

PETITIONER:
K. GOPINATHAN NAIR ETC.

Vs.

RESPONDENT:
STATE OF KERALA

DATE OF JUDGMENT: 21/03/1997

BENCH:
SUJATA V. MANOHAR

ACT:

HEADNOTE:

JUDGMENT:
(WITH CIVIL APPEAL NOS. 1167-71/92, 1546/93, 3647-52/86)

J U D G M E N T

Mrs. Sujata V. Manohar, j.
CIVIL APPEAL S NOS. 4955-77/91, 1167-71/92 & 1546/93

The assessees are processors of cashewnuts in kerala. Prior to September 1970 the assessees imported raw cashewnuts from African countries under an open general licence. After processing these cashewnuts the assessees exported cashewnut kernel to other Notification issued under the Import Trade (control) order bearing No. 3-1970 and dated 31st of August, 1970, " cashewnuts" were deleted from the schedule of items which could be imported under an open general licence. Instead they were now required to be imported through a canalising agency, namely, the cashew corporation of India Ltd. As a result, for the assessment years 1971-71 to 1972-73 the assessees imported their requirement of cashewnuts from African countries through the cashew Corporation of India Ltd. The assessees were called upon to pay sales tax under the Kerala General sales Tax Act in respect of the caswhewnuts purchased by them from the canalising agency. According to the assessees, the sales effected by the cashew corporation of India to them are not exigible to tax under the Kerala General are not exigible to tax Act since these are sales in the course of import and hence are sales in the course of import and hence are exempt from the state sales tax under section 5(2) of the central sales Tax Act, 1956, This contention of the assessees has been negatived by the dales tax authorities in Kerala. In a revision which was filed by the assessees before the Kerala High Court the Kerala High Court remanded the matters to the sales Tax Tribunal to consider the following question. namely :

"Whether the purchases of African nuts made by the assessees from the cashew corporation of India are in the course of import eligible for exemption under section 5(2) of the central sales Tax Act?"

The Tribunal after re-considering the matter answered the question against the assessees. This finding of the

Tribunal has been upheld by the Kerala High court in revision. Hence these appeals have come before us.

CIVIL APPEALS NOS. 3647-52/86

This group of appeals also deals with the import of cashewnuts, but in the state of Karnataka, by the Cashew corporation of India Ltd. which is a canalising agency for the import of cashewnuts for sale to the processors of cashewnuts in Karnataka. The processors, after processing cashewnuts, export cashew Kernel. However, which under the Kerala General sales Tax Act, 1965, cashew was assessable at the last point of purchase in the state under the Karnataka sales Tax Act, 1957 cashes is assessable at the first point of purchase in the state. Hence, in these appeals, assessment of sales tax by the state of Karanataka is sought to be made on the cashew corporation of India in respect of aspect of cashew imported by it at the instance of the processor and sold to the processor. The transaction which are the subject-matter of controversy in these appeals, however, are identical with the transactions which are the subject-matter of appeals in the Kerala matters.

Before we decide whether the import of cashew nuts by the cashew corporation of India and the purchase of cashewnuts by the assesseees/processors from the cashew corporation of India is in the course of import or whether it is the local sale liable to tax under the Kerala or Karnataka General sales Tax Act, it is necessary to set out the exact nature of the transaction in question.

The Import Trade (control) policy for April 1971-March 1972, in part B, paragraph 51 deals with import through public sector Agencies. Under the sub-heading "Canalisation of Import", it states only through public sector Agencies. The canalising agency in the case of cashewnuts is the cashews corporation of India Ltd. Under the Import Trade (control) Handbook of Rules and procedures 1970 the procedure for imports through public sector Agencies is set out. It, inter alia, states that the canalising agency will pool the import requirements of actual users and import will be arranged in bulk through the agency concerned. It also provides that consolidated import licences/release orders will be issued in such cases to the importing agency concerned. The value of the consolidate licence/release order to be issued will be equal to the aggregate value of all the licence/release orders which could have been issued to the individual actual users had they applied separately. Such licences/release orders will be subject to the condition, inter alia, that the imported goods shall be distributed by the licensee to the actual users whose particulars are shown in the relevant import application for use in their respective factories. Therefore, the quantity imported, the specifications of the goods imported and the place from which they are imported are all as per requirements of the local processors.

