Mounting pressure on Parliament for changing the law was the aftermath of Mohamed Serajuddin. The narrow and pedantic holding in that decision that only a face-to-face sale by an Indian exporter to the foreign importer qualified for exemption from tax planted apprehension in the minds of the trading class. It placed hurdles in the path of international trade. According to the Exports (Control) Orders, export of certain goods can be made only by specified agencies such as the State Trading Corporation (S.T.C.), Minerals and

2. Exports (Control) Orders are issued under the Imports and Exports (Control) Act 1947. Section 3 of the Central Act confers power on the Central Government to make provisions by order for prohibiting, restricting or otherwise controlling the import into and export of goods out of India. Besides the Imports and Exports (Control) Act 1947 there are Central enactments which control exports and imports in regard to specific commodities. The Foreign Exchange Regulation Act 1947 regulates the import and export of gold, silver, coin, currency notes and bank notes. The Customs Act 1962 invests the Central government with power to prohibit export and import of goods for the purposes mentioned therein. The export of coffee is regulated by the Coffee Board under the Coffee Act 1942. Similarly export of tea is regulated by the Tea Board under the Tea Act 1953, and coir and coir products by the Coir Board under the Coir Industry Act 1953.
Metal Trading Corporation (M.M.T.C.) and Cashew Corporation of India.3

Manufacturers and traders in spheres other than those affected by specific regulations, particularly in the small and medium sectors, also have to depend upon experienced export houses for exporting the goods. Special expertise is needed for carrying on export trade. Needless to say, the sale of goods made to the canalising agency or export house for export is inextricably connected with the export. If such a sale does not qualify for exemption as one in the course of export, it would be subjected to tax under the respective sales tax law of the State. The tax element will enter into the price structure of the commodity. This leads to increase of price of exportable goods. There is great competition in the world market. The Indian sellers have to capture market against tremendous odds. The price factor is an important criterion in this respect. The Central government realised the ill-effects of the Supreme Court decision and they wanted to allay the fear of the trading

Parliament came forward with an amendment Act to nullify the effect of Mohamed Serajuddin. Accordingly a new sub-section was added to the provision dealing with the definition 'in the course of export'. The new law provided that sale or purchase of any goods immediately preceding the sale or purchase occasioning the export shall also be deemed to be in the course of export.

4. The new provision is contained in sub-section (3) of Section 5 of the Central Act. See for text Appendix B. In the statement of objects and reasons accompanying the Amendment Bill touching upon the consequential effect of Mohamed Serajuddin, it is stated: "This would make our exports uncompetitive in the fiercely competitive international markets. It is therefore proposed to amend....Section 5... to provide that the last sale or purchase of any goods preceding the sale or purchase occasioning export of those goods out of the territory of India shall also be deemed to be in the course of such export...." See the Statements of Objects and Reasons accompanying the Amendment Bill cited in G.C.Mathur, S.D.Singh's The Law of Central Sales Tax, p.375, (1985).

5. The need for an amendment of the Central Sales Tax Act to exempt last sale prior to export was canvassed by S.N.Jain early in 1963. He has quoted the following passage from p.36 of the Report of the Import and Export Policy Committee (Mudaliar Committee), 1962: "It has been reported to us that the definition of the expression 'in the course of export' in the Central Sales Tax Act is so worded as to exclude sales which are really intended wholly and definitely for export. For instance if a manufacturer sells to the agent of a foreign dealer and the delivery is given in India with the express and avowed object of removing the goods beyond the customs frontier, sales tax is levied on the ground that delivery was given in India. This conception of 'sale in the course of export' is believed to be much narrower than that adopted, for instance, by the Supreme Court of the United States in a number of cases. The present definition has caused some hardship; and it is suggested that a liberal view should be taken of the expression 'in the course of export and import'; and the Central Sales Tax Act should be suitably amended". See, "Sale in the Course of Export: Need for Statutory Amendment", 5 J.I.L.I. p.357 (1963) at 374, 375.
The Import and Export Policy Committee (Mudaliar Committee) appointed by the Ministry of Commerce, Government of India, had prophesied the injurious nature of the earlier provision and sagaciously suggested a wholesome liberal change in the law as early as in 1962. Though late the Indian Parliament rose to the occasion after thirteen long years. If the Central government had translated into reality the suggestion of the Committee that a liberal view should be taken of the expression 'in the course of' so as to include sale 'for export' as well within its ambit, a great amount of judicial time could have been saved. The necessary fillip to push up export trade could have been provided from that time onwards. In the agonising history of cold-storing expert committee reports by the powers-that-be, Mudaliar Committee Report appears to be a tragic instance.

