IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SALES TAX REFERENCE NO. 52 OF 2009
IN
REFERENCE APPLICATION NO. 46 OF 2008

The Commissioner of Sales Tax }
Maharashtra State, 8th floor, }
Vikrikar Bhavan, Sardar Balwant }
Singh Dhodi Marg, Mazgaon, }
Mumbai-400 010 } Applicant

versus

M/s. Radhasons International, }
325, Sai Leela, 2nd floor, }
Linking Road, Khar (W), }
Mumbai-400 052 } Respondent

WITH
SALES TAX REFERENCE NO. 60 OF 2009
IN
REFERENCE APPLICATION NO. 45 OF 2008

The Commissioner of Sales Tax }
Maharashtra State, 8th floor, }
Vikrikar Bhavan, Sardar Balwant }
Singh Dhodi Marg, Mazgaon, }
Mumbai-400 010 } Applicant

versus

M/s. Radhasons International, }
325, Sai Leela, 2nd floor, }
Linking Road, Khar (W), }
Mumbai-400 052 } Respondent

Mr.V. A. Sonpal-Special Counsel with Ms.Jyoti Chavan-AGP for the applicant (State).

Mr.N. V. Tapare for the respondent.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

Reserved on 9th October, 2018
Pronounced on 8th February, 2019

Judgment :- (Per S. C. Dharmadhikari, J.)

1. The Second Bench of the Maharashtra Sales Tax Tribunal at Mumbai (for short "MSTT") on 24th June, 2008, on two reference applications bearing Nos. 45 of 2008 and 46 of 2008 arising out of Second Appeal Nos. 1358 and 1359 of 2003, decided on 19th October, 2007, has referred the following question for opinion and answer of this court:-

> " Whether on the facts and circumstances of the case and on a true and correct interpretation of the definition of the term 'crossing of customs frontiers of India' in section 2(ab) of the Central Sales Tax Act, 1956 and the provision in section 5(2) of the said Act the Tribunal was legally justified in holding that the impugned bonded sales effected to parties situate in Maharashtra are exempt from tax as sales in the course of import under the second limb of section 5(2) of the Central Sales Tax Act, 1956 for the reasons of the said sales having been effected by transfer of the documents of title to the goods before crossing the customs frontiers of India?"

2. The facts and circumstances in which this question has been referred are as under:-

3. The appellant is a partnership firm, carrying on business as reseller and importer in HR/CR sheets, chashew, carnals import licence etc. The appellant's place of business was visited by the Sales Tax Officer, E-121, Enforcement Branch in 1997. The main purpose of the enforcement visit was to examine the validity of

turnover of sales claimed as "high sea sales" exempt from tax under the second limb of section 5(2) of the Central Sales Tax Act, 1956 (CST Act). The enforcement authority, on verification of the relevant documents, found that the appellant's claim of high sea sales for the year 1995-96 and 1996-97 in the context of the sales of the goods while being in customs bonded warehouse was erroneous and it insisted that the appellant should pay taxes on the impugned sales. Accordingly, the appellant made certain advance payments. Thereupon, the enforcement authority communicated the findings of its scrutiny to the concerned ward officer with a request to consider them appropriately in the assessment for the relevant periods.

4. The Ward Officer [STO (C-440)], Bandra Division, Mumbai then assessed the appellant for the period 1st April, 1995 to 31st March, 1996 and for the period 1st April, 1996 to 31st March, 1997 under the Bombay Sales Tax Act, wherein, the impugned bond sales were assessed to Sales Tax by disallowing the claim of high sea sales. The assessment orders, thus, resulted in certain demands. The appellant filed appeals against the said assessment orders aggrieved by dis-allowance of claim of high sea sales and subjecting it to tax @ 4% under the Bombay Act. The goods being iron and steel coils covered by Schedule Entry B-6, it was

contended before the first appellate authority that the bond sales were effected on high sea basis by transfer of documents of title to the goods before the goods have crossed the customs frontiers of India and hence were exempt from tax under the second limb of section 5(2) of the CST Act. Alternatively, it was contended that the sales were in the course of import occasioning the import of goods into India covered by the first limb of section 5(2) of the CST Act. However, the first appellate authority confirmed the dis-allowance of the claim of the appellant of high sea sales by passing order dated 25th April, 2003. Therefore, the appellant filed the second appeals before the tribunal challenging the decision of the first appellate authority.

5. It was submitted on behalf of the Revenue that the cases of M/s. Indo Text Export Pvt. Ltd. (S. A. Nos. 284 and 285 decided on 17th June, 1995) and M/s. Sheventilal and Brothers (Appeal No. 104 of 1980 decided on 15th April, 1983) are applicable to the present matter. The above cited judgments decide the issue that once the imported goods are cleared from the area of custom station for being kept in the customs bond, the custom frontiers of India are crossed and the course of import comes to an end. Therefore, such bond sales do not qualify as “high sea sales”. On the other hand, the appellant, in support of its claim of high sea

sales placed reliance on the Madras High Court judgment in the case of M/s. State Trading Corporation (12 STC 294) which was based on the Apex Court judgment in the case of M/s. Kiran Spinning (113 ELT 753). On interpretation of the definition of the term "crossing the customs frontiers of India" in section 2(ab) of the CST Act, the Madras High Court has unequivocally held that the bond sales do qualify as high sea sales.

6. On appeal to the Tribunal, it was held vide judgment dated 19th October, 2007 that this interpretation of section 2(ab) of the CST Act, as made by the Madras High Court is contrary to that made by this tribunal in the case of M/s. Sheventilal and Brothers (supra) and M/s. Indo Text Export Pvt. Ltd. (supra). However, it has to be noted that Madras High Court judgment in the case of M/s. State Trading Corporation of India (supra) is based on the Hon'ble Supreme Court's judgment. Further, when this tribunal interpreted the provisions of the CST Act, at that time, no judgment of the Hon'ble Supreme Court or High Court to interpret the said provision of the CST Act was available. The situation has undergone a material change. Now, the Madras High Court judgment (based on the Hon'ble Supreme Court judgment) is available to us, in which, it, on profound consideration, has interpreted the provisions in the CST Act, particularly section

2(ab) thereof and has held that the term "crossing the customs frontiers of India" in the said section 2(ab) would mean the clearance of goods for home consumption on payment of duty and with this interpretation, a sale made by transfer of documents while the goods are in bonded warehouse would qualify as exempt under the second limb of section 5(2) of the CST Act.

7. In the light of the forgoing discussion, departing from the earlier view, the tribunal, while deciding the second appeals by its judgment dated 19th October, 2007, held that the sales made by transfer of documents while the goods are in bonded warehouse will qualify as a sale in the course of import exempt from tax under the second limb of section 5(2) of the CST Act. The alternative ground made by the appellant's representative regarding the impugned sales effected to the parties situated in other states being otherwise inter-State sales and hence not liable to tax under the Bombay Act was also allowed by the tribunal. Such sales effected to inter-State parties, even if held to be not allowable as sales in the course import, would be liable to tax under the CST Act, in view of the Bombay High Court judgment in the case of M/s. Nievea Times (108 STC 6 order dated 14th August, 1997). It was held that in any case, assessment of such sales to tax under the Bombay Act would be bad in law.

8. So holding, the tribunal allowed the impugned bond sales as sales in the course of import exempt from tax under the second limb of section 5(2) of the CST Act and accordingly deleted the taxed levied thereon.

9. As per the order, the impugned sales are allowed as exempted from tax under the second limb of section 5(2) (high sea sales) of the CST Act. The taxes levied thereon are deleted. As the Revenue is not satisfied with the said judgment, it has preferred these two applications under section 61(1) of the Bombay Act requesting the tribunal to refer certain questions of law to this court for opinion and answer.

10. The tribunal, at the instance of the Revenue and while deciding their reference applications, opined that all the sales effected parties are not situated in the State. Some of the sales are out of Maharashtra and the same are allowed as exempt from tax solely for the reason that they qualify as high sea sales under section 5(2) of the CST Act. After referring to the judgments rendered by the Madras High Court and the Andhra Pradesh High Court, the tribunal opined that both these judgments express contrary views on the interpretation of the definition of the term "crossing the customs frontiers of India" defined in section 2(ab)

of the CST Act. It may be that the Madras High Court's judgment was not available when the Andhra Pradesh High Court decided a similar case, but what the Madras High Court did was to follow a judgment of the Hon'ble Supreme Court rendered in the case of M/s. Kiran Spinning (supra). In the view of the tribunal, this judgment of the Hon'ble Supreme Court was not directly on the interpretation of the above term/words and appearing in the CST Act, but was on "crossing the customs barriers" for the purpose of taxable event under the Customs Act, 1962. Thus, whether these two expressions, namely, "crossing the customs frontiers of India" and "crossing the customs barriers" would, in the context of two different taxing statutes, convey the same meaning, prompted the tribunal to refer the questions of law reproduced above for answer and opinion of this court. It, therefore, partly allowed the two reference applications.

11. We have heard Mr. V. A. Sonpal, the learned Special Counsel appearing with Ms. Jyoti Chavan-AGP for the State and Mr. N. V. Tapare appearing for the respondent. With their assistance, we have carefully perused the paper books in both references.

12. Mr. Sonpal would submit that the issue is whether the sales by the respondent to various parties in Maharashtra can be treated as sale in the course of import under section 5(2) of the CST Act and hence exempt from the local tax. According to Mr.Sonpal, these sales are not exempt from the Bombay Sales Tax Act, 1959 (for short, BST Act). After inviting our attention to the facts, he would submit that it is evident that goods imported from foreign country by sea reached a port at Mumbai. They were unloaded at the port at Mumbai. The respondent filed a bill of entry for warehousing and an assessment was done for custom duty. The goods were removed from the customs area and warehoused in bonded warehouse. The bill of lading is a document of title to goods in favour of the buyer. It is endoursed in the name of buyer, who clears the goods from bonded warehouse after filing bill of entry for home consumption and payment of duties. The argument of the dealer is that if transfer of documents of title to goods is effected before filing the bill of entry for home consumption, as claimed by it, then, the sale must be treated as sale in the course of import. However, according to Mr. Sonpal, the requirement of such sale being termed as sale in the course of import is not fulfilled. The crossing of customs frontiers occurs when goods were unloaded on the harbour when the frontiers of the customs was crossed first time and secondly

and alternatively, crossing of customs frontiers occurs when bill of entry for warehousing was filed and duties assessed. Since the payment is deferred and goods were stored till then in bonded warehouse cannot be said to be a continuing course of import. Thus, according to Mr.Sonpal, the issue is what is meant by "crossing of customs frontiers in India"?

13. Relying on the definition of "crossing the customs frontiers of India", it is urged that the documents of title to the goods have been transferred after removing the goods from port area for warehousing, by filing bill of entry for warehousing and assessment of duty under the Customs Act, 1962. Therefore, it cannot be said that a sale by transfer of documents of title to goods before crossing customs frontiers of India has taken place.