In the present case, litters were issued by the state Trading corporation of which the cashew corporation of India was a subsidiary, informing the processors regarding canalisation of import of cashewnuts through the cashew corporation of India and requesting the processors to apply in proforma for the allotment of raw cashewnuts. Based on these applications, the cashew corporation of India obtained from the Government of India a bulk licence for the import of raw cashewnuts. Necessary orders were placed with foreign dealers for supply of cashewnuts by the cashew corporation of India. The cashewnuts to be imported were marked in separate lots in respect of each allotted before shipment from the foreign port. Allotment orders in respect of each

marked lot were made in favour of the concerned processor by the cashew corporation of India and the shipment was effected only on the basis of the acceptance of such an allotment order by the concerned processor. The cashew corporation of India prepared separate invoices in the name of each allotted in respect of each separate and marked shipment. A separate bill of lading was prepared in respect of goods pertaining to each allotted. The insurance premium for this lot was also charged by the cashew corporation of India from the allotted. For the clearance of these goods from the customs, separate documents of title pertaining to each processor were prepared and subsidiary import licences were also issued in the name of each allottee by the cashew corporation of India in respect of their earmarked lots. A simultaneous letter of authority was also issued by the chief controller of Imports and Exports in favour of the allottee in respect of the lot concerning which the allottee was given a sub-licence. On the marine insurance taken by the cashew corporation of India a separate endorsement was taken in the name of each allottee and the premium was included in the C.S.F. value of the goods so despatched. The steamer agent issued a delivery order to the processors clearing agent and the goods were accordingly cleared by the clearing agents of the processors. The cashew corporation of India charged to the assessee the price which it had paid to the foreign seller and a commission for their work as a canalising agency.

Thus it is clear that although the canalising agency placed a bulk order for the import of cashewnuts and opened a letter of credit in favour of the foreign sellers, the bulk order so placed was a sum total of the requirements of all the processors of cashewnuts in whose favour allotment orders were issued. The cashew corporation of India had from the inception marked separately each lot imported by it in favour of each allottee. It had also in turn, prepared a corresponding set of documentation in favour of the allottee and the allottee was required to open a corresponding letter of credit in favour of the cashew corporation of India in favour of the cashew corporation of India in respect of the lot being imported on its behalf. The allottees also paid the corresponding insurance premium for the marine insurance taken out by the cashew corporation of India pertaining to the import of cashewnuts.

We have to consider whether the transaction between the cashew corporation of India and each of the processors can be considered as a sale by the cashew corporation of India to the processor in the course of import. Under Article 286 of the constitution of India, restriction have been placed on the power of the state of tax sales. Article 286 (1) and (2) provide as follows:-

"286(1) : No law of a state shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place-

- (a) outside the state; or
- (b) in the course of the import of the goods into, or export of the goods out of, the territory of India;

(2) Parliament may by law formulate principles for determining when a sale or purchase of good takes places in any of the

ways mentioned in clause (1)."
Article 296(1) (g) and (3) provides
as follows:

"269 (1) ; The following duties and
taxes shall be levied and collected
by the Government of India but
shall be assigned to the states in
the manner provided in clause (2),
namely-

(g) taxes on the sale or purchase
of goods other than newspapers,
where such sale or purchase takes
place in the course of Inter state
Trade or commerce;

(3) Parliament may by law formulate
principles for determining when a
sale of purchase of, or consignment
of, goods takes place in the
course of inter-state trade or
commerce."

Accordingly, the Central sales Tax Act, 1956 in Section
3 and 5 lays down principle for deciding whether a sale or
purchase takes place in the course of inter-state trade or
commerce or in the course of import or in the course of
import or export:

"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 commerce if the
sale or purchase-

- (a) occasions the movement of
goods from one state to
another; or
- (b) is effected by transfer of
documents of title to the
goods during their movement
from one state to another.

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 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."