Even the new provision enacted by Parliament in 1976 defies solution. It created a host of new problems than it attempted to solve. This was due to the apparent ill-drafting of the provision. It would be seen that sub-section (3) of Section 5 used ambiguous language. Parliament seems to have reluctantly or hesitatingly extended the concession, as is clear from the conditional clause of exemption.

6. Ibid.
7. Section 5(3) came into force with effect from April 1, 1976.
8. Ibid.
The provision was designed to put an end to the zig zag trends in appellate judicial thinking in the area. The new law provided that sale or purchase of any goods immediately preceding the sale or purchase occasioning the export would also be deemed to be in the course of export. This was, however, subject to conditions. Such penultimate sale or purchase must have taken place after an agreement has been concluded for export of the goods or an order for such export has been received. Further the sale or purchase must be made for the purpose of complying with such agreement or order.

Thus in the context of export, the expression 'in the course of' included the last sale or purchase of any goods preceding the export.

Before examining the ramifications of this legislative provision, an unjust omission in the legislative scheme needs to be pointed out. That is the disallowance of similar concession in the case of first sale following import. This is not indeed the first time such an omission was made. One may recall here that long ago at the very threshold of legislative attempt to codify the legal principles in this field of taxation, the Commerce Ministry suggested before the Law Commission the desirability of including the last purchase preceding the export as a transaction in the course of export. It was thought that such a measure would stimulate export. The Ministry did not put forward a similar suggestion for exempting first sale following import.
The Law Commission therefore turned down the suggestion.\(^9\) It is not known why and under what circumstances the Ministry of Commerce confined its proposal to export only. However, the Law Commission stated that the discriminatory approach was illogical. The Commission itself could have resolved the unreasonableness by proposing an extension of the exemption to both export and import fronts.

The aim of exemption of sale preceding the export is to boost the export trade with a view to earning foreign exchange. It may be argued that a similar exemption need not be extended in the case of sale after the import.\(^10\) This argument is based on a mistaken assumption that by so extending the exemption the import will be pushed up. An exemption from tax on sale after import can result in an inflow of goods from other countries only in a free market economy where the import trade is uncontrolled by government regulations. When in pursuance of well-considered import policy, absolutely essential goods like raw materials and machinery are imported with hard earned foreign exchange, a policy of taxation that would create burden by way of price increase in respect of those goods is unscientific.

The absence of logic pointed out long ago by the Law Commission still continues. It calls for correction by extending the exemption in the context of import also.

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9. See Ch.III, n.46.
The Constitution authorises Parliament to formulate principles governing when a sale or purchase takes place in the course of export or import. Parliament enacted that sale or purchase penultimate to export shall be deemed to be in the course of export when certain conditions are satisfied. Can it be said that it was formulating any principle? Was it not merely declaring that certain sales shall be deemed to be in the course of export? If so was not the provision ultra vires the Constitution? These questions were posed before the Supreme Court in Consolidated Coffee Ltd. v. Coffee Board.

The Court rightly held that what was contained in the provision was not a mere fiction but a general principle. The word 'deem' in the provision did not mean a fiction, but it is used to declare a principle. A 'principle' is a guiding rule applicable generally and does not include specific directions. Approaching the question from this angle, the Court saved the provision from attack on the ground of constitutional invalidity. The Court held that the provision formulated a principle inasmuch as it laid down the general guiding rule applicable to all penultimate sales that satisfied the conditions specified therein. The case came before the Supreme Court by way of writ petition under Article 32 of the Constitution moved by

11. Constitution of India, Article 286(2). For text, see Appendix A.
13. Id. at 175,
registered exporters of coffee. The validity of a circular demanding deposit and bank guarantee from registered exporters as also the scope of Section 5(3) of the Central Act came to be determined by the Supreme Court in Consolidated Coffee.¹⁴

The language of the provision¹⁵ granting the exemption is ambiguous and equivocal. The exemption is conditional. To qualify for exemption there has to be an agreement for export. Agreement with whom? With a foreign buyer? Or, would it include an agreement to export and for that a sale to a local party? The view was canvassed that the term should be understood to cover not only an agreement with a foreign buyer, but also an enforceable agreement to export, even with a local party to implement which the penultimate sale was made.

