

CASE NO.:
Appeal (civil) 1811-1815 of 1977

PETITIONER:
STATE OF ORISSA

RESPONDENT:
MINERALS AND METALS TRADING CORPORATION OF INDIA LTD.

DATE OF JUDGMENT: 18/07/1994

BENCH:
KULDIP SINGH & DR. A.S. ANAND

JUDGMENT:
JUDGMENT

1994 SUPPL.(1) SCR 762

The Judgment and Order of the Court was delivered by

KULDIP SINGH, J. The Sales Tax Tribunal, Orissa referred the following question under Section 24(1) of the Orissa Sales tax Act 1947 (the Act) for the opinion of the High Court of Orissa, Cuttack :-

"(1) Whether on the facts and in the circumstances of the case, the Tribunal is correct in holding that there has been no contravention of the declaration given under Rules 27(2) of the Orissa Sales Tax Rules thus attracting the proviso to section 5(2)(A)(a)(ii) of the Orissa Sales Tax Act?

(2) Whether in the facts and circumstances of the case, the learned Tribunal having held that there was no contravention of section 5(2)(A)(a)(ii) of the Act acted within its jurisdiction in remanding the appeal?

(3) Whether in the facts and circumstances of the case, the sale by the petitioner-Company to the Japanese Buyer comes within the ambit and scope of Article 286(1) (b) of the Constitution of India read with section 5 of the Central Sales Tax Act?"

A three Judge-Bench of the High Court by its judgment dated May 11, 1976 answered the questions as under : -

"(1) on the facts and in the circumstances of the case, the Tribunal was correct in holding that there was no contravention of the declarations given under Rule 27(2) of the Orissa Sales Tax Rules and, therefore, the proviso to section 5(2) (A) (a)(ii) of the Orissa Sales Tax Act was not attracted.

(2) In the fact and circumstances of the case, the sales by the assessee to the Japanese buyer are covered by the embargo under Article 286(1)(b) of the Constitution of India read with section 5 of the Central Sales Tax Act and, therefore, are not exigible to sales-tax under the Orissa Act.

The remaining question, -in view of what we have already stated, does not survive for answer."

These appeals by the State of Orissa are against, the full Bench judgment of the High Court.

The Minerals and Metals Trading Corporation of India Limited, respondent in the appeals herein, is a government company within the meaning of Section 617 of the Companies Act, 1956. The respondent-assessee is registered as a dealer under the Act. During the years 1966-67, 1967-68 and the quarters

ending June, September and December 1968, the respondent purchased mineral ores from the mine owners, who were registered dealers under the Act. While purchasing mineral ores from the mine owners the respondent gave declarations in terms of Rule 27 of the Orissa Sales Tax Rules, 1947 (the Rules) to the effect that the said mineral Ores would be resold within the State of Orissa. The Sales Tax Officer while examining the accounts relating to the relevant period found that the respondent has sold the mineral ores in the course of export to the Japanese buyers with whom the assessee had pre-existing export contracts. The Sales Tax Officer came to the conclusion that the mineral ores were sold in violation of the declarations furnished by the respondent and, as such, contravened the provisions of Section 5(2)(A)(a)(ii) of the Act. The Sale Tax Officer added the amount of the relevant sales to the taxable turnover of the respondent and issued a demand for payment of the tax. The respondent filed an appeal before the first appellate authority, which was dismissed. Aggrieved by the order of the first appellate authority, the respondent filed a second appeal before the Sales Tax Tribunal. It was contended before the Tribunal that the goods were resold in Orissa and the transaction with the Japanese buyers being sale in the course of export, it was not liable to tax by virtue of Article 286(1)(b) of the Constitution of India. The Tribunal came to the conclusion that the sale by the respondent in favour of the Japanese buyers, was within the State of Orissa and, as such there was no violation of the terms of the declarations. The Tribunal, however, did not agree with the other contention that the transactions were in the course of export and, therefore, not exigible to sales tax. The Tribunal rejected the second contention. The net result was that the assessee was not found liable on account of violation of the undertaking in the declarations but the assessee's sale in favour of the Japanese buyers was found liable to tax. As the accounts had to be re-verified to ascertain the correct figures, the Tribunal remanded the matter. The Tribunal stated the cases and referred the questions at the instance of both the Revenue as also the assessee for the opinion of the High Court. We have already set out the answers given by the High Court. Sections 2(g) and 5(2)(A)(a)(ii) of the Act and Rule 27(2) of the Rules are reproduced hereunder : -

"Section 2(g) Sale means, with all its grammatical variations and cognate expression, any transfer of property in goods for cash or deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge and the words 'buy' and 'purchase' shall be construed accordingly.