Clearly, therefore, the language of section 3, 5(2) is similar, and the requirements in each of these provisions for considering whether a sale or purchase of goods can be said to take place in the course of inter-state trade or commerce or export or import are similarly worded. Under the first requirement so specified, in each of the three cases the sale or purchase in question should occasion the requisite movement of goods. This movement may be either from one state to another or it may be from India to another country, as the case may be. We from India to another country, as the case may be. We must, therefore, consider whether the sale or purchase which is before us, that is to say, the transaction between the cashew corporation of India and the assesseees/processors, has occasioned the import of cashewnuts from Africa into the territory of India.

How does one determine whether a sale has occasioned the movement of goods either from a foreign country into India or from India to a foreign country or from one state in India to another state in India? This court has, in the course of several decisions that I shall refer to, laid down some basic tests to determine whether the sale in question has occasioned the requisite movement of goods. These are:

(1) There should be a direct connection between the sale and the import or export of goods or their being sent to another state.

(2) Such movement should be inextricably linked with the sale so that the bond between the sale transaction and movement cannot be severed without a breach of his obligation by the seller or the purchaser, as the case may be.

(3) This obligation (to import, export etc.) May arise by statute, by contract or even by mutual understanding between the parties, from the very nature of the transaction. It is immaterial whether the sale has preceded such movement or succeeded such movement. So long as there is an unbreakable chain linking the sale and the movement of goods, it will be covered by section 5 or section 3, as the case may be. Usually such an unbreakable chain is forged by the terms of the contract of sale, or from operation of statute or even from an understanding between the local buyer and the local seller. Of course where there is only one sale-- between a local buyer and a foreign seller or a local seller and a foreign buyer, the contract or import. But the application of section 5 is not confined to such contracts alone as the cases cited hereafter will show. If only a one-sale test were to be applied, these would be the only contracts qualifying for exemption. Such is not the interpretation put on sections 3 and 5 because in several cases this court has considered even a sale other than an import or export if there is a direct connection between the sale and the import or the export.

The distinction between an independent sale and a linked sale is clearly brought out by a constitution Bench of this court in the case of Ben Gorm Nilgiri Plantations company, Coonoor & ors. V. sale Tax Officer, special circle,

Ernakulam & ors. (1964 (3) SCR 706 at 711) which decided the requirements of a sale in the course of export (two Judges dissenting). In this case, the appellants carried on the business of growing and manufacturing tea. The purchasers were local agents of foreign buyer. The sales were by public auction. It was the common case of all the appellants that the purchases by the local agents of the foreign buyers were with a view to export the goods to their principal abroad and in fact the tea was exported. The appellants contended that sales of tea to the local agents were in the course of export. There Judges, out of the five Judges concerned, held that this was not a sale in course of export. They said that the transaction of sale which is a preliminary to export may be regarded as a sale for export but it is not necessarily to be regarded as one in the course of export.

The test laid down in this case is: in order that the sale should be in the course of export, the export must be inextricably linked with the sale so that the bond cannot be severed without a breach of the obligation arising by statute, contract or mutual understanding between the parties arising from the nature of the transaction; so that export cannot be interrupted without a breach of the contract between the local buyer and the local seller. In that case the local seller had no interest in the export of tea. Hence the sale was not in the course of export.

This test is reiterated in the subsequent decisions dealing with exports and imports. In the case of K.G. Khosla & co. V. Deputy Commissioner of Commercial Taxes (1966 (3) SCR 352), another constitution Bench of this court interpreted section 5(2) of the central sales Tax Act, 1956 and held that section 5(2) does not lay down any condition that before a sale could be said to occasion the imports, it is necessary that the sale should precede the import.

Since this is one the earliest cases dealing with a sale in the course of import, I refer briefly to its facts.

The assessee entered into a contract with the Director General of supplies and Disposal, New Delhi for the supply of axle-box bodies. According to the contract the goods were to be manufactured in Belgium and D.G.I.S.D., London or its representative, was entitled to inspect the goods in Belgium. It was the assessee's responsibility to get the goods manufactured in Belgium and import them into India. Accordingly the assessee supplied axle-box bodies to the Southern Railway at Perambur worked after importing them from Belgium. The question was whether this was a sale in the course of import. The court said that the sale of the assessee to the Railways need not have the movement of goods from Belgium to India was in pursuance of the condition of contract between the assessee and the Director General of Supplies. There was no possibility of those goods being diverted by the assessee for any other purpose. Consequently, the sales took place in the course of imports.