¹⁴. Ibid. The Coffee Board issued a circular which stipulated conditions to avail of the benefit of exemption. The traders had to furnish deposits or bank guarantees equal to the amount of sales tax which would be due if the sales were not held to be exempted under Section 5(3), in respect of the coffee sold by it at the export auction. According to the circular, the buyer at the auction should, in order to get exemption from tax in respect of the purchase of coffee at the auction must have an export contract (namely either agreement or order) with a foreign buyer at the time of auction and that the coffee purchased by him at the auction should be exported in pursuance of it and proof of export produced. The sale of coffee by the Board to the buyers (registered exporters) took place on the condition which was an express one and an essential term of the contract, namely, the coffee shall be exported and shall not be diverted to any other destination or sold or disposed of or released in India. The question was whether the auction sale of coffee by the Board to the exporters on such condition was exempt from levy of sales tax.

¹⁵. Central Sales Tax Act 1956, Section 5(3).
The Supreme Court did not uphold the view that an agreement to export need not be with a foreign buyer but can be with a local person for the purpose of making the penultimate sale a sale in the course of export. The reasoning of the Court in arriving at the conclusion was that Section 5(3) of the Central Act provided that the penultimate sale should be for the purpose of complying with the agreement or order in relation to the export. The word 'order' in the context of the legislation must be understood in a commercial sense, meaning firm request for supply of goods emanating from a buyer. It cannot mean an order, direction, mandate, command or authorisation to export that may be issued by a statutory body like the Coffee Board. An order for export therefore means an order for supply from a foreign buyer. The word 'agreement' according to the Court, would take colour from the word 'order' and would on the principle of *noscitur a sociis* also mean, an agreement with a foreign buyer. More importantly, the Court found justification for its stand from the user of the definite article 'the' before the word agreement, because Parliament has not said 'an agreement' or 'any agreement' for or in relation to such export. In the context, the expression 'the agreement' would refer to that agreement which is implicit in the sale occasioning the export, clearly suggesting that the agreement is one with the foreign buyer. The agreement with or order from the foreign buyer must be available before the penultimate sale was complete.

17. Id. at 197.
18. Ibid.
The provision, as it stands, is detrimental to foreign trade. If it is insisted that there has to be an existing agreement with a foreign buyer and that the sale to the exporter should be in pursuance of it would take a lot of goods exported outside the purview of exemption. On the other hand, a provision to the effect that a contract even with a local buyer to export would qualify the sale for exemption has a beneficial implication. It will make sales to exporters free from tax. This in turn would promote export trade since goods could be made available at competitive rates in international market.

Why not the penultimate sales also be exempt even if the orders are obtained by the exporter afterwards if the sale takes place on the express condition that the goods shall be exported and the same shall not be diverted to another destination or sold or disposed of or released in India? An agreement with the export house or the agency that the latter shall export the product should be sufficient to qualify for exemption. It would facilitate export at competitive price. The exemption should not therefore depend on the circumstances of a pre-existing foreign contract or order. A legislative reform is the proper remedy at this juncture.

The Supreme Court noted that the question of exemption from tax of the export trade involves two public interests.

20. Supra, n.12 at p.183.
Promotion of export trade is one public interest. Augmentation of State revenue is another. By a liberal construction the former public interest is served, but the latter public interest is severely curtailed. The Court observed that it is difficult to hold that Parliament intended to prefer one and sacrifice the other. The limitation of exemption to penultimate sale that satisfied the condition was indicative of State's anxiety not to diminish States' revenue unduly.

The public interest involved in export promotion and earning of foreign exchange should be given precedence over the public interest involved in raising internal tax revenue in a developing country. The nation strives to earn foreign

21. The Attorney-General appearing for the Coffee Board stated that a liberal construction of Section 5(3) extending the exemption to sales to exporters would promote the export trade by making the Indian coffee available at competitive rates at international market. Id. at 177.