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

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

(ii) 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;

(iii) where there is a single contract or sale or purchase of goods situated at more places than one, the provisions of this Explanation shall apply as if there were contracts in respect of the goods at each of such places.

Section 5(2)(A) In this Act the expression "taxable turnover" means that parts of a dealer's gross turnover during any period which remains after deducting therefrom: -

(a) his - turnover during that period on -

(ii) Sales to a registered dealer of goods specified in the purchasing dealer's certificate of registration as being intended for resale by him in

Orissa and on sales to a registered dealer of containers and other materials for the packing of such goods",

Provided that when such goods are used by the registered dealer for purposes other than those specified in his certificate of registration, the price of goods so utilised shall be included in his taxable turnover.

Rule 27(2)(i) Claim for deduction of turnover under item (ii) of sub-clause (a) of clause (A) of sub-section (2) of Section 5:- A dealer who wishes to deduct from his gross turnover the amount of a sale on the ground that he is entitled to make such deduction under item (ii) of sub-clause (a) of clause (A) of sub-section (2) of Section 5 of the Act, shall, on demand, produce a copy of the relevant cash receipt or bill according as the sale is a cash sale or a sale on credit, and a declaration in Form XXXIV duly filled up and signed by the purchasing dealer or by such responsible persons as may be authorized in writing in this behalf by the purchasing dealers."

It would be useful to have before us Article 286(l)(b) of the Constitution of India and Section 5(1) of the Central Sales Tax Act, 1956 which are as under : -

"286. Restrictions as to imposition of tax on the sale or purchase of goods.-(l) 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).

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

(2).....

(3).....

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

The undisputed scheme of the Act is that a dealer becomes liable to pay tax at the time of purchase but being a registered dealer under the Act a facility is given to him and the liability to pay the tax is deferred to a later stage, when he resells the goods. To ensure that the sale does not escape tax altogether a declaration is taken from the dealer to the effect that the goods are meant for resale within the State. In other words, the Act has adopted a single point tax. Under the scheme, the taxable event is postponed until a registered dealer sells the goods to an unregistered dealer, a consumer or in breach of the undertaking diverts the goods for other purposes. The proviso to section 5(2) of the Act operates when the purchasing dealer violates his undertaking and he becomes liable to pay the tax which he had avoided on the basis of the declaration.

It is not disputed that the assessee purchased mineral ores from the mine owners - who were registered dealers under the Act - upon furnishing declaration as provided in rule 27(2) of the Rules. The assessee had not paid sales tax on those purchase. The declaration makes it obligatory for the assessee to resell the mineral ores, so purchased, within the State of Orissa.

The learned counsel for the appellant has not challenged before us the finding of the High Court that the sale by the assessee to the Japanese buyers is covered by the embargo under Article 286(l)(b) of the Constitu-

tion of India read with section 5 of the Central. Sales Tax Act and, therefore, is not exigible to sales tax under the Act. The learned counsel very fairly concedes that the sale by the assessee to the Japanese buyers is in the course of the export of the goods out of the territory of India. The contention of the learned counsel for the appellant, however, is that what is sought to be taxed is the purchase by the assessee from the mine owners and not the sale by it to the Japanese buyers. It is contended that the assessee deliberately gave incorrect declaration to the effect that the goods were meant for resale in Orissa fully knowing that the goods were not meant for such resale. It is further contended that the assessee had already entered into agreements to export the mineral ores to the Japanese buyers. It was to their knowledge that the goods were not meant for resale within the State of Orissa. According to the learned counsel the declaration was deliberately given to avoid the tax liability.