The next important case decided by this court deals with a sales in the course of export of goods. This is the case of coffee Board, Bangalore V. Joint commercial Tax officer, Madras & Anr. (1969 (3) SCC 349). It is a decision of a constitution Bench of this court with one Judge dissenting. In this case, the coffee Board had sold coffee which was to be exported out of India. Such Coffee for export was specially screened and selected. Auctions were held known as "Export Auctions" for sale of this coffee. The purchasers at such auctions subsequently exported the coffee. The question was whether the sale by the coffee Board to the local purchaser would be considered as a sale in the course of export. The court said that in order that

the sale may occasion the immediate cause of export. Therefore the introduction of a third party dealing independently with the seller on the one hand and with the foreign importer on the other hand, broke the link between the sale and the export. It, therefore, held that such a sale was not in the course of export.

In this case a special emphasis has been laid on the fact that there were two sale--one sale to the intermediary, and the other sale to the importer. The court observed that there must be a single sale which should course the export. It said that there is no room for two or more sales in the course of export. The court was clearly impressed by the fact that when the coffee Board sold the coffee to a purchaser locally, there was no stipulation that the purchaser was bound to export the coffee. Obviously if the coffee Board had sold the coffee to a foreign buyer, the export of coffee would have followed. This is what a one-sale test amounts to. But section 5(1) does not say that only a sale by a local purchaser to a foreign buyer is a sale test in the course of export. The language of section 5(1) is much wider. Any sale which occasions the export is a sale in the course of export. A literal adoption of a one-sale test would result in ignoring earlier decisions of the constitution Bench where two sales were involved and a sale subsequent to the sale between a local buyer and a foreign seller was held to be a sale in the course of import when it was established that there was a firm link between the subsequent sale and the prior import.

The one-sale test must be understood in the context of the facts which the court was required to consider. The sale prior to export. Hence in that case, the earlier sale had not occasioned the export.

In fact, these observations in the coffee Board's case (supra) have been explained in The Deputy commissioner of Agricultural Income Tax and sales Tax, Central Zone, Ernakulam V. M/s. Kotak & co., Bombay etc. (1974 (3) SCC 148) and in Deputy commissioner of Agriculture Income Tax & Sales Tax, Ernakulam V. Indian Explosives Ltd. (1985 (4) SCC 119) on the basis that in the coffee Board's case (supra) there was no inextricable link between the local sale and the export, while in the cases of Indian Explosives and Kotak & co. (supra) there was such an inextricable link between the import of the goods the local sale.

In the case of M/s. Kotak & Co. (supra) the assessee-firm was engaged in the supply of foreign cotton to textile mills on the basis of actual user's import licences issued to the textile mills. The assessee-firm contacted the foreign suppliers and id the offers received were found acceptable to the mills, and on that basis, accepted the offer made by the foreign supplier. The textile mill issued a letter of authority authorising the assessee-firm to import cotton. One of the terms of the letter of authority was that the person or firm in whose favour it has been issued will purely act as an agent of the licensee and the licence holder will have to ensure that the goods on importation will be delivered to him and shall not be disposed of otherwise. This clause was read as part of the contract entered into between the assessee and the textile mills. This Court held that from the facts as set out above it was clear that the case fell within the rule laid down by this court in K.G. Khosla's case (supra). The sales was in the course of import although there were two sales, one entered into by the assessee with the foreign supplier and the other sale by the assessee with the textile mills.

