(2011) 12 AHC CK 0478

In the Allahabad High Court

Case No : Writ Tax No. 1484 of 2007 and Connected with Writ Tax Nos. 1483/2007, 1482/2007, 1613/2007, 1614/2007, 1580/2007, 1585/2007, 1515/2007, 1519/2007, 1542/2007, 1551/2007, 1559/2007, 1573/2007, 1550/2007, 1560/2007, 1574/2007, 1576/2007, 1658/2007, 1661/2007

ITC Limited APPELLANT

Vs

State of UP and Others RESPONDENT

Date of Decision : 23-12-2011

Acts Referred:

Citation : (2011) 12 AHC CK 0478

Hon'ble Judges : Naheed Ara Moonis, J.;Sunil Ambwani, J.

Bench : Division Bench

Final Decision : Dismissed

Judgement

Hon''ble Sunil Ambwani, J. and Hon''ble Naheed Ara Moonis, J.—In all these writ petitions the petitioners as traders, manufacturers and importers bringing scheduled goods into the local areas in the State of U.P. for consumption, use or sale therein have challenged the validity of the U.P. Tax on Entry of Goods into Local Areas Act, 2007, (in short the U.P. Act of 2007) on the grounds of lack of the legislative competence of the State of U.P. of enactment, as also violative of freedom of trade, commerce and intercourse guaranteed under Article 301 and not saved by Article 304(b) of the Constitution of India. The petitioners have also challenged the retrospectivity of the Act. w.e.f. 1.11.1999, when the U.P. Tax on Entry of Goods Ordinance, 1999, replaced by U.P. Tax on Entry of Goods Act, 2000, was promulgated and which was struck down by this Court in Indian Oil Corporation Ltd. v. State of U.P. AIR 2004 Alld. 277.

2. The substance of challenge in all these writ petitions to the constitutional validity of the U.P. Act of 2007 is that the entry tax is levied under the Act is by way of payment of compensatory tax of which the quantifiable/ measurable benefits are not provided either facially or patently to its payers, in view of the

tests laid down in Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, The expenditure of the entry tax as compensatory tax collected is not broadly in proportion to defray the cost of regulation, or to meet the outley incurred for some special benefit to the trade commerce and industry. There is no link between the entry tax collected and the facilities extended to the trades, directly or indirectly, and for which the State on which the burden of proof lies has failed to prove the direct and immediate effect on trade and commerce, as laid down in Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, and the working trest enunciated in The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others,

3. We have heard Shri S.P. Gupta, Sr. Advocate assisted by Shri Yashwant Verma; Shri Bharat Ji Agrawal, Sr. Advocate assisted by Shri Piyush Agrawal, Shri Subham Agrawal; Shri V.K. Upadhyay, Sr. Advocate assisted by Shri Ritwik Upadhyay; Shri Dhruv Agrawal, Sr. Advocate assisted by Shri Nikhil Agrawal; Shri Aloke Kumar; Shri K.N. Kumar; Shri R.R. Agrawal appearing along with Shri Suyash Agrawal; Shri S.D. Singh; Shri Nishant Mishra; Shri Navin Sinha, Sr. Advocate assisted by Shri Saral Srivastava for the petitioners. Shri S.P. Kesarwani, Addl. Chief Standing Counsel along with Shri C.B. Tripathi, Addl. Chief Standing Counsel appear for the State respondents.

The Background

4. The Second State Finance Commission (2001-06) of the State of U.P. observed in para 14.111 of its report that octroi used to be the most important source of revenue for urban local bodies in the State. The collection of octroi was full of deficiencies, malpractice and caused harassment. It also imposed negative economic costs due to impediments on movement of goods carriers, leading to wastage of fuel and substantial time delays. A decision was taken at the national level to abolish octroi and to compensate local bodies through matured mechanisms for loss of revenue cost. The U.P. Taxation Enquiry Committee 1980 recommended abolition of octroi. In the alternative it suggested levy of entry tax on selected commodities. Subsequently in many states including State of U.P. octroi was abolished. Some States like Maharashta and Gujarat did not abolish the octroi. In U.P. it was decided to levy surcharge on sales tax, the proceeds whereof were to be distributed to Urban Local Bodies as grants to compensate them for the loss of revenue. In the course of time the surcharge was merged in trade tax. The Urban Local Bodies were made entitled to receive a share of 7% in net tax receipts, following the recommendations of the First State Finance Commission. The volume of transfers to the Urban Local Bodies substantively improved under the new system. In 1995-96 total non-planned grants to Urban Local Bodies in U.P. amounted to Rs.285 crores. In the year 2001-02 this amount exceeded to Rs.700 crores.

5. The 11th Finance Commission in its report presented to the Lok Sabha on 27th July, 2000 considered in para 8.13 the assessment about the manner and extent of augmentation of the Consolidated Funds of the State, keeping in view of the

provisions required to be made for the emoluments and terminal benefits of the local bodies including teachers; the existing powers of the local bodies to raise financial resources and the powers, authorities and responsibilities transferred to local bodies. In para 8.14 to para 8.18 of the report, the 11th Finance Commission submitted the study of the report on panchayats and municipalities; measures to augment the consolidated funds of the State, reforms in local tax and rates and maintenance of civil services. In para 8.16 on the issue of reforms in local tax and rates, the 11th Finance Commission reported as follows:

8.16. In addition to the measures mentioned above, we would like to highlight the need for improving the revenue mobilisation by the local bodies themselves. Many SFCs have, in their reports, given suggestions in this regard, of which some are State specific but some can be considered useful for all the States. We mention two local taxes, besides user charges, for consideration of all the States.

a. Property/house tax : Property tax/house tax is the single most important local tax today, in a majority of the States. Yet it has remained beset with a variety of problems that have prevented the local bodies to exploit its full potential. Such problems are not merely confined to the proximity factor, namely, the local bodies being too close to the people to be effective tax collectors. In most States, the tax rates have not been revised periodically and there is no standard mechanism for determination of property tax rates and their revision. Indeed, West Bengal has experimented with the institution of Central valuation authority and some other States have initiated reforms in the system of property taxation with provisions for self-assessment, mandatory periodic revision, dispensing with the demand notice for the tax and putting the onus on property owners for timely tax payment, etc. Such measures have yielded good results and need to be pursued by all States in a rationalised manner. Most States have accorded a variety of tax concession/exemption leading to Revenue loss to the local bodies. Arrears of taxes are allowed to accumulate either due to sheer inefficiency or due to delay in assessments and in appeals. Yet another major impediment to the growth of revenue from the property/house tax has been the rent control laws. The property/house tax legislation should be suitably modified to overcome this impediment where the property has been let out, the property tax should be made recoverable from the occupier.

b. Octroi/entry tax: Besides the property/house tax, octroi has been the major source of revenue for the municipalities and, in some States, even for the panchayats. Many States have, however, abolished octroi with a view to remove impediments to the physical movement of goods, though several other new barriers have been created. Some States have introduced a levy in lieu of octroi, usually the entry tax, the net proceeds of which are transferred to the local bodies in the form of grant. During our interaction with the representatives of the local bodies, we were told that though the grant in lieu of octroi given to the local bodies was raised by certain percentage from year to year, it does not have as much buoyancy as the octroi had. There have also been numerous complaints of delay in release of the compensatory grants. While we do not advocate re-introduction of octroi, we do feel that there is a need for replacing it with a suitable tax that is buoyant and can be collected by the local bodies.

6. The State of U.P. promulgated the U.P. Tax on Entry of Goods Ordinance, 1999 w.e.f. 1.11.1999, which was later on enacted as U.P. Tax on Entry of Goods Act, 2000. The Prefatory Note of the Act of 2000 read as follows:

Prefatory Note-Statement of Objects and Reasons.--With a view to augmenting the revenue of the State, it was decided to make law to provide for the levy and collection of tax on entry of certain goods into a local area from any place outside that local area including a place outside Uttar Pradesh for consumption, use or sale therein, at such rates, not exceeding five per cent of the value of the goods, as may be specified by the State Government by notification. It was also decided to provide for the application of certain provisions of the Uttar Pradesh Trade Tax Act, 1948 including the use of check-posts and barriers established thereunder for the purposes of the said law. Since the State Legislature was not in session and immediate legislative action to implement the aforesaid decision was necessary, the Uttar Pradesh Tax on Entry of Goods Ordinance, 1999 (U.P. Ordinance No. 21 of 1999) was promulgated by the Governor on October 30, 1999 after obtaining the instructions of the President.... 7. The Act of 2000 was challenged by M/s Indian Oil Corporation Ltd. and many other companies and traders importing scheduled goods into local area of the State. A Division Bench consisting of Hon?ble Mr. Justice M. Katju (as he then was) and Mrs. Justice Poonam Srivastava by their judgment dated 27.1.2004 reported in AIR 2004 All 277, declared the Act as violative of Article 301 and 304 of the Constitution of India and thus ultra vires, and allowed all the writ petitions. The observations of the Bench made in paragraph 51, 54, 66, 67, 68, 69 and 107 are quoted as below:

Paragraph No. 51, In our opinion, this does not help the respondents because the respondents have to show that the realization from entry tax has been used for facilitating trade and commerce and not for raising general revenue. There is nothing to show that the amount realised as entry tax cannot be used or has not been used for setting up schools, housing payment of salary to Government employees, payment of salaries to Ministers, M.L.As, constructing Government building acquiring land etc.

Paragraph No. 54. In our opinion a tax to be a compensatory tax must be in the nature of a cess. A cess is a tax imposed for realizing revenue which is utilized for a specific purpose. Thus, while a cess is also a tax, it is a tax of a special nature. It does not realize revenue which is used for general public expenditure but for specific expenditure for a specific purpose. For example, education cess would be a tax which generates revenue which is utilized for education purposes e.g., school building, paying salaries to teachers etc. Similarly, a health cess would be a tax which generates revenue which is utilized for health purposes e.g. for building hospitals giving free medicines to poor people etc. Similarly in our opinion a compensatory tax is really in the nature of a cess because it generates revenue which is not used for general public purpose but for the specific purpose of facilitating trade and commerce.

Paragraph No. 66. In fact in the Statement of Objects and Reasons of the impugned Act (U.P. Act No. 12 of 2000) it is specifically mentioned:

Preferatory Note-Statement of Objects and Reasons-with a view to augmenting the revenue of the State it was decided to make law to provide for levy and collection of tax on entry of certain goods into a local area from any place outside that local area including a place outside U.P.... Paragraph No. 67. Thus the Statement of objects and Reasons of the impugned Act clearly discloses that the impugned Act was enacted to augment the general revenue of the State and not for facilitating trade and commerce.

Paragraph No. 68. In the supplementary counter affidavit of Shri B.P. Sonkar dated 7th January, 2004 the respondents have annexed copy of a letter of the Director (Judicial), Government of India, Ministry of Home Affairs, dated 19th January, 2000 addressed to the Principal Secretary, Legislative Section, Government of U.P. this letter states:

With reference to your letter No. 2386/XVII-V-I-1 (Ka)-39/39 dated 1st January, 2000 on the subject mentioned above, I am directed to say that the Government of India have no objection to the introduction of the Uttar Pradesh Tax of Entry of Goods Bill, 2000, in the State Legislature under Article 304 (B) of the Constitution of India. Paragraph No. 69. In our opinion, there is a difference between the Government of India and President of India. The aforesaid letter dated 19th January 2000 only states that the Government of India has no objection to the introduction of the impugned Act but it does not say that the president of India has given his previous sanction as required by the proviso the Article 304(b) of the Constitution.

Paragraph No. 107. Any amount collected under the said Act shall be refunded to the petitioners with 10 per cent annum interest from the date of realization to the date of refund and the refund shall be made within two months from Tribunal today. However, if the burden of tax has been passed on by the petitioners to the consumers then the refund shall not be given to the petitioners of the tax realized as it will amount to unjust enrichment.

8. Aggrieved by the judgment the State of U.P. preferred Special Leave to Appeal (Civil) No. 2757-2758 of 2004. The Supreme Court by order dated 9.2.2004 stayed the operation of the judgment subject to appellant depositing all the taxes that may be realized from the respondents after 27.1.2004 in a separate interest bearing account. The interim order is quoted as below:

Issue notice on the application for impleadment.Leave granted.

The operation of the impugned judgment is stayed, subject to the appellant''s depositing all taxes that may be realized by the appellant from the respondents after 27.1.2004 in a separate interest bearing account. This amount and the interest accrued thereon shall be held subject to the further orders of this Court.

9. A two judges bench of the Supreme Court had doubted the correctness of the views expressed in Bhagat Ram Rajiv Kumar v. CST 1995 Supp 1 SCC 673, which was relied on in a subsequent decision in State of Bihar v. Bihar Chamber of Commerce (1996) 9 SCC 136 and had referred the matter to a Larger Bench. In Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, a Constitution Bench of the Supreme Court overruled the judgment in Bhagat Ram and Bihar Chamber of Commerce?s case and concluded as follows:

49. In our opinion, the doubt expressed by the referring Bench about the correctness of the decision in Bhagatram''s case 1995 Supp. (1) SCC 673 followed by the judgment in the case of Bihar Chamber of Commerce (1996) 9 SCC 136 was well-founded.

50. We reiterate that the doctrine of ''direct and immediate effect'' of the impugned law on trade and commerce under Article 301 as propounded in Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, and the working test enunciated in The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, for deciding whether a tax is compensatory or not vide para 19 of the report, will continue to apply and the test of ''some connection'' indicated in para 8 of the judgment in Bhagatram Rajeevkumar v. Commissioner of Sales Tax M.P. 1995 Supp. (1) SCC 673 and followed in the case of State of Bihar v. Bihar Chamber of Commerce (1996) 9 SCC 136, is, in our opinion, not good law. Accordingly, the constitutional validity of various local enactments which are the subject matters of pending appeals, special leave petitions and writ petitions will now be listed for being disposed of in the light of this judgment.

10. When the matter of entry tax in Special Leave to Appeal Nos.2757-2578/2004, were again taken up, a Division Bench of the Supreme Court passed an order on 14.7.2006 to the following effect:

Paragraph No. 5. Since relevant data do not appear to have been placed before the High Courts, we permit the parties to place them in the concerned writ petitions within two months. The concerned High Courts shall deal with the basic issue as to whether the impugned levy was compensatory in nature. The High Courts are requested to decide the aforesaid issue within five months from the date of receipt of our order. The judgment in the respective cases shall be placed on record by the concerned parties within a month form the date of the decision in each case pursuant to our directions. 11. A Division Bench of this Court consisting of Hon''ble Justice A.K. Yog and Hon''ble Justice Poonam Srivastava considered the validity of the Act of 2000 on the relevant date and the material provided by the State of U.P., on the principles of law laid down in Jindal Sainless Ltd. (2) v. State of Haryana (Supra). The reasons and conclusions of the Division Bench in its judgment dated 8.1.2007 given in paragraph 27 to 34 are quoted as below:

27. It is to be appreciated that we are not called upon to adjudicate or define parameters of ''compensatory tax'' or vires of the ''Act'', which is outside the scope of the ''issue'' remitted to High Court vide Supreme Court judgment and order dated July 14, 2006 Reported as jindal Stainless Ltd. v. State of Haryana whereunder High Court''s, after affording opportunity to the parties to furnish relevant data (to discharge its ''burden'') decide nature of ''entry tax'', i.e., whether the ''tax'' under the Act, is ''compensatory'' in nature. Undisputedly it is to be done on the parameters/touchstone laid down by the apex court in the case of Jindal Stainless Ltd. holding:

(a) That ''tax'' rests upon and has roots running on the lines of ''principles of equivalence'' (which is converse of the principle of ability to pay) applies to a case of compensatory tax

(b) That benefits, under a compensatory tax, are quantifiable and measurable.

(c) That it is broadly-proportional and not progressive;

(d) That it is based on the principle of ''pay for the value'';

(e) That it is based on the concept of recompense/reimbursement; and reimbursement/recompense is in close proximity to the cost incurred by the provider of the services/facilities; and

(f) That compensatory tax, compulsorily charged is in proportion to the special benefits derived to defray the cost of regulation or facilities or special advantages provided to the trades in question;

(g) That the burden of showing that the tax is compensatory in nature lies on the State.