The High Court analysed the various terms of the contract under which the assessee effected the sale in favour of the Japanese buyers. The High Court concurred with the findings of the Tribunal that the sale to the Japanese buyers was effected at Paradeep (a port within the State of Orissa). The High Court reached the said finding on the following reason-ing :-

"Assessee claims that it effected sales in favour of the Japanese Buyers at Paradeep. The terms of the contract under which sales are said to have taken place are available on the record and it is stated that more or less the contracts are of a uniform pattern. At the time of hearing parties have, therefore, referred to us a contract dated 1st of June, 1965, which has been printed in the paper book. An analysis of the terms of the contract may now be made. Article 6 provides for analysis of the ore at the loading port. Article 10 provides that each shipment shall be deemed as delivered when it is loaded on board the vessel and trimmed. Under Article 12, Paradeep is a port of delivery. Insurance cover in terms of Article 9 after the ore is loaded on board the vessel is to be arranged by the Buyer at its expense. Under Article 13, risk with respect to the shipment passes from the seller to the buyer when ore has been loaded and trimmed on board the vessel. The heading of this article is "title and risk" and the obvious intention is that title passes to the Buyer with the contemplated activity being over. Under Article 14, in the event of loss of cargo in part or hi full, the result of the loading port analysis is deemed to be final. Article 16 obliges the buyer to arrangement ships for transport. Provision has also been made for payment by irrevocable, transferable, assignable, divisible and confirmed without recourse to Drawer Letters of Credit to cover 100 per cent value of each shipment. On the basis of these clauses which reflect the true intention of the contracting parties, it is claimed that title in the ores passed at Paradeep and thus there were local sales within the State.....On the terms of the contract indicated above, we do not think, the Tribunal can be said to have been wrong in holding that sales took place at paradeep.....We concur with the finding of the learned Tribunal that the assessee effected resales at Paradeep within the ; state of Orissa."

After holding that the sale by the assessee to the Japanese buyer was within the State of Orissa, the High Court further examined the question whether the sale was in the course of export and, as such was protected by Article 286(l)(b) of the Constitution of India read with Section 5 of the Central Sales Tax Act. Relying upon the judgment of this Court in *Md. Serajuddin & Ors. v. State of Orissa*, [1975] 2 SCC 47, the High Court came to the following conclusions : -

The analysis of the legal position given in paragraph 25 of the judgment of the Court makes it clear that the sales effected by the assessee in favour of the foreign buyer must be held to have been in course of export and is thus squarely covered by Article 286(l)(b) of the Constitution read with section 5 of the Central Sales Tax Act. Thus the sale by the assessee in favour of the Japanese Buyers though completed at Paradeep is yet not exigible to Orissa Sales Tax in view of the restriction imposed by Article

286(l)(b) of the Constitution."

We agree with the High Court that the sale effected by the assessee in favour of the Japanese buyers is the sale in the course of the export of the goods out of the territory of India and, as such, is not exigible to sales tax. As stated above the learned counsel for the State of Orissa has also not questioned the findings of the High Court on this point. We are, however, of the view that the High Court fell into patent error in holding that sale to the Japanese buyers was made within the State of Orissa. A sale "in the course of the export of the goods" and a sale "within the State of Orissa" are two distinct events. A sale "in the course of the export of the goods" cannot be a sale within the State of Orissa. The assessee entered into contracts with the Japanese buyers for "export sale" of the mineral ores. An "export sale" has an entirely different legal concept. In the "export sale", the "sale" and the "export" are so intertwined and intermixed that both begin and end together. The various clauses of the contract entered into by the assessee and the Japanese buyers are wholly irrelevant and are of no consequence. Even if on the construction of the contract of "export sale" the sale part of it is completed within the State it would still not be considered as legally complete because till the time the "sale" and the "export" both are completed none can be taken to be complete. It is, therefore, inherent in the concept of "export sale" that both the "sale" and the "export" are completed when the goods are appropriated by the foreign buyer."

Patanjali Sastri, C J., speaking for this Court in *State of Travancore-Cochin & Ors. v. The Bombay Co. Ltd.*, [1952] SCR 1112, examining the scope of the "export sale" under Article 286(l)(b) of the Constitution of India observed as under : -

"We are clearly of opinion that the sales here in question, which occasioned the export in each case, fall within the scope of the exemption under article 286(l)(b). Such sales must of necessity be put through by transporting the goods by rail or ship or both out of the territory of India, that is to say, by employing the machinery of export. A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction. Of these two integrated activities, which together constitute an export sale whichever first occurs can well be regarded as taking place in the course of the other. Assuming without deciding that the property in the goods in the present cases passed to the foreign buyers and the sales were thus completed within the State before the goods commenced their journey as found by the Sales Tax Authorities, the sales must, nevertheless, be regarded as having taken place in the course of the export and are, therefore, exempt under article 286(l)(b)."