14. Mr. Sonpal submits that crossing of customs frontiers of India occurs when bill of entry is filed and duty assessed. He relies upon some provisions of the Customs Act and particularly sections 30, 46 and prior to them, section 17 and thereafter, section 47 and 68 of the said Act to submit that when the goods are imported by water, then, as soon as the vessel reaches an Indian port, the process of importation is complete. If the goods are carried by sea and the vessel reaches an Indian port, it is the movement or entry of the vessel which must be held to be the

movement of importation of the goods. Hence, there cannot be said to be a sale in the course of import thereafter. Mr.Sonpal submits that in the present case, some events are relevant. From the documents furnished before the tribunal, it is evident that the agreement of high sea sale was entered into before the ship arrived at the port and therefore, when the goods were cleared for warehousing, the bill of entry should have been filed and shown the name of the purchasers as actual importers. Admittedly, the bill of entry for warehousing was filed and in the name of the respondents. Transfer of title to the goods on high sea would make the person, who purchased the goods on high sea, the importer of the goods and he would be liable to be assessed to customs duty. As the bill of entry records the name of the respondent as importer and it was the respondent who was assessed to customs duty, then, it is evident that the sale of goods by the respondent to local buyers is not high sea sale. After filing of the bill of entry and the assessment of customs duty, the import stream dries up and ceases to flow. Once the Customs Department levies the duty, whether paid or deferred, then, it is nothing but a local sale. If the transfer had taken place before filing the bill of entry and making of the assessment, then, the sale is deemed to be effected in the course of import and not otherwise. Hence, Mr.Sonpal says that the question of law

referred for opinion of this court be answered in favour of the Revenue/Department and against the dealer.

15. In support of his contentions, Mr. Sonpal has relied upon the following decisions:-

(i) State of Madras vs. Davar and Company, (1969) 3 SCC 406.

(ii) M/s. Minerls and Metals Trading Corp. of India Ltd., Visakhapatnam vs. The State of Andhra Pradesh, (1998) 110 STC 394.

(iii) M/s. Indo Tex Exports (Pvt.) Ltd. vs. The State of Maharashtra, 1996 (13) MTJ 147.

(iv) M/s. Indo Burma Trading corporation vs. State of Maharashtra, 2004 (30) MTJ 443.

(v) State Trading Corporation of India Ltd. vs. State of Tamil Nadu and Anr., 2003 (129) STC 294.

(vi) Kiran Spinning Mills vs. Collector of Customs, (2000) 10 SCC 228.

(vii) P. U. Usha vs. State of Kerala, (2007) 5 VST 484.

(viii) Apar Private Ltd. and Ors. vs. Union of India and Ors., 1985 (22) ELT 644.

(ix) Indian Tourist Development Corporation Limited vs. Assistant Commissioner of Commercial Taxes and Anr., (2012) 3 SCC 204.

(ix) Deepak Bhandari vs. Himachal Pradesh State

Industrial Development corporation Limited, Civil Appeal No. 1019 of 2014, decided on 29th January, 2014 (S. C.).

(x) Minerals and Metal Trading Corporation of India Ltd. vs. Sales Tax Officer and Ors., (1998) 7 SCC 19.

(xi) Narang Hotels and Resorts Pvt. Ltd. vs. State of Maharashtra and Ors., (2004) 135 STC 289.

16. For properly appreciating the rival contentions, one would have to make a brief reference to the relevant statutory provisions. Insofar as the BST Act is concerned, from its preamble, it would be evident that it is an Act to consolidate and amend the law relating to the levy of tax on the sale or purchase of certain goods and this Act extends to the whole of the State of Maharashtra. In section 2, certain definitions are set out and this section opens with the words "In this Act, unless the context otherwise requires". The word "dealer" means:-

> "(11) "dealer" means any person who whether for commission, remuneration or otherwise carries on the business of buying or selling goods in the State, and includes [16] the Central Government, or any State Government which carries on such business, and also any society, club or other association of persons which buys goods from or sells goods to its members;
>
> Exception I - An agriculturist who sells exclusively agricultural produce grown on land cultivated by him personally, shall not be deemed to be a dealer within the meaning of this clause;
>
> Exception II - An educational institution carrying on the activity of manufacturing, buying, selling or supplying goods, in the performance of its functions for achieving its objects, shall not be deemed to be a dealer within the meaning of this clause;

Exception III - A transporter holding permit for transport vehicles (including cranes) granted under the Motor Vehicles Act, 1988, which are used or adopted to be used for hire shall not be deemed to be a dealer within the meaning of this clause in respect of sale or purchase of such transport vehicles or parts, components or accessories thereof.

Explanation. - For the purpose of this clause, -

(i) each of the following persons and bodies who dispose of any goods including goods as unclaimed or confiscated or as unserviceable or as scrap, surplus, old, obsolete or discarded material or waste products whether by auction or otherwise, directly or through an agent for cash, or for deferred payment, or for any other valuable consideration, shall, not withstanding anything contained in clause (5A) or any other provision of this Act, be deemed be a dealer, to the extent of such disposals namely, -

(a) Port Trust

(b) Municipal Corporation and Municipal Councils, and other local authorities;

(c) Railway administration as defined under the Indian Railways Act 1890;

(d) shipping, and Construction Companies;

(e) Air transport companies and Airlines;

(f) * * * * *

(g) Maharashtra State Road Transport Corporation constituted under the Road Transport Corporations Act, 1950;

(h) Customs Department of the Government of India administering the Customs Act, 1962;

(i) Insurance and financial corporations or companies and Banks included in the Second Schedule to the Reserve Bank of India Act, 1934;

(j) Advertising agencies;

(k) any other corporation, company, body or authority owned or set-up by, or subject to administrative control of the Central Government or any State Government.

(l) incorporated or un-incorporated society, club or other association of persons;

> (ii) an auctioneer, who sells or auctions goods belonging to any principal whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal, shall, notwithstanding anything contained in clause (5A) or any other provisions of this Act, be deemed to be a dealer;
>
> (iii) a factor, broker, commission agent, del credere agent or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supplying or distributing goods belonging to any principal or principals whether disclosed or not, shall notwithstanding anything contained in clause (5A) or any other provisions of this Act, be deemed to be a dealer."

17. A bare perusal of this definition [section 2(11)] would indicate as to how any person, who, whether for commission, remuneration or otherwise carries on business of buying or selling goods in the State and includes the Central Government, or any State Government which carries on such business, and others are taken to be dealers. Then, the next definition and which could be relevant for our purpose is of the term/word "goods". That definition is to be found in section 2(13), which reads as under:-

> ""goods" means every kind of movable property (not being newspapers, or actionable claim or money, or stocks, shares or securities), and includes growing crops, grass, and trees and plants (including the produce thereof) and all other things attached to or forming part of the land which are agreed to be served before sale or under the contract of sale."

18. The word "importer" is defined in section 2(14) to mean a dealer who brings any goods into the State or to whom any goods are despatched from any place outside the State. The term "place

of business" is defined in an inclusive manner in section 2(20). It includes warehouse, godown or other place where a dealer stores his goods and any place where he keeps his books of account. The word "prescribed" is defined in section 2(21) to mean prescribed by rules. The word "sale" is defined in section 2(28) and which reads thus:-

> "2(28) "sale" means a sale of goods made within the State for cash or deferred payment or other valuable consideration, and includes any supply by a society or club or an association to its members on payment of a price or of fees or subscription, but does not include a mortgage, hypothecation, charge or pledge; and the words "sell", "buy" and "purchase", with all its grammatical variations and cognate expressions, shall be construed accordingly.
>
> Explanation. - For the purpose of this clause, -
>
> (a) a sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in sub-section (2) of section 4 of the Central Sales Tax Act, 1956 (LXXIV of 1956);
>
> (b) (i) every disposal of goods referred to in the Explanation to clause (11);
>
> (ii) a delivery of goods on hire-purchase or any system of payment of installments;
>
> (iii) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drinks (whether or not intoxicating, where such supply or service is made or is given on or after the 2nd day of February 1983, for cash, deferred payment or other valuable consideration;
>
> (iv) the transfer, otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;
>
> (v) the supply of goods by any unincorporated association or body of

> persons, to a member thereof for cash, deferred payment or other valuable consideration;
>
> shall be deemed to be a sale."

19. The comprehensive definition of the term "sale" denotes that it means sale of goods made within the State and for the purpose of section 2(28), the explanation which was added by the Maharashtra Act 24 of 1990 indicates that the sale within the State includes a sale determined to be inside the State in accordance with the principles formulated in sub-section (2) of section 4 of the CST Act and every disposal of goods referred to in the explanation to clause (11) of section 2 shall be deemed to be a sale.

20. The word "State" is defined in section 2(31) to mean the State of Maharashtra. The word "tax" is defined to mean a sales tax, purchase tax, turnover tax, surcharge or resale tax as the case may be, payable under the BST Act (see section 2(32).

21. Chapter II contains several provisions. Those are under the heading "Incidence and Levy of Tax". Section 3 appears thereunder and reads as under:-

> "**S. 3. Incidence of tax.** - (1) Every dealer whose turnover either or all sales or of all purchases, during -

(i) the year ending on the 31st day of March 1981,

(ii) the year commencing on the 1st day of April 1981

has exceeded or exceeds the relevant limit specified in sub-section (4), shall until such liability ceases under sub-section (3), be liable to pay tax under this Act on his turnover of sales, and on his turnover of purchases, made, on or after the notified day:

Provided that, a dealer to whom sub-clause (i) does not apply but sub-clause (ii) applies and whose turnover either of all sales or of all purchases, first exceeds the relevant limits specified in sub-section (4) after the notified day shall not be liable to pay tax in respect of sales and purchases which take place upto the time when his turnover of sales, or turnover of his purchases as computed from the 1st day of April 1981, first exceeds the relevant limit applicable to him under sub-section (4).

(2) Every dealer whose turnover, either of all sales or of all purchases made, during any year commencing on the 1st day of April, being a year subsequent to the years mentioned in sub-section (1) first exceeds the relevant limit specified in sub-section (4) shall, until such liability ceases under sub-section (3), be liable to pay tax under this Act with effect from the said date:

Provided that, a dealer shall not be liable to pay tax in respect of such sales and purchases as take place during the period commencing on the 1st day of April of the said year upto the time when his turnover of sales or turnover of purchases as computed from the 1st day of April of the said year, does not exceed the relevant limit applicable to him under sub-section (4).

(3) Every dealer who has become liable to pay tax under this Act, shall continue to be so liable until his registration is duly cancelled; and upon such cancellation his liability to pay tax, other than tax already levied or leviable, shall until his turnover of sales or of purchases again first exceeds the relevant limit specified in sub-section (4), ceases:

Provided that, where the dealer becomes liable to pay tax again in the same year in which he ceased to be liable as aforesaid, then in respect of such sales and purchases as take place during the period commencing on the date of cessation of liability to tax and upto the time when his turnover of sales

or of purchases does not exceed the relevant limit applicable to him under sub-section (4), no tax shall be payable.

