.

3. *Jeewan Lal (1929) Ltd. v. The Commercial Tax Officer*, 16 S.T.C. 478; 69 C.W.N. 260, 265, (Dated 8th February, 1965) (D.N. Sinha J.)

4. *Shafeeq Shanmeem & Co. v. State of Andhra Pradesh* (1964) 15 S.T.C. 828, 836 (Andhra Pradesh), noted in the yearly Digest, May, 1965, Col. 1198.

5. *Government of Andhra Pradesh v. Nagendrappa* (1956) 7 S.T.C. 568 A.I.R. 1957 A.P. 297.

6. *Dhiraj Lal v. Commissioner of Commercial Taxes*, A.I.R. 1963 Cal. 442, 448, 455, para 24 and 43 (P.B. Mukherjea J.)

its incident, i.e., an inseparable incident or whether it is *de hors* or outside the contract." In the same decision it was pointed out, that the place where the title passes cannot by itself alone determine whether the sale is in the course of inter-State trade or not.

Test of
"Linking"

In some cases, it has been emphasised that the movement of the goods contemplated must be closely *linked* with the sale of goods, and that the exemption is not intended to cover a later movement undertaken "for the better enjoyment of the goods" after the title has passed¹.

In one case, in relation to inter-State trade, it was emphasised, that the connection between the f.o.r. sale at a railway station in the State for a destination outside the State and the movement that followed the delivery to the common carrier, was so *intimate* and real that it was occasioned, caused, or brought about by the sale. In that case, the delivery was to the common carrier for the purpose of despatch to the purchaser in the other State,² and the sale was held to be exempt under section 3, Central Sales Tax Act, 1956.

Situs not
conclusive.

That the situs of a sale is not *conclusive* on the question of exemption from tax on a sale *vis-a-vis* article 286, has been noticed in some cases. Reference may, in this connection, be made to the following observations in an Andhra Pradesh case³:—

"That apart, as observed by Das, C. J. in *Bengal Immunity Co. Ltd. v. State of Bihar*,⁴ "the situs of a sale or purchase is wholly irrelevant as regards its inter-State character". His Lordship added: "Now, even when the *situs* of a sale or purchase is in fact inside a State, with no essential ingredient taking place outside, nevertheless, if it takes place in the course of inter-State trade or commerce, it will be hit by clause (2). If the sales or purchases are in the course of inter-State trade or commerce the stream of inter-State trade or commerce will catch up in its vortex all such sales or purchases which take place in its course wherever the *situs* of the sales or purchases may be....." It is true that these remarks are made in the context of inter-State trade and commerce. But they are equally applicable to export trade.

1. *T. Bapputy v. Government of Kerala*, A.I.R. 1962 Kerala 79, 71, para. 3; 12 S.T.C. 722 (Inter-State sales).
2. *Mis Sudarshanam Iyengar and Son vs. State of Kerala*, A.I.R. 1962, 66, 67, para. 713 S.T.C. 17 (Inter-State sales).
3. *Guduthur Thimmappa & Son v. State of Andhra Pradesh* (1954) 15 S.T.C. 299, 307 (Andhra).
4. *Bengal Immunity Co. Ltd. v. State of Bihar* (1955) 6 S.T.C. 446, 481.

Finally, reference may be made to an Andhra Pradesh decision,¹ where the following observations occur:— Contract involving.

‘We need only refer to a recent decision of the Supreme Court in *Cement Marketing Co. of India (Br.) Ltd. v. State of Mysore*² in the course of which the entire case law was reviewed and the position was summed up thus at page 984 of the A.I.R.:—

“Thus the tests which have been laid down to bring a sale within inter-State sales are that the transaction must involve movement of goods across the border,³ transactions are inter-State in which as a direct result of such sales the goods are actually delivered for consumption in another State;⁴ a contract of sale must involve transport of goods from one State to another under the contract of sale.⁵

So the true test is that where under a contract of sale, there is a transport of goods from outside a State into the territory of the State, and the contract itself involves the movement of goods across the border, the transaction is stamped with the character of an inter-State sale. Nothing more is necessary. In other words, where the sale or purchase occasions the transport of goods from one State to another, the sale or purchase would be in the course of inter-State trade.

APPENDIX 2

The system of sale-tax has been reviewed in a recent Report,⁶ and the relevant passages are quoted below.⁷⁻⁸ Brief review of the system of sales-tax.

‘5. Central sales tax is levied under the provisions of the Central Sales Tax Act, 1956. This tax is confined to sales in the course of inter-State trade. A sale or purchase of goods takes place in the course of inter-State trade’ if the sale or purchase occasions the move-

1. *Tungabhadra Industries v. State of Andhra Pradesh*, A.I.R. 1966 A.P. 85 para 18 (F.B.) (March 1966 issue).
2. *Cement Marketing Co. of India (Pr.) Ltd. v. State of Mysore*, A.I.R. 1963 S.C. 980; 14 S.T.C. 175.
3. *Mohan Lal Hargovind Das v. State of Madhya Pradesh*, (1955) 2 S.T.C. 509; 1955-56 S.T.C. 687.
4. *Ram Narain & Sons Ltd. v. Assistant Commissioner of Sales Tax*, A.I.R. 1955 S.C. 765, 773; 6 S.T.C. 627.
5. *Bengal Immunity Co. Ltd. v. State of Bihar*, A.I.R. 1955 S.C. 661, 734; 6 S.T.C. 446.
6. Committee on Sales-tax (on Commodities exported from India), (Government of India, Ministry of Commerce), Report (1964), Chapter 3, pages 11 to 13, paragraph 5 to 11.
7. For a detailed description, see Report of the Taxation Enquiry Commission (1953-54), Vol. 3, pages 141-162.
8. For a short analysis, see Harvard Law School, *Taxation in India* (1960), paras 16/1.1 and 16/3.

ment of goods from one State to another or is effected by the transfer of documents of title to the goods during their movement from one State to the other. The Central Sales Tax Act has declared certain goods such as coal, cotton, cotton-yarn, hides and skins, iron and steel, jute, oil seeds, cotton fabrics, silk fabrics, rayon or art silk fabrics, woollen fabrics, sugar and tobacco as goods of special importance in inter-State trade or commerce.

"On the sales of such "declared" goods the rate of Central sales tax cannot exceed 2 per cent. On other goods when the sales are to persons other than the dealers registered under the Central Sales Tax Act or to Governments, Central and States, the rate is 10 per cent, except that wherever the rate of tax under the local law is higher than 10 per cent. on any goods the said higher rates apply to the inter-State sale. When sales are made to dealers registered under the Central Sales Tax Act and to Government against appropriate certificates in the prescribed forms, (Forms "C" and "D" *vide* Appendices VI and VII respectively), the rate is 2 per cent.

"These rates are subject to a general exception that if a commodity is subject to tax in a State at a rate lower than 2 per cent. or is exempt from tax, the inter-State sale of that commodity from that State would be subjected to tax at that lower rate or would be exempt from tax, as the case may be, whether such a sale is made to a registered dealer or not.

"Central Sales Tax is complementary to the sales tax levied by the State, and administration of the law is entrusted to the Sales Tax Authorities of the States who generally exercise the same powers for the purpose of levy, collection and enforcement of the payment of Central Sales Tax as are available to them under the Local Sales Tax Act. The proceeds from the Central Sales Tax become a part of the Consolidated Fund of the State where the sale takes place. In addition to the general provisions, the States are empowered under a section of the Central Act to grant exemption or reduction in the rates of tax in inter-State sales of goods or classes of goods if it is considered expedient in the public interest to do so. Such a power is not available with the Central Government under the present Act."

"7. The State sales taxes are either selective or general. Sales of certain specific commodities like motor spirit, foreign liquor, etc., are taxed in some States under separate laws. The remaining goods in general are governed by the general law of sales tax of

each State under which certain specific goods may be Exempted while in the case of other goods the rates may be different for different goods. The major part of the sales tax structure of the States consists of multi-point, single-point or two-point taxes or a combination of these."

"8. Broadly speaking, while multi-point sales tax is levied in Andhra Pradesh, Bihar, Kerala, Madras, Mysore and U.P., the States of Assam, Jammu and Kashmir Madhya Pradesh, Orissa, Punjab, Rajasthan and West Bengal impose a single-point tax. Except Madhya Pradesh and Rajasthan, the States belonging to the second group levy tax on the last sale. Maharashtra and Gujarat have a two-point sales tax on the sales of certain commodities, and on others single-point tax is levied. There is, however, no clear-cut demarcation among the three systems and in every State, whether levying a single-point, a two-point or a multi-point tax, higher sales tax at a suitable stage is levied on certain luxury goods, known as specified goods. Besides, in all States sales tax on "declared goods" is levied at any one stage which may vary from State to State and from commodity to commodity in the same State. Multi-point tax has been combined with single-point tax in some of the multi-point States. There are several other variations also from the general pattern."

"9. Sales tax rates vary from State to State and often from commodity to commodity within the same State. The system of taxation is also not uniform in all the States. The basis of levy is different, the minimum taxable turnover limit is not uniform and there is diversity in the coverage and in the schedule of exempted goods. Among the single point States the general rate of sales tax varies. It has been fixed at 4 per cent. in Assam, Madhya Pradesh and Rajasthan and 5 per cent. in Orissa and West Bengal and 6 per cent. in Punjab. The minimum rate is $\frac{1}{2}$ per cent. and the maximum rate generally 10 per cent. In regard to foreign liquor the rate is higher still: in seven States it is more than 20 per cent."

"10. In the States where a multi-cum-single point tax system is prevalent, i.e., in Andhra Pradesh, Bihar, Kerala, Madras, Mysore and U.P. the general rate of multi-point tax is 2 per cent. except in the case of Bihar where it is $\frac{1}{2}$ per cent. In some States like Madras and Mysore a special rate of 1 per cent. is imposed on the sale of foodgrains, whereas in Andhra Pradesh a higher rate of 3 per cent. is levied on the articles of food and drinks sold in hotels, restaurants, etc. In U.P., unlike other States, there are many special rates between $\frac{1}{2}$ per cent. and 3 per cent. depend-

ing upon the nature of commodities. The minimum rate of single-point tax in multi-cum-single-point States fluctuates between $\frac{1}{2}$ per cent. and 3 per cent."

"11. In all States the liability to pay tax arises only when the taxable turnover is more than the minimum fixed for that purpose. This minimum also varies from State to State. In the majority of the cases it is about Rs. 10,000 per annum though in some cases it is as low as Rs. 5,000. Again, although most of these tax systems contain a list of articles which are exempted from the tax their number varies from State to State. From the tax laws prevalent in different States it would seem that Kerala has the smallest number of exemptions while Madras has the largest. Both are, incidentally, multi-point systems. In most of the States the exemptions are confined to essential goods, raw materials, goods sold to certain institutions like schools, hospitals, charitable organisations, etc., goods produced by cottage or village industries, etc."

NOTE BY MEMBER, SHRI K. G. DATAR

1. I regret, I am unable to agree with the view of the majority of the Members on the main question whether *Khosla's case* goes beyond and is inconsistent with the two *Travancore* cases. I have, therefore, thought it my duty to place my views on record for whatever they may be worth.

**Khosla's
case Salient
facts.**

2. Before considering the scope and effect of the decision now before us, particularly in the light of the previous decisions of the Supreme Court bearing on the points which are involved in it, it would be necessary to state some of the salient facts on which it was rendered.

3. K. G. Khosla and Co., who was the Appellant before the Supreme Court and who may be referred to in this note as the assessee, entered into a contract with the Director-General of Supplies and Disposals, New Delhi, for the supply of axle box bodies. Under this contract, the assessee undertook to get the axle box bodies manufactured according to specifications therein set out, in Belgium by manufacturers named M/s. La Brugeoies Et. Nivelles Belgium and import them into the territory of India and thereafter deliver them to the consignee (Southern Railway, Perambur and Golden Rock Works and Mysore) as directed by the purchaser,—the Director General of Supplies and Disposals and as agreed in the contract. The assessee was entitled to be paid 90 per cent. of the price of the goods supplied by him, only after inspection and delivery of the goods to the consignee (Southern Railway) and the balance of 10 per cent. was payable to him on final acceptance by the Consignee.

4. Clause 17(L) of the Contract provided:—

Contract in:
Khosla's
case.

"The contractor (assessee) is entirely responsible for the execution of the contract in all respects in accordance with the terms and conditions as specified in the A/T (Acceptance of Tender) and the Schedule annexed thereto. Any approval which the Inspector may have given in respect of the stores, materials or other particulars and the work or workmanship involved in the contract (whether with or without test carried out by the contractor's Inspector) shall not bind the purchaser (Director-General of Supplies and Disposals and notwithstanding any approval or acceptance given by the Inspector it shall be lawful for the Consignee (Southern Railway) on behalf of the purchaser to reject the stores on arrival at the destination (Perambur, Golden Rock Works and Mysore) if it is found that the stores supplied by the Contractor are not in conformity with the terms and conditions of the contract in all respects¹."

5. In pursuance of this contract which, as stated above, the assessee had entered into with the Director-General of Supplies and Disposals, the assessee supplied axle box bodies of the value of Rs. 174029.50 to the Southern Railway at Perambur and Golden Rock Works and of the value of Rs. 132987.75 to Southern Railway, Mysore. The Joint Commercial Tax Officer held that the former sales were liable to tax under the Madras General Sales Tax Act and the latter under the Central Sales Tax Act. He rejected the contention of the assessee that the Sales were in the course of import. He held that "there was no privity of contract between the foreign seller (Belgian Manufacturers) and the Government, for the goods. The goods were supplied only as the goods of the seller (assessee) and intended for them. They were cleared as their own and delivered after clearance²."

Judgment of
Sales Tax
Officer.

6. The assessee filed two appeals but the Appellate Assistant Commissioner agreeing with the Joint Commercial Tax Officer rejected the appeals.