22. Justice Tulzapurkar said: "...it is obvious that if the liberal construction, as suggested by the counsel for the petitioners, is accepted the former public interests will undoubtedy be served while the latter will greatly suffer and if the narrow construction is accepted the latter public interest will be served and the former will suffer. It is difficult to say that the Parliament intended to prefer one and sacrifice the other. In fact the granting of exemption to penultimate sales was obviously with a view to promote the exports but limiting the exemption to certain types of penultimate sales that satisfy the two specified conditions displays an anxiety not to diminish the States' revenue beyond a certain limit". Ibid.
exchange by all means. India's industrialisation depends largely upon it. Through industrial endeavours the States could earn by levying taxes on manufactured goods, which will raise tax revenue, besides creating new employment opportunities to the people. The loss of revenue for the States due to the liberal construction of the provision does not appear to be serious when compared to the benefit that it may bring due to industrialisation and the increase of employment potential. The exemption provision therefore calls for a change.

In Ben Gorm\textsuperscript{23} the Court had observed that a sale is inextricably bound up with the ultimate export if the link between the two cannot be voluntarily interrupted without a breach of the contract. The link is created by the obligation to export. Such obligation can arise by reason of statute, contract or even mutual understanding between the parties. There was an obligation to export in Consolidated Coffee.\textsuperscript{24} Coffee was sold to the exporters by the Coffee Board for export. Was not the penultimate sale therefore exempt as a sale in the course of export being a sale occasioning the export on the basis of Ben Gorm? Such a contention was raised in the case. The Court answered the question in the negative.

\begin{itemize}
\item 23. Ben Gorm Nilgiri Plantations \textit{v. Sales Tax Officer}, (1964) \textit{I5 S.T.C.} 753.
\item 24. \textit{Supra}, n.12.
\end{itemize}
The Court severely curtailed the dimensions of the Ben Gorm doctrine and observed that the doctrine should be read in the context of the facts of that case. This appears to be a polite way of diluting the dictum. The celebrated dictum was a general statement obtaining from the legal position as it stood then, and not from ephemeral observations rendered exclusively for deciding Ben Gorm. The Court drew up the general principle in that case, which may apply in the absence of peculiar factors which may call for formulation of a different test. The Court said that whether a sale is for export or one in the course of export is a question to be decided on the basis of an appraisal of all the facts. The Court added however that though no single test could be laid down as decisive for determination of that question, the distinction between a sale for export and one in the course of export was real.

After the crucial sentence the Court in the same paragraph proceeded to say in Ben Gorm:

25. Ibid.
26. Supra, n.12 at 183.
27. See Deputy Commissioner of Agricultural Income Tax and Sales Tax v. Indian Explosives Ltd. (1985) 60 S.T.C. 310 at 313 where Justice Tulpuckar observed that the text of integral connection is formulated by the Supreme Court in Ben Gorm, (1964) 15 S.T.C. 753 (S.C.) at 759.
28. The crucial sentence in Ben Gorm is this: 'The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export..." Ben Gorm Nilgiris Plantations v. Sales Tax Officer, (1964) 15 S.T.C. 753 at 759 per Shah, J.
"...In general, where the sale is effected by the seller, and he is not connected with the export which actually takes place, it is a sale for export. Where the export is the result of sale, the export being inextricably linked up with the sale so that the bond cannot be dissociated without a breach of the obligation arising from the statute, contract, or mutual understanding between the parties arising from the nature of the transaction, the sale is in the course of export".29

The words 'in general' clearly indicate the general nature of the statement of the law. Moreover the generality of the statement was so understood by the Supreme Court itself in cases30 prior to Consolidated Coffee, dealing with similar issues. If the observations were related only to the facts in Ben Gorm, the Court would not have banked upon them in the prior cases.

After stating that Ben Gorm did not lay down any general proposition of law, the Court proceeded to say in Consolidated Coffee:

"...even if the Ben Gorm Nilgiri Plantations case is regarded as laying down a general proposition... still the question would be what type of obligation

29. Id. at 760. (Emphasis is mine).
and arising from what circumstances would be necessary or enough in the case of penultimate sale must depend upon the language of the statute concerned and therefore the question will again be what type of obligation and arising from what circumstances has been prescribed by the Parliament by enacting Section 5(3) and that would depend upon the proper construction of the phrase 'the agreement or order for or in relation to such export' occurring therein..."31

The above-quoted observations of the Court, curtail the meaning of the concept of sale 'occasioning the export' enshrined in Section 5(1) of the Central Act. That concept has been given shape in Ben Gorm and other cases. The obligation to export may, accordingly, stem from a variety of circumstances. But in Consolidated Coffee it is confined to two circumstances, namely prior agreement or order from foreign buyer. This erroneous view resulted from the linking up of Section 5(3) with Section 5(1). The two sections deal with distinct and separate situations. Section 5(1) deals with sale occasioning export. Section 5(3) deals with sale preceding the one which occasions the export. This is evident from the historical background of section 5(3). There was no need for clubbing the two and limiting the scope of Section 5(1) by interpolating words which were not there. There was no need for borrowing words from Section 5(3)

to interpret Section 5(1). In so doing the Court limited the scope of Section 5(1) in a manner not warranted by the circumstances.