(4) For the purposes of this sub-section, the limits of turnover shall be as follows:

(i) Limits of turnover Rs.1,00,000	(a) In the case of a dealer, who is an importer, and the value of taxable goods sold or purchased by him during the year is not less than Rs.10,000 and the value of any goods whether taxable or not brought by him into the State or despatched to him *from outside the State during the year is not less then Rs.25,000*. Or (b) In the case of a dealer who is a manufacturer, and the value of taxable goods sold or purchased by him during the year is not less then Rs.10,000 and the value of any goods whether taxable or not manufactured by him during the year is not less than Rs.25,000.
(ii) Limits of turnover Rs.2,50,000	In case of dealer to whom clause (i) does not apply and who holds Liquor Vendor License in Form FL-I, FL-II, FL-III or FL-IV (including temporary club licences) under the Bombay Foreign Liquor Rules, 1953 or License in Form E under the Special Permits and License Rules, 1952, or License in Form CL-II, CL-III or CL/FL/TOD/III under the Maharashtra Country Liquor Rules, 1973.
(iii) Limits of turnover Rs.5,00,000	In any case, including the case where a dealer has not become liable to pay tax under clause (i) , or, as the case may be, clause (ii), where the value of taxable goods sold or purchased by the dealer during the year is not less than Rs.10,000.

(5) For the purpose of calculating the limit of turnover for liability to tax. -

(a) except as otherwise expressly provided, the turnover of all sales or as the case may be, the turnover of all purchases shall be taken whether such sales or purchases are taxable or not; and

(b) the turnover shall include all sales and purchases made by dealer on his own account, and also on behalf of principals mentioned in his accounts."

22. From a perusal of section 3 onwards, it would be evident that sections 4 and 5 apart, the incidence of tax would fall on the transactions aforenoted by us. In fact, sections 4 and 5 make this aspect clear.

23. After one peruses the other chapters, it can be gathered that the tax is on the sale of goods and that the incidence would fall in terms of the provisions referred by us. The rest of the provisions of the Act give effect to the object and purpose of the law itself.

24. At this stage, we must also refer to the CST Act and it is an Act to formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import into or export from India, to provide for the levy, collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce and to declare certain goods to be of special

importance in inter-State trade or commerce and specify the restriction and conditions to which State laws imposing taxes on the sale or purchase of such goods of special importance shall be subject. The Statement of Objects and Reasons leading to the CST Act demonstrates that it is in the interest of the national economy of India, certain amendments were undertaken in the Constitution by the Constitution (Sixth Amendment) Act, 1956. The taxes on sales or purchases of goods in the course of inter-State trade or commerce were brought expressly within the purview of the legislative jurisdiction of Parliament. The restrictions could be imposed on the powers of State Legislatures with respect to the levy of taxes on the sale or purchase of goods within the State where the goods are of special importance in inter-State trade or commerce and that is how the formulation of principles for determining when sale or purchase takes place in the course of inter-State trade or commerce or in the course of export or import or outside a State in order that the legislative spheres of Parliament and the State legislatures become clearly demarcated. We are not concerned with the goods of special importance in the course of inter-State trade or commerce.

25. It is stated that the legislation authorised by the Constitution, as amended above, is with a view to enable the State

Governments to raise additional revenues by levying tax on inter-State transactions which are at present immune from tax under their respective sales tax laws. The Taxation Enquiry Commission was set up and based on its recommendations, and consultation with the States, the Government of India was of the view that certain principles should govern the scheme of the detailed legislation on the three inter-related subjects. They are:-

> "(i) The Central Government should authorise the State Governments to impose on behalf of the Central Government tax on the sale or purchase of goods in the course of inter-State trade or commerce. The Central legislation should also delegate to the States the Central Government's power to levy and collect the tax and for this purpose prescribe the same system of registration, assessment, etc., as prevails in the States concerned under their own sales tax system.
>
> (ii) an important aspect of the Central legislation will be concerned with the definition of the locale of sales for the purpose of defining in detail the relative jurisdiction, firstly of the Union and the States, and secondly, of the States inter se. It is therefore, necessary that the law should define clearly, with specific reference to sales tax the circumstances in which a sale or purchase becomes taxable by a particular State and no other. It should also define for the purpose of the Constitutional restrictions on the State's power to impose a tax under Item 54 of the State List, when a sale or purchase of goods may be said to take place:
>
> (a) in the course of export out of India,
>
> (b) in the course of import into India, and
>
> (c) in the course of inter-State trade or commerce.
>
> (iii) The Central legislation should provide for the declaration of certain commodities which are in the nature of raw materials and of special importance in inter-State trade or commerce and lay down the restrictions and conditions as to the rate, system of levy and other incidents of tax subject to which the States may impose tax on the sale or purchase thereof."

26. Therefore, the Act has been enacted. It contains in all six Chapters and we have very relevant definitions, which we would like to refer to and contained in Chapter I. Firstly, we would reproduce four important definitions and they are of the words and expressions "appropriate State", "business", "crossing the customs frontiers of India" and "dealer". They read as under:-

> "2(a) "appropriate State" means -
>
> (i) in relation to a dealer who has one or more places of business situated in the same State, that State;
>
> (ii) in relation to a dealer who has places of business situated in different States, every such State with respect to the place or places of business situated within its territory.
>
> 2(aa) "business" includes -
>
> (i) any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade,commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern; and
>
> (ii) any transaction in connection with or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern;
>
> 2(ab) "crossing the customs frontiers of India" means crossing in the limits of the area of a customs station in which imported goods or export goods are ordinarily kept before clearance by customs authorities.
>
> *Explanation*. - for the purposes of this clause, "customs station" and "customs authorities" shall have the same meaning as in the Customs Act, 1962 (52 of 1962).
>
> 2(b) "dealer" means any person who carries on (whether regularly or otherwise) the business of buying, selling, supplying or disturbing goods, directly or indirectly, for cash or for deferred payment, or for commission remuneration or other valuable consideration, and includes -
>
> (i) a local authority, a body corporate, a company, any co-operative society or other society, club, firm,

Hindu undivided family or other association of persons which carries on such business;

(ii) a factor, broker, commission agent, del credere agent, or any other mercantile agent, by whatever name called, and whether of the same description as hereinbefore mentioned or not, who carries on the business of buying, selling, supplying or distributing, goods belonging to any principal whether disclosed or not; and

(iii) an auctioneer who carries on the business of selling or auctioning goods belonging to any principal, whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal.

Explanation. - 1.- Every person who acts as an agent, in any State, of a dealer residing outside that State and buys, sells, supplies, or distributes, goods in the State or acts on behalf of such dealer as -

(i) a mercantile agent as defined in the Sale of Goods Act, 1930 (3 of 1930), or

(ii) an agent for handling of goods or documents of title relating to goods, or

(iii) an agent for the collection or the payment of the sale price of goods or as a gurantor for such collection or payment,

and every local branch or office in a State of a firm registered outside that State or a company or other body corporate, the principal office or headquarters whereof is outside that State, shall be deemed to be a dealer for the purpose of this Act.

Explanation 2. - A Government which, whether or not in the course of business, buys, sells, supplies or distributes, goods, directly or otherwise, for cash or for deferred payment or for commission, remuneration or other valuable consideration, shall except in relation to any sale, supply or distribution of surplus, un-serviceable or old stores or materials or waste products or obsolete or discarded machinery or parts or accessories thereof, be deemed to be a dealer for the purposes of this Act;"

27. The word "goods" is defined in section 2(d) and the term "place of business" is defined in section 2(dd), which reads as under:-

> "2(dd) "place of business" includes -
>
> (i) in any case where a dealer carries on business through an agent by (whatever name called), the place of business of such agent;
>
> (ii) a warehouse, godown or other place where a dealer stores his goods; and
>
> (iii) a place where a dealer keeps his books of account."

28. The word "sale" is defined in section 2(g), which reads as under:-

> "2(9) "sale", with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or deferred payment or for any other valuable consideration, and includes, -
>
> (i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
>
> (ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
>
> (iii) a delivery of goods on hire-purchase or any system of payment by instalments;
>
> (iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
>
> (v) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
>
> (vi) a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or

> any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, but does not include a mortgage or hypothecation of or a charge or pledge on goods."

29. The term "sales tax law" is defined in section 2(i) to read as under:-

> "2(i) "sales tax law" means any law for the time being in force in any State or part thereof which provides for the levy of taxes on the sale or purchase of goods generally or on any specified goods expressly mentioned in that behalf and includes value added tax law, and "general sales tax law" means any law for the time being in force in any State or part thereof which provides for the levy of tax on the sale or purchase of goods generally and includes value added tax law."

30. A bare perusal of these definitions and together would indicate as to how formulation of principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import or export. Sections 3, 4 and 5 are extremely relevant for our purpose and they read as under:-

> "**3. When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce**. - 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; or
>
> (b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation 1. - Where goods are delivered to a carrier or other bailee for transmission, the movement of the goods shall, for the purpose of clause (b), be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee.

Explanation 2. - Where the movement of goods commences and terminates in the same State it shall not be deemed to be a movement of goods from one State to another by reason merely of the fact that in the course of such movement the goods pass through the territory of any other State.

Explanation 3. - Where the gas sold or purchased and transported through a common carrier pipeline or any other common transport or distribution system becomes co-mingled and fungible with other gas in the pipeline or system and such gas is introduced into the pipeline or system in one State and is taken out from the pipeline in another State, such sale or purchase of gas shall be deemed to be a movement of goods from one State to another.

4. When is a sale or purchase of goods said to take place outside a State. - (1) Subject to the provisions contained in section 3, when a sale or purchase of goods is determined in accordance with sub-section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

(2) A sale or purchase of goods shall be deemed to take place inside a State, if the goods are within the State -

(a) in the case of specific or ascertained goods, at the time the contract of sale is made; and

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation.

Explanation. - Where there is a single contract of sale or purchase of goods situated at more places than one, the

provisions of this sub-section shall apply as if there were separate contracts in respect of the goods at each of such places.

5. When is a sale or purchase of goods said to take place in the course of import or export. - (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 documents of title to the goods after the goods have crossed the customs frontiers 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.

(3) Notwithstanding anything contained in sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export.

(4) The provisions of sub-section (3) shall not apply to any sale or purchase of goods unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner a declaration duly filed and signed by the exporter to whom the goods are sold in a prescribed form obtained from the prescribed authority.

(5) Notwithstanding anything contained in sub-section (1), if any designated Indian carrier purchases Aviation Turbine Fuel for the purposes of its international flight, such purchase shall be deemed to take place in the course of the export of goods out of the territory of India.

Explanation. - For the purposes of this sub-section, designated Indian carrier" means any carrier which the

Central Government may, by notification in the Official Gazette, specify in this behalf."

