IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 14206 of 2018

With
R/SPECIAL CIVIL APPLICATION NO. 13405 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 13407 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 14207 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 15916 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 15917 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 20196 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

and
HONOURABLE MR.JUSTICE A.C. RAO

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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RELIANCE INDUSTRIES LTD. & 1 other(s)
Versus
STATE OF GUJARAT & 2 other(s)

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Appearance:
MR SN SOPARKAR SENIOR COUNSEL WITH MR UCHIT N SHETH(7336) for the Petitioner(s) No. 1,2
MR KAMAL TRIVEDI, ADVOCATE GENERAL WITH MR VINAY VISHEN AGP(1) for the Respondent(s) No. 1,2,3
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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR.JUSTICE A.C. RAO

Date : 16/04/2020

COMMON CAV JUDGMENT

(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. Since the issues raised in all the captioned writ applications are the same, those were heard analogously and are being disposed of by this common judgment and order.

2. For the sake of convenience, the Special Civil Application No.14206 of 2018 is treated as the lead matter.

3. By this writ application under Article 226 of the Constitution of India, the writ applicant, a Public Limited Company, engaged in the manufacture and sale of Petrochemicals, has prayed for the following reliefs;

> *"(A) This Hon'ble Court may be pleased to issue a writ striking*
> *down and declaring Section 84A of the VAT Act as being ultra-vires and beyond the legislative competence of the State of Gujarat under Entry 54 of List II of the Seventh Schedule to the Constitution of India;*
>
> *(B) Without prejudice to the above and in the alternative this*
> *Hon'ble Court may be pleased to issue a writ striking down and declaring Section 84A of the VAT Act as being manifestly arbitrary, confiscatory and hence violating*

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Article 14 of the Constitution of India;

(C) Without prejudice to the above and in the alternative this Hon'ble Court may be pleased to issue a writ striking down and declaring Section 84A of the VAT Act in so far as it is introduced with retrospective effect from 1.4.2006 as being manifestly arbitrary, confiscatory and hence violating Article 14 of the Constitution of India;

(D) This Hon'ble Court may be pleased to issue writ of mandamus
or writ in the nature of mandamus or any other appropriate writ or order quashing and setting aside impugned notices dated 1.9.2018 (annexed at Annexure B and C).

(E) This Hon'ble Court may be pleased to hold that the impugned
notices issued by the learned Respondent No. 3 are wholly without jurisdiction, bad and illegal;.

(F) Pending notice, admission and final hearing of this petition,
this Hon'ble Court be pleased to restrain the learned Respondents from proceeding further pursuant to impugned notices annexed at Annexure B and C;

(G) Ex parte ad interim relief in terms of prayer F may kindly be granted'"

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2. Thus, the subject matter of challenge in all the writ applications is the constitutional validity of Section 84A of the Gujarat Value Added Tax Act, 2003 (for short "the GVAT Act"). The challenge to the constitutional validity is substantially on the ground that Section 84A of the GVAT Act is ultra vires and beyond the legislative competence of the State under Entry 54 of List II of the Seventh Schedule to the Constitution of India. The challenge to the validity is also on the ground that Section

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84A of the GVAT Act is arbitrary, unreasonable and, therefore, is violative of Article 14 of the Constitution of India.

3. The facts, giving rise to this litigation, may be summarized as under;

3.1 The Deputy Commissioner of Commercial Tax, Corporate-I, Ahmedabad passed an assessment order dated 23.12.2009 for the Financial Year 2006-07 against the writ applicant company by reversing the Input Tax Credit to the extent of 8% i.e. 4% under each of the provisions of Sections 11(3)(b)(ii) and 11(3)(b)(iii) of the GVAT Act.

3.2 The Joint Commissioner (Appeals), Baroda, being the First Appellate Authority, vide order dated 30.12.2010 dismissed the First Appeal filed by the Petitioner Company under Section 73 of the VAT Act, confirming the aforesaid order dated 23.12.2009.

3.3 On 26.04.2012, the Gujarat Vat Tribunal passed an order allowing the Second Appeal of the Petitioner Company, by quashing and setting aside both the above referred orders of the Sales Tax Authorities by holding, *inter alia*, that the First Appellate Authority had erred in confirming the Assessment Order for branch transfer and consignment adjustments wherein admissible Input Tax Credit was reduced twice, while applying both clauses (ii) as well as (iii) of Section 11(3)(b) of the VAT Act, resulting into reduction of the Input Tax Credit to the extent of 8% for purchases of furnace oil, natural gas and light diesel oil, as sub-clause (iii) of Section 11(3)(b) of the VAT Act is not applicable to consignment of branch transfer transactions.

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3.4 This Court, vide its judgment dated 18.1.2013 reported in 2013 SCC Online Guj. 8788 dismissed the appeal of the State Government filed against the aforesaid order of the VAT Tribunal, while holding inter alia, that the reduction of Input Tax Credit under Section 11(3)(b) would, in no case, exceed 4% on the ground that the limitation of availing of the tax credit as provided under Section 11(3)((b) could be applied only once irrespective of the fact as to whether particular commodity purchased falls in more than one sub-clauses of Section 11(3)(b) of the VAT Act.

3.5 On 30.03.2013, an Assessment Order came to be passed by the Deputy Commissioner of Commercial Tax, Ahmedabad for the F.Y. 2008-09 in the case of the petitioner Company, deciding the assessment proceedings for the said period as under in respect of the two different issues;

(I) As per the aforesaid judgment dated 18.01.2013 of this Court, rendered in the case of the petitioner Company with respect to the reduction of Input Tax Credit on natural gas used as raw material, the competent authority reduced the ITC of the Petitioner Company at the rate of 4%, instead of 8%, under the provisions of Section 11(3)(b) of the Act.

(ii) As per the decision dated 30.04.2010 of the Gujarat VAT Tribunal, rendered in the case of Welspun Gujarat Stahi Rohren Ltd., while considering the availment of sales tax incentive limit, under the provisions of Section 49(2) of the Gujarat Sales Tax Act, 1969 the tax paid by the assessee on purchases of goods used in manufacture of taxable goods exported outside the country was not to be included. In other words,

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according to the Tribunal, the said incentive limit cannot be curtailed by the said tax paid by the assessee.

3.6 In an appeal filed by the State against the aforesaid decision dated 30.04.2010 rendered by the Tribunal in the case of Welspun Gujarat Stahi Rohren Ltd., this Court vide its judgment dated 04.04.2014, nullified the findings and observations of the Tribunal and, *inter alia*, held that while considering the availment of sales tax incentive limit, the tax paid on the purchase of goods used in the manufacture of taxable goods exported outside the country is required to be considered.

3.7 in view of the aforesaid judgment dated 04.04.2014 of this Court rendered in the case of Welspun Gujarat (supra), the Additional Commissioner of Commercial Tax issued a revision dated 10.03.2018 under Section 75 of the VAT Act to the petitioners to show cause as to why the assessment order dated 30.03.2013, referred to above, at Sr. No.5 should not be revised so as to give effect to the aforesaid judgment of this Court in the case of Welspun Gujarat (supra) and thereby, reducing the sales tax incentive limit after considering the tax paid on purchases of the goods used in manufacture of taxable goods, exported outside the country.

3.8 The provisions of the Constitution (One Hundred and First Amendment) Act, 2016, came to be enacted, which came into force w.e.f. 01.07.2017.

3.9 On 20.09.2016, the Additional Commissioner of Commercial Tax passed an order and reduced the sales tax incentive, in case of the Petitioner Company, while considering

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the tax paid on the purchase of taxable goods used in the manufacture of taxable goods, exported outside the country.

3.10 On 01.07.2017, the legislations, i.e, the Gujarat Goods and Services Tax Act, 2017 and the Central Goods & Services Tax Act, 2017 came into force to levy tax on all the intra-state suppliers of goods or services or both.

3.11 Apropos the aforesaid Constitution (101st Amendment) Act, 2016, the Gujarat Value Added Tax Act, 2003 came to be substantially amended by way of substitution and deletion of many provisions thereof by virtue of the Gujarat Value Added Tax (Amendment) Act, 2017, which came into force w.e.f. 01.07.2017.

3.12 Meanwhile, the Supreme Court passed an order dated 22.09.2017 in an appeal filed by the State, setting aside the aforesaid judgment dated 18.01.2013 of this Court by holding, i*nter alia*, that the Input Tax Credit is required to be reduced twice. i.e, to the extent of total 8%, under sub clauses (ii) and (iii) of Section 11(3)(b) of the VAT Act , in such a way that the reduction should not exceed the amount of the Input Tax credit claimed. The said judgment of the Supreme Court was reported in (2017) 16 SCC 28.

3.13. In view of the aforesaid judgment of the Supreme Court, the Additional Commissioner of Commercial Tax issued a revision notice dated 03/06.11.2017 in Form 503 under Sections 75 of the Act to revise the Assessment Order for F.Y. 2008-09 made vide order dated 30.03.2013 (Sr. No.5 above), for reducing the Input Tax Credit to the extent of 8% under the provisions of Section 11(3)(b)(ii) and 11(3)(b)(iii) of the VAT Act

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in light of the judgment dated 22.09.2017 of the Supreme Court.

3.14 By an order dated 16.03.2018, this Court, while allowing the Special Civil Application No.22283 of 2018 filed by the petitioner, quashed and set aside the aforesaid revision notice issued by the department under Section 75 of the VAT Act on the ground that the said revision notice cannot be sustained being beyond the period of limitation provided under Section 75 of the VAT Act.

3.15 By virtue of the VAT Amendment Act, 2018, Section 84A came to be added in the VAT Act to be operative retrospectively w.e.f 01.04.2006, *inter alia*, providing for the exclusion of the period spent between the date of the decision of the appellate tribunal and that of the High Court as well as the Supreme Court in computing the period of limitation, referred to in Section 75 of the VAT Act. In the present case, the period commencing from the date of the decision of this Court dated 18.01.2013 rendered against the revenue upto the date of the decision of the Supreme Court i.e., 22.09.2017 being in favour of the revenue, is sought to be excluded by virtue of the above referred retrospective amendment to enable the department to issue a notice for revision for revising the assessment made for the year 2008-09 and thereby removing the basis of the later judgment dated 16.03.2018 of this Court (Sr. No.10 above).

3.16 in view of the above, on 01.09.2018, fresh notice for revision came to be issued by the Addl. Commissioner of Commercial Tax to the Petitioner on the basis of the above

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referred newly added Section 84A, for revising the assessment for the F.Y.2008-09 made vide order dated 30.03.2013 (at Sr. No.5 above) for reducing the Input Tax Credit to the extent of 8% under the provisions of Section 11(3)(b)(ii) and 11(3)(b)(iii) of the VAT Act in light of the judgment dated 22.09.2017 of the Supreme Court.

3.17 In the present case, the original period of limitation as provided under Section 75 of the VAT Act for issuing notice is of 3 years from the date of the assessment order i.e. 30.03.2013 which had lapsed on 30.03.2016. However, by virtue of the newly enacted Section 84A, the period spent from the date of the decision of the High Court is 18.01.2013 upto the date of the decision of the Supreme Court i.e. 22.09.2017 is to be excluded in computing the aforesaid period of three years, referred to under Section 75 of the Act.

3.18 In such circumstances, referred to above, the writ applicant seeks to challenge the constitutional validity of Section 84A of the GVAT Act as well as the revision notice dated 01.09.2018.

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Submissions on behalf of the writ applicant;

4. Mr. S.N.Soparkar, the learned senior counsel appearing with Mr. Uchit N. Sheth, the learned counsel appearing for the writ applicant vehemently submitted that Section 84A of the GVAT Act is without legislative competence and, therefore, is unconstitutional. Mr. Soparkar would submit that the constitution (101st Amendment) Act , 2016 introduced the Goods & Services Tax regime in India. It sought to replace all

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the indirect taxes, levied on the goods and services by the Union of India as well as the State Governments. It came to be a comprehensive indirect tax levy on manufacture,, sale or consumption of goods and services. The Act of 2016 inserted Articles 246A, 269A and 279A to the Constitution of India. It amended the provisions of Article 286 of the Constitution. It deleted Entry No.92 and 92C of List-I of the Seventh Schedule and inserted Entry 84 of List-I and Entry 54 of List-II of the Seventh Schedule. In tune with the constitutional amendments incorporated, the Central Goods & Services Tax Act, 2017, Integrated Goods and Services Tax Act, 2017 and the respective State Goods and Services Tax Act, 2017 were enacted. Mr. Soparkar further submitted that Article 246A of the Constitution of India makes the provision with respect to goods and services tax. It empowers the Parliament and the legislature of every State, subject to Article 246A(2) and notwithstanding anything contained in Articles 246 and 254, to make laws with respect to Goods and Services Tax imposed by the Union or the State. According to Mr. Soparkar, while the State Legislatures have been empowered to impose goods and service tax by the newly inserted Article 246A of the Constitution, the scope of Entry 54 has been drastically curtailed to six specific products. It is submitted that the State Legislature does not have the competence to enact any law under Entry 54 except the law concerning only the six specific products. It is vehemently submitted that despite such limited legislative competence, the State Legislature proceeded to enact Section 84A whereby the assessment related to the tax liability of all goods which were earlier covered under Entry 54 are now sought to be reopened. In other words, according to Mr. Soparkar, liability is sought to be imposed and enforced in

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respect of all goods though the competence of the Legislature is limited to the six products. In such circumstances, according to Mr. Soparkar, Section 84A of the Vat Act is beyond the legislative competence of the State Legislature.

5. According to Mr. Soparkar, the competence of the Legislature could be adjudged at the time of the enactment of the provision. If at the time of passing the law if the Legislature has the necessary competence, then such law can even be passed with retrospective effect covering the period when the Legislature did not have the competence. However, if at the time of the amendment, the Legislature does not have the competence, then the law cannot be enacted on the ground that the same is concerning the period when the Legislature had the necessary competence. In support of this submission, Mr. Soparkar seeks to rely on the decision of the Supreme Court in the case of ***A. Hajee Abdul Shukoor & Co. vs. State of Madras***, *(1964) 15 STC 719 (SC) (page 730)*.

6. Mr. Soparkar drew the attention of this Court to Section 19 of the Constitution Amendment Act. Drawing the attention of this Court to Section 19 of the Constitution Amendment Act, he submitted that it was provided in the Constitution Amendment Act that any legal provision inconsistent with the provisions of the unamended constitution shall continued to be in force until amended or repealed by a competent legislature or until expiration of one year from the commencement of the Constitution Amendment Act. In other words, even an existing statutory provision would automatically cease to exist latest by one year from the date of the commencement of the Constitution Amendment Act. In such circumstances, the State

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legislature definitely lacks the competence to make a new enactment such as Section 84A pertaining to the erstwhile entries of the State List.

7. Mr. Soparkar would submit that Section 84A of the VAT Act is not saved under Article 246A of the Constitution. He would submit that Article 246A of the Constitution was inserted by the 101st Constitution Amendment Act with the prime object of subsuming multiple indirect taxes and to confirm concurrent power upon the Parliament and State Legislature to impose "Goods & Services Tax' in accordance with the recommendations of the Goods & Services Tax Council constituted under Article 279A of the Constitution.

8. Mr. Soparkar would submit that if the State Legislature could be said to have the power to enact the Value Added Tax Laws under Article 246A of the Constitution, then the Entry 54 of List II of the Seventh Schedule to the Constitution which was retained to the extent of six products kept outside the GST regime, will be rendered redundant. The argument of the learned senior counsel is that the fact that Entry 54 of List II of the Seventh Schedule stands retained so far as the six products are concerned, indicates that the sales tax/value added tax enactment is not permissible under Article 246A of the Constitution. The learned senior counsel would submit that the stance of the State that Article 246A of the Constitution supports the enactment of the provision under the VAT Act flies in the face of the existence of Entry 54 of List II of the Seventh Schedule to the Constitution which survived the 101st Constitution Amendment Act.

9. Mr. Soparkar submitted that the case of the State that

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the impugned proceedings are one relating to the recovery towards one of the six products covered under Entry 54 of List II of the Seventh Schedule is contrary to the materials on record. It is submitted that the goods manufactured by the writ applicant are in the nature of petrochemicals and are not covered by Entry 54 of List II of the Seventh Schedule to the Constitution. It is submitted that if the revision initiated by the impugned notice is concluded by disallowance of the Input Tax Credit, then the same would result in the recovery of tax on such petrochemicals.

10. Mr. Soparkar submitted that Section 84A of the VAT Act is manifestly arbitrary and violative of Articles 14 and 19(1)(g) of the Constitution of India. He would submit that when the assessment for a particular year attains finality, the same creates a vested right in favour of the dealer. The dealer would, accordingly, arrange his affairs. The alteration of such position without any definite time limit only on the ground that a judgment has been pronounced in favour of the Revenue in another case is manifestly arbitrary and illegal. In support of such submission, the learned senior counsel seeks to rely on the decision of the Supreme Court in the case of ***State of Punjab vs. Shereyas Industries Ltd***., *(2006) 91 VST 23 (SC)*.

11. In the aforesaid context, Mr. Soparkar submitted that any legislation which is found to be manifestly arbitrary can be struck down as violative of Article 14 of the Constitution. In this regard, strong reliance has been placed on the decision of the Supreme Court in the case of ***Shayara Bano vs. Union of India***, (2017) 9 SCC 1.

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12. Mr. Soparkar would submit that the retrospective insertion of Section 84A with effect from 01.04.2006 makes the provision exhaustively arbitrary and unreasonable. He would submit that the Legislature may have the power to legislate prospectively as well as retrospectively, but any retrospective legislation would be prone to the scrutiny on the anvil of the test of reasonableness. In this regard, reliance is placed on the decisions of the Supreme Court in the case o***f Rai Ramkrishna vs. State of Bihar***, *AIR 1963 SC 1667* and ***Epari Chinna Krishna Moorthy vs. State of Orissa***, *AIR 1964 SC 1581*. Mr. Soparkar also invited the attention of this Court to the decision of the Supreme Court in the case of ***R.C. Tobacco (P) Ltd. vs. Union of India***, *2005 7 SCC 725*.

13. In the aforesaid context, Mr. Soparkar seeks to rely upon the following decisions;

(I) in the case of ***Jayam & Co. vs. Assistant Commissioner***, *(2016) 96 VST 1 (SC)*;

(ii) In the case of ***Filco Trade Centre Pvt. Ltd. vs. Union of India***, *(2008) 57 GSTR 204 (Guj.)*;

(iii) In the case of ***Avani Exports vs. Commissioner of Income Tax***, *(2012) 348 ITR 391 (Guj.); (Para 24)*

14. Mr. Soparkar further submitted that the test of unforeseen and unforeseeable burden should be applied keeping in mind the impugned retrospective amendment. He pointed out that the revision proceedings were permitted to be initiated only within three years from the date of passing of the

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order. Such position was prevailing even under the Gujarat Sales Tax Act, 1969. Section 67 of the Sales Tax Act empowered the Commissioner to initiate the revision proceedings within the stipulated time limit and it was consistently held that the revision proceedings initiated beyond the stipulated period of limitation was time barred.

15. Mr. Soparkar further submitted that the provisions of limitation in the taxing statute are enacted with a specific objective of giving certainty and finality to the legal proceedings and to avoid exposure to the risk of litigation for an indefinite period of time. Any changes in such limitation period should be ordinarily prospective. He would submit that the retrospective operation given to the impugned amendment without any valid reason could be termed as manifestly arbitrary and violative of Article 14 of the Constitution of India. In this context, reliance is placed on the decision of the Supreme Court in the case of ***K.M. Sharma vs. Income Tax Officer***, *2002 (4) SCC 339* and the judgment of this Court in the case o***f Tata Teleservices vs. Union of India,*** (*2016) 385 ITR 497 (Guj.).*

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16. Mr. Soparkar vehemently submitted that the impugned amendment leads to an absurd situation with unforeseeable consequences. In such circumstances, the same is manifestly arbitrary. Mr. Soparkar gave an example in this regard. By way of an illustration, he pointed out that a case in which Mr. X of Surat selling cotton yarn was assessed to tax for the year 2006-07 at the rate of 5% in March, 2010. Such assessment was not challenged by either side and the same attained finality. For the same period, issue was raised in the case of

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Mr. Y of Rajkot, demanding tax at the rate of 15% on the cotton yarn. Mr. Y succeeds before the Appellate Authority and the rate of tax is held to be 5%. The Department prefers appeal before the Tribunal and the same is pending. In the year 2025, the matter in the case of Mr. Y reaches the Supreme Court and holds that the applicable rate of tax on cotton yarn is 15%. In such circumstances, the impugned amendment will enable the authorities to revise in the year 2025 the assessment order passed in the case of Mr. X of Surat in the year 2010. This, according to Mr. Soparkar, is violative of Article 14 of the Constitution as it could be termed as manifestly arbitrary.

17. Mr. Soparkar also submitted that the impugned amendment is violative of Article 19(1)(g) of the Constitution of India as it adversely effects the fundamental right of free trade business.

18. Mr. Soparkar also submitted that Section 84A of the VAT Act is not a validating Act by any stretch of imagination. There was no levy which was held to be illegal by any Court which needs validation. The revision notices had been issued beyond the statutory period of limitation and those were quashed on such ground. Therefore, according to Mr. Soparkar, there is nothing to be validated by Section 84A of the Act. It could be said that a fresh liability is sought to be created by retrospectively extending the period of limitation.

19. For the purpose of understanding the true meaning of the term “validation Act” reliance is placed on the decision of the Supreme Court in the case of ***Amarendra Kumar Mohapatra vs. State of Orissa***, *(2014) 4 SCC 583*. it was

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also argued that Section 64 of the VAT Act fortifies all the above referred submissions, more particularly, that the impugned provision is excessive and disproportionate. Mr. Soparkar also submitted that the impugned Section 84A of the VAT Act cannot be defended on the ground that the tax dues which were morally due to the State are sought to be recovered. It is submitted that the reasons of morality and fairness can have no application to bring a person within the four corners of the taxing statute so as to make him liable to payment of tax. In this regard, reliance is placed on the decision of the Supreme Court in the case o***f Assistant Commissioner, Commercial Taxes vs. LIS (Registered),*** *(2018) 15 SCC 283****.***

20. It is submitted that the stance of the State that as it was remedy less, it had to insert Section 84A of the Act , is absolutely not tenable in law. It is submitted that the respondents could have issued notice for revision under Section 75 of the VAT Act within the stipulated period of limitation to keep the matter alive. It is submitted that if the time period for passing order in revision was to expire and the issue was still pending before the Supreme Court, then the respondents could have passed an order in favour of the dealer and, thereafter, carried the matter before the Tribunal/High Court by filing the revision application/appeal. In this regard, reliance is placed on the decision of this Court in the case of ***Nestle India Ltd. vs. Deputy Commissioner of Commercial Tax***, *(2016) 89 VST 56.*

21. In the last, the learned senior counsel submitted that the Commissioner is empowered to revise an assessment order

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passed by his delegatee under Section 75 of the VAT Act . Once such power of revision in respect of an assessment order is exercised, then the power gets exhausted and the same assessment order cannot be revised again. In this regard, reliance is placed on the decision of the Supreme Court in the case of ***OCL India Ltd. vs. State of Orissa***, *(2003) 130 STC 35 (SC)* and the decision of this Court in the case of ***Malaviya Bros. & Co. vs. Sales Tax Officer***, *1973 GSTB 206*

22. In such circumstances, referred to above, Mr. Soparkar, the learned senior counsel appearing for the writ applicant prays that there being merit in all his submissions, referred to above, the provision of Section 84A of the VAT Act deserves to be declared as ultra vires.

Submissions on behalf of the State Government;

23. Mr. Kamal Trivedi, the learned Advocate General appearing for the State vehemently submitted that the State Legislature is empowered to enact taxation laws relating to the intra-state supply with respect to only six items and not with any other items. Prior to the enactment of Constitution (101“ Amendment) Act, 2016, in terms of Article 246 of the Constitution of India, the Union and the State Governments were empowered to make laws relating to the matters covered under List I (Union List), List ll (State List) and List lll (concurrent List). In other words, there used to be a clear demarcation of legislative powers between the Union and the States by confining themselves within the field entrusted upon them.