In the same year in the case of M/s. Binani Bros. (p)

Ltd. V. Union of India & Ors. (1974 (1) SCC 459), a constitution Bench of this court considered section 5(2) of the central sales Tax Act. In this case the assessee was a registered dealer in non-ferrous metals. The assessee was also an importer of these metals. The assessee was on the approved list of registered supplier to the Directorate General of supplies and Disposals, for whom it had imported and supplied non-ferrous metals for several years. In order to get import licences the petitioner user to get Import Recommendation Certificates issued by the D.G.S. & D. or other authorities like the state trading corporation. The assessee claimed that the imports had been occasioned by their contractual obligations to D.G.S. & D. This court, however, negatived the contention. It said to the petitioner by the foreign seller and the sale by the petitioner to the D.G.S. & D under the import licences granted to it, the assessee was entitled to import the goods any person or country and the import licences issued to it imposed no obligation on the petitioner to supply the goods only to D.G.S & D after the goods were imported. Hence there were two independent sales and the sale transaction between the assessee and the D.G.S.& D. Cannot be considered as having occasioned the import.

This judgment has been explained and distinguished in the subsequent case of Indian Explosives Ltd. (supra). In this case, the local purchaser used to place order with the assessee quoting their import licence numbers. The assessee then placed orders with the foreign supplier for the supply of goods. In such orders the name of the local purchaser who required the goods as also its imports licence numbers were specified. On receipt of the goods, the assessee used to invoice the local purchaser. This court held that the sale effected by the assessee to the local purchaser was in the course of import as there was an integral connection between the sale to the local purchaser and the actual import of goods from the foreign supplier. This court cited with approval the ratio laid down in K.G. Khosla's case (supra). It distinguished Binani Brother's Case (supra) on two material aspects; (1) In that case the assessee itself held the import licence and the goods were imported on the strength of such an import licence and (2) There was no term or condition prohibiting diversion of the goods after the import. However, in the case before them, the integral connection or inextricable link between the transaction of sale and the actual import were established.

In the case of The State of Bihar & Anr. V. Tata Engineering & Locomotive Co. Ltd. (1970 (3) SCC 697), A constitution Bench of this court considered the provisions of section 3 of the central sales Tax Act, 1956, to decide what can be considered as a sale in the course of inter-state or commerce. Noting the similarity in language between section 3 and 5, the court relied upon there decision of this court dealing with section 5(1) and 5(2). In the case before the court the assessee sold their trucks, buses, chassis and spare parts to the appointed dealers for the purpose of being sold their trucks, buses, chassis and spare parts to the appointed dealers for the purpose of being sold in the territories outside the stat assigned to these dealers under the dealership agreement. The court held that the sales were in the course of inter-state trade or commerce. Dealing with the expression "in the course of", it observed that sales or purchase which themselves occasion the export or import or movement of goods from one state to another come within the exemption. If the sale cannot be dissociated from the export or import or movement of goods

from one state to another, then the sale and the resultant export or import or movement of goods must be considered as forming part of a single transaction.

In the case of *Md. Serajuddin & Ors. V. The state of Orissa* (1975 (2) SCC 47), however, the one-sale test appears to have been applied in isolation. The assessee entered into two contracts with the state Trading Corporation for supplying mineral ore for export since the export of Mineral ore was canalised through the state Trading corporation. The state Trading corporation, in turn, entered into contracts with foreign buyer. By a majority of four to one, this court held that the sale by the assessee to the state Trading corporation was not a sale in the course of export even though it was a canalising agency for export. This was because it felt that introduction of a third party dealing independently with the seller on the one hand and with the importer on the other broke the link between the two because, now instead of one there were two sales -- one to the intermediary albeit a canalising agency, and the other to the importer. It was this emphasis on one sale which led the court into not placing sufficient emphasis on the test propounded in *Ben Gorm Nilgiri Plantation's case* (supra) although this test was affirmed by it as valid.

This decision led to the amendment of section 5 by parliament by the addition of sub-section (3) which makes a sale preceding the export sale also a sale in the course of export in circumstances set out therein, thus obviating any difficulties which may arise in the case of sales in the course of export by virtue of this emphasis on a single sale in the case of *Md. Serajuddin* (supra).

To put it a little differently, when there is a local sale followed by export of the goods sold; or import of goods followed by a local sale, one must examine whether the export or the import of goods is an essential ingredient of the local sale. In some cases dealing with exports, the court found that the local sale lacked this essential ingredient because the local seller of the goods had no interest in seeing that the goods were exported, although the local purchaser may have bought the goods for export. To the local seller, it was immaterial whether the goods were in fact exported or not. so that there was no understanding between the local seller and the local buyer that the goods must be exported.