31. Chapter III is titled as "Inter-State Sales Tax". Therein, we find sections 6, 6-A, 7, 8, 8-A, 9, 9-A, 9-B, 10, 10-A and sections 11 to 13. We need not refer to rest of the Chapters for the simple reason that section 3 of this Act deals with sale or purchase of goods which is said to have taken place in the course of inter-State trade or commerce and section 4 deals with a sale or purchase of goods which is said to have taken place outside a State. Section 5 deals with a sale or purchase of goods in the course of import or export. Since sub-section (1) of section 5 as also sub-section (2) expressly contain the words "crossing the customs frontiers of India". What we should bear in mind is that a sale or purchase of goods shall be deemed to have taken 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 document of title to the goods after the goods have crossed the customs frontiers of India. Similarly, a sale or purchase of goods shall be deemed to have taken 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 a transfer of document of title to the goods before the goods have crossed the customs frontiers of India. The important distinction

between sub-sections (1) and (2) of section 5 is that the deeming fiction therein, in the case of a sale or purchase of goods in the course of the export of goods by a transfer of documents to title would be after the goods have crossed the customs frontiers of India and in the case of import, the transfer of documents of title to the goods should take place before the goods have crossed the customs frontiers of India. We have already reproduced the definition of the term "crossing the customs frontiers of India" and that definition has come in by an amendment to this section 2. That amendment was inserted by the Amendment Act 103 of 1976. Thus, when crossing in the limits of the area of a customs station in which imported or export goods are ordinarily kept before clearance by customs authorities would denote crossing the customs frontiers of India.

32. To understand this concept, some provisions of the Customs Act, 1962 would have to be referred to. The Customs Act, 1962 is an Act to consolidate and amend the law relating to customs. While considering the object and scheme of the Act, the Hon'ble Supreme Court in the case of *Commissioner of Customs vs. M.Ambalal*[1], observed as under:-

> "10. The Customs Act, 1962 is an Act to consolidate and amend the law relating to customs. The object of the Act is to regulate the import and export of goods, into and from the

1 (2011) 2 SCC 74

shores of India, or otherwise, and determine the customs duty payable. It also attempts to fill the lacunae of the previous customs legislations viz. the Sea Customs Act and the Land Customs Act. It also aims to counter the difficulties that have emerged over the years due to the changing economic and financial conditions; amongst them it proposes to tackle the increasing problems of smuggling both in and out of the country. The Act aims to sternly and expeditiously deal with smuggled goods, and curb the dents on the revenue thus caused. In order to deal with the menace of smuggling, the authorities are enabled to detect, conduct search and seizure, and if necessary, confiscate such smuggled goods, within the territory of India.

.....

12. Dutiable goods are goods whose import is permitted by the Act or any other law in force. Duty is the tax leviable on the goods occasioned by their import into India or their export out of India. The dutiability of the goods is covered by Section 12 of the Act which is the charging section. Under this section, all goods imported into or exported from India are liable to customs duty unless the Customs Act itself or any other law for the time being in force provides otherwise. The rate of duty is fixed by the Customs Tariff Act, 1975. "Import" and "imported goods" mean that if goods are brought into India, meaning thereby into the territory of India from outside, there is import of goods and the goods become imported goods and become chargeable to duty up to the moment they are cleared for home consumption. The word "importer" has been defined in the Act as importer in relation to any goods at any time between their importation and the time when they are cleared for home consumption includes any owner or any person who holds himself out to be an importer. The word "smuggling", in relation to goods, means any act or omission which will render such goods liable to confiscation under Section 111 or Section 113 of the Act.

.....

22. In order to understand the true meaning of the term "imported goods" in the exemption notification, the entire scheme of the Act requires to be taken note of. As noted above, "imported goods" for the purpose of this Act is explained by a conjoint reading of Sections 2(25), 11, 111 and 112. Reading these sections together, it can be found that one of the primary purposes for prohibition of import referred to the latter is the prevention of smuggling [See Section 11(2)

> (c)]. Further, in the light of the objects of the Act and the basic skeletal framework that has been enumerated above, it is clear that one of the principal functions of the Act is to curb the ills of smuggling on the economy. In the light of these findings, it would be antithetical to consider that "smuggled goods" could be read within the definition of "imported goods" for the purpose of the act. In the same light, it would be contrary to the purpose of exemption notifications to accord the benefit meant for imported goods on smuggled goods."

33. From a perusal of the Chapters into which this Act is divided, it is evident that Chapter I is containing preliminary provisions. Chapter II is titled as "officers of Customs", whereas, Chapter III is titled as "Appointment of Customs Ports, Airports, Etc." and Chapter IV contains "Prohibitions on Importation and Exportation of Goods", whereas, Chapter IVA provides "Detection of Illegally Imported Goods and Prevention of the Disposal thereof". Similarly, Chapter IVB deals with "Prevention or Detection of Illegal Export of Goods". Then, by Chapter IVC, there is a power conferred to exempt from the provisions of Chapters IVA and IVB. This Chapter contains only one section, namely, section 11N.

34. By Chapter V, provisions are made for levy and exemption from customs duties. Chapter VA indicates amount of duty in the price of goods, etc. for the purpose of refund, whereas, Chapter VB provides for advance rulings. Chapters VI and VII contain provisions relating to conveyances carrying imported or export

goods and clearances of imported goods and export goods. Chapter VIA is introduced for payment through electronic cash ledger, whereas, Chapter VIII deals with goods in transit. Chapter IX is titled as "Warehousing" and that is important for our purpose. The rest of the Chapters deal with drawback, special provisions regarding baggage, goods imported or exported by post, courier and stores. Chapters XII, XIIA contain provisions relating to coastal goods and vessels carrying coastal goods and audit. Chapter XIII has been enacted to provide for searches, seizure and arrest, following which, Chapter XIV deals with confiscation of goods and conveyances and imposition of penalties. There are Chapters in relation to settlement of cases, appeals, offences and prosecutions and they are Chapters XIVA, XV and XVI. Finally, Chapter XVII contains miscellaneous provisions.

35. For understanding the meaning of the words and expressions used in various Chapters, in Chapter I (section 2), there are definitions. This section opens with the words "in this Act unless the context other requires". The word "bill of entry" is defined in section 2(4) to mean a bill of entry referred to in section 46. Then, the term "customs airport" is defined in section 2(10) to mean any airport appointed under clause (a) of section 7

to be a customs airport and includes a place appointed under clause (aa) of that section to be an air freight station. The other important definitions are of the words "customs area", "customs port", "customs station", "duty", "entry" and "import". The definition of the term "imported goods" is contained in section 2(25) to mean any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption.

36. The above expressions would indicate as to how on their combined reading, the incidence of customs duty would fall on such goods as are imported into India from a place outside India. Now, by Chapter III, which provides for appointment of customs ports, airports etc. it is evident that the Board, namely, the Central Board of Customs and Excise, now known as the Central Board of Indirect Taxes and Customs constituted under the Central Boards of Revenue Act, 1963 notifies in the Official Gazette the ports and airports which alone shall be customs ports or customs airports for unloading of imported goods and loading of export goods or any class of such goods. The Board can also notify the places which alone shall be inland container depots or air freight stations for unloading of imported goods and loading of export goods or any class of such goods. As we have referred

above, there is a separate Chapter in the Customs Act, titled as "Warehousing" (Chapter IX). Now, it is evident for the purpose of this Act that the clearance of imported goods and export goods is dealt with by a separate Chapter, namely, Chapter VII. By section 44, it is clarified that this Chapter shall not apply to (a) baggage and (b) goods imported or to be exported by post. The term "baggage" has also been categorically defined and that includes unaccompanied baggage but does not include motor vehicles. The term "postal articles" has also a distinct legal connotation. Section 45 of the Act is also material for our purpose and it says that there are restrictions on custody and removal of imported goods. Section 45 reads as under:-

> "**45. Restrictions on custody and removal of imported goods**. - (1) Save as otherwise provided in any law for the time being in force, all imported goods, unloaded in a customs area shall remain in the custody of such person as may be approved by the Principal Commissioner of Customs or Commissioner of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII.
>
> (2) The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force, -
>
> (a) shall keep a record of such goods and send a copy thereof to the proper officer;
>
> (b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer or in such manner as may be prescribed.
>
> (3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilferred after unloading thereof in a customs area while in the custody of a

> person referred to in sub-section (1), that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an arrival manifest or import manifest or, as the case may be, an import report to the proper officer under section 30 for the arrival of the conveyance in which the said goods were carried."

37. A perusal of section 45 leaves us in no manner of doubt that save as otherwise provided in any law for the time being in force, all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Principal Commissioner of Customs or Commissioner of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII. By sub-section (2), the person having custody of any imported goods in a customs area has to discharge certain obligations and duties. By sub-section (3) of section 45, which is inserted by Act 22 of 1995, it is evident that this is a non-obstante clause. By this sub-section, the person in whose custody the goods are placed, he shall be liable to pay any duty on the goods which are pilferred after unloading thereof in a customs area while in the custody.

38. Section 46 of the Customs Act, 1962 reads as under:-

> "**46. Entry of goods on importation**. - (1) The importer of any goods, other than goods intended for transit or transhipment, shall make entry thereof by presenting electronically on the customs automated system to the proper officer a bill of entry for home consumption or warehousing in such form and manner as may be prescribed:

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically, on the customs automated system allow an entry to be presented in any other manner:

Provided further that if the importer makes and subscribes to a declaration before the proper officer to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouses appointed under section 57 without warehousing the same.

(2) Save as otherwise permitted by the proper officer, a bill of entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

(3) The importer shall present the bill of entry under sub-section (1) before the end of the next day following the day (excluding holidays) on which the aircraft or vessel or vehicle carrying the goods arrives at a customs station at which such goods are to be cleared for home consumption or warehousing:

Provided that a bill of entry may be presented at any time not exceeding thirty days prior to the expected arrival of the aircraft or vessel or vehicle by which the goods have been shipped for importation into India:

Provided further that where the bill of entry is not presented within the time so specified and the proper officer is satisfied that there was no sufficient cause for such delay, the importer shall pay such charges for late presentation of the bill of entry as may be prescribed.

(4) The importer while presenting a bill of entry shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, and such other documents relating to the imported goods as may be prescribed.

(4A) The importer who presents a bill of entry shall ensure the following, namely:-

(a) the accuracy and completeness of the information given therein;

(b) the authenticity and validity of any document supporting it; and

(c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or *vice versa*."

39. The marginal heading of section 46 is indicative of the fact that when the goods enter, then, the importer of the goods, other than goods intended for transit or transhipment shall make entry thereof by presenting electronically on the customs automated system to the proper officer a bill of entry for home consumption or warehousing in the prescribed form. Then, there are various sub-sections which indicate as to how the presentation of the bill of entry would result in certain consequences and particularly for protecting the interest of the Revenue.

40. Section 47 provides for clearance of goods for home consumption and that reads as under:-

"**47. Clearance of goods for home consumption.** - (1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption:

Provided that such order may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria:

Provided further that the Central Government may, by notification in the Official Gazette, permit certain class of importers to make deferred payment of said duty or any charges in such manner as may be provided by rules.