Appeals dis-
missed by
Appellate
Assistant
Commission-
er.

7. The Sales Tax Appellate Tribunal on further appeal also held that the sale by the Appellants (assessee) to the Director-General of Supplies and Disposals had not occasioned the imports. The Tribunal found that "the Appellants (Assessee) had entered into contracts for

Judgment
by the Tri-
bunal in the
further
appeal.

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1. These facts are stated in Paragraph 1 of the judgment of the Supreme Court.
 2. See paragraph 2 of the Supreme Court judgment. Assessment Order No. A27-7/59 dated 30-8-1960 passed by the Joint Commercial Tax Officer, Harbour Division I.

supply of axle box bodies with the Director-General of Supplies and Disposals, New Delhi, in order to fulfil these contracts, they had entered into further contracts with the manufacturers in Belgium. The goods contracted to be supplied to the Government Departments were got manufactured by the Appellants (Assessee) in Belgium, imported into India, cleared at Madras Harbour and supplied to the buyers thereafter. There was no privity of contract between the Belgium manufacturers and the Government Departments. The Belgian manufacturers after manufacture, consigned the goods to the Appellants (Assessee) by ship under bills of lading in which the Consignee was the Appellants themselves. The goods were consigned to the Madras Harbour, cleared by the Appellants' own clearing agents and despatched for delivery to the buyers (Southern Railway) thereafter¹."

Judgment of Madras High Court, in Khosla's case.

8. The Assessee, thereafter filed two revisions before the High Court at Madras. The High Court also rejected the contention of the Assessee that the sale by the Assessee to the Government Department (Director-General of Supplies and Disposals) had occasioned the import. The High Court prefaced its judgment by setting out the same facts as had been mentioned by the lower Appellate Tribunal. The High Court stated:—

"The Assessee, M/s. Khosla and Company entered into a contract with the Director-General of Supplies and Disposals, New Delhi for the supply of 'axle box bodies'. In order to fulfil the contract, the assessee had to enter into contract with manufacturers in Belgium. The goods were so got manufactured and imported into India and cleared at the Madras Harbour and supplied to certain parties on the instructions of the buyer, the Director-General of Supplies and Disposals as contained in the contract itself. There was no privity of contract between the Belgium manufacturers and the Government Departments who ultimately received the supplies. The manufacturers consigned the goods to the Assessee under bills of lading which, after clearance at the Madras Harbour by the Assessee, were despatched for delivery to the ultimate consumers indicated by the Director-General²."

9. Again, in the course of its judgment the High Court observed:—

"It is common ground that on entering into the contract with the Director-General of Supplies and

1. See paragraphs 1 and 3 of the Supreme Court Judgment. The findings of the Tribunal contained in the last two sentences are quoted in paragraph 1 of the Supreme Court judgment. See para 4 of the common order dated 30-11-19 61 in Tribunal Appeals Nos. 325 and 326 of 1961.

2. See the judgment of the High Court dated 16-8-1963 in T.C. Nos. 100, 219, 220, and 255 of 1962.

Disposals the Assessee placed orders for manufacture with the Belgium company;— That the goods were under consignment to the Assessee and that it took delivery of the goods and arranged for the despatch by rail or delivery locally to the consignees indicated in the contract is also clear¹.”

10. It may not be out of place also to mention here that the date of the acceptance of the contract which the assessee had entered into with the Director-General of Supplies and Disposals for the supply of axle box bodies in the manner stated above was 24-4-1956². It was thereafter that the Assessee in his turn placed an order on 30-4-1956 with the Belgium Manufacturers for the manufacture and the shipment of the axle box bodies which he had contracted to supply to the Director-General of Supplies and Disposals. This order of the Assessee was accepted by the Belgium Manufacturers on 11-5-1956 and the Belgium Manufacturers in due course exported the manufactured goods to the Madras Harbour in three consignments, by three different ships and sent over the shipping documents, bills of lading etc. to the assessee, between the months of March and June 1956. They also requested him in their covering letters to make over the payment of the total amounts involved under the conditions agreed to between them³.

11. These, in brief, are the facts of the case and they do not appear to have been disputed by either party at any stage of the proceedings right from the time when the Joint Commercial Tax Officer proposed to levy taxes under the two Sales Tax Acts upto the stage when the matter came before the Supreme Court for final hearing.

12. The Supreme Court held that the sale of axle box bodies effected by the Assessee in favour of the Director-General of Supplies and Disposals had taken place in the course of import of goods within the meaning of the provisions of section 5(2) of the Central Sales Tax Act and was therefore exempt from taxation in view of article 286(1) (b) of the Constitution. Supreme Court's judgment Khosla's case.

13. By the Constitution (Sixth Amendment) Act, 1956 Articles 269 and 286 were amended. In exercise of the authority conferred upon the Parliament by the Articles so amended, Parliament enacted the Central Sales Tax Constitution amendment Act, 1956.

1. See the judgment of the High Court dated 16-8-1963 in T.C. Nos. 100, 219, 220 and 255 of 1962.
2. See page 53 of the printed paper book of the Supreme Court. This date is the date of the Advance Acceptance notified in the Savingram No. SRI/17529-f/1 of the Office of the D.G.S.D, The same was confirmed on 6-9-1956.
3. See the letters sent by the Belgium Manufacturers to the Assessee; printed at pp. 68 and 71 and the letters sent by the Assessee to the Punjab National Bank; pp. 65, 69 and 73 of the Supreme Court Paper Book in Khosla's case.

Act (No. 74 of 1956). The Act was enacted as its preamble recites—

“to formulate principles for determining when a sale or purchase takes place in the course of inter-State trade or commerce or outside a State or in the course of import into or export from India—”.

14. Sections 3, 4 and 5 of the said Act formulated these principles. Section 5(2) upon which reliance was placed by the Supreme Court and which is material for our present purpose, is as under:—

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

15. The Supreme Court was of the view that it was in accordance with the principles laid down in this subsection that it had to determine the question, namely, whether the sale in the instant case, that is to say, the sale by the Assessee in favour of the Director-General of Supplies and Disposals had occasioned the import of the goods into the territory of India from Belgium. If the sale had occasioned the import, then there was no difficulty in holding that it had taken place in the course of such import so as to be exempt from taxation under article 286(1)(b).

16. In construing this sub-section (2) of section 5, reliance was placed upon the interpretation which had been put by the Supreme Court in one of its previous decisions (*Tata Iron and Steel Co. Ltd., Bombay vs. S. R. Sarkar*, A.I.R. 1961 S. C. 65) on the analogous provisions contained in section 3(a) of the Central Sales Tax Act. That subsection reads as follows:—

“A sale or purchase of goods shall be deemed to take place in the course of inter State trade or commerce if the sale or purchase (a) occasions the movement of goods from one State to another.”

Khosla's case 17. In paragraph (9) of its judgment (page 1221), the
Court. Supreme Court observed:—

“It seems that the expression ‘occasions the movement of goods’ occurring in section 3(a) and section 5(2) must have the same meaning. In *Tata Iron and Steel Company Limited, Bombay vs. S. R. Sarkar* (A.I.R. 1961 S.C. 65), Shah J. speaking for the majority interpreted section 3 as follows:—

“In our view, therefore, within clause (b) of section 3 are included sales in which property in the goods passes during the movement of the goods from one State to another by transfer of

documents of title thereto; clause (a) of section 3 covers sales, other than those included in clause (b) in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale and property in the goods passes in either State."

18. Though the wording in the two sub-sections is not exactly the same, in section 3(a) the wording is "occasions the movement of goods," while in section 5(2) it is "occasions such import"; and indeed it could not be otherwise in view of the different topics therein dealt with, there cannot be any doubt that the construction which the Supreme Court placed upon section 5(2) following that which had been placed by Mr. Justice Shah on section 3(a) in the earlier case referred to above is correct and wholly consistent with the earlier decisions of the Supreme Court bearing on the point.

19. Since the Parliament enacted the Central Sales Tax Act, the Supreme Court had primarily to look to the principles therein formulated for determining when a sale or purchase took place in the course of inter-State trade or commerce or in the course of import into, or export out of, the territory of India. Section 3(a) is in *pari materia* with section 5(2). The Supreme Court held that as in the case of section 3(a) so in the case of section 5(2)—the movement of goods—or more precisely the import of goods into the territory of India, must be the result of a covenant or incident of the contract of sale.

Central
Sales Tax
Act, 1956

20. On the same principles, section 5(1) came to be construed in *Ben Gorm Nilgiri Plantations, etc., vs. Sales Tax Officer* [A.I.R. 1964 S.C. 1752; (1964) 7 S.C.R. 706]. In paragraph 8 on page 1755 of the judgment, the Supreme Court observed:—

Ben Gorm
case.

"—to constitute a sale in the course of export it may be said there must be an intention on the part of both the buyer and the seller to export, there must be an obligation, and there must be an actual export. The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them or even from the nature of the transaction which links the sale to export.——. And to occasion export there must exist such a bond between the contract of sale and the actual exportation that each link is inextricably connected with the one immediately preceding it.——. Where the export is the result of sale, the export being inextricably linked up with the sale so that the bond cannot be dissociated without a breach of the obligation arising between the parties arising from the nature of the transaction, the sale is in the course of export."

21. It would be seen that in construing sections 3(a) and 5 in the manner in which they were construed by the Supreme Court, the Supreme Court had necessarily to refer to and follow its own earlier decisions in which the expressions "in the course of the import of the goods into, or export of the goods out of, the territory of India" [(clause (1) (b)] and "in the course of inter-State trade or commerce", occurring in Articles 286 as it stood before the amendment of 1956, had come to be judicially interpreted. In fact, what was the law expounded by the Supreme Court in its previous decisions was codified and incorporated into sections 3 and 5 of the Central Sales Tax Act of 1956. In *Cement Marketing Co. vs. State of Mysore* [1963 S.C. 980 A.I.R.: (1963) 3 S.C.R. 777] in paragraph 11 on page 984, the Supreme Court observed:—

"In section 3 of the Central Sales Tax Act, the legislature has accepted the principle governing inter-State sales as laid down in *Mohanlal Hargovind's case*, [(1955) 2 S.C.R. 509 (A.I.R. 1955 S.C. 786)]"

R. (1964
1 Mad. 383
Lakshmi
Mills vs.
State of
Madras.

22. In I.L.R. (1964) 1 Madras 383, (*Lakshmi Mills vs. State of Madras*), the High Court of Madras observed:

"This statutory provision (section 3) practically codifies the pre-existing Judge-made law on the subject."

Ben Gorm
case.

23. Again, in *Ben Gorm Nilgiri Plantations, etc. vs. Sales Tax Officer* [1964 S.C. 1752 A.I.R.; (1964) 7 S. C. R. 706] where section 5(1) fell to be considered, the Supreme Court observed:

"This was legislative recognition of what was said by this Court in the *State of Travancore-Cochin vs. Bombay Company Ltd.*, Alleppey 1952 S.C.R. 112: (A.I.R. 1952 S.C. 366) and *State of Travancore-Cochin vs. Shanmugha Vilas Cashew Nut Factory* 1954 S.C.R. 53: (A.I.R. 1953 S.C. 333) about the true connotation of the expression "the course of the export of the goods out of the territory of India in Article 286(a)(b)."

Second
Report of
Law
Commission

24. The recommendation of the Law Commission contained in its Second Report also points to the same conclusion. Before the Central Sales Tax Act, 1956 was enacted the Law Commission was invited to offer its suggestions for formulating principles for determining when a sale or purchase of goods takes place—

(i) outside a State,

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

(iii) in the course of inter-State trade or commerce.

In its Report, the Law Commission stated (para. 10, page 3):—

‘——We, therefore, recommend the acceptance of the principles laid down by the Supreme Court (in the *Travancore-Cochin* cases, 1952) S.C.R. 1112 and (1954) S.C.R. 53, see Report page 2, para. 63. We would express them in the following manner :—

“A sale or purchase of goods shall be deemed to take place in the course of export of the goods out of the territory of India, only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

I am at this stage concerned with the bare fact that the Law Commission only accepted the principles laid down in the two Travancore cases and not with the actual recommendations which, as expressed in the Report, seem to go beyond such principles.

25. It may be noted, that when the Central Sales Tax Act came to be enacted, the legislature had before it the Report of the Law Commission, and it eventually adopted in section 5 the same language in which the Law Commission had expressed its recommendation. Thus the history of this legislative process which preceded the enactment of the Central Sales Tax Act also leaves us in no doubt that the principles laid down in the earlier decisions of the Supreme Court were themselves enacted as the principles for determining when a sale or purchase of goods takes place in the course of the import of the goods into, or export of the goods out of, the territory of India. Indeed, I may be permitted to say that sections 3 and 5 of the Central Sales Tax Act, as we see them today, are in one sense so inextricably linked up with the previous and authoritative decisions of the Supreme Court, particularly on the subjects dealt with in those sections, that it would be difficult correctly to construe them without knowing and following the guiding principles already enunciated in those decisions. I am aware that in *Tata Iron and Steel Co. Ltd. vs. S. R. Sarkar* [A.I.R. 1961 S. C. 65: (1961) 1 S.C.R. 379], the Supreme Court made the following observations (paragraph 17 S.I.R.):—

‘Cases of this Court viz. *State of Travancore-Cochin vs. Bombay Co. Ltd., Alleppy* 1953—3 S.C.R. 1112 (A.I.R. 1952 S.C. 366) and *State of Travancore-Cochin*

1956 Act
linked up
with the two
Travancore
cases.

Tata Iron
case

vs. *Shanmugha Vilas Cashew Nut Factory* 1954 S.C.R. 53: (A.I.R. 1953 S. C. 333)———have no bearing on the interpretation of section 3(a) and (b). In those cases the meaning of the expressions "in the course of import and export" and "in the course of inter-State trade or commerce" used in Article 286 fell to be determined. The Constitution does not define these expressions. The Parliament has in the Central Sales Tax Act, 1956 sought to define by section 3 when a sale or purchase of goods is said to take place in the inter-State trade or commerce———and by section 5 when a sale or purchase is said to take place in the course of import or export. In interpreting these definition clauses, it would be inappropriate to requisition in aid the observation made in ascertaining the true nature and incidents without the assistance of any definition clause of———"sales in the course of imports" and "sales in the course of inter-State trade or commerce" used in Article 286.