It appears that the Court was in error in not applying the Ben Gorm doctrine to the facts of the Consolidated Coffee where the sale, looked at from any angle, was unquestionably integrated with the export. If the goods are not exported, that would entail penalty, besides seizure by the Coffee Board. Property passed to the auction purchaser after the same is shipped or sent to the customs station. Till then Coffee Board had right over the goods. The sale had almost an f.o.b. connotation and even then the Court adopted a narrow view.

The Court committed a fundamental mistake in holding that the obligation to export should, after the enactment of Section 5(3) of the Central Act, be of a nature specified in that enactment. When in Ben Gorm it was held that the obligation to export may arise from statute, the Court was referring to a statutory requirement to export which would make the sale one occasioning the export. The provision in Section 5(3) of the Central Act that a sale to exporter to fulfil prior contract with a foreign buyer would be in the course of export, does not create any obligation to export. Section 5(3) of the Central Act was laying down a principle for deciding when a sale not occasioning the export would qualify for exemption, on fulfilment
of the two conditions. When a sale is closely connected with export, as in a case where the statute creates an obligation to export, the sale is one which occasions the export. For deciding whether or not such an obligation to export exists, the Court in Consolidated Coffee ought to have looked into the Coffee Act, 1942. The mistake of the Court did lay in applying Section 5(3) of the Central Act for deciding the question of statutory obligation to export.

The requirement that there should be a pre-existing contract with the foreign buyer for the supply of goods and a resultant purchase by the exporter for the purpose of exemption of penultimate sale raises some problems. Suppose an exporter purchases packing materials for packing marine products exported by him. The pre-existing contract is for supply of marine products only. But these products cannot be exported without packing. Will the purchase of the necessary packing materials by the exporter or the sale of such materials to him be eligible for exemption under Section 5(3)? This question came up for adjudication before the Madras High Court in Packwell Industries v. State of Tamil Nadu. The Court held that packing materials, required for packing of marine products for export, supplied to exporters did not qualify for exemption as they were not the

32. (1982) 51 S.T.C. 329 (Mad.).
subject-matter of the contract of export with the foreign buyer. This position exposes the inadequacy of the provision of granting exemption to the penultimate sales enacted with a view to boosting export trade.

What would be the case if the goods sold to exporter from part of the goods for which there exists a pre-existing contract for export. In other words if the goods contracted to be exported are purchased in part from different sellers will the transaction be eligible for exemption? A question of this nature arose in Girdharilal. There was a contract for export of football including bladders. Orders were placed by the exporters to the assessee. The assessee manufactured only football covers. He sold the football covers to the exporter. The sale occasioned the export of those goods in the same condition in which they were received by the exporters. The High Court of Andhra Pradesh on these facts held that the contention of the State that for the purpose of being entitled to exemption under Section 5(3) of the Act the assessee must sell

33. Id. at 330. The Tribunal had found that the packing cases were not the subject-matter of the contract for export. In view of this finding the Court held that packing materials did not qualify for exemption.
34. For a comment pleading for an inference of an implied term in the contract also for the packing material of the exported good, see S.N.Jain, (1982) A.S.T.L. 500, at pp.509,510.
36. Id. at 289.
football bladder as well as covers, was not correct. The sale of the football covers by the assessee was held to be eligible for exemption.

The exemption for penultimate sales will be available when two conditions are satisfied, namely, there must be an anterior contract for export and the same goods purchased in pursuance of such contract should be exported.\(^{37}\) Exemption is not allowable if the goods agreed to be supplied to the foreign buyer are different from the goods purchased. Obviously if the goods purchased are subjected to a process of manufacture before export the goods exported cannot be said to be the same as the goods purchased. Quite often it may become necessary to process the goods before they are exported. In such a context disputes would arise on the eligibility of penultimate transactions for exemption under Section 5(3).