24. In terms of the erstwhile Entry 54 of List II, the State

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legislature was empowered to levy taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I. In other words, in respect of all intra-state sale / purchase of goods other than newspaper, the State legislature was empowered to levy taxes on the said transactions.

25. However, while making a paradigm shift in the indirect tax regime to empower the Centre and the State, both to levy taxes simultaneously, the Constitution came to be amended vide the 101st Constitution Amendment Act, 2016. Pertinently, vide the said Constitutional Amendment, new Article 246A came to be inserted in the Constitution of India, which confers right upon both, the Union and the legislature of every State to make laws with respect to goods and services for imposition of tax. by the Union or by such State.

26. Mr. Trivedi pointed out that the said erstwhile Entry 54 of List ll of the 7th Schedule also came to be amended vide the 101st Constitution Amendment Act, 2016.

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27. Mr. Trivedi would submit that It was never the intention of the Parliament to take away the power of the State legislature to enact laws with respect to intra-state sale or purchase of goods. However, the intention as discernible from the language of the above Article 246A, clearly appears to confer simultaneous powers on the Union and the State legislatures to make laws for levying tax simultaneously on every transaction of supply of goods or services or both. In the aforesaid context, Mr. Trivedi seeks to rely upon the decision of the Supreme Court in the case of ***Union of India vs. Mohit***

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Mineral Pvt. Ltd., reported in *(2019) 2 SCC 599.*

28. Mr. Trivedi would submit that the term "goods and services tax', used in the afore-quoted Article 246A of the Constitution of India, is defined under Article 366(12A) of the Constitution, which means "any tax" on "supply of goods" which necessarily occurs on the sale of goods.

29. According to Mr. Trivedi, by virtue of Article 246A read with Article 366(12A) of the Constitution of India, the Union and the State legislatures,. both have power to make laws with respect to any tax on supply of goods. or services or both except taxes on the supply of the alcoholic liquor for human consumption. At this stage. it Is worthwhile to note that, undisputedly, the term "supply includes 'sales/purchases.

30. Mr. Trivedi would submit that by virtue of the said Constitution Amendment Act of 2016, two major changes have been brought in picture:

(a) Tax would be now imposed on 'supply of goods', which was earlier used to be only on 'sale/purchase of goods';

(b) The demarcation of powers between the Union and the legislatures of every State has disappeared and that the Union and the legislatures of every State, both are empowered to make laws with reference to the supply of goods:

31. It is further argued that by virtue of Article 246A of the Constitution of India, the power to make laws with respect to 'intra-state' sale or purchase of goods still exists with the State legislature, even after the enactment of the said 101st

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Constitution Amendment Act of 2016. In the aforesaid context, Mr. Trivedi seeks to rely on a recent pronouncement of the Kerala High Court in the case of ***Golden Jewels (India) Pvt. Ltd. vs. State Tax Officer,*** 2019 SCC Online Ker. 973.

32. It is pointed out that the judgment rendered by the learned Single Judge has been affirmed in appeal by the Division Bench of the Kerala High Court vide judgment dated 6th March, 2019.

33. Mr. Trivedi submitted that it is a settled principle of law that the Entries to the legislative lists are not the sources of the legislative power, but are merely topics or fields of legislation and that the competence to legislate flows from Articles in Part XI of the Constitution of India. Hence, amendment: in such Entries, like amendment in Entry 54 of List II in the present case would not make any difference to the legislative competence of the State legislature to make any laws, which otherwise flows from the substantive provisions under the Constitution.

34. It is submitted that by enacting Section 84A in the VAT Act, the State Legislature has not proposed to levy any fresh tax, but merely allowed the department to enlarge the period of limitation under the provisions of Section 75 of the VAT Act, if permissible, so as to collect the legitimate tax already levied, but was not collected in view of pendency of litigation before the Apex Court.

35. It is submitted that though the Constitutional (101" Amendment) Act, 2016, was passed to subsume various taxes,

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like excise, service tax, VAT, etc., but, the same does not indicate that henceforth, the State Legislature would not have any power to make laws with respect to VAT, for the past transactions under the provisions of Section 75 of the VAT Act, more particularly, in view of Article 246A read with Article 366(12A) of the 101st Constitutional Amendment Act, 2016, read with Section 142(6) and 142(7) of the CGST Act.

36. According to Mr. Trivedi, 101st Constitutional Amendment Act of 2016, inter alia. inserting Article 246A. starting with non-obstante clause, came into effect on 01.07.2017 conferring power on the State Legislature to enact law with reference to any tax on supply of goods. Whereas, Section 84A came to be enacted by the State Legislature on 03.04.2018, to be operated upon retrospectively with effect from 01.04.2006, which is the date on which the VAT Act had come into force.

37. According to Mr. Trivedi, the State Legislature was very much competent to legislate when it enacted Section 84A of the VAT Act. According to Mr. Trivedi, the decision relied upon on behalf of the writ applicant of the Supreme Court in the case of A. Hajee Abdul Shakoor (supra0 is of no avail.

38. Mr. Trivedi gave us a fair idea as regards the effect of Section 19 of the Constitutional Amendment Act, 2016. It is submitted that w.e.f. 01.07.2017, the Gujarat VAT Act, 2003 came to be substantially amended and more particularly Section 2(13) dealing with the definition of the term ‘goods’ with reference to the amended Entry 54 of List II and the addition of sub-section (2A) in Section 100 relating to Repeal and Savings with further insertion of Section 84A on

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03.04.2018. However, the said newly inserted Section 84A is not inconsistent with the provision of Section 19 of the Constitution Amendment Act, 2016, nor has the said Section 19 of the Constitution Amendment Act, 2016 denuded State's power to enforce Gujarat VAT Act in its amended form.

39. Mr. Trivedi would submit, relying on the decision of the Supreme Court in the case of J.K. Jute Mills Company Ltd. vs. State of Uttar Pradesh, AIR 1961 SC 1354 that the power of the legislature to enact a law with reference to a topic entrusted to it is unqualified and, therefore, in exercise of such power, it is competent for the legislature to enact a law which is either prospective or retrospective. Mr. Trivedi, without prejudice to his aforesaid submission, would submit that there are many ways and means of enacting and amending the Act for the purpose of inserting an amendment in the existing legislation with retrospective effect. Such amending Acts have the effects of validating, curing or declaring etc. with retrospective effect for the purpose of overcoming a legal obstacle or curing existing legal defects, or validating the tax declared illegal or declaring a particular position of law.

40. According to Mr. Trivedi, for all practical purposes, the VAT Amendment Act of 2018 is a validating Act, inasmuch as it has sought to overcome the obstacle in terms of limitation of 3 years provided under Section 75 of the VAT Act, which obstacle stood confirmed by this Court vide its judgment dated 16.03.2018 in SCA No.22283 of 2018, while quashing and setting aside the revision notice dated 03/06.11.2017 issued by the State Authorities to revise the assessment order for Financial Year 2008-09, as time barred under Section 75 and

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hence, illegal. This revision notice was issued on the basis of the judgment dated 22.09.2017 of the Supreme Court reported in (2017) 16 SCC 28, whereby the judgment dated 18.01.2013 of this Court, reported in 2013 SCC Online Guj. 8788, was set aside necessitating the recovery of lost revenue.

41. Mr. Trivedi seeks to rely on the decision of the Supreme Court in the case of ***Shri Prithvi Cotton Mills Ltd. vs. Broach Boroush Municipality***, *1969 Part II SCC 283*.

42. Mr. Trivedi would submit that there is no merit in the contention canvassed on behalf of the writ applicant that it is mandatory that there has to be an invalid levy of tax declared by any Competent Court which can be validated by a Validating Act. There can be a Validating Act conferring jurisdiction which may be absent or validating the illegal demand of tax on the basis of wrong interpretation of the provisions as held by the Court by amending the said provision retrospectively. In support of such submission, Mr. Trivedi seeks to rely on the following three decisions;

(I) In the case of ***Government of Andhra Pradesh vs. Hindustan Machine Tools Ltd***., *(1975) 2 SCC 274*;

(II) In the case of ***M/s. Ujagar Prints vs. Union of India***, *(1989) 3 SCC 488*;

(III) In the case of ***Asst. Commissioner of Agricultural Income Tax***, (2015) 11 SC 462;

43. Mr. Trivedi would submit that the statutes of limitation are retrospective in nature, when they deal with procedural law

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and they are prospective, when they deal with the substantive rights, unless the same are expressly or by implication made retrospective. In other words, there is no bar under the Constitution that a statute of limitation impacting a substantive right, cannot be made retrospective in nature. Thus, even if Section 84A of the VAT Act is considered to be not a Validating Act, but simply a statutory provision relating to limitation, then in that case also, the same is rightly brought in picture with retrospective effect.

44. Mr. Trivedi also seeks to rely upon the following three decisions to fortify his submission that a law cannot be held to be unreasonable merely because it operates retrospectively.

(I) In the case of ***R.C. Tobacco Pvt. Ltd. vs. Union of India & Anr***., reported in *(2005) 7 SCC 725*;

(II) In the case of ***Raj Ramkrishna vs. State of Bihar***, reported in *AIR 1963 SC 1667*;

(III) In the case of ***Epari Chinna Krishna Moorthy vs. State of Orissa***, reported in *AIR 1964 SC 1581*;

45. On the issue of reopening of the closed assessments, the submissions of Mr. Trivedi are as under;

> *"1. It has been contended on behalf of the Petitioners that by virtue of Section 84A of the Gujarat VAT Act, it is not legally permissible to the department to reopen the assessments which have already attained finality before such amendment is brought into force.*
>
> *2. In this regard, it is submitted that it is settled principle of law that it is the language of the provision which matters and when the meaning of the said*

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provision is amply clear, it has to be given full effect. In other words, when the provision of law is explicit, it has to operate fully and there could not be any limit to its operation.

3. It is not disputed that a fiscal statute can be given retrospective operation. Thus, if the contention raised by the Petitioners is accepted, the clear intention of the legislature become redundant. The provisions of Section 84A of the VAT Act now inserted with retrospective effect from 01.04.2006, do not put any embargo on the department in reopening the assessment, if period, as prescribed earlier, had expired before the said section came into operation.

4. Earlier the re-assessment under the provisions of Section 75 of the VAT Act could have been completed within five years, of that particular assessment year and now, by virtue of the said Section 84A of the VAT Act, the same may extend up to the period spent in litigation before the High Court or the Supreme Court, as the case may be. A bare reading of the said Section 84A shows that the operation of the said section, encompasses back and relates to previous assessment years, whether or not they have become final by reason of the expiry of the period prescribed under the Act.

5. In addition to the above, it is submitted that as such, under the provisions of the VAT Act. there is no bar to reopen the assessments, which have attained finality. The provisions of Section 75 of the VAT Act specifically empower the appropriate authority to reopen the assessments, which have attained finality. Thus. the provisions of Section 84A of the VAT Act do not provide for anything which was not there previously but, the same only explain/clarify as to in what manner, the said prescribed period is to be calculated."

46. As regards the retrospective Introduction of Section 84A of the VAT Act being manifestly arbitrary and violative of Article 14 of the Constitution of India, the submissions of Mr. Trivedi are as under;

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"1. It has been contended on behalf of the Petitioners that the provision under challenge is manifestly arbitrary on the ground that the same seeks to reopen the assessments and in other words, take away the vested rights of the Petitioners. As per the Petitioners, once the assessment for a particular year attains finality, the same creates a vested right in favour of the Petitioners and alteration of such vested rights and that too, on the ground that judgment in favour of the revenue has been pronounced by a Court in some other case. is manifestly arbitrary and illegal.

2. In this regard. it is submitted that the provision under challenge is neither manifestly arbitrary nor illegal, as alleged or otherwise. In fact, even it is considered that finality of an assessment, for a particular year. creates a vested right in favour of the Petitioners. then in that event also. in terms of Section 35/75 of the VAT Act. it is always open for the competent authority to reopen/revise the assessment orders, within the prescribed time limit, which have attained finality.

3. In the present case, the provision under challenge merely enables the authority to exclude the period spent before the competent forum for deciding the issue. The said provision under challenge is only enacted with a view to safeguard the revenue, which the authority would lose, with efflux of time, without any fault on the part of the department but only due to the pendency of cases before the Higher forum. In this behalf, reliance is placed on the above judgment of the Apex Court in the case of ***Commercial Tax Officer Vs. Biswanath Jhunjhunwalla***, reported in (11) (1996) 5 SCC 626.

4. Thus. in other words, though the interpretation provided by the Supreme Court would be applied retrospectively. due to the prescribed time limit of 3 years provided for reopening of assessments in the VAT Act. the department was not able to reopen the past assessments prior to the period of 3 years, resulting in lose the revenue, which the State was otherwise entitled for.

5. In addition to above, even otherwise. in taxation matters, the law laid down by the Courts with respect to the interpretation of any provision, apply to all the cases

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and that, it is not open for any assessee to contend that reopening of its case, on the ground of a judgment delivered in favour of the revenue by a Court in some other case. is manifestly arbitrary and illegal.

6. As such, at the most, the provision under challenge merely extends the time limit prescribed under Section 35/75 of the VAT Act, which ultimately enables the department to issue show cause notice as to why the assessment order of a particular year should not be reopened and at that stage, the concerned assessee can show cause as to how and in what manner, the judgment delivered in some other case is not applicable to the facts of the said assessee. Hence, the same does not envisage imposition of tax/penalty directly but, the same would only be levied/imposed only after hearing the concerned assessee. Thus, there arises no question of arbitrariness.

7. Petitioners have relied upon the following four authorities for contending that Section 84A of the VAT Act is “manifestly arbitrary” and hence hit by contravention of Article 14 of the Constitution of India. It is undoubtedly true that the legislation can now be struck down as unconstitutional on the ground that the same being manifestly arbitrary. However, that does not mean that Section 84A of the VAT Act is manifestly arbitrary.

8 As observed by the Apex Court in the aforesaid case of Shayara Bano (supra), “manifestly arbitrariness” means something done by legislature capriciously, irrationally and/or without adequate determining principle, or something done which is excessive and disproportionate.

9. In fact, one needs to consider as to which particular provision came to be held as as ‘manifestly arbitrary” in the above referred four judgments by the Supreme Court and then, to equate Section 84A of the VAT Act with those provisions. On mere comparison of this type will reveal that by no stretch of imagination, Section 84A of the VAT Act can be considered to be manifestly arbitrary, much less arbitrary.”

47. On the issue of the retrospective operation of the provision under challenge being unreasonable and violative of Article 19(1)(g) of the Constitution, the submissions of Mr.

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Trivedi are as under;

> *"1. It is contended on behalf of the Petitioners that the retrospective operation provided to the provision under challenge is unreasonable, on the ground that the same fails the test of reasonableness, as laid down by the Apex Court in the case of R. C. Tobacco Vs. Union of India reported in (2005) 7 sec 725.*
>
> *2. In this regard. it is submitted that applying the said tests to the retrospectivity of the provision under challenge, the same would clear the test of the reasonableness and that the same is not unreasonable, as alleged or otherwise.*
>
> *3. As far as the test with regard to the context in which the retrospectivity is contemplated is concerned, it is submitted that the provision under challenge has been given retrospective effect only with a view to safeguard the revenue's interest which was lost because of the pendency of issue before the appropriate forum. In other words, even if an issue is decided in favour of the department but due to the delay occurred in deciding the same issue, the department would lose the opportunity to apply the said favorable decision to the cases which have been already decided on the basis of wrong/incorrect proposition of law.*
>
> *4. As far as the period of such retrospectivity is concerned, it is submitted that as such it has been held by the Supreme Court that the test of length of time covered by the retrospective operation cannot, by itself, be treated as a decisive test. Even otherwise. considering the facts of the present case, there arises no question of any unforeseen or unforeseeable financial burden imposed for the past period. inasmuch as. the provision under challenge simply enables the department to exclude the period spent in litigation before the Courts and that the same do not envisage to levy/ impose any tax/penalty upon an assesses retrospectively, which was not there at the time of assessment. In other words, the question of unforeseen financial burden would only come in picture in cases where the provision imposes taxes/increases the rate of taxes retrospectively, which an assesses would not have foreseen while undertaking*

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his/her business.

5. In addition to the above. It is pertinent to note that the power of the department to revise/reopen the assessment under the provisions of Section 35/75 of the VAT is not under challenge and hence, in any case, without there being the provision under challenge, the department can revise/reopen the assessment orders within the prescribed time limit. Thus, in the present case. there arises no question of any unforeseen or unforeseeable financial burden imposed by applying the provision under challenge retrospectively.

6. Therefore. the retrospective operation of the provision under challenge is not unreasonable and hence, the said provision under challenge is not required to be struck down."

48. On the argument canvassed by the learned senior counsel appearing on behalf of the writ applicant that the assessment order cannot be revised for the second time, the submissions of Mr. Trivedi are as under;

"1. It is alternatively contended on behalf of the Petitioners that when the revision powers conferred under Section 75 is exercised once, then in that event, such powers get exhausted and the said assessment order cannot be revised once again. In other words. as per Petitioners, the assessment orders which are already revised once, cannot be taken in revision again by the revisional authority. In this regard, it is submitted that the said contention is not tenable in the eye of law.

2. On a plain reading of the provisions of Section 75 of the VAT Act, it would be discernible that the said Section does not debar/restrict the revisional powers to be exercised more than once, on different issues. If, the said contention raised by the Petitioners to the effect that once an assessment order is revised on one issue. then the revisional authority cannot revise the said assessment orders for another issue also, is accepted, then in that eventuality, the same would frustrate the intention of the legislature and would defeat the very purpose of the legislature to provide revisional powers to

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the competent authority, more particularly, in a situation where the law with respect to different issues get settled at different points of time.

Thus, with respect to different issues, the assessment orders can be revised more than once, if the same is within the prescribed period of limitation.

3. In addition to the above. it is submitted that it is settled principle of law that the Doctrine of Merger is applicable only to the extent to which the issue or issues got settled/decided/ forms part of revision, expressly or by necessary implication. Thus, the issues/controversies which are not forming the subject matter of revision, the doctrine of merger would not be applicable and that the colour of the assessment order to the extent of those unchallenged issues would not get altered.

4. Pemnently, in the present case, the second revision notice dated 01.09.2018 issued to the Petitioners, is based on altogether different issue and not related or identical to the issue which was revised earlier vide Order dated 10.03 2016. In other words, the controversy sought to be raised in the present notice in question is admittedly based on an issue. which was never taken in appeal or revision by any of the parties. In view thereof, except for the issue which was revised vide order dated 10.O3.2016, the revisional authority would not be debarred/ restricted from exercising its revisional powers upon all other issues. Even under the Civil law, action in regard to a property challenged in the subsequent suit based upon different cause of action, is not barred on the ground of the earlier suit having been filed for the same property but in respect of another cause of action. Thus, consideration of 0rder 2 Rule 2 of CPC or waiver. estoppel, or constructive res-judicata do not apply to such an eventuality, which exists in the present case.

5. As far as the judgments viz. (14A) OCL India Ltd. Vs. State of Orissa, reported in (2003) 130 STC 35, and (14B) Malavia Bros. & Co. Vs. Sales Tax Officer, reported in 1973 GSTB 206, relied upon by the Petitioners are concerned, the same would also not be applicable to the facts of the present case. In the first case referred to above, it was held that once the Assistant Commissioner, as a delegatee of the Commissioner, had revised the

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order of the Sales Tax Officer, then in that case, the Commissioner, as a delegator, could not have exercised the power of revision once over again as the same having been exhausted in the first Instance. Whereas in the second case referred to above, the Revisional Authority was seeking to revise in respect of the same subject matter, which was already settled either in revision or appeal. As against this, as aforesaid, in the present case, the notice in question is altogether on different issue and admittedly, not on the same subject/issue, which was revised earlier."

49. As regards the amendment in the repealed enactment, the submissions of Mr. Trivedi are as under;

"1. It has been contended by the Petitioners that the provisions of the VAT Act stand repealed qua all goods, except 6 items which are enumerated in Entry 54 of List II of the 7th Schedule of the Constitution of India.

2. In this regard, it is categorically stated that the provisions of the VAT Act, more particularly, Section 75 of the VAT Act still exists and that the same are not repeated.

3. However, even assuming without admitting that the provisions of VAT Act stand repealed all goods but 6 items, then in that also, it is submitted that the State Legislature still possesses the power and it is also permissible under the law to amend the provisions, which are repealed or not in existence. Therefore, it is incorrect to contend that the State Legislature seeks to amend the provisions of VAT Act, which are not in existence, and hence invalid. "

50 In such circumstances, referred to above, Mr. Trivedi, the learned counsel appearing for the State prays that there being no merit in this writ application, the same be rejected.

ANALYSIS

51. Having heard the learned counsel appearing for the

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parties and having gone through the materials on record, the following questions fall for our consideration;

(i) Whether Section 84A of the GVAT Act is ultra vires and beyond the legislative competence of the State under Entry 54 of List II of the seventh schedule to the Constitution of India?

(ii) Whether by virtue of Article 246A read with Article 366(12A) of the Constitution of India, the Union and the State Legislatures, both have the power to make laws with respect to any tax on supply of goods or services or both, except taxes on the supply of the alcoholic liquor for the human consumption? . In other words, whether by virtue of Article 246A of the Constitution of India, the power to make laws with respect to “intra-state' sale or purchase of goods still exists with the State Legislature even after the enactment of the 101st Amendment Act of 2016.

(iii) Whether Section 84A of the GVAT Act is manifestly arbitrary and violative of the Articles 14 and 19(1)(g) of the Constitution of India?

(iv) Whether the retrospective insertion of Section 84A with effect from 01.04.2006 makes the provision exceedingly arbitrary and unreasonable?

(v) Whether Section 84A of the GVAT Act is a validating Act?

(vi) Whether by virtue of Section 84A of the GVAT Act, it is permissible to the Department to reopen the assessments which have already attained finality before such amendment came into force?.

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(vii) Whether the provisions of the Gujarat Vat Act stand repealed qua all the goods except the six items enumerated in the Entry 54 of List Ii of the seventh schedule of the Constitution of India?. In other words, whether the provisions of the VAT Act more particularly, Section 75 of the Act still operates and the other provisions cannot be said to be repealed?.

52. Before adverting to the rival submissions canvassed on either side, we must look into few relevant provisions of the Constitution of India and the Gujarat Vat Act.

53. Section 84A of the Act reads thus;

> *"**84A.Exclusion of period in some cases***
>
> *(1) Notwithstanding anything contained in this Act, an issue on which the Appellate Authority or the Appellate Tribunal or the High Court has given its decision which is prejudicial to the interest of revenue in some other proceedings and an appeal to the Appellate Tribunal or the High Court or the Supreme Court against such decision of the Appellate Authority or the Appellate Tribunal or the High Court is pending, the period spent between the date of the decision of the Appellate Authority and that of the Appellate Tribunal or the date of decision of the Appellate Tribunal and that of the High Court or the date of the decision of the High Court and that of the Supreme Court shall be excluded in computing the period referred to in section 34 or section 35.*
>
> *(2) Notwithstanding anything contained in this Act, if any decision or order under section 73 or section 75 involves an issue on which the Revision Authority or Appellate Authority or the High Court has given its decision which is prejudicial to the interest of revenue in some other*

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proceedings and an appeal to the High Court or the Supreme Court against such decision of the Appellate Tribunal or the High Court is pending, the period spent between the date of the decision of the Appellate Tribunal and the date of the decision of the High Court or the date of the decision of the High Court and the date of the decision of the Supreme Court shall be excluded in computing the period of limitation referred to in section 73 or section 75. "

54. We shall now look into few relevant provisions of the Gujarat Value Added Tax (Amendment) Act, 2017.

55. In the principal Act, in section 2,-

(1) clauses (1), (1 A) and (2) shall be deleted;

(2) in clause (4), in sub-clause (ii), for the words "plant, machinery, raw materials, processing materials, packing materials, empties, consumable stores, waste products, or such other goods, or waste or scrap of any of them", the words "raw materials, processing materials, consumable stores, waste products or such other goods" shall be substituted;

(3) clauses (5) and (9) shall be deleted;

(4) in clause (10), Exceptions (i) to (iii) shall be deleted;

(5) clause (11) shall be deleted;

(6) for clause (13), the following clause shall be substituted, namely:-

> **"(13) "goods"** means goods as covered under entry 54 of List II of the Seventh Schedule to the Constitution of India;";

(7) in clause (19), the words "material used in the packing of the goods" shall be deleted;

(8) In clause (27), for the words, figures and letters "on sales

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or purchase of goods and includes lump sum tax leviable or payable under Section 14, 14A, 14B, 14C or 14D", the words "on sales of goods" shall be substituted;

(9) for clause (29), the following clause shall be substituted, namely:-

"(29) "taxable goods" means goods liable to tax under section 7 excluding the goods on which no tax is payable under section 5;";

(10) in clause (30), -

(i) the words "or purchases" shall be deleted;

(ii) in sub-clause (b), the words, brackets and figures "under sub-section (1) of section 5 or" shall be deleted;

(11) in clause (34), in sub-clause (a) the words "or purchases", occurring at two places, shall be deleted;

(12) clause (37) shall be deleted.

