PART II
EXPORT AND IMPORT
The Constitution places some restrictions on the power of the State to levy tax on sale or purchase of goods. One of them is that no State shall levy tax on sale or purchase of goods taking place in the course of export or import. The power to levy customs duty on import and export is conferred on the Union. It can make laws in respect of trade and commerce with foreign countries and import and export. The power to define customs frontiers is also within the legislative sphere of the Centre. Comprehensive legislative power in respect of international trade and commerce is thus conferred exclusively on the Union.

1. Constitution of India, Article 286(1)(b). For the text see Appendix A.
2. Article 246 read with Entry 83 of List I in the Seventh Schedule to the Constitution. Article 246(1) confers on Parliament exclusive power to make laws in respect of matters enumerated in List I in the Seventh Schedule. Entry 83 in List I reads, "Duties of customs including export duties".
3. Constitution of India, Seventh Schedule, List I, Entry 41. It reads: "Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers".
4. Ibid.
The Constitutional prohibition is against levy of tax by the State\textsuperscript{6} in respect of sale or purchase in the course of export or import; a sale or purchase before the beginning of the 'course' of export is not therefore exempt from levy of tax. Same is the case with a sale or purchase after the 'course' of import. When does the 'course' of export or import begin? When does it end?

Every journey has a starting point and a terminus. Movement of goods in the 'course' of export or import also should have the same features. Does the course of export or import begin when the goods start their journey and end when they reach the destination? In other words, does the 'course' of export begin only when the goods start moving from India to a foreign destination and end when it reaches the destination? Similarly, does 'the course of import' begin on movement of the goods from a foreign country and end when they reach the Indian destination?

If the answers to the above questions are in the affirmative, certain consequences follow. A sale or purchase which itself occasions such movement of goods will not be within the sphere of exemption. Only a sale or purchase effected after the movement of the goods from one country to another will fall within the exemption, this being a sale or purchase in the course

\textsuperscript{6} See supra, n.1.
of export or import. Suppose a merchant in Cochin sells his goods to one in London and exports the goods to London in fulfilment of the contract of sale. On the proposition raised above, the sale will not be one in the course of export. This is so because it is a sale or purchase which 'causes' the movement. It is one 'before' the movement of goods and hence is not one 'during' such movement. Therefore it will not be a sale 'in the course of' export. The State in which the sale took place can then tax the transaction because there is a sale completed within the State and the export journey begins only after the sale.

Such a position will create some difficulties. Taxation of the goods at points prior to their movement to a foreign country brings about multiple tax burden on the exported goods. When States begin to tax sales involved in respect of goods exported, foreign commerce ceases to be a matter under the exclusive control of the Union. The Union may not then be able to regulate the tax burden on goods so as to give proper incentives to international trading in them. The policy of export promotion may not materialise when heavy tax burden imposed by States impede foreign trade.

7. The power to levy tax on sale or purchase of goods within the State is vested in States. See, Constitution of India, Seventh Schedule, List II, Entry 54.
With what objective was the Constitutional prohibition enacted? Was it to avoid taxation by the State and to leave 'foreign commerce' entirely at the hands of the Union? What considerations persuaded the framers of the Constitution to exempt sale and purchase of goods in the course of export and import from being taxed? Which sale and purchase were so sought to be exempted? A look at the history of enactment of the prohibitory provision in the Constitution is worthwhile in this context.

The Constitution as drafted first for the consideration of the Constituent Assembly contained no restriction on the power of the State to tax sale or purchase of goods exported or imported. A provision was proposed to be incorporated in the draft by the Central Ministry of Finance. This sought to prohibit levy of tax by a State in two circumstances. One was when the sale or purchase takes place in the course of import of the goods into the territory of India. The other was in respect

8. Supra, n.1.
10. Ibid. The relevant portion of the draft Article read: "246A. Restrictions regarding taxes on sale or purchase of goods: (1) No law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of goods where under the general law relating to sale of goods such sale or purchase--
(a) takes place in the course of import of the goods into the territory of India; or
(b) is the last sale or purchase effected in India with a view to the export of the goods out of the territory of India; or
(c) ...."
of the last sale or purchase effected in India with a view to exporting the goods out of the territory of India. It is interesting to note the differences in the languages used. The expression 'in the course of' was confined to the context of taxation of imported goods. For exempting from tax the goods exported the expression used was 'with a view to export'. What do these expressions mean? To claim exemption from taxation a sale or purchase has to be a sale or purchase in the course of import. What constituted a sale or purchase in the course of import was a point not clear and hence debatable. But in the context of export the provision in the draft was quite clear. The sale or purchase, as the case may be, to qualify for the exemption should be the last sale or purchase effected in India with a view to exporting the goods out of the territory of India. The sale to a person for export and the purchase by him for export were sought to be brought within the coverage of the prohibition so that they could not be taxed by the State. In other words, the sale or purchase immediately preceding the export qualified for exemption.