26. I have already stated¹ that a different view was expressed by the Supreme Court in its later decisions on the relevancy of the earlier decisions in interpreting sections 3 and 5 of the Central Sales Tax Act, 1956. Besides, in the case of *Tata Iron and Steel Co. Ltd. vs. S. R. Sarkar* the Supreme Court even without the aid of the earlier decisions came to construe the provisions of section 3 in the same way in which the expression "where such sale or purchase takes place in the course of inter-State trade or commerce" occurring in article 286 (as it stood before the amendment) had been construed in the earlier decisions. That a fresh mind was brought to bear on the interpretation of section 3 without any reference to earlier decisions on the subject and yet the same conclusion was arrived at, only reinforces the correctness and the universality of the propositions laid down in the previous decisions. Certain expressions were used (e.g. "sales and purchases which themselves occasion the export or import of the goods, as the case may be") in the previous decisions for elucidating when a sale or purchase took place in the course of export or import or in the course of inter-State trade or commerce, and if the same expressions have now been used in sections 3 and 5 of the Central Sales Tax Act, it seems to me that in interpreting these sections, we have necessarily to go to the earlier decisions and see how the expressions now codified into the sections were used and explained in those decisions. In fact, even assuming that there were no such observations as we find in the cases of *Cement Marketing Co. vs. State of Mysore* (A.I.R. 1963 S.C. 980) and *Ben Gorm Nilgiri Plantations vs. Sales Tax Officer* (A.I.R. 1964 S.C. 1752) on the relevancy of the earlier decisions, the Supreme Court could not but have

1. Paragraphs 21 and 23.

referred to, and approved of and followed the earlier decisions in interpreting sections 3 and 5 if only because the expressions used in the sections were the identical expressions used and explained in the earlier decisions. If the Parliament in the exercise of its power conferred on it by the Constitution formulated principles for determining when a sale or purchase of goods took place in the course of import or export or in the course of inter-State trade or commerce, it seems to me that the key to interpret the principles so formulated is afforded by the principles already laid down by the Supreme Court almost in the same language.

27. In this view, therefore, it would be necessary to study the previous relevant decisions bearing on the subject of sale or purchase in the course of import or export as also in the course of inter-State trade or commerce. First, I would consider the group of cases relating to the sale or purchase in the course of inter-State trade or commerce. It is true that they have no direct bearing on the issue in the present case, which is "whether the sale by the Assessee in favour of the Director-General of Supplies and Disposals has occasioned import within the meaning of section 5(2)." But since the provisions relating to sale or purchase in the course of import or export are analogous to those relating to sale or purchase in the course of inter-State trade or commerce both in the Constitution and in the Central Sales Tax Act in so far as they are applicable for our present purpose, a study of this group of cases would be necessary, and, indeed, illuminating.

28. In *Bengal Immunity Co. Ltd. vs. State of Bihar* (A.I.R. 1955 S.C. 661 : (1955) 2 S.C.R. 603), Mr. Justice Venkatarama Ayyar (in his dissenting judgment) observed in paragraph 153 at page 734 (A.I.R.) as follows :—

"A sale could be said to be in the course of inter-State trade only if two conditions concur :—

(1) a sale of goods, and

(2) a transport of those goods from one State to another *under the contract of sale*" (emphasis supplied by me).

"Unless both these conditions are satisfied there can be no sale in the course of inter-State trade. Thus, if X, a merchant in State A, goes to State B, purchases goods there and transports them into A, there is undoubtedly a movement of goods in inter-State commerce. But that is not under any contract of sale."

29. In support of these observations, the learned Judge has quoted a definition from Rottschaefer, a little lower down on the same page.

'In—Rottschaefer on Constitutional Law (1939 Ed.) a sale in the course of inter-State commerce is thus defined:

"The activities of buying and selling constitute inter-State commerce if the contracts therefor contemplate or necessarily involve the movement of goods in inter-State commerce".'

In the Second Report of the Law Commission this is what is quoted from the same author (p. 4 bottom):—

Second
Report Law
Commission

"The decisive factor that renders making a contract an act of inter-State commerce is in that it contemplates or necessarily involves the movement of goods in inter-State commerce, and this test applies whether it be a contract to buy or one to sell."

Endupuri
case

30. The same learned Judge when he delivered the judgment of the Court in *Endupuri Narasimham vs. State of Orissa* [A.I.R. 1961 S.C. 1344: (1962) 1 S.C.R. 314], referred to his observations made in the *Bengal Immunity case* and again stated (page 1344):—

"In order that a sale or purchase might be inter-State it is essential that there must be transport of goods from one State to another under the contract of sale or purchase".

Cement
Marketing
Co. and
Singareni
Case.

31. These observations were again quoted with approval in *Cement Marketing Company vs. State of Mysore* (A.I.R. 1963 S.C. 980 at pp. 983 and 984, para 11) which was also a case of inter-State sale under article 286(2) as it stood before its amendment. In the recent case reported in A.I.R. 1966 S.C. 563, *Singareni Collieries Co. vs. Commissioner of Commercial Taxes* where the Supreme Court were considering among other sales also sales for the period September 7, 1955 to September 10, 1956 under which coal had been actually delivered outside the State of Andhra for consumption in those States, the Supreme Court observed in para (20) as follows:—

'As pointed out by Venkatarama Ayyar J. in the *Bengal Immunity Company's case* [(1955) 2 S.C.R. 603: A.I.R. 1955 S.C. 661].

Bengal
Immunity
Case.

"A sale could be said to be in the course of inter-State trade only if two conditions concur: (1) a sale of goods and (2) a transport of those goods from one State to another under the contract of sale. Unless both these conditions are satisfied there can be no sale in the course of inter-State trade."

"In these transactions relating to supply of coal, which we have assumed are sales, coal was transported in pursuance of the allotment orders to other States.

We have also assumed for the purpose of this argument that compliance with allotment orders resulted in a contract of sale. The transactions were unquestionably in the course of inter-State trade."

32. Thus in the cases of inter-State sales which arose before the enactment of the Central Sales Tax Act, 1956, the Supreme Court had adopted the same test for determining when a sale took place in the course of inter-State trade or commerce, as was later adopted in construing section 3(a) of the Act, for the same purpose. The test was—as indeed it is under the Act—whether the contract of sale contained a covenant or whether it is an incident of such contract and whether as a result of such covenant or incident there was movement of the goods from one State to another. Where a dealer in "A" State agrees to sell goods to another in "B" State and undertakes as part of that contract to deliver the goods to the purchaser in the "B" State and the goods are transported from "A" State to "B" State, whatever be the means of transport—air, road or rail—the transaction viewed as a whole is an inter-State sale or purchase. The movement of goods from one State to another in a contract of inter-State sale is the necessary result of the covenant or incident of the contract as otherwise the contract cannot be fulfilled or performed.

33. It is necessary to emphasise, though it seems to me obvious, that such a contract of sale must be between the seller and the buyer. Section 4 of the Sale of Goods Act, 1930 says that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. It is true that in *'State Trade Corporation of India Ltd. and another vs. The State of Mysore* [A.I.R. 1963 S.C. 548: (1963) 3 S.C.R. 792] and in *Cement Marketing Company of India Ltd. vs. State of Mysore* [A.I.R. 1963 S.C. 980: (1963) 3 S.C.R. 777], the contracts of sale were not directly between the buyers on the one hand and the sellers on the other. In the first case, the contract of sale was between the buyer and the supplier, the Marketing Company. But it was admitted that the supplier made the sales to the buyers as the agent of the State Trade Corporation and the Marketing Company did not deny its liability to be taxed as such agent. In the course of its judgment the Supreme Court observed (A.I.R. page 550, para. 11):—

"Since the permits with which we are concerned provided that the supply "had to be made from one or other factory situate outside Mysore, the contracts must be deemed to have contained a covenant that the goods should be supplied in Mysore from a place situate outside its borders. A sale under such a contract would clearly be an inter-State sale as defined in section 3(a) of the Central Sales Tax Act."

Test of contract.

Contract must be between buyer and seller.
State Trade Corporation case.

Cement
Marketing
case.

34. In the second case also, the contract of sale had been entered into between the buyer and the Cement Marketing Co. Ltd., who were described as the Sales Managers of the Associated Cement Co. Ltd. The buyer entered into a contract with the Cement Marketing Co. who sent the authorisation and the buyer's order to the factory named in the authorisation and the factory then supplied the requisite goods to the buyer. On a consideration of all the relevant facts of the case, the Supreme Court held that the Cement Marketing Co. was only a Sales Manager of the Associated Cement Co. Ltd. who were the real sellers, and observed (A.I.R. page 984, para. 3):—

“It was not the volition of the first appellant (Cement Marketing Co.) to supply to the purchaser the goods from any of the factories of the second appellant (Associated Cement Co.). The factories were nominated by the Government by authorisation which formed the basis of the contract between the *buyer* and the *seller*. Applying these tests to the facts of the present case, we are of the opinion that the sales were in the nature of inter-State sales and were exempt from sales tax.”.

Same test
of
contract.

35. The same test of contract that has been applied, as seen above, for determining when a sale or purchase takes place in the course of inter-State trade or commerce, has been held to apply for determining when sales by export or purchases by import take place. Before I refer to and discuss the relevant authorities bearing on these latter kinds of transactions, it may be necessary to know what “import” and “export” mean.

“Import”
meaning.

36. According to Webster's International Dictionary, the word “import” means “to bring in from a foreign or external source especially to bring (wares or merchandise) into a place or country from a foreign country in the transactions of commerce; opposed to export”.

“Export”
meaning.

Similarly, “export” according to Webster's International Dictionary means “to carry away to carry or send abroad especially to foreign countries as merchandise or commodities in the way of commerce; the opposite of import.”

Empress
Mills vs
Municipal
Committee.

The Oxford Dictionary gives a similar meaning to both these words (See *Empress Mills vs. Municipal Committee, Wardha*, A.I.R. 958 S.C. 341 at p. 344; (1958) S.C.R. 1102 where these definitions are referred to).

Gokal's
Case.

37. In *J. V. Gokal & Co. vs. Assistant Collector of Sales Tax* [A.I.R. 1960 S.C. 595; (1960) 2 S.C.R. 852], the Supreme Court in paragraph 9 of its judgment on page 598, A.I.R., posed the question: “What does the phrase ‘the course of the import of the goods into the territory of India’ convey?” and proceeded to explain the phrase as follows:

"The crucial words of the phrase are "import" and "in the course of". The term "Import" signifies etymologically "to bring in". To import goods into the territory of India therefore, means to bring into the territory goods from abroad. The word "course" means "progress from point to point". The course of import, therefore, starts from one point and ends at another. It starts when the goods cross the customs barrier in a foreign country and ends when they cross the customs barrier in the importing country. These words were subject of judicial scrutiny by this Court in State of Travancore-Cochin vs. Shanmugha Vilas Cashew Nut Factory [(1954) S.C.R. 53: A.I.R. 1953 S.C. 333]. Construing these words Patanjali Sastri C.J. observed at page 62 (S.C.R.) (at page 336 of A.I.R.):—

"The word "course" etymologically denotes movement from one point to another and the expression "in the course of" not only implies a period of time during which the movement is in progress but postulates also a connected relation."

"As regards the limits of the course, the learned Chief Justice observed at page 68 (of S.C.R.) (page 338 of A.I.R.):—

"It would seem, therefore, logical to hold that the course of the export out of, or of the import into, the territory of India does not commence or terminate until the goods cross the customs barrier."

"The course of the import of the goods may be said to begin when the goods enter their import journey, i.e., when they cross the customs barrier of the foreign country and end when they cross the customs barrier of the importing country."

38. The Supreme Court then considered the question "When can it be said that a sale takes place in the course of import journey?" It was observed (A.I.R. 1960 S.C. 595, at page 598, para. 10):—

Tata Iron
case.

"This Court in *State of Travancore vs. Bombay Company Ltd.* (1952) S.C.R. 1112: (A.I.R. 1952 S.C. 366), held that a sale which occasioned the export was a sale that took place in the course of the export of the goods. If A, a merchant in India, sells his goods to a merchant in London, and puts through the transaction by transporting the goods by a ship to London, the said sale which occasioned the export is exempted under article 286(1)(b) of the Constitution from the levy of sales tax. The same principle applies to a converse case of goods which occasioned the import of goods into India."

Burmah
Shell Case

39. In *Burmah Shell Oil Standard Co. vs. Commercial Tax Officer* (A.I.R. 1961 S.C. 311): (1961) 1 S.C.R. 902, the Supreme Court observed that the test of export is that the goods must have a foreign destination where they can be said to be imported. The crucial fact is the sending of the goods to a foreign destination where they would be received as imports. The country to which the goods are sent is said to import them and the words "export" and "import" are complementary. The two notions of export and import thus go in pairs.

Kerala
Cochin Case.

40. Again, in *State of Kerala vs. Cochin Coal Co. Ltd.* [A.I.R. 1961 S.C. 408: (1961) 2 S.C.R. 219], the Supreme Court explained what was meant by the expressions "Export" and "Import" as follows:—

"The concept of export in Article 286 postulates, just as the word "import", the existence of two termini between which the goods are intended to move or between which they are intended to be transported, and not a mere movement of goods out of the country without any intention of their being landed in specie in some foreign post."

Deputy
Commission-
er vs.
Devar:
I.L.R. (1964)
1 Mad. 383.