56. In the principal Act, in section 7, -

(1) for sub-section (1), the following sub-section shall be substituted, namely:-

> "*(1) Subject to the provisions of this Act, there shall be levied a tax on the turnover of sale of Motor spirit commonly known as Petrol, High Speed Diesel, Aviation Turbine Fuel, Petroleum Crude, Natural Gas and Alcoholic Liquor for human consumption specified in Schedule III at the rate set out against each of them:*
>
> *Provided that the Government may levy, from importer or manufacturer or oil marketing companies, a tax at full rate on the retail price in such manner as may be notified by the Government.";*

57. In section 100, after sub-section (2), the following sub-

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section shall be added, namely:-

"*(2A) The amendment of the Gujarat Value Added Tax (Amendment) Act, 2017 (Guj. 26 of 2017) shall not-*

(a) revive anything not in force or existing at the time of such amendment or repeal; or

(b) affect the previous operation of this Act prior to the coming into force of the Gujarat Value Added Tax (Amendment) Act, 2017 and orders or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under this Act prior to the coming into force of the Gujarat Value Added Tax (Amendment) Act, 2017 (Guj. 26 of 2017) or orders made thereunder:

Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the coming into force of the Gujarat Value Added Tax (Amendment) Act, 2017 (Guj. 26 of 2017); or

(d) affect any tax, surcharge, penalty, fine, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of this Act prior to the coming into force of the Gujarat Value Added Tax, (Amendment) Act, 2017 (Guj. 26 of 2017); or

(e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed; or

(f) affect any proceedings including that relating to an appeal, revision, review or reference, instituted under this Act prior to the coming into force of the Gujarat Value Added Tax (Amendment) Act, 2017 (Guj. 26 of

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2017) and such proceedings shall be continued under the said amending Act.".

58. The newly enacted Article 246A of the Constitution of India reads as under;

> *"Article 246A. Special provision with respect to goods and services tax:*
>
> *(1) Notwithstanding anything contained in articles 246 and 254, Parliament and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.*
>
> *(2) Parliament has exclusive power to make laws with respect to goods and service tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.*
>
> *Explanation:-The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of Article 279A, take effect from the date recommended by the Goods and Services Tax Council."*

59. The said erstwhile Entry 54 of List II of the seventh schedule also came to be amended vide the 101st Constitution Amendment Act, 2016 and the amended Entry 54 reads as under:-

> *"54. Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commodity known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for consumption, but not including sale in the course of inter-State trade or commerce or sale in the course of international trade or comme4rce of such goods."*

60. Article 366 (12A) of the Constitution reads as under;

> *"366(12A) 'goods and services tax means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption."*

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61. Sections 142(6) and 142(7) of the GST Act reads as under;

> *"142(6) (a) every proceeding of appeal, review or reference relating to a claim for input tax credit initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of existing law, and any amount of credit found to be admissible to the claimant shall be refunded to him in cash in accordance with the provisions of existing law, and the amount rejected, if any, shall not be admissible as input tax credit under this Act:*
>
> *Provided that no refund shall be allowed of any amount of input tax credit where the balance of the said amount as on the appointed day has been carried forward under this Act;*
>
> *(b) every proceeding of appeal, review or reference relating to recovery of input tax credit initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of existing law and if any amount of credit becomes recoverable as a result of such appeal, review or reference, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act.*
>
> *(7) (a) every proceeding of appeal, review or reference relating to any output tax liability initiated whether before, on or after the appointed day under the existing law, shall be disposed of in accordance with the provisions of the existing law, and if any amount becomes recoverable as a result of such appeal, review or reference, the same shall, unless recovered under the existing law, be recovered as an arrear of duty or tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act.*
>
> *(b) every proceeding of appeal, review or reference relating to any output tax liability initiated whether before, on or after the appointed day under the existing law, shall be disposed of in accordance with the provisions of the existing law, and any amount found to be admissible to the claimant shall be refunded to him in*

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cash in accordance with the provisions of existing law and the amount rejected, if any, shall not be admissible as input tax credit under this Act."

62. At this stage, it would not be out of place to incorporate the statement of objects and reasons for the enactment of Section 84A of the Gujarat Vat Act.

"STATEMENT OF OBJECTS AND REASONS

After implementation of the Gujarat Value Added Tax Act, 2003 in the State, Amendments have been made from time to time for better administration and tax compliance.

It is noticed that in some cases under the said Act, orders are passed by the authorities under Gujarat Value Added Tax Act,2003, but the appellate authorities including the High Court or the Supreme Court have decided the matters before them involving similar issues, due to which if the orders passed by the authorities under the said Act are allowed to stand which are contrary to the judgment/s of the said appellate authorities, they will be prejudicial to the Government Revenue unless they are taken in revision under the said Act. Section 84 of the Act that provides for exclusion of period of limitation in certain cases, does not provide the exclusion of time spent between the judgment of Appellate Court and the Higher Court when the earlier judgment is prejudicial to the interest of revenue.

It is therefore, considered necessary and expedient in the interest of safeguarding the revenue to insert section 84A so as to provide the contingency for exclusion of the period spent between the earlier judgment and later judgment of any Appellate Authority, Tribunal, High Court, or as the case may be, Supreme Court involving issue prejudicial to the interest of revenue.

This bill seeks to amend the said Act of 2003 to achieve the aforesaid objects."

63. Section 174 of the GGST Act, which provides for the "repeal and savings" reads thus;

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"174. Repeal and Savings;

(1) The repeal of the Acts specified in section shall not:-

(a) revive anything not in force or existing at the time of such amendment or repeal; or

(b) affect the previous operation of the amended Acts or repealed Acts and orders or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed Acts:

Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or

(d) affect any tax, surcharge, fine, penalty, interest as are due or may

become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended repealed Acts; or

(e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so repealed ; or

(f) affect any proceedings including that relating to an appeal, review or reference, instituted before on, or after the appointed day under the said amended Act or repealed Acts and such proceedings shall be continued under the said repealed Acts as if this Act had not come into force and the said Acts had not been repealed. (2) The mention of the particular matters referred to in Section 173 shall not be held to prejudice or affect the general application of section 7 or section 7A or section

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25 of the Gujarat General Clauses Bom. 1 of 1904 with regard to the effect of repeal."

64. The Constitution (One hundred and first Amendment) Act, 2016 introduced the Goods and Services Tax regime in India. It sought to replace all indirect taxes levied on goods and services by the Union as well as the State Governments. It came to be a comprehensive indirect tax levy on manufacture, sale or consumption of goods and services. The Act of 2016 inserted Article 246A, 269A and 279A to the Constitution of India. It amended the provisions of Article 286 of the Constitution. It deleted Entry 92 and 92C of List I of the Seventh Schedule and inserted Entry 84 of List I and Entry 54 of the List II of the Seventh Schedule. In tune with the constitutional amendments incorporated, Central Goods and Services Tax Act, 2017, Integrated Goods and Services Tax Act, 2017 and the respective State Goods and Services Tax Act, 2017 were enacted.

65. Article 246A of the Constitution of India makes special provision with respect to Goods and Services Tax. It empowers the Parliament and the Legislature of every State subject to Article 246A(2) and notwithstanding anything contained in Articles 246 and 254, to make laws with respect to Goods and Services Tax imposed by the Union or the State. Article 246A(2) recognises the exclusive power of the Parliament to make laws with respect to Goods and Services Tax where the supply of goods, or of services, or both takes place in course of inter-state trade or commerce. Article 269A deals with levy and collection of Goods and Services Tax in course of inter-state trade or commerce. Essentially, Article 269A recognises the Government of India to collect Goods and Services Tax on

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supplies in the course of inter-state trade or commerce. It allows the apportionment of the tax levied and collected between the Union and the States as may be provided by Parliament by law. It recognises the authority of the Parliament by law to formulate the principles for determining the place of supply and when a supply of goods or of services or both takes place in the course of inter-state trade or commerce. Article 279A deals with Goods and Services Tax Council. It envisages the Constitution of a Goods and Services Tax Council. It enumerates the powers and functions of such Council, the decision making process therein and the establishment of a mechanism to adjudicate any disputes.

66. **Effect of repeal at Common Law – Repeal obliterates the statute as if it has never been enacted**

66.1 Under the common law, a statute after its repeal is completely obliterated as if it has never been enacted, except as to the transactions past and closed.

66.2 Craies on Statute Law, 7th Edition at pages 411-412 states the principle as under:

> *"When an Act of Parliament is repealed, "said Lord Tenterden in Surtees V. Ellison," it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule. Tindal C.J. stated title exception more widely. He said: "The effect of repealing a statute is to be obliterate it as completely from the records of the Parliament as if it had never been passed and it must be considered as a law that never existed except for the purpose of those action which were commenced, prosecuted and concluded whilst it was an existing law."*

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66.3 **Bennion on Statutory Interpretation**, 6th Edition at Pg 276 explains the effect of repeal as under –

> *"Effect of repeal*
>
> *At common law the repeal of an Act makes it as if it had never been, except as to matters past and closed. ....*
>
> *Thus anything done after the repeal in purported exercise of a repealed provision is a nullity."*

66.4 A seven judge bench of the Supreme Court in the case of **Keshavan Madhava Menon v. State of Bombay, 1951 AIR 128** referred to a passage from the Crawford's book on Statutory Construction which reads as under:

> *"it is well settled that if a statute giving a special remedy is repealed without a saving clause in favour of pending suits all suits must stop where the repeal firnds them. If final relief has not been granted before the repeal went into effect, it cannot be after, if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision was rendered.* ***The effect of the repeal is to obliterate the statute repealed as completely as if it had never been passed, and it must be considered as a law which never existed, except for the purposes of those actions or suits which were commenced, prosecuted and concluded while it was an existing law.*** *Pending judicial proceedings based upon a statute cannot proceed after its repeal. This rule holds true until the proceedings have reached a final judgement in the court of last resort, for that court, when it comes to announce its decision, conforms it to the law then existing and may therefore reverse a judgement which was correct when pronounced in the subordinate tribunal from which whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgement of the lower court has been withdrawn by an absolute repeal." (P. 601).*

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....emphasis supplied

66.5 Justice G.P. Singh in his Principles of Statutory Interpretation, 12th Edition 2010, while examining the consequences of repeal has stated as following at page 695.

> "*Under the common law rule the consequences of repeal of a statute are very drastic. Except as to transactions past and closed, a statute after its repeal is as completely obliterated as if it had never been enacted. The effect is to destroy all inchoate rights and all causes of action that may have arisen under the repealed statute. Therefore, leaving aside the cases where proceedings were commenced, prosecuted and brought to a finality before the repeal, no proceeding under the repealed statute can be commenced or continued after the repeal.*"

66.6 The Apex Court in ***Mohan Raj Vs. Dimbeswari Saikia & Anr***, AIR 2007, SC 232, has quoted the above passage with approval in paragraph 23 which is quoted below:

> "*23.It is now well settled that such Repealing Act shall be construed to have not taken away the accrued right of a person. In G.P. Singh's Principles of Statutory Interpretation (10th Edn.) 2006 at Page 631, it is stated:*
>
> "*Under the common law rule the consequences of repeal of a statute are very drastic. Except as to transactions past and closed, a statute after its repeal is as completely obliterated as if it had never been enacted. The effect is to destroy all inchoate rights and all causes of action that may have arisen under the repealed statute. Therefore, leaving aside the cases where proceedings were commenced, prosecuted and brought to a finality before the repeal, no proceeding under the repealed statute can be commenced or continued after the repeal.*"

66.7 The aforesaid principle is reiterated in the Constitution

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Bench decision of the Supreme Court in the case of **Kolhapur Canesugar Works Ltd v. Union of India – 2000 (119) ELT 257 (SC).**

66.8 Thus, at common law, a statute become non-existent on its repeal, unless saved by some saving provision.

67. **Section 6 of the General Clauses Act – abrogates the Common Law effect of repeal**

67.1 To prevent the drastic effect of obliteration of statute on its repeal and to save the rights acquired or liabilities incurred, the savings clauses are provided in the repealing statutes.

67.2 Apart from that, Section 6 of the General Clauses Act, 1897 provides a general savings. The section reads as under:

> ***"6. Effect of repeal –***
> *Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not:*
> *(a) Revive anything not in force or existing at the time at which the repeal takes effect; or*
> *(b) Affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or*
> *(c) Affect any right privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or*
> *(d) Affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or*
> *(e) Affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid,*
> *and any investigation, legal proceeding or remedy*

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may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

67.3 The aforesaid provision will apply to repeal of any enactment by a Central Act, unless a different intention appears from the repealing Act. The section inter alia provides that repeal shall not affect the previous operation of any enactment so repealed, anything duly done or suffered; or affect any rights, privileges, obligations or liabilities acquired, accrued or incurred under the repealed enactment; or affect penalty, forfeiture or punishment incurred or investigation, legal proceedings in respect of right, privilege, obligation, liability, penalty, forfeiture or punishment.

1. 68. **The term 'repeal' is used when the entire act is abrogated. The term 'amendment' is used when a portion of an Act is repealed and re-enacted. There is no real distinction between them. Repeal thus includes partial repeal.**

68.1 The use of any particular form of words is not necessary to bring about a repeal. All that is necessary is that the words should indicate the intention to abrogate the Act or provision in question. The word 'repeal' is usually used when the entire Act is sought to be abrogated. However, when the object is to repeal only a portion of an Act, the term 'omission' is used. Further, where the object is to repeal a part and re-enact another provision in its place, the term 'amendment' is used.

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68.2 The above principle has been explained by the Supreme Court in the case of **Bhagat Ram Sharma v. Union of India, AIR 1988 SC 740** as under:

> *"It is a matter of legislative practice to provide while enacting an amending law, that an existing provision shall be deleted and a new provision substituted. Such deletion has the effect of repeal of the existing provision. Such a law may also provide for the introduction of a new provision. There is no real distinction between 'repeal' and an 'amendment'. In Sutherland's Statutory Construction, 3rd edn., vol. 1 at p. 477, the learned author makes the following statement of law:*
>
> *"The distinction between repeal and amendment as these terms are used by the Courts is arbitrary. Naturally the use of these terms by the Court is based largely on how the Legislatures have developed and applied these terms in labelling their enactments. When a section is being added to an Act or a provision added to a section, the Legislatures commonly entitle the Act as an amendment... When a provision is withdrawn from a section, the Legislatures call the Act an amendment, particularly when a provision is added to replace the one withdrawn. However, when an entire Act or section is abrogated and no new section is added to replace it, Legislatures label the Act accomplishing this result a repeal. Thus as used by the Legislatures, amendment and repeal may differ in kind addition as opposed to withdrawal or only in degree-abrogation of part of a section as opposed to abrogation of a whole section or Act; or more commonly, in both kind and degree-addition of a provision to a section to replace a provision being abrogated as opposed by abrogation of a whole section of an Act. This arbitrary distinction has been followed by the Courts, and they have developed separate rules of construction for each. However, they have recognized that frequently an Act purporting to be an amendment has the same qualitative effect as a repeal – the abrogation of an existing statutory provision- and have therefore applied the term 'implied repeal' and the rules of construction applicable to repeals to such amendments.*

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Amendment is, in fact, a wider term and it includes abrogation or deletion of a provision in an existing statute. If the amendment of an existing law is small, the Act professes to amend; if it is extensive, it repeals a law and re-enacts it."

68.3 Further, in the case of **Fibre Boards (P) Ltd v. CIT Bangalore, 2015 (8) TMI 482 – SC,** the Supreme Court held that there is no distinction between 'repeal' and 'omission'. Similar dictum is laid in the case of **Shree Bhagwati Steel Rolling Mills v. Commir. Of Central Excise, 2015 (326) ELT 2019 (SC).**

68.4 Accordingly, Section 6 of the General Clauses Act, 1897 will also apply to the omission, amendment, substitution, etc. which repeals a part of an Act or partially repeals an Act.

69. **Applicability of the General Clauses Act, 1897 for the interpretation of the Constitution**

69.1 Article 367(1) of the Constitution states that the General Clauses Act, 1897 (subject to the adaptations and modification made under Article 372) shall apply for the interpretation of the Constitution. The relevant extract is as under:

"367.(1) Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India."

69.2 Thus, the General Clause Act applies only for the interpretation of constitution. The General Clauses Act defines

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various terms in section 3. These definitions will apply for the interpretation when these words are employed in the Constitution. Apart from the definition, Section 16 (power to appoint to include power to suspend or dismiss), Section 21 (Power to issue to include power to add to, amend, vary or rescind Notification, Orders, Rules or Bye-laws), etc. which are general rules of construction and which are otherwise in accord with the common law may also apply for the interpretation of the Constitution.

69.3 Therefore, perhaps, the other matters such as the savings in the case of repeal (Section 6), revival of repeal enactments (Section 7), construction of references to the repealed enactments (Section 8), continuation of order issued under the repealed enactment and re-enacted (Section 24), etc. which are not related to interpretation may not apply by virtue of Article 367.

69.4 Further, Section 6 applies only to repeal of an enactment. Enactment is defined under Section 3(19) of the General Clauses Act to include regulation or any provision contained in any Act or regulation. However, Constitution is not an enactment. The Constitution is supreme and is, in fact, the foundation of all the enactment. This has been observed by the Law Commission in its 60th Report on the General Clauses Act, 1897 in the context of Section 8 (construction of references of repealed enactment). The relevant extract of the report is as under:

> *"1.30.**Effect of section 8 on Article 367.-** Will section 8 of the General Clauses Act, which provides that when*

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an enactment is repealed and re-enacted, references to the old enactment will be construed as references to that, re-enacted one, make any difference? We do not think so. It should be noted that the words "unless the context otherwise requires" (in Article 367) mean that the General Clauses Act, section 8, is to be excluded. ***Even by its terms, section 8 of the General Clauses Act will not apply to the Constitution, because expression "enactment" (which occurs in section 8) would not take in the Constitution, which is not an "enactment". The Constitution is supreme and is, in fact, the foundation of all enactments."***

69.5 Thus, Section 6 of the General Clauses Act, 1897 will not apply to the Constitution (contrary view taken by the Allahabad High Court in the case of Farzand v. Mohand, AIR 1968 All 67(73). However, no reasoning has been given to apply Section 6 of the General Clauses Act, 1897 to the Constitution.)

69.6 The above principle about the non-applicability of the General Clauses Act, 1897 is relevant and applicable even to the Constitutional Amendment Acts as they are made by the Parliament in exercise of its constituent powers under Article 368 and not in exercise of normal legislative powers under Article 245 of the Constitution.

69.7 The question as to whether Section 6 applies to the Constitution is relevant to determine whether after the repeal of the Entry in the legislative list, the laws made in pursuance of such legislative powers can be saved. That provision has presently been made under Section 19 of the Constitution (One hundred and First) Amendment Act, 2016. Thus, contextually also Section 6 will not apply to the present case.

70. **Need for Article 372 in the Constitution – Saving of**

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laws in force

70.1 Article 395 of the Constitution inter alia repeals the Government of India Act, 1935. The repeal of the Government of India Act, 1935 may have the effect that all the previous Acts passed under it may cease to operate.

70.2 Accordingly, Article 372 of the Constitution provides for continuance of the existing laws in force on repeal of the Government of India Act, 1935. The relevant extract of the said Article is as under:

> ***"372. Continuance in force of existing laws and their adaptation***
> *(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."*

70.3 The objective behind the enactment of Article 372 was explained by Durga Das Basu in his Commentary on the Constitution of India (First Edition) at page 726-727 as under:

> "*The general rule is that with the repeal of a statute, all bye-laws made thereunder cease to be valid, unless there is a saving clause in the new statute, preserving the old bye-laws. On this principle, laws passed under the previous Government Acts would have ceased to operate on the commencement of this Constitution, by reason of Art. 395, post.*
>
> *The object of the prevent clause is to sanction the*

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continuance of the existing laws until they are repealed or amended by a competent authority under the new constitution."

70.4 The Supreme Court in the case of South India Corporation v. Secretary, Board of Revenue, 1964 AIR 207, in the context of Article 372 observed as under:

"The object of this article is to maintain the continuity of the pre-existing laws after the Constitution came into force till they were repealed, altered or amended by a competent authority. Without the aid of such an article there would be utter confusion in the field of law. The assumption underlying the article is that the State laws may or may not be within the legislative competence of the appropriate authority under the Constitution. The article would become ineffective and purposeless if it was held that pre- Constitution laws should be such as could be made by the appropriate authority under the Constitution. The words "subject to the other provisions of the Constitution" should, therefore, be given a reasonable interpretation, an interpretation which would carry out the intention of the makers of the Constitution and also which is in accord with the constitutional practice in such matters. The article posits the continuation of the pre-existing laws made by a competent authority notwithstanding the repeal of certain acts under Art. 395; and the expression "other" in the article can only apply to provisions other than those dealing with legislative competence."

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70.5 Thus, in the absence of Article 372 in the Constitution, perhaps the laws enacted under the Government of India Act, 1935 would have ceased to operate. Article 372 saves the operation of such laws.

71. **Need for Article 277 in the Constitution – Saving of laws which become inconsistent with the changes in the matters enumerated in the Legislative lists in Schedule**

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VII.

71.1 Apart from the repeal of the Government of India Act, 1935, the Constitution also made some changes in the subject matters allocated to the legislature for enacting laws. Thus, some of the matters within the legislative competence of the Government of State were shifted to the Union List in the Seventh Schedule of the Constitution.

71.2 Accordingly, to save taxes, duties, cesses or fees which prior to the commencement of the Constitution were lawfully being levied by the Government of State and the subject matter to which they relate has been now mentioned in the Union List, Article 227 was enacted. The relevant extract of the said article is as under:

> *"277. **Savings***
> *Any taxes, duties, cesses or fees which, immediately before the comencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law."*

71.3 The analogous provision to Article 277 in the Government of India Act, 1935 was Section 143(2). The Supreme Court in the case of **Ram Krishna Ramanath v. The Janpad Sabha, Gondia, 1962 AIR 1073** held that Section 143(2) is a saving clause designed to prevent dislocation of finances of local government by the reason of distribution of heads of taxation on different lines. The relevant extract of the judgement is as

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under:

> *"Section 143 (2) which is a saving clause and obviously, designed, to prevent a dislocation of the finances of Local Governments and of local authorities by reason of the coming into force of the provisions of the Government of India Act distributing heads of taxation on lines different from those which prevailed before that date, cannot be construed as one conferring a plenary power to legislate on those topics till such time as the Central Legislature intervened."*

71.4 The aforesaid provision is needed, apart from the general savings in Article 372, as Article 372 is subject to the other provisions of the Constitution. If Article 277 was not enacted, a doubt may arise whether the laws enacted by the Government of State prior to the constitution would become inconsistent with Article 246 due to the heads of taxation being shifted to the Union List.