It appears that the provisions in the draft Article had two objectives. The Government of India thought that the power to levy tax on sale or purchase of goods should be vested in the Provinces. But it was also thought that the power should not be absolute and should be exercised by the Provinces in such

11. Ibid.
a way as not to conflict with the policy of the Central Government in relation to business and industrial matters. The draft Article aimed, on the one hand, at imposing minimum restriction to safeguard the policy of the Central Government in regard to industrial development, and, on the other, securing uniformity between provinces in the matter of imposition of tax.12

When the draft Article was discussed in a conference with the Provincial Premiers13 the need for changing the text was put forward by some of them. It was then agreed that the Provincial Premiers should send draft amendments to Article 264A which they desired to make and the matter would be reconsidered.14

The Government of West Bengal felt that the exemption of last sale or purchase effected in India 'with a view to the export of the goods' was administratively unworkable and was very vague. It expressed the view that to qualify for exemption actual export of the goods outside India must be established and the draft should be so amended to prevent provinces from taxing goods exported. The draft Article prepared by the Government of West Bengal sought to prevent States from taxing sale or purchase of goods actually exported.15

13. The Drafting Committee had discussion with the Premiers of the Provinces and certain others. Id. at 683.
14. Id. at 700.
15. Id. at 712-713. The relevant portion of the draft prepared by the Government of West Bengal read: "264 A(1)--No law of a State shall impose or authorise the imposition of, a tax on the sale or purchase of goods shown, to the satisfaction of an authority appointed by or under such law, to have been dispatched by or on behalf of the 'seller or the purchaser, according as the tax is on the sale or the purchase of the goods to an address--(i), (ii) outside India".
The Government of Bihar also felt that it would be administratively difficult to ascertain whether or not the goods were purchased with a view to exporting or for local sale. An exporter of goods might carry on business in the same goods in the Provinces. In that case it becomes difficult to ascertain the intention behind the purchase of goods. It was pointed out that the draft by the Ministry of Finance was defective in other ways too. It would enable levy of multiple tax except on the last stage, in respect of the goods exported. It affected adversely those Provinces which levied single point tax at the last stage. The amendment proposed by the Bihar Government provided for exemption of the sale of goods despatched by or on behalf of a dealer to any place outside India.16

The Government of Madras was of the view that the sale or purchase preceding the export sale should not qualify for exemption. In its view the exemption should apply only to the sale taking place when goods are exported. In other words, only export sale should qualify for exemption. The words 'in the course of import' in the draft17 was taken to refer only to the purchase involved in the import. The draft suggested by the Government of Madras therefore sought to exempt export sale and import purchase.18

16. Id. at 716.
17. Article 264 A(1)(b), supra, n.10.
18. The relevant portion of the draft suggested by the Government of Madras read, "264A. No law of a State shall impose or a authorised the imposition of a tax on the sale or purchase of goods where under the general law relating to sale of goods such sale or purchase--(a).... (b) takes place when goods are imported into the territory of India, or (c) takes place when goods are exported out of the territory of India...." Shiva Rao, op.cit., p.721.
The Government of Bombay wanted the exemption to cover all points of taxation preceding the export. The draft prepared by that Government sought to exempt taxation of sale or purchase at all points preceding export of goods outside India.19

The Government of United Provinces also felt that the expression 'with a view to the export' in the draft was vague and hence likely to be misused. It was therefore proposed that the exemption should be available on the sale or purchase of goods sold with a view to export only when the goods are so exported.