(2) The importer shall pay the import duty -

(a) on the date of presentation of the bill of entry in the case of self-assessment; or

(b) within one day (excluding holidays) from the date on which the bill of entry is returned to him by the proper officer for payment of duty in the case of assessment, reassessment or provisional assessment; or

(c) in the case of deferred payment under the proviso to sub-section (1), from such due date as may be specified by rules made in this behalf,

and if he fails to pay the duty within the time so specified, he shall pay interest on the duty not paid or short-paid till the date of its payment, at such rate, not less than ten per cent. but not exceeding thirty-six per cent. per annum, as may be fixed by the Central Government, by notification in the Official Gazette:

Provided that the Central Government may, by notification in the Official Gazette, specify the class or classes of importers who shall pay such duty electronically:

Provided further that where the bill of entry is returned for payment of duty before the commencement of the Customs (Amendment) Act, 1991 and the importer has not paid such duty before such commencement, the date of return of such bill of entry to him shall be deemed to be the date of such commencement for the purpose of this section:

Provided also that if the Board is satisfied that it is necessary in the public interest so to do, it may, by order for reasons to be recorded, waive the whole or part of any interest payable under this section."

41. Then, by section 48, there is a procedure in case of goods not cleared, warehoused or transhipped within thirty days after unloading.

42. Section 49 deals with goods stored pending clearance or removal. This section, before substitution by the Finance Act, 2017 and thereafter reads as under:-

> **Before substitution -**
> "49. Storage of imported goods in warehouse pending clearance. - Where in the case of any imported goods, whether dutiable or not, entered for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time, the goods may, pending clearance, be permitted to be stored for a period not exceeding thirty days in a public warehouse, or in a private warehouse, if facilities for deposit in a public warehouse are not available; but such goods shall not be deemed to be warehoused goods for the purposes of this Act, and accordingly the provisions of Chapter IX shall not apply to such goods:
>
> Provided that the Principal Commissioner of Customs or Commissioner of Customs may extend the period of storage for a further period not exceeding thirty days at a time.
>
> **After substitution -**
>
> **49. Storage of imported goods in warehouse pending clearance or removal.** - Where -
>
> (a) in the case of any imported goods, whether dutiable or not, entered for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied on the application of the importer that the goods cannot be cleared within a reasonable time;
>
> (b) in the case of any imported dutiable goods, entered for warehousing, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied on the application of the importer that the goods cannot be removed for deposit in a warehouse within a reasonable time,

> the goods may pending clearance or removal, as the case may be, be permitted to be stored in a public warehouse for a period not exceeding thirty days:
>
> Provided that the provisions of Chapter IX shall not apply to goods permitted to be stored in a public warehouse under this section:
>
> Provided further that the Principal Commissioner of Customs or Commissioner of Customs may extend the period of storage for a further period not exceeding thirty days at a time."

43. Thus, a combined reading of the definitions of the terms "customs airport", "customs area", "customs port" and "customs station" would indicate that these are the notified places where the goods on import, until they are cleared, have to be placed. Their custody is with the person referred by us in the aforereferred provisions. Thus, once the imported goods are unloaded in the customs area, then, there has to be entry made, save and except such goods which are intended for transit or transhipment and there is a provision for clearance of goods for home consumption.

44. The question before us is the word "import" means bringing into India from a place outside India. The term "import manifest" is a term defined in section 2(24) together with "import report" required to be delivered under section 30. Section 2(25) deals with "imported goods" and we have seen that definition, which means any goods brought into India from a place outside India,

but does not include goods which have been cleared for home consumption. The term "importer" is defined in section 2(26) to mean, in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner, beneficial owner or any person holding himself out to be the importer. Thus, the term "imported goods" as defined would mean any goods brought into India from a place outside India. However, such goods cease to be imported goods once having cleared for home consumption. The "bill of entry" is defined in section 2(4) to mean a bill of entry referred to in section 46.

45. When we see this scheme in the light of the provisions contained in Chapter VI and particularly section 46 falling therein, it is evident that the filing of bill of entry means the importer of any goods, on importation, presenting this bill to the proper officer for home consumption or warehousing. If they have to be cleared for home consumption, then, the procedure under section 47 of the Customs Act, 1962 has to be followed and when they have to be warehoused after unloading, then, section 48 is the provision which has to be abided by the concerned persons.

46. When we refer to the Chapter title "Warehousing" (Chapter IX), that contains sections 57 to 73A. A combined reading of these sections would indicate as to how there are public warehouses, private warehouses and special warehouses for all of which, licences can be issued. By section 59, a warehousing bond is provided and section 60 provides permission for removal of goods for deposit in warehouse. Section 61 sets out the period for which goods may remain warehoused and section 64 preserves the owner's rights to deal with the warehoused goods. Sections 60 and 61 read as under:-

> "**60. Permission for removal of goods for deposit in warehouse.** - (1) When the provisions of section 59 have been complied with in respect of any goods, the proper officer may make an order permitting removal of the goods from a customs station for the purpose of deposit in a warehouse.
>
> Provided that such order may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria.
>
> (2) Where an order is made under sub-section (1), the goods shall be deposited in a warehouse in such manner as may be prescribed.
>
> **61. period for which goods may remain warehoused.** - (1) Any warehoused goods may remain in the warehouse in which they are deposited or in any warehouse to which they may be removed, -
>
> (a) in the case of capital goods intended for use in any hundred per cent export oriented undertaking or electronic hardware technology park unit or software technology park unit or any warehouse wherein manufacture or other operations have been permitted under section 65, till their clearance from the warehouse;

(b) in the case of goods other than capital goods intended for use in any hundred per cent export oriented undertaking or electronic hardware technology park unit or software technology park unit or any warehouse wherein manufacture or other operations have been permitted under section 65, till their consumption or clearance from the warehouse; and

(c) in the case of any other goods, till the expiry of one year from the date on which the proper officer has made an order under sub-section (1) of section 60:

Provided that in the case of any goods referred to in this clause, the Principal Commissioner of Customs or Commissioner of Customs may, on sufficient cause being shown, extend the period for which the goods may remain in the warehouse, by not more than one year at a time:

provided further that where such goods are likely to deteriorate, the period referred to in the first proviso may be reduced by the Principal Commissioner of Customs or Commissioner of Customs to such shorter period as he may deem fit.

(2) Where any warehoused goods specified in clause (c) of sub-section (1) remain in a warehouse beyond a period of ninety days from the date on which the proper officer has made an order under sub-section (1) of section 60, interest shall be payable at such rate as may be fixed by the Central Government under section 47, on the amount of duty payable at the time of clearance of the goods, for the period from the expiry of the said ninety days till the date of payment of duty on the warehoused goods:

Provided that if the Board considers it necessary so to do, in the public interest, it may, -

(a) by order, and under the circumstances of an exceptional nature, to be specified in such order, waive the whole or any part of the interest payable under this section in respect of any warehoused goods;

(b) by notification in the Official Gazette, specify the class of goods in respect of which no interest shall be charged under this section;

(c) by notification in the Official Gazette, specify the class of goods in respect of which the interest shall be chargeable from the date on which the proper officer has made an order under sub-section (1) of section 60.

Explanation. - For the purpose of this section, -

(i) "electronic hardware technology park unit" means a unit established under the Electronic Hardware Technology Park Scheme notified by the Government of India.

(ii) "hundred per cent export oriented undertaking" has the same meaning as in clause (ii) of *Explanation* 2 to sub-section (1) of section 3 of the Central Excise Act, 1944 (1 of 1944); and

(iii) "software technology park unit" means a unit established under the Software Technology Park Scheme notified by the Government of India."

47. A perusal of these two provisions would indicate as to how there is a discretion in the proper officer to make an order permitting removal of the goods from a customs station for the purpose of deposit in a warehouse and where such order is made under sub-section (1) of section 60, the goods shall be deposited in a warehouse. Then, section 61 deals with the period for which goods may remain warehoused and the categories of goods which is covered by this provision are the capital goods, goods other than capital goods and any other goods.

48. By section 64, the owner's right to deal with the warehoused goods with the sanction of the proper officer is preserved. Now, with the amended provision as well, the owner has a discretion to inspect the goods, deal with their containers in

such manner as may be necessary to prevent loss or deterioration or damage to the goods, show the goods for sale. By other sections falling in this Chapter, the warehoused goods can be dealt with and can also be removed from one warehouse to another.

49. Section 68 is important for our purpose and reads as under:-

> "**68. Clearance of warehoused goods for home consumption.** - Any warehoused goods may be cleared from the warehouse for home consumption if -
>
> (a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form;
>
> (b) the import duty, interest, fine and penalties payable in respect of such goods have been paid; and
>
> (c) an order for clearance of such goods for home consumption has been made by the proper officer:
>
> Provided that the order referred to in clause (c) may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria:
>
> Provided further that the owner of any warehoused goods may, at any time before an order for clearance of goods for home consumption has been made in respect of such goods, relinquish his title to the goods upon payment of penalties that may be payable in respect of the goods and upon such relinquishment, he shall not be liable to pay duty thereon:
>
> Provided also that the owner of any such warehoused goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force."

50. The importer of any warehoused goods may clear them for home consumption, if a bill of entry for that purpose has been presented in a prescribed form and the import duty leviable on such goods and penalties etc. in respect of such goods have been

paid and an order for clearance of such goods for home consumption has been made by the proper officer. The second proviso to this section will reveal as to how the owner of any warehoused goods may, at any time, before an order for clearance of goods for home consumption has been made in respect of such goods, relinquish his title to the goods upon payment of penalties that may be payable in respect of the goods and upon such relinquishment, he shall not be liable to pay duty thereon.

51. By section 71, it is categorically stated that goods not to be taken out of warehouse except as provided by this Act.

52. Thus, the import is complete on compliance of the above noted provisions of the Customs Act, 1962 and therefore, that expression for the purposes of the BST and the CST Act has to be understood accordingly.