28. Laying down parameters of compensatory tax, the apex court in Jindal Stainless Ltd. observed:

40. In the context of Article 301, therefore, compensatory tax is a compulsory contribution levied broadly in proportion to the special benefits derived to defray the costs of regulation or to meet the outlay incurred for some special advantage to trade, commerce and intercourse. It may incidentally bring in net-revenue to the Government but that circumstance is not an essential ingredient of compensatory tax. 29. It is clear from the perusal of documents annexed with the affidavit of Amitabh Mishra that the amount of revenue earned from ''entry tax'' under the Act is pooled in the ''consolidated fund''--which is utilised under budgetary-allocation to the States, which is also utilised as ''grant-in-aid'' by ''State'' to make up budgetary deficit of a local body to discharge their statutory/ constitutional obligations--which apart from others include construction of roads, bridges, etc. The respondents have placed figures relating to the ''funds'' given as ''grant-in-aid'' to panchayats/local bodies from ''consolidation fund''--as part of its share received by State of U.P.

30. There is, therefore, no occasion for us to probe reasonableness or

proportionality of the same in the instant case.

31. ''Aims and objects'' of the Act, even though not decisive as held by the Supreme Court, merely refer ''to augment revenue of the State'' and hence support the contention of the petitioners that ''tax'' under it is not compensatory in nature. The State has failed to pin-point or establish through its data, the specific/additional service/facility provided to its tax-payer (s).

32. It is obvious that the apex court remitted the issue of ''compensatory tax'' (after parties are given opportunity to file ''data'' to discharge their burden) apparently for the reason that it found ''aims and object'' of the Act irrelevant and none of the provisions of the Act (including its Sections 4, 4-A and 6 read with the Schedule) reflect that the amount of ''entry tax'' is to provide ''additional'' or ''specific'' facility to the scheduled trades visa-vis those who are not subjected to this ''tax''. There is no co-relation between the ''levy of entry tax'' and the ''scheduled trades''.

Finding

33. There is not even an iota of evidence/material on record to give required data/statistics to prove/establish that the amount collected as ''tax'' and its expenditure on providing additional/specific advantage/facility provided to trade/s in particular mentioned under the Schedule of the Act. In absence of such a data it is not possible for this court to hold that ''entry tax'' is ''compensatory tax''. We hold accordingly.

34. In the nature of the case we make no order as to costs.

12. The State of U.P. filed special leave petition against the order of the Division Bench dated 8.1.2007 in which following interim order was passed by the Supreme Court on 17.4.2007:

It is stated by learned counsel for the State of U.P. that an appeal shall be filed against the order of the Allahabad High Court which was passed pursuant to the directions given by this Court on 14th July, 2006 in Civil Appeal No. 3453 of 2003 and connected cases. It is stated that some other High Court have also decided the matter afresh. The High Court''s orders, wherever it has been passed in favour of the tax payers, shall operate so far as the concerned writ petitioner''s are concerned. A list has been filed indicating that seven of the High Courts have already decided the writ petitions and the judgments are awaited in respect of five other High Courts. The concerned High Courts, i.e. Karnataka, Rajasthan, Andhra Pradesh, Orissa and Tamil Nadu are requsted to dispose of the matter pursuanct to the direcgtion of this Court dated 14th July, 2006 within a period of three months. 13. M/s Indian Oil Corporation demanded refund of the entry tax of Rs.3022 crores on the basis of the order dated 8.1.2007 passed by the High Court and the interim order dated 17.4.2007 passed by the Supreme Court. The State of U.P. decided to enact a new law to remove the defects pointed out by the Division Bench of this Court and to bring it in conformity with the parameters of the compensatory tax as laid down by the Supreme Court in Jindal Sainless Ltd. (2) v. State of Rajasthan (Supra). The U.P. Tax on Entry of Goods Into Local Areas Ordinance (U.P. Ordinance No. 35 of 2007) was promulgated with retrospective effect from 1.11.1999. The Ordinance was replaced by the U.P. Tax on Entry of Goods into Local Areas Act, 2007 (the Act).

14. The object and reasons of U.P. Ordinance No. 37 of 2007, which was replaced by the U.P. Act No. 30 of 2007 are quoted as below:

Statement of objects and reasons:

The Uttar Pradesh Tax on Entry of Goods Act, 2000 (U.P. Act No. 12) was enacted to provide for the levy and collection of tax on entry of goods into a local area for consumption, use or sale therein. The said Act was declared ultra vires by the Hon''ble High Court of Judicature at Allahabad in Writ Petition No. 251/03 M/s Indian Oil Corporation and another v. State of U.P. and others in its judgment dated 27th January, 2004, the State Government preferred the Special Leave Petition No. 2757-2758/2004 before the Hon''ble Apex Court of the country and the Hon''ble Apex Court in the said Special Leave Petition No. 2757-2758/2004 stayed the operation of the said judgment of the Hon''ble High Court on 9th February 2004 with the condition that the amount realized as entry tax shall be deposited in the separate bearing account thereafter, in the case of Jindal Stainless Steel and another v. State of Haryana and others the Hon''ble Supreme Court required the Hon''ble High Court to submit its report regarding whether the entry tax under the said Act falls in the category of compensatory tax or not. The Hon''ble High Court in its judgment dated January 8, 2007 held that the entry tax under the said Act does not fall in the category of compensatory trax. The same judgment had been delivered by the Hgh Court in the case of the Indian Oil Corproation Limited and other similar cases. A Special Leave Petition was filed in the Supreme Court by the State Government against the judgment of the High Court dated January 8, 2007. Since M/s Indian Oil Corporation was demanding for the refund of Rs.3022.58 Crores on the basis of the interim order dated 17.4.2007 of the Apex Court, the State Government was considering to enact afresh the said Act retrospectively after the judgment of the Constitution Bench of the Hon''ble Supreme Court. In the meantime, the Bihar Entry Tax Act has been held valid by the Hon''ble Patna High Court. It was, therfore, decided to make a law with retrospective effect by removing the shortcomings pointed out in the judgment of the High Court of Judicature at Allahabad and in the light of the observations with respect to the compensatory tax made by the Constiuttion Bench of the Supreme Court and on the basis of the provision of the Bihar Entry Tax Act, which has been held valid by the Patna High Court.

Since the State Legislature was not in session and immediate legislative action was necessary to implement the aforesaid decision, ''The Uttrar Pradesh Tax on Entry of Goods into Local Areas Ordinance, 2007'' U.P. Ordinance No. 35 of 2007 was promulgated by the Governor on September 24, 2007.

This Bill is introduced to replace the aforesaid Ordinance.

15. The Act was amended by the Amendment Act No. 8 of 2009 to make it single point levy on the entry of the scheduled goods in the State of U.P. The statement of objects and reasons of the Amendment Act No. 8 of 2009 are quoted as below:

Amendment Act No. 8 of 2009 Statement of Objects and Reasons

The Uttar Pradesh Tax on Entry of Goods into Local Areas Act, 2007 (U.P. Act No. 30 of 2007) has been enacted to provide for levy and collection of tax on entry of goods into a local area for consumption, use or sale therein. With a view to simplifying tax system and removing certain anomalies it has been decided to amend the said Act mainly to provide that,

(a) no tax shall be levied on or collected from a dealer or subsequent dealer on entry of goods into a local area if the tax on such goods has been paid in any other local area;

(b) the State Government is being empowered to allow rebate upto the full amount of tax under the said Act whether the liability for payment of tax under the Uttar Pradesh Value Added Tax Act, 2008 has accrued before or after entry of such goods into any local area. The Uttar Pradesh Tax on Entry of Goods into Local

Areas (Amendment) Bill, 2009 is introduced accordingly.

16. The State Government made and published by notification dated 24.9.2008 the U.P. Tax on Entry of Goods into Local Area Rules, 2008 providing for registration of dealers (Rule 3); submission of returns and assessment of tax (Rule 4); refund of tax in certain circumstances (Rule 5); manner of payment (Rule 6) and release and deposit of tax by the manufacturer (Rule 7) and power to amend the formate of different forms (Rule 8). The U.P. Tax on Entry of Goods into Local Areas (Fund) Rules, 2007 were notified on 11.10.2007 providing for utilization of money of the fund (Rule 3); manner of utilization of the fund (Rule 4); heads and accounts and financial procedures (Rule 5). The U.P. Tax on Entry of Goods into Local Areas First amendment Rules, 2010 were notified on 19.1.2010.

17. In order to appreciate the challenge to the Rules it would be necessary to refer to Sections 4, 5, 12, 14 and 17 of the Act:

4. Levy of tax-(1) For the purpose of development of trade, commerce and industry in the State, there shall be levied and collected a tax on entry of goods specified in the Schedule into a local area for consumption, use or sale therein, from any place outside that local area, at such rate not exceeding five percent of the value of the goods as may be specified by the State Government by notification and different rates may be specified in respect of different goods or different classes of goods;

Provided that the State Government may by notification amend the Schedule and upon issue of any such notification, the Schedule shall, subject to the provisions of sub-section (10), be deemed to be amended accordingly.

(2) The tax under sub-section (1) shall be continued to be levied till such time as is required to improve infra-structure within the State such as power, road, market condition etc. with a view to facilitate better market conditions for trade, commerce and industry.

(3) The tax levied under sub-section(1) shall be payable by a dealer who brings or causes to be brought into the local area such goods, whether on his account or on the account of his principal or takes delivery or is entitled to take delivery of such goods on its entry into a local area:

Provided that the State Government may by notification, permit any Power Project Industrial Unit engaged in generation, transmission and distribution, having aggregate capital investment of rupees one thousand crore or more to own the liability of payment of tax of other dealers on the entry of such goods into a local area from any place out side that local area as are used and consumed by the said unit subject to such conditions as may be specified in the notification.

Explanation :-Where the goods are taken delivery of on its entry into a local area or brought into a local area by a person other than a dealer, the dealer who takes delivery of the goods from such person shall be deemed to have brought or caused to have brought the goods into the local area.

(3A) Notwithstanding anything to the contrary contained in sub-section (1) of sub-section (3), no tax shall be levied on or collected from a dealer or subsequent dealer who brings or causes to be brought into a local area any goods in respect of which tax has been paid in any other local area under any of the said sub-sections and such dealer furnishes before the concerned assessing authority the prescribed declaration in regard thereto within such time as may be prescribed:

Provided that the amount of tax deposited under this section shall be deemed to have been deposited for and on behalf of such dealer or any subsequent dealer to whom above prescribed declaration has been issued.

(4) The State Government may by notification remit the amount of tax to the extent necessary to ensure that effective rates of tax on entry of goods into a local area, from any place out side the local area for consumption or use in a Power Project Industrial Unit, do not exceed the respective rates applicable as on the date of commencement of State Energy Policy subject to the conditions as may be notified in such notifications.

(5) No dealer who brings or causes to be brought any goods into a local area shall be liable to tax, if during the assessment year the aggregate value of such goods is less than two lakh rupees in the case of manufacturers and three lakh rupees in case of other dealers or such larger amount as the State Government

may by notification specify in that behalf either in respect of all dealers in any goods or in respect of a particular class of such dealers:

Provided that the provisions of this sub-section shall not apply in respect of value of the goods brought into a local area from outside Uttar Pradesh.

(6) Notwithstanding anything contained in sub-section (1) or sub-section (3), no tax shall be levied on or collected from a dealer who brings or causes to be brought into a local area any goods which are

(i) consigned without using them in the local area to any place outside the State; or

(ii) sold or re-sold either in the course of inter-State trade or commerce or in the course of export out of the territory of India,

Explanation-Section 3, section 5 and section 6-A of the Central Sales Tax Act, 1956 shall apply for the purpose of determining whether or not any goods has been sold by a dealer in the course of inter-State trade or commerce or in the course of export out of the territory of India.

Provided that where at the time of entry of goods into a local area, the quantity or value of goods to be sold within such local area for the purpose of being taken outside the State without consumption, use or sale in such local area, is not ascertainable, the dealer shall pay the amount of tax on the value of total quantity of goods and after the goods are consigned or sold outside the State or int he course of export, the dealer may claim refund or adjustment of the amount so paid as tax in the month in which such goods area transferred outside the State or sold in the course of inter-State trade or commerce or in the course of export, in respect of such goods.

(7) Deleted.

(8) Where tax, in respect of entry of any goods into a local area, is payable and has been so paid by the agent, the principal shall not be liable for payment of tax and likewise where tax, in respect of entry of any goods into a local area, is payable and has been so paid by the principal, the agent shall not be liable for payment of tax.

(9) Where in respect of any

(i) purchased scheduled goods,

(a) value of such goods is not ascertainable or value of such goods, as declared by the dealer or the person in-charge of the goods, as the case may be, is not verifiable on account of non-availability or non-production of any document; or

(b) any document produced in support of purchase price or transport charges and other charges, is not worthy of credence; or

(ii) scheduled goods, acquired or obtained otherwise than by way of purchase, value of such goods disclosed by the person in-charge of the goods or the dealer, as the case may be, does not appear to be reasonable and worthy of credence, then the whole-sale price, in the open market in a local area in which such goods are being brought, reasonably determined by the assessing authority, after affording reasonable opportunity of being heard to the person in-charge of the goods or the dealer, as the case may be, shall be deemed to be, the value of goods, and for this purpose in reference to clause (i), the assessing authority shall assume that goods has been acquired or obtained otherwise than by way of purchase.

(10) Every notification made under this section shall, as soon as may be after it is made, be laid before each House of the State Legislature, while it is in session, for a total period of not less than fourteen days, extending in its one session or more than one successive sessions and shall unless some later date is appointed take effect from the date of its publication in Gazette subject to such modifications or annulments as the two Houses of the Legislature may during the said period agree to make, so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done thereunder except that any imposition, assessment, levy or collection of tax or penalty shall be subject to the said modification or annulment.

5. Reversal of levy of tax- Where any dealer has brought or has caused to be brought or has taken delivery of any goods notified under sub-section (1) of section 4 on its entry into a local area, for consumption, use or sale therein and has paid tax in respect of entry of such goods into such local area or purchased such goods on which entry tax has already been paid, such tax shall be refunded or adjusted to such dealer by whom without using them in the local area such goods are consigned to any other place outside the State or are sold either in the course of inter-State trade or commerce or in the course of export outside the territory of India.

12. Realization of tax through manufacturer

(1) Notwithstanding anything contained in any other provision of this Ordinance, any person who intends to bring into a local area from any manufacturer within the State, such goods specified in the Schedule as may be notified by the State Government, shall, at the time of taking delivery of the goods from the manufacturer, pay to the manufacturer the tax payable on entry of such goods into the local area and the manufacturer shall receive the tax so paid. The manufacturer shall not give such goods to the purchaser unless the amount of such tax has been paid by the purchaser.

(2) The manufacturer receiving the tax under sub-section (1) shall submit to the assessing authority a return in respect of the goods supplied, and the tax received, by him under sub-section (1) and deposit the tax so received, in such manner and within such time as may be prescribed.

(3) Where any manufacturer fails to deposit, the tax under this section he shall

be liable to pay the tax along with the interest and penalty, if any, payable thereon which shall be recoverable as arrears of land revenue.

(4) Where the assessing authority is satisfied that any goods referred to in sub-section (1) is lost or destroyed after its delivery by the manufacturer and before its entry into the local area, it shall direct that the tax paid in respect of such goods shall be refunded to the person who had paid the tax under sub-section (1):

Provided that no claim for such refund shall be entertained after the expiry of six months from the date of the loss or destruction of the goods.

(5) Provisions regarding imposition of penalty in respect of amount of tax deducted under section 34 of the Uttar Pradesh Valued Added Tax Act, 2008 and provision regarding payability of interest under sub-section (2) of section 33 of the said Act shall mutatis mutandis apply to amounts collected by manufacturers from purchasers under this section.