41. The High Court of Madras in *Deputy Commissioner of Commercial Taxes vs. Devar and Company* [I.L.R. (1964) 1 Madras 383], made some pertinent observations on the expressions "import" and "export". On page 387, it was observed:—

"The course of import or export covers a range of integrated activities. These activities are similar in character and cover the same field whether in respect of export or import. We shall, however, deal with the course of import as the instant case is concerned with import; but we have no doubt that the course of export is precisely of the same pattern as that of import. One is the reverse of the other. The Supreme Court of the United States used the expression *Export Stream*. We are having in mind the following passage in *Empresa Siderurgica, S.A. vs. Merced* (93 L. Ed. 1276, 1280):—

"It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainly that the goods are headed for their destination and will not be diverted to domestic use. Nothing less will suffice."

If we can coin the expression *import stream*, it would not be a mere metaphor but it would serve to illustrate the true significance of the course of import. A stream has its starting point and the end and so has the import course. When does the import begin and when does

it end? What is the interval between its commencement and termination? These are the vital questions the answer to which would solve the problem before us. The import taken as a whole from start to finish, or the course of import to use the language of the Constitution makers or the Parliamentarian, consists of a bundle of interlinked and interlaced activities spread over a duration of time, beginning from the goods going through the customs gate of the exporting country and ending with the crossing of the customs barricade of the importing country. The *import stream* dries up and ceases to flow after the customs department of the importing State levies the duty and thereby declares the eligibility of the goods to be cleared and *mingled with the general mass of goods and merchandise in the country.*'

42. I shall now deal with the decided cases of export-sales and import-purchases with particular reference to the nature of the contracts of sale or purchase which invariably formed the basis of the transactions therein considered. While considering these decided cases, I leave out of account such sales or purchases in the course of import or export as are effected by transfer of shipping documents while the goods are beyond the customs frontiers of India and which after the coming into force of the Central Sales Tax Act, 1956 are covered by the latter parts of its section 5(1) and (2). The latter part of section 5(1) reads, "or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India"; and the latter part of section 5(2) says, "or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India". The sales or purchases covered by these parts do not present such difficulty, nor do they arise for our consideration in the present case. In the present case, we are only concerned with whether the sale by the assessee in favour of the Director-General of Supplies and Disposals occasioned the import of goods from Belgium to India.

Export sales
and Import
purchases.

43. In *State of Travancore-Cochin vs. Bombay Co., Ltd.* [A.I.R. S.C. 366: (1952) S.C.R. 1112], the dealings of the Respondents consisted of export sales of certain commodities to foreign buyers. The Respondents claimed exemption from assessment of sales tax on the ground that such sales took place in the course of the export of goods out of the territory of India within the meaning of article 286(1) (b). It is necessary to emphasise that the Indian exporters were themselves the sellers of their commodities to the buyer overseas. As this case (which is called the I Travancore case) forms the bed rock of the entire superstructure of the law as developed in later cases and as, as we have noted above, it became the precursor of the Central Sales Tax Act, it would be necessary to quote here some of the relevant passages in the judgment of the Supreme Court.

First Travancore case

In paragraph (10) on page 367, the learned Chief Justice observed:—

“We are clearly of the opinion that the sales here in question which occasioned the export in each case fall within the scope of the exemption under article 286 (1) (b). Such sales must of necessity be put through by transporting the goods by rail or ship or both out of the territory of India, that is to say, by employing the machinery of export. A sale by export thus involves a series of integrated activities commencing from the *agreement of sale with a foreign* buyer and ending with the delivery of goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated and the sale and the *resultant* export form parts of the same transaction.”

The final conclusion arrived at by the Supreme Court is stated in paragraph (14) on page 368:—

“We accordingly hold that whatever else may or may not fall within article 286 (1) (b), sales and purchases which themselves occasion the export or the import of the goods, as the case may be, out of, or into the territory of, India come within the exemption.”

44. It is necessary to remember (my repetition may be pardoned) that the transaction in this case was between the Indian exporter who *was himself the seller* on the one hand, and the buyer in a foreign country on the other. It is only this kind of transaction which the Supreme Court described as a *sale by export*. The nature of such transaction and its activities and the utter impossibility of its being put through without the machinery of export were described by the Supreme Court in the passage extracted above, for explaining what the Court meant by a sale by export and when such transaction of sale by export took place. These observations were made only in regard to the particular kind of transaction involved in that case. It is necessary to emphasise this aspect of the case as these observations could be expressed almost in the same language¹ and made applicable to other kinds of transactions which may not be themselves sales by export as explained in this case but which may eventually and even necessarily lead to the export of the goods from this country to a foreign port. It may be noted that in this case, as also in the *Second Travancore case* which will be presently

1. See the dissenting judgment of Mr. Justice S.R. Das in the II Travancore Case (A.I.R. 1953 SC. 333) where he has used the same language in expressing his view that the last purchase before export and the first sale after import also earn the exemption under Art. 286(1)(b) Pages 348, 350. See also A.I.R. 1962 S.C. 1733 at page 1736 where in paras 9 and 10, the same observations were relied upon for containing that the last purchase before export was protected.

referred to, the Supreme Court was construing and explaining the words of article 286(1)(b), which may, for convenience of reference, be set out here:--

"286(1) No law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place—

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

45. Which are the transactions of sale and purchase that take place in the course of import or export? It is submitted that the Supreme Court carefully considered this question and laid down that it was only the *sales* which occasioned the export and only the *purchases* which occasioned the import that came within the exemption of article 286(1)(b), as being respectively in the course of export and import. Be it noted that the Supreme Court considered only the transactions of *sales* (and not of purchases) as occasioning the export, and only the transactions of *purchases* (and not of sales) as occasioning the import.

46. Further, an agreement of sale by an Indian exporter with a foreign buyer was regarded as an integrated activity commencing the process of a sale by export. It need hardly be stated that it is a necessary incident of such an agreement of sale (being what it is—with a foreign buyer) that the goods agreed to be sold must be transported by rail or ship or by both out of the territory of India, only by employing the machinery of export.

47. It is also necessary to bear in mind the scope and ambit in which the principle of integrated activities adopted in this case for explaining "in the course of", will have its legitimate operation. Within its scope and ambit an agreement of sale to, and purchase from, a person in a foreign land are by this decision, held to be included, and they are therefore regarded as taking place *in the course* of export or import, as the case may be, although such agreement of sale or purchase is obviously in point of time anterior to the actual and physical handing over of the goods out of the country or bringing them into the country. But it is only such agreements of sale or purchase which though apparently not "in the course of export or import" are perforce dragged into the export or import stream, as the case may be. For, the Supreme Court says that if only the etymological meaning of the word "course" is stressed, it would merely be formulating a mechanical test which would place too a narrow construction upon clause (1)(b) in that it would limit its operation only to sales and purchases effected during the transit of goods and would, if accepted, rob the exemption much of its usefulness.

Second
Travancore
case.

48. This decision of the Supreme Court which, as we have seen above, holds that it is only the sales that occasion the export, and only the purchases that occasion the import that are regarded as taking place in the course of export or import, as the case may be, for the purpose of article 286(1) (b), was reaffirmed in the II Travancore case which further considered if any other transactions could or could not be regarded as having taken place in the course of import or export, either by occasioning import or export, or otherwise.

49. The Second Travancore case is *State of Travancore-Cochin vs. Shanmugha Vilas Cashew Nut Factory* (A.I.R. 1953 S.C. 333; (1954) S.C.R. 53). The facts of this case are that the Respondents were dealers in cashewnuts in the State of Travancore. Their business consisted in making purchases of cashewnuts and after converting them into edible kernels and oil they used to export the edible kernels and the oil to U.S.A.

50. The purchases of cashewnuts made by the Respondents fell into 3 groups—

- (1) Purchases made in the local market;
- (2) Purchases from the neighbouring Districts of the State of Madras;
- (3) Purchases by way of imports.

In respect of all these three kinds of purchases the Respondents claimed exemption from the States General Sales Tax Act under article 286(1) (b). Their contention was that the cashewnuts had been purchased with a view to exporting their kernels and oil to America. Of course, this contention assumed, and the majority of the Judges of the Supreme Court were also prepared to assume for the sake of argument, that the raw materials (cashew-nuts) purchased in the three ways mentioned above were the same as the manufactured goods (kernels and oil) exported to America. On the contentions of the Respondents, the Supreme Court formulated the question for their consideration as follows (page 336, para 9):--

“The only question debated before us was whether in addition to the export-sale and import-purchase which were held in the previous decision to be covered by the exemption under clause (1) (b), the following two categories of sale or purchase would also fall within the scope of that exemption:—

- (1) The *last purchase* of goods made by the exporter for the purpose of exporting them to implement orders already received from a foreign buyer or expected to be received subsequently in the course of business, and *the first sale* by the importer to fulfil orders pursuant to which the

goods were imported or orders expected to be received after the import.

(2) Sales or purchases of goods effected within the State by transfer of shipping documents while the goods are in the course of transit.”

51. In considering this question the Supreme Court applied the same principle of “integrated activities” as had been applied in the *first Travancore case* and stated (A.I.R. page 336, para 10):—

“As regarded the first-mentioned category, we are of opinion that the transactions are not within the protection of clause (1) (b) — the expression “in the course of” not only implies a period of time during which the movement is in progress but postulates also a connected relation —. A sale in the course of import should be understood in the context of clause (1) (b) as meaning a sale taking place not only during the activities directed to the end of exportation out of the country but also as part of or connected with such activities —. The phrase “integrated activities” was used in the previous decision to denote that “such a sale” (i.e. a sale which occasions export) cannot be dissociated from the export without which it cannot be effectuated and the sale and the resultant export form parts of a single transaction. It is in that sense that the two activities—the sales and the export—were said to be integrated —. It is not correct to speak of a purchase for export as an activity so integrated with the exportation that the former could be regarded as done “in the course of” the latter. A purchase for the purpose of export like production or manufacture is only an act preparatory to export and cannot, in our opinion, be regarded as an act done “in the course of the export of the goods out of the territory of India” any more than the other two activities (production or manufacture) can be so regarded.”

“The same reasoning applies to the first sale after import which is a distinct transaction effected after the importation of goods into the country has been completed, and having no integral relation with it. — (page 338, end of page 14). We find no warrant in the language employed (in article 286) to extend the protection to cover the last purchase before export or the first sale after import.”

52. In para 16 at page 338, the Supreme Court stated its conclusions as follows:—

(1) Sales by export and purchases by import fall within the exemption under article 286(1)(b). This was held in the previous decision (*1 Travancore case*).

(2) Purchases in the State by the exporter for the purpose of export as well as sales in the State by the importer after the goods have crossed the customs frontier are not within the exception.

(3) Sales in the State by the exporter or importer frontier are not within the exemption.

by transfer of shipping documents while the goods are beyond the customs frontier are within the exemption, assuming that the State power of taxation extends to such transaction.

Combined effect of the two Travancore case.

53. Thus, apart from the transactions effected by transfer of shipping documents as mentioned in the third conclusion set out above, it is clear from the two Travancore cases that it is only the two kinds of transaction mentioned in the first conclusion that come within the exemption under article 286(1)(b). These two kinds of transactions are sales by export (i.e. export-sales), and purchases by import (i.e. import-purchases). They were held in the I Travancore case that they came within the exemption because they respectively *occasioned the export and the import*. Thus to this category of transactions, the II Travancore case did not add any further transactions as *occasioning export or import*. Therefore it must be taken as settled by these two Travancore Cases that it is only the sales of the nature that we had in the first Travancore Case that occasion the export and only the purchases of similar nature that occasion the import. In other words, when the exporter is himself a seller to a foreign buyer, his sale comes within the exemption as *occasioning the export*; likewise, when the importer is himself a purchaser from a foreign seller, his purchase comes within the exemption which particular transactions *occasion the export or the import* as occasioning the import. It is necessary to bear in mind (as contradistinguished from the transactions effected by transfer of shipping documents) because, as we shall presently see,——in the later cases also it is only these particular transactions (export-sales and import-purchases) that have been held to so occasion the export and import; and because, the word "occasion" which was used for the first time in the two Travancore cases has now come to receive statutory recognition by its being used in sections 3 and 5 of the Central Sales Tax Act.

"occasioned" means import-purchase and export-sale.

Combined effect of the Travancore case.

54. Further, we have seen that the *first Travancore case* held the agreement of sale by a seller with a foreign buyer as commencing the series of integrated activities resulting in export. This aspect of the case was referred to in the *Second Travancore Case* as follows (page 336):—

Integrity effect—meaning of.

"The previous decision proceeded on this view and emphasised the integral relation between the two of the goods into the territory of India. A few facts relating to such dealings may be stated here, so that we may

(sale and export) where the contract of sale itself occasioned the export as the ground for holding that such a sale was one taking place in the course of export."

55. The necessity of the existence of such an agreement of sale (or of purchase as in the case of import) was stressed and explained in the Second Travancore Case, both in a positive and in a negative way. This is clear from the manner in which the Supreme Court dealt with certain types of dealings of purchases in respect of which the Respondents claimed exemption under article 286 (1) (b) as having been effected in the course of the import appreciate the views of the Supreme Court on such dealings and how they disposed of them by invoking the principle of privity of contract. Respondents placed orders with a Bombay party for purchase of cashew-nuts from Africa. Certain purchases were made from African sellers by the Bombay party acting only as Agents for the Respondents. In regard to certain other dealings, the Bombay party indented the goods on their own account, and placed orders for these goods with African sellers. The African sellers shipped the goods direct to Cochin or Quilon on C.I.F. terms. The shipping documents were made out in the name of the Bombay party as consignees and were delivered to them against payment through bankers at Bombay. The Bombay party cleared the goods through their own representatives at the port of destination, and issued separate delivery orders to the respondents for the respective quantities ordered. Thus, the Bombay party sold the goods as principals to the Respondents. Contract.