53. If the CST Act is now referred in the context of the above provisions, it is evident that Chapter II thereof formulates the principles for determining whether a sale or purchase of goods takes place in the course of import. For our purpose, section 5 is important and it says that 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 a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India. In the facts of the present case and as highlighted by Mr.Sonpal, it is evident that the goods were in the customs bonded warehouse and the claim of high seas sale was disallowed. The transaction was treated as a local sale. We have already seen from the provisions of the Customs Act, 1962 that the term "customs station" is defined to mean any customs port, customs airport or land customs station. Now, if the goods are stated to be crossing the customs frontiers of India, then, in terms of the CST Act that means crossing the limits of the area of customs station in which the imported goods or export goods are ordinarily kept before clearance by the customs authorities. That also is evident by the fact that when the goods arrive in India, they are dealt with by Chapter VI of the Customs Act, 1962, which contains provisions relating to conveyances carrying imported or export goods. Therein, section 29 deals with arrival of vessels and aircrafts in India and section 30 deals with delivery of arrival manifest or import manifest or import report and that is an obligation of a person carrying imported goods either by vessel or an aircraft and he has to deliver to the proper officer such a manifest. Then, by sections 31 and 32, it is clear that the imported goods cannot be unloaded from the vessel until entry

inwards is granted or imported goods not to be unloaded unless mentioned in arrival manifest or import manifest or import report. The loading and unloading of goods can take place at appropriate place only and the goods cannot be loaded or unloaded except under the supervision of the customs officer (see sections 33 and 34 of the Customs Act, 1962). Then, there are other provisions in this Chapter and that conveyance which has brought the goods cannot be permitted to leave the customs station until a written order to that effect has been given by the proper officer. The clearance of imported goods and export goods is a matter dealt with by Chapter VII to which we have made extensive reference. Hence, when crossing the customs frontiers of India is a concept dealt with by the CST Act, then, the limits of the area of customs station in which the imported goods are ordinarily kept before clearance by the customs authorities is mentioned. That is for a limited purpose. Once the imported goods unloaded in a customs area have to remain in the custody of the customs authorities until they are cleared for home consumption or are warehoused, then, presenting a bill of entry for home consumption or warehousing denotes that such goods which are imported have been cleared. The importation in that sense and as understood by the Customs Act, 1962 is complete. The goods themselves cease to be imported goods when they have

been cleared for home consumption. The clearance of goods for home consumption is dealt with by section 47 of the Customs Act, 1962, but storage of imported goods in warehouse only because they are not cleared after unloading having been dealt with by the Customs Act, 1962 and particularly section 48 thereof, does not mean that for the purposes of the CST Act the goods have not crossed the customs frontiers of India. This is not a case where the deeming fiction in sub-section (2) of section 5 of the CST Act operates. Admittedly, this is not a case of a sale of goods occasioning the import, but what is claimed is that the sale is effected by transfer of documents of title to the goods before the goods have crossed the customs frontiers of India. This later part is also belied by the fact and as claimed by Mr.Sonpal that in this case, the bill of lading was issued on 15th September, 1995 and the bill of entry for the period 1995-96 for warehousing was filed on 13th November, 1995 and the agreement for sale has been executed thereafter. Once these are the admitted dates and events, then, this is not a case where the documents of title to the goods have been transferred before the goods have crossed the customs frontiers of India. This is, therefore, a local sale.

54. Mr. Tapare appearing on behalf of the dealer-respondent before us argued orally as also placed his written submissions. In

para 2 of the written submissions in clauses (a) to (d), the respondent-dealer has set out the details of the transactions. It is conceded that the respondent imported the goods from foreign country by sea. It is then conceded that on arrival of vessels, the goods were unloaded, ex-bond bill of entry was filed by the respondent and provisional duty was assessed and goods were kept in bonded warehouse under the control and supervision of customs authorities. It is further stated that the assessee-dealer then entered into the contract, by relying on the bill of lading which is a document of title to the goods, with the local customers. It is stated that the customers, which are local, on the basis of this bill of lading, prepared the bill of entry for home consumption and after completing the customs formalities and payment of customs duty, the goods were then cleared for home consumption.

55. Once on this factual position, the dealer claims the transaction to be effected by transfer of document of title to the goods before clearance from customs authorities, then, it is evident that in the light of the discussion in the forgoing paragraphs about the legal provisions, particularly of the Customs Act, 1962 and the BST Act, the second limb of sub-section (2) of section 5 of the CST Act is not attracted.

56. Mr. Tapare has relied upon the definitions of some relevant words and expressions appearing in the CST Act and the Customs Act, 1962. We need not advert to these legal provisions once again for we have discussed them in great detail.

57. Then, Mr. Tapare submitted that the goods which are stored in the bonded warehouse are still within the customs area. Once again, this argument is without any merit for reliance is placed on the notification dated 21st November, 1994 which declares Nhava Sheva as customs port. We are of the opinion that this notification and its wording has limited relevance, in the sense that this may be notified as customs port, but the controversy before us and on essential facts is different. Once we have found that this is not a sale covered by the second limb of sub-section (2) of section 5, then, the argument based on this notification cannot be accepted. Pertinently, Mr.Tapare could not get over the factum of the provisional assessment made and the payment of duty in pursuance thereof. Then, the argument of Mr. Tapare is that in this case, the respondent has transferred the bill of lading in favour of the buyer before payment of customs duty. He relied upon the fact that the duty was not paid by the respondent nor physical delivery of the goods was given to the customers. It is the buyer/customer, who has cleared the goods from the

customers and taken delivery. Therefore, the goods have not crossed the customs frontiers of India.

58. This argument cannot be accepted in the light of the fact that the bill of entry could be filed, as found from the Customs Act, 1962 for both, home consumption or warehousing. That section 46(1) clearly says that the importer has to make an entry by presenting to the proper officer the bill of entry for home consumption or warehousing. Sub-section (3) of section 46 of the Customs Act, 1962, before its amendment by the Finance Act, 2017 and thereafter amply clarifies that the bill of entry under sub-section (1) may be presented at any time for delivery of the import manifest or report, as the case may be and the proviso to sub-section (3), prior to its amendment also throws light on this aspect. Hence, we are unable to accept the argument of Mr.Tapare that the customs frontiers of India are not crossed until the goods find their free access into the country by crossing the outer limits of the area of customs station and it is possible only at the time of clearance by the customs authorities by making the payment of customs duty. This argument is not sound on facts and in law. Merely because the Customs Act, 1962 is referred in his written arguments, but without referring to the specific provisions thereof, it is not possible to accept his

argument that the course of import comes to an end when the goods are brought in clearance namely, when the imported goods are made free for home consumption. Till then, they are in custody and control of the customs authorities. Without following the procedure under the Customs Act, 1962, they cannot be lifted out.

59. In this regard, Mr. Tapare placed strong reliance upon the judgment of the Hon'ble Supreme Court in the case of *M/s.Priyanka Overseas Pvt. Ltd. and Anr. vs. Union of India and Ors.*[2]. There, the question before the Hon'ble Supreme Court arose in the typical factual background. The Government of India framed import policy for the years 1985-88 under which import of items under open general licence have been mentioned under Appendix 6 Entry No. 1. The Hon'ble Supreme Court was concerned with serial number 4 which fell in Appendix 5 part B. That dealt with petroleum products, oil, seeds etc. Then, the peculiar facts have been referred from para 4 onwards up to para 14. From para 15 onwards, the first part of the issue/controversy and contentions in relation thereto have been noticed. Thereafter, reliance was placed on section 68 of the Customs Act, 1962 and from paras 20 onwards, the contentions of the appellants and the

2 **AIR 1991 SC 583**

respondents/Union of India were noted. Then, the question arose in that case as to what duty could be imposed. In the context of imposition of duty on the goods which were covered by the open general licence arose only because of the peculiar facts of that case. It is evident from the narration in para 33 onwards that the Hon'ble Supreme Court referred to a judgment delivered by it in the case of *Duni Chand Rataria vs. Bhuwalka Brothers*[3]. The Hon'ble Supreme Court distinguished it and then went on to consider the provisions then prevailing, but by applying them to the peculiar facts of that case. The Hon'ble Supreme Court pertinently observed that under sections 68 and 71 of the Customs Act, 1962, goods placed in a warehouse can be taken out only after clearance for home consumption. But, the customs officer refused to release the goods on an erroneous assumption that the appellant was liable to pay redemption fine and since it had not paid that amount of fine, the goods were not liable to be released. Once the High Court declared that the imposition of redemption fine was not permissible, then, on the date when the formalities with the customs authorities have been complied with, the goods could have been removed.

3 **AIR 1955 SC 182**

60. We are of the firm opinion that if this judgment is perused in its entirety, the paragraphs relied upon by Mr.Tapare can have no application to the facts before us. This decision was rendered in entirely different factual background and controversy. We do not think that the respondent can take any assistance of this decision.

61. Then, reliance is placed on the judgment in the case of *Kiran Spinning Mills vs. Collector of Customs*[4]. The issue there was whether the appellant before the Hon'ble Supreme Court, who imported the goods but placed them in bonded warehouse after they landed in India, was liable to pay additional duty under section 3 of the Customs Tariff Act, 1975. There, an Ordinance was promulgated on 3rd October, 1978 effective from 4th October, 1978, whereunder, articles were charged with additional duty of excise equal to 10% of the basic excise duty payable on such articles under the Central Excise and Salt Act, 1944. It was not disputed that under section 3 of the Customs Tariff Act, 1975, additional duty on such articles, which were imported, became payable equivalent to the additional excise duty levied under that Ordinance. The goods, which were imported by the appellant were cleared from the bonded warehouse after 4th October, 1978

4 (2000) 10 SCC 228

and that is why demand of additional duty was made relying on this Ordinance. The appellant before the Hon'ble Supreme Court paid that amount under protest, but thereafter, filed application for refund. After being unsuccessful before the authorities and the tribunal, appeals were filed in the Hon'ble Supreme Court. The argument there was that this duty would apply and take effect from 4th October, 1978. It being a new duty/levy, it would not be attracted on goods in fully manufactured condition and in stock with the manufacturer on the midnight of 3rd October, 1978 and 4th October, 1978. The contention was that at the time when the goods landed in India, additional duty of excise was not payable on similarly manufactured goods in India even if they were placed in a bonded warehouse in India and therefore, no additional duty could be charged under the Excise Act. This argument was expressly rejected by holding that the taxable event being the date of crossing the customs barriers and not on the date when the goods had landed in India or had entered the territorial waters, the additional duty of excise was leviable under the Ordinance.

62. Reliance of Mr.Tapare on this judgment is misplaced because what this argument overlooks are the provisions of the CST Act and the definitions as well as Chapter V of the Customs

Act, 1962. Section 15 of the Customs Act, 1962 has been extensively amended and that amended provision applied for the purposes of date for determination of rate of duty and tariff valuation of imported goods. Thus, this judgment in the case of *Kiran Spinning Mills* (supra) dealt with the issue as to whether the import duty has to be paid when the import is complete and that import is complete only when the goods crossed the customs barriers or otherwise. The Hon'ble Supreme Court held that the taxable event is as above. We do not think that this judgment has any application.

63. In *Narang Hotel's* case (supra), on which also Mr.Tapare placed reliance, the issue before this court arose under the CST Act and the BST Act. True it is that even the Customs Act, 1962 has been referred, however, the context in which the issue was raised is indeed peculiar. The Narang Hotels argued that sales made by them for flight kitchen were liable to sales tax or not and that adjudication was sought by M/s. Narang Hotels. The argument was that the sale of goods to foreign airlines by the flight kitchen were in the course of export within the meaning of section 5(1) of the CST Act. The said sales occasioned export of the goods out of the territory of India by transfer of documents of title to the goods, after the goods crossed the customs frontiers of

India. As such, the sales effected by them to the foreign airlines were not exigible to the provisions of the BST Act. In answering this, the Division Bench of this Court held that such sales are not sales in the course of export. The necessary ingredients to establish that sale are not satisfied. It is in that context that the Division Bench held that the argument of the Department/ Revenue was correct.