71.5 Thus, to put the matter beyond any doubt, Article 277 saves the laws relating to taxes, duties, cesses or fees even though they are inconsistent with the provisions of the Constitution until provision to the contrary is made by the Parliament._

72. **Unconnected ancillary matter – Whether Section 19 of the Constitution (One Hundred and First) Amendment Act, 2016 applies to laws relating to service tax, excise duty, etc. levied by the Parliament.**

72.1 Section 19 of the Constitution (One Hundred and First) Amendment Act, 2016 reads as under:

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"19. Notwithstanding anything in this Act, ***any provision of any law relating to tax on goods or services or on both in force in any State*** *immediately before the commencement of this Act, which is inconsistent with the provisions of the Constitution as amended by this Act shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until expiration of one year from such commencement, whichever is earlier.*

....emphasis supplied

72.2 A doubt has been raised as to whether Section 19 will apply to the Central levies such as the service tax, excise duty, etc. as only the provisions of law in force in any state.

72.3 On a plain reading of the section, it will become clear that the doubt is entirely unfounded. 'Law.... In force in any State' will include even a law made by the Parliament as it is in force in the state. The words used are not 'law enacted by state legislature'.

72.4 Thus even the Central levies such as the service tax, etc. will be covered by Section 19 of the Constitution (One Hundred and First) Amendment Act, 2016.

73. **Legislature competent to repeal, alter or amend – The legislature which has present competence to enact the law sought to be repealed, can repeal such law. It is irrelevant that the law was enacted by another legislature when it had the competence.**

73.1 The Supreme Court in the case of **A. Hajee Abdul**

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Shukoor & Co. v. State of Madras – AIR 1964 SC 1729 held that the competence to make a law for a past period depends on the present legislative power. The relevant extract of the judgement is as under:

> *"The State Legislature is free to enact laws which would have retrospective operation. Its competence to make a law for a certain past period, depends on its present legislative power and not on what it possessed at the period of time when its enactment is to have operation."*

73.2 In the case of **Kerala State Electricity Board v. Indian Aluminum Co. Ltd. AIR 1976 SC 1031,** the Supreme Court held as under:

> *"Both the 1910 Act as well as the 1948 Act are existing law as contemplated under Article 372 of the Constitution. An existing law continues to be valid even though the legislative power with respect to the subject matter of the existing law might be in a different list under the Constitution from the list under which it would have fallen under the Government of India Act, 1935. But after the Constitution came into force an existing law could be amended or repealed only by the legislature which would be competent to enact that law if it were to be newly enacted."*

73.3 Further, the power to repeal is also co-extensive with the power to enact. Thus, only the legislature which has the power to enact a law, can repeal such a law. This was held by the Supreme Court in the case of **Rama krishna Ramanath v. The Janpad Sabha, Gondia, 1962 AIR 1073** as under:

> *"There is no doubt that the general principle is that the power of a legislative body to repeal a law is co-extensive with its power to enact each a law, as would be seen from the following passage in the judgment by Lord Watson in Attorney General for Ontario v. Attorney*

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General for the Dominion:

> *"Neither the Parliament of Canada nor the provincial legislatures have authority to repeal statutes which they could not directly enact."*

73.4 Thus, the power to repeal or alter an enactment is co-extensive with the power to enact. The power has to be seen at the time when the repealing legislation is being enacted. The legislation may be prospective or retrospective. It can also be made retrospective for the period for which the legislature did not have the competence. However, the legislature should have the competence at the time when such a repealing law is being enacted.

74. **Possibility of amendment of a repealed Act, after its repeal when it is not in operation.**

74.1 The Madras High Court in the case of **Kalyanam Veerabhadrayya v. King, AIR 1960 Mad 243** held that a repealed Act which is non-existent cannot be amended unless the competent legislature revives or re-enact the repealed Act and then make amendments to it.

74.2 The facts in the case before the Madras High Court were these: The Maintenance of Public Order Act, 1947 was enacted for a period of one year. However, the Act provided that the Provincial Government is empowered to extend the operation of the Act beyond the period of one year. This power was held to be bad as it amounts to delegation of legislative function. The Madras Maintenance of Public Order Removal of Doubts Ordinance, 1949 was passed to declare that the Maintenance

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of Public Order Act, 1947 remains in force and shall continue to be in force. In these facts the court held that the amendments can be made only to an existing Act. However, the legislature is competent to revive or re-enact the repealed legislation and make amendments to it. In the facts of that case, the court held that the legislature had not done so. The relevant extract of the judgement is as under:

> *"An amending Act is not an independent Act but an Act passed with a view to effect an improvement or to more effectively carry out the purpose for which the original law was passed. To remove doubts by a declaratory Act, there should be in existence an Act, the doubts in which have to be removed. It the Act had already ceased to be in force, a declaratory Act would have no operation. An amending Act also presumes the existence of an original Act. If the original Act, which was a temporary Act, terminated after the lapse of time, the amending Act would be inoperative."*

74.3 For the aforesaid proposition, the court relied on the decision of Federal Court in the case of **Jatindra Nath Gupta v. Province of Bihar, AIR 1949 FC 175** wherein Mukherjee J. held as under:

> *"It is certainly competent to the Legislature in exercise of its plenary powers to revive or re-enact a legislation which has already expired by lapse of time. The Legislature is also competent to legislate with retrospective effect; but neither of these things seems to have been done in the present case. The Legislature proceeds on the footing that the old Act was alive at the date. Then the new Act was passed, and the new Act merely purports to amend one of the provisions of the old Act. There could be no amendment of an enactment which a not in existence and from the fact that the Legislature purports to amend an Act, it could not held as a matter of construction that the intention of the*

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Legislature was to renew a dead Act or make a new enactment on the same terms as the old with retrospective effect."

74.4 However, in the case of **State of Rajasthan v. Mangilal Pindwal, AIR 1996 SC 2181,** the Supreme Court held that retrospective amendments can be made to the repealed statutes in respect of the transactions past and closed. The judgement has been summarised in Justice GP Singh's Principles of Statutory Interpretation, 14th Edition at page 757-758 as under:

"Since repeal of a law takes effect from the date of repeal and the law repealed remains in operation for the period before its repeal without assistance of nay saving clause for transaction past and closed, it can be retrospectively amended to affect such transactions even after its repeal. Thus, when Rule B made under Article 309 of the Constitution substitutes Rule A, which in effect means that A is repealed and B is enacted in its place, A can be amended retrospectively for the period during which it was in operation to validate transactions past and closed. In the case from which the above principle is deduced, a rule permitted compulsory retirement of a Government servant by paying three months salary. This rule was later repealed by substituting another rule in its place. During the period the earlier rule was in operation, a Government service was retired in payment of an amount as salary but which was found on calculation later to be little short of three months salary making the retirement invalid. The rule was after its repeal amended for the period it was in operation to retire a Government servant forthwith without paying him three months salary but entitling him to claim three months salary after retirement. This amendment was held to be valid and effective to validate the retirement of the Government servant concerned. "

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74.5 The above referred cases, however, are not concerned with the competence of the legislature to enact retrospective laws, but only with the issue as to whether the amendments can be made to the repealed laws.

75. **Repeal of the State VAT Act is not effected by the Constitution (One Hundred and First) Amendment Act, 2016. Repeal is effected by the State GST Acts. Such Acts provide for savings of the pending proceedings. Thus, assessments can be initiated, continued and concluded in pursuance of such saving clause contained in the respective GST laws.**

75.1 In respect of the pending assessments, they can be initiated, continued and concluded. This is because while repealing the VAT Acts by the State GST Act, specific savings have been provided in this regard.

75.2 This provision can perhaps be traced to Section 19 of the Constitution (One Hundred and First) Amendment Act, 2016. Section 19 is not some section enacted under an Act of Parliament or State Legislature. It is a part of the constitution amendment Act and has to be read as an addendum to the Constitution.

75.3 Section 19 provides that the laws relating to the goods and services tax which are inconsistent with the amended Constitution shall continue until amended or repealed by a competent legislature. It is a debatable issue as to who is the competent legislature for the purpose of Section 19: the State Legislature or Parliament?

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75.4 It is argued on behalf of the State that the law relates to tax on sales, which may be covered within the ambit of Article 24CA. It has been argued that the State Legislature will be a competent legislature for the purpose of Section 19.

75.5 Further, Section 19 can be said to be an independent and limited legislative power to repeal the earlier enactments. Such power will also include all ancillary powers necessary to exercise the main powers. Further, as this is an independent power, by necessary implication it may exclude the applicability of other articles such as Article 286, Article 279A, etc. Thus, the saving clause can also be enacted in exercise of such power to save the initiation, continuation and conclusion of assessments.

76. **Which is the legislature competent to amend the laws relating to the Sales Tax after the Constitution (One Hundred and First) Amendment Act, 2016? State Legislature or Parliament?**

THE HIGH COURT OF GUJARAT

76.1 Article 245 of the Constitution provides that the Parliament may make laws for the whole or any part of the territory of India and the Legislature of a State can make laws for the whole or any part of the State.

76.2 Article 245 is the fountain source of the power. In other words, both the Parliament and State legislature are supreme and none is the delegate of another.

76.3 Article 246 read with the Seventh Schedule only

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demarcates the fields of the legislation. However, within their competence, each legislature has plenary powers. Further, while enacting laws which are within their competence, the Parliament or State Legislature can also make laws for the matter which are ancillary to the main matters.

76.4 Thus, to determine the validity of a law, the provisions of the Constitution have to be seen to determine whether the legislature enacting the law has necessary competence to enact such law.

76.5 The Constitution (One Hundred and First) Amendment Act, 2016 inter alia substituted Entry 54 of List II of the Seventh Schedule of the Constitution to confine it to the "Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption'.

76.6 The substitution of Entry 54 amounts to repeal of the old entry and subsequent enactment of the new entry. In absence of any saving clause, the old entry will become non existent as if it had never been in the Constitution, except for the transactions past and closed. However, Section 19 of the Constitution (One Hundred and First) Amendment Act, 2016 saves the laws which are inconsistent with the amended constitution until amended or repealed by competent legislature or expiration of one year of the commencement of Constitution (One Hundred and First) Amendment Act, 2016, whichever is earlier.

76.7 The legislature competent to amend or repeal is the legislative which has the power to enact such law after the

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amendment of the Constitution.

"RELEVANCE OF ARTICLE 246A:

Restriction placed on State legislature in respect of laws relating to sales tax by Article 286 and other provisions of the Constitution prior to the 101st Constitution Amendment Act."

76.8 Article 246(3) of the Constitution provides that the State Legislature has the exclusive power to make laws for such state or any part thereof in respect of any matters enumerated in the List II of the Seventh Schedule.

76.9 The Entry 54 of the List II reads as: 'Taxes on the sale or purchase of goods other than newspaper subject to the provisions of entry 92A of List I.' Entry 92A of List I read as: 'Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter –State trade or commerce'.

76.10 Thus, the State Legislature could make laws for taxes on sale or purchase of goods other than those taking place in the course of inter – state trade or commerce. Article 269(3) of the Constitution provided that the Parliament may by law formulate principles for determining when a sale or purchase takes place in the course of inter-state trade or commerce. Section 3 of the Central Sales Tax Act, 1956 was enacted in pursuance of this power.

76.11 The other restrictions were placed by Article 286 of the Constitution (as it stood post Constitution Sixth Amendment Act and before its amendment by Constitution

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One Hundred and First Amendment Act).

76.12 Prior to the One Hundred and First Amendment of the Constitution, Article 286 of the Constitution had stood as follows:;

> *"286. (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—*
>
> *(a) outside the State; or*
>
> *(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.*
>
> *(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).*
>
> *(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of,—*
>
> *(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce; or*
>
> *(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause (b), sub-clause (c) or sub-clause (d) of clause (29A) of article 366,*
>
> *be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."*

76.13 In Article 286 of the Constitution, vide the Constitution (One Hundred and First Amendment) Act, 2016, the following amendments were made, namely:–

> *"13. In article 286 of the Constitution,—*
>
> *(I) In clause (1),—*

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(A) for the words "the sale or purchase of goods where such sale or purchase takes place", the words "the supply of goods or of services or both, where such supply takes place" shall be substituted;

(B) in sub-clause (b), for the word "goods", at both the places where it occurs, the words "goods or services or both" shall be substituted;

(ii) in clause (2), for the words "sale or purchase of goods takes place", the words "supply of goods or of services or both" shall be substituted;

(iii) clause (3) shall be omitted."

76.14 After the amendments made by the said Constitution Amendment Act, the Article 286 stands as follows:

"286. (1) No law of a State shall impose, or authorise the imposition of, a tax on the supply of goods or of services or both, where such supply takes place—

(a) outside the State; or

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

(2) Parliament may by law formulate principles for determining when a supply of goods or of services or both in any of the ways mentioned in clause (1)."

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76.15 Here, two things are important. First is that the Constitution nowhere provides that the Legislatures of the States can make law for imposing goods and services tax on the intra-State supply of goods or services or both. Secondly, the Constitution does not give powers to the Parliament for formulating principles for the purpose of determining which supplies shall be an intra-State supply of goods or services or

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both. The powers of Legislatures of States can be derived from Article 246A (1) read with Article 246A (2) and Article 286. There is no other provision in the Constitution which either confer the GST Law making the powers or curtails such law making powers of the Legislatures of the States. However, unless Clause (1) of Article 246A takes effect in relation to the petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel, the Parliament and the Legislatures of the States, both, cannot make the law providing levy of goods and services tax (GST) on supply of these goods.

76.16 Thus, a law of a state cannot impose tax on sale or purchase of goods which takes place (a) outside the state or (b) in the course of the import into or export out of India. Clause (2) provides that the Parliament may formulate the principles for determining when a sale or purchase takes place in the ways mentioned in clause (1).

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76.17 Section 4 of the Central Sales Tax Act, 1956 has been enacted in exercise of the powers under Article 286(1)(a) read with clause (2). Section 5 of the Central Sales Tax Act, 1956 has been enacted in exercise of the powers under Article 286(1)(b) read with clause (2).

76.18 Thus, any state law imposing tax on sale or purchase of goods has to comply with the provisions of Article 269(3), Article 286(1)(a) and Article 286(1)(b).

Restriction on the State legislature in respect of the laws relating to goods and services tax after the 101st—

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Constitution Amendment Act.

76.19 The Constitution (One Hundred and First) Amendment Act, 2016 made various changes in the Constitution with regard to the power to make laws relating to the goods and services tax.

76.20 Article 246A has been inserted which provides for power to make laws relating to goods or services tax simultaneously to the Parliament and the State Legislature. The relevant extract of the said Article is as under:

> ***"246A. Special provision with respect to goods and services tax***
> *(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.*
> *(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce".*

76.21 Thus, both the State Legislature and the Parliament has the power to make laws with respect to the goods and services tax. However, the Parliament has the exclusive power to make laws with respect to the goods and services tax where the supply takes place in the course of inter-state trade or commerce.

76.22 Article 296(5) of the Constitution provides that the Parliament may by law formulate the principles for determining when a supply takes place in the course of inter-state trade or

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commerce. The said Article reads as under:

> *"(5)Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce."*

76.23 The Parliament has accordingly enacted, the Integrated Goods and Service Tax Act, 2017, Sections 7 and 8 respectively of which provides the principles for determining when a supply takes place in the course of inter – state trade or commerce.

76.24 Further Article 286 also places some restriction on imposition of tax on the supply of goods or services or both. The Article provides that no law of a state shall authorize the imposition of tax on supply of goods and services or both where such supply takes place outside the state or in the course of the import into or export out of the territory of India. The relevant extract reads as under:

> ***"286. Restriction as to imposition of tax on the sale or purchase of goods:-***
> *(1) No law of a State shall impose, or authorize the imposition of, a tax on the supply of goods or of services or both, where such supply takes place-*
> *(a) outside the State; or*
> *(b) in the course of the import of the goods or services or both into, or export of the goods or services or both out of, the territory of India.*
> *(2) Parliament may by law formulate principles for determining when a supply of goods or of services or both in any of the ways mentioned in clause (1)."*

76.25 Further, Article 279A provides for the constitution of a Goods and Services Tax Council which shall make recommendations on all matters relating to the goods and

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services tax.

76.26 It may not be out of place to note that the residuary power of the Parliament under Article 248 of the Constitution to make laws with respect to any matter not enumerated in the Concurrent List or State List has also been subject to Article 246A.

76.27 Thus, both the State legislature and the Parliament have simultaneous power to make laws relating to goods and services tax under Article 246A.

77. **Amendment of State VAT Acts now made after the 101st Amendment Act for the period when the VAT Acts were in force, can perhaps be made only by the Legislature which has the present competence over the subject matter and it should be in accordance with the present provisions of the Constitution!**

77.1 As seen above the competence to make a law even for a past period depends on the present legislative power. After the amendment of the Constitution, both the Parliament and State Legislature have the competence to enact laws relating to the goods and services tax.

77.2 However, the exercise of the power is circumscribed by other provisions of the Constitution such as Article 246A(2) read with Article 269A(5) which relates to supply in the course of inter-state trade or commerce, Article 286 which relates to restriction on imposition of tax by law made by a state on supply taking place outside the state, in the course of import

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into or export out of territory of India and Article 279A which related to recommendations of the GST Council. Thus, the powers can be exercised only after complying with such provisions of the Constitution.

77.3 We have our own doubts whether an amendment to the VAT Act (which was originally enacted complying with the erstwhile Article 286 and Article 269(3) can now also comply with the new Article 246A(2), Article 269A(5) and Article 286 respectively.

77.4 Further, to what extent the aspects of taxation such as the sale, entry into local area, manufacture, etc. will be covered within the ambit of laws relating to the goods or service tax is also not amply clear. In other words, the State Legislature can make amendments to the earlier VAT Acts, Entry Tax Acts only if such aspects can be traced to Article 246A of the Constitution.

77.5 Section 19 of the Constitution (One Hundred and First) Amendment Act, 2016 can also not be a source of power to amend the State VAT laws. First, the power to amend under Section 19 is only for a period of one year from the commencement of the amendment act.

77.6 Secondly, the words used in Section 19 are that the laws inconsistent with the new provisions of Constitution 'shall continue to be in force'. The Supreme Court in the case of **Ram Krishna Ramanath v. The Janpad Sabha, Gondia AIR 1962 SC 1073** held that the Provincial Legislature which was competent to enact laws prior to the Government of India

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Act, 1935 has a limited legislative power by virtue of Section 143(2) of the Government of India Act, 1935 (which is analogous to Article 277 of the Constitution). This was because the words used was 'may be continued until provision to the contrary is made by the Federal Legislature'. The Supreme Court construed the words 'may' in the phrase to mean 'may continue to be levied if so desire by the Provincial Legislature'. Accordingly, the Supreme Court found a limited legislative power in the Provincial Legislature to repeal the Act or to reduce the rate of tax but not to increase the burden by enhancing the rate of tax.

77.7 However, the above case may not apply to the present case as the words used in Section 19 of the Constitution (one Hundred and First) Amendment Act, 2016 are that the laws shall continue to be in force.

77.8 It is settled principle that the legislative power of the State legislature is plenary. They are not delegate of the Parliament. However, this principle is relevant only when the threshold question on the competence to legislate with respect to subject matter is in favour of the State Legislature.

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78. The Supreme Court in the case of ***Union of India & Anr. vs. Mohit Mineral Private Limited***, *(2019) 2 SCC 599*, had the occasion to consider the challenge to the validity of the Goods and Services Tax (Compensation to States) Act, 2017 enacted by the Parliament as well as the Goods and Services Tax Compensation Rules, 2017. While considering such challenge, the Supreme Court considered Article 246A quite in details. We quote the relevant paras;

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"21. First, we need to notice relevant constitutional provisions and the Parliamentary enactments relevant for the issues raised in these cases.

22. Part XII of the Constitution deals with Finance. Article 265 provides that no tax shall be levied or collected except by authority of law. Article 366 contains definitions. Article 366(26A) defines "services" as "services means
anything other than goods". Whereas Article 366 (29A) contains an inclusive definition of "tax on the sale or purchase of goods". A Bill was introduced in the Lok Sabha namely, the Constitution (One Hundred and TwentySecond Amendment) Bill, 2014 on 19.12.2014 proposing constitutional amendments to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. Statement of Objects and Reasons of the Bill are as follows:"

STATEMENT OF OBJECTS AND REASONS

The Constitution is proposed to be amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. The goods and services 14 tax shall replace a number of indirect taxes being levied by the Union and the State Governments and is intended to remove cascading effect of taxes and provide for a common national market for goods and services. The proposed Central and State goods and services tax will be levied on all transactions involving supply of goods and services, except those which are kept out of the purview of the goods and services tax.

2. The proposed Bill, which seeks further to amend the Constitution, inter alia, provides for—

(a) subsuming of various Central indirect taxes and levies such as Central Excise Duty, Additional Excise Duties, Excise Duty levied under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, Service Tax,

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Additional Customs Duty commonly known as Countervailing Duty, Special Additional Duty of Customs, and Central Surcharges and Cesses so far as they relate to the supply of goods and services;

(b) subsuming of State Value Added Tax/Sales Tax, Entertainment Tax (other than the tax levied by the local bodies), Central Sales Tax (levied by the Centre and collected by the States), Octroi and Entry tax, Purchase Tax,
Luxury tax, Taxes on lottery, betting and gambling; and State cesses and surcharges in so far as they relate to supply of goods and services;

(c) dispensing with the concept of 'declared goods of special importance' under the Constitution;

(d) levy of Integrated Goods and Services Tax on inter-State transactions of goods and services;

(e) levy of an additional tax on supply of goods, not exceeding one per cent. in the course of inter-State trade or commerce to be collected by the Government of India for a period of two years, and assigned to the States from where the supply originates;

(f) conferring concurrent power upon Parliament and the State Legislatures to make laws governing goods and services tax;

(g) coverage of all goods and services, except alcoholic liquor for human consumption, for the levy of goods and services tax. In case of petroleum and petroleum products, it has been provided that these goods shall not be subject to the levy of Goods and Services Tax till a date notified on the recommendation of the Goods and Services Tax Council.

(h) compensation to the States for loss of revenue arising on account of implementation of the Goods and Services Tax for a period which may extend to five years;"

23. The Constitution (One Hundred and First Amendment) Act, 2016 dated 08.09.2016 was passed to amend the Constitution of India. By Constitution (One Hundred and First Amendment) Act, 2016, new Articles 246A, 269A

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and 279A were inserted. Amendments were also made in Articles 248, 249, 250, 268, 269, 270, 271, 286, 366 and 368. Article 268A was omitted. Amendments were also made in Seventh Schedule of the Constitution in List I and List II.

Article 246A and 269A as inserted by Constitution (One Hundred and First Amendment) Act, 2016 is as follows:"

246A. Special provision with respect to goods and services tax.(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce

Explanation.—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.".

269A. Levy and Collection of goods and services tax in course of inter-State
trade or commerce.(1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation.—For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

(2) The amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.

(3) Where an amount collected as tax levied under clause

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(1) has been used for payment of the tax levied by a State under article 246A, such amount shall not form part of the Consolidated Fund of India.

(4) Where an amount collected as tax levied by a State under article 246A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of the State.

(5) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.".

24. Article 270 of the constitution as amended by the above Amendment Act is as follows:"

270.Taxes levied and distributed between the Union and the States.(1) All taxes and duties referred to in the Union List, except the duties and taxes referred to in Articles 268, 269 and 269A, respectively, surcharge on taxes and duties referred to in Article 271 and any cess levied for specific purposes under any law made by Parliament shall be levied and collected by the Government of India and shall be distributed between the Union and the States in the manner provided in clause (2)."

25. Section 18 and Section 19 of the Constitution (One Hundred and First Amendment) Act, 2016 is also relevant, which are to the following effect:"

18. Compensation to States for loss of revenue on account of introduction of goods and services tax.Parliament shall, by law, on the recommendation of the Goods and Services Tax Council, provide for compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for a period of five years.