(6) The amount of tax deposited under this section shall be deemed to have been deposited for and on behalf of the dealer from whom such tax has been received. The manufacturer shall mention the amount of such tax in the tax invoice or sale invoice, as the case may be, issued to the purchasing dealer. It shall be deemed to be the proof for deposit of tax unless the tax invoice or sale invoice, as the case may be, is found forged or bogus or fake or not validly issued or obtained fraudulently.

14. Utilization of the proceeds of the levy under this Ordinance

(1) The proceeds of the levy under this Ordinance shall be appropriated to the Fund and shall be utilized exclusively for the development or facilitating the trade, commerce and industry in the State of Uttar Pradesh which shall include the following:

(a) construction, development and maintenance of roads and bridges for linking the market and industrial areas;

(b) providing finance, aids, grants and subsidies to financial, industrial and commercial units;

(c) creating infrastructure for supply of electricity and water to industries, marketing and other commercial complexes;

(d) creation, development and maintenance of other infra-structure for the furtherance of trade, commerce and industry in general;

(e) providing finance, aids, grants and subsidies for creating, developing and maintaining pollution free environment in the concerned areas;

(f) any other purpose connected with the development of trade, commerce and industry or for facilities relating thereto which the State Government may specify by notification;

(g) providing finance, aids, grants and subsidies to local bodies and government agencies for the purposes specified in clauses (a), (c), (d), (e) and (f);

(2) The entry tax levied and collected under this Ordinance shall be credited to the Uttar Pradesh Trade Development Fund and shall exclusively be used for facilitating trade, commerce and industry. The amount realised as entry tax shall not be used for the purposes other than those specified in sub-section (1).

(3) The State Government shall, by notification, specify the manner of deposit of tax under appropriate Heads of Accounts and the manner in which the proceeds of the levy shall be utilized exclusively for the development of trade and commerce in the State of Uttar Pradesh.

17. Validation-

Notwithstanding any judgement, decree or order of any Court, Tribunal or Authority, all actions taken, things done, rules made, notifications issued or purported to have been taken, done, made or issued and entry tax levied, assessed, collected, realised, received or liability accrued under the Uttar Pradesh Tax on Entry of Goods Act, 2000 shall be deemed to have been validly taken, done, made, issued, levied, assessed, collected, realised, received or accrued under this Ordinance, as if this Ordinance were in force at all material times and no suit or other proceedings shall be maintained or continued in any Court or before Tribunal or any Authority for the refund of entry tax.

(2) For the removal of doubts it is hereby declared that nothing in sub-section (1) shall be construed as preventing any person from claiming refund of entry tax paid by him in excess of the amount due from him under the Act provided the burden of tax has not been passed on.

18. By a notification dated 29.9.2008 w.e.f. 30.9.2008 the State Government, in exercise of powers under sub-section (1) of Section 4 of the Act of 2007, notified a Schedule with 20 items for levy and collection of entry tax with the rate of tax, varying from 1% on motor vehicles of all kinds, including chases thereof, but excluding tractor (Item 13), and iron and steel as defined under Section 14 of the Central Sales Tax Act, 1956 (Item 14), to 5% on crude oil (Item 1), natural gas (Item 3), tobacco in the form of cigarette (Item 5), paper meant for writing, printing and packing purpose excluding news print (Item 6), pan masala containing tobacco (gutkha) (Item 7); high speed diesel, low sulphur high speed diesel and other petroleum products excluding, kerosene oil for public distribution system (Item 11); clinker (Item 12) and refrigerator, air conditioners, and air conditioning plants (Item 20). The entry tax was notified at 2% on the remaining items including machinery and spare parts (Item 2); non-levy sugar (Item 4); cement (Item 8), coal (Item 9); aluminum and its product (Item 14); cable of all kinds (Item 16), laptop, computer system and peripherals, TV including LCD (Item 17); tyre and tubes excluding tyres and tubes of cycle, rickshaw and animal driving vehicle (Item 18), and marbles stones and their tiles (Item 18).

19. The notification was amended on 19.2.2010, excluding natural gas, cement, motor vehicles of all kinds, tyres and tubes. It was again amended on 29.3.2009 excluding machinery and spare parts; wood and timber of all kinds; clinker; aluminum and its products; cables of all kinds, lap top-computer system and peripherals; marbles stones and tiles; and refrigerator, air conditioner and conditioning plants. On high speed diesel and other petroleum products, excluding kerosene oil for public distribution system, a notification was issued on 04.3.2008 providing rebate and a notification was issued on 30.6.2008, providing exemptions. At present only 08 items out of 20 are left in the Schedule for levy of entry tax. Section 5 of the Act of 2007 provides for reversal of levy of tax. Where any dealer has paid entry tax in respect of entry of such goods in such local area or purchased such goods, on which entry tax has already been paid, such tax shall be refunded or adjusted to such dealer by whom without using them in the local area, such goods are assigned to any other place outside the State or are sold either in the course of inter-state trade or commerce or in the course of export outside the territory of India. Section 6 provides for powers to the State Government to give rebate by a notification upto the full amount of tax leviable under the Act. Where the tax is payable in respect of a sale or purchase of such goods under the UP Value Added Tax Act, 2008 by a dealer registered under the Act, and for exemptions under Section 7 by the State Government on any notified goods.

20. In almost all the writ petitions, the Court has passed interim orders. In some of the writ petitions interim orders directed furnishing of bank guarantees, which were to be renewed from time to time. The writ petitions were heard in the year 2009. The hearing, however, could not be concluded. Thereafter all the cases were bunched together and were heard for several days fixing dates. In almost all the States in the country after abolition of octroi the State Governments in exercise of their legislative competence under entry 52 of List 2 of the 7th Schedule of the Constitution of India, which authorizes the State to levy tax on entry of goods into local area for consumption, use and sale therein, have enacted legislations imposing entry tax on the entry of the goods into local area. Whereas the High Courts of the State of Gujarat, Orissa, Madhya Pradesh, Assam, Andhra Pradesh and Chattisgarh have upheld the respective State legislations imposing entry tax and the Patna High Court upheld retrospective validation of levy, the High Courts of States of Punjab and Haryana, Kerala, West Bengal, Jharkhand, Rajasthan, Arunanchal Pradesh, Tamil Nadu and Karnataka have struck down the Acts being violative of Article 301 and not saved by 304(b) of the Constitution of India on the touchstone/ parameters laid down in Jindal Stainless Ltd. (2) v. State of Rajastan (Supra).

21. The Gujarat High court in Eagle Corporation Pvt. Ltd. v. State of Gujarat and Ors. 2007 (6) VST 560 (Gujarat) by its judgment dated 10.10.2006 dismissed the writ petitions upholding the validity of the Gujarat Tax on Entry of Specified Goods into Local Areas Act, 2001. The High Court found that the levy of entry tax under the Gujarat Act were compensatory. The entry tax on the goods did not

violate Article 301, nor was the levy of tax found to be discriminatory between goods so imported and the goods so manufactured or produced in the State. The importer would be at par with the local dealers.

22. The Patna High Court in Indian Oil Corporation Ltd. and Anr. v. State of Bihar and Ors. decided on January 9th, 2007, (2007) 10 VST 140 (Patna) examined the provisions of the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale therein Act, 1993 as amended by Bihar Amendment Act, 2001; Bihar Amendment Act, 2003; Bihar (Amendment and Validation) Act, 2003; Bihar Amendment Act 7 of 2006 and Bihar Amendment Act (9) of 2006 and held the Validation Act to be constitutionally valid. It held that the collection of entry tax is compensatory tax, which has been diverted to Urban Local Bodies, to provide various services and infrastructure facilities to traders community to carry on their business activity. The Patna High Court further found that since the State had not produced any data to show that levy of entry tax under the Act of 1993 was a reimbursement/ recompense, for the quantifiable/ measurable benefit provided or to be provided to its payer, the levy was not compensatory in nature under the Parent Act of 1993, and in any event till the amendment of the Act on 29th August, 2006, and therefore levy under the Parent Act of 1993, was violative of Article 301 of the Constitution of India. It struck down the Amendment and Validating Act of 2003, as bad both on account of giving retrospective effect to the amendment, and for want of previous sanction by the President.

23 The Karnataka High Court in Manipal Academy of Higher Education, Manipal v. State of Karnataka and Ors., decided on 9.10.2007, 2008 (13) VST 377 (Karnataka), upheld the charge of tax under the Karnataka Tax on Entry of Goods Act, 1979 as compensatory tax, which has been diverted to Urban Local Bodies to provide various services and infrastructural facilities to trader community to carry on their business activity.

24. The Orissa High Court in Reliance Industries ltd. v. State of Orissa decided on 18.2.2008 reported in (2008) 16 VST 85 (Orissa) upheld the validity of Orissa Entry Tax Act on the ground that there was no discrimination between goods imported from outside the State and those manufacture or produce in the State and brought into the local areas within the State. The rate of tax imposed was applicable uniformly on the goods imported from outside or goods manufactured within the State or brought into local areas and further the levy was compensatory in nature, the Act did not violate Article 301 or Article 304 (a) or (b).

25. The Madhya Pradesh High Court in Godfray Philips India Ltd. v. State of M.P. and Ors. decided on May 15, 2008 reported in (2008) 17 UST 465 (MP) upheld ''the entry tax under the Madhya Pradesh Sthaniya Kshetra Ke Mal Ke Pravesh Par Kar Adhiniam, 1976'' as compensatory in nature, and thus valid. It held that various notifications issued from time to time did not challenge the tax effect, enhancing the rate of tax and therefore the tax remains compensatory. The Act

did not create a barrier in trade and the concept enshrined under Article 301 and 304 of the Constitution of India was not attracted. It also give reasons for holding the Act as compensatory as the Act provided for local bodies to maintain rolls for facilitating trade and commerce; there was no direct or immediate impact empowering trading facilities; the incidental used by community of the facilities used by traders, did not engage the primary or principal use for facilitating trade and commerce; the entry tax collected was allotted to the local bodies for the loss sustained due to abolition of octroi. The substantial amount of the entry tax was allotted to the local bodies was spent in commercial or industrial centres; measures have been taken to provide trading facilities and markets had been established. The proportionality between quantum of tax and the facilities/ services provided demonstrated that 44% of the amount spent by them was on the expenditure incurred creating facilities for trade, commerce and industry; the tax imposed was single point tax and was provisional to the benefits without which the trading facilities could not have been availed of.

26. The Guwahati High Court in Indian Oil Corporation Ltd. (Guwahati Refinery) v. State of Assam and Ors. decided on 9.1.2009 reported in (2009) 21 VST 76 (Guwahati) upheld the validity of the Assam Entry of Tax Act, 2008 as well as the retrospectivity of the Act w.e.f. 1.10.2001. The Assam High Court held that the persons bringing specified goods transported through pipelines is an importer within the meaning of the Act. The services provided by the State, i.e. security of the pipelines would benefit the petitioner, who receive crude oil within the refinery owned by it, thus showing a discernible relationship between tax paid and the services to be provided. The Court further held that validity situate more often than not being retrospective operation. The services provided to the entry tax payers as recompense may be existing or intended, creation of special fund by the name of Assam Trade Development Fund, for exclusive utilization for development of infrastructure and amenities to facilitate trade, commerce and intercourse including different fields mentioned in the Act has been made inclusive and thus providing that other areas, where development of infrastructure and proceedings for mandates will be required to be made determining on the experience of the working of the Act. The transfer of the entire amount of the entry tax collected to the fund is sufficient indication that the levy is intended to provide certain identifiable benefits to the trade. The Assam high Court also held that different rates of tax levied for different goods by itself is not destruction of the compensatory nature of the tax. The advalorem rate of tax being a measure of tax, levy in question cannot be adjudged to be unconstitutional unless such rate can be held to be confiscatory. The amount collected is provided to be allocated to different local bodies to enable them to carry on their activities useful by the State itself for expenditure against infrastructural development activities in the local areas. By enacting the Validating Act of 2008 the State Legislature has removed the defects in the Act of 2001. Thus levy of entry tax under the Act of 2008 is compensatory and valid. The Court made observations with regard to the dates from which the different

specified goods would become taxable.

27. The Jharkhand High Court, in Tata Steel Limited v. State of Jharkhand and others (2008) 17 VST 209 (Jharkh), declared Section 11 of the Jharkhand Value Added Tax Act, 2005 and the amendment made therein by the Jharkhand Value Added Tax (Amendment) Act, 2007 as ultra vires and unconstitutional, being opposed to Article 301 of the Constitution and not saved by Article 304 of the Constitution of India on the grounds that the respondent-State did not produce and place any material before the Court showing that payment of compensatory tax is a reimbursement for the quantifiable/measurable benefit provided or to be provided to its payers. The High Court found that there was no quantifiable data, i.e., a benefit which is measurable. Maintaining of roads and providing bridges is not compensatory in nature so as to constitute special advantage to trade, commerce and intercourse. The expenses for maintenance or construction of roads and bridges are met from the general revenue of the State. It is the statutory obligation and duty of the State to provide facilities like roads and bridges. Similarly, State Financial Corporation, constituted under the State Financial Corporation Act for providing incentive and financial aids functions as a statutory body. The supply of electrical energy and waters to the industries, marketing and commercial complexes, cannot be held to be special benefits to the trades men. The trade development fund was created by notification dated 29.3.2008 with retrospective effect from 1.4.2006. Nothing was brought on record to show that the entry tax collected from 1.4.2006 till the date of notification was utilised. The entry tax was thus found by the Jharkhand High Court as discriminatory being violative of Article 304(a) of the Constitution of India.

28. The Kerala High Court, in Thressiamma L. Chirayil v. State of Kerala and another (2007) 7 VST 293 (Ker), held that the levy of entry tax imposed by the Kerala Tax on Entry of Goods into Local Areas Act, 1994 on goods imported from other States to the State of Kerala and from abroad, is not compensatory in nature. The State Government could not discharge its burden by placing the materials before the Court that the payment of levy of entry tax is reimbursement/recompense for the quantifiable/measurable benefit provided or to be provided to the petitioners. The Act imposing entry tax could not be said to be specifically meant for facilitating trade, commerce and intercourse, but is raised for augmenting the general revenue of the State. The Act was thus illegal, unauthorised and violative of Article 301 of the Constitution of India. The Kerala High Court held that the provision for convenient roads in the State and its expenditure for maintenance, so also bridges, water transport, ports, light houses, development of industries and allied matters are not the services rendered by the State so as to support the levy of compensatory tax. Neither in the object and reasons of Bill nor in the preamble of the Act there is any indication that the levy of entry tax was for the aforesaid purpose but only for augmenting the general revenue. The essence of compensatory tax is that the services rendered or facilities provided should be more or less commensurate

with the tax levied. The services provided should have a direct co-relation with the trade. Applying the test in Jindal Stainless Ltd (2) vs. State of Haryana it was held that it cannot be said that maintaining of roads, providing bridges, etc. is compensatory in nature so as to meet the outlay incurred for some special advantage to trade, commerce and intercourse. Providing these facilities and its use may incidentally bring in net revenue to the Government, but that circumstance is not an essential ingredient of compensatory tax. Some indirect connection or some connection, more or less commensurate, etc., are not the tests, but the direct and immediate effect is the test. Maintaining of roads, bridges, etc., and promotion of SSI units, etc. are generally met from the general funds or revenue. Whether the goods are transported into the State from outside the State or abroad the State has got a duty to provide those facilities, like roads, and bridges, which is being enjoyed not only by persons who bring goods notified for levy of entry tax but also others. The Kerala High Court found that there are absolutely no connection or nexus with the collection of entry tax and its utilisation for the benefit of traders/manufacturers from whom such tax is collected.