Amidst the conglomeration of claims and counter-claims from Provinces, the draft proposed by the Ministry of Finance was modified. The modified draft sought to prohibit States from imposing tax on the sale or purchase of goods where such sale or purchase took place in the course of import of the goods into, or export of the goods out of, the territory of India.20 It sought to prohibit taxation of exports and

19. The relevant portion of the draft prepared by the Government of Bombay read: "264 A(1). No law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods which are shown to the satisfaction of the appropriate authorities of the State concerned to have been despatched--(i) to any place outside the territory of India...." Id.at 723.
20. C.A.D., Vol.X, p.325. The relevant portion of the Article accepted on 16th October 1949 read: "264 A(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).... (b) in the course of the import of the goods into, or export of the goods out of the territory of India...".
imports by the States. The attempt was only to prohibit levy of tax on the sale or purchase involved in the export and import. This was made clear by Ambedkar when he moved the draft Article before the Constituent Assembly. He said:

"The first thing that I would like to point out to the House is that there are certain provisions in this Article 264 A which are merely reproduction of the different parts of the Constitution. For instance, in sub-clause (1) of Article 264 A as proposed by me sub-clause (b) is merely a reproduction of the Article contained in the Constitution, the entry in the Legislative List that taxation of imports and exports shall be the exclusive province of the Central Government".

A.K. Ghosh, participating in the debate in the Constituent Assembly pointed out that the expression 'in the course of export' will create problems. There may be many transactions of sale and purchase before a commodity is exported. All these sales and purchases will be exempt under the revised draft. There will be difficulty in ascertaining the nature of such transactions. He emphasised that the term 'export' should be

21. Ibid.
22. Id. at 326. For the provisions referred, see, Constitution of India, Article 246(1) read with Entry 83 of List I in the Seventh Schedule. See supra, n.2.
23. He cited this example: "A buys a commodity saying that he will export it. But he does not export it, but, sells to B, and B purchases it saying that he will export it, and in this manner the commodity passes on from one hand to other and from one province to another without payment of any tax, and it may be that in the end it is not exported at all. How can you check up this process? There will be a lot of difficulty and confusion if this clause is passed as it stands". See, C.A.D., Vol.X, p.333.
defined to mean the last transaction of sale and 'import' to mean the first transaction of purchase and that the exemption should operate only at these two points. 24

Commenting on the criticisms levelled against the expressions 'in the course of export' and 'in the course of import' and the amendments moved, Ambedkar said that the phraseology was considered very carefully by the Drafting Committee. He pointed out that the Committee was of the view that the phrase was as good as any other that could be invented. He, however, said that the Drafting Committee would further examine this matter to see whether any other expression would be more appropriate. 25 No change in the phraseology was however, made subsequently. This provision remained in the same form in which it was moved by Ambedkar, put to vote and adopted as part of the Constitution. 26 While the Articles in the draft Constitution were renumbered, Article 264 A became Article 286. Article 264 A(1)(b) thus became Article 286(1)(b).

It is clear that the Constituent Assembly had the apprehension that transactions other than export sale and import

24. Ibid.
25. Ambedkar said: "There is only one point, I think, about which I like to say a word. There are, I know, some friends who do not like the phraseology...The Drafting Committee...are satisfied that the phraseology is as good as could be invented. But I am prepared to say that the Drafting Committee will further examine this particular phraseology...." Id. at 340.
26. Id. at 341.
purchase may be exempted under the phraseology 'in the course of' and that the obvious intention behind the restriction was only to keep the power of taxing international trade within the domain of the Centre. This is evident from the speech of Ambedkar introducing the draft Article before the Constituent Assembly\textsuperscript{27}, the trend of the criticism against the phrase in the draft and the reply given by Ambedkar to the criticism.\textsuperscript{28}

The apprehension about the phraseology 'in the course of' turned out to be true. As the terms 'export' and 'import' were not defined in the context of the phrase 'in the course of' courts were flooded with litigation. Views of different shades were canvassed for judicial acceptance. When the legislative text is vague, judicial interpretation gives the law proper shape and direction.\textsuperscript{29} The law on the scope of exemption of sales and purchases of goods involved in export and import thus centered round judicial interpretation of the phrases 'in the course of export' and 'in the course of import'.