A question of such a nature arose, though not in the context of Section 5(3) of the Act, in Kailash Nath v. State of U.P.\(^{38}\) The assessee sold cotton cloth to exporters who after dyeing and hand-printing, exported them outside India. Under a notification issued by the State Government, sale of cotton cloth with a view to export outside India was not taxable if proof of

\(^{37}\) Central Sales Tax Act 1956, Section 5(3).
\(^{38}\) (1957) 8 S.T.C. 358 (S.C.); A.I.R. 1957 S.C. 790.
actual export was furnished. The State levied tax on the trans­action. The contention that when cloth was coloured and printed it was transformed into some other material did not succeed.

In Deputy Commissioner of Sales Tax (Law) v. Neroth Oil Mills Co., the assessee purchased prawns from catching centres. They were subjected to processing, namely, pealing, cleaning, grading, cooking and freezing before export. The claim for exemption of the purchase turnover from levy of tax was rejected by the sales tax authority on the ground that what was exported was not the same commodity. The claim of the assessee for exemption was upheld by the Sales Tax Appellate Tribunal. On revision the High Court of Kerala held that the prawns purchased by the assessee and the prawns exported after processing are commercially the same commodity. Peeling, cleaning and processing were held to be the minimum requirements for making the article exportable, and these activities, did not convert the thing into a different article. The question ultimately came up before the Supreme

39. (1982) 49 S.T.C. 249 (Ker.).
40. The Tribunal upheld the claim by applying the decision of the Supreme Court in Deputy Commissioner of Sales Tax (Law) v. Pio Food Packers, (1980) 46 S.T.C. 63 (S.C.); A.I.R. 1980 S.C. 1227 wherein pineapple fruit was purchased and afterwards sliced, packed and sold in sealed containers. The Court held that although a degree of processing is involved in preparing pineapple slices from the original fruit, the commodity continues to possess its original identity, notwithstanding the process involved.
41. Supra, n.39.
42. The Madras High Court also held a similar view. See, State of Tamil Nadu v. Cevere Southern, (1983) 52 S.T.C. 328 (Mad.) and State of Tamil Nadu v. Tata Oil Mills Co., (1983) 52 S.T.C. 328. These two cases are reported in the same page.
Court in another case, Sterling Foods v. State of Karnataka. The Court held that frozen shrimps, prawns and lobsters are commercially regarded the same commodity as raw shrimps, prawns, and lobsters. Cutting of head and tail, peeling, deveining, cleaning and freezing did not alter the nature of the goods. The Court formulated the test for determining whether the processing alters the original character and identity of the goods. The test is whether the processed commodity is regarded in the trade by those who deal in it as distinct in identity from the original one or is regarded the same as the original. The Court said:

"With each process suffered, the original commodity experiences change. But it is only when the change or a series of changes take the commodity, to the point where commercially it can no longer be regarded as the original commodity, but instead is recognised as a new and distinct commodity that it can be said that a new commodity, distinct from the original has come into being".

This decision has been followed in Canara Exports v. State of Karnataka. In Shiphy International also the same view was reiterated. The test of commercial parlance applied by the
Court for deciding the question whether the processing amounts to manufacturing resulting in a change of identity of the goods is quite apposite.

While it appears that the controversy on eligibility for exemption of purchase tax on marine products has been satisfactorily adjudicated by the Supreme Court\textsuperscript{47}, the dispute in regard to the claim of exemption in the case of purchase of cashew-nuts by an exporter for exporting kernel after processing it in factory is awaiting adjudication by the Supreme Court.

The question whether cashewnut and its kernel are two different commercial commodities came up for adjudication before the Andhra Pradesh High Court in Malabar Cashewnuts and Allied Products\textsuperscript{48}. The assessee was an exporter of cashew kernel. He purchased raw cashewnut in the State of Andhra Pradesh. After processing them in the factory he exported the kernel to countries outside India. The purchase turnover of cashew was subjected to tax under the local Act. The claim for exemption on the ground that the raw cashewnut was purchased in the State solely for the purpose of complying with the agreement entered

\textsuperscript{47} See supra, nn.43,45,46.
into with foreign buyers for sale of cashew kernel and that the transaction should be exempted since cashew nut and kernel were the same commodity was rejected by the sales tax authority. The High Court, however accepted the contention of the assessee following an earlier ruling of the same court in Singh Trading Co., though in a different context. In that case it was held that though cashew kernel is taken out by drying of cashew nut and breaking open the shell of the nut and that involves a certain process, still it could not be said that cashew nut and kernel are two different commercial commodities. Cashew nut is subjected to that kind of process only to make the kernel usable.