56. On these facts, the Supreme Court observed first, as regards the purchases made by the Bombay party only as agents of the Respondents as follows (Para 21, page 339, A.I.R.):—

"It will be seen that in respect of the purchases (falling under this head), the Bombay party acted merely as the agents of the respondents, *privity* being established between the latter and the African sellers. The purchases are thus purchases which occasioned the import and therefore come within the exemption. Privity.

"As regards (the other kind of purchases), the Bombay party are the purchasers and they sell the goods as principals to the respondents at the port of destination by issuing separate delivery orders against payments. No *privity* being established between the respondents and the African sellers, the respondents' purchases can only be described as purchases from Bombay party of the goods within the State; in other words, they were local purchases ——— and do not come within the exemption." Combined effect.

57. Thus, it is clear that the existence of privity of contract between the Indian buyer and the overseas seller, in the one case, rendered the purchases as purchases in the course of import, while the absence of it in the other case rendered the purchases as not in the course of import. It is obvious, that the Supreme Court by adopting the principle of privity of contract only stressed the necessity of the existence of a contract between the Indian seller or buyer and the foreign party. The Shorter Oxford English Dictionary gives the meaning of "privity" as any relation between two parties recognised by law, e.g. covenant. Earl Jowitt in his Dictionary of English Law gives the meaning of "Privity of Contract" as follows:—

"Privity of contract is the relation between the immediate parties to a contract as where A agrees with B to pay him £100."

We may now refer to the later decisions of the Supreme Court in which the two Travancore cases have been followed.

Gurviah's
case.

58. In *State of Madras vs. Gurviah Naidu and Co. Ltd.*, A.I.R. 1956 S.C. 158, the facts were that a merchant in Salem secured orders for the supply of untanned hides and skins from London purchasers, and then in pursuance of such orders placed with him, he purchased them locally in order to implement those orders and exported them, and the question was whether a tax on those purchases (made locally) was hit by article 286(1)(b). In holding that it was not, the Supreme Court observed:—

"Such purchases were, it is true, for the purpose of export but such purchases did not themselves occasion the export and consequently did not fall within the exemption of article 286(1)(b) of the Constitution as held by this Court in (1952) S.C.R. 1112: (A.I.R. 1952 S.C. 366). Nor did such purchases in the State by the exporter for the purpose of export come within the ambit of article 286(1)(b) as held by the decision of the majority in (1954) S.C.R. 53 (A.I.R. 1953 S.C. 333)."

This was clearly a case of the last purchase before export, which under the 2nd conclusion in the *II Travancore case* did not come within the ambit of article 286(1)(b).

Mysore
Spinning
case.

59. The next case which may be referred to is *State of Mysore vs. Mysore Spinning and Manufacturing Co. and another Ltd.*, A.I.R. 1958 S.C. 1002. Here, the Respondents who are Textile Mills at Bangalore carry on business as manufacturers and sellers of textile goods, such as cotton and yarn. These mills sold to licensed export dealers at Bombay and other ports who exported the goods to foreign buyers. The Mills had no direct contract with any foreign buyer. The licensed exporters at the ports dealt with them

(foreign buyers) and the Mills dealt with the exporters. The procedure in which this business of export was conducted may also be briefly noted. In the first place, the exporters used to obtain a firm offer from a buyer overseas specifying the quality and quantity of cloth or yarn required by the buyer. Thereafter the exporters would enquire from the Mills whether they could sell or manufacture goods of the quality and quantity required by the overseas buyer. If the Mills said, "Yes", the exporter entered into a firm contract with the foreign purchaser and thereafter the exporter entered into a contract with the Mills for the sale of those goods. The contract had to be marked "for export only", and the prices fixed had to be higher than the inland prices. The specifications and the details of the goods, had also to be entered. Thereafter the Mills packed the goods and despatched them to the exporter. The goods had to be marked clearly "for export only". Then finally, the exporter took delivery of the goods and shipped them overseas.

Thus, it was clear that from first to last, the Mills had no direct contact with the overseas buyer and that the sales that occasioned the export were not the sales by the Mills to the exporter. But the Mills contended that, nevertheless, these sales were made in the course of export and so protected by article 286 (1) (b).

60. Mr. Justice Vivian Bose speaking for the Court observed (page 1005, paras. 19 and 20):—

Two sales-
could not
occasion
export.

"There are two sales here and both could not have occasioned the export, only the second of the two did that, and the Respondents (Mills) were not parties to it either directly or through the exporters as their agents. It follows that the first sale with which alone the Respondents were associated, did not do that. If it did not, then it hardly matters, whether the goods were exported through the instrumentality of the exporters or not, because according to the decisions of this Court, all sales that precede the one that occasions the export are taxable.

"Even if the facts were as stated (i.e. if the goods had been manufactured with the main intention for export), as we have already pointed out, this Court has decided that only the sale that occasions the export is exempt and that the sale to the exporter that preceded it is not, even if it was made "with a view to" or "for the purpose of export".

This case, it will be seen, explained the same principle of the sale occasioning export in a different way by reference to the number of transactions of sales involved and leading up to the export. If there were two sales, as there were in this case, one leading to the other, only the last sale could be regarded as having occasioned the export. It

was also held in this case that even if the goods had been manufactured (in the present case, by the Mills) with the main intention of exporting them and with that end in view had been sold to the exporters in the ports, the sale by the Mills under these circumstances could still not be considered as one occasioning the export.

Gordhandas' case.
Privity

61. In *Gordhandas vs. B. Banerjee* (A.I.R. 1958 S.C. 1006) the existence of privity between the foreign merchant and the Appellant who claimed exemption for his sale under article 286(1) (b) was regarded as necessary to render his sale as occasioning export. Here the facts were, the Appellant Gordhandas sold the goods to the Bombay party who in their turn exported the goods to foreign merchants. In paragraph 10 (on page 1010) the Supreme Court observed:—

“As soon as the goods were sold to the Bombay parties the Appellant's interest in the goods ceased and whatever happened to the goods subsequently was no concern of the Appellant. In fact, there is no privity between the Appellant and the foreign merchants to whom the goods were ultimately exported.”

Gokal's case.
as summarising the two Travancore cases.

62. In *J. V. Gokal & Co. vs. Assistant Collector Sales Tax* (1960) 2 S.C.R. 852; (A.I.R. 1960 S.C. 595), the Supreme Court again followed the two Travancore Cases and at paragraph 10, (page 598), observed:—

“This Court in *State of Travancore-Cochin vs. Bombay Co. Ltd.*, held that a sale which occasioned the export was a sale that took place in the course of export of goods This Court again in 1954 S.C.R. 53 (A.I.R. 1953 S.C. 333) extended the doctrine to a case of sale or a purchase of goods effected within the State by transfer of shipping documents while the goods were in the course of transit.”

Thus, it is only to this extent that the principles laid down in (the *I Travancore case*) for determining when a sale or purchase took place in the course of export or import were regarded as extended by the (*Second Travancore case*).

Which transactions' according to Supreme Court, are in the course of export or import.

63. From this and the two *Travancore cases* it is clear which particular transactions would be in the course of export and which, in the course of import. For convenience. I may enumerate them here:—

(1) A sale which occasions export would be in the course of export.

(2) A purchase which occasions import would be in the course of import.

(3) A sale or purchase which is effected by transfer of shipping documents while the goods are on the high seas would be in the course of export. (Such

transactions would be very rare but are not inconceivable. See paragraph 13 of the I *Travancore* case and paragraph 15 and 49 of the II *Travancore* case, A.I.R.).

(4) A sale or purchase, effected by transfer of shipping documents while the goods are on the high seas, would be in the course of import. (See paragraph 13 of the I *Travancore* case and paragraph 15 and 49 of the II *Travancore* case, A.I.R.; and also the facts of this case i.e. *J. V. Gokal's case*).

64. From this enumeration, it would be seen that the Supreme Court has by its interpretation of article 286(1) (b) analysed and covered all the transactions of sale or purchase which take place in the course of the import of the goods into, or export of the goods out of, the territory of India. In fact, by not adopting a *mechanical test* (see paragraph 13 of the I *Travancore* case, A.I.R.), the Supreme Court put a liberal construction upon article 286 (1) (b) by including in the category of transactions taking place in the course of export or import, a sale which occasions export as taking place in the course of export and a purchase which occasions import as taking place in the course of import, though such sale or purchase does not literally take place in the course of export or import.

All transactions under Art. 286 (1)(b) covered by the Supreme Court decisions.

65. In *Universal Import Agency vs. Chief Controller of Imports* (1961) 1 S.C.R. 305 (A.I.R. 1961) S.C. 41, the Supreme Court again referred to the two *Travancore* cases at page 47 (paragraph 19), and observed:—

Universal Import Agency case.

'This Court had in the context of article 286(1) (b) of the Constitution to consider the connotation of the words "in the course of export or import" in *State of Travancore Cochin vs. Bombay Co., Ltd.* (I *Travancore case*).'

Patanjali Sastri C. J. described the nature of export sale thus at page 367 (A.I.R.):—

"Such sales must of necessity be put through by transporting the goods by rail or ship or both out of the territory of India, that is to say, by employing the machinery of export. A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction."

The same principle has been restated by the learned Chief Justice in (*II Travancore case*). The learned Chief Justice stated at page 336 (A.I.R.) thus :—

“The phrase *integrated activities* was used in the previous decision to denote that a sale, that is a sale which occasions the export cannot be dissociated from the export without which it cannot be effectuated and the sale and the resultant export from parts of a single transaction.”

66. I have repeated these passages here, only with a view to facilitating comparison of these passages with the statement of law made by the Supreme Court on what constitutes a purchase by import. An identical language has been employed in explaining and setting out the connotation of import purchase. In para 20 (A.I.R.), the Supreme Court observes :—

“Applying the said principles (i.e. principles laid down in the two Travancore cases) to an import sale, it may be stated that a purchase by import involves a series of integrated activities commencing from the contract of purchase with a foreign firm (emphasis supplied by me) and ending with the bringing of goods into the importing country and that the purchase and resultant import form parts of the same transaction.”

These observations, which are directly applicable in the present case, make it clear that an import stream can be started only by an Indian buyer entering into an agreement of purchase with a foreign seller. This is the same thing as saying that there must be privity between the Indian buyer and the seller overseas. Let me, however, proceed with the later cases before I set down all the principles of law as deduced from the several decisions of the Supreme Court.

67. *Endupuri Narasimham vs. State of Orissa* (1962) I S.C.R. 314; (A.I.R. 1961 S.C. 1344), is a case of intra-State sales. But the observations made by the Supreme Court on article 286 (1)(b) are apposite. Indeed, the whole law on the subject of sale or purchase of goods in the course of export or import has been succinctly and precisely set out in these observations. The Supreme Court says (Page 1346, A.I.R.) :—

“With reference to the analogous provision under Article 286 (1)(b) prohibiting imposition of tax on the sale or purchase of goods in the course of import or export, it has been held by this Court that it is *only* a sale or purchase which occasions the export or import of the goods out of, or into, the territory of India, or a sale in the State by the exporter or importer by transfer of shipping documents while the goods are

beyond the customs barrier, that is within the exemption and that a sale which precedes such export or import or follows it is not exempt, vide (the two Travancore cases)."

68. The next case which may be referred to is *East India Tobacco Co. vs. State of Andhra Pradesh* [(1963) 1 S.C.R. 404; A.I.R. 1962 S.C. 1733]. In this case, the Appellants were doing business in the export of tobacco. They first entered into contracts with their customers abroad for sale of tobacco. Thereafter they purchased the requisite quantities of goods (tobacco) in the local markets and then they exported them to their foreign purchasers in performance of their contracts with them. The purchases made by the Appellants were sought to be assessed to sales tax. The Appellants contended that these purchases made in the local markets were protected under article 286 (1)(b). On these facts, the Supreme Court observed (page 1236, paragraph 9) :—

It may be assumed for the purpose of the present discussion that the purchases made by the Appellants on which the tax is sought to be imposed were made for the purpose of executing specific orders which they had received from their foreign customers. The question is whether even so the sales in question took place in the course of export for the purpose of article 286 (1)(b). In support of their contention that they did, the Appellants rely on the following observations in (*I Travancore case*):—

"A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with delivery of goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated and the sale and the resultant export form parts of a single transaction. Of these two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other".

"Now the contention is that the agreement entered into with the foreign purchasers for sale of Virginia tobacco, the purchase of the same locally by the Appellants for performing the contract and their subsequent export to the foreign purchasers must all be held to form one integrated transaction of sale in the course of export."

"Now the observations quoted above were made in refutation of the contention that the expression 'sale in the course of export or import' meant only a sale which takes place while the

goods are actually in movement, in the course of export or import, as for example, when shipping documents are endorsed and delivered when the goods are in transit. This Court held that it was too narrow an interpretation to put on the words in question and that a sale which actually occasions the export or import would fall within article 286 (1)(b). The question whether sales which precede export are sales in the course of export within article 286 (1)(b) arose directly for decision in the II Travancore case."

69. The Supreme Court also referred to two more cases, [*State of Madras vs. Gurviah Naidu & Co. Ltd.* (A.I.R. 1956 S.C. 158) and *State of Mysore vs. Mysore Spinning & Manufacturing Co.* (A.I.R. 1958 S.C. 1002)] with approval and concluded (page 1337, paragraph 14) :—

"On these authorities the Law must be taken to be well settled that it is only the sale under which the export is made (emphasis supplied by me) that is protected by article 286 (1)(b) and that a purchase which precedes such a sale does not fall within the purview though it is made for the purpose of, or with a view to export."

Ben Gorm
case.

70. The last case of the Supreme Court to which I may refer in this connection is *Ben Gorm Nilgiri Plantations v. Sales Tax Officer* (1964) 7 S.C.R. 706: A.I.R. 1964 (2) S.C. 1752. Before considering the observations made by the Supreme Court, I would state the facts which arose in the case. The Appellants—the Assessee—were the manufacturers or producers of tea in the State of Kerala. They sold their manufactured tea by public auction through their brokers to the agents or intermediaries of foreign principals. Thus, in effect, the sales were made by the Appellants themselves in favour of the agents of foreign buyers and delivery of the goods sold was also given to such agents. It is only thereafter that the agents themselves exported the goods purchased by them to their principals a foreign destinations.