The judicial process at the appellate level, especially while interpreting the Constitution, is not merely one of finding

\textsuperscript{27} See supra, n.22.
\textsuperscript{28} Supra, n.25.
\textsuperscript{29} Considerable case law has developed on the phrase 'in the course of' when the expression is used in other contexts. For instance Workmen's Compensation Act 1923, Section 3 and the case law. See S.C.Srivastava, Social Security and Labour Laws, pp.76-84, (1985).
the legislative intention but one of giving the skeleton provision flesh and blood and making it strong to meet the needs of the time. No wonder that the provisions are interpreted not completely in conformity with the original legislative intention as disclosed in the Constituent Assembly Debates.

The scope of the expression 'in the course of' appearing in Article 286 of the Constitution came up for the interpretation of the Supreme Court in the First Travancore case.30 The assessee exported on c.i.f.31 and f.o.b.32 terms cashew kernel manufactured in Travancore-Cochin from cashew nut imported from East Africa. Exemption was claimed in respect of such sale on the ground that the sale took place in the course


31. Under c.i.f. contract, the price the buyer has to pay covers the cost of the goods, the charges for insurance of the goods during transit and the freight to the port of destination. The seller tenders the shipping documents namely the bill of lading, policy of insurance and the invoice to the buyer. The essential feature of a c.i.f. contract is that the requirement of delivery of goods to the buyer is satisfied by delivery of the documents. The buyer cannot insist on physical delivery of goods. If goods are lost in transit or are damaged the buyer has his remedy against the insurer or the shipper. See, David M. Sassoon and H. Orren Merren, British Shipping Laws, C.I.F. and F.O.B. Contracts, pp.3 and 4, (1964).

32. Under f.o.b. contract the seller meets the costs and bears the responsibility of putting the goods free on board. When the goods pass the ship's rail, the delivery is complete and the risk passes to the buyer. In other words, the seller's duty is to make available free on board, without any expense to the buyer, goods answering the description in the contract of sale. The buyer has to advise the seller in which ship to load and make other arrangements for the transport of the goods. Id. at 331-334.
of export. The State contended that the sale was completed before the export of the goods. Taking the view that the sale cannot therefore be considered as in the course of export, the State levied tax on the transaction.

The levy was challenged by the assessee. The High Court of Travancore-Cochin did not accept the plea of the State. It gave a wide interpretation of the term 'in the course of' appearing in Article 286. The High Court said:

"The words 'in the course of' make the scope of this clause very wide. It is not restricted to the point of time at which goods are imported into or exported from India. The series of transactions which necessarily precede export or import of goods will come within the purview of this clause. Therefore, while in the course of that series of transactions the sale has taken place, such sale is exempted from the levy of sales tax".33

In holding so the High Court made a reference to the Constituent Assembly Debates to ascertain the true scope of the expression 'in the course of export' and gave it a wide interpretation to cover series of sales preceding the export. Chief Justice Kunhi Raman referred to the speeches of Ambedkar winding up the discussion34 and of A.K.Ghosh pointing out the confusion

34. Supra, n.25.
that is likely to arise about the meaning of the term 'in the course of export'. The Chief Justice pointed out the fact that the amendment moved to restrict the exemption to the last sale or first purchase (export sale and import purchase) was not accepted by the Constituent Assembly. Though Ambedkar had given an assurance that if better phraseology was found to be necessary he would see that the wording was altered, no such alteration was made. These circumstances therefore pointed out, in the opinion of Chief Justice Kunhi Raman, that the framers thought that the words 'in the course of' would convey the meaning they intended to convey namely, that not only the last sale but other sales also involved in the series of transactions preceding the export did qualify for exemption.

It may be noted however, that the intention of the Constituent Assembly was not so clearly expressed in the deliberations on the lines suggested by Chief Justice Kunhi Raman. On the other hand the deliberations seemed to suggest an intention to restrict it to the export sale and import purchase.

35. A.K. Ghosh commenting on Article 264 A(1)(b) said: "In all cases of export, there are various transactions before the commodity is actually exported from the country. But under this clause, all these transactions—the intermediate transactions which take place—are exempted from sales tax. I could have understood the position if it was that at the point of export, that is to say, the last transaction, where from it is actually exported, the sales tax will not be realisable at that point". Id. at 333.
The amendment moved by Ambedkar was considered sufficient to serve this purpose, as is clear from his clarifications and the willingness to modify the phrase\textsuperscript{36} 'in the course of' to avoid the criticism of the possibility of its wider interpretation.