29. The Karnataka High Court, in Bharat Earth Movers Ltd v. State of Karnataka and others decided on 29.3.2007 (2007) 8 VST 69 (Katn), allowed the writ petitions holding the Karnataka Special Tax on Entry of Certain Goods Act, (29 of 2004) as violative of Articles 301, 304(a), (b) and 255 of Constitution of India; followed its earlier Division Bench decision in Avinyl Polymers Pvt. Ltd v. State of Karnataka (1998) 109 STC 26 (Karn) and held that the State was not able to demonstrate any exclusive or special service provided to the class of taxpayers who bear the entry tax under the Act. The Karnataka High Court found that there was absolutely no co-relation to the revenue generated under the specific Act to the so-called expenditure incurred by the local authorities for services sought to be provided such as provision for roads, water, lighting, drainage, etc. There are other levies imposed under other enactments by the State and local authorities. There is no link or co-relation at all on facts in respect of the revenue from the levies under the enactment and the revenue and expenditure under other enactments. The levy of entry tax was only in respect of the goods brought into a local area by an importer from outside the State and not on other persons who bring similar goods to the very local area, thus the discrimination is writ large on the face of the provisions violating Article 304(a) of the Constitution of India. There was no parity in the matter of levy of tax by the State legislature on particular or similar goods.

30. The Karnataka High Court further held that taxing statute has the effect of impeding movement but can still be found to be a non-discriminating to pass the test of Article 304(1) but not answer the requirements of Article 304(b). The State in imposing such tax must demonstrate that it is a reasonable restriction and is in public interest and further the requirement of obtaining the previous sanction of the President in terms of the proviso inevitably gets attracted. Since the Bill did not receive the sanction of the President nor the defects were cured

by the Act having been reserved for the assent of the President, the provisions of the Act are violative of Article 304(b) of the Constitution of India.

31. The Madras High Court, in ITC Limited v. State of Tamil Nadu and another (2007) 7 VST 367 (Mad.), held that the Tamil Nadu Tax on Entry of Goods in Local Areas Act, 2001 and various notifications issued there under levying entry tax on goods imported from other States to the State of Tamil Nadu and from abroad is not compensatory in nature. Since the State Government could not discharge its burden by placing material before the Court, that payment of levy of entry tax is reimbursement/recompense for the quantifiable/measurable benefits provided or to be provided to the tax payers. The levy imposing entry tax being discriminatory is also violative of Article 304(1) of the Constitution. The demand of entry tax under the Act was held to be illegal, unauthorised and violative of Article 301 of the Constitution. The Madras High Court held that maintaining of roads, providing bridges etc. cannot be said to be compensatory in nature so as to constitute special advantage to trade, commerce and intercourse. Maintenance of roads, bridges etc., is generally met from general funds or revenue. Whether goods are transported into the State or outside State or abroad, the State has got a duty to provide facilities like roads, brides, etc., which are being enjoyed not only by the persons who bring the goods notified for levy of entry tax, but also by others. The State of Tamilnadu also levies taxes for the purpose of maintenance of roads from the owners of motor vehicles under the Tamil Nadu Motor Vehicles Taxation Act, 1974 wherein the parameters of levy are based on the laden weight of the motor vehicle. The Madras High Court also held that the levies of entry tax only on goods which are imported into the State of Tamil Nadu as against those which are produced or obtained within the State of Tamilnadu causes discrimination. The price structure of the imported goods vis-a-vis the locally manufactured goods or the economics of the importer, need not be gone into, to examine the discrimination.

32. The Gauhati High Court in ITC Limited v. State of Assam and others delivered by Hon''ble I.A. Ansari, J sitting singly on 17.11.2006 (2007) 9 VST 250 (Gauhati) declared the notifications issued under sub-section (4) of Section 3 of Assam Entry Tax Act, 2001 dated January 8, 2002, August 21, 2003, August 26, 2003, September 29, 2004 and February 28, 2005 and the Ordinance of 2005 as well as the Assam Entry Tax (Second Amendment) Act, 2005 as ultra vires, unconstitutional, null and void. While examining the true nature and character of the levy it was held that if an entry tax, imposed by a State by recourse to Entry 52 of the State List is otherwise in conformity with the provisions of the Constitution, the levy cannot be interfered with. The preamble of the Act, the statement of objects and reasons and the provisions of the Act envisages the Act as a taxing statute for augmenting revenue of the State. The tax levied was not specifically meant for providing any trading facility nor are the provisions of the Act regulatory in nature. The State Government did not show as to what trading facilities it was really provided to the traders, and what expenses were incurred for providing such facilities. It also did not show as how much amount realised

from the imposition of the entry tax is utilised for providing the trading facilities. The Court found that the legislative object and the scheme of the enactment are to realise payment of sales tax in advance inasmuch as those, who pay entry tax, would be exempted from payment of State sales tax or value added tax and therefore the levy was in colourable exercise of powers.

33. Learned Single Judge further held that having failed to sustain the levy of luxury tax on tobacco and its products under the Assam Taxation (Luxury) Act, 1997 in the light of decision of the Supreme Court in Godfrey Phillips India Ltd. v. State of UP (2005) 139 STC 537, the notification was issued on 28.2.2005 inserting tobacco and tobacco products in the Schedule to the Act making them taxable at the same rate at which luxury tax had been imposed on these items. The notification was, therefore, in colourable exercise of powers to levy and collect the tax. Learned judge also found that when a Bill imposing restrictions on the movement or transportation of a particular item of goods has received the President''s sanction under the proviso to Article 304(b), it will not absolve the State Legislature from obtaining the President''s specific sanction if an item, which had not been originally included in the Bill, when it had received the sanction of the President, is sought to be subsequently included. The President''s sanction, under Article 304(b), is the sine qua non for the validity of a legislative enactment. The new insertion in the Bill, which was originally not there, will not survive, unless the President''s sanction is obtained for that purpose.

34 The Gauhati High Court ? Itanagar Bench in Jaiprakash Associates Limited (Cement Division) v. State of Arunachal Pradesh and others decided on 5.3.2009 (2009) 22 VST 310 (Gauhati) held that the levy of tax on the entry of goods, other than non-taxable import, under the Arunachal Pradesh Goods Tax Act, 2005, for consumption use or sale thereof into the local area of State of Arunachal Pradesh is violative of Articles 301 and 304 of the Constitution of India. The High Court held that a conjoint reading of the Articles 301 to 304 would show that the State legislature has no power to impose a discriminatory tax. The word ''and'' as mentioned in Article 304(1) is read as ''or'' then either compliance of Articles 304(a) or Article 304(b) would be sufficient in which event a situation may develop, where a State legislature would impose a discriminatory tax, by taking prior sanction of the President. The scheme of Articles 301 to 304 makes it clear that where the tax is discriminatory, the same shall be violative of Article 304(a) of the Constitution and is liable to be struck down. No further enquiry is required to be made in such a case and the Presidential assent, if obtained, would not validate such a fiscal legislation. The Court further held that the basis of compensatory tax which is an exception under Article 301, is quantifiable and measurable benefit, whereas in the case of tax, the benefit, if any, is incidental, indirect and immeasurable. There must be a link between the levy and the facilities provided. The burden lies on the State. The preamble, the statement of objects and reasons of the Act and also the provisions contained as a whole clearly demonstrate that the Act was envisaged as a taxing statute for augmenting revenue of the State and not for providing any trading facility nor

are the provisions regulatory in nature. The State may raise revenue for its various developmental programmes. If however such developmental programmes are meant not for providing trading facilities, but for the residents and/or non-residents in general no tax in the form of entry tax, which puts restrictions on the freedom of movement of goods can be imposed. The traders are incidental beneficiaries of such welfare and developmental activities of the State. The levy is neither regulatory nor compensatory and cannot be allowed to survive.

35. The Punjab and Haryana High Court in Jindal Strips Limited and Another Vs. State of Haryana and Others, after the matter was remanded to consider the relevant data on the issue as to whether the impugned levy was compensatory in nature, held that that the levy under the Haryana Local Area Development Tax Act, 2000 is not to meet the cost of any specific facility for trade, commerce and intercourse already provided or planned to be provided. The impugned levy was initially meant to be for assistance to local areas for their development generally. The amendments brought in the year 2007 brought about only a superficial change in the language while retaining the basic character of the levy as a source for general development. Mere specification of the 60% of the amount in line with jdugments dealing with the levy of fee is of no consequence when the very subject matter of utilisation cannot be treated as any special direct or exclusive service or benefit to the payer of the tax. The data given by the State of having incurred expenditure at 17% of the total collections and is for less than the amount. The other statute namely Haryana Rural Development Fund Act, 1983, Punjab Passengers and Goods Taxation Act, 1952, Punjab Agricultural Produce Market Act, 1961, etc., levying compensatory taxes to cover the cost of services. The burden of proof on the State that the payment of levy of entry tax is reimbursement/recompense for the quantifiable/measurable benefits provided or to be provided to the petitioners was not discharged and thus the levy under the act was not found to be compensatory in nature. It thus amounted to restriction on free-flow of trade and commerce and is hit by Article 301 of the Constitution of India.

36. The judgment, in Jindal Strips Limited vs. State of Haryana (supra) declaring the levy of entry tax as not compensatory in character and amounting to restriction on the free flow of trade and commerce and hence violative of Articles 301 and 304 of the Constitution, led the State of Haryana to repeal the Act of 2000 and to enact on 16.4.2008 the Haryana Tax on Entry of Goods into Local Areas Act, 2008. The new Act sought to facilitate the tax already collected under the Act of 2000 by treating it to have been collected under the Act of 2008.

37. In Indian Oil Corporation Limited Vs. State of Haryana and Another, allowed the writ petition challenging the Haryana Tax on Entry of Goods Into Local Areas Act, 2008 declaring the levy of entry tax as unconstitutional on the ground that the functional test of the compensatory tax being reimbursement of actual or projected expenditure does not depend upon the enforcement of the

Act but on whether the trade has the use of certain facilities for the better conduct of its business and paying not patently much more than what is required for providing the facilities. The Court found that there was no quantifiable or measurable benefit. The provisions of the Act are ambiguous and are of the nature of general development. The mere mention of the words ''exclusively for development or facilitating trade, commerce and industry'' is not enough to satisfy the test laid down for holding the levy to be compensatory in character. There is no tangible data to ascertain that service is planned to be provided, envisaging quantifiable and measurable benefit. The levy is for general development and incidental benefit which is not measurable does not meet the principle of equivalence. Such a levy unless saved under Article 304 will be ultra vires under Article 301 of Constitution. The Punjab and Haryana High Court further found that out of a sum of Rs. 1, 600 crores already collected, only a sum of Rs. 240 crores was available and the remaining had already been spent. The burden of proof to justify the levy as compensatory was on the State. The State was unable to show co-relation between levy and the cost of existing facility or facility planned to be provided by producing the relevant data. The Court did not find that the writ petition was premature, in the absence of any estimate of services to be provided or projected to be provided, the levy was unconstitutional.

THE TRADE, COMMERCE AND INTERCOURSE WITHIN THE TERRITORY OF INDIA

38. Part XIII of the Constitution of India provides for trade, commerce and intercourse within the territory of India. Article 301 to 307 under this Chapter are quoted as below:

Article 301. Freedom of trade, commerce and intercourse Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

Article 302 Power of Parliament to impose restrictions on trade, commerce and intercourse Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.

Article 303 Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce (1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

Article 304 Restriction on trade, commerce and intercourse among States Notwithstanding anything in article 301, the Legislature of a State may by law -

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced;

and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

Article 305 Saving of existing laws and laws providing for State monopolies Nothing in articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise direct; and nothing in article 301 shall affect the operation of any law made before the commencement of the Constitution (Fourth Amendment) Act, 1955, in so far as it relates to, or prevent Parliament or the Legislature of a State from making any law relating to, any such matter as is referred to in sub-clause (ii) of clause (6) of article 19.

Article 306 Power of certain States in Part B of theFirst Schedule to impose restrictions on trade andcommerce)omitted(...)

Article 307 Appointment of authority for carrying out the purposes of articles 301 to 304 Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of articles 301, 302, 303 and 304, and confer on the authority so appointed such powers and such duties as it thinks necessary.

39. Article 301 states that subject to the other provisions of Part XIII, trade, commerce and intercourse throughout the territory of India shall be free. Freedom is not for all laws but from such laws which restrict and affect activities of trade, and commerce amongst the State.

40. In Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, the constitutionality of Assam Taxation (On Goods Carried by Roads and Inland Waterways) Act, 1954 enacted by the Legislature of Assam providing for levy of tax on certain goods carried by road or inland waterways in the State of Assam, was questioned by a number of tea companies who sold most of their products outside the State of Assam after transporting them by road or waterways to West Bengal and other States. The majority opinion (Gajendragadkar, Wanchoo and Das Gupta, JJ.) stated their conclusion in the following words:

52... Our conclusion, therefore, is that when Article 301 provides that trade shall be free throughout the territory of India it means that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States themselves. It is the free movement or the transport of goods from one part of the country to the other that is intended to be saved, and if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of Article 301, and its validity can be sustained only if it satisfies the requirements of Article 302 or Article 304 of Part XIII. At this stage we think it is necessary to repeat that when it is said that the freedom of the movement of trade cannot be subject to any restrictions in the form of taxes imposed on the carriage of goods or their movement all that is meant is that the said restrictions can be imposed by the State Legislatures only after satisfying the requirements of Article 304(b). It is not as if no restrictions at all can be imposed on the free movement of trade. (AIR p.254, para.52).

It was also held:

... Thus considered we think it would be reasonable and proper to hold that restrictions, freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301...We are, therefore, satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be:

Does the impugned restriction operate directly or immediately on trade or its movement?'' (AIR p.254 para.51)

41. In The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, validity of Section 4(1) of the Rajasthan Motor Vehicles Taxation Act, 1951 was challenged. The section levied a tax on all motor vehicles used in any public place or kept for use at the rates specified in the Schedules. Violation of the provision invited penalties provided under Section 11. Certain operators challenged the Act as violative of Articles 301 and 304(b). Since serious doubts were expressed with respect to the propositions enunciated by the majority and by Shah, J. in Atiabari Tea Co. (supra) the matters were referred to a larger Constitution Bench of seven Judges. By a majority 4:3 (S.K.Das, Kapur and Sarkaria, JJ. Joined by Subba Rao, J.), the Supreme Court upheld the constitutionality of the Act on the ground that the taxes levied by it are compensatory in nature and, therefore, outside the purview of Article 301. Once outside the purview of Article 301, it was held, Article 304 was also not attracted. The Court observed in paragraph -19 that:

The taxes are compensatory taxes which instead of hindering trade, commerce and intercourse facilitate them by providing roads and maintaining the roads...... (AIR page 1425)

Vide para. 21 of the Report, it was observed that:

If a statue fixes a charge for a convenience or service provided by the State or an agency of the State, and imposes it upon those who choose to avail themselves of the service or convenience, the freedom of trade and commerce may well be considered unimpaired. (AIR page.1425)

Thus, the concept of ''compensatory tax'' was propounded. Therefore, taxes which would otherwise interfere with the unfettered freedom under Article 301 will be protected from the vice of unconstitutionality if they are compensatory.

42. In The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, it was said, vide (AIR page.1425, para 19), that

a working test for deciding whether a tax is compensatory or not is to enquire whether the trade is having the use of certain facilities for the better conduct of its business and paying not patently much more than what is required for providing the facilities. 43. In G.K. Krishnan and Others Vs. State of Tamil Nadu and Others, K.K. Mathew, J. summarised the scope of Articles 301 to 304 and stated that Article 301 imposes a general limitation on all legislative power in order to secure that trade, commerce and intercourse throughout the territory of India shall be free. Article 302 gave power to Parliament to impose general restrictions upon that freedom. But a restriction is put on this relaxation by Article 303(1) which prohibits Parliament from giving preference to one State over another or discriminating between one State and another by virtue of the entries relating to trade and commerce in Lists I and III of Seventh Schedule and a similar restriction is placed on the States, though the reference to the States is inappropriate. Each of the clauses of Article 304 operates as a proviso to Articles 301 and 303. Article 304(a) places goods imported from sister-States on a par with similar goods manufactured or produced inside the State in regard to State taxation within the allocated field. Article 304(b) is the State analogue to Article 302, for it makes the State''s power contained in Article 304(b) expressly free from the prohibition contained in Article 303(1) by reason of the opening words of Article 304. Whereas in Article 302 the restrictions are not subject to such requirement of reasonableness, the restrictions under Article 304(b) are so subject.