71. The question before the Supreme Court was: "Is the sale by auction to the agent or intermediary of the foreign buyer in the course of export within the meaning of article 286 (1)(b)?" The Supreme Court held that the Appellants were not concerned with the actual exportation of the goods and the sales were intended to be complete without the export and that accordingly the sales were not in the course of export.

In the course of its judgment, the Supreme Court, first, stated what constitutes a sale in the course of export and in expounding the law on this subject it referred to the

first Travancore case and proceeded (page 1755, paragraph 8) :

"A sale in the course of export predicates a connection between the sale and the export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted without a breach of the contract or the compulsion arising from the nature of the transactions. In this sense, to constitute a sale in the course of export, it may be said that there must be an intention on the part of both the buyer and the seller to export, there must be an obligation to export, and there must be an actual export. The obligation may arise by reason of Statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export——
———And to occasion export there must exist such a bond between the contract of sale and the actual exportation that each link is inextricably connected with the one immediately preceding it."

72. It may be noted that the same principles as had been laid down in the two Travancore cases have been restated and explained in this case. What is, however, emphasised by the Supreme Court even in this case is a contract of sale between the seller and the buyer which must "link the sale to export". What kind of link or bond should there be between the contract of sale and the export? When do these two activities—contract of sale and the export—become integrated with one another and become parts of a single transaction? —The bond between the contract of sale and the export is an indissoluble bond, and the two activities must be merged in one another before a completed transaction of sale can arise. Such a result has been described in the first Travancore case as a sale which cannot be dissociated from the export, or as one which cannot be effectuated without the machinery of export. The sale, in order to be complete must, if I may use the expression, float on the export stream so that it may finally reach its foreign destination. Mr. Justice Shah has illustrated the principles which he stated earlier, by reference to certain instances (see page 1756, paragraph 8) with a view to explaining further to what cases they do not apply. First, he considers the facts of the case which was before him and puts them in the form of an instance. "For instance", says the learned Judge "the foreign purchaser either by himself or through his agent purchases goods within the territory of India and exports the goods and even if the seller has the knowledge that the goods are intended by the purchaser to be exported, such a transaction is not in the course of export, for, the seller does not export the goods (underlined by me), and it is not his concern as to how the purchaser deals with the goods.

Ben Gorn
case.

Link or
Bond.

Such a transaction without more cannot be regarded as one in the course of export because etymologically "in the course of export" contemplates an integral relation or bond between the sale and the export.

73. When the learned Judge observed "such a transaction without more" in the foregoing passage, he had obviously in his mind the contract or agreement of sale before him which contained no obligation whatever on the seller to export the goods. If there had been any such obligation or covenant requiring the seller to export the goods, it would have established an integral relation between the sale and the export. Then the learned Judge takes another instance presumably afforded by the facts of the I Travancore case. It is "a transaction under a contract of sale with a foreign buyer under which the goods may under the contract be delivered by the seller to a common carrier for transporting them to the purchaser. Such a sale would indisputably be one for export whether the contract and delivery to the common carrier are effected directly or through agents." Further on, it is observed :—

"In general where the sale is effected by the seller and he is not connected with the export which actually takes place, it is a sale for export. Where the export is the result of sale, the export being inextricably linked up with the sale so that the bond cannot be dissociated without a breach of the obligation arising by statute, contract or mutual understanding between the parties arising from the nature of the transaction, the sale is in the course of export."

74. I may also quote the following observations from the next paragraph (9) :—

"But there is nothing in the transaction from which springs a bond between the sale and the intended export linking them up as parts of the same transaction. There is nothing in law or in the contract between the parties, or even in the nature of the transaction which prohibits diversion (by the purchaser) of the goods for internal consumption. The sellers have no concern with the actual export of the goods, once the goods are sold. They have no control over the goods. There is therefore no direct connection between the sale and export of goods which would make them parts of an integrated transaction of sale in the course of export."

Direct
connection.

Thus, it would be seen that if there were a direct connection between the sale and the export of goods, it would make the sale and export of goods parts of an integrated transaction of sale in the course of export. Now, such a direct connection is possible only when the contract of sale contains a covenant, or when it is an incident of such

contract, whereunder the seller is obliged to export the goods. This is clear from the observations of the Supreme Court which I have quoted earlier. In this case, it is true that there was both a sale and an export of the goods sold. But one WAS not connected with the other, in that the seller himself did not export the goods. The sale was intended to be complete without export and the seller was not concerned with the actual exportation of the goods. What is to be noted in this case is that it was the purchaser who after purchasing the goods and taking delivery thereof within the territory of India himself exported them. But such export is not under a contract of sale.

75. We have already seen that the provisions regarding inter-State sales are analogous to the provisions dealing with export sales. While dealing with inter-State sales Mr. Justice Venkatarama Ayyar (*in Bengal Immunity case*) A.I.R. 1955 S.C. 661 at page 734, first defined as to what constituted a sale in the course of inter-State trade, and then, to bring home the principles that he was enunciating, gave an illustration :—

“If X, a merchant in State A, goes to State B, purchases goods there and transport them into A, there is undoubtedly a movement of goods in inter-State commerce but that is not under the contract of sale.”

In the same way, it may be said that if a foreigner either by himself or through his agent comes to India and purchases goods (as in this case) and exports them to his own country, there is undoubtedly an export of goods. But that is not under the contract of sale which the Indian seller had entered into with the foreigner's Agent.

76. In regard to cases where there were at least two sales, the Supreme Court observed (page 1756. paragraph 10) :—

“It may be regarded as therefore settled law that where there are two sales leading to export the first under which the goods are procured for sale and the property in the goods passes within the territory of India, and the second by the buyer to a foreign party resulting in export—the first cannot be regarded as a sale in the course of export, for a sale in the course of export must be directly and integrally connected with the export.”

77. I may also refer to a few decisions of the High Court of Madras bearing on some of the points that arise in the present reference.

78. In *Gandhi Sons vs. State of Madras* (A.I.R. 1955 Madras 722), the facts were that some Bombay merchants had entered into certain contracts of purchase with the

merchants in Madras who were dealers in pepper. The Bombay merchants made the purchases either on their own behalf or on behalf of undisclosed foreign principals. Between the undisclosed principals and the Madras merchants there was no privity. The Bombay merchants then exported the goods. The Madras sellers contended, that their sales to Bombay merchants were in the course of export. In dealing with this question, the High-Court observed (page 724, paragraph 15) :—

‘What was characterised by the Supreme Court (I Travancore case) as an “export sale” was one in which the assessee (here, the Madras sellers) figured as exporters, privity having been established between them and the foreign buyer, either through direct negotiation or dealing or through the local representatives of the latter..... Undoubtedly an export took place here. But in that transaction the assessee (the Madras sellers) were not the sellers who exported or whose sales occasioned the export.

A sale will occasion an export or there will be an export sale as understood by the Supreme Court only where the sale is to a foreign buyer with whom the local seller has privity and when as a direct result of such sale the goods are transported across the frontier.”

A. Gaffoor Sahib's case. 79. In *A. Gaffoor Sahib & Co. vs. Madras State* (A.I.R. 1958 Madras 314), the petitioner was the seller and Rallis (India) Ltd. were the buyers. No doubt the goods sold by the petitioner to Rallis (India) Ltd. for export abroad, but then it was the buyers, Rallis (India) Ltd. that were the exporters. There was no privity of contract between the petitioner and the persons to whom the goods were ultimately sold by Rallis (India) Ltd. On these grounds, the petitioner's sales were held not protected under article 286(1)(b).

Dhan Lakshmi case. 80. The facts in *Dhan Lakshmi Mills Ltd. vs. State of Madras* (A.I.R. 1961 Mad. 87) were similar to those in the present case (Khosla's case), if not somewhat more in favour of the assessee. The Dhan Lakshmi Mill at Tirupur was the assessee in that case. The Mill intimated its requirement to the Bombay dealers, who then placed orders with suppliers in Africa. The shipments were directed from African ports to Cochin. In the meantime, the assessee (the Mill) applied for the import quota, and requested the authorities to issue the licence to the seller at Bombay. The Bombay dealers sent the shipping documents to their clearing agents at Cochin. These clearing agents presented the shipping documents, cleared the goods through the customs and then despatched the goods to Tirupur to the Mill and the railway receipts were sent to the Mill through banks.

On these facts, the High Court observed (page 88, A.I.R. 1961 Mad.):—

“It is no doubt true the dealer in Bombay ordered the Cotton from his Vendor abroad (Africa) *only to carry out the importer's contractual obligations to sell the cotton so imported to the assessee (the Mill)*. The assessee provided the facilities by arranging for the grant of import licence to the dealer in Bombay, even as the assessee provided further facilities for the transport of the cotton by rail in this country after the cotton had been imported and after it had been cleared through the customs. The relationship between the assessee and the importer at Bombay was that of a buyer and seller, both being principals, and the sale was only after the import of the goods even where the contract to sell (between the Bombay dealer and the Mill) preceded the order to the exporter abroad (African exporter) to ship the goods in India.

It was the seller's agent at Cochin that cleared the goods by rail to the assessee and it was that agent that consigned the goods by rail to the assessee and the assessee's contractual obligation was normally to pay for the cotton against delivery of the railway receipt at Tirupur. We agree with the Tribunal that these purchases of the imported cotton effected by the assessee did not fall within the scope of article 286(1)(b) of the Constitution.”

81. In *Mohideen Thumby & Co. vs. State of Madras* (A.I.R. 1962 Mad. 323), the law on the export sale was laid down as follows:— Mohideen
Thumby
case.

“An export sale is one which is effected between a seller in the State and a buyer abroad outside the Indian territory. The foundation of such a sale is the contract between the two in respect of goods or merchandise forming the subject-matter of the sale. The contract can be entered into directly between the seller and the buyer or it can be brought about by their respective agents duly authorised in that behalf. It is impossible to conceive of an export sale without the essential element of a privity of contract between the two contracting parties. The absence of a contract either in the form of actual agreement signed by the seller and the buyer or their respective agents, or in the form of letters between the buyer and the seller evidencing the term of agreement is definitely fatal to any claim that any sale transaction by a local dealer is an export sale hit by the provisions of article 286(1)(b) of the Constitution.”

Propositions summarised. 82. From a review of the cases which I have tried to discuss above, it seems to me that the following propositions of law are well established:—

(1) Words "export" and "import" are complementary. The two notions of export and import go in pairs. The same principles must apply in determining when a sale takes place in the course of export or when a purchase takes place in the course of import.

(2) A sale would be in the course of export only if it occasions export and a purchase would be in the course of import only if it occasions import.

(3) When the interpretation of the term "occasion" brought the principle of integrated activities into play, a purchase was not regarded as taking place in the course of export any more than a sale was regarded as taking place in the course of import. Thus, a purchase could not occasion export and a sale could not occasion import. This statement of course does not cover the field of sales or purchases that take place in the course of import or export by transfer of shipping documents before or after the goods have crossed customs frontiers of India. Indeed, apart from such transactions as are effected by transfer of shipping documents, none of the cases which I have mentioned above has decided that a purchase occasioned the export and a sale occasioned the import.

"occasion"

(4) Further, the term "occasion" is used in sections 3 and 5 of the Central Sales Tax Act. Apart from the historical significance of the use of such word in these sections, it would be seen that in common usage the words "cause" and "occasion" are synonymous. "Such in fact", says Ballentine "is their ordinary use" (see Law Dictionary II, page 398). There must, therefore, be casual connection between the transaction (of sale or purchase) and the movement of goods from one State to another or from one country to another.

(5) When can it be said that there would be such a casual connection? The answer to this question would be the same, whether you look at the section in the context of its historical back-ground, that is to say, in the light of the previous decisions of the Supreme Court, or construe the section as was done on first principles in the Tata Iron and Steel case. It is that the movement must be caused by, or be the result or, a covenant or incident of the contract of sale between the parties.

(6) Now, it is obvious, that as in the case of intra-State sales or inter-State sales, so in the case of sales where the goods are intended to be sold to buyers overseas, such contract of sale must be between the

Indian exporter-seller and the foreign-buyer (see the *I Travancore case*). The foundation of an export sale is stated to be the contract between an Indian seller and a buyer abroad. The position is the same in regard to purchases by import where there must be a contract of purchase with a foreign vendor [See (1961) 1. S.C.R. 305, *Universal Import Agency vs. Chief Controller of Imports*].

(7) This principle is stated also in terms of "privity of contract". It has been held that it is impossible to conceive of an export sale without the essential element of a privity of contract between the two contracting parties. In the *II Travancore case* it was decided, that the absence of a privity of contract between the African sellers and the Indian buyers was regarded as fatal to the contentions of the latter that their purchases were in the course of import. Privity.

(8) It is now settled law that where there are two sales leading to export, the first under which the goods are procured for sale and the property in the goods passes within the territory of India, and the second by the buyer to a foreign party resulting in export—the first cannot be regarded as a sale in the course of export. On the same principle the first sale after the purchase by import has been held to be not in the course of import.

83. With these principles of law in my mind, I would approach Khosla's case and see if they are made applicable to it. A few facts may be recalled here. The assessee (Khosla & Co.) in the first place, entered into a contract of sale with the Director-General of Supplies and Disposals whereunder the assessee undertook to get some axle-box bodies manufactured in Belgium by particular manufacturers named in the contract, and to import them and thereafter deliver them according to the directions of D.G.S.D. as contained in the contract. What kinds of axle-box bodies were required by D.G.S.D. had also been specified and set out in the contract. I would keep these facts in the forefront of other facts as it is this contract and these facts in particular which have been construed as occasioning the import of goods from the Belgium manufacturers. The contract had been entered into between the Assessee as the seller and the D.G.S.D. as the purchaser. It may be noted that the contract was to end in a completed sale only after the goods were imported into India and were delivered to the Consignees as directed by the D.G.S.D. It is only after acceptance of such delivery that the Assessee was to receive the price of goods sold by him. Khosla's case discussed with reference to propositions above stated.