M. Hidayatullah, C.J. speaking for this Court in *Coffee Board, Bangalore v. Joint Commercial Tax Officer, Madras & Anr.*, [1970] 3 SCR 147, interpreted the phrase "sale in the course of export" in the following words:-

"The phrase 'sale in the course of export' comprises in itself three essential: (i) that there must be a sale (ii) that goods must actually be exported and (iii) the sale must be a part and parcel of the export..... The export results from the sale and is bound up with it. The word 'course' in the expression 'in the course of' means 'progress of process of, or shortly 'during'. The phrase expanded with this meaning reads 'in the progress or process of export' or 'during export'. Therefore the export from India to a foreign destination must be established and the sale must be a link in the same export for which the sale is held".

In *Md. Serajuddin & Ors. v. State of Orissa*, [1975] 2 SCC 47, this Court

examined the earlier judgments on the interpretation of Article 286(l){b} of the Constitution of India, It would be useful to refer the following observations of the Bench in the said case : -

"The expression "in the course" implies not only a period of time during which the movement is in progress but postulates a con-nected relation. Sale in the course of export out of the territory of India means sale taking place not only during the activities directed to be end of exportation of the goods out of the country but also as part of or connected with such activities."

It is, therefore, clear that the export sale envisaged under Article 286(1) (b) of the Constitution of India continue to be in the process of completion till the goods reach the destination.

The argument of the learned counsel for the respondent that the assessee by the deposit of the mineral ores at Paradeep Port made a "sale" to the foreign buyer at the port is fallacious and overlooks the fact that the purchase had been made by the assessee from the registered dealers, to satisfy his pre-existing contract with the Japanese buyer and the goods were deposited or believed at Paradeep Port for transportation, out of the country, to the destination of the foreign buyer, to satisfy the requirements of the pre-existing contract, the delivery of the goods at the Paradeep Port .was thus in discharge of the obligation under the contract on the part of the exporter-assessee and formed but a single transaction. It was not a second "sale" to the foreign buyer in the State of Orissa. The effort to confuse the delivery of goods at Paradeep Port for transportation to the destination of the foreign buyer with a "sale" at Paradeep Port is a futile attempt to wriggle out of his mis-declaration. In the declaration filed by the assessee, he not only mis-stated that the goods were meant for re-sale within the State of Orissa but also concealed the fact that there was a pre-existing contract between the assessee and the Japanese buyers to satisfy which the mineral ores were being purchase, for export, from the registered dealers. The declaration made by the assessee concealed more than what is revealed. The assessee, therefore, made a declaration which was palpably incorrect. The assessee thus contravened the provisions of Section 5(2)(A)(a)(ii) of the Act and rendered itself liable under the proviso to the said Section.

We, therefore, hold that the sale by the respondent-assessee was in contravention of the declaration given by the assessee under rule 27(2) of the Rules and, as such, attracts the proviso to Section 5(2)(A)(a)(ii) of the Act. We allow the appeals partly. We uphold answer No. 2 given by the High Court but we set aside answer No. 1 of the High Court and in that place substitute the following answer.

1. On the facts and circumstances of the case the Tribunal was wrong in holding that there was no contravention of the declaration given under rule 27(2) of the Rules. The assessee contravened the said declaration and, as such, the proviso to Section 5(2)(A)(a)(ii) of the Act was attracted.

The appeals are allowed in the above terms. The appellant shall be entitled to the costs which we quantify as Rs. 20,000.

Civil Appeals Nos. 343-347 of 1987.

With

Civil Appeal No. 868 of 1987.

Order

These appeals are sequel to a batch of writ petitions filed before the Orissa High Court challenging the validity of the amended Section 5(2)(A) (a)(ii) of the Orissa Sales Tax Act, 1947 (the OST Act) as sub-stituted by

the Orissa Sales Tax (Amendment) Act, 1978 with retrospective effect. The High Court upheld the validity of the OST Act.

The High Court classified the batch of petitions into the following three categories :

1. Assessments in which unamended declarations in Form No.XXXIV under rule 27(2) of the Orissa Sales Tax Rules, 1947 were given and purchases were made without payment of tax,
2. Assessment and imposition of tax on sale or purchase of declared goods in violation of Section 15 of Central Sales Tax Act, 1956 and Section 14-B of the OST Act read with Rule 42-A of the OST Rules.
3. Assessment and imposition of tax after the amendment of Form No.XXXIV, that is, after 26.4.1978. Declarations in amended form were given and purchases were made without payment of tax.