44. After the year 1995 the working test compounded in Automobile Transport Co. Ltd. (supra) was applied by the Supreme Court in relation to motor vehicle taxes for deciding whether the levy was compensatory or not as observed above. In G.K. Krishnan v. State of T.N. (supra) it was observed that the very idea of a compensatory tax is service more or less commensurate with the tax levied. In Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others, while considering the challenge to M.P. Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 the Supreme Court observed ''The concept of compensatory nature of tax has been widened and if there is substantial or even some link between the tax and the facilities extended to such dealers directly or indirectly the levy cannot be impugned as invalid.''. In State of Bihar v. Bihar Chamber of Commerce (1996) 9 SCC 136 the Bench of two Judges reiterated the position that ''some connection'' between the tax and the trading facilities extended to

dealers directly or indirectly is sufficient to characterise it as compensatory tax. The Court held that where the State provides several facilities to the trace, such as laying and maintenance of roads, waterways, markets etc. the entry tax on that premise is compensatory in nature.

45. On 26.9.2003 a Two-Judge Bench of Supreme Court doubted the correctness of the view in Bhagatram Rajeevkumar v. CST (supra) and State of Bihar v. Bihar Chamber of Commerce (supra) and the matter was heard by a larger bench. In Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, a Constitution Bench of Five Judges considered the reference and held in paragraphs 36 to 53 as follows:

36. We have examined and analyzed the relevant provisions of Part-XIII and particularly Article 301 as we are required to lay down the parameters of compensatory tax vis-`-vis Article 301, as indicated vide para 27 (of SCC) of the referral order.

GENERIC CONCEPT OF COMPENSATORY TAX: INTRODUCTION:

37. The concept of compensatory tax is not there in the Constitution but is judicially evolved in Automobile Transport as a part of regulatory charge. Consequently, we have to go into concepts and doctrines of taxing powers vis-`-vis regulatory powers, particularly when the concept of compensatory tax was judicially crafted as an exception to Article 301 in Automobile Transport.

DIFFERENCE BETWEEN EXERCISE OF TAXING AND REGULATORY POWER:

38. In the generic sense, tax, toll, subsidies etc. are manifestations of the exercise of the taxing power. The primary purpose of a taxing statute is the collection of revenue. On the other hand, regulation extends to administrative acts which produces regulative effects on trade and commerce. The difficulty arises because taxation is also used as a measure of regulation. There is a working test to decide whether the law impugned is the result of the exercise of regulatory power or whether it is the product of the exercise of the taxing power. If the impugned law seeks to control the conditions under which an activity like trade is to take place then such law is regulatory. Payment for regulation is different from payment for revenue. If the impugned taxing or non-taxing law chooses an activity, say, movement of trade and commerce as the criterion of its operation and if the effect of the operation of such a law is to impede the activity, then the law is a restriction under Article 301. However, if the law enacted is to enforce discipline or conduct under which the trade has to perform or if the payment is for regulation of conditions or incidents of trade or manufacture then the levy is regulatory. This is the way of reconciling the concept of compensatory tax with the scheme of Articles 301, 302 and 304. For example, for installation of pipeline carrying gas from Gujarat to Rajasthan, which passes through M.P., a fee charged to provide security to the pipeline will come in the category of manifestation of regulatory power. However, a tax levied on sale or purchase of gas which flows from that very pipe is a manifestation of exercise of the taxing

power. This example indicates the difference between taxing and regulatory powers (See: Essays in Taxation by Seligman).

DIFFERENCE BETWEEN ''A TAX'', ''A FEE'' AND ''A COMPENSATORY TAX'':

PARAMETERS OF COMPENSATORY TAX:

39. As stated above, in order to lay down the parameters of a compensatory tax, we must know the concept of taxing power.

40. Tax is levied as a part of common burden. The basis of a tax is the ability or the capacity of the taxpayer to pay. The principle behind the levy of a tax is the principle of ability or capacity. In the case of a tax, there is no identification of a specific benefit and even if such identification is there, it is not capable of direct measurement. In the case of a tax, a particular advantage, if it exists at all, is incidental to the States'' action. It is assessed on certain elements of business, such as, manufacture, purchase, sale, consumption, use, capital etc. but its payment is not a condition precedent. It is not a term or condition of a licence. A fee is generally a term of a licence. A tax is a payment where the special benefit, if any, is converted into common burden.

41. On the other hand, a fee is based on the ''principle of equivalence''. This principle is the converse of the ''principle of ability'' to pay. In the case of a fee or compensatory tax, the ''principle of equivalence'' applies. The basis of a fee or a compensatory tax is the same. The main basis of a fee or a compensatory tax is the quantifiable and measurable benefit. In the case of a tax, even if there is any benefit, the same is incidental to the government action and even if such benefit results from the government action, the same is not measurable. Under the principle of equivalence, as applicable to a fee or a compensatory tax, there is an indication of a quantifiable data, namely, a benefit which is measurable.

42. A tax can be progressive. However, a fee or a compensatory tax has to be broadly proportional and not progressive. In the principle of equivalence, which is the foundation of a compensatory tax as well as a fee, the value of the quantifiable benefit is represented by the costs incurred in procuring the facility/ services which costs in turn become the basis of reimbursement/recompense for the provider of the services/facilities. Compensatory tax is based on the principle of ''pay for the value''. It is a sub-class of ''a fee''. From the point of view of the Government, a compensatory tax is a charge for offering trading facilities. It adds to the value of trade and commerce which does not happen in the case of a tax as such. A tax may be progressive or proportional to income, property, expenditure or any other test of ability or capacity (principle of ability). Taxes may be progressive rather than proportional. Compensatory taxes, like fees, are always proportional to benefits. They are based on the principle of equivalence. However, a compensatory tax is levied on an individual as a member of a class, whereas a fee is levied on an individual as such. If one keeps in mind the ''principle of ability'' vis-`-vis the ''principle of equivalence'', then the difference between a tax on one hand and a fee or a compensatory tax on the other hand

can be easily spelt out. Ability or capacity to pay is measurable by property or rental value. Local rates are often charged according to ability to pay. Reimbursement or recompense are the closest equivalence to the cost incurred by the provider of the services/facilities. The theory of compensatory tax is that it rests upon the principle that if the government by some positive action confers upon individual(s), a particular measurable advantage, it is only fair to the community at large that the beneficiary shall pay for it. The basic difference between a tax on one hand and a fee/compensatory tax on the other hand is that the former is based on the concept of burden whereas compensatory tax/fee is based on the concept of recompense/reimbursement. For a tax to be compensatory, there must be some link between the quantum of tax and the facility/services. Every benefit is measured in terms of cost which has to be reimbursed by compensatory tax or in the form of compensatory tax. In other words, compensatory tax is a recompen se/reim bursement.

43. In the context of Article 301, therefore, compensatory tax is a compulsory contribution levied broadly in proportion to the special benefits derived to defray the costs of regulation or to meet the outlay incurred for some special advantage to trade, commerce and intercourse. It may incidentally bring in net-revenue to the government but that circumstance is not an essential ingredient of compensatory tax.

44. Since compensatory tax is a judicially evolved concept, understanding of the concept, as discussed above, indicates its parameters.

45. To sum up, the basis of every levy is the controlling factor. In the case of ''a tax'', the levy is a part of common burden based on the principle of ability or capacity to pay. In the case of ''a fee'', the basis is the special benefit to the payer (individual as such) based on the principle of equivalence. When the tax is imposed as a part of regulation or as a part of regulatory measure, its basis shifts from the concept of ''burden'' to the concept of measurable/quantifiable benefit and then it becomes ''a compensatory tax'' and its payment is then not for revenue but as reimbursement/ recompense to the service/facility provider. It is then a tax on recompense. Compensatory tax is by nature hybrid but it is more closer to fees than to tax as both fees and compensatory taxes are based on the principle of equivalence and on the basis of eimbursement/recompense. If the impugned law chooses an activity like trade and commerce as the criterion of its operation and if the effect of the operation of the enactment is to impede trade and commerce then Article 301 is violated.

BURDEN ON THE STATE:

46. Applying the above tests/parameters, whenever a law is impugned as violative of Article 301 of the Constitution, the Court has to see whether the impugned enactment facially or patently indicates quantifiable data on the basis of which the compensatory tax is sought to be levied. The Act must facially indicate the benefit which is quantifiable or measurable. It must broadly indicate

proportionality to the quantifiable benefit. If the provisions are ambiguous or even if the Act does not indicate facially the quantifiable benefit, the burden will be on the State as a service/facility provider to show by placing the material before the Court, that the payment of compensatory tax is a reimbursement/ recompense for the quantifiable/ measurable benefit provided or to be provided to its payer(s). As soon as it is shown that the Act invades freedom of trade it is necessary to enquire whether the State has proved that the restrictions imposed by it by way of taxation are reasonable and in public interest within the meaning of Article 304(b) (See: para 35 of the decision in the case of Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam,

SCOPE OF ARTICLES 301, 302 and 304 VIS-@-VIS COMPENSATORY TAX:

47. As stated above, taxing laws are not excluded from the operation of Article 301, which means that tax laws can and do amount to restrictions on the freedom guaranteed to trade under Part-XIII oftheConstitution. This principle is well settled in the case of Atiabari Tea Co. It is equally important to note that in Atiabari Tea Co, the Supreme Court propounded the doctrine of ''direct and immediate effect''. Therefore, whenever a law is challenged on the ground of violation of Article 301, the Court has not only to examine the pith and substance of the levy but in addition thereto, the Court has to see the effect and the operation of the impugned law on inter-State trade and commerce as well as intra-State trade and commerce.

48. When any legislation, whether it would be a taxation law or a non-taxation law, is challenged before the court as violating Article 301, the first question to be asked is: what is the scope of the operation of the law? Whether it has chosen an activity like movement of trade, commerce and intercourse throughout India, as the criterion of its operation? If yes, the next question is: what is the effect of operation of the law on the freedom guaranteed under Article 301? If the effect is to facilitate free flow of trade and commerce then it is regulation and if it is to impede or burden the activity, then the law is a restraint. After finding the law to be a restraint/restriction one has to see whether the impugned law is enacted by the Parliament or the State Legislature. Clause (b) of Article 304 confers a power upon the State Legislature similar to that conferred upon Parliament by Article 302 subject to the following differences:

(a) While the power of Parliament under Article 302 is subject to the prohibition of preference and discrimination decreed by Article 303(1) unless Parliament makes the declaration under Article 303(2), the State power contained in Article 304(b) is made expressly free from the prohibition contained in Article 303(1) because the opening words of Article 304 contains a non-obstante clause both to Article 301 and Article 303.

(b) While the Parliament''s power to impose restrictions under Article 302 is not subject to the requirement of reasonableness, the power of the State to impose restrictions under Article 304 is subject to the condition that they are reasonable.

(c) An additional requisite for the exercise of the power under Article 304(b) by the State Legislature is that previous Presidential sanction is required for such legislation.

WHY WAS THE MATTER PLACED BEFORE A BENCH OF FIVE JUDGES:

49. The concept of compensatory taxes was propounded in the case of Automobile Transport in which compensatory taxes were equated with regulatory taxes. In that case, a working test for deciding whether a tax is compensatory or not was laid down. In that judgment, it was observed that one has to enquire whether the trade as a class is having the use of certain facilities for the better conduct of the trade/business. This working test remains unaltered even today.

50. As stated above, in the post 1995 era, the said working test propounded in the Automobile Transport stood disrupted when in Bhagatram''s case, a Bench of three Judges enunciated the test of ''some connection'' saying that even if there is some link between the tax and the facilities extended to the trade directly or indirectly, the levy cannot be impugned as invalid. In our view, this test of ''some connection'' enunciated in Bhagatram''s case1 is not only contrary to the working test propounded in Automobile Transport''s case but it obliterates the very basis of compensatory tax. We may reiterate that when a tax is imposed in the regulation or as a part of regulatory measure the controlling factor of the levy shifts from burden to reimbursement/recompense. The working test propounded by a Bench of seven Judges in the case of Automobile Transport and the test of ''some connection'' enunciated by a Bench of three Judges in Bhagatram''s case cannot stand together. Therefore, in our view, the test of ''some connection'' as propounded in Bhagatram''s case is not applicable to the concept of compensatory tax and accordingly to that extent, the judgments of this Court in Bhagatram Rajeevkumar v. Commissioner of Sales Tax, M.P. and State of Bihar v. Bihar Chamber of Commerce stand overruled.

51. Before concluding, we may point out that parties before us have taken more or less extreme positions and, therefore, we have not examined the arguments in seriatim.

CONCLUSION:

52. In our opinion, the doubt expressed by the referring Bench about the correctness of the decision in Bhagatram''s case followed by the judgment in the case of Bihar Chamber of Commerce was well-founded.

53. We reiterate that the doctrine of ''direct and immediate effect'' of the impugned law on trade and commerce under Article 301 as propounded in Atiabari Tea Co. Ltd. v. State of Assam and the working test enunciated in Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan for deciding whether a tax is compensatory or not vide para 19 of the report, will continue to apply and the test of ''some connection'' indicated in para 8 of the judgment in Bhagatram Rajeevkumar v. Commissioner of Sales Tax, M.P.1 and followed in the

case of State of Bihar v. Bihar Chamber of Commerce, is, in our opinion, not good law. Accordingly, the constitutional validity of various local enactments which are the subject matters of pending appeals, special leave petitions and writ petitions will now be listed for being disposed of in the light of this judgment.

46. The Special Leave to Appeals arising from various States deciding questions arising out of levy of entry tax on the basis of State of Karnataka and Another Vs. Hansa Corporation, were pending when the judgment in Jindal Stainless Limited (2) v. State of Haryana (supra) was rendered by the Supreme Court on 13.4.2006. A Two-Judge Bench of the Supreme Court in Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, remanded all the matters to the respective High Courts to deal with the basic issue as to whether the impugned levy was compensatory in nature on the basis of the data to be provided by the State on whom the burden lay to satisfy that the payment is a reimbursement/ recompense for the quantifiable/measurable benefits provided or to be provided to its payers.

47. In the aforesaid context this Court by its judgment dated 8.1.2007 decided M/ s Indian Oil Corporation Limited, Mathura vs. State of UP by a Bench consisting of Indian Oil Corporation Limited Vs. State of Uttar Pradesh and Others, applying the test in Jindal Stainless Limited (2) (supra) this Court held U.P. Tax on Entry of Goods Act, 2000 on the data provided by the State, to be violative of Articles 301 and 304 as it did not satisfy the test of compensatory tax laid down by the Supreme Court leading to the enactments of UP Tax on Entry of Goods into Loal Areas Act, 2007 giving rise to these writ petitions.

48. Most of the States have amended the legislation imposing entry tax to bring it in tune with the law laid down in Jindal Stainless Ltd (2) and another vs. State of Haryana and others (supra). The judgement holds the field and that almost all the cases cited by us decided by different High Courts rely upon the law of compensatory tax as judicially evolved in Automobile Transport (supra) as a part of regularly charge. Most of the High Courts of the States namely Punjab and Haryana, Jharkhand, Kerala, Karnataka, Tamil Nadu, Assam and Bihar have struck down the entry tax where sufficient data was not produced by the States to establish that the entry tax was not compensatory inasmuch as it was not levied to reimburse or recompense, and that the State Government failed to provide sufficient data to show that the benefits were quantifiable/measurable with the levy. The States of Gujarat, Orissa and Madhya Pradesh have, however, held otherwise.