19. Transitional provisions- Notwithstanding anything in this Act, any provision of any law relating to tax on goods or services or on both in force in any State immediately before the commencement of this Act, which is inconsistent with the provisions of the Constitution as amended by this Act shall continue to be in force until

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amended or repealed by a competent Legislature or other competent authority or until expiration of one year from such commencement, whichever is earlier.

26. At this stage, it is also relevant to notice that in the Constitution (One Hundred and Twenty Second Amendment) Bill, 2014, Clause 18 contain a provision for arrangement for assignment of additional tax on supply of goods to States for two years or such other period recommended by Council, which was to the following effect:"

18. Arrangement for assignment of additional tax on supply of goods to States for two years or such other period recommended by Council (1) An additional tax on supply of goods, not exceeding one per cent. in the course of inter-State trade or commerce shall, notwithstanding anything contained in clause (1) of article 269A, be levied and collected by the Government of India for a period of two years or such other period as the Goods and Services Tax Council may recommend, and such tax shall be assigned to the States in the manner provided in clause (2).

(2) The net proceeds of additional tax on supply of goods in any financial year, except the proceeds attributable to the Union territories, shall not form part of the Consolidated Fund of India and be deemed to have been assigned to the States from where the supply originates.

(3) The Government of India may, where it considers necessary in the public interest, exempt such goods from the levy of tax under clause (1).

(4) Parliament may, by law, formulate the principles for determining the place of origin from where supply of goods take place in the course of inter-State trade or commerce."

27. Clause 19 contain compensation to States for loss of revenue on account of introduction of goods and services tax. Clause 19 of the Bill is as follows:"

19. Compensation to States for loss of revenue on account of introduction of goods and services tax- Parliament may, by law, on the recommendation of the

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Goods and Services Tax Council, provide for compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for such period which may extend to five years."

28. It is, however, to be noticed that Constitution (One Hundred and Twenty Second Amendment) Bill, 2014 was passed but Clause 18 of the Bill was not incorporated and Clause 19 found place as Section 18 of the Constitution (One Hundred and First Amendment) Act, 2016. After the aforesaid Constitution Amendment, Parliament enacted Central Goods and Services Tax Act, 2017 (Act No.12 of 2017 dated 12.04.2017) to make a provision for levy and collection of tax on intra State supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto. On the same day, another enactment namely 'The Integrated Goods and Services Tax Act, 2017' (Act No. 13 of 2017 dated 12.04.2017) was enacted to make a provision for levy and collection of tax on inter-State supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto. Another enactment namely 'The Union Territory Goods and Services Tax Act, 2017' (Act No. 14 of 2017) was passed on the same day to make a provision for levy and collection of tax on intra-State supply of goods or services or both by the Union territories and for matters connected therewith or incidental thereto. The Fourth Parliamentary enactment, which is subject matter of challenge in the present case was also enacted on the same day, i.e. 12.04.2017, namely 'The Goods and Services Tax (Compensation to States) Act, 2017' (Act NO. 15 of 2017) to provide for compensation to the States for the loss of revenue arising on account of implementation of the goods and services tax in pursuance of the provisions of the Constitution (One Hundred and First Amendment) Act, 2016. As the Preamble indicate (Compensation to States) Act, 2017 was enacted in pursuance of the provisions of the Constitution (One Hundred and First Amendment) Act, 2016.

79 The observations made by the Supreme Court as contained in para 55 are important. Those read as under:

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"55. The expression used in Article 246A is "power to make laws with respect to goods and service tax". The power to make law, thus, is not general power related to a general entry rather it specifically relates to goods and services tax. When express power is there to make law regarding goods and services tax, we fail to comprehend that how such power shall not include power to levy cess on goods and services tax. True, that Constitution (One Hundred and First Amendment) Act, 2016 was passed to subsume various taxes, surcharges and cesses into one tax but the constitutional provision does not indicate that henceforth no surcharge or cess shall be levied."

80. The issue can also be looked into from a different angle. Article 246(A) of the Constitution of India has been inserted in the Constitution of India to provide for integrated power to the Union of India and the States to make a common law to levy tax on the "Goods and Services". Article 246A is not akin to the "concurrent list" enumerated in List III in Schedule VII of the Constitution of India which empowers, either the Union or State, to make laws with respect to levy of tax on either the goods or services. The Parliament in its wisdom did not incorporate power to make laws with respect to the "Goods and Services Tax" in the "Concurrent list" enumerated in List III in Schedule VII of the Constitution of India but inserted a new Article 246A in the Constitution of India to confer an integrated power, to both the Union and the State, which is to be exercised simultaneously by both, to make a common law to levy tax on the "Goods and Services". The purpose of this constitutional amendment was perhaps to have a uniform "Goods and Services Tax" law throughout the country.

81. It prima facie appears that the power conferred by Article 246A of the Constitution of India is to be exercised by both, the

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Union and the States concurrently to ensure uniform "Goods and Services Tax" law all over the country. The Union of India or States cannot separately exercise power given by Article 246A of the Constitution of India independent of each other unlike the power given by the "Concurrent list" enumerated in the List III in the Schedule VII of the Constitution of India.

82. Further, Article 245A in the Constitution of India empowers to make a integrated tax law with respect to levy of tax on either "Goods" or "Services".

83. Once again, we may look into the observations made by the Supreme Court in Mohit Mineral Pvt. Ltd (supra) as contained in para-55. The same reads thus;

> *"55. The expression used in Article 246A is "power to make laws with respect to goods and service tax". The power to make law, thus, is not general power related to a general entry rather it specifically relates to goods and services tax. When express power is there to make law regarding goods and services tax, we fail to comprehend that how such power shall not include power to levy cess on goods and services tax. True, that Constitution (One Hundred and First Amendment) Act, 2016 was passed to subsume various taxes, surcharges and cesses into one tax but the constitutional provision does not indicate that henceforth no surcharge or cess shall be levied."*

84. The objective of the One Hundred and first amendment to the Constitution of India vide the Constitution (One Hundred And Firsts Amendment) Act, 2016 was to bring into force a uniform law for levy of tax on "Goods and Services" and not separate laws with respect to either Goods and Services.

85. The statement of objects and reasons as provided in the

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Bill introduced in Loksabha on 18th December, 2014 clearly stated that the Constitution is proposed to be amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including the Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. It further provided that it seeks to amend the Constitution to subsume the State Value Added Tax/Sales Tax.

86. It is an established principle of interpretation of statues to look into the mischief which was intended to be remedied by enactment of the statute.

87. It has been held by the Supreme Court in the case of ***U.P.Bhoodan Yagna Samiti, U.P. Vs. Braj Kishore and Ors***. reported in *AIR 1988 SC 2239* that one has to look to the intention of the Legislature, one has to look to the circumstances under which the law was enacted, the Preamble of the law, the mischief which was intended to be remedied by the enactment of the statute.

88. The Entry 54 in List II in Schedule VII of the Constitution of India was amended to extinguish the power of states to levy taxes on sale or purchase of goods except taxes on the sale of petroleum products and alcoholic liquor for human consumption. Therefore, the power to amend any law with respect to levy of tax on the sale or purchase of goods such as “Gujarat VAT Act” could be said to have been abolished with the aforesaid amendment in the Entry 54 in List II in Schedule VII of the Constitution of India.

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89. Having given our earnest consideration to all the relevant aspects of the matter, we have reached to the conclusion that Article 246A of the Constitution of India does not save Section 84A of the VAT Act from being declared invalid or ultra vires. As noted above, Article 246A of the Constitution was inserted by the 101st Constitution Amendment Act with the sole or rather the precise object of subsuming multiple indirect taxes and to confer concurrent power to the Parliament and State Legislature to impose "Goods & Services Tax" in accordance with the recommendations of the Goods & Services Tax Council statute under Article 279A of the Constitution of India. The very object of such large scale reform was to replace number of indirect taxes being levied by the Union and the State Governments and to remove the cascading effect of taxes and provide for a common national market for goods and services. This is apparent from the statement of objects and reasons referred to by the Supreme Court in Mohit Mineral Pvt. Ltd. (supra)

90. Further Section 18 to the Constitution Amendment Act provides for compensation to the States for the loss of revenue arising on account of the implementation of the goods and services tax for a period of 5 years. Thus the entire scheme of the Constitution Amendment Act recognizes imposition of only "goods and services tax" under Article 246A of the Constitution of India. The phrase the "goods and services tax" is defined under Article 366(29A) to mean any tax on supply of goods or service or both except taxes on the supply of alcoholic liquor for human consumption. Such "supply" cannot be fragmented into different components by the State legislature and assume power to impose independent tax on the sale of goods without

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reference to the Goods and Services Tax Council. Such interpretation would be contrary to the entire scheme as well as the object and purpose of the Constitution Amendment Act. In fact the provision providing for compensation to the States for the loss of revenue due to the goods and services tax would also be irrelevant if the State legislatures are independently empowered to enact sales tax/value added tax legislations by taking recourse to Article 246A of the Constitution of India.

91. In fact if the State legislature has the power to enact the value added tax laws under Article 246A of the Constitution of India as argued on behalf of the State, then Entry 54 of List II of the Seventh Schedule to the Constitution which was retained to the extent of six products which are outside the GST regime will be rendered redundant. The very fact that Entry 54 of List II of the Seventh Schedule was retained in so far as the six products are concerned indicates that the sales tax/value added tax enactment is not permissible under Article 246A of the Constitution of India. The vociferous argument of the State that Article 246A of the Constitution can support the enactment of provision under the Vat Act falls flat in the face of the existence of Entry 54 of List II of the Seventh Schedule to the Constitution of India which survived the 101st Constitution Amendment Act.

92. We may clarify that in Mohit Mineral Pvt. Ltd. (supra), the challenge was to the imposition of the compensation cess under the Goods & Services Tax (Compensation to States) Act, 2017 on the ground of lack legislative competence. The Union defended such levy by relying upon Article 246A of the

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Constitution. Cess was imposed on the Goods & Services Tax itself and its validity was upheld by the Supreme Court. Mr. Soparkar invited our attention to few distinguishing features of the said case with the facts of the present case. In our opinion, the distinguishing features are quite relevant.

Sr. No.	Observation and conclusions of Supreme Court	How not applicable to the present case
(1)	The Supreme Court observed in para 40 of the judgement that the expression "cess" means a tax levied for some special purpose, which may be levied as an increment to an existing tax. The cess was with respect to goods and services tax. It was concluded in para 56 that power to levy goods and services tax included power to levy cess on goods and services tax	In the present case the Vat enactment has absolutely nothing to do with the goods and services tax. It cannot be compared to a cess or surcharge imposed on the goods and services tax
(2)	It was observed in para 41 of the judgement that the residuary power of legislation is with the Parliament and in the absence of any contention	In the present case the challenge is to the competence of the State legislature. The State legislature does not have any residuary power and it

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	that the subject matter of the legislation was within the competence of the State legislature it could not be said that there was lack of legislative competence in Parliament.	has to fall within the four corners of the fields demarcated to it under the scheme of the Constitution
(3)	In so far as challenge with reference to 101st Constitution Amendment Act was concerned it was observed in paras 57 and 58 of the judgement that Section 18 of the 101st Constitution Amendment Act did provide for compensation to the States for the loss of revenue arising on account of the implementation of the goods and services tax and hence the levy of compensation cess was under the 101st Constitution Amendment Act.	The impugned Section 84A of the Vat Act is completely dehors the object and purpose of the 101st Constitution Amendment Act. In fact if power to enact such provision is upheld under Article 246A of the Constitution of India then Entry 54 of List II of the Seventh Schedule to the Constitution of India which was specifically retained by the 101st Constitution Amendment Act will be rendered redundant

93. In the aforesaid context, we may look into a very recent pronouncement of the Kerala High Court in the case of ***M/s.***

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Opac Engineering Pvt. Ltd. vs. The State Tax Officer (Works Contract) & Ors., rendered in *WP (C) No.32439 of 2019*, decided on 6th Day of December, 2019/ 15th Agrahayana, 1941. In the case before the Kerala High Court, the legality and validity of the notices and assessment orders issued to the petitioners in connection with the assessment under the Kerala Value Added Tax Act (for short "the KVAT Act") for the A.Y. 2010-11 and 2011-12 was made a subject matter of challenge. The main plank of challenge to the impugned notices and orders was on the ground that the authorities concerned had no jurisdiction since the amendments introduced to Section 25(1) of the KVAT Act through the Kerala Finance Acts of 2017 and 2018 notified through Gazette Notifications dated 19.06.2017 and 31.03.2018 respectively did not contemplate a retrospective operation of the amended provisions. A learned Single Judge of the Kerala High Court formulated the following questions of law for the purpose of deciding the matter.

> "(a) Whether under the provisions of Section 25(1) of the KVAT Act, as amended by the Kerala Finance Act, 2017, and before the repeal of the KVAT Act on 22.06.2017, the six year period of limitation for re-opening assessments could be relied upon to issue pre-assessment notices in cases where, by 31.03.2017, the five year period for re-opening assessments under the unamended provisions of Section 25(1) of the KVAT Act had already expired?
> (b) If issue (a) is answered in the negative, whether the amendment to the third provision to Section 25(1) of the KVAT Act, through the Kerala Finance Act, 2017, would enable the revenue to re-open assessments in cases where, by 31.03.2017, the five year period for re-opening assessments under the un-amended provisions of Section 25(1) of the KVAT Act had already expired?
>
> (c) Whether after the CAA, 2016, and the repeal of the KVAT Act pursuant thereto, on 22.06.2017, the State

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Legislature retained any residual power of legislation so as to amend the provisions of Section 25(1)of the KVAT Act through the Kerala Finance Act, 2017?

(d) Whether the amendment to the provisions of Section 25 (1) OF THE KVAT Act, through the Kerala Finance Act, 2018, and the pre-assessment notices and assessment orders issued consequential thereto, could be justified by relying on the savings clause under Section 174 of the SGST Act?"

94. The discussion with respect to the issues Nos. c and d respectively assumes importance and significance. We quote the findings recorded by the Kerala High Court.

" Although detailed arguments have been advanced before me on both these issues, I find that I need confine myself only to a consideration of issue (c) in these cases. This is because issue (d) had come up for consideration before a learned single judge in a batch of cases where the validity of Section 174 of the State GST Act had been called in question. Rejecting the contentions of the assessees in those cases, the court in Sheen Golden Jewels (India) Pvt. Ltd. v. State Tax Officer & Ors. - [2019 (27) KTR 119 (Ker)] found that the mere repeal of the KVAT Act with effect from 22.06.2017 did not have the effect of making the KVAT inapplicable in respect of those actions that were expressly saved by the provisions of Section 174 of the State GST Act. The Court found that the State legislature retained its legislative power to enact the savings clause under Section 174 of the State GST Act and that the only difference in the nature of that power was that, while prior to the introduction of GST through the CAA the State Legislatures enjoyed exclusivity in the mater of legislation on the subject of taxes on sale or purchase of goods, after the CAA, they had simultaneous legislative power, with the Parliament, to legislate in respect of taxes on supply (which included sale) of goods or services or both. The challenge to the notices and orders issued/passed by the revenue authorities was rejected on the finding that the actions of the revenue authorities, in issuing such notices and passing such orders, were saved by the provisions of Section 174 of the State GST Act, the validity of which

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was also upheld.

18. I am given to understand that an intra-court appeal against the aforesaid judgment of the learned Single Judge is pending consideration before a Division Bench of this Court. At any rate, the said judgment, which dealt with actions taken by the revenue authorities before the amendments brought in to the KVAT Act through the Kerala Finance Act, 2018, did not have to consider the issue of legislative competence of the State Legislature to amend the KVAT Act, after the CAA, 2016, and the repeal of the KVAT Act pursuant thereto, on 22.06.2017. It is to a consideration of the said issue that I now turn.

19. As already noticed above, the amendments effected to Section 25 (1) of the KVAT Act, through the Kerala Finance Act 2017, were before the repeal of the KVAT Act with effect from 22.06.2017. The provision as it stood then, and in particular the third proviso thereto, authorised the re-opening of past assessments till 31.03.2018. The amendment effected through the Kerala Finance Act, 2018, with effect from 01.04.2018, enlarged the period for re-opening past assessments from 31.03.2018 to 31.03.2019. Under ordinary circumstances, and based on my findings above as regards the effect of the amendments brought into the third proviso to Section 25 (1) by the Kerala Finance Act, 2017, the legislative measures should have sufficed to justify a re- opening of past assessments up to 31.03.2019, notwithstanding that the amendment itself was effective only from 01.04.2018. However, the intervention of the CAA 2016, and the consequent repeal of the KVAT Act with effect from 22.06.2017, has a bearing on the legality of the 2018 amendment. ***A distinction does exist between the saving of rights, privileges, immunities and liabilities under a repealed enactment, through a savings clause inserted in the new enactment traceable to the same legislative power, and an amendment brought in to a repealed enactment after the legislative power justifying both actions, prior to the CAA 2016, could have been traced to Article 246 of our Constitution, read with the relevant entry in the VIIth Schedule thereto, the position changed when there was a fundamental shift in the nature of the tax levy and a fresh conferment***

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of legislative power to legislate in respect of the new levy. After the CAA 2016, the State Legislatures stood denuded of their power to legislate in respect of taxes on sale or purchase of goods, that was covered under Entry 54 of List II of the VII th Schedule to the Constitution, and they were instead conferred with legislative powers, to be exercised simultaneously with the Parliament, in respect of taxes on supply of goods or services or both. While the new legislative power could justify the inclusion of a savings clause in the new legislation enacted in respect of the new levy of tax, to save accrued rights, privileges, immunities etc. under the erstwhile enactment, the deletion of Entry 54 of List II automatically denuded the State Legislatures of the power to further legislate on the subject of taxes on sale or purchase of goods, except to the limited extent retained under the Constitution. The power to amend a statute being a facet of the legislative power itself, the State legislature could not have exercised a power to amend the KVAT Act, save to the extent permitted, when it did not retain any residual right to further legislate on the subject of taxes on sale or purchase of goods*.*

20. There is yet another aspect of the matter. It is trite that when a Court judges the Constitutionality of a legislative enactment it should try to sustain the validity of the enactment to the extent possible and it should strike down the law only when it is impossible to sustain it State of Bihar v. Bihar Distilery - [JT (1996) 10 SC 854]. At the same time, the Court must proceed to determine the intention of the Parliament, not only from the language used in the statute but also from surrounding circumstances and an understanding of the mischief that was sought to be remedied by the statute. When one applies the said test to the events that took place after the CAA, 2016, it cannot but be noticed that the very purpose of the CAA was to bring about a change in the system of indirect taxation in our country through the introduction of a Goods and Service Tax, and the phasing out of the multitude of indirect tax levies, including value added taxes, that were levied and collected by the Centre and the States. Section 19 of the CAA 2016, which is the sunset clause in the said enactment, envisaged the

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continuation of the erstwhile system of taxation for a period of one year from the date of enactment of the CAA or till such time as the State legislatures amended or repealed their respective VAT legislations, whichever was earlier. ***When the State legislature repealed the KVAT Act, while simultaneously bringing into force the new State GST Act, with a savings clause of limited operation, it effectively acknowledged the absence of any power to legislate thereafter on the subject of tax on sale or purchase of goods, except in respect of the limited commodities for which the said power was retained under the Constitution. In respect of all other commodities, the legislative power of the State was only in respect of taxes on the supply of goods or services or both, a power that had to be exercised simultaneously with the Parliament and not unilaterally or exclusively. Thus, at the time of repeal of the KVAT Act, and simultaneous enactment of the State GST Act with a savings clause therein, the savings clause operated only to save rights, privileges, immunities, action taken etc under the erstwhile enactment as it stood at the time of its repeal, which included the amendments brought in through the Kerala Finance Act, 2017. There could not have been any further legislative exercise by the State legislature in relation to the repealed KVAT Act****.*

21. I therefore find that issue (c) has to be answered in the negative and in favour of the writ petitioners. The amendments to Section 25 of the KVAT Act, through the Kerala Finance Act, 2018 are declared illegal and unconstitutional in as much as they were beyond the legislative competence of the State Legislature.

In the result, these writ petitions are disposed by declaring that,

(i) the assessments in respect of which the period of limitation for re-opening under Section 25 of the KVAT Act was to expire by 31.03.2017 can be re-opened up to 31.03.2018 by virtue of the amendment to the third proviso to Section 25 (1) vide Kerala Finance Act, 2017.

(ii) the assessments in respect of which the period of limitation for re-opening under Section 25 of the KVAT Act was to expire by 31.03.2018 cannot be re-opened up

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to 31.03.2019 or thereafter, by relying on the amendments introduced through the Kerala Finance Act, 2018 since the State Legislature did not have the power to amend the KVAT Act after the CAA 2016, and the repeal of the KVAT Act pursuant thereto, on 22.06.2017.

(iii) The legality of the orders/notices impugned in these writ petitions shall stand determined by the declarations in (i) and (ii) above. "

95. The line of reasoning adopted by the Kerala High Court in the aforesaid decision fortifies our view that the State Legislature could not have amended the State VAT Act by enacting Section 84A which is sought to be protected by virtue of Article 246A of t he Constitution.

96. The dictum as laid by the Kerala High Court may be summarized as under:

"Amendments made prior to introduction of GST

The Legislature can take away a right/immunity by retrospective amendment. However, Section 25(1) which was made effective only from April 1, 2017, has a prospective operation. Therefore, the Department cannot issue assessment notice where limitation period expired prior to the amendment.

The amendment to the third proviso of Section 25(1) is retrospective in nature. If the same is read to be prospective, the purpose of this amendment will not be met. The Court held that the assessment whose limitation period expired on March 31, 2017 (i.e. Financial Year 2011-12), could have been undertaken till March 31,2018.

Amendments made after the introduction of GST

The Constitution (One Hundred and First) Amendment Act, 2016 ('CAA') which came into force on September 16, 2016, stripped the State Legislatures of their power

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to legislate in respect of sale or purchase of goods covered under Entry 54 of List II of the Schedule VII of the Constitution of India. The sunset clause under Section 19 of the CAA allowed continuation of the erstwhile State VAT laws till September 16, 2017 or until such statutes were repealed or amended, whichever was earlier. The KVAT Act was repealed with effect from June 22, 2017.

Since the power to amend is a legislative power, the State Legislature lacked the legislative competence to amend Section 25 of the KVAT Act after the repeal of KVAT Act on June 22, 2017. Therefore, the assessments for the FY 2011-12 could not have been re-opened after March 31, 2017 (till March 31, 2018) as provided by the Kerala Financial Act, 2018.

The existence of legislative competence is fundamental to the exercise of legislative functions and necessarily includes the power to amend. Prior to the repeal of the KVAT Act and the sunset date under the CAA, the Legislature was competent to amend the KVAT Act.

Post repeal of the KVAT the savings clause under the KGST Act cannot be relied upon to make any amendments in the erstwhile VAT laws. The savings clause only saves the executive actions such as the power to issue notices and pass orders under the erstwhile laws but not the power to legislate in respect of the same.

Therefore, no amendments whether prospective or retrospective can be made after the concerned erstwhile law has been amended or repealed or if one year has lapsed from the enactment of the CAA."

97. Mr. Kamal Trivedi, the learned Advocate General placed strong reliance on the decision of the Kerala High Court in the case of ***Sheen Golden Jewels (India) Pvt. Ltd vs. State Tax Officer***, *2019 SCC Online Ker. 973*. Strong reliance has been placed on the following observations;

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"133.Article 246 of the Constitution deals with the distribution of legislative powers. Under Clause (1) of that Article, Parliament has the exclusive power to make laws on any of the matters enumerated in List I (Union List) in the Seventh Schedule. Under Clause (2) both Parliament and the State Legislature have concurrent powers to make laws on any matter enumerated in List III (the Concurrent List) of the Seventh Schedule. But the State Legislature's power to legislate over the matters in the Concurrent List is subject to Parliament's power under the Union List. Then, of course, subject to Parliament's powers under List I and List III, the State Legislature has the exclusive power to make laws on any matter enumerated in List II (State List). Besides, under Article 245(4) of the Constitution, Parliament has the power on any matter for any part of the territory of India not included in a State.