The High Court allowed the writ petitions falling under category Nos. (1) and (2) above and the assessment and imposition of tax in respect of those petitioners was quashed. So far as the writ petitions falling under category No. (3) above are concerned, those were dismissed with no order as to costs. The appellants before us are those petitioners who were in category No. (3) before the High Court. The State of Orissa has not come up in appeal against the judgment of the High Court allowing the writ petitions of the petitioners falling under category Nos. (1) and (2) before the High Court. We are not expressing any opinion in respect of the part of the judgment of the High Court which is not under appeal before us.

We have today pronounced judgment in Civil Appeals Nos. 1811-1815 of 1977 titled State of Orissa v. Minerals & Metals Trading Corporation of India Limited

We allow the appeals in the above terms with costs. We further hold that the orders of the Tribunal in these cases shall be non-est and inoperative to the extent the said order are contrary to the law laid down by this Court. We quantify the costs as Rs. 5000 to be paid by each of the assessee in each of the cases.

Special Leave Petition (C) No. 14571 of 1992.

Order

We have today pronounced judgments in Civil Appeals Nos. 1811-15 of 1977 titled State of Orissa v. Minerals and Metals Trading Corporation of India Limited and also in the Civil Appeals Nos. 343-347 of 1987 titled M/s. Industrial Minerals & Metals and Anr. v. The Sales Tax Officer & Anr. for the reasons recorded and the conclusions reached in the above judgments, we dismiss the Special Leave Petition.

Civil Appeal No. 654 of 1991.

Order

The appellants challenged the validity of Section 5(2)(A)(a)(ii) of the Orissa Sales Tax, 1947 (the OST Act) as amended by Section 2(c) of the Orissa Sales Tax (Amendment) Act, 1978 by way of a writ petition under Article 226 of the Constitution of India before the Orissa High Court. The order of the Sales Tax Officer, Cuttack III Circle pertaining to the assessment year 1982-83 was also sought to be quashed in the writ petition. The challenge to the validity of Section 5(2)(A)(a)(ii) of the OST Act was on the following grounds : -

"(i) that it is beyond the legislative competence of the State legislature to enact the provision since the tax relates to inter-State sale/export

sale in respect of which the Parliament has the exclusive competence to legislate. In this connection reliance is placed on Article 286 of the Constitution and Entry 54 of List II of the Seventh Schedule of the Constitution;

(ii) that the provision is repugnant to sections 3, 4 and 5 of the C.S.T. Act and hence it is hit by Articles 254 and 269 of the Constitution.;

(iii) that they levy of tax is discriminatory and therefore hit by Article 14 of the Constitution; and

(iv) that it affects the petitioners' right of freedom of trade and commerce embodied in Article 19(1) (g)."

In addition to the above grounds it was also contended that while selling the goods in the course of inter State sale the appellants-petitioners did not contravene the declaration in as much as the sale took place within the State of Orissa and, as such, could not be exigible to tax under the OST Act but for the supervening circumstance of the constitutional bar as provided under the Central Sales Tax Act. The High Court by its well reasoned judgment dated July 30, 1990 dismissed the writ petition. This appeal by way of special leave is against the judgment of the High Court.

We have been taken through the judgment of the High Court wherein all the points raised by the appellants-petitioners have been dealt with by giving detailed reasons in respect of each of the points. We see no ground to interfere with the judgment of the High Court. We agree with the reasoning and the conclusions reached therein.

We have today pronounced judgments in civil Appeals Nos. 1811-15(NT) of 1977 titled State of Orissa v. Minerals and Metals Trading Corporation of India Limited and also in Civil Appeal Nos.343-347 of 1987 titled A/A. Industrial Minerals & Materials & Anr. v. The Sales Tax Officer Anr. Even on the force of the reasoning and conclusions in these judgments, this appeal has to be dismissed. We, therefore, dismiss the appeal with costs. We quantify the costs as Rs. 5000.

Civil Appeals Nos. 2947-50 (NT) of 1977.

KULDIP SINGH, J. The Sales Tax Tribunal, Orissa (the Tribunal) stated a case and referred the following question for the opinion of the High Court:-

"Whether on the facts and in the circumstances of the case, the Member Sales Tax Tribunal is correct in holding that even sales in course of inter-state trade and commerce, can be sale inside the State if the goods are inside the State of Orissa, and whether his interpretation of the definition of 'sale' as given in section 3(g) of the Orissa Sales Tax Act, 1947 and the Explanation Attached to the definition 'sale is correct?"

The High Court answered the question in the affirmative and in favour of the assessee. These appeals by the State of Orissa are against the Judgment of the High Court.