49. On 18.12.2008, when some of the cases arising out of the judgements of the High Courts in entry tax matters came up for hearing before the Constitution Bench of Supreme Court, it was found that some of the High Courts before which the State entry tax stood challenged had taken the view that clause (a) and (b) of Article 304 of the Constitution of India are independent of each other and that if the impugned law stood saved under Article 304 (A), then it need not be tested with reference to clause (b) for determining its validity. The Supreme Court

recalled that on 18.12.2008 a Division Bench of the Court had referred to the Constitution 10 questions, the most important of which being-whether the State enactments relating to levy of entry tax have to be tasted with reference to both Article 304(a) and Article 304(b) of the Constitution and whether Article 304(a) is conjunctive with or separate from Article 304(b). Referring to Atiabari T. Company Ltd. decided on 26.9.1960 and Automobile Transport (Rajasthan) Ltd. decided on 9.4.1962, the Supreme Court found that on a number of aspects the Supreme Court needs to revisit the interpretation of Part XIII of the Constitution of India including various tests propounded in the judgement of the Constitution Bench of the Court in Atiabari T. Company and Automobile Transport (Rajasthan) Ltd. The Constitution Bench observed that even in the year 1975 in G.K. Krishnan and Others Vs. State of Tamil Nadu and Others, a doubt was expressed to the tests laid down in the two judgements namely that Article 304(a) prohibits only imposition of a discriminatory tax. It is not clear from the Article that a tax simplicitor can be treated as a restriction on the freedom of internal trade. Article 304(a) is intended to prevent discrimination against imported goods by imposing them tax at a higher rate than that born by goods produced in the State. A discriminatory tax against outside goods is not a tax simplicitor but a barrier to trade and commerce. Article 304 itself makes a definition between tax and restriction. That apart taxing powers of the Union and States are separate and mutually exclusive. It is strange that power to tax given to States, say, for instance, under Entry 54 of List-II, to pass law imposing tax on sale of goods are taken upon the goodwill of the Union executive. The Constitution Bench of the Supreme Court felt that in view of the aforesaid, the matter needs to be reconsidered by a Larger Bench. In the referring order the Supreme Court observed in Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, as follows:

11. Some of these aspects which need consideration by larger Bench of this Court may be briefly enumerated. Interplay/interrelationship between Article 304(a) and Article 304(b). The significance of the word ''and'' between Article 304(a) and 304(b). The significance of the non obstante clause in Article 304. The balancing of freedom of trade and commerce in Article 301 vis-`-vis the States'' authority to levy taxes under Article 245 and Article 246 of the Constitution read with the appropriate legislative Entries in the Seventh Schedule, particularly in the context of movement of trade and commerce.

12. Whether Article 304(a) and Article 304(b) deal with different subjects? Whether the impugned taxation law to be valid under Article 304(a) must also fulfil the conditions mentioned in Article 304(b), including Presidential assent? Whether the word ''restrictions'' in Article 302 and in Article 304(b) includes tax laws? Whether validity of a law impugned as violative of Article 301 should be judged only in the light of the test of non-discrimination? Does Article 303 circumscribe Article 301? Whether ''internal goods'' would come under Article 304(b) and ''external goods'' under Article 304(a)? Whether ''per se test'' propounded in Atiabari''s case (supra) should or should not be rejected? Whether

tax simpliciter constitutes a restriction under Part XIII of the Constitution? Whether the word ''restriction'' in Article 304(b) includes tax laws? Is taxation justiciable? Whether the ''working test'' laid down in Atiabari makes a tax law per se violative of Article 301? Inter-relationship between Article 19(1)(g) and Article 301 of the Constitution? These are some of the questions which warrant reconsideration of the judgments in Atiabari Tea Co. Ltd and Automobile Transport (Rajasthan) Ltd. (supra) by a larger Bench of this Court.

The Submissions

50. Shri S.P. Gupta, Senior Advocate assisted by Shri Yashwant Verma appearing in Writ Petition No. 1484 of 2007 (I.T.C. Limited vs. State of UP and others) has challenged the levy of entry tax by the Act of 2007 on the ground that the entry tax levied on the value of the scheduled goods does not either facially or on the basis of data provided by the State satisfies the test of compensatory tax as laid down in Jindal Stainless Limited (2) case (supra) by the Supreme Court. He submits that the tax on the entry of goods into the local area for consumption use or sale thereof levied under the Act by a legislation with reference to Entry 52 of List II of 7th Schedule has failed to satisfy the working test of quantifiable and measurable benefits to the trades. Shri Gupta has relied upon judgments of this Court in Indian Oil Corporation Limited and Another Vs. State of Uttar Pradesh and Others, and thereafter the judgment after remand by the Supreme Court in Indian Oil Corporation vs. State of UP and others 2007 UPTC 258 and submits that the new legislation has not caused any change nor has with reference to Section 14 and the data provided by the State justified the entry tax as compensatory tax. Shri Gupta submits that the defects pointed out by this Court in IOC vs. State of UP and others (supra) have not been removed by the new legislation.

51. Shri Gupta submits that Section 4 of the Act of 2007 is the charging section. Sub-section (1) of Section 4 provides that for the purpose of development of trade, commerce and industry in the State, there shall be levied and collected a tax on entry of goods specified in the Schedule into a local area for consumption, use or sale therein. The words ''in the State'' refer to the development of trade, commerce and industry in the whole of the State. It does not restrict the development of trade, commerce and industry in the local area indicating that the object is to provide facilities to trade in general and not to any industry or any class thereof. The linkage of benefits of the tax to be compensatory to save itself from the vice of Article 301 should be to provide services to that particular trade or industry and not to the development of trade, commerce and industry in the State in general. He submits that the levy being on the value of the goods (advalorem) makes the levy progressive which is an attribute of tax as a common burden and not a compensatory tax which is close to a fee in which the benefit has to be given to the payer and not in general.

52. Referring to Section 14 of the Act of 2007 Shri Gupta submits that the words in sub-section (1) ''the proceeds of the levy under the Act shall be appropriated

to the Fund and shall be utilised exclusively for the development or facilitating the trade, commerce and industry in the State of Uttar Pradesh'' looses its relevance when the word is used broadly with no definite meaning. He submits that the words ''in general'' in clause (d); ''in concerned area'' in clause (e) and ''any other purpose'' in clause (f) make the utilisation of the funds for general purposes. The U.P. Trade Development Fund provided in sub-section (2) of Section 14 and exclusively use of the entry tax levied and collected and credited to the fund for facilitating trade, commerce and industry does not ensure that the amount will be utilised for the purposes of development of the trade, from which it is collected. The entire fund and its utilisation is designed in a manner to be spent as a tax and not as a facility.

53. Shri Gupta submits that the Act of 2000 was declared unconstitutional. Any Act declared unconstitutional is a dead letter. It has to be treated as ''still born'' and thus it cannot be validated. The provisions of Section 17 trying to validate the levy retrospectively is not possible as the amount under the old Act has been appropriated and spent as general revenue. He relies upon the judgment of Supreme Court in Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam, and Rai Ramkrishna and Others Vs. The State of Bihar,

54. Shri Bharat Ji Agrawal, Senior Advocate assisted by Shri Piyush Agrawal appears for Indian Oil Corporation in Writ Petition No. 1483 of 2007 and Gas Authority of India Limited in Writ Petition No. 1284 of 2008. He submits that the Indian Oil Corporation Limited had successfully challenged the constitutional validity of the U.P. Tax on Entry of Goods Act, 2000. The Writ Petition No. 251 of 2003 (Tax) was allowed by this Court on 27.1.2004. The judgment is reported in 2004 U.P.T.C. 170. This Court had held in paragraphs-62 and 63 of the judgment that Entry 52 of List II cannot be said to give power to the State Legislature to legislate on entry tax. The power flows from Article 246 of the Constitution, which has to be read subject to the other Articles in the Constitution. Article 301 states that it is subject to the other provisions of Part XIII. Hence, it is not subject to Article 246 as Article 246 is in Part XI of the Constitution. Hence, power to legislate under Article 246 of the Constitution has to be read as subject to Article 301 of the Constitution. It follows that the State Legislature cannot make a law which violates Articles 301 of the Constitution. Hence, the scope of the legislative field contained in Entry 52 List II of the 7th Schedule has to be restricted and treated as subject to Article 301 and other Articles in the main body of the Constitution. The entry tax cannot be imposed as it violates Article 301 of the Constitution, despite Entry 52 of List II. In paragraph-65 this Court held that impugned Act imposing entry tax violates Article 301 of the Constitution as the revenue generated by it cannot be said to be specifically meant for facilitating trade or commerce, but is raised for augmenting the general revenue of the State. The statement of objects and reasons of the Act (U.P. Act No. 12 of 2000) also discloses that the Act was enacted to augment the general revenue of the State and not for facilitating trade and commerce.

55. Shri Bharat Ji Agrawal submits that though on 27.1.2004, when the earlier writ petition was decided, the judgment in Bhagatram Rajeevkumar v. CST (supra) held the field. This Court held that the case is not of much help because in the said case in the counter affidavit filed by the State which was not disputed, the nature of levy was demonstrated to be compensatory. The decision proceeded on a concession made by the petitioner''s counsel that the levy was compensatory in nature. The Court thereafter observed that even if there is substantial or even some link between the tax and the facilities extended to such dealers directly or indirectly the levy cannot be impugned as invalid. The stand of the State that the revenue earned was made over to the local bodies to compensate them for the loss caused, makes the impost compensatory in nature, as augmentation of their finance would enable them to provide municipal services more efficiently, which would help or ease free flow of trade and commerce. The Division Bench held that seven-Judges Constitution Bench decision of the Supreme Court in Automobile Transport Limited vs. State of Rajasthan (supra) in which it was held that paying not patently much more than what is required for providing the facilities, prevailed at that time and thus not much reliance could be placed upon Bhagatram Rajeev Kumar v. Commissioner of Sales Tax (supra).

56. Shri Bharat Ji Agrawal submits that on remand in the second judgment of this Court on 8.1.2007 in Indian Oil Corporation Limited Vs. State of Uttar Pradesh and Others, this court clearly held that there is not even an iota of evidence/material on record to give required data/statistics to prove that the amount collected as tax and its expenditure on providing additional/specific advantage/facility provided to trade/s in particular mentioned under the Schedule of the Act. In absence of such a data it is not possible for this court to hold that entry tax is compensatory tax. He submits that Indian Oil Corporation Limited had paid the entry tax upto 17.4.2007. The State Government was consequently obliged to return the entire amount collected under the directions of this Court. In paragraph 107 of the judgment dated 27.1.2004 the Supreme Court also directed the amount to be kept in deposit. When the amount was demanded from the State Government, the U.P. Tax on Entry of Goods into Local Areas Ordinance, 2007, was enacted, which later became the U.P. Act No. 30/2007 on 19.11.2007. In the statement of objects and reasons the demand made by Indian Oil Corporation Limited (the petitioner) for refund of Rs. 3022.58 crores on the basis of the interim order dated 17.4.2007 of the Apex Court was referred to. In order to avoid the demand the State Government, in view of the fact that it was considering to enact a new Act retrospectively after the Constitution Bench of the Supreme Court and in view of the judgment of the Patna High Court upholding the validity of the Bihar Entry Tax Act. Shri Bharat Ji Agrawal submits that the Act of 2007 was enacted only to avoid the liability arising out of judgment of this Court to refund the amount to the Indian Oil Corporation.

57. Shri Bharat Ji Agrawal refers to judgment in Jindal Stainless Limited (2) which has now decided the constitutional issue of the validity of the enactments

levying entry tax. He submits that the tests laid down by the Jindal Stainless Limited (2) are not satisfied in the levy of entry tax in the Act of 2007. For the compensatory tax to be constitutional valid, if it does not have protection of Article 304(b), the benefit of tax must be quantifiable and measurable to the trade. The compensatory tax is by way of recompense/ reimbursement to the trade. It is of an hybrid nature which is more closure to fee than tax. The burden of proving that the benefit to the trade is quantifiable or measurable is on the State. Shri Agrawal referred to Section 14 of the Act of 2007 and submits that none of the benefits intended in Section 14 taking individually or collectively give any benefit to the development of trade and commerce. The Act of 2007 does not mention in any of its provision that the entry tax can be utilised for the payers. There is no special benefit intended to the payers.

58. Shri Bharat Ji Agrawal submits that Indian Oil Corporation is challenging levy of entry fees only on crude oil and not on petroleum products, which have been added to the Schedule by Notification dated 15.1.2004. He submits that the refinery of IOC is situated at Mathura. It purchases crude oil from different countries from abroad as well as indigenous crude oil from Bombay High and Panna Fields through underground pipe lines laid by the petitioner. The crude oil is directly unloaded through SBM located near Vedinar and is transported by underground pipeline from Vadinar in Gujrat directly into Mathura Refinery. The pipeline and associated facilities have been constructed entirely by and at the cost of petitioner No. 1 on the land acquired by petitioner No. 1, the compensation for which has been entirely paid and borne by petitioner No. 1. Petitioner No. 1 exclusively owns, operates, controls, ensures and safeguards the pipeline (called the Salaya-Mathura Pipeline) through which crude oil is transported to feed Mathura Refinery without any contribution or special service or facility whatsoever provided by the State of Uttar Pradesh for the import of crude oil by petitioner No. 1 into the State of Uttar Pradesh.

59. The crude oil is not produced in the State of U.P. The crude oil produced in the country can barely meet 30% of the demand of crude oil in the country. Most of the crude oil produced in India is produced off shore and is transported to the shore through tanker vessels. The rest of the crude oil necessary to meet the requirements of the country is imported into India from abroad through bulk tankers or carriers. The petitioner Corporation has set up its own infrastructure and off-shore unloading SMB facilities in the Gulf of Kutch (off the coast of Gujrat) for unloading the tanker vessels carrying the indigenous crude oil from Bombay High and other off-shore fields, and for unloading the bulk carriers which carry imported crude oil brought from the Middle East and other regions.

60. Shri Bharat Ji Agrawal submits that State of U.P. is not providing any facility whatsoever to Mathura refinery for transport or import of crude oil to the said refinery. As mentioned above, the petitioner uses its own infrastructure installed by it in the land in which the right of user is vested in terms of Petroleum, Minerals and Pipelines (Acquisition of Right of User of Land) Act, 1962. He

submits that in IOC v. State of U.P. decided on 27th January, 2004 this Court had held that no facility whatsoever has been provided by the U.P. Government to Mathura refinery for transportation of crude oil from outside State of U.P., which is ultimately transported through underground pipelines maintained exclusively by the petitioner itself. He submits that the cost incurred by the IOC for acquiring land for Sadaya Mathura pipelines was approximately 13.6 crores in or about 1976-77, made up of free hold land (Rs.11.47 corres); lease hold land (Rs.1.13 crores) and right to way, (Rs.98.75 lacs). In addition the petitioner Corporation has spent approximately Rs.1361.33 crores for construction of Salaya Mathura Pipeline in 1977-80. The pipeline is operated, maintained, secured and insured by the Corporation. The Corporation has installed sophisticated tele-supervisory and tele-communication instruments and facilities along the pipeline so that the pipeline can be remotely operated, controlled and monitored from control stations located at vital points along the pipeline. Tele-supervisory control and telecommunication systems for the Salaya-Mathura Pipeline have been installed at total costs of Rs.55.85 crores incurred by the petitioner Corporation.

61. The petitioner Corporation provides security to the pipeline in addition to the tele-supervisory instrumentation and controls by means of manual patrolling of the pipeline route, for which it engages approximately 42 perosns out of which 10 persons are engaged for patrolling the Chaksu Mathura Section of the pipeline. In the year 2005-06 the Corporation incurred expenses of Rs.1.56 crores out of which Rs.36.62 lacs was on Chaksu Section in Mathura. The Corporation also insures the pipelines. In the last years the Corporation paid insurance premium of Rs.20.75 crores.

62. Shri Bharat Ji AGrawal further submits thta the only user and importer of the crude oil in the State of U.P. is Mathura Refinery of the petitioner Corporation. The crude oil is exclusively transported and delivered to Mathura Refinery through the Salaya Mathura Pipeline as stated above. The State of U.P. has no hand whatsoever in establishment or constructing the pipeline and its associated facilities, nor has any hand whatsoever in operating, repairing, maintaining, insuring or securing/ patrolling the pipeline, all of which have been done and are being done exclusively by the petitioner Corporation at its own expense. Thus, so far as the petitioner is concerned, the entry tax neither has nor ever had any compensatory element and operates purely as a general tax on crude oil imported by the petitioner Corporation into the State of U.P. for Mathura Refinery.

63. Shri Bharat Ji Agrawal submits that Mathura Refinery has paid under protest the following amounts towards entry tax on crude oil to the State of U.P. during the past years:

Year

Amount (Rs.)