On appeal by the State, the following different views on the scope of the expression were considered by the Supreme Court:\textsuperscript{37}

The exemption may cover sale by export and purchase by import. The scope of the expression 'in the course of' is limited to sale or purchase which occasions the export or import. It does not extend to any other sale or purchase, however directly it may be connected with the export or import.

Besides the actual export to import, the exemption may cover the purchase by the exporter for the purpose of export and also sale by the importer after the import. In other words, the exemption covers also the last purchase by the exporter and the first sale by the importer. These transactions are so proximately and directly connected with the export or import as to form part of the same transaction and hence fall within the scope of the expression 'in the course of' import or export.

The exemption may cover only sale or purchase effected when the goods are in transit to the foreign destination. In

\begin{footnotes}
\item[36] Supra, n.25.
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other words 'in the course of' mean only sale or purchase after the goods begin their movement from one country to the other and before they reach the destination.

On a wider view, the exemption may cover all sales and purchases taking place in the series of transactions finally resulting in export or import.

The wider view which was accepted by the High Court received no approbation at the hands of the Supreme Court. The Court also disapproved the narrow view that a sale or purchase taking place in the course of the movement of the goods from one country to the other alone qualifies for exemption.38

The Supreme Court did not in the First Travancore case39 deal with the question of the scope of the exemption of sale or purchase in the course of export and import in the abstract, but confined itself to the facts of the case. It held that the transaction of the first type mentioned above involved in the case, namely, export sale will be covered by the exemption. The sale had to be put through by transporting the goods out of the territory of India employing the machinery of export. It was held that the sale therefore qualified for exemption.

38. Id. at 368.  
39. Supra, n.37.
Chief Justice Patanjali Sastri observed:

"A sale by export thus involves a series of integrated activities commencing from the agreement of sale with delivery of goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated and the sale and the resultant export form parts of a single transaction....We accordingly hold that whatever else may or may not fall within Article 286(1)(b), sales and purchases which themselves occasion the export or the import of the goods, as the case may be, out of or into the territory of India come within the exemption..."

The Court obviously did not examine the other proposition whether sales preceding the export or sales and purchases for export or local sales of imported goods by the importer qualify for exemption from levy of sales tax.

In arriving at its conclusion the Supreme Court made a literal construction of the provision. It did not look at the Constituent Assembly debates. Will sales of other nature

40. Id. at 367-368.
41. Ibid. This was made clear by the words "Whatever else may or may not fall within Art.286(1)(b)..."
42. Extrinsic aids like Constituent Assembly Debates were not to be used for construction of statutes according to the view prevalent at that time. But the notion has changed since. The changed notion is reflected in the following observations: "We may, therefore legitimately refer to the Constituent Assembly Debates for the purpose of ascertaining what was the object which the Constitution makes had in view and what was the purpose which they intended to achieve..." Faqu Shaw v. State of West Bengal, A.I.R.1974 S.C.613 at 629 per Bhagavati, J. See also G.P. Singh, Principles of Statutory Interpretation, p.183, (1983).
be exempt? This question was left open. The apprehension expressed by some of the members of the Constituent Assembly on the possibility of a wider coverage for the expression 'in the course of export or import' still continued.

The scope of the provision for exemption again came up before the Supreme Court in the Second Travancore case. Under the Travancore-Cochin General Sales Tax raw cashew and its kernel were subjected to tax at the purchase point. A cashew factory located in the erstwhile Travancore-Cochin State imported cashewnut from East Africa. Cashewnut was purchased also locally and from the neighbouring State of Madras. The nuts were processed in the factory and the processed nuts and oil were exported to foreign countries. The sales tax authorities levied tax on these purchases under the Travancore-Cochin General Sales Tax Act.