134. The CA Act examined, we can notice that from 16.09.2016, Article 246 stood amended and modified in its operation; Article 246A was introduced. Section 2 of the CA Act signifies a drastic constitutional shift in the division of legislative powers: instead of division, it fosters amalgamation. Article 246A has no schedules.

135. And the scheme of the CA Act further examined, Entry 54 of List II stands substituted. So comes the assertion from the petitioners that Entry 54 abrogated (it is not, though), the States have been denuded of the power of taxation from 16.9.2016 on the items that stand deleted. For them, the interim or temporary continuation is only up to 16.09.2017, as per Section19 of the CA Act. They also argue that if the State wants to sustain "taxes under Entry 54, then there is no necessity to abrogate the erstwhile Entry 54 on 16.09.2016. Read otherwise, Section 19 would be rendered otiose, meaningless, and would have no significant purpose at all.

136. Unfortunately, the whole argument is sought to be erected on a slippery slope. There is no denudation of legislative power, no obliteration of Entry 54 of List II. An entry's abrogation, as it were, would not ipso facto lead to the legislative denudation. I will elaborate on that, later.

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141. Now, let us examine both Section 19 of the CA Act and Section 174 of the KSGST Act. Section 19 mandates that any inconsistent law relating to tax on goods and services in force in any State before 16.09.2016 (the commencement of the CA Act) shall continue to be in force "until amended or repealed by a competent Legislature or other competent authority". So the States were, first, required to amend the inconsistent laws to bring them in harmony with the CA Act. Otherwise, the States must repeal them. And they were given one year for achieving this. If the States do neither, those inconsistent acts stand repealed.

142. Here, the States acted; they amended a few inconsistent Acts. They also repealed a few more. As with the KVAT Act, the repeal, if it were, has not resulted in its abrogation or annihilation. So the operation of the so-called sunset clause (as provided in Section 19) has not denuded the State's power to enforce the KVAT Act in its amended form. The Act remained, with its remit reduced, though. Thus goes out of reckoning the petitioners' another assertion: that with the repeal of the enactments, the procedural mechanism has disappeared. It has not. The prospectivity of the amendment undisputed, what remains to be examined is the State's power to save what had happened before the CA Act came into force or, more precisely, until one year after that Act came into force. Indeed, the CA Act allowed the State Acts in the same legislative field to coexist for one year: the window period.

180. The petitioners argue that the CA Act has disrupted the federal demarcations; the State's legislative fields under Entry 54 of the Second Schedule have been truncated. Thus, the State has no longer the power to legislate on the files that have been taken away from it. Have the State's legislative power on the items once available for it under the Entry 52 taken away? We will see.

181 First, the State's legislative powers have not been taken away; they have been, on the contrary, constitutionally permitted to be shared with the Union

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Government. What is gone is the State's exclusivity. To the legislative fields of exclusivity and concurrency, what has been added is the simultaneity-novel as it may sound.

182. To encapsulate, I may observe that all the petitioners have advanced one common argument: the State has been denuded of its legislative power to enact Section 174 of the Kerala State Goods and Services Act, 2017. The obvious prop for this assertion comes from the 101st Constitutional Amendment-that is, the attenuated or modified Entry 54 of the List II, the State List.

183. All the petitioners contend that the KSGST Act came into being because of the Constitutional Amendment. And that very Constitutional Amendment has put paid to many other enactments-for example, the Kerala Value Added Tax Act, 2003. So with the Entry 54 of List II unavailable for the State to incorporate Section 174 of the KSGST Act, the whole saving mechanism vis-à-vis transactions before 16.09.2017 crumbles.

184. I am afraid it is a fallacy on the petitioners' part to contend that the State lacks the legislative power to enact Section 174 of the KSGST Act. Article 246A is the special provision (if it can be called a provision) on the Goods and Services Tax. It empowers, as rightly contended by the learned Senior Counsel Shri Venkataraman, both the Union and the State, for the first time, to have simultaneous-not concurrent- powers to legislate on certain items. Indeed, concurrency yields to the doctrine of repugnancy, but simultaneous legislative power does not. That is, both the legislatures, say one from the Union and the other from the State, coexist-operate in the same sphere, subject to other constitutional safeguards.

185. In Synthetics and Chemicals Ltd., the Supreme Court has held that the power to legislate does not flow from a single Article of the Constitution. To articulate this assertion and to elaborate on it, Bimolangshu Roy observes that besides the declaration in Article 246, there are various other Articles in the Constitution which confer authority on the Parliament or on a State legislature to legislate, under various circumstances.

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186. Indeed the State legislatures are assigned only specified fields of legislation, the residuary legislative powers lying with the Parliament. But taxing entries are distinct from the general entries. So comes a federal constitutional experiment in the fiscal field: the 101st Constitutional Amendment."

98. It has been vehemently argued by Mr. Trivedi by placing reliance on the aforesaid observations of the Kerala High Court that the entries to the legislative list are not the only source of the legislative power but are merely topics or fields of legislation and that the competence to legislate flows from the Articles in Part-XI of the Constitution of India. It is sought to be argued by the learned Advocate General that the amendments in such entries like the amendment in Entry 54 of List II in the present case would not make any difference to the legislative competence of the State Legislature to make any laws, which otherwise flows from the substantive provisions under the Constitution. To fortify such submission, reliance has been placed on a decision of the Supreme Court in the case of ***Hoechst Pharmaceuticals Ltd. vs. State of Bihar***, *(1983) 4 SCC 45*. It has been argued by Mr. Trivedi that by enacting Section 84A in the VAT Act, the State Legislature has not proposed to levy any fresh tax, but merely allowed the department to enlarge the period of limitation under the provisions of Section 75 of the VAT Act, if permissible, so as to collect the legitimate tax already levied but could not be collected in view of the pendency of litigation before the Supreme Court.

99. We are afraid we are not in a position to agree with the stance of the State. In Sheen Golden Jewels (India) Ltd. (supra),

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the challenge was to Section 174 of the Kerala Goods & Services Tax Act, 2013 which saved the levy, assessment and recovery of transactions under the pre-GST enactments on the ground that the same was beyond the legislative competence of the State Legislatures after the 101st Constitutional Amendment Act. In such context, it was held that the State Legislature had the competence to enact a savings clause in respect of the past transactions. The High Court rejected the contention that even the existing liabilities under the pre-GST enactments would stand obliterated by Section 19 of the 101st Constitutional Amendment Act. In the case on hand, the issue is altogether different and of wide import. In the case on hand, the issue is whether the State Legislature can create fresh liabilities by enactment of Section 84A of the VAT Act after the 101st Constitutional Amendment Act. The dictum as laid down in Hoechst Pharmaceuticals Ltd. (supra) would also not help the State. In the said case, the Supreme Court observed that various entries in the three lists in the seventh schedule of the Constitution are not “powers” of legislation but “fields” of legislation and that the power to legislate is given by Article 246 and other Articles of the Constitution. In the case on hand, the State seeks to uphold the validity of Section 84A of the VAT Act by placing reliance upon Article 246A of the Constitution and not on the list of seventh schedule to the Constitution of India.

100. In M/s. Hoechst Pharmaceuticals (supra), the Supreme Court held as under:

> *“The word "Notwithstanding anything contained in Clauses (2) and (3), in Article 246(1) and the words "subject to Cls. (1) and (2)" in Art. 246(3) lay down the principle of Federal*

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Supremacy viz. that in case of inevitable conflict between Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists II and III, and in case of overlapping between Lists II and III, the former shall prevail. But the principle of Federal Supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an "irreconciliable" conflict between the Entries in the Union and State Lists. In the case of a seeming conflict between the Entries in the two Lists, the Entries should be read together without giving a narrow and restricted sense to either of them. Secondly, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction. It should be considered whether a fair reconciliation can be achieved by giving to the language of the Union Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it and equally giving to the language of the State Legislative List a meaning which it can properly bear. The nonobstante clause in Article 246(1) must operate only if such reconciliation should prove impossible. Thirdly, no question of conflict between the two Lists will arise if the impugned legislation, by the application of the doctrine of 'pith and substance' appears to fall exclusively under one List, and the encroachment upon another list is only incidental."

101. From the aforesaid decision, which is sought to be relied upon by the State, the principle that flow are these:

[1] First, the words "notwithstanding anything contained" in clauses (1) and (2) of Article 246 and the words "subject to" used in clauses (2) and (3) of Article 246 show the supremacy of Parliament namely when there is any conflict between the Union and the State power, the Union power enumerated in List I shall prevail over the State power mentioned in Lists II and III and in case of overlapping between Lists II and III, the former shall prevail.

[2] Secondly, however, before the Court decides the supremacy of Parliament, there should be an effort by

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the Court to reconcile the conflict between the entries in the Union and the State Lists. The non-obstante clause in Article 246(1) and (2) operates only when such reconciliation between the two entries is not possible.

[3] Thirdly, where the competence of State Legislature is challenged, the Court should not proceed with the supremacy of Parliament by employing expressions 'notwithstanding' and 'subject to' and the Court should consider the scope of the entries under which the legislation has been enacted.

[4] Fourthly, there would be no conflict between the two lists if on the application of doctrine of pith and substance, the legislation falls exclusively in one List and the tresspass is only incidental and

[5] Fifthly the general entry in one list of the Seventh Schedule of the Constitution is not to be interpreted as to obliterate the subject-matter of a specific entry in other list.

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102. While laying down the aforesaid principles of law, the Supreme Court made a statement that the entries in the lists are themselves not powers of legislation, but fields of legislation. This does not necessarily imply that the entries are to be ignored. It must receive at the most a liberal construction by a broad & generous spirit & not in a narrow pedantic sense.

103. Tests to ascertain the legislative competence of the State Legislature to enact a provision of law.

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104. In the case of State of Bombay vs. R.M.B. Chamarbaugwalia and others reported in AIR 1956 Bom 1, Chagla, C.J. sitting with Justice Dixit observed thus:

> ***"The first question that arises for our consideration is with regard to the legislative competence of the State Legislature to enact this Act. In our opinion, the correct principle which should be applied in order to ascertain whether the State Legislature is competent to pass an impugned piece of legislation is in the first place to look at the Lists annexed to the Seventh Schedule of the Constitution in Order to determine whether the Legislature has legislated upon a topic within its competence. If it has legislated upon a topic not within its competence, than the legislation is clearly ' ultra vires ' and no further question arises.***

105. The aforenoted Division Bench decision of the Bombay High Court was looked into by a Seven Judge Bench of the Supreme Court reported in AIR 1957 SC 699. S.R. Das, J., speaking for the Bench, observed thus:

> *"**The principal question canvassed before us relates to the validity or otherwise of the impugned Act. The Court of Appeal has rightly pointed out that when the validity of an Act is called in question, the first thing for the Court to do is to examine whether the Act is a law with respect to a topic assigned to the particular Legislature which enacted it. If it is, then the court is next to consider whether, in the case of an Act passed by the Legislature of a Province (now a State) its operation extends beyond the boundaries of the Province or the State; for under the provisions conferring legislative powers on it such Legislature can only make a law for its territories or any part thereof and its laws cannot, in the absence of a territorial nexus, have any extra-territorial operation. If the impunged law satisfies both these tests, then finally the court has to ascertain if there is anything in any other part of the Constitution which places any fetter an the legislative powers of such Legislature. The impugned law has to pass all these, three tests. "***

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106. A Division Bench of this High Court in the case of State of Gujarat vs. Ramanlal Sankalchand and Co. reported in AIR 1965 Guj 60, speaking through Justice P.N. Bhagwati (as His Lordship then was) observed thus:

> *" **In every case, therefore, where a provision in an enactment is challenged as beyond the legislative competence of the Legislature, the first question that must be considered is whether the provision falls within the express words of the entry conferring power on the Legislature which enacted the legislation. If it falls directly within the subject of legislation, cadit questio**."*

107. In the case of Gullapalli Nageswara Rao and others vs. A.P. State Road Transport Corporation reported in AIR 1959 SC 308, a Bench of five Judges, speaking through S.R. Das, C.J.I., observed as under:

> *"As was said by Duff J., in AttorneyGeneral for Ontario v. Reciprocal Insure (1924 A. C.328 at p. 337), 'Where the law making authority is of a limited or qualifled character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the Legislature is really doing.'*
>
> *In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that Legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The Legislature cannot violate the constitutional prohibitions by employing an indirect method."*
>
> *We have quoted the observations in extenso as they neatly summarise the law on the subject. The legal position may be briefly stated thus : The Legislature can only make laws within its legislative competence. Its legislative field may be circumscribed by specific legislative entries or limited by Fundamental Rights created by the Constitution. The Legislature cannot over-step the field of its competency, directly or indirectly. The Court will scrutinize the law to*

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ascertain whether the Legislature by device purports to make a law which, though in form appears to be within its sphere, in effect and substance, reaches beyond it. If, in fact, it has power to make the law, its motives in making the law are irrelevant."

108. There need not be any debate on the statement of law that the entries in the lists are themselves not power of legislation, but fields of legislation. It is trite that India being a Union of State both the Parliament and the State Legislature can frame laws having regard to their respective legislative competence enumerated in the three Lists contained in the Seventh Schedule of the Constitution of India. The Parliament has exclusive power to make laws with respect of any of the matters enumerated in List I in the Seventh Schedule. Similarly, State Legislatures have exclusive power to make laws in respect of any of the matters enumerated in List II. Parliament and State Legislatures both have legislative power to make laws with respect to any matter enumerated in List III, the Concurrent List. The various entries in the three Lists are fields of legislation. They are designed to define and delimit the respective areas of legislative competence of the Union and State Legislatures.

109. We once again reiterate the tests prescribed by the Supreme Court in the case of Chamarbaugwalia (supra) for the purpose of testing the competence of enactment passed by the legislature of a State. First, the Court should examine whether the Act is a law with respect to a topic assigned to the particular legislature which enacted it. Thereafter, the Court should consider whether in the case of an Act passed by the legislature of a State, its operation extends beyond the

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boundaries of the State. If these two tests are satisfied, then the Court should in the lists consider or rather ascertain if there is anything in any other part of the Constitution which places any fetter on the legislative powers of such legislature. The mandate of the Supreme Court is very clear that the impugned law should pass of the above referred three tests.

110. Thus, in view of the aforesaid discussion, we find it difficult to uphold the contention of Mr. Trivedi that Article 54 in Lists II of the Seventh Schedule to the Constitution as amended should be ignored as the State Legislature has been conferred with the power to enact a provision like Section 84A of the Gujarat VAT Act by virtue of Article 246A of the Constitution.

111. Mr. Soparkar brought to our notice that the argument canvassed on behalf of the State that the impugned proceedings are one relating to the recovery related to one of the six products covered under Entry 54 of List II of the Seventh Schedule is something contrary to the record of the case. It has been pointed out to us that the goods manufactured by the writ applicant are petrochemicals which are indisputably not covered by Entry 54 of List II of the Seventh Schedule of the Constitution of India. It has been argued that if the revision initiated by the impugned notice is concluded by disallowance of the input tax credit, then the same will result in recovery of tax on such petrochemicals. The fact that the input tax credit proposed to be disallowed is relating to the purchases of natural gas is of no significance. Tax on natural gas has been fully paid as pointed out by Mr. Soparkar. The tax demand on the writ applicants proposed to

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be made by disallowance of the input tax credit is on the sales made by the writ applicants which are indisputably of goods not covered under Entry 54 of List II of the Seventh Schedule to the Constitution of India.

EQUITY, MORALITY AND FAIRNESS:

112. Mr. Trivedi, the learned Advocate General also tried to defend Section 84A of the VAT Act on the ground that the tax dues which were morally due to the State are sought to be recovered. In other words, the argument is that the State had no other option but to enact Section 84A in the VAT Act. It is sought to be argued that the State was remediless in a situation where there was judgment of this High Court operating in favour of the dealer at the time of assessment which was subsequently reversed by the Supreme Court. Such stance of the State is not tenable in law in view of two decisions of the Supreme Court. In the case of ***Asst. Commissioner, Commercial Tax vs. LIS (Registered)***, *(2018) 15 SCC 283*. it has been observed in Para-12 as under;

> *"12. Time and again, it has been emphasized that a taxing statute cannot be made applicable to a citizen by unnatural or unreasonable extensions thereof. A recent view of this Court in this regard is available in 'Shabina Abraham vs. Collector of Central Excise and Customs'1 wherein a judgment of the Bombay High Court which is of considerable vintage i.e. 'Commissioner of Income Tax, Bombay v. Ellis 1 2015 (322) E.L.T. 372(S.C.) 8 C.Reid2, has been referred to and, in fact, relied upon to observe that reasons of morality and fairness can have no application to bring a citizen who is not within the four corners of the taxing statute with its fold so as to make him liable to payment of tax. In this regard paragraphs 31, 32 and 33 of the opinion rendered in Shabina Abraham (supra) would commend to us for recapitulation and, therefore, are extracted below :*

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31. The impugned judgment in the present case has referred to Ellis C. Reid's case but has not extracted the real ratio contained therein. It then goes on to say that this is a case of short-levy which has been noticed during the lifetime of the deceased and then goes on to state that equally therefore, legal representatives of a manufacturer who had paid excess duty would not by the self-same reasoning be able to claim such excess amount paid by the deceased. Neither of these reasons are reasons which refer to any provision of law.

Apart from this, the High Court went into morality and said that the moral principle of unlawful enrichment would also apply and since the law will not permit this, the Act needs to be interpreted accordingly. We wholly disapprove of the approach of the High Court. It flies in the case of first 2 AIR 1931 Bombay 333 principle when it comes to taxing statutes. It is therefore, necessary to reiterate the law as it stands. In Partington v. A.G., (1869) LR 4 HL 100 at 122, Lord Cairns stated :

"If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable, construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute."

32. In Cape Brandy Syndicate v. IRC, (1921) 1 KB 64 at 71, Rowlatt J. laid down :

"In a taxing Act one has to look merely at what is clearly said.
There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

33. This Court has, in a plethora of judgments, referred to the aforesaid principles. Suffice it to quote from one of such judgments of this Court in Commissioner of Sales

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Tax, Uttar Pradesh v. Modi Surgar Mills, 1961 (2) SCR 189 at 198 :-

"In interpreting a taxing statute,equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The Court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency."

113. In the case of ***Nestle India Ltd vs. Deputy Commissioner of Commercial Tax***, *(2016) 89 VST 56 (Guj.)*. It has been observed by M.R. Shah (as His Lordship then was) in Para 8.13 as under;

"8.13 Now, so far as the decisions, upon which the learned AGP has relied, which are referred to herein above in support of his submission that principle of res judicata is not applicable to Tax Laws, as every year is a separate unit is concerned, there cannot be any dispute that generally, the principle of res judicata would not be applicable to Tax Laws as every year is a separate unit. However, it is required to be noted that the same would not be applicable in a case where the issue with respect to classification and/or Entry is interpreted by higher forum and the same had attained finality, inasmuch as the same is not challenged and the decision of the higher forum has been followed consistently for number of years, unless there are change circumstances in the subsequent assessment years. Unless there are change circumstances, in the subsequent years, in case of interpretation of Entry i.e. whether a particular goods fall in a particular Entry or not and consequently, on the said goods, there is exemption leviable or not, the subordinate authority even on the ground of judicial discipline is bound to follow the decision of the higher court/forum. If the State and/or authority is of the opinion that the earlier decision, which is against the revenue, is not correct decision and for whatever reason, earlier, the same was not challenged before the higher forum and

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the same came to be implemented erroneously and/or mechanically and the authority is of the opinion that there is likelihood of huge loss to the revenue, even in such a case, appropriate remedy available to the authority would be to pass an order following the earlier binding decision of the higher forum and thereafter, the revisional authority either may take the order in suo motu revision and thereafter, the matter may be carried to the Tribunal (in the present case, VAT Tribunal) and in that case, the Tribunal being Coordinate Bench may either follow the earlier decision of the Tribunal (Coordinate Bench) or may refer the matter to the Special Bench/Full Bench and if the Tribunal concurs with the earlier decision, in that case, the revenue may still approach the High Court and the High Court may take different view than the earlier view taken by the Tribunal, as in that case, the decision of the Tribunal is not binding to the High Court. Thus, even in case, where the officer and/or authority is of the opinion that the earlier decision though not challenged and/or even implemented for years is not a good decision and/or not in the interest of the revenue, the revenue is not remediless. However, as observed hereinabove, the Assessing Officer being lower in rank cannot be permitted to ignore and/or cannot be permitted to take a contrary view than the view taken by the higher forum, more particularly, when in the subsequent years, there are no change circumstances and the decision of the higher forum (in the present case, learned Tribunal), has been acted upon and implemented for the years. "

114. It is well known that motive or intention for making an Act or issuing an ordinance is not justifiable before a court of law. Whenever the expressions colourable exercise of power or fraud on Constitution are used in connection with any enactment, it only means that the particular legislature had no legislative competence although it purports to have exercised that power. Reference in this connection may be made to the cases of K.C.Gajapati Narayan Deo v. State of Orissa (AIR 1953 SC 375), Bhairabendra Narayan Bhup v. State of Assam (AIR 1956 SC 503), Gullapalli Nageswara Rao v. Andhra Pradesh

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State Road Transport Corpn. (AIR 1959 SC 308) and R.S. Joshi etc v. Ajit Mills Ltd. (AIR 1977 SC 2279). In the case of K.C.Gajapati Narayan Deo (AIR 1953 SC 375), it was observed (at p. 379):

> *"It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of 'bona fides' or 'mala fides' on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all..... if the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of funadamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements."*

115. In the aforesaid context, we may refer to a decision of the Supreme Court in the case of Assistant Commissioner, Commercial Taxes and others vs. LIS (Registered) reported in (2018) 15 SCC 283, wherein the Supreme Court has observed that in interpreting a taxing statute, the equitable considerations are entirely out of place. It has been observed in so many words that reasons of morality and fairness can have no application to bring a citizen who is not within the four corners of the taxing statute within its fold so as to make him liable to payment of tax. We quote the relevant observations:

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"12. Time and again, it has been emphasized that a taxing statute cannot be made applicable to a citizen by unnatural or unreasonable extensions thereof. A recent view of this Court in this regard is available in 'Shabina Abraham vs. Collector of Central Excise and Customs' (2015) 10 SCC 770 wherein a judgment of the Bombay High Court which is of considerable vintage i.e. 'Commissioner of Income Tax, Bombay v. Ellis 2015 (322) E.L.T. 372(S.C.) 8 C.Reid AIR 1930 Bom 333, has been referred to and, in fact, relied upon to observe that reasons of morality and fairness can have no application to bring a citizen who is not within the four corners of the taxing statute with its fold so as to make him liable to payment of tax. In this regard paragraphs 31, 32 and 33 of the opinion rendered in Shabina Abraham (supra) would commend to us for recapitulation and, therefore, are extracted below :

32. The impugned judgment in the present case has referred to Ellis C. Reid's case but has not extracted the real ratio contained therein. It then goes on to say that this is a case of short-levy which has been noticed during the lifetime of the deceased and then goes on to state that equally therefore, legal representatives of a manufacturer who had paid excess duty would not by the self-same reasoning be able to claim such excess amount paid by the deceased. Neither of these reasons are reasons which refer to any provision of law. Apart from this, the High Court went into morality and said that the moral principle of unlawful enrichment would also apply and since the law will not permit this, the Act needs to be interpreted accordingly. We wholly disapprove of the approach of the High Court. It flies in the case of first 2 AIR 1931 Bombay 333 principle when it comes to taxing statutes. It is therefore, necessary to reiterate the law as it stands. In Partington v. A.G., (1869) LR 4 HL 100 at 122, Lord Cairns stated :

> *"If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable, construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute."*

33. In Cape Brandy Syndicate v. IRC, (1921) 1 KB 64 at 71,

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Rowlatt J. laid down :

> *"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

34. This Court has, in a plethora of judgments, referred to the aforesaid principles. Suffice it to quote from one of such judgments of this Court in Commissioner of Sales Tax, Uttar Pradesh v. Modi Surgar Mills, 1961 (2) SCR 189 at 198 :-

> *"In interpreting a taxing statute,equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The Court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency."*

116. We are at one with Mr. Soparkar that the State-respondents could have definitely issued notice for revision under Section 75 of the VAT Act within the stipulated period of limitation to keep the matter alive. To illustrate, if the time limit for passing of revisional order was to expire and the issue was still pending before the Supreme Court, then the respondents could have passed an order in favour of the dealer and, thereafter, carried the matter before the Tribunal/High Court by filing the revision application/appeal.