From 1.11.1999 to 26.1.2004

7,73,80,00,513/-

27.1.2004 to 31.3.2004

51,34,78,066/-

2004-2005

308,45,58,828/-

2005-06

555,83,58,629/-

2006-07 (Up to 28.2.2007

672,47,75,718

Total

2361,91,71,753/-

64. It is submitted that mere creation of Trade Development Fund and the proposed utilisation of fund for general purpose for development of trade, commerce and industry cannot make the impugned tax as compensatory tax. Applying the tests laid down in Jindal Stainless, it is clear that the tax is not compensatory tax for following reasons:

1. The tax is levied on traders dealing in 15 goods and not on any other goods;

2. The tax is levied on traders moving the goods into the local area and outside the local area, and not on traders moving the goods within the local area;

3. There are no specific benefits or facilities or amenities to be provided to the traders in those 15 goods who move from one local area to another, to the exclusion of benefits or facilities provided to the members of trader, commerce and industry generally.

4. The proceeds of the tax collected from such a limited category of traders is being applied to the entire State.

5. Even assuming that the traders who pay the said tax may also incidentally, as part of the larger body of trade, commerce and industry derive some benefit, the tax collected from them is patently much more than the facilities provided to them.

6. On both the principles laid down in Jindal Stainless namely the specific benefit to the payer and ''pay for the value'', and on the test laid out in Automobile Transport case that the tax should not be patently much more than the facilities provided to the tax payer, the impugned tax is indefensible.

65. It is submitted that in Kamaljeet Singh and others Vs. Municipal Board, Pilkhwa and others, it was held that mere rendering by a municipal or local

body of certain services which constitute its statutory duty and responsibility cannot have the effect or consequence of rendering the tax levied by the local body compensatory in nature.

66. It was held in The Government of Andhra Pradesh and Another Vs. Hindustan Machine Tools Ltd., that the laying of roads and drainage or the supply of street-lights are a statutory function of public authorities and it is difficult to hold in the absence of any material, that any of such services as have been mentioned to us have in fact been rendered to the respondent.

67. In The Municipal Council, Madurai Vs. R. Narayanan and Others, it was held that the authority to justify the levy qua fee, must render some special services to the category from whom the amount is exacted and the total sum so collected must have a reasonable correlation to the cost of such services. Where these dual basic features are absent, you cannot legally claim from the licensee under the label ''fee''.

68. Referring to the decision of the Committee constituted to supervise the Trade Development Fund it is submitted that the Committee has only talked about trade and industry in general and not for utilisation of the amount of entry tax collected in respect of crude oil, which is paid by the petitioner and which amount has only been transferred to the consolidated fund. No money whatsoever has been utilised for giving any benefit in respect of trades mentioned in schedule much less in respect of crude oil.

69. Shri Bharat Ji Agrawal refers to judgment of Jharkhand High Court in Tata Iron and Steel Company Ltd vs. State of Jharkhand and others dated 14.8.2006 (2007) 6 VST 587 (Jha) in which similar provisions for expenditure of the entry fee collected by the State of Jharkhand were made. The Jharkhand Tax on Entry of Goods into Local Areas for Consumption, Use or Sale thereof was amended to provide for similar benefits and provisions of Jharkhand Trade Development funds. The Act was not held to satisfy the requirement under Article 301 with Article 304(b) of Constitution of India. The levy of entry fee was thus held as ultra vires Article 301 of the Constitution of India. He has also relied upon Hardev Motor Transport Vs. State of M.P. and Others, Sree Rayalaseema Alkalies and Allied Chemicals Limited Vs. State of Andhra Pradesh and Others, and Dinesh Pouches Ltd. v. State of Rajasthan and others (2008) 16 VST 387 (Raj) in support of his submission. Shri Bharat Ji Agrawal has also referred to the judgments of Kerala High Court, Karnataka High Court, Punjab and Haryana High Court and Gauhati High Court in which the similar Acts to levy entry fee were held to be ultra vires to Article 301 of Constitution.

70. Shri Bharat Ji Agrawal appearing in Writ Petition No. 1284 of 2008 (M/s GAIL India Limited vs. State of UP and others) submits that earlier Writ Petition No. 1138 of 2002 (Gas Authority of India Limited vs. State of UP and another) challenging the Circular dated 2.3.2002 to levy tax on whole sale price is pending. The entry tax can be levied only on purchase price or on the price on

which the natural gas is purchased by the GAIL. The Circular issued under the old Act of 2000 has now been incorporated in the definition clause of the new Act of 2007. In Section 2(h) defines value of goods to mean the value of any goods as ascertained from original purchaser/invoice or bill and includes value of packing material, packing and forwarding charges, insurance charges etc. The explanation provides that for the purpose of ascertaining wholesale price of any goods the wholesale price shall include any amount paid, or payable by the purchaser as excise duty or any other duty but shall not include any amount charged for anything done to the goods after entry of goods into the local area or any amount of fees or tax including tax under the Act payable in respect of sale of goods of the like kind or like quantity. The petitioner had paid entry tax on purchase price. Shri Agrawal submits that the entire transportation of the natural Gas by the GAIL is by underground pipeline on which the State does not spend any amount. The entire maintenance and security of the underground pipelines of GAIL is made by the company. No facilities are provided by the State which can be treated as quantifiable benefits.

71. Shri Bharat Ji Agrawal submits that Gas Authority of India Ltd. has been paying substantial amount of entry tax to U.P. State Government in the form of entry tax but nothing has so far been done by the State Government for development of trade and industry relating to natural gas. The details of the entry tax deposited by GAIL of natural gas since beginning are given as below:-

Year

Auraiya

Agra

Noida

Total

Amount (Rs. In crores)

1999-00

10.10

0.26

5.14

15.50

2000-01

26.28

0.87

12.85

40.00

2001-02

25.3

1.17

12.16

38.36

2002-03

28.62

1.93

11.51

42.06

2003-04

31.97

2.60

13.88

48.45

2004-05

38.24

3.52

16.68

58.44

2005-06

87.06

14.20

25.35

126.61

2006-07

132.84

21.08

25.95

179.87

2007-08

169.04

23.86

2712

220.02

2008-09

236.44

29.30

33.69

299.02

2009-10

190.19

25.15

36.19

251.53

2010-11

49.51

0.72

1.63

51.85

2011-12 (Up to Nov.11)

38.14

0

0.35

38.49

Total

1063.46

124.66

222.50

1410.61

72. Shri Bharat Ji Agrawal also appears in Writ Petition No. 1780 of 2008 M/s Jaypee Greens Limited vs. State of UP and others, Writ Petition No. 1532 of 2007 Jaiprakash Industries Ltd vs. State of UP and Ors., Writ Petition No. 840 of 2007 Diamond Cement Limited vs. State of UP and others, Writ Petition No. 1515 of 2007 Birla Corporation Ltd. vs. State of UP and others and Writ Petition No. 1525 of 2007 M/s Prism Cement Ltd vs. State of UP and others. The cement was deleted from the 1st Schedule as notified goods for the levy of entry tas by Notification No. 104 dated 15.1.2009. The levy and collections prior to 15.1.2009 are under challenge in these writ petitions.

73. Shri Bharat Ji Agrawal submits that cement plants are situated in remote corner of the State where the facility of transportation is not given nor there is any roads or bridges linking these areas with the highways. In Writ Petition No. 1532 of 2007 more than Rs. 34 crores have been paid as entry tax by Jaiprakash Industries Limited from the years 2003-04 to the year 2006-07, out of which not even Rs. 1 crore has been paid by way of any facility. In Writ Petition No. 2074 of 2008 Hitech Pipe Limited vs. State of UP and Others the entry tax on iron and steel included in the schedule on 29.9.2008 and modified on 15.1.2009 is under challenge on the same grounds as in the earlier writ petitions.

74. Shri Bharat Ji Agrawal also appears along with Shri Shashi Kumar in Writ Petition No. 1580 of 2007 M/s UAL Uttar Pradesh Proprietor-UAL Ind. Ltd. vs. State of UP and others manufacturing and trade in cement and in Writ Petition No. 1722 of 2007 M/s Vikram Cement and ors vs. State of UP and others.

75. Shri Dhruv Agrawal, Senior Advocate assisted by Shri Nikhil Agrawal appearing in Writ Petition No. 1482 of 2007 Moser Baer India Limited and another vs. State of UP and others submits that the petitioner is a 100% export oriented unit. It has got certificates from Ministry of Commerce, Government of India dated 25.9.1997 and the certificate dated 24.7.2000 for commercial production. The unit has 100% exemptions from payment of trade tax. The petitioner had earlier filed a Writ Petition No. 486 of 2001 Moser Baer India Limited vs. State of UP and Others which was connected with the Writ Petition filed by the Indian Oil Corporation and was decided by this Court on 27.1.2004, holding the levy of entry fee to be violative of Article 301. The Civil Appeal Nos. 997-1998 of 2004 were filed in which the Supreme Court passed orders on 9.2.2004 staying realisation and to keep the amount in separate interest bearing account. On 19.3.2004 the Supreme Court directed that old stay to continue.

76. Shri Dhruv Agrawal has also referred to Division Bench judgment of this Court dated 8.1.2007 after remand by the Supreme Court in which it was held that there was not a iota of evidence produced by the State Government to show the quantifiable and measurable benefits of the entry fee to the trade. He submits that the findings inter-se between the parties unless reference by the Supreme Court are binding on the State. Shri Dhruv Agrawal submits that the

ordinance dated 23.9.2007, which was later on converted into Act No. 30 of 2007 cannot validate the entry fee which was realised under an unconstitutional act. The entry tax cannot be justified to be levied retrospectively. He submits that in any case the entry fee is not compensatory and is thus violative in view of Jindal Stainless Limited (2) as compensatory. He relies upon B. Krishna Bhat Vs. State of Karnataka and Another, , in which relying upon the Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others, the Supreme Court held as follows:

Applying the said principles to the facts of the present case, it is seen that the invalidity pointed out by the High Court about the lack of services rendered at the relevant point of time is an invalidity which was not capable of being removed to justify the levy of tax by an Amending Act and the Legislature could not have either ignored this finding of fact by the High Court or overruled the same. Therefore, in our opinion, in respect of the tax collected for the period before the date of the Amendment there could have been no validation of such collection. Hence, the Amending Act so far as it validates the collection of property tax by the BDA, cannot be sustained for a period prior to the date of the Amending Act.

We however make it clear that in this appeal we have not decided the nature of levy under Section 28B after it was introduced by the Amending Act as to whether it is a tax simpliciter requiring no service at all or whether it is a tax in the nature of a fee requiring services as held by the learned Single Judge in the earlier round of litigation. Our examination of the validity of the Amending Act has been confined only to the arguments addressed before us. In regard to the validation of the past collection, our finding is based on the finding given by the High Court in the earlier judgment which has become final and as a consequence of such finding the validation of such collection is impermissible. Therefore, Section 7 of the Amending Act so far as it validates collection of property tax made by the BDA prior to the introduction of Section 28B has to be declared as invalid and beyond the legislative power.

This declaration of ours in regard to the illegality of the validation of the property tax collected prior to the Amendment, however, does not apply to the collection made by the BDA of the cesses required to be collected by it under Section 28C of the Act. The collection contemplated under Section 28C is not a levy under the BDA Act. It is a levy imposed underthe Acts mentioned in that Section, namely, the Karnataka Compulsory Primary Education Act, 1961; Karnataka Health Cess Act, 1962; Karnataka Public Libraries Act, 1965; and the Karnataka Prohibition of Beggary Act, 1975. The cess in question is not for the benefit of the BDA but the same is collected by the BDA only as an agent. It is for this purpose that under Section 28A the BDA was deemed to be a local authority so that it could collect the cess under the said respective Acts. These collections as an agent do not suffer from want of legislative sanction. The only lacking part was that under the respective Acts referred to hereinabove, the said collection could be made by a local authority only, which the BDA was not until Section 28C was introduced. This lacuna was removed by introduction of Section 28C and the BDA has been made a deemed local authority for the purpose of such collection. Therefore, once the BDA has been declared as a deemed local authority with retrospective effect, we find no difficulty in accepting the validity of this collection. Hence, the validity of Section 28C has to be upheld and consequently all the cesses collected by the BDA under the Acts referred to under Section 28C have to be declared as validly collected.

For the reasons stated above, we uphold the validity of Sections 28B and 28C of the BDA Act which are under challenge while we declare that that part of Section 7 of the Amending Act which validates the collection of property tax by the BDA before the introduction of Sections 28A and 28B as invalid; consequently the said collection is liable to be refunded as directed by the court in earlier proceedings. Accordingly, this appeal is partly allowed to the extent indicated hereinabove. No costs.

77. Shri Dhruv Agrawal further submits that the words ''local area'' in Entry 52 of the State List had come up for consideration in Diomond Sugar Mill''s case AIR 1961 SC 653. Referring to paragraph-25 of the judgment Shri Agrawal submits that local area is not any specified area in the State. The area must be administered by the local body. The local area cannot be understood in the general sense. The entry tax has to be seen in the context of the local area. The U.P. Trade Development Fund to which the entire amount of entry tax levied or collected has to be credited under sub-section (2) of Section 14 refers to the fund for development of the State and not in respect of any local area. Shri Agrawal submits that the entry tax can be levied for entry of goods into local area. The entry tax is a compensatory tax which must be utilised for the development of trade vis-a-vis a local area and not the entire State.

78. Shri V.K. Upadhyay, appearing in Writ Petition No. 1489 of 2007 Hindalco Industries Limited and another and others vs. State of UP and Others submits that ratio of the law laid down relating to compensatory tax in Jindal Stainless Limited (2) is the last word. He submits that unless it is shown that the benefit is to be given to the trade in the State, the levy of entry fee will be violative of Article 301 of Constitution. Shri Upadhyay submits that Hindalco Industries Limited imports coal for its captive power plant in Renu Sagar at Renukoot and also imports cement and machinery parts. The area, in which the scheduled goods are brought, is not local area. He submits that an industrial township of Renukoot is not an industrial development area under the U.P. Industrial Area Development Act, 1976 nor is a local area defined under Section 2 (d) (I) to (viii). The notification dated 7.4.2000 under Section 243 (a) declaring industrial State of Renukoot as industrial township does not make it an industrial area as defined under the Act. He relies upon Diamond Sugar Mills Ltd. and Another Vs. The State of Uttar Pradesh and Another, to support his submission.

79. Shri V.K. Upadhyay, Senior Advocate assisted by Shri Ritvik Upadhyay has

appeared in Writ Petition No. 1489 of 2007 Hindalco Industries Limited and another vs. State of UP and others. He submits that Hindalco Industries Limited brings into the State of UP coal for consumption in its Renu Sagar Captive Power Plant at Renukoot, District Sonebhadra. The company also brings into the State, cement and machinery parts, which are scheduled items under the Act of 2007. He submits that Jindal Stainless Limited (2) is the last word on the questions of law raised in these writ petitions. If the entry tax collected goes to general revenue of the State, the benefit of which is given to all the trades, the tax is not a compensatory tax to be saved from the vice of Article 301 of Constitution. He submits that the benefits of collection of entry tax may not be given one to one to the traders. The benefit must flow to the traders of the scheduled commodity. There should be a plan for expenditure of the entry tax on the trades, which should broadly compensate the traders.

80. Shri V.K. Upadhyay, Senior Advocate assisted by Shri Ritvik Upadhyay also appear in Writ Petition No. 1510 of 2007 Kanoria Chemical Industries Ltd vs. State of UP and others; Writ Petition No. 566 of 2009 M/s Soni India Private Limited vs. State of UP and Others; Writ Petition No. 1153 of 2008 M/s Hi-Tech Carbon Limited vs. State of UP and others, Writ Petition No. 1856 of 2008 Arun Kumar Singh vs. State of UP and others and in Writ Petition No. 2138 of 2008 M/s Honda Seil Cars (I) Limited vs. State of UP and others. He submits that the entry tax under Section 4 of the Act is imposed on the entry of scheduled goods into local area. The ''local area'' under Section 2(c) is defined under the Act as follows:

(d)''local area'' means the territorial area of,:

(i) a Municipal Corporation under the Uttar Pradesh Municipal Corporation Act,1959;

(ii) a Municipality under the Uttar Pradesh Municipalities Act, 1916;

(iii) a Zila Panchayat or a Kshettra Panchayat under the Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961;

(iv) a Gram Panchayat under the United Provinces Panchayat Raj Act, 1947;

(v) a Cantonment under the Cantonments Act, 1924;

(vi) any Industrial Development Area under the Uttar Pradesh Industrial Area Development Act, 1976;

(vii) an Industrial Township by whatever name called,

(viii) any other local authority by whatever name called under an Act of the Parliament or the State Legislature.