43. See for example the speech of A.K. Ghosh, supra, n.35.
44. State of Travancore-Cochin v. Shanmuga Vilas Cashewnut Factory, A.I.R. 1953 S.C. 333. This case involved appeals from the decision of the High Court of Travancore-Cochin. The appeals, though heard originally along with other appeals involved in the First Travancore case (supra, n.30) were later remitted to the High Court for further finding in respect of certain material facts relating to the business of the cashew dealers. The other appeals were disposed of in the First Travancore case (supra, n.30).
45. Travancore-Cochin General Sales Tax Act, 1124 (M.E.), Section 3(4).
46. The purchase of cashew from abroad fell into two categories. In one sort of transactions commission agent at Bombay purchased the goods while the goods were in transit in the high seas as agent of the factory. In the other set of transactions the agent at Bombay purchased the goods in their own name while the goods were in transit, took delivery of the goods at Cochin and then sold them to the factory.
The question for consideration before the Supreme Court in the *Second Travancore* case was the validity of the levy of tax on purchase of cashew by the assessee. The issue involved was whether the purchases were exempted from levy of tax by the State by virtue of Article 286(1)(b) of the Constitution. The purchases fell into three categories: namely, (1) goods purchased from local vendors, (2) goods purchased through commission agent at Bombay when the goods were on the high seas and (3) goods imported by commission agents and purchased in the State of Travancore-Cochin by the factory. The first and the third categories of purchases were those made in the State. The second category was of purchase while the goods were in transit in the high seas. All the three categories of purchases were made with a view to exporting the goods after processing. An exporter may purchase goods for the purpose of exporting them to implement orders received or expected to be received. An importer may sell goods imported in accordance with the contract pursuant to which the goods were imported. Sales or purchase may be effected between parties within the State by transfer of shipping documents while the goods are in transit from one country to another. Will these transactions fall within the coverage of the constitutional exemption? These were the points of law posed before the Supreme Court for decision in the *Second Travancore* case.

47. Suora, n.44.
48. See n.46.
49. Ibid.
50. Suora, n.44.
The question of exemption of sale or purchase made while the goods are on the high seas was not expressly considered by the Constituent Assembly while formulating the provision for exemption.

The Supreme Court held that purchase of goods by the exporter for the purpose of export did not qualify for exemption. The sale by the importer to implement orders already received or expected to be received also did not come within the constitutional exemption. The Court pointed out that the prohibition was not on taxation of goods exported or imported. The expression 'in the course of' in the context of export or import implied both a period of time during which the movement is in progress and also a connected relation with the export or import.51 A sale in the course of export was therefore held to mean a sale taking place during the activities connected with the export and as part of such activities. A purchase for

51. State of Travancore-Cochin v. Shanmughavilas Cashewnut Factory, A.I.R. 1953 S.C. 333. Chief Justice Patanjali Sastri observed at p.336: "It is obvious that the words 'import into' and 'export out of' in this context do not mean the article or commodity imported or exported. The reference to 'the goods' and 'to the territory of India' makes it clear that the words 'export out of' and 'import into' mean the exportation out of the country and importation into the country respectively. The word 'course' etymologically denotes movement from one point to another and the expression 'in the course of' not only implies a period of time during the movement is in progress but postulates also a connected relation".
the purpose of export is not integrally connected with the export. The purchase by itself does not occasion the export. A sale to the foreign buyer occasions the export. It is that sale in the Court's view, which comes within the purview of exemption from levy of tax by States. Sale to or purchase by the exporter as also purchase by a dealer for sale to an exporter is not exempted from taxation.52

By holding so the Court did apply the intention of the framers of the Constitution to limit the exemption to one sale or purchase, namely, export sale or import purchase. Should the original intention as reflected in the Constituent Assembly debates govern the scope of the exemption for ever? One may disagree. The Constitution is a living document. Its provisions should be interpreted not too rigidly. Constitutional interpretation should involve a process of evolving the law through adaptation of the norms to the changing needs of the time. The Travancore cases53 were decided three and a half decades ago shortly after the coming into force of the Constitution. In those early days the Supreme Court might have

52. The Court said: "A purchase for the purpose of export like the production or manufacture for export, is only an act preparatory to export and cannot, in our opinion, be regarded as an act done 'in the course of' the export of the goods out of the territory of India..." Ibid.
53. Supra, n.30
legitimately, in tune with the intention of the Constituent Assembly, limited the purpose of the prohibition with a view to avoiding double taxation of the foreign trade, i.e., taxation of the same transaction by the Union and States.

The holding in the Second Travancore case, a close analysis would reveal, went beyond that. Apart from the transaction of sale and purchase between the exporter and importer in different countries which occasion the movement of goods from one country to another, a different category of sale and purchase was brought within the exemption. The transactions of import involved in the Second Travancore case were not one of direct purchase of goods by the factory from a foreign seller. The purchases were made through agents, while the goods were on the high seas, by transfer of documents of title. The movement of goods from one country to another was not occasioned by the purchase; instead the purchase was made during such movements. Thus an extension of the scope of the exemption from the narrow confines of a sale occasioning the export or import contemplated by the Constituent Assembly was brought about in the Second Travancore case.