84. Immediately after this contract was entered into by him, the Assessee with a view to fulfilling the same had to enter, and in fact did enter, into a contract with the Bel-

gium manufacturers and placed orders with them for the manufacture of the required goods and for importing them into India. The Belgium manufacturers in due course exported the goods to the Madras Harbour and sent over the shipping documents, bills of lading etc. to the Assessee, and also asked him to remit the price of the goods as agreed to between them.

Khosla's case discussed.

85. When the goods reached the Madras Harbour, they were cleared by the Assessee as his own and it was after taking delivery of the same that he despatched some of them by rail and the others locally, to the Consignees indicated by the D.G.S.D.

86. It is thus clear that the Assessee entered into a contract with foreign sellers—namely, the Belgium manufacturers—for the goods to be imported into India. In this contract, the Assessee is the purchaser and the Belgium manufacturers are the foreign sellers. It is this contract which in the language of the Supreme Court (II Travancore case) is a contract of import-purchase or of purchase by import. It is true that this contract, I may even say, was necessitated by the contractual obligation the Assessee had undertaken in the earlier contract of sale which he had entered into with the D.G.S.D. It was in pursuance of that contract that the Assessee had to enter into the later contract with the foreign sellers. It is also true that the Assessee purchased and imported the goods from Belgium for the purpose of executing the specific contract of sale which he had made with the D.G.S.D. But where, as here, there are two contracts and where the goods were imported by the Assessee under the contract of purchase with the foreign sellers, both contracts could not have occasioned the import; it is only the contract of purchase that did it. There was privity of contract between the Assessee and the foreign sellers. It is this contract in compliance whereof the Belgium manufacturers put the goods into the export stream which from the point of view of the Assessee, the purchaser, became the import stream.

Khosla's case discussed.

Which contract occasioned import.

87. Further, it cannot be disputed, that the Assessee cleared the goods at the harbour as his own goods purchased from the foreign sellers by employing the machinery of import. It was thereafter that the Assessee sold his goods to the D.G.S.D. Indeed, it is the *sales effected by him* in favour of the D.G.S.D. that are now in question and are claimed to be protected under article 286(1)(b). Thus, it may be stated that while the contract of sale between the D.G.S.D. and the Assessee occasioned (if I may use this expression) the contract of purchase between the Assessee and the foreign sellers, it was the later contract of purchase that alone occasioned import of goods into the territory of India. The first contract no doubt eventually led to the import, but cannot be regarded as germane for occa-

sioning the import within the meaning of section 5(2) of the Central Sales Tax Act and as explained by the previous decisions of the Supreme Court. Any covenant or incident in such contract referring to the movement of goods would also be not relevant to occasioning the import. The contract that is relevant for the purpose is the contract between the Assessee and the Belgium exporter. You cannot conceive of the Assessee importing the goods without the Belgium manufacturer exporting them from his harbour. Thus, there must be community of intention between the exporter who must exercise his volition to export and the importer who must exercise his volition to import. This was expressed as intention on the part of both the buyer and the seller to export in the *Ben Gorm Nilgiri* case.

88. I think the High Court and the lower taxing authorities in this case referred only to the absence of integrality between the two events, namely, the first contract of sale and the import, when they stated that there was no privity of contract between the foreign seller and the D.G.S.D.

89. Further, the matter may be looked at from another point of view. What is claimed here is that the sale by the Assessee in favour of D.G.S.D. *occasioned* the import, and therefore is protected under article 286(1)(b). This claim seems to me to be basically untenable, in view of the previous decisions of the Supreme Court. The second *Travancore* case precisely enumerated which transactions of sales or purchases could be regarded as taking place in the course of import or export. While I am on this point, I leave out of account such transactions as are effected by transfer of shipping documents when the goods are on high seas. I am considering only such transactions which were held to be *occasioning* export or import, as the case may be. In other words, we are only concerned with the group of transactions covered by the first conclusion in the second *Travancore* case. They are sales by export and purchases by import. These transactions were explained in the I *Travancore* case as sales and purchases themselves occasioning the export or the import of the goods, as the case may be, out of, or into, the territory of India. This view has been accepted and no addition has been made to this group of transactions, in the later cases. I may refer here only to two cases. In *Endupuri vs. State of Orissa* (1962) 1 S.C.R. 314, the Supreme Court observed:—

“.....it has been held by this Court that it is only a sale or purchase which occasions the export or import.....that is within the exemption.”

90. Again, in *East India Tobacco vs. State of Andhra* (1963) 1 S.C.R. 404, it was stated:—

“On these authorities the law must be taken to be well settled that it is *only* the sale under which the export is made that is protected by article 286(1)(b) and:

that a purchase which precedes such a sale does not fall within the purview though it is made for the purpose of, or with a view to export."

The same is the position with purchases by import. If so, the sales by the Assessee to D.G.S.D. cannot be regarded as *occasioning* the import so as to earn the exemption.

91. The case may be considered from still another angle. If the present case involves two contracts, it would come squarely within the decision which the Supreme Court gave in the *second Travancore case* while dealing with the second type of transactions which the purchasers claimed to come under article 286(1)(b). The facts in that case so far as relevant are similar to the present case and bear repetition here. The Travancore purchasers placed orders with a Bombay party (who may be compared with the Assessee in the present case) for purchase of cashew-nuts from Africa. The Bombay party indented the goods on their own account and placed orders for these goods with African sellers. The African sellers shipped the goods to Cochin on c.i.f. terms. The shipping documents were made out in the name of the Bombay party as consignees and delivered to them against payment through Bankers at Bombay. The Bombay party cleared the goods through their representatives at the port of destination, and issued separate delivery orders to the purchasers for the respective quantities ordered. Thus, the Bombay party sold the goods as principals to the purchasers. (These facts, it need hardly be stated, are almost identical with the present facts). On these facts the Supreme Court observed:—

"The Bombay party are the purchasers and they sell the goods as principals to the Respondents (Travancore purchasers) at the port of destination by issuing separate delivery orders against payments. No *privity* being established between the Respondents (Travancore purchasers) and the African sellers, the Respondents' purchases can only be described as purchases from the Bombay party of the goods within the State."

92. Even according to the minority view expressed by Mr. Justice S. R. Das in his dissenting judgment in the *second Travancore case*, a sale of the nature which the present Assessee effected in favour of the D.G.S.D. would not be saved. While expressing his view that the first sale by the importers to the dealers, wholesale or retail, was in the course of import, Mr. Justice S. R. Das made an exception in the case of a sale by an importer directly to a consumer. At page 350 (A.I.R.), the learned Judge says:—

"If, however, a particular importer himself happens to be a retail dealer of the goods and sells the

goods to the actual consumers.....then such retail sales may, like local retail sales of similar goods, be liable to sales tax by the State."

In the present case, the goods were sold to D.G.S.D. obviously for consumption and the Assessee, the importer may well be regarded as having entered into a retail deal of sales.

93. Another point may be discussed. Does the special nature of the goods in the present case make any difference and will it render the sale as one in the course of import? In paragraph 11 of its judgment, the Supreme Court in *Khosla's case* observed:—

"There was no possibility of these goods being diverted by the Assessee for any other purpose."

There is no doubt that the goods in the present case are of special nature and were required only by Southern Railway. But it is respectfully submitted that nothing can turn on this circumstance. The previous cases have not considered this circumstance as a ground in support of the case of export or import. Whether the goods were of a special nature or not, it was not possible for the Assessee to commit a breach of his contractual obligations unless he was prepared to render himself liable for such breach. And if he was prepared to render himself liable for such breach, it would be possible for him not only to commit a breach of his contractual obligations in respect of such special goods as the axle-box bodies in question, but also to divert the goods to some other railway requiring the same and probably offering a higher price. Of course, it would not be prudent for the Assessee to commit such wanton breach and divert the goods for some other purpose. He would not be so foolish as to render himself legally liable for such breach and expose himself to the risk of having his import licence or other Government permits forfeited. But in law, there does not seem to be any impediment which renders it impossible for the Assessee to divert even such goods for other purposes.

94. I may in this connection refer to some of the previous cases which involved specified goods only with a view to explaining that no point was made in them on the special nature and the undivertibility of the goods.

In *State of Mysore vs. Mysore Spinning and Manufacturing Co.* (A.I.R. 1958 S.C. 1002), where the question of export arose, the procedure in which the business of export was conducted was described. The first step was for the Bombay exporters to obtain a firm offer from a buyer overseas specifying the quality and quantity of cloth or yarn required by the buyer. Then the exporters inquired from the Mills whether they could sell or manufacture the

Khosla's
case
discussed.

goods of the quality and quantity required by the overseas buyer. If the Mills said "yes", the next step was for the exporter to enter into a firm contract with the foreign purchaser, and then it was for the exporter to enter into a contract with the Mills for the sale of those goods. The contract had to be marked "for export only", and the prices fixed had to be higher than the inland prices. The specifications and details of the goods had also to be entered. Then the exporter obtained a final licence from the Export Controller. This licence set out the names of the seller (Mills) and the exporter. Among other things the goods had to be marked clearly "for export only". Then the Mills informed the exporter about the despatch of the goods, and finally the exporter took delivery and shipped them overseas. Yet, the sales by the Mills were held not to occasion the export. The goods had been manufactured to order, and the Mills with their contractual obligations could not have diverted them for any other purpose. Yet, their inability to so divert the goods was not considered as in any way causing their sales to take place in the course of export.

Divertibility

95. In *East India Tobacco Co. vs. State of Andhra Pradesh* (A.I.R. 1962 S.C. 1733), the assessee first entered into contracts with their customers abroad for the sale of special kind of tobacco called Virginia tobacco, and thereafter they made purchases of the requisite quantities of such tobacco locally and exported them to the foreign purchasers in performance of their contracts. The purchases of the assessee in the local market were held not to occasion export.

96. In a Madras case (*Dhan Lakshmi Mills Ltd. vs. State of Madras*, A.I.R. 1961 Mad. 87), where the facts were similar to those obtaining in the present case, the Mill intimated its requirements to the Bombay importers who thereafter imported the required goods and sold them to the Mill. The Bombay importers, after having imported the goods which were in accordance with the requirements of the Mill, could not have diverted them for any other purpose without a breach of their contractual obligations with the Mill. Yet, their sales to the Mill were held as not occasioning the import.

97. There is also another point which seems to arise in connection with the present discussion. That turns upon what we mean by the word "diversion". In paragraph (9) of the majority judgment of the Supreme Court in *Ben Gorm Nilgiri case* (A.I.R. 1964 S.C. 1752, 1756), the word "diversion" has been used in the following sentence:—

"There is nothing in law or in the contract between the parties, or even in the nature of the transaction which prohibits *diversion* of the goods for internal consumption."

This was stated obviously with the object of emphasizing that the purchaser in the auction was not bound to export the goods for the simple reason that there was no term in the contract between him and the seller which obliged him only to export the goods.

98. But the main use of this word ("Divert" or "Diversion") is to be found in the judgment of the Supreme Court of U.S.A. where the question as to when the process of exportation starts, has been dealt with. If the Supreme Court of U.S.A. evolved the doctrine of original package for determining how long the imported goods would continue to be imports and as such enjoy the immunity from State taxation, it evolved another principle for determining when the process of exportation commences, and that is what may be stated as the principle of divertibility. Under the Constitution of U.S.A. property intended for export from the United States is not immune to local taxation under the export clause until it enters the export stream and this point is not reached until the property is delivered to a carrier for export or has in fact started on its journey from the United States. I may refer to one or two decisions of the Supreme Court in this connection.

99. In *Richfield Oil Corporation vs. State Board of Equalization*, 329 U.S. 69 (1946), the question was whether the Appellant, a producer and seller of oil in California had exported the oil to a purchaser in New Zealand. The purchaser had furnished the ship to carry the oil to New Zealand. Delivery of the oil was made into the hold of the vessel (furnished by the purchaser) from the Appellant's tanks located at the Dock. Mr. Justice Douglas who delivered the judgment of the Court observed: -

Richfield
Oil Corporation case.

"That delivery marked the commencement of the movement of the oil abroad (New Zealand). It is true as the Supreme Court of California observed that at the time of delivery, the Vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel it passed into the control (emphasis supplied by me) of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use."

100. In *Empresa Siderurgica vs. Merced County*, 337 U.S. 154; 93 L.Ed. 1276 (1949), the same learned Judge (Justice Douglas) again explained when the process of exportation started:

Empresa
Siderurgica
case.

"It is not enough that on the tax date there was a purpose and plan to export this property. Nor is it sufficient that in due course that plan was fully executed. Part of the plant (machinery that is taxed was

dismantled but it had not been delivered to any carrier for export or otherwise started on its journey on the tax date. It might still have been diverted into the domestic market. The fact that any such diversion would entail a breach of contract, that a part of the plant had already been started on its export journey, that an export license had been obtained and a letter of credit had been deposited in this country increases the expectation on the tax date that exportation of the entire plant would eventuate. But that prospect, no matter how bright, does not start the process of exportation. On the tax date the movement to foreign shores had neither started nor been committed.”

In another place of the judgment, the learned Judge observes:—

“Under that test it is not enough that there is an intent to export or a plan which contemplates exportation or an integrated series of events which will end with it. . . . It is the entrance of the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.”

101. The Supreme Court has quoted this passage in the *Second Travancore case* (A.I.R. 1953 S.C. 333, 337) only to highlight the fact that a sale which takes place in the course of export, when the goods are actually on the high seas and therefore incapable of being diverted to domestic use attracts the application of article 286(1)(b). On page 338 (A.I.R. 1953 S.C. 333, 338), the learned Chief Justice observes:—

“ Where the goods are transported pursuant to a contract of sale already concluded with a foreign buyer and the shipping documents have been sent to him, any further sale of such goods by the Indian seller is impossible.”