IS THE VAT AMENDMENT ACT, 2018 A VALIDATING ACT?

117. Mr. Trivedi made a gallant effort to convince us to accept the submission that for all practical purposes, the VAT Amendment Act, 2018 is a validating Act. According to Mr.

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Trivedi, it seeks to overcome an obstacle in terms of the limitation of three years provided under Section 75 of the VAT Act. According to Mr. Trivedi, the said obstacles stood confirmed by this Court vide its judgment and order dated 16th March, 2018 rendered in the Special Civil Application No.22283 of 2018 while quashing and setting aside the revision notice dated 03/06.11.2017 issued by the State Authorities to revise the assessment order for the F.Y.2008-09 as time barred under Section 75 . According to Mr. Trivedi, the said revision notice was issued on the basis of the judgment delivered by the Supreme Court dated 22nd September, 2017 reported in (2017) 16 SCC 28 whereby the judgment of this High Court dated 18th January, 2013, referred to above, was quashed and set aside. According to Mr. Trivedi, the validation exercise may be undertaken by a Competent Legislature by adopting any of the following methods.

(a) By removing the obstacle of illegality or invalidity, retrospectively, or,

(b) By providing for jurisdiction retrospectively, where jurisdiction had not been properly invested before, or,

(c) By re-enacting retrospectively, a valid and legal taxing provision and then by fiction, making the tax already collected to stand under the re-enacted law, or

(d) By giving its own meaning and interpretation of the law under which tax was collected and by legislation fiat, making the new meaning binding upon the Courts.

116. In the aforesaid context, Mr. Trivedi seeks to rely on a decision of the Supreme Court in the case of ***Shri Prithvi***

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Cotton Mills Ltd vs. Broach Borough Municipality, *1969 (2) SCC 283*, more particularly, the observations made in Para-4, which reads thus;

> *"4. ....Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction.* ***Validation of a tax*** *so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal.* ***Sometimes this is done by providing for jurisdiction where jurisdiction*** *had not been properly invested before.* ***Sometimes this is done by re-enacting retrospectively a valid and legal taxing*** *provision and then by fiction making the tax already collected to stand under the re-enacted law.* ***Sometimes the legislature gives its own meaning and interpretation of the law under which the tax was collected and*** *by legislative fiat, makes the new meaning binding upon courts. The legislature may follow* ***any one method or all of them*** *and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation...."*

118. Mr. Trivedi would submit that it is not necessary that there has to be an invalid levy of tax declared by any Competent Court which can be validated by a validating Act. There can be a validating Act-conferring jurisdiction which was absent or validating the illegal demand of tax on the basis of wrong interpretation of the provisions. Mr. Trivedi invited our attention to a decision of the Supreme Court in the case of ***The Government of Andhra Pradesh vs. Hindustan Machine Tools Ltd***., *1975 (2) SCC 274*.

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118. In the case of Government of Andhra Pradesh Vs. Hindustan Machine Tools Ltd (supra), the Andhra Pradesh High Court quashed and set aside the notice seeking to recover property tax on the "factory" of the Company while relying upon Section 2(15) of the Andhra Pradesh Gram Panchayats Act, 1964, defining the term "house", on the ground that the said definition does not include "factory" and hence no tax could be recovered, since the demand in that behalf was illegal. When the appeal of the State against the judgment of the High Court was pending before the Apex Court, State Legislature retrospectively amended the said Section 2(15) of the said Act so as to eliminate the impediment on which the High Court rested its judgment.

119. However, ultimately, while upholding the demand of tax retrospectively, it was observed as under:

> *"We see no substance in the respondent's contention that by re-defining the term 'house' with retrospective effect and by validating the levies imposed under the unamended Act as if notwithstanding anything contained in any judgment, decree or order of any court, that Act as amended was in force on the date when the tax was levied, the Legislature has encroached upon a judicial function. The power of the Legislature to pass a law postulates the power the pass it prospectively as well as retrospectively, the one no less than the other. Within the scope of its legislative competence and subject to other constitutional limitation, the power of the Legislature to enact laws is plenary. In United Provinces v. Atiqa Begum, Gwyer, C.J. while repelling the argument that Indian Legislatures had no power to alter the existing laws retrospectively observed that within the limits of their powers the Indian Legislatures were as supreme and sovereign as the British Parliament itself and that the powers were not subject to the "strange and unusual prohibition against retrospective legislation".*

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The power to validate a law retrospectively is, subject to the limitations aforesaid, an ancillary power to legislate on the particular subject".

120. Mr. Trivedi submitted that in the case on hand also, a show-cause notice dated 3rd November, 2017 for revision came to be quashed and set aside by this High Court on the ground that the same was time barred in accordance with the provisions of Section 75 of the VAT Act, as a result of which, the State Legislature, instead of amending the said Section 75 of the VAT Act, inserted a new Section 84A and thereby enlarged the remission period available under Section 75 of the Act. Mr. Trivedi would submit that the statutes of limitation are retrospective in nature when they deal with the procedural law and they are prospective when they deal with the substantive right unless the same are expressly or by implication made retrospective. According to Mr. Trivedi, there is no bar under the Constitution that a statute of limitation impacting a substantive right cannot be made retrospective in nature. Thus, even if Section 84A of the VAT Act is considered to be not a validating Act, but simply a statutory provision relating to limitation, then in that case also, the same is rightly brought into picture with retrospective effect.

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121. Mr. Soparkar, the learned senior counsel appearing for the writ applicant vehemently submitted that Section 84A is a substantive provision and cannot be labelled as a validating enactment. According to Mr. Soparkar, in the case on hand, there is absolutely no levy which is sought to be validated by Section 84A of the VAT Act. It retrospectively extends the period of limitation for assessment/reassessment/revision in cases where there are pending proceedings in some other

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cases which result into a judgment in favour of the Revenue.

122. The question that falls for our consideration is whether Section 84A of the VAT Act is a validating Act?.

123. The Supreme Court, in the case of ***Amrendra Kumar Mohapatra vs. State of Orissa***, *(2014) 4 SCC 583* has very succinctly explained the concept of validating Act. We quote the relevant observations;

> *"22. Black's Law Dictionary (9th Edition, Page No.1545) defines a Validation Act as*
>
> *"a law that is amended either to remove errors or to add provisions to conform to constitutional requirements".*
>
> *To the same effect is the view expressed by this Court in Hari Singh & Others v. The Military Estate Officer and Anr. (1972) 2 SCC 239, where this Court said "*
>
> *21.The meaning of a Validating Act is to remove the causes for ineffectiveness or invalidating of actions or proceedings, which are validated by a legislative measure".*
>
> *In ITW Signode India Ltd. v. Collector of Central Excise (2004) 3 SCC 48, this Court described Validation Act to be an Act that*
>
> *"44. removes actual or possible voidness, disability or other defect by confirming the validity of anything which is or may be invalid".*
>
> *23. The pre-requisite of a piece of legislation that purports to validate any act, rule, action or proceedings were considered by this Court in Shri Prithvi Cotton Mills Ltd. and Ann v. Broach Borough Municipality and Ors. (1969) 2 SCC 283. Two essentials were identified by this Court for any such legislation to be valid. These are:*
>
> *(a) The legislature enacting the Validation Act should be competent to enact the law and;*

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(b) the cause for ineffectiveness or invalidity of the Act or the proceedings needs to be removed.

24. The Court went on to enumerate certain ways in which the objective referred to in (b) above could be achieved by the legislation and observed :

"4..... Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding upon courts. The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the Legislature has the power over the subject- matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating Law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the Validating Law for a valid imposition of the tax." (emphasis supplied)

25. Judicial pronouncements regarding validation laws generally deal with situations in which an act, rule, action or proceedings has been found by a Court of competent jurisdiction to be invalid and the legislature has stepped in to validate the same. Decisions of this Court which are a legion take the view that while adjudication of rights is essentially a judicial function, the power to validate an invalid law or to legalise an illegal action is within the exclusive province of the legislature. Exercise of that power by the legislature is not, therefore, an encroachment on the judicial power of the Court. But, when the validity of any such Validation Act is called in question, the Court would have to carefully examine the

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law and determine whether (i) the vice of invalidity that rendered the act, rule, proceedings or action invalid has been cured by the validating legislation (ii) whether the legislature was competent to validate the act, action, proceedings or rule declared invalid in the previous judgments and (iii) whether such validation is consistent with the rights guaranteed by Part III of the Constitution. It is only when the answer to all these three questions is in the affirmative that the Validation Act can be held to be effective and the consequences flowing from the adverse pronouncement of the Court held to have been neutralised. Decisions of this Court in Shri Prithvi Cotton Mills Ltd. and Anr. V. Broach Borough Municipality and Ors. (1969) 2 SCC 283, Hari Singh v. Military Estate Officer (1972) 2 SCC 239, Madan Mohan Pathak v. Union of India (1978) 2 SCC 50, Indian Aluminium Co. etc. v. State of Kerala and Ors. (1996) 7 SCC 637, Meerut Development Authority etc. v. Satbir Singh and Ors. etc. (1996) 11 SCC 462, and ITW Signode India Ltd. v. Collector of Central Excise (2004) 3 SCC 48 fall in that category.

26. Even in the realm of service law, validation enactments have subsequent to the pronouncement of competent Courts come about validating the existing legislation. Decisions of this Court in I.N. Saksena v. State of Madhya Pradesh (1976) 4 SCC 750, Virender Singh Hooda and Ors. v. State of Haryana and Anr. (2004) 12 SCC 588 and State of Bihar and Ors. v. Bihar Pensioners Samaj (2006) 5 SCC 65 deal with that category of cases.

27. In the case at hand, the State of Orissa had not suffered any adverse judicial pronouncement to necessitate a Validation Act, as has been the position in the generality of the cases dealt with by this Court. The title of the impugned Legislation all the same describes the legislation as a Validation Act. The title of a statute is no doubt an important part of an enactment and can be referred to for determining the general scope of the legislation. But the true nature of any such enactment has always to be determined not on the basis of the label given to it but on the basis of its substance.

28. In M.P.V. Sundararamier & Co. v. State of A.P. & Anr. AIR 1958 SC 468 this Court was considering whether the impugned enactment was a Validation Act in the true

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sense. This Court held that although the short title as also the marginal note described the Act to be a Validation Act, the substance of the legislation did not answer that description. This Court observed:

"It is argued that to validate is to confirm or ratify, and that can be only in respect of acts which one could have himself performed, and that if Parliament cannot enact a law relating to sales tax, it cannot validate such a law either, and that such a law is accordingly unauthorised and void. The only basis for this contention in the Act is its description in the Short Title as the "Sales Tax Laws Validation Act" and the marginal note to s. 2, which is similarly worded. But the true nature of a law has to be determined not on the label given to it in the statute but on its substance. Section 2 of the impugned Act which is the only substantive enactment therein makes no mention of any validation. It only provides that no law of a State imposing tax on sales shall be deemed to be invalid merely because such sales are in the course of inter-State trade or commerce. The effect of this provision is merely to liberate the State laws from the fetter placed on them by Art. 286(2) and to enable such laws to operate on their own terms." (emphasis supplied)

29. We may also refer to Maxwell on Interpretation of Statutes (12th Edn., page 6), where on the basis of authorities on the subject, short title of the Act has been held to be irrelevant for the purpose of interpretation of statutes. Lord Moulton in Vacher and Sons Ltd. v. London Society of Compositors [1913] AC 107 described the short title of an Act as follows:

"A title given to the act is solely for the purpose of facility of reference. If I may use the phrase, it is a statutory nickname to obviate the necessity of always referring to the Act under its full and descriptive title....Its object is identification and not description." (emphasis supplied) "

124. The law relating to validating statutes in general is to be found in a catena of judgments. We can do no better than to quote paragraph 4 from the judgment of the Supreme Court in the case of ***Shri P.C. Mills Vs. Broach Municipality,*** *AIR*

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1970 SC 192 rendered by a Constitution Bench of five Judges :

> *"4. Before we examine Section 3 to find out whether it is effective in its purpose or not we may say a few words about validating statutes in general. When a legislature sets out to validate a tax declared by a Court to be illegally collected under ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A Court"s decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the reenacted law. Sometimes the legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiats makes the new meaning binding upon Courts. The legislature may follow any one method or all of them and while it does so it may neutralize the effect of the earlier decision of the Court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the legislature has the power over the subject- matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating law, therefore, depends upon*

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whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the Courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax." *(Emphasis by me)*

125. In the case of ***D. Cawasji and Co. Vs. State of Mysore*** *1984 (supp). SCC 490*, the issue related to constitutionality of Mysore Sales Tax Amendment Act, 1969 which provided for levy of higher rate of tax with retrospective effect to nullify the judgment and order of the High Court for refund of excess amount of tax illegally collected. On the basis of Articles 14 and 19, the Act was held to be unconstitutional being unreasonable and arbitrary. The Court further held that the Act in question could not be considered to be a validating Act because in words of the Court -

"*A validating Act seeks to validate earlier Acts declared illegal and unconstitutional by courts by removing the defect or lacunae which led to invalidation of the law. With the removal of the defect or lacunae resulting in the validation of any Act held invalid by a competent court, the Act may become valid, if the validating Act is lawfully enacted. ..... The retrospective operation of a validating Act properly passed curing the defects and lacunae which might have led to invalidity of any act done may be upheld, if considered reasonable and legitimate.*"

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126. The legislative power conferred on the appropriate Legislatures to enact laws in respect of topics covered by the several entries in the three lists can be exercised both prospectively and retrospectively.

127. Where the Legislature can make a valid law, (i) it may provide only for the prospective operation of the material

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provisions of the said law (ii) it can provide for the retrospective operation of thee said provisions or (iii) it may provide retrospective as also prospective operation of the said provisions.

128. As held by the Supreme Court in case of **Krishnamurthi & Co. Etc vs State of Madras 1972 AIR 2455,** the legislative power, in addition includes the subsidiary or auxiliary power to validate laws which have been found to be invalid. If a law passed by the Legislature is struck down by the court as being invalid for one infirmity or another, it would be competent to the appropriate Legislature to cure the said infirmity and pass a validating law so as to make the provisions of the said earlier law effective from the date when it was passed.

129. Accordingly, the retrospective amendment may be passed with or without validation. Reference may be made to following Acts passed by The Gujarat State Legislature which are retrospective amendments with validation.

130. Section 8 of the Bombay Motor Vehicle Tax (Gujarat Amendment and Validation) Act, 2002 (Gujarat Act No. 9 of 2002) reads as under:

> *"8.* ***Validation of imposition and collection of tax on designated omnibuses****:-*
>
> *(1)Notwithstanding any judgement, decree or order of any court, tax imposed, assessed or collected or purporting to have been imposed, assessed or collected under the principal Act, on designated omnibuses during the period beginning with 1st day of April, 1991 and*

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ending on the 16th day of August, 2001, shall be deemed to have been validly imposed, assessed or collected in accordance with law as if at all material times when such tax was imposed, assessed or collected, the principal Act as amended by section 2, 3 and 4 except sub-clause (a) of clause (1) thereof and section 7 of this Act and section 9 had been in force and accordingly –

(a) no suit or other proceeding shall be maintained or continued in any court for the refund of any tax paid in respect of designated omnibus under the principal Act,

(b) no court shall enforce a decree or other directing the refund of any tax paid in respect of designated omnibus under the principal Act,

(c) any tax imposed or assessed in respect of designated omnibus under the principal Act during the period beginning from the 1st day of April, 1991 and ending on the 16th day of August, 2001 but not collected before 17th day of August, 2001 may be recovered (after assessment of tax where necessary) in the matter provided in the principal Act.

(2) For the removal of doubts, it is hereby declared that nothing in sub-section (1) shall be construed as preventing any person-

(a) from questioning in accordance with the provisions of the principal Act and rules made thereunder the assessment of tax on designated omnibus for any period, or

(b) from claiming refund of any tax paid by him on designated omnibuses in excess of the amount due from him under the principal Act and the rules made thereunder."

131. Section 5 of the Gujarat Sales Tax (Amendment and Validation) Act, 2002 (Gujarat Act, No. 15 of 2002) reads as under:

*"5. **Validation of levy and collection of tax on specified works contract:-***

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(1) Notwithstanding anything contained in any judgement, decree or order of any court, tribunal or authority, the tax deducted, levied, assessed, reassessed or collected or purported to have been deducted, levied, assessed, reassessed or collected under the principal Act on specified sales in pursuance of a specified works contract under section 57B shall be and shall be deemed always to have been validly deducted, levied, assessed, reassessed or collected in accordance with law as if the provisions of the principal Act as amended by this Act had been in force at all material times when such tax was deducted, levied, assessed, reassessed or collected and accordingly-

(a) no suit, appeal, application or other proceedings shall be maintained or continued in any court or before any tribunal or authority whatsoever for the refund of the said tax,

(b) `no court, tribunal or other authority shall enforce any decree or under directing refund of the said tax, and

(c) recoveries shall be made in accordance with the provisions of the principal Act as amended by this Act as if said provisions had been in force at all material times.

(2) For the removal of doubt, it is hereby declared that:-

(a) Nothing in sub-section (1) shall be construed as preventing any person –

(I) From questioning, in accordance with the provisions of the principal Act as amended by this Act, the deduction, levy, assessment, re-assessment, or collection of thee aforesaid tax, or

(II) From claiming, in accordance with the provisions of the principal Act as amended by this Act, refund of the aforesaid tax paid by him in excess of the amount due from him.

(a) No act or omission on the part of any person shall be punishable as an offence which would not have been

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punishable if this Act had not come into force."

132. Section 4 of the Gujarat Purchase Tax on Sugarcane Act, 1989 reads as under:

> *"4.**Validation of remission of interest and deferred payment of tax**:-*
>
> *"Any interest payable by the owner for any period has been waived or any deferment of payment of tax granted by any order of the State Government before the commencement of this Act shall be and shall be deemed always to have been validly waived or granted in accordance with law as if the provisions of sections 18 and 19 of the principal Act as amended by this Act had been in force at all material time when such interest was waived or the deferment of payment was granted."*

133. On a bare perusal of the above referred amendment Acts, it is evident that the amending Act specifically provides for validation of various aspects (namely assessment, re-assessment, collection etc.) notwithstanding any judgement, decree or order of any court, Tribunal or authority to the contrary.

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134. We shall once again look into Section 84A of the Gujarat Value Added Tax (Amended Act) 2017. The same reads thus:-

> *"84A(1) Notwithstanding anything contained in this Act, an issue on which the Appellate Authority or the Appellate Tribunal or the High Court has given its decision which is prejudicial to the interest of revenue in some other proceedings and an appeal to the Appellate Tribunal or the High Court or the Supreme Court against such decision of the Appellate Authority or the Appellate Tribunal or the High Court is pending, the period spent between the date of the decision of the Appellate*

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Authority and that of the Appellate Tribunal or the date of the decision of the High Court and that of the Supreme Court shall be excluded in computing the period referred to in section 34 or section 35.

(2)Notwithstanding anything contained in this Act, if any decision or order under section 73 or section 75 involves an issue on which the Revision Authority or Appellate Authority or the High Court has given its decision which is prejudicial to the interest of revenue in some other proceedings and an appeal to the High Court or the Supreme Court against such decision of the Appellate Tribunal or the High Court is pending, the period spent between the date of the decision of the Appellate Tribunal and the date of the decision of the High Court or the date of the decision of the High Court and the date of the decision of the Supreme Court shall be excluded in computing the period of limitation referred to in section 73 of section 75".

135. Vide the Gujarat Value Added Tax (amendment) Act, 2018 (Gujarat Act No. 10 of 2017) Section 84A has been inserted in the Gujarat Value Added Tax Act, 2003 with retrospective effect. However, the amending Act does not provide for any validation of various acts of the revenue authorities namely the assessment, re-assessment, collection etc. Accordingly, the said Act cannot be treated as a "validating Act".

136. Section 84A (as inserted by 2017 amendment Act), provides for exclusion of certain period spent by the revenue authorities in the appellate proceedings for the purpose of calculating time limit for (i) audit assessment (ii) turnover escaping assessment (iii) appeal and (iv) revision. All these provisions provide for outer time limit of the order to be made. In case where the orders are already made by the revenue authorities and matter is closed, the retrospectives

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amendment without validation may not validate such orders.

137. In Indian Aluminium Co. and others v. State of Kerala and others, (1996) 7 SCC 637, the Government of Kerala issued a statutory order levying surcharge on electricity. The order was declared by the Court to be ultra vires followed by a direction to refund the amount collected thereunder. The State Legislature introduced a Validating Act, which was impugned unsuccessfully before the High Court as also the Supreme Court. The Supreme Court laid down the following tests for judging the validity of the Validating Act: (i) whether the Legislature enacting the Validating Act has competence over the subject-matter, (ii) whether by validation, the Legislature has removed the defect which the Court had found in the previous law; (iii) whether the validating law is inconsistent (sic consistent) with the provisions of Part III of the Constitution. If these tests are satisfied, the Act can with retrospective effect validate the past transactions which were declared to be unconstitutional. The Legislature cannot assume power of adjudicating a case by virtue of its enactment of the law without leaving it to the judiciary to decide it with reference to the law in force. The Legislature also is incompetent to overrule the decision of a Court without properly removing the base on which the judgment is founded. The Supreme Court on a review of judicial opinion, proceeded to lay down the following principles among others so as to maintain the delicate balance in the exercise of the sovereign powers by the Legislature, Executive and Judiciary :-

> "(i) in order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian

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social order, the respective sovereign functionaries need free play in their joints so that the march of social progress and order remains unimpeded;

(ii) in its anxiety to safeguard judicial power, it is unnecessary to be overzealous and conjure up incursion into the judicial preserve invalidating the valid law competently made;

(iii) the Court, therefore, needs to carefully scan the law to find out; (a) whether the vice pointed out by the Court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the Legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution;

(iv) the Court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the Legislature. Therefore, they are not encroachment on judicial power;

(v) in exercising legislative power, the Legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the Court, if those conditions had existed at the time of declaring the law as invalid..... It is competent for the Legislature to enact the law with retrospective effect;

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(vi) the consistent thread that runs through all the decisions of this Court is that the Legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the constitution and the Legislature must have competence to do the same."

138. Thus, it is permissible for the Legislature, subject to its legislative competence otherwise, to enact a law which will withdraw or fundamentally alter the very basis on which a judicial pronouncement has proceeded and create a situation which if it had existed earlier, the Court would not have made the pronouncement.

139. Thus, we find it difficult to take the view that the VAT Amendment Act, 2018 is a validating Act.

140. We, once again, go back to the issue with regard to the competence of the State Legislature to enact Section 84A of the Act.