The respondent-assessee is a registered dealer under the Orissa Sales Tax Act 1947, (the Act). The assessee purchased certain goods from a registered dealer on the basis of declaration furnished by it for resale of the purchased goods in the State of Orissa. The goods were however sold in the course of inter-State trade. The Sales Tax Officer came to the conclusion that the declaration furnished by the assessee was violated and, as such, it became liable under the proviso to Section 5(2)(A)(a)(ii) of the Act. Against the assessment made, the respondent preferred appeals under the Act before the Assistant Commissioner of Sales Tax which were dismissed. The assessee thereafter preferred appeals before the Sales Tax Tribunal, Orissa. The Tribunal by its order dated March 2, 1973 annulled the

assessment and directed the refund of tax and penalty, if paid. The Tribunal - at the instance of the appellant - referred the above quoted question for the opinion of the High Court.

Section 5(2)(A)(a) of the Act, to the extent it is relevant reads as under:-

"In this Act the expression 'taxable turnover' means that part of a dealer's gross turnover during any period which remains after deducting therefrom : -

(a) his turnover during that period on-

(i) the sale of any goods notified from time to time as tax free under section 6 and of the packing materials, if any in respect of such goods;

(ii) sales to a registered dealer of goods specified in the purchasing dealer's certificate of registration as being intended for resale by him in Orissa and on sales to a registered dealer of containers and other materials for the packing of such goods;

Provided that when such goods are used by the registered dealer for purposes other than those specified in his certificate of registration, the price of goods so utilised shall be included in his taxable turnover."

"Sale" is defined in Section 2(g) of the Act to mean as under :

".....with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge and the words 'buy' and 'purchase' shall be construed accordingly;

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

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

(ii)

(b)..

The High Court answered the question in favour of the assessee on the following reasoning :

"In this case there is no dispute that specific, or ascertained goods were the subject-matter of sale because these goods were purchased from registered dealers. There is no material on the record to show that the goods were not within the State of Orissa when the contract of sale was made. In the facts before us normally it should be presumed that the goods were actually within the State unless the Taxing Department established the contrary. Therefore, in view of the definition of 'sale', it must be deemed that the sale took place within the State in regard to the goods.....Under the scheme of the Act, sales tax is leviable at a single point and a registered dealer at the point of sale is entitled to pass on the incidence of sales tax to the buyer. Where the buyer is a registered dealer, upon furnishing a declaration in terms of section 5(2)(A)(a)(ii) of the Act he is entitled to exemption from payment of sales tax and the payment of tax is shifted and deferred to a point where the sale takes place in favour of a consumer, an unregistered dealer or is a transaction in respect of which no declaration has been furnished even when the purchasing dealer is a registered dealer. Section 5(2)(A)(a)(ii) authorises a dealer to exclude from the 'gross turnover' the sales to a

registered dealer of goods specified in the purchasing dealer's certificate of registration as being intended for resale by him in Orissa. The proviso occurring in section 5(2)(A)(a)(ii) requires the sale price of goods used by the purchasing dealer for the purposes other than those mentioned in his certificate of registration to be included in his taxable turnover. The assessee before us had purchased bini from registered dealers and had furnished declaration. It is not disputed that it was entitled to make such purchases free of tax on furnishing declarations. Its declarations contemplated that it would resale the goods so purchased in Orissa. As we have already found, the goods purchased by the assessee were as a fact resold in Orissa, but these sales', by application of the provisions of the Central Act became the first sales under the Central Act. It is true that the scheme under the Act collecting Orissa sales tax at the deferred point has not worked out, but it the facts of the case it cannot be said that the assessee used the goods purchased by it for a purpose other than that specified in its certificate of registration which alone would attract the application of the proviso under which the additional demand has been raised. If the assessee as a fact resold the goods in Orissa, but on account of some supervening law that transaction is made taxable under some other Act and tax under the Orissa Sales Tax Act was not imposable, it would not amount to any violation of the declarations by the assessee. We agree with the contention raised on behalf of the assessee that the Proviso cannot be applied to a case of this type. In our opinion, the Tribunal came to the correct conclusion in the matter."