This seldom happens in the case of imports whenever the local seller imports the goods as per the specification of a specific local buyer and on the mutual understanding between the local buyer and the local seller that the goods so imported by the local seller will be purchased by the local buyer. There is in such cases, a direct link between the local sale and the import. In fact it is this mutual understanding between the local buyer and the local seller which occasions the import. That is why the cases dealing with imports have not resorted to differentiating between one sale or two sales. They have applied the test as prescribed by section 5 : whether the import is a result of understanding/contract between the local buyer and local seller. It is , the local buyers and local sale falls under Section 5. If it is not -- as may well happen if the importer seller his goods after they arrive to the best available offeror in the market, then the sale is not covered by section 5. That is why there has been no need to amend section 5 to expressly cover a local sale following import.

Now , If we apply this test of inseverable link between

the local sale and import to the transaction in the present case, it is clear that the local sale which is between the assessee and the cashew corporation of India is inextricably linked with the import of cashewnuts by the cashew corporation of India. In the first place, the very scheme of canalisation in the present case envisages that the cashew corporation of India ascertains the exact requirements of the former importers who are now required to secure their supplies through the canalising agent. Orders of import which are placed by the cashew corporation of India are in exact terms of the requirements of each of the allottees and are a sum total of these requirements. There is specific allocation of each lot before it is shipped from the foreign port, in favour of each of the allottees. The local purchaser has to clear the allocated goods on their arrival. Even a subsidiary licence is issued in favour of the local purchaser. The price of imported cashewnuts is paid by the local purchaser. The cashewnuts is paid by the local purchaser. The cashew corporation of India is only paid a commission. There is thus a clear allocation of the goods being imported in favour of the local purchaser and there can be no question of the diversion of the import to anybody else. The cumulative effect of this arrangement is : it is the specific requirement of local purchaser which has led to the specific requirement of local purchaser which has led to the specific import. Whether the actual sale takes place before the import or after the import is irrelevant in this context (vide K.G. Khosla's case [supra]). It is that arrangement between the local buyer and the local seller which has occasioned the import.

The respondents drew our attention to the fact that in the case of any default by the local purchaser, the canalising agency would be entitled to sell the goods elsewhere. This, however, in my view, does not detract from the fact that the import is as per the requirements of the local purchaser and is directly linked with it. A specific allocation is made in favour of each of the local purchasers. The orders for import are placed to comply with the specific requirements of the local purchasers. A default clause cannot alter the nature of the transaction between the local purchaser and the canalising agency. The very term 'canalising agency' in the context of the canalisation scheme as set out earlier strengthens the arguments that the imports were effected on behalf of and/or for the benefit of the local purchaser who had agreed to purchase these cashewnuts. The fact that only a commission is charged by the canalising agency from the local purchasers also reinforces this conclusion. In these circumstances, the fact that a bulk order is placed by the canalising agency with the foreign supplier does not snap the link between the transaction of sale by the cashew corporation of India to the assessee and the import of cashewnuts by the cashew corporation of India. It is the local sale which has given rise to the import. It will qualify as a sale in the course of import.

The respondent-state has placed strong reliance on the case of Md. Serajuddin (supra). It was contended that in the light of the observation made there, unless there is only one sale -- the sale which results in import -- the sale cannot be considered as causing the import. The real test, in my view, is of inseverable linkage. This is how observation regarding the need for one sale in the earlier coffee Board's case (supra) have been explained by this court in the cases of Indian Explosives and Kotak & Co. (supra). In the case of Consolidated Coffee Ltd. & Anr. etc.

v. Coffee Board, Bangalore etc. etc. (1980 (3) SCR 625) also , this court has observed that section 5(1) was construed by this court in the two sales rather very strictly in the two cases, namely, the Coffee Board and Md. Serajuddin cases (supra). Referring to the statement of objects and Reasons in respect of the amending Act which brought about the introduction of sub-section (3) in section 5, this court observed that from the statement of objects and Reasons, it is clear that Md. Serajuddin's decision (supra) is specifically referred to as having necessitated the amendment. Secondly, from the statement of objects and Reasons, it is clear that penultimate sales made by small and medium scale manufactures to an export canalising agency or private export house to enable the latter to export those goods in compliance with existing contracts or orders, are regarded as inextricably connected with the export of the goods and hence earmarked for conferral of the benefit of exemption.