102. If I export the goods and part with the bills of lading and other shipping documents, the goods would pass into the control of the foreign purchaser (as they did in the *Richfield Oil Corporation case* referred to above), it would not be possible for me to recall them and divert them for domestic use. It seems to me that the word “divert” or “diversion” could be used only while describing the exportation of goods. Whatever the value of this principle and the use of these words in determining and indicating the commencement of the process of exportation, it would certainly have no application whatever and these words cannot appropriately be used in determining and indicating the end of the course of import. When the goods are imported, they are obviously meant for home consumption.

‘Divert’ and ‘diversion’ not appropriate in describing course of import.

103. Similarly, another point may arise for our consideration in the course of the present discussion on the subject before us. And that is what is meant by *mingling of imported goods* with the general mass of goods and merchandise in our country; and when does such mingling of goods take place? It seems to me that the mingling of goods does not mean that the imported goods can be mixed up with the indigenous goods of the same kind and quality, for instance, the imported cotton can be mixed up with the cotton that is grown in our country with the result that the imported cotton may lose (if at all) its identity. I do not think this is the meaning of the mingling of imported goods.

Mingling of goods test how to be applied.

In the *Second Travancore case* (A.I.R. page 337 bottom), the learned Chief Justice observed:—

“Similar difficulties and uncertainties are encountered in bringing within the exemption the first sale after import. How is the exemption to be applied to the goods imported from abroad after they are mingled with the other goods and lose their *distinctive character as imports*?”

Mingling.

I think this only means that the imported goods will cease to be considered as imported goods after they cross the customs barrier of the importing country and stand on a par with the indigenous goods *for the purpose of taxation*. The observation of Mr. Justice S. R. Das (in the *II Travancore case*) on this point is also instructive (A.I.R. page 350 of 1953 S.C. 333):—

“It is only after that first sale of the goods by the importers to the dealers that *the goods become parts of the general mass of property* in the State concerned thereafter subject to *the taxing power of that State*.”

104. In *Deputy Commissioner of Commercial Taxes, Madras vs. Messrs. Caltex Ltd.* (A.I.R. 1962 Madras 298; I.L.R. (1962) Madras 585), the High Court of Madras observed (A.I.R. page 300):—

Deputy Commissioner of Commercial Taxes vs. M/s. Caltex Ltd.

“.....When once the goods have been permitted to be imported and the import duty on the goods has been levied by the customs officers, the course of import ends whether or not the goods are immediately cleared for home consumption, or are only kept in the bonded warehouses..... In our opinion, it is not the factual mingling of the imported goods with the mass of the goods of the local area that terminates the course of import. The course of import to our minds comes to an end when once the goods have passed the customs frontier in the sense that the customs duty has been levied on the goods and the importer has been permitted to clear the goods.”

It is stated in this case that when and after this event happens, the goods cease to be part of the import stream

and there is then no objection to the goods being brought into the country presumably in the sense of their being thereafter regarded as part of the general mass of property liable to taxation by a State.

Deputy
Commis-
sioner of
Commer-
cial Taxes

vs.
Devar & Co.

105. Again, in *Deputy Commissioner of Commercial Taxes vs. Devar & Co.* [I.L.R. (1964) Madras 363], the same High Court observed (page 387):—

“The import stream dries up and ceases to flow after the Customs Department of the importing State levies the duty and thereby declared the eligibility of the goods to be cleared and mingled with the general mass of goods and merchandise in the country.”

When
imports
cease to be
imports in
U.S.A.

106. For determining under the Constitution of U.S.A. how long the imported wares remained under the protection of Article 1, Section 10, Clause 2,¹ the Supreme Court enunciated the original package doctrine in the leading case of *Brown vs. Maryland* (12 Wheat 419; 6 L. Ed. 678). In that case, the learned Chief Justice Marshall observed:—

Doctrine
original
package
Brown vs.
Maryland.

“When the importer has so acted upon the thing imported that it has become incorporated and mixed with the mass of property in the country, it has perhaps lost its distinctive character as an import and has become subject to the taxing power of the State; but while remaining the property of the importer in his warehouse in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition of the Constitution.”

Warring vs.
City of
Mobile

107. In *Warring vs. City of Mobile*—19 L. Ed. 342 (1868), it was held:—

“When the importer sells the imported articles or otherwise mixes they with the general property of the State of things changes as was said by this Court in the leading case (*Brown vs. Maryland*) as the tax then finds the articles already incorporated with the mass of the property by the act of the importer.”

Low vs.
Austin.

108. In *Low vs. Austin*—20 L. Ed. 517 (1872), it was held that goods imported from a foreign country upon which the duties and charges at the customs house had been paid, were not subject to State taxation while remaining in the original cases unbroken and unsold, in the hands of the importer; and that goods imported did not lose their character as imports and become incorporated into the mass of the property of the State until they passed from the control of the importer or were broken up by him from their original cases. In this case, it was observed:—

“Indeed, goods imported while they remain in the hands of the importer in the form and shape in which

1. Article 1, section 10, clause 2 of the Constitution of U.S.A. says, “No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports

they were brought into the country, can in no just sense be regarded as part of that mass of property in the State usually taxed for the support of the State Government.”.

109. In *Brown vs. Houston* (114 U.S. 622), it was held **Brown vs. Houston.** that as soon as the goods were in the State, they became part of the general mass of property and were liable to be taxed in the same manner as the other property of similar character. In the course of its judgment, the Supreme Court observed:—

“Take the city of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey or from the pastures and green fields of the west? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold and constituting part of the great mass of its commercial capital—provided always that the assessment be a general one and not discriminative between goods of different States?”.

110. In the “Constitution of U.S.A.”, (1952 Ed.) (Senate Document No. 170 on page 363), we find the following statement of law:—

“A box, case or bale in which separate parcels of goods have been placed by the foreign seller is regarded as the original package and upon the opening of such container for the purpose of using separate parcels, or of exposing them for sale, each parcel loses its character as an import and becomes subject to taxation as a part of the general mass of property in the State.”.

111. Thus, this doctrine of original package laid down **Doctrine of original package.** that importation was not over so long as the goods were in the original package and hence a State had no power to tax imports until the original package was broken or there was one sale while the goods were still in the original package. The imports would be clothed with a tax immunity only until the happening of one or the other of these two events regarded as sufficient to alter the character of the imports as imports and make them assimilated with the general mass of property.

112. But this doctrine of original package has no place **Doctrine of original package does not apply to India.** in our country. (See the *II Travancore case and State of Bombay vs. F. N. Balsara*, A.I.R. 1951 S.C. 318). Our Supreme Court has adopted a simpler test for determining when the course of import comes to end. I have already

shown¹ by reference to the decisions of the Supreme Court and of the High Court of Madras that the course of the import of the goods would end when the goods cross the customs barrier of the importing country.

113. I am not, however, here so much directly concerned with the difference that exists on this subject between the American law and ours, as with the result that *ipso facto* follows on the goods ceasing to be imports. Whether the goods cease to be imports on their packages being broken up as under the Constitution of U.S.A., or on their crossing of the customs frontier as under our Constitution, the result is the same. As soon as the goods imported lose their character as imports, in one or the other way they become mingled with the general mass of our property in a State and subject to State taxation.

Khosla's case
inconsistent
with previous
decisions.

114. For the reasons stated in the foregoing paragraphs, I am of the opinion that the present decision in Khosla's case is not consistent with the previous decisions of the Supreme Court, which I have discussed above. In particular, the decision goes beyond the decisions of the Supreme Court in the two *Travancore cases* and is likely to create uncertainty in the law. What, then, is the remedy that I can suggest? Before legislation can be thought of, what I think might be a proper step in the first instance is for the Government to approach the Supreme Court and persuade it to reconsider the present decision in some other matter where the same questions may again come up before it for decision. I have no doubt such matters may soon come up, if not they are already pending, before the Supreme Court. I have made this somewhat qualified suggestion, and also with some hesitation, for the reason which I am presently explaining in the following paragraphs:—

115. If the Legislature while enacting section 5 of the Central Sales Tax Act only accepted the principles of law which were laid down by the Supreme Court in the two *Travancore cases* and which were recommended by the Law Commission in its Second Report, in my opinion, the section should not be what it is today. At present the section reads "..... if the *sale or purchase*..... occasions such export....." and "if the *sale or purchase* occasions such import.....". If only the *Travancore cases* were to be followed and accepted, it would be *only the sale occasioning the export* and *only the purchase occasioning the import*.

116. It may be noted that the decision of the Supreme Court in Khosla's case does not seem to go upon the present wording of section 5. The Supreme Court did not state that because the present section mentioned both "sale" or "purchase" as occasioning the import the legislature did con-

1. See paragraphs 37, 104 and 106.

template a sale (as well as a purchase) as occasioning the import and that if so, the sale to the nature entered into by the assessee (Khosla & Co.) with D.G.S.D. must be regarded as occasioning the import as otherwise the word "sale" in this context would be wholly redundant. It does not appear that it was this reasoning that the Supreme Court adopted in the present case. At any rate, there is no such clear indication in the judgment although I cannot positively say that this was not at the back of the minds of the learned Judges who constituted the Bench. The Supreme Court held that it was quite clear from the contract (of sale between the assessee and D.G.S.D.) that it was incidental to the contract that the goods would be manufactured in Belgium and imported into India for the consignee (Southern Railway) and that movement of goods from Belgium to India was in pursuance of the conditions of the contract between the assessee and the D.G.S.D. It is not, however, unlikely that the Supreme Court may, if persuaded to reconsider the present decision as suggested above, be inclined to go upon the wording of the section as much as a purchase occasions import. It is in such eventuality that Legislature may step in and amend the section so that it may be in conformity with the principles laid down in the two Travancore cases and indeed in all the later cases except the one now under reference. It is only with a view to obtaining clarification as to the grounds for the decision that I have suggested that the Supreme Court be again approached for reconsidering the matter.

Khosla's case inconsistent with previous decisions—remedy.

117. If, however, it is considered that the wording of the section as it stands today was very much present in the minds of the learned Judges and necessarily formed the basis of their judgment in *Khosla's case*, then there would be no need to approach the Supreme Court for such reconsideration. The only remedy would, then be to effect an amendment of the section in the manner indicated above.

Amendment only remedy.

K. G. DATAR.

LAW COMMISSION,
Dt. 31-12-1966.

NOTE OF DISSENT BY SHRI RAMA PRASAD
MOOKERJEE

After anxious and mature consideration I have arrived at the conclusion that the decision in *Khosla's case* does not, strictly speaking, either follow or is consistent with the principles laid down by the Supreme Court in the two *Travancore Cases* (1952) S.C.R. 1112 and (1954) S.C.R. 53)—principles which had been accepted by all concerned and were intended to be incorporated in the Central Sales Tax Act.

I cannot, therefore, agree with the majority view on the principal question as to whether *Khosla's case* goes beyond and is inconsistent with the two *Travancore cases*.

It will, however, not be necessary for me to enter into a detailed discussion as I am in general agreement with the reason assigned by Shri K. G. Datar in his exhaustive Note of Dissent.

The Taxation Enquiry Commission had recommended that Parliament should have power to tax inter-State transactions and that it should be empowered by law to determine the principles when a sale or purchase of goods took place in the course of inter-State trade or commerce and also when a sale or purchase took place in the course of import into or export out of the territory of India or outside a particular State.

In pursuance thereof the Constitution (Tenth Amendment) Bill was introduced in Parliament. When that Bill was pending the Law Commission had been invited to offer its suggestions for formulating principles as aforesaid.

For the formulation of the principles to determine when a sale or purchase takes place in the course of import or export, the Law Commission felt no difficulty.

The Supreme Court had before this considered in the two *Travancore Cases* (1952) S. C. R. 1112 and (1954) S. C. R. (53)—article 286 (1) (b) of the Constitution as it then stood. The Taxation Enquiry Commission had observed that the interpretation so given by the Supreme Court was "perfectly satisfactory so far as foreign trade is concerned". The Law Commission also accepted the principles so laid down by the Supreme Court.

The Law Commission also considered how far such principles should be applicable in the case of inter-State Sales or Purchases and of Sales or Purchases outside a State.

The Law Commission, thereafter, enunciated the principles based on the Supreme Court decisions in the two *Travancore Cases*.

It should be here noticed that the draft of the proposed Parliamentary Legislation had neither been placed before nor considered by the Law Commission.¹ Further, the Law Commission made it clear in the Report that "the principles enunciated by us in the foregoing paragraphs do not purport to be a draft of the sections of the proposed Bill".

1. Certain points relating to the Bill were forwarded to the Law Commission on 8th October, 1956 and were considered by the Commission on 20th October 1956. But they did not concern import sales.—P.M.B.

In spite of such observations the language used in the Commission's Report was copied *verbatim* in the subsequent Bill.

The Legislature while enacting section 5 of the Central Sales Tax Act purports to accept, as recommended by the Law Commission, the principles of law as enunciated by the Supreme Court in the said two *Travancore* Cases. The language of section 5 of the Central Sales Tax Act should not be, as observed by Sri Datar, what it is.

In order to put the intention beyond doubt the section should be amended. As observed by Sri Datar—

“The section should not be what it is today. At present the section reads “.....if the *sale or purchase*..... occasions such export.....” and “if the *sale or purchase* occasions such import....”. If only the Travancore cases were to be followed and accepted, it would be *only the sale occasioning the export* and *only the purchase occasioning the import*.”.

My view is that immediate steps should be taken to introduce the amendment. It is *not necessary* for “the Government to approach the Supreme Court and persuade it to reconsider the present decision in some other matter where the same questions may again come up before it for decision”.

RAMA PRASAD MOOKERJEE.