The Madras and Kerala High Courts have disagreed with this view. According to these courts when cashew nut was subjected to the process, whether manually or mechanically, the product which came out of it was different commercially. However the Madras High Court decision is pending in appeal before the Supreme Court.

52. Dinod Cashew Corporation v. Deputy Commercial Tax Officer, (1986) 61 S.T.C. 1 (Mad.).
53. Justice Anjaneyulu observes in Malabar Cashew Nuts and Allied Products v. State of A.P., (1988) 68 S.T.C. 269 (A.P.) at 273: "It is submitted that the Madras High Court's decision is the subject-matter of appeal before the Supreme Court".

and its kernel are the same commercial commodity remains unsettled. A decision by the Supreme Court that cashew nut and cashew kernel are one and the same commodity and that the identity remains the same even after the processing would be one in tune with the purpose of enactment of the provision. Such a decision will serve the cause of our export trade better.

When an exporter purchases pepper and after a process of garbling, exports it, is the exemption available under Section 5(3) of the Act? It was contented on behalf of the Revenue in Sheth Brothers⁵⁴ that it was not a purchase in the course of export falling under the exemption clause. It was argued by the State that the goods exported were not the same goods purchased by the exporter. No doubt the purchase by the exporter in the context of Section 5(3) is a purchase occasioning the export. The question was decided by the Kerala High Court against the revenue. The Court rightly held that merely because pepper purchased was subject to a process of cleaning and making it presentable for the export market the identity of the goods did not change. By a process of garbling, pepper did not undergo a process which changed its character so as to render it a different commercial commodity. What was purchased by the exporter and what was sold by him was pepper. Garbling involves only a work incidental to export such as stone-picking,

⁵⁴ Deputy Commissioner of Sales Tax v. Sheth Bros., (1983) 52 S.T.C. 40 (Ker.).
dust removing, washing, drying, oil polishing, grading and packing. The States take up the position that such processes change the identity of the goods with a view to impose tax on the transaction. Obviously, States have no interest or concern in the export trade. The State wants to squeeze the last drop of revenue by way of tax from the dealer. It has least consideration for lessening the tax burden in order to provide exhilaration to the exporter. The State, it appears, sees the earning of foreign exchange as exclusively the responsibility of the Centre. A change in the attitude of the State is necessary. Some practical steps should be adopted to achieve this.

The denial of exemption to penultimate transactions of goods which are exported appears to be illogical in the context of the obvious legislative intention to boost export trade. The purpose of boosting the export will be better served by exempting all sales to exporters. The denial of exemption on the ground that the goods purchased are processed or manufactured or packed to make it exportable, and therefore, they are not the same goods, is unjustifiable.

Export trade would in the ultimate analysis generate more revenue. The foreign exchange earned by export trade could be used for developmental and productive purposes which would undoubtedly produce more tax bases and would generate more revenue. There may be loss of revenue to a particular
State at a given time by not taxing a sale involved in export. But such loss will be compensated when more and more industrialisation is rendered possible by import of raw materials, and machinery using the foreign exchange earned as a result of export. Subsidiary industries may also grow up widening the scope of employment as also the tax base. Tax reduction or cut will inspire manufacturing and productive endeavours. Imposition of heavy taxes may not always result in more revenue.\textsuperscript{55} It may, on the other hand, generate a tendency for evasion.\textsuperscript{56} The loss incurred by the State on account of exemption given to export oriented sales should be reimbursed to the State by the Central Government in proportion to the quantum of export made from each State. Such a measure has an added advantage. States will cooperate more with the Centre in promoting export.

The legislative attempt in mid-seventies extending the tax exemption to limited spheres of export trade has misfired. The amendment was too efficacious to achieve the desired goal. Ambiguous and half-baked, the law had the provision hedged in by limitations. In setting the law in the right direction, the Supreme Court had a tremendous opportunity which it did not make the most of. Instead of accelerating the goal-oriented justice, the Court applied a break, and caused setback to export trade.

\textsuperscript{55} See, N.A. Palkhivala, \textit{We, the People}, p.92 (1984).