We are of the view that the High Court fell into patent error in holding that the sales in dispute were made by the assessee within the State of Orissa. It is not disputed that the said sales were in the course of inter-state trade. If the goods were to remain within the State of Orissa the sales could not be in the course of inter-State trade. To make a sale in the course of inter-State trade, it is necessary that the contract must envisage the completion of the sale as well as the movement of the goods to the other State in the course of inter-State trade. The very fact that the sales in dispute were the sales in the course of inter-State trade, they could not be the sales within the state in terms of section 2(g) of the Act. The Act provides for a single point levy and the tax is payable at one point or the other. When the assessee purchased the goods free of tax by giving an undertaking that the goods would be resold within the State of Orissa and subsequently violates the undertaking by selling the goods in the course of inter-State trade and commerce, the proviso to section 5(2)(A)(a)(ii) of the Act is directly attracted and the assessee is liable to pay tax. A sale cannot be inside Orissa and at the same time in the course of inter-State trade and commerce. In order that a sale or purchase might be inter-State, it is essential that there must be transport of goods from one State to another under the contract of sale or purchase. In *Bengal Immunity Com-pany Limited v. State of Bihar*, [1955] 2 SCR 603, occur the following observations which are apposite : -

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

It is the admitted case of the assessee that the sales in question were the sales in the course of inter-State trade and if that is the position then the question of the same sales being the sales within the State did not arise.

We have, today, pronounced judgment in Civil Appeals Nos. 343-347 of 1987 titled *M/s. Industrial Minerals & Metals & Anr, v. The Sales Tax Officer & Anr.*, wherein we have held that a sale in the course of the export of goods out of the territory of India cannot be a sale at the same time within the State of Orissa. On the principles, a sale in the course of inter-State trade and commerce cannot be a sale within the State of Orissa.

There is, thus, patent violation of the undertaking given by the assessee. This Court in Himatsingka Timber Co. Ltd. v. State of Orissa, (1966) 18 STC 235 dealing with section 5(2)(A)(a)(ii) of the Act held as under :-

"The tax was always leviable on the first sale and it would have been so levied but for the certificate which was furnished by the company when making purchases from the local dealers. The certificate was that the sleepers and timber were for resale in Orissa and when that condition was not fulfilled, the tax became payable even under section 5(2)(a)(ii) before the 1951 amend-ment."

In Endurpuri Narasimhan & Son v. State of Orissa & Ors.t (1961) 12 STC 282, certain sales to the petitioner therein were not included in the taxable turnover of the seller by reason of the registration certificate which the petitioner had obtained on a declaration that the goods were to be resold in Orissa. In violation of the declaration the petitioner sold the goods to dealers outside the State and he was taxed under section 5(2)(a)(ii) of the Act. This Court held that the imposition of the tax was not on the sales by the petitioner to person outside the State but on the purchases by him inside the State for which he gave an undertaking and violated the same by not selling the goods within the State of Orissa.

Even otherwise, the High Court was not justified in holding that the onus for proving that the goods at the time of the contract were not within the State of Orissa was on the sales tax authority. The assessee on purchase of the goods became liable to pay the tax but he did not do so because it was a sale from a registered dealer to a registered dealer. The assessee saved the tax and postponed the event by giving an undertaking that he would sell the goods within the State. True to the undertaking the onus to show that the goods were actually sold within the State of Orissa was on the assessee. In any case, a contract of sale by which the goods are sold and are to be transported from one State to another cannot be made a lever for the argument that though the sale is in the course of inter-state trade and commerce but nevertheless it is a sale within the State of Orissa under Section 2(g) of the Act.

Our answer to the question referred, therefore, on the facts and in the circumstances of this case, is that the Member, Sales Tax Tribunal, was not correct hi holding that even the sales in the course of inter-State trade and commerce can be sales inside the State if the goods were inside the State of Orissa and for coming to that conclusion, the Tribunal wrongly and illegally relied upon the definition of "sale" under Section 2(g) of the Act including the explanation therein:

We allow the appeals, set aside the judgment of the High Court. The appellant shall be entitled to costs which We assess as Rs. 5,000 in each of the appeals.

Civil Appeal No. 4840 of 1994.

(Arising out of SLP (C) No. 4889 of 1979).

With

Civil Appeal No. 4842 of 1994.

(Arising out of SLP (C) No. 4969 of 1979).

And

Civil Appeal No. 4841 of 1994.

(Arising out of SLP (C) No. 4970 of 1979).

KULDIP SINGH, J. Leave granted in all the special leave petitions.