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141. In ***Bhikaji Narain Dhakras v. State of M.P***. *(AIR 1955 SC 781)*, while considering the validity of the pre-Constitution Act the Supreme Court observed: “All laws, existing or future, which are inconsistent with the provisions of Part III of the Constitution are by the express provisions of Article 13 rendered void to the extent of such inconsistency. Such laws were not dead for all purposes. They existed for the purpose of pre-Constitution rights and liabilities and they remained

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operative even after the Constitution as against non-citizens." In Sundaramier and Co. v. State of Andhra Pradesh (AIR 1958 SC 468) the main point for determination was the validity of the Sales Tax Validation Act 1956, a Madras Act. Venkataram Aiyar, J. reviewed the authorities and thereafter concluded:-

> *"Thus a legislation on a topic not within the competence of the Legislature and a legislation within its competence but violative of Constitutional limitations have both the same reckoning in a Court of Law; they are both of them unenforceable. But does it follow from this that both the laws are of the same quality and character and stand on the same footing for all purposes.... If a law is on a field not within the domain of the Legislature, it is absolutely null and void, and a subsequent cession of that field to the Legislature will not have the effect of breathing life into what was of stillborn piece of legislation and a fresh legislation on the subject would be requisite. But if the law is in respect of a matter assigned to the Legislature but its provisions disregard Constitutional prohibitions, though the law would be unenforceable by reason of those prohibitions, when once they are removed, the law will become effective without re-enactment."*

142. The above observations show that a law enacted by a legislature without having legislative competence would be void ab initio and the same cannot be revived or revitalised even if the legislative competence is conferred on that legislature subsequently. But in a case where the legislature has legislative competence to enact a law, and some of its provisions violate any of the fundamental rights contained in Part III of the Constitution, the same would be rendered void under Article 13(2) of the Constitution and would remain unenforceable. The law so enacted is not wiped off the Statute Book nor it stands repealed. Further if the offending provisions of the Statute which violate fundamental rights are removed the law would become effective and enforceable

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even without re-enactment. Such a law, whether pre-Constitution or post-Constitution, is not wholly dead if it violates fundamental rights; it is merely eclipsed by fundamental right and remains as it were in a moribund condition as long as the shadow of fundamental rights falls upon it. When that shadow is removed the law begins to operate proprio vigore from the date of such removal unless it is retrospective. A law declared void by a court is not effected from the Statute Book; it is revived and revitalised if Constitutional limitations are removed by Constitutional amendment or by re-enactment by legislature.

143. In view of the aforesaid discussion, we have reached to the conclusion that Section 84A of the Gujarat Value Added Tax (Amendment) Act, 2018 is invalid on the ground that the same is beyond the legislative competence of the State Legislature.

IS SECTION 84A OF THE GUJARAT VAT (AMENDMENT) ACT, 2017 MANIFESTLY ARBITRARY AND UNREASONABLE?

144. The aforesaid takes us now to consider the question whether Section 84A of the VAT Act is manifestly arbitrary and is liable to be struck down being violative of Article 14 of the Constitution of India.

145. Mr. Soparkar, the learned senior counsel appearing for the writ applicant submitted that Section 84A of the VAT Act is manifestly arbitrary and violative of Articles 14 and 19(1)(g) respectively of the Constitution of India. He would submit that when the assessment for a particular year attains finality,

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the same creates a vested right in favour of the dealer. The dealer would arrange his affairs of business considering the fact that his liability has crystallized for the periods where the assessments have attained finality. Alteration of such position without any definite time limit only on the ground that the judgment in favour of the Revenue has been pronounced by a Court in another case, with which, the concerned dealer has nothing to do, could be termed as manifestly arbitrary and unreasonable. Mr. Soparkar would submit that the legislation which is found to be manifestly arbitrary is liable to be struck down is now a well settled position of law in view of the decision of the Supreme Court in the case of ***Shayara Bano vs. Union of India***, *(2017) 9 SCC 1,* It is argued that the test of manifest arbitrariness would apply to invalid legislation as well as to subordinate legislation under Article 14 of the Constitution.

146. Mr. Soparkar submitted that the impugned amendment leads to an absurd and unforeseen consequences. To illustrate, Mr. X of Surat selling cotton yarn was assessed to tax for the year 2006-07 at the rate of 5% in March, 2010. Such assessment was not challenged by either side and the same attained finality. For the same period, an issue was raised in the case of Mr.Y of Rajkot demanding tax at the rate of 15% on the cotton yarn. Mr. Y, however, succeeded before the appellate authority and the rate of tax was held to be 5%. The department preferred appeal before the Tribunal and the same was pending. In the year 2025 the matter in the case of Mr. Y reaches the Supreme Court and the Apex Court in the case of Mr. Y holds that the applicable rate of tax on cotton yarn is 15%. In such facts and circumstances, the impugned

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amendment will enable the authorities to revise in the year 2025 the assessment order passed in the case of Mr. X of Surat in the year 2010.

147. Mr. Soparkar invited our attention to the provision of Section 64 of the VAT Act, which reads as under;

> *"64.The dealer shall preserve his books of accounts and the records relevant for the purpose of this Act till the period of six years from the end of the accounting year to which the books of accounts and the records relate.*
>
> *Provided that where the dealer is a party to an appeal or revision under this Act, he shall preserve the books of accounts and the records pertaining to the subject matter of such appeal or revision until the appeal or revision is finally disposed of."*

148. Thus, the provision requires the dealer to preserve books of accounts only for a period of six years from the end of the relevant accounting year. The proviso thereto requires further preservation of books of accounts only to the extent a matter is pending in appeal or revision. However, the impugned provision exposes the dealer to assessment/re-assessment/revision for an indefinite period which is excessive and disproportionate. In fact, the retrospective operation of the provision w.e.f 1st April, 2006 allows reopening of assessments of years in respect of which a dealer was not required to preserve the books of accounts and, therefore, the retrospective operation is all the more onerous and manifestly arbitrary.

149. In the last, Mr. Soparkar submitted that the retrospective operation of Section 84A of the VAT Act makes the same all the more oppressive.

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150. Mr. Trivedi, in response to the aforesaid submissions, submitted that Section 84A of the VAT Act , cannot be termed as arbitrary in any manner. According to him, there is a clear context in bringing Section 84A of the VAT Act with retrospective operation inasmuch as the sole intention behind enacting the same is to safeguard the interest of the Revenue by seeking to recover which is legitimately due. According to Mr. Trivedi, the words "manifestly arbitrary" means something done by the Legislature capriciously, rationally and or without adequate determining principle, or something done which is excessive and disproportionate. According to Mr. Trivedi, the dictum as laid in Shayara Bano (supra) is completely misplaced.

151. Mr. Trivedi pointed out that in the case *of* ***R.C. Tobacco Pvt. Ltd. Vs. Union of India***, reported in *(2005) 7 SCC 725: AIR 2005 SC 4203,* while holding the retrospective amendment by way of Section 154 of the Finance Act, 2003, it was observed as under;

> *"16. ..... A law cannot be held to be unreasonable merely because it operates retrospectively."*
>
> *32. ..... How the manufacturer will adjust its liability with its customers does not concern the respondents....."*
>
> *33. .....It may be that the retrospective operation may operate harshly in some cases, but that would not by itself invalidate the demand."*

152. In the case of ***Rai Ramkrishna vs. State of Bihar***, reported in *AIR 1963 SC 1667*, while upholding the

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constitutional validity of the retrospective operation of the Bihar Taxation on Passengers and Goods (carried by Public Service Motor Vehicles) Act, 1961, it was observed as under;

> *"14 ….However, in respect of passengers carried by the owner between 01.04.1950 and the date of the Act (i.e. 25.09.1961), how can the owner recover the tax, he is now bound to pay to the State asks Mr.Seetalvad? Prima facie, the argument appears to be attractive but a closer examination will show that the difficulty which the owner may experience in recovering the tax from the passengers will not necessarily after the character of the tax.*
>
> *18. ….. but the test of the length of time covered by the retrospective operation cannot by itself, necessarily be a decisive test…."*

153. In the case of ***Epari Chinna Krishna Moorthy vs. State of Orissa,*** reported in *AIR 1964 SC 1581*, while upholding the constitutional validity of the retrospective operation of Orissa Sales Tax Validation Act, 1961, it was observed as under;

> *"(2)…. Up to June 1952, the claim for exemption made by him was upheld and the amount represented by the sales of the said gold ornaments was deducted from the taxable turnover shown by the petitioner in his returns. Subsequently, however, **this assessment were reopened** under Section 127) of the Act and it was claimed that the deduction made on certain sales transactions of the gold ornaments were not justified and to that extent, the petitioner had escaped assessment. The petitioner resisted this attempt of reopening the assessment…."*
>
> *(11)… But it would be difficult to accept the argument that because the retrospective operation may operate harshly in same cases therefore the legislation itself is in valid."*

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154. The issue whether law can be declared unconstitutional on the ground of arbitrariness has received the attention of the Supreme Court in a Constitution Bench Judgment in the case of Shayara Bano v. Union of India & Ors. 24. R.F. Nariman and U.U.Lalit, JJ. (State of M.P. v. Rakesh Kohli, (2012) 6 SCC 312; Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1 22 (1996) 3 SCC 709 23 (2016) 2 SCC 445 24 (2017) 9 SCC 1) discredited the ratio of the aforesaid judgments wherein the Court had held that a law cannot be declared unconstitutional on the ground that it is arbitrary. The Judges pointed out the larger Bench judgment in the case of Dr. K.R, Lakshmanan v. State of T.N. & Anr., and Maneka Gaandhi v. Union of India & Anr. where manifest arbitrariness is recognised as the third ground on which the legislative Act can be invalidated. The following discussion in this behalf is worthy of note:

> *"87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three Judge Bench decision in McDowell (State of A.P. v. McDowell and Co., (1996) 3 SCC 709) when it is said that a constitutional challenge can succeed on the ground that a law is disproportionate, excessive or unreasonable, yet such challenge would fail on the very ground of the law being unreasonable, unnecessary or unwarranted. The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in*

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Part III of the Constitution.

88. We only need to point out that even after McDowell (State of A.P. v. McDowell and Co., (1996) 3 SCC 709), this Court has in fact negated statutory law on the ground of it being arbitrary and therefore violative of Article 14 of the Constitution of India. In Malpe Vishwanath Acharya, this Court held that after passage of time, a law can become arbitrary, and, 25 (1996) 2 SCC 226 26 (1978) 1 SCC 248 therefore, the freezing of rents at a 1940 market value under the Bombay Rent Act would be arbitrary and violative of Article 14 of the Constitution of India (see paras 8 to 15 and 31).

xx xx xx

99. However, in State of Bihar v. Bihar Distillery Ltd. (State of Bihar v. Bihar Distillery Ltd., (1997) 2 SCC 453), SCC at para 22, in State of M.P. v. Rakesh Kohli (State of M.P. v. Rakesh Kohli, (2012) 6 SCC 312 : (2012) 3 SCC (Civ) 481), SCC at paras 17 to 19, in Rajbala v. State of Haryana (Rajbala v. State of Haryana, (2016) 2 SCC 445), SCC at paras 53 to 65 and in Binoy Viswam v. Union of India (Binoy Viswam v. Union of India, (2017) 7 SCC 59), SCC at paras 80 to 82, McDowell (State of A.P. v. McDowell and Co., (1996) 3 SCC 709) was read as being absolute bar to the use of arbitrariness as a tool to strike down legislation under Article 14. As has been noted by us earlier in this judgment, McDowell (State of A.P. v. McDowell and Co., (1996) 3 SCC 709) itself is per incuriam, not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed. The judgments, following McDowell (State of A.P. v. McDowell and Co., (1996) 3 SCC 709) are, therefore, no longer good law."

155. The historical development of the doctrine of arbitrariness has been noticed by the Hon'ble Judges in Shayara Bano in detail. It would be suffice to reproduce paragraphs 67 to 69 of the said judgment as the discussion in these paras provide a sufficient guide as to how a doctrine of arbitrariness is to be applied while adjudging the constitutional

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validity of a legislation.

> "67. We now come to the development of the doctrine of arbitrariness and its application to State action as a distinct doctrine on which Sate action may be struck down as being violative of the rule of law contained in Article 14. In a significant passage, Bhagwati, J., in E.P. Royappa v. State of T.N. stated: (SCC p. 38, para 85)
>
> 85. The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground, it is really in substance and effect merely an aspect of the second ground based on violation of Articles 14 and 16. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is founding faith, to use the words of Bose, J., a way of life, and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined and confined within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and

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constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Article 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant consideration because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducting from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the letter comprehends the former. Both are inhibited by Articles 14 and 16.

68. This was further flashed out in Maneka Gandhi v. Union of India, where after stating that various fundamental rights must be read together and must overlap and fertilise each other, Bhagwati, J., further amplified this doctrine as follows: (SCC pp. 283-84, para 7) The nature and requirement of the procedure under Article 21

7.Now, the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made truncate its all-embracing scope and meaning, for to do so would to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in E.P.Royappa v. State of T.N., namely that: (SCC p. 38, para 85)

85. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and

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arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.

Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be right and just and fair and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

69. This was further clarified in A.L.Kalra v. Project and Equipment Corpn., following Royappa and holding that arbitrariness is a doctrine distinct from discrimination. It was held: (A.L.Kalra case SCC p. 328, para 19)

19. It thus appears well settled that Article 14 strikes at arbitrariness in executive/administrative action because any action that is arbitrary must necessarily involve the negation of equality. One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action per se arbitrary itself denies equal of (sic) protection by law. The Constitution Bench pertinently observed in Ajay Hasia case and put the matter beyond controversy when it said: (SCC p. 741, para 16)

16. Wherever therefore, there is arbitrariness in State action whether it be of the legislature or of the executive or of an authority under Article 12, Article 14 immediately springs into action and strikes down such State action.

This view was further elaborated and affirmed in D.S.Nakara v. Union of India. In Maneka Gandhi v. Union

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> of India it was observed that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It is thus too late in the day to contend that an executive action shown to be arbitrary is not either judicially reviewable or within the reach of Article 14. The same view was reiterated in Babita Prasad v. State of Bihar, SCC at p. 285, para 3."

156. The aforenoted doctrine is, thus, treated as a facet of both Articles 14 and 21 of the Constitution.

157. In case of The State of Jammu & Kashmir vs. Triloki Nath Khosa and ors reported in AIR 1974 SC 1 the Constitution Bench of the Supreme Court upheld the legislation classifying the Assistant Engineers into Degree-holders and Diploma-holders respectively for the purpose of promotion. It was observed that classification on the basis of educational qualifications made with a view to achieving the administrative efficiency cannot be said to rest on any fortuitous circumstances and one has always to bear in mind the facts and circumstances in order to judge the validity of a classification. It was observed that there is a presumption of constitutionality of a statute. The burden is on one who canvasses that certain statute is unconstitutional to set out facts necessary to sustain the plea of discrimination and to adduce cogent and convincing evidence to prove those facts. In order to establish that the protection of the equal opportunity clause has been denied to them, it is not enough for the petitioners to say that they have been treated differently from others, not even enough that a differential treatment has been accorded to them in comparison with other similarly circumstanced. Discrimination is the essence of classification and does violence to the constitutional guarantee

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of equality only if it rests on an unreasonable basis.

158. On the question of the grounds on which a law framed by the legislation i.e. the parliament of the State assembly the decision of three Judge Bench of Supreme Court in case of State of A.P. And ors vs. Macdowell and Co. and ors reported in (1996) 3 SCC 709 held the field and was often referred. In the said judgement, the Supreme Court had opined that the grounds for striking down a statute framed by the legislature are only two viz. (1) lack of legislative competence, or (2) violation of fundamental rights or any other constitutional provision. If enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause or the equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6). No enactment can be struck down by just saying that it is arbitrary or unreasonable. 'Arbitrariness' is an expression used widely and rather indiscriminately-an expression of inherently imprecise import. Hence, some or the other constitutional infirmity has to be found before invalidating the Act. An enactment cannot be struck down on the ground that the Court thinks it unjustified. The Parliament and legislatures, composed as they are of the representatives of the people and supposed to know and be aware of the need of the people and every what is good and bad for them. The Court cannot sit on the judgement over their wisdom.

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159. In the recent judgement of the Supreme Court in case of Shayra Bano vs. Union of India and ors reported in (2017) 9 SCC 1, Rohinton Fali Nariman, J., however, expressed a somewhat different view. It was observed that a statute can also be struck down if it is manifestly arbitrary. It was observed as under:

> *"101. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers v. Union of India, (1985) SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."*

160. It is well settled that as long as the legislation has the necessary competence to frame a law and the law so framed is not violative of the fundamental rights enshrined in the constitution or any of the constitutional provision, the Court would not strike down the statute merely on the perception that the same is harsh or unjust. Particularly, in taxing statutes the Courts have recognized much greater latitude in the legislation in framing suitable laws. Reference in this respect can be made to the well known judgement of Supreme Court in case of R.K.Garg vs. Union of India and ors (supra) it was

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observed as under:

> *"8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrine or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislature judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Dond 354 US 457 where Frankfurter, J. said in his inimitable style:*
>
> *In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial difference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events-self- limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.*
>
> *The court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry" that exact wisdom and nice adoption of remedy are not always possible and that "judgment is largely a prophecy based on meagre and un-interpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible*

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abuses. There, may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture v. Central Reig Refining Company 94 Lawyers Edition 381 be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

161. It is equally well settled that wherever the parliament has the power to frame a statute it also includes the power to make the law retrospective. In other words, the parliament also has wide powers to frame the laws including taxing statutes with retrospective effect. However, the Courts have recognized certain inherent limitations in framing retrospective tax legislations.

162. In Tata Motors Ltd vs. State of Maharashtra and ors reported (2004) 5 SCC 783, it was observed that it is undoubtedly true that the legislature has the powers to make

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laws retrospectively including the tax laws. Levies can be imposed or withdrawn but if a particular levy is sought to be imposed only for a particular period and not prior or subsequently, it is open to debate whether the statute passes the test of reasonableness at all.

163. In Commissioner of Income Tax vs. Vatika Township petitioner. Ltd reported in 367 ITR 466 the Constitution Bench of the Supreme Court observed as under:

> *"31. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in Phillips vs. Eyre[3], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.*
>
> *32. The obvious basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule as was observed in the decision reported in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co.Ltd[4]. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the*

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legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.

33. *We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India & Ors. v. Indian Tobacco Association[5], the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra & Ors.[6] It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are confronted with any such situation here.*"

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164 The illustration given by Mr. Soparkar for the purpose of demonstrating that the impugned amendment is arbitrary and unreasonable is quite apt.

165. We are of the view that if unlimited time period is available to the Revenue for assessment/re-assessment/revision in any case based on a decision rendered in the case of any other dealer the same would lead to an

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irreparable situation and, in such circumstances, it renders Section 84A manifestly arbitrary and unreasonable.

166 Then we are taking about unreasonableness in the impugned provision, we should look into the English decision in the case of **Kruse vs. Johnson (1895-90) All ER 105**. It has been observed as under:

> *“"Unreasonableness in what sense! If for instance they were found to be partial and unequal in their operation between different classes, if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with rights of those subject to them as could find no justification in the minds of the reasonable men, the Court might well say parliament never intended to give authority to make such rules and that they are unreasonable and ultra vires ."*
> *24. In Municipal Corporation of Delhi v. Birla Cotton Spinning and Weaving Mills, Delhi, AIR 1968 SC 1232, a Constitution Bench of the Apex Court had occasion to examine the issue. The Court approved the aforesaid principle enunciated in the case of Kruse v. Johnson (supra).*
>
> *25. Chief Justice Wanchoo approving the principle said :-*
>
> *26. In such case of the act of such a body in exercise of the power conferred on it by law is unreasonable, the Court can held that such exercise is void for unreasonableness">. This principle was laid down as far back as 1898 in Kruse v. Johnson, (1898) 2 QB 91, in connection with a bye law made by a county council_. The Court held that a bye law could be struck down on the ground of unreasonableness.*
>
> *Hidayatullah, J. agreed and said:--*
>
> > *"Now the rule regarding reasonableness of bye laws was laid down in (1898) 2 QB 91. The rule has been universally accepted and applied in India and elsewhere."*
>
> *Sikri, J. Concurred :*
>
> > *"I agree with the learned Chief Justice and Hidayatullah, J. that in suitable cases taxation in pursuance of*

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delegated powers by a Municipal Corporation can be struck down as unreasonable by Courts. If Parliament chooses to delegate wide powers it runs the risk of the bye laws or the rules framed under the delegated powers being challenged as unreasonable."

167. In the case of **Mafatlal Industries Ltd. vs. Union of India**, (1998) 111 STC 467 (SC), the Supreme Court observed that allowing refund claims beyond the stipulated period of limitation based on the decisions rendered in other cases would "do violence to several well-accepted principles of law. It was further observed that "one of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding". Denouncing the legality of the practice of claiming refund after number of years based on subsequent decisions it was observed that "But according to the present practice, writs and suits are being filed after lapse of a long number of years and the rule of limitation applicable in that behalf is said to be three years from the date of discovery of mistake of law. The incongruity of the situation needs no emphasis." The effect of such practice was explained further by the Hon'ble Court in the same paragraph as follows "An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos." The conclusion of the Supreme Court summarizing the proposition was contained in para-99(iv) which reads as under;

"99(iv) It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also

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claim that the decision of the court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person , whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment of levy has become final in his case he cannot seek to reopen it nor can he claim refund without reopening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well-established principles of law. It also leads to grace public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund."

168. The entire gamut of retrospective operation of fiscal statues was revisited by the Supreme Court in a Constitution Bench judgment in Commissioner of Income Tax (Central) - I, New Delhi v. Vatika Township Private Limited [2015 1 SCC 1] in the following manner:

"33. A Constitution Bench of this Court in Keshavlal Jethalal Shah v. Mohanlal Bhagwandas [AIR 1968 SC 1336 : (1968) 3 SCR 623], while considering the nature of amendment to Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act as amended by Gujarat Act 18 of 1965, observed as follows: (AIR p. 1339, para 8)

> *"8. ... The amending clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional jurisdiction was before the amendment derived from Section 115 of the Code of Civil Procedure, and the legislature has by the amending Act not attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act."*

34. It would also be pertinent to mention that assessment creates a vested right and an assessee cannot be subjected to

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reassessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective. (See CED v. M.A Merchant[1989 Supp (1) SCC 499 : 1989 SCC (Tax) 404].)

35. We would also like to reproduce hereunder the following observations made by this Court in Govind Das v. ITO[(1976) 1 SCC 906 : 1976 SCC (Tax) 133], while holding Section 171(6) of the Income Tax Act to be prospective and inapplicable for any assessment year prior to 1-4-1962, the date on which the Income Tax Act came into force: (SCC p. 914, para 11)

> *"11. Now it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that-*
>
> *'all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.'" (emphasis supplied)*

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It is no doubt true, as held by the Supreme Court, in the case of **Jayam and Co vs. Assistant Commissioner and another reported in [2016] 96 VST 1 (SC)** that the State has enormous powers in the matter of legislation and in enacting fiscal laws. Great leverage is allowed in the matter of taxation laws because several fiscal adjustments have to be made by the Government depending upon the needs of the

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Revenue and the economic circumstances prevailing in the State.

Even so an action taken by the State cannot be so irrational and so arbitrary that it creates a situation like the one in case on hand.

169. In view of the above, we hold that Section 84A of the VAT Act is liable to be struck down even on the ground of being manifestly arbitrary, excessive, oppressive and unreasonable.

170. Our final conclusions may be summarized as under;

(i) Section 84A of the Gujarat VAT Act is ultra vires and beyond the legislative competence of the State Legislature.

(ii) Section 84A of the Gujarat VAT Act is manifestly arbitrary, unreasonable and therefore, violative of the Articles 14 and 19(1)(g) of the Constitution of India.

(iii) Section 84A of the Gujarat VAT Act is not a validating Act.

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171. In view of the aforesaid discussion, all the writ applications succeed and are hereby allowed. Section 84A of the Gujarat VAT Act is declared as ultra vires and beyond the legislative competence of the State Legislature under Entry 54 of List II of the Seventh Schedule to the Constitution of India and is also declared to be violative of Article 14 of the Constitution of India on the ground of being manifestly arbitrary, unreasonable and oppressive.

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172. As a result of the above, the impugned notices in each of the writ applications issued under Section 75 of the Gujarat VAT Act is hereby quashed and set aside.

(J. B. PARDIWALA, J)

(A. C. RAO, J)

FURTHER ORDER

After the judgement is pronounced, Mr. Kamal Trivedi, the learned Advocate General makes a request to stay the operation, implementation and execution of the judgement. Having regard to what has been stated in the judgement and more particularly, having taken the view that Section 84A of the Gujarat VAT Act is *ultra vires*, we decline to accept the request of the learned Advocate General.

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(J. B. PARDIWALA, J)

(A. C. RAO, J)

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