64. We do not see how this paragraph relied upon by Mr.Tapare from this judgment can be applied de-hors the factual position and the controversy. That paragraph cannot be read in isolation. Paras 41 and 42 so also para 44 of this judgment, hence, cannot be pressed into service. Before us the issue is very clear and that is that the Customs Act, 1962 imposes a duty on import. The goods which are described loosely as imported goods are now expressly defined and section 2(25) of the Customs Act, 1962 says that imported goods means any goods imported, but does not include goods which have been cleared for home consumption. The clearance for home consumption could be of also warehoused goods. True it is that the importer of any warehoused goods has cleared such goods prior to the amendment to sub-section (1), but from the unamended and amended sections, it is evident that the warehoused goods can also be cleared for home consumption. The

bill of entry within the meaning of section 46 can be filed for both, home consumption or warehousing. It may be that the clearance of goods for home consumption by section 47 is independently possible. However, in the case of warehoused goods, a procedure for clearance after unloading is provided by section 48. Such goods, which are not cleared for home consumption or warehousing or transshipped within 30 days from the date of unloading thereof at a customs station, then, these goods can be cleared after following this procedure with the permission of the proper officer.

65. We have already noted the provisions in the backdrop of the factual situation before us. We do not think that in the factual background, the respondent can derive any assistance from the discussion in the judgment in the case of *Narang Hotels* (supra).

66. Once we are of the firm opinion that the CST Act touches the concept of crossing the customs frontiers of India, which is distinct from customs barriers of India, then all the more we cannot agree with Mr.Tapare.

67. Mr.Tapare then relied upon the judgment of the High Court of Judicature of Madras in the case of *State Trading Corporation*

of India vs. the State of Tamil Nadu[5]. There, the Madras High Court had before it a peculiar provision and we term this provision as peculiar simply because the court was concerned with news print which the State Trading Corporation, as the canalising agent, imported for the users of news print. The newspaper establishments to whom the sales were effected paid the price, but did not pay the sales tax as it was not collected by the assessee on the sales. The argument was that the sale was effected in the course of import. This argument was negatived and in the context of such a controversy, the Madras High Court referred to the facts. The port of Chennai is a port which was notified under section 7(1)(a) of the Customs Act, 1962. The imported news print was stored in that customs port, which was also the customs station, before clearance by the customs authorities was also not disputed. The Madras High Court distinguished the judgment of the Andhra Pradesh High Court in the case of *Minerals and Metal Trading Corporation of India* (supra). The relevant paragraphs of the judgment in this case of the High Court of Madras are as under:-

> "12. As held by the Supreme Court in the case of Kiran Spinning Mills vs. Collector of Customs (1999) 113 ELT 753, which arose under the Additional duty of Excise (Textiles and Textile Articles) Ordinance, 1978 the taxable event is the crossing of the customs barrier, and not the date when the goods had landed in India, or had entered the territorial

5 **2002 149 ELT 3**

waters. When goods are imported into India even after the goods are unloaded from the ship, and even after the goods are assessed to duty subsequent to the filing of a bill of entry, the goods cannot be regarded as having crossed the customs barrier until the duty is paid and the goods are brought out of the limits of the customs station. In the case of Kiran Spinning Mills (1999) 113 ELT 753, the apex Court has observed thus;

> "In other words, the taxable event occurs when the customs barrier is crossed. In the case of goods which are in the warehouse, the Customs barriers would be crossed when they are sought to be taken out of the customs and brought to the mass of goods in the country."

13. Until such time as the duty payable on those goods is not paid, the amount of duty payable being determined with reference to the rate at which the duty was levied as on the date of the removal of the goods from the warehouse, the goods cannot be regarded as having crossed the customs barrier of India.

14. Section 47 of the Customs Act refers to clearance of goods for home consumption, while Section 68 of the Act deals with clearance of warehoused goods for home consumption. In this case, the goods had been warehoused and the clearance for home consumption was made under Section 68, after the title to the goods had been transferred to the buyers. The duty was paid by the buyers.

15. The Tribunal has in its order, placed reliance on the decision of the Supreme Court in the case of Madras Marine and Co. v. State of Madras (63 STC 169). The Tribunal has omitted to notice the caution set out in that judgment that the amendment introduced in Section 2 by the Act 103 of 1976 would have been relevant only if they were considering the case of sale by the transfer of documents of title to the goods as contemplated by Section 5 of the Central Sales Tax Act, but, that facts of the case before it did not involve a transfer of document of title to the goods, and therefore, the fact that the customs station itself was within the State of Tamil Nadu would not, on that score alone render all sale of goods which are in the course of import and awaiting clearance from that station, local sales.

16. The "clearance" referred to in Section 2(ab) of the C.S.T. Act, in the absence of any other compelling factor has to be regarded as having reference to the clearance of goods for home consumption under Section 47 or the clearance of warehoused goods under Section 68 of the Customs Act. The

> clearance in this case, clearly was after the transfer of document of title and was not earlier. The crossing of the limits of the customs station took place after the clearance of the goods from the warehouse for home consumption.
>
> 17. The title having passed on to the buyer before such clearance and crossing, the sale effected by the assessee/dealer was clearly one which was in the course of import. The impugned order of the Tribunal upholding the denial of exemption to the dealer in respect of these sales is, therefore, unsustainable and is set aside. The writ petitions are allowed."

68. Pertinently, before the High Court of Madras, the clearance was after transfer of documents of title and not earlier. The factual position before us is otherwise. Hence, for the reasons aforestated, this judgment is also distinguishable.

69. For similar reasons, the other judgment of the Madras High Court in the case of *Tarajyot Polimars Limited vs. Deputy Commercial Tax Officer and Ors.*[6] is also distinguishable.

70. Now, we turn to the judgments relied upon by Mr.Sonpal. Mr.Sonpal made very detailed submissions and urged that several judgments which are referred by him in the written submissions should be referred by us. We only refer to the judgment of the four Judge Bench in the case of *State of Madras vs. Davar and Co.* (supra). In this judgment, the Hon'ble Supreme Court made the distinction very clear. Paragraphs 10 to 14 of this judgment are relevant. They read as under:-

6 **2005 (140) STC 239**

"10. We are of the view that the judgment of the Madras High Court cannot be sustained and the, expression 'customs frontiers' in Section 5 of the Central Act cannot be construed to mean 'customs barriers'. Article 286(1) places a ban on the State imposing or authorising the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place outside the State or in the course of import of goods into or export of goods out of the territory of India. Clause (2) of Article 286 gives power to the Parliament, by law, to formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1). Accordingly Parliament has enacted the Central Act. Section 5 of that Act lays down the conditions under which a sale or purchase of goods can be said to take place in the course of import or export. Sub-sections (1) and (2) deal with sale or purchase of goods in the course of export and sale or purchase of goods in the course of import, respectively. As we are concerned with a sale in the course of import, the relevant provision is sub-section (2) of Section 5, which is as, follows :

> "5(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."

11. In this case, the claim made by the assessee for exemption from tax liability is on the ground that the sale was effected by transfer to the buyer of documents of title to the goods. Under Section 5(2) of the Central Act, in order to treat the sale as one in the course of import, the documents of title must have been transferred before the goods have crossed the customs frontiers of India. The question is what does the expression 'customs frontiers' of India, in Section 5 of the Central Act, mean? To answer this question, it is necessary to refer to certain Proclamations made by the President of India and Notifications issued by the Central Government under Section 3-A of the Sea Customs Act, 1878 (VIII of 1878) (hereinafter called the Act).

12. The President of India has issued a Proclamation, dated March 22, 1956 and that contains a declaration as to the extent of the territorial waters of India. That Proclamation has been published with the notification of the Government of India in the Ministry of External Affairs, No. S.R.O. 669, dated March 22, 1956 and is as follows:

"S.R.O. 669.-The following proclamation by the President is published for general information:

PROCLAMATION

"WHEREAS international law has always recognised that sovereignty of a state extends to a belt of sea adjacent to its coast;

AND WHEREAS international practice is not uniform as regards the extent of this sea-belt commonly known as the territorial waters of the State, and consequently it is necessary to make a declaration as to the extent of the territorial waters of India;

I, Rajendra Prasad, President of India, in the Seventh Year of the Republic, do hereby proclaim that, notwithstanding any rule of law or practice to the contrary which may have been observed in the past in relation to India or any part thereof, the territorial waters of India extend into the sea to a distance of six nautical miles measured from the appropriate base line."

RAJENDRA PRASAD,
President."

On September 30, 1967 another Proclamation was issued by the President of India and published with the notification of the Government of India in the Ministry of External Affairs, No. F.L/lll(1)/67, dated September 30, 1967. By this Proclamation the earlier Proclamation of March 22, 1956 has been superseded and the territorial waters of India have been declared to extend into the sea to a distance of twelve nautical miles measured from the appropriate base line. But in the present appeals, we are concerned only with the earlier Proclamation dated March 22, 1956.

13. Section 3-A of the Act gives power to the Central Government, to define, by notification in the Official Gazette, the 'customs frontiers' of India. By virtue of the powers conferred by this section, the Central Government (Ministry of Finance, Revenue Division) had issued a notification, No.25-Customs, dated April 1, 1950, defining the 'customs frontiers' of India; but it is not necessary to Consider the definition contained in this notification, as it has been superseded by the issue of a fresh Notification, No. S.R.O. 1683

dated August 6, 1955. The latter notification, issued by the Ministry of Finance (Revenue Division) Customs, which is relevant for the present purpose, is as follows:

> "New Delhi, the 6th August 1955.
>
> S.R.O. 1633.-In exercise of the powers conferred by section 3-A of the Sea Customs Act, 1878 (VIII of 1878), and in supersession of the notification of the Government of India in the Ministry of Finance (Revenue Division) No. 25-Customs. dated the 1st April 1950, the Central Government hereby defines the customs frontiers of India as the boundaries of the territory, including territorial waters, of India.
>
> Sd/- Jt. Secretary."

14. The expression 'customs frontiers of India' in Section 5 of the Central Act, in our opinion, must be construed in accordance with the notification issued by the Central Government under Section 3-A of the Act, on August 6, 1955 read with the Proclamation of the President of India dated March 22, 1956. So applying the definition of 'customs frontiers' it is clear that, in the instant case, the sales were effected by transfer of documents of title long after the goods had crossed the customs frontiers of India. We have already stated that the ships carrying the goods in question were in the respective harbours within the State of Madras when the sales were effected by the assessees by transfer of documents of title to the buyers. If so, it follows that the claim made by the assessees that the sales in question were sales in the course of import, has been rightly rejected by the assessing authority. Unfortunately, though various aspects seem to have been pressed before the High Court by the State of Madras, this notification of August 6, 1955 issued by the Government of India, defining the 'customs frontiers' of India, was not brought to the notice, of the High Court."

71. The Division Bench of the Andhra Pradesh High Court [(M/s. *Minerls and Metals Trading Corporation of India* (supra)] dealt with a similar contention and by noticing the words employed in the later part of sub-section (2) of section 5 of the CST Act "crossed the customs frontiers of India". These words

have been expressly defined in section 2(ab) of the CST Act to remove any ambiguity. This definition has been inserted by Act 103 of 1976.