These appeals are sequel to the applications filed by the State of Orissa under Section 24(2) (b) of the Orissa Sales Tax Act, 1947 (the Act) for a direction to the Orissa Sales Tax Tribunal to state a case and refer the questions framed out of the appellate order of the Tribunal for the opinion of the High Court. The High Court dismissed the applications on the ground that the questions formulated for the opinion of the High Court had already been decided by a Division Bench of the High Court in *State of Orissa v. Johrimal Gajanand*, (1976) 37 STC 157 and since the view taken by the Tribunal was in conformity with the opinion expressed by the High court, the applications were not competent. These appeals by the State of Orissa are against the orders of the High Court rejecting the applications of the State under Section 24(2)(b) of the Act.

We have today delivered judgment in Civil Appeals Nos. 2947-50 (NT) of 1977 wherein the High Court judgment in *State of Orissa v. Johrimal Gajanand*, (1976) 37 STC 157 has been reversed. For the reasons recorded and the conclusions reached by us in *Joltrimat Gajanand's* case (supra), we allow these appeals, set aside the impugned orders of the High Court. The High Court also fell into patent error in not taking into consideration the amendment to section 5(2)(A)(a)(ii) of the Act made in the year 1978 with retrospective effect. We have upheld the validity of the amended section 5(2)(A)(a)(ii) of the Act by our judgment delivered today in Civil Appeals where in we have reversed the full-Bench judgment of the Orissa High Court in *Mineral & Metals Trading Corporation of India Limited v. State of Orissa*, reported in (1976) 38 S.T.C. 189. Before the High Court the appellants had relied upon the Full Bench Judgment of the Orissa High Court in *MMTC* case (supra) in support of their contentions. The High Court rejected the contentions of the appellants and upheld the validity of the amended Section 5(2)(A)(a)(ii) of the OST Act on the following reasoning :

"Under the scheme of the Act, the taxable event is postponed until the registered dealer sells the goods to an unregistered dealer or a consumer, or in breach of the undertaking given. Law is well settled that the competent legislature can enact law after removing the infirmities or deficiencies as pointed out by the Court. All that is to be seen in such cases is that the amended law is within the competence of the legislature. Powers of the State Legislature under Entry 54 of List II of the VII Schedule to the Constitution are plenary. The impugned amended Act is an attempt by the State Legislature to ensure the single point levy by nullifying the effect of the two decisions of this Court. The question is whether such action is within, the competence of the State Legislature and is in conformity with Article 286 of the Constitution of India.

It is the contention of the petitioners that the goods were meant for resale in Orissa and in fact were resold inside Orissa. The State Legislature has power to impose tax on the sale or purchase of goods other than news papers. This is subject to the provisions of Entry No. 92 A of List I. The petitioners would have paid the tax while purchasing the goods from a registered dealer. But while purchasing the goods, they have avoided the tax by giving a declaration that the goods purchased were meant for the purpose of resale in Orissa and such resale should be subject to levy tax under the O.S.T. Act. But subsequently, in violation of the declaration they have sold the same in course of inter-state trade or commerce or export and avoided payment of tax. Normally the tax should have been paid at the first point and the petitioners could not have avoided payment of such tax and would have paid the tax but for the declaration given by them. They have sold the goods in violation of the declaration given by them. As already held, in case of declared goods, they are entitled to reimbursement by virtue of section 15 of the C.S.T. Act and section 14-B of the O.S.T. Act and rule 42-A of the O.S.T. Rules. From Section 15 of the C.S.T. Act, it is abundantly clear that it places restrictions and conditions upon the local law. Its intention is that declared goods should suffer tax at only

one point and at a prescribed rate. Section 15 does not bar levy of sales tax by a State on declared goods, but it provides for refund of such tax to the persons making such sale in the course of inter-State Trade or commerce. Therefore, section 15 clearly shows that there is no bar for levy of charge on declared goods but that is to be refunded. In section 15, no provision has been made for refund of tax on goods other than declared goods. From this, it can be gathered that the State has also the power to impose tax on the declared goods. But by virtue of Section 15, it is to be reimbursed. If the intention were not to tax goods other than declared goods, such provision should have been clearly made. Viewed from this angle, it cannot be said that the assessment and the demand of tax made by the authorities are bad and should be struck down. The State by the amended provision has only wanted to impose tax on intra-State sale; and it is within the competence and powers of the State Legislature under Entry 54 of List II of Schedule VII of the Constitution of India"

We agree with the above quoted reasoning and the conclusions reached by the High Court.

We dismiss the appeals with costs. We quantify the costs to be paid by each of the appellants separately as Rs. 5000.