When an exporter purchases goods for export or when an importer sells goods after import there is no question of

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54. Supra, n.44.
55. Ibid.
56. Ibid.
levy of duty on export or import. Will a policy of taxing such sale or purchase be against national interest? Export-import trade is essential for energising the economic activities of the country. On the one side the revenue interest of the States has to be protected. On the other side we have to boost the export to earn foreign exchange and to make available imported goods at a reasonable price in order to augment industrial adventures. These two competing interests of the nation have to be balanced in formulating the system of taxation of sale or purchase of goods involved in export and import. That is a major policy question involved in deciding the scope of exemption.

Looked at from this perspective it becomes obvious that there is need for reformation of the scope of the exemption in tune with changing times to keep a proper balance between competing claims. Clearly the law should not therefore be confined to the same narrow limits of the legislative intention behind the exemption provision reflected in the Constituent Assembly Debates or even to the limited extension of the scope of the exemption brought about in the Second Travancore case.\textsuperscript{57}

The Court had no hesitation to declare that the sale or purchase effected by transfer of documents of title while

\textsuperscript{57} Ibid.
the goods are on the high seas, qualifies for exemption.\textsuperscript{58} One cannot say that these sales or purchases occasion the export, or, the import, as the case may be. A series of sales or purchase could be effected by transfer of documents of title while the goods are in transit. These sales or purchases are effected during a course of time while the goods are being exported or imported. The sale or purchase does not have a relation with the export or import as a causative factor thereof. To put it differently, the sale or purchase is effected during export or import, but not as part of the export or import. The test formulated in the \textit{First Travancore case}\textsuperscript{59}, obviously, does not suit to a sale effected while the goods are in transit. Such a sale has absolutely no causal connection with the export or import.\textsuperscript{60} Nonetheless, in order to substantiate its decision, the Court found a new line of reasoning. It observed that the process of export-import did not commence or terminate until the goods crossed the customs frontiers. So while the goods are on the high seas the goods are in the course of export. The term 'in the course of' implies a movement or progress with a beginning and an end. The transit sales or purchases are the sales and purchases effected after the beginning and before the end of such movements. They are regarded commercially as incident to the

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\item \textsuperscript{58} Supra, n.56.
\item \textsuperscript{59} Supra, n.40.
\item \textsuperscript{60} Supra, n.51.
\end{itemize}
import and export. They fell according to the Court within the constitutional protection. It is pertinent to note here that the question of imposing sales tax on transit sales while the goods are pursuing their export journey to a foreign country would not arise in practice. Once the sale is concluded the shipping documents are transferred to the foreign buyer. Therefore there would not be any further sale of such goods by the exporter in India. On the other hand, in the case of import to India, the importer can sell the goods in India while the goods are still on the high seas. According to the holding of the Court such sale could be regarded commercially as incident to the import and will be exempt from taxation by the State.

The extension of the exemption on application of the theory of incidence was limited by the Court to sale or purchase while goods are in transit from one country to the other. Why not the exemption be extended to purchase for export and to sale after the import on the same theory of incidence? Purchase is a necessary incident of export. One may export goods purchased after subjecting them to a process of manufacture. In both the cases the purchase has a close connection with export. But the Court expressed the view that such transaction is not an integral part of export and therefore is not 'in the course of export'. If the theory of incidence were extended to such purchases the result would have been totally different. So is the case with sale after import.
Clearly, therefore, in the *Travancore* cases\(^6\) the Court adopted an attitude of widening the dimension of exemption of sale and purchases involved in export and import from the narrow confines set by the framers of the Constitution. At the same time the attitude reflected a conservative approach of limiting the exemption to two categories namely, to sale and purchase between exporter and importer and to sale and purchase during the transit while the goods are on the high seas. In so restricting the scope of the prohibition of taxation, the Supreme Court seems to have failed to appreciate the commercial reality and significance of the transactions in the context of the need for fostering foreign trade. The letter of the law and the technical aspects of the law, overshadowed its functional role.

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