72. In the case of *Madras Marine and Co. vs. State of Madras*[7] the Hon'ble Supreme Court noticed the position prior to this Amendment Act and later on as under:-

> "34. It may be mentioned that there was an amendment in 1976 of the Central Sales Tax Act, 1956 by Act 3 of 1976. By that provision, the following was inserted in section of the Central Sales Tax Act, 1956:
>
> > "(ab) "crossing the customs frontiers of India" meant crossing the limits of the area of a customs station in which imported goods or export goods are ordinarily kept before clearance by customs authorities.
> >
> > Explanation-For the purposes of this clause, "customs station" and "customs authorities", shall have the same meanings as in the Customs Act, 1962."
>
> 35. Mr. Desai sought to urge that this was declaratory and was valid for all the relevant years. Whether a law is a declaratory or not, depends upon the Act and the language used. There was nothing in the Act or object of the Act which stated that it was further to amend the Central Sales Tax Act, 1956 that it was declaratory and not prospective in nature. Our attention was drawn to certain decisions, whether an Act is retrospective and declaratory in operation or prospective would depend upon the purpose of the Act, the object of the Act and the language used. See in this connection the observation in The Central Bank of India v. Their Workmen, [1960] 1 SCR 200; Keshavlal Jethalal Shah v. Mohanlal Bhagwandas and Anr., [1968] 3 SCR 623 and Chanan Singh and Anr. v. Jai Kaur, [19701 1 SCR 803 at 804-807. But that amendment is not relevant in the view we have taken.
>
> 36. The short question, therefore, that arises in all these matters is whether sale of the goods in question took place within the territory of Tamil Nadu. In these cases sale took place by appropriation of goods. Such appropriation took

7 **AIR 1986 SC 1760**

> place in bonded warehouse. Such bonded warehouses were within the territory of State of Tamil Nadu. Therefore, under sub-section (2), sub-clauses (a) and (b) of section 4 of the Central Sales Tax Act, 1956, the sale of goods in question shall be deemed to have taken place inside the State because the contract of sale of ascertained goods was made within the territory of Tamil Nadu and furthermore in case of unascertained goods appropriation had taken place in that State in terms of clause (b) of sub-section (2) of section 4 of the Central Sales Tax Act, 1956. There is no question of sale taking place in course of export or import under section 5 in this case. From that point of view the amendment introduced by Act 103 of 1976 by incorporating in clause (ab) of section 2 of the Central Sales Tax Act, 1956 does not affect the position. In this connection reference may be made from the observations of this Court in Burmah Shell oil Storage Ltd., (supra) where it has been held that customs barrier does not set a terminal limit to the territory of the State for sales-tax purposes. Sale, therefore, beyond the customs barrier is still a sale within the State. The amendment introduced in section 2 by the Act 103 of 1976 does not affect the position because the custom station is within the State of Tamil Nadu. That question might have been relevant if we were considering the case of sale by the transfer of documents of title to the goods as contemplated by section 5 of the Central Sales-Tax Act. In the premises we are unable to accept the contentions urged on behalf of the appellants in the Civil Appeals and also the contentions urged in the Writ Petition."

73. The distinction made by the Hon'ble Supreme Court in the case of *Minerals and Metals Trading Corporation of India Ltd. vs. Sales Tax Officer and Ors*[8] is clear. There, the bill of lading representing the title document was transferred while the consignment was still upon high seas. That is how the sale was taken to be in the course of import and outside the local tax. However, the discussion in this judgment is extremely relevant for our purpose. We reproduce paras 5 to 11 from this judgment as under:-

8 **AIR 1999 SC 121**

"5. The appellant filed writ petitions in the High Court of Orissa challenging the levy of sales tax on the aforesaid sales. The High Court noted the argument that the aforesaid sales on high seas basis had been effected prior to the imported goods "crossing the customs frontier of India", which expression was defined in Section 2 (ab) of the Central Sales Tax Act by an amendment which had taken place prior to the aforesaid sales. The High Court, however, relying upon the judgment of the Karnataka High Court in the case of cashew Corporation of India v. State of Karnataka, (1986) 63 STC 90, held that the appellant was liable to sales tax and dismissed the writ petitions.

6. By reason of the provisions of Article 286 (1)(b) no law of a State shall impose, or authorised the imposition of, 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, or export of the goods out of the territory of India. Section 5 of the Central Sales Tax Act deals with this: "When is sale or purchase of goods said to take place in the course of import or export." Sub-section (1) thereof deals with exports and sub-section (2) with imports. Sub-section (2) reads thus:

> "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."

The definition in Section 2(ab) of the phrase "crossing the customs frontiers of India" reads thus: "crossing the customs frontiers of India means crossing the area of a customs station in which imported goods or export goods are ordinarily kept before clearance by customs authorities." It was inserted by an amendment in 1976. The Objects and reasons of the amendment were that the phrase had been interpreted to mean, coterminous with the extent of the territorial waters. This had given rise to practical difficulties as it was difficult to determine whether, at the time of the sale or purchase, the goods had entered or crossed the territorial waters. The actual checking of the goods took place in the customs station and not at the edge of the territorial waters. It was, therefore, necessary to so define the expression. A customs station has, by reason of the Explanation to Section 2(ab), the same meaning as in the Customs Act, 1962, and that is : "any customs port, customs airport or land customs station". A customs port is any port appointed under Clause (a) of Section 7 of the Customs Act to be a customs port. (That Paradeep Port is a customs port is not in dispute).

7. Section 5, sub-section 2 has two parts. 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 if the sale or purchase either (i) occasions such import or (ii) it is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India, that is to say, before the goods have crossed the limits of the area of the customs station in which they are kept before clearance by the customs authorities.

8. The judgment of a Constitution Bench of this Court in J. V. Gokal and Co. (Private) Ltd. v. The Assistant Collector of Sales Tax (Inspection) and Ors., 1960(2) SCR 852, has set out the legal position of import sales thus:

> "The legal position vis-a-vis the import-sale can be summarized thus: (1) The course of import of goods starts at a point when the goods cross the customs barrier 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."

The judgment states that it is well settled in the commercial world that a bill of lading represents the goods and the transfer of it operates as the transfer of goods. The delivery of the bill of lading while the goods are afloat is equivalent to the delivery of the goods themselves.

9. The facts afforested, based upon documents, show that the bill of lading had been endorsed in favour of SAIL while the consignment of the said coils was still upon the high seas. The sale, therefore, was a sale in the course of the import of the said coils into the territory of India; it was effected by transfer of the documents to the said coils before they had crossed the limits of the customs station at Paradeep Port. The position would be the same in respect of the goods sold to Paradeep Phosphates Ltd.

10. The High Court noticed the argument based on the latter part of Section 5 but did not address it. It relied upon the judgment of the Karnataka High Court in the case of

> Cashew Corporation of India. That was a case where notice was taken of the amendment introducing Section 2(ab) into the Central Sales Tax Act in 1976. It was held to be prospective in operation and, therefore, of no assistance in constructing the meaning of the expression 'customs frontier of India' prior thereto. The High Court failed to notice that in the case in hand the aforesaid sales had taken place long after the introduction of Section 2 (ab) and, therefore, the question whether they were sales in the course of import had to be judged on the basis of its provisions.
>
> 11. The aforesaid sales being covered by the provisions of the latter part of Section 5(2) read with Section 2(ab) of Central Sales Tax Act, they are sales in the course of import and not liable to sales tax."

74. The High Court of Judicature of Andhra Pradesh at Hyderabad was dealing with a similar case (*Minerls and Metals Trading Corporation of India Ltd. vs. The State of Andhra Pradesh*[9]) where the argument that the imported goods were transferred by endoursement of bill of lading in favour of the local buyers before the customs clearance of goods was turned down. The MMTC approached the High Court of Andhra Pradesh at Hyderabad and this argument was dealt with by the Division Bench as under:-

> "14. In order to get over the judgment of the Supreme Court the amendment in Section 2(ab) is made. On the basis of the report submitted by the Law Commission recommending amendment to Section 2 of CST to get over the difficulty to actually ascertain the point of time when a ship crosses the territorial waters of India.
>
> We have already referred to Section 5(2) read with Section 2(ab). The goods will cross the limit of the area of the customs station only on clearance by the customs authorities. Clearance by the customs authorities will be after filing the bill of entry and after the assessment of duty under Section

9 **(1998) 110 STC 394**

> 38 of the Act. Before the assessment of the duty the goods kept in the customs port cannot cross the limits of the customs port. Therefore irrespective of the fact whether duty is paid or not, when once the bill of entry is filed and the imported duty is assessed, then only the goods can cross the limits of the customs port, therefore, any transfer of documents of title before the clearance of the goods by the customs authorities on making the assessment of goods would amount to a sale in the course of import, as after the assessment is made and on filing of the bill of entry the goods get mingled with the general mass of goods and merchandise of the country. The goods get the eligibility to be declared as local goods after clearance, even though they are not physically removed from the harbour premises. They attain the character of local goods and cease to be foreign goods. Therefore, the relevant point of time for determining as to whether the sale of goods is in the course of import by a transfer of title deeds is the transfer by title deeds before filing the bill of entry and the assessment of duty irrespective of the fact whether the goods are physically cleared from the harbour or not and whether duty is paid or not. As pointed out in the earlier paras after the filing of the bill of entry the assessment of the duty the import stream dries up and ceases to flow after the customs department levies the duty declaring the eligibility of the goods to be cleared and mingles with the general mass of goods and merchandise in the country. Once the duty is levied the import is at an end and the national customs barrier is supposed to have been crossed. The reason being it is difficult to ascertain the point of time or the place at which the goods have entered the limits of the customs port. Therefore, the assessing authorities under the APGST Act does not get jurisdiction to assess the goods if the transfer of title deeds is effected before the clearance of goods by filing the bill of entry under the Customs Act and after making the assessment of the import duty payable under Section 28 of the Customs Act, 1962."

75. We do not think that our view is in any way different. We have noticed all the sections of the Customs Act, 1962 which are relevant to the issue, including Chapter VI and particularly sections 15 and 18 thereof. Hence, we are of the firm view that it is not necessary to refer to all the judgments relied upon by Mr.Sonpal.

76. The judgment finally relied upon by Mr.Tapare and at the close of his submissions in the case of *Hotel Ashoka* (supra) is distinguishable on facts. There, the India Tourism Development Corporation managed a duty free shop at the international airport. The argument was that the return under the CST Act was not filed as no tax was payable. The goods which had been sold from this duty free shop were sold directly to the customers before importing the goods or before the goods had crossed the customs frontiers of India. There, on facts, it was found that the goods which had been brought from foreign countries had been kept in bonded warehouse and they were transferred to duty free shop situated at the international airport of Bengaluru. The further admitted fact was that the goods were kept be in bonded warehouse by execution of bond. When the goods were kept in bonded warehouse, it cannot be said that they had crossed the customs frontiers. Paragraph 1 of this judgment relied upon by Mr.Tapare cannot carry the respondent's case further. The bonds and coupled with the fact that the goods were in the bonded warehouse and taken to the duty free shops at the international airport at Bengaluru was a typical distinguishing feature. Unlike in the present case, where the transfer of title document was after the goods crossing the customs frontiers of India, then, all the more, the reliance on this judgment is misplaced.

77. In view of the above discussion, the question forwarded for our opinion is answered in favour of the applicant/Department and against the respondent/dealer. The references are disposed of in these terms.

(B.P.COLABAWALLA, J.) (S.C.DHARMADHIKARI, J.)