The assessees contend that in any event, the test of one sale laid down in the cases of coffee Board and Md. Serajuddin (supra) should be confined only to export sales and should not be applied to imports. They further contend that even in the area of export of export the test has now been ruled out by reason of a subsequent amendment made to section 5 of the Central sales tax act as result of which sub-section (3) has been introduced in section 5. Hence such a test a should not now be applied to imports for the first time.

In view similarity of language in section 5(1) and 5(2), no such distinction is possible between imports and exports. Similar test will have to be applied to both the sub-section. There is no express amendment as far as imports are concerned which can assist the processor in the present case. It may be that such an amendment was not necessary in the case of imports because the difficulty with the penultimate sales had mainly arisen in the case of exports. However, whether it is exports or imports or inter-state sales. what needs to be emphasised is the basis requirement prescribed under section 3 and 5, namely, that the transaction in question must occasion either the export or the import or the movement of goods from one state to another. This clearly postulates an inseverable link between the transaction of sale in question and the import or export or movement of goods from one state to another, as the scale may be. The one-sale test referred to in some cases dealing with exports is only an aspect of this basic test. We concerned with a sale which occasions an import. Therefore, we have to see whether there is such an inextricable and direct link between local sales which are before us and the import of cashewnuts from African countries into India by the cashew Corporation of India. The facts already set out show that there is such an inserverable link as the import made by the cashew corporation of India is a necessary consequence of the specific requirements submitted by the processor and is a result of the obligations which it has undertaken under its arrangements with the local processor which has crystalised later in the form of the contract of sale. The sale in question are, therefore, in the course of import.

It was also argued by Mr. Poti, learned counsel appearing for the assessees, that in the present case, the sale by the cashew corporation of India to the assessee took places before the goods crossed the customs frontiers of India. Hence it is a sale in the course of import. He placed reliance upon section 2(ab) of the central sales Tax Act,

1956, which defines " crossing the customs frontier of India" as crossing the limits of the area of a customs station in which imported goods or export goods are ordinary kept before clearance by customs authorities. He submitted that since the goods were sold by the cashew corporation of India to the assessee before the goods were cleared by the customs authorities they must be considered as having been sold in the course of import because they were sold before the goods crossed the customs frontiers of India. This definition, however, of crossing the customs frontiers of India has been introduced only by act 103 of 1976 long after the imports in question took place. it would have no application to the present case. The contention of Mr. Poti that this definition must be applied even to goods imported prior to 1976 because it is only clarificatory in nature, cannot be accepted. Prior to the introduction of this definition in the central sales Tax Act of 1956, crossing the customs frontiers of India was understood as crossing the limit of territorial waters of India. The definition, therefore, cannot be considered in the merely clarificatory. Since it came to be introduced in the central sales Tax Act after the imports in question, it cannot be resorted to for the purposes of the present case.

It was next submitted by Mr. poti that the sale in the present case was effected by a transfer of documents to title to the goods before the goods crossed the customs frontiers of India even in the sense of crossing the territorial waters of India. hence it was a sale in the course of import. He relied upon the second part of section 5(2) of the Central sales Tax Act for this purpose. The Tribunal, however, has found as a fact that there is no clear evidence as to when the sale by transfer of documents took place. In the absence of any factual basis, therefore, this submission also cannot be accepted.

However, since there is a direct and inseverable link between the transaction of sale and the import of goods on account of the nature of the understanding between the parties as also by reason of the canalising scheme pertaining to the import of cashewnuts, the sales in question cannot be taxed under the Kerala General sales Tax Act or the Karnataka General sales tax Act, as the case may be. There will, however, be no order as to costs

After submitting this judgment, I have had the benefit of reading the judgment of my learned brother S.B. Majmudar J. I have the highest regard for his views. I am, however, unable to agree with him for reasons which, I hope, are clear from what I have already said.