81. Shri V.K. Upadhyay submits that the entry tax is to be levied under the Act of 2007 on entry of goods specified in the schedule into a local area for consumption, use or sale thereof from any place outside that local area. The

''local area'' is defined under Section 2(d) of the Act of 2007, as the territory area of a Municipal Corporation under the Uttar Pradesh Municipal Corporations Act, 1959; a Municipality under the Uttar Pradesh Municipalities Act, 1916; a Zila Panchayat or a Kshetra Panchayat under the Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961; a Gram Panchayat under the United Provinces Panchayat Raj Act, 1947; a Cantonment under the Cantonements Act, 1924; any Industrial Development Area under the Uttar pradesh Industrial Area Development Act, 1976; an Industrial Township by whatever name called; and any other local authority by whatever name called under an Act of the Parliament of the State Legislature.

82. Relying upon Diamond Sugar Mills Ltd. and Another Vs. The State of Uttar Pradesh and Another, Shri Upadhyay submits that the local area as defined under Section 2(d) of the Act of 2008 means an area, which is a local authority and has local self governance. Section 2(31) of the General Clauses Act, 1987 defines ''local authority'' to mean a municipal committee, district board, body and port commissioner or other authority legally entitled to or entrusted by the Government with the control or management of the municipal or local fund. The ''local authority'' is defined under the U.P. General Clauses Act in Section 2(25) and the ''local fund'' is also defined under Section 2(26). Relying upon Shaktikumar M. Sancheti and Another Vs. State of Maharashtra and Others, he submits that the expression ''local area'' as used in various Articles of the Constitution, namely 3 (b), 12, 245(1), 246, 277, 321, 323-A and 371-D indicates that the constitutional intention was to understand the local area in the sense of any area, which is administered by a local body, may be corporation, municipal board, district board etc. The definition does not bring the entire State as local area as the use of word ''a'' before ''local area'' in the Section is significant. The taxable event is not the entry in any area of the State but a local area. If the goods are brought into the factory, which is defined by a separate notification as industrial area, it cannot be said that the goods have been brought into the local area in the State. The notified industrial area of Hindalco is not a notified industrial development area under the U.P. Industrial Area Development Act, 1976. The industrial area of Hindalco is not a local authority, and does not have a local fund, and thus the entry of goods into local area will not attract the levy of entry fee. Hindalco Industries Limited had earlier filed a Writ Petition No. 1891 of 2006, and thereafter Writ Petition No. 1699 of 2007 challenging notices issued under Section 21 of the Trade Tax Act relating to the period under the old Act. The company has also filed Writ Petition No. 1489 of 2005 challenging the assessment and demand, which was paid under protest. A Writ Petition No. 382 of 2007 challenging notices under Rule 4(5) under the Entry Tax Act is also pending.

83. Shri Navin Sinha, Senior Advocate assisted by Shri Saral Saxena appears in Writ Petition No. 247 (Tax) of 2004 M/s J.S. Gupta and sons vs. State of UP and others. He submits that the petitioner is a 100% export oriented unit dealing in manufacture and sale of metal ware, glass ware, and imported wooden ware.

The unit is registered with the Department of Commerce, Ministry of Commerce and Industries, Government of India and is carrying on business activities in the export process zone in terms of the Export-Import Policy imposed at the relevant time. Notices were issued to the company raising a demand to pay entry tax in the year 2003-04 on tendu patta, coal, diesel, lakari and cement, which are brought by the petitioner from outside the State. The State Government vide Notification dated 22.10.2001 has granted exemption to cent percent export oriented units under Section 4-B of the Act of 2007 and in view of the notification the impugned demand notice was wholly uncalled for. The demand notice was issued without giving show cause notice or opportunity of hearing to the petitioner.

84. Shri Manish Goyal, appearing for the petitioners in some of the writ petitions, submits that all the activities under Section 14 for which the entry tax to be credited to U.P. Trade Development Fund, shown to be exclusively used for the development or facilitating the trade, commerce and industry in the State of UP namely construction, development and maintenance of roads; providing financial grants and subsidies to industries and commercial units; creating infrastructure for supply of electricity and water to industries, marketing and other commercial complexes; creation, development and maintenance of other infrastructure for the furtherance of trade, commerce and industry etc. are the activities, which are covered within the 18 items of the Twelfth Schedule, with reference to Article 243-W of the Constitution of India. The municipalities and other local bodies entrusted with these powers, authority and responsibilities, under the Constitution of India, could not have been passed over in the expenditure of the amount of the entry tax, collected and credited to the State Development Fund. There is no public representative in the State Development Fund, nor any procedure for allocation or guidelines have been prescribed. The municipality must have a say for development. The octroi was abolished, as it created barriers and its realisation was not free from irregularities. The new Act does not provide for any safeguard for checking the irregularities for which the octroi was abolished. Shri Goyal submits that the entry tax is a different form of octroi. The Schedule includes only 20 items and leaves many other items at the discretion of the State Government. There is no rational nexus in notifying the goods and thus the Act is discriminatory in character in respect to various trades.

85. Shri K.N. Kumar appears for Railways in Writ Petition Nos. 791 of 2009; 801 of 2009 and 875 of 2009. He submits that under Section 184 of the Railways Act, 1989 the taxation on railways by local authorities, and under Section 185 the taxation on railways for advertisement is prohibited. The railway administration is not liable to pay any tax in aid of funds of any local authority, unless the Central Government by a notification declares the railway administration to be liable to pay the tax specified in such notification and while such notification is enforced, the railway administration shall be liable to pay to the local authority either the tax specified in the notification or in lieu thereof such sums may be determined by an officer appointed by the Central Government to be fair and reasonable. He

submits that notwithstanding anything to the contrary in any other law Section 185 restricts the railway administration to pay any tax to any local authority in respect of any advertisement made or any part of railways unless the Central Government by a notification declares the railway administration to be liable to pay the tax specified in such notification. He submits that the demand of entry tax on the railway administration to provide finance, aids, grants and subsidies to the local bodies and the Government agencies under Section 14(g) of the Act of 2007 for the purposes specified in Clauses (a), (c), (d), (e) and (f), is violative of Sections 184 and 185 of the Railways Act. Even otherwise he submits that under Article 285, the State shall not tax on property of the Union Government. The railways bring cables for its use. The cables are not brought for sale. The property in cables belongs to railway and in which no transaction takes place. He submits that new Act of 2007 cannot raise demand on the transactions completed prior to its commencement.

86. Shri R.R. Agarwal assisted by Shri Suyash Agarwal appears in Writ Petition Nos. 745 of 2006, 913 of 2006, 1357 of 2006, 1425 of 2006, 1599 of 2009, 1600 of 2009, 34 of 2009 and 39 of 2011. He had adopted the arguments of Shri S.P. Gupta and Shri Bharat Ji Agrawal and submits that so long the Constitution Bench judgment of Supreme Court in Jindal Stainless Limited (2) holds the field, all the Courts of the country must follow the principles laid down in the judgment. Shri Aloke Kumar appearing in some of the writ petitions relating to scheduled commodities namely coal, paper, cement, clinker, imported timber, machinery and tendu leaves, has also adopted the argument of Shri S.P. Gupta and Shri Bharat Ji Agrawal. He submits that the burden of proof, that the entry tax is compensatory tax to the trades, and that its payment to the trades and that the entry tax is a reimburse/recompense that the quantifiable/measurable benefits, is on the State Government. The State Government has failed to discharge the burden. For example the traders of coal cannot be compensated in any manner as the trading of coal is based on transportation. The traders of coal are already paying toll tax in addition to the road tax paid by transporters, and that too according to the loading capacity of the vehicle, the coal traders have no use of power or water for running their trade. They are also paying Clean Energy Cess to the Central Government. Similarly the traders in tendu patta cannot be compensated from the collections of entry tax, as they are not entitled nor get any compensation or facility under the Act.

The Reply

87. Shri S.P. Kesarwani, Addl. Chief Standing Counsel assisted by Shri C.B. Tripathi have defended the constitutional validity of the Act of 2007, its working and the retrospective operation of the Act in Section 17. They have relied upon short counter affidavit of Shri C.L. Gupta, Asstt. Commissioner, Commercial Tax, Sector-1, Noida in Writ Petition No. 1284 of 2008, M/s Coal (India) Ltd. v. State of U.P. and Ors. and the counter affidavit of Shri V.B. Singh, Deputy Commissioner, Commercial Tax, Sector-1, 2 and 3, Allahabad in Writ Petition No.

1532 of 2007 Jaiprakash Associates ltd. v. State of U.P.

88. It is submitted by Shri S.P. Kesarwani that the Act of 2000 was enacted to provide for the levy and collection of entry tax on entry of certain goods specified in the Schedule into a local area from any place outside that local area including a place outside the U.P. for consumption, use or sale therein. Section 4A was inserted by U.P. Act No. 13/2001, providing for realization of tax through manufacturer. Entry 52 of the State List provides for the ''tax on the entry of goods into a local area for consumption, use or sale therein''. The validity of the Act of 2000 was challenged in the High Court In Writ Petition No. 251 of 2003, Indian Oil Corporation Ltd. v. State of U.P. and Ors. by judgment dated 27.1.2004 the Act was declared to be violative of Article 301 and 304 of the Constitution of India. Aggrieved the State of U.P. preferred Special Appeal No. 2757-2758 of 2004 in the Supreme Court. On 9.2.2004 the Supreme Court passed an order to the following effect:

Leave granted.

The operation of the impugned judgment is stayed subject to the appellant?s depositing all the taxes that may be realized by the appellant from the respondents after 27.1.2004 in a separate account. This amount and the interest accrued thereon shall be held subject to the further orders of this Court.

89. The question of constitutional validity of the entry tax was referred to the Constitution Bench of the Supreme Court in Jindal Stainless Steel and Anr. v. State of Haryana and Anr., JT 2006 (4) SC 611. When the Special Appeal No. 2757-2758 of 2004 were again taken by the Division Bench of the Supreme Court, an order was passed on 14.7.2006 to the following effect:

Paragraph No. 5. Since relevant date do not appear to have been placed before the High Courts, we permit the parties to place them in the concerned writ petitions within two months. The concerned High Courts shall deal with the basic issue as to whether the impugned levy was compensatory in nature. The High Courts are requested to decide the aforesaid issue within five months from the date of receipt of our order. The judgment in the respective cases shall be placed on record by the concerned parties within a month form the date of the decision in each case pursuant to our directions. 90. Pursuant to the aforesaid order the matter was taken up by the High Court. The State of U.P. placed relevant date in the High Court to demonstrate that the entry tax is compensatory in nature. This Court, however, by its order dated 8.1.2007 found after considering the date that there is not even an iota of evidence/ material on record to give required date/ statistics to prove, establish that the amount collected as tax and its expenditure on providing additional/ specific addition/ facility provided to trades in particular mentioned under the Schedule of the Act. In the absence of such data it is not possible for the Court to hold that the entry tax is compensatory tax.

91. Against the observations made by the court and the order passed on 8.1.2007 the State of U.P. has fled objections by way of special leave petition in

the Supreme Court and the matter is still pending. In the meantime, the following interim order was passed on 17.4.2007:

It is stated by learned counsel for the State of U.P. that an appeal shall e filed against the order of the Allahabad High Court which was passed pursuant to the directions given by this Court on 14th July, 2006 in Civil Appeal No. 3453 of 2003 and connected cases. It is stated that some other High Court have also decided the matter afresh. The High Court''s orders, wherever it has been passed in favour of the tax payers, shall operate so far as the concerned writ petitioner''s are concerned. A list has been filed indicating that seven of the High Courts have already decided the writ petitions and the judgments are awaited in respect of five other High Courts. The concerned High Courts, i.e. Karnataka, Rajasthan, Andhra Pradesh, Orissa and Tamil Nadu are requsted to dispose of the matter pursuanct to the direcgtion of this Court dated 14th July, 2006 within a period of three months. 92. M/s Indian Oil Corporation started demanding refund of the alleged amount of Rs.3022 crores on the basis of the order dated 8.1.2007 passed by the Supreme Court. The State of U.P. considered it expedient to remove the basis of the judgment of the High Court and to enact new law in conformity with the parameters of the compensatory tax as enunciated by the Hon?ble Supreme Court in Jindal Stainless Ltd. (2) (Supra). Consequently U.P. Tax on Entry of Goods into Local Areas Ordinance, 2007 was promulgated with retrospective effect from 1.11.1999. The U.P. Ordinance No. 35 of 2007 was replaced by the U.P. Tax on Entry of Goods into Local Areas Act, 2007. Shri Kesarwani submits that the Act of 2007 read with U.P. Tax on Entry of Goods into Local Areas (Fund) Rules, 2007 notified on 11.10.2007, has completely altered the basis of the judgment of this Court dated 27th January, 2004 and the observations made by this Court dated 8.1.2007 (in pursuance to the remand order). He submits that the entire money collected as entry tax under the U.P. Act of 2007 read with U.P. Tax on Entry of Goods into Local Area (Fund) Rules, 2007 has to be spent on development or facilitating trade and commerce of the goods mentioned in the schedule to the Act, and the State Government will have no power to divert the money collected as entry tax. Now a complete mechanism regarding utilization of entry tax has been provided, and the entire entry tax collected is to be utilized for the development of trade and commerce of the goods mentioned in the schedule. The Accountant General as an independent body has been given power to audit the entire money collected and the money spent towards entry tax. A High Power Committee constituted under the Chairmanship of the Chief Secretary, Government of India in its meeting dated 5.5.2008 has allocated the entire collection from entry tax after 24.9.2007 i.e. the date of promulgation of Ordinance No. 35 of 2007 towards the development of trade and commerce of scheduled goods.

93. In the meeting of the U.P. Trade Development Fund presided by the Chief Secretary, Government of U.P. held on 5.5.2008 the entire collections and allocations of the year 2007-08 was considered. In the year 2007-08 the entry tax collected on the 15 scheduled items are given as below:-

1.

Crude oil as defined under Section 14 of the Central Sales Tax Act, 1956

67.18 lacs

2.

Machinery and machinery parts of which the value is more than 10 lacs

519.23 lacs

3.

Natural gas

13482.99 lacs

4.

Sugar other than levy sugar

2472.74 lacs

5.

Tobacco in the shape of cigarette

6.25 lacs

6.

All kinds of paper

2094.74 lacs

7.

Pan Masala with tobacco (Gutkha)

508.18 lacs

8.

Cement

1104.58 lacs

9.

Coal

9159.12 lacs

10.

Tendupatta

253.54 lacs

11.

Wax

18.67 lacs

12.

Treated leather

112.8 lacs

13.

All kind of timber from the trees of any variety

122.85 lacs

14.

High speed diesel and another petroleum products except the kerosene oil for public distribution

5239.8 lacs

15.

Clinker

163.04 lacs

94. The Committee found that on paper and high speed diesel oil and other petroleum products, and the kerosene oil, which is not for public distribution system, the State had provided exemption in entry tax upto December, 2007. From 1st January, 2008 there are proposals to reduce the VAT to the extent of entry tax paid on paper upto 1st January, 2008 and that all other goods after giving rebate of entry tax, entry tax is not admissible on these items. In this manner after 1st January, 2008 the rates of entry tax on high speed diesel and petroleum products and on all kinds of paper is almost nil. After reducing the entry tax on these items the net collections of entry tax from October, 2007 to 31st March, 2008 was Rs.279.91 crores. A number of importers have obtained interim orders of realisation of entry tax. The collection, therefore, reflect from only those persons, who have not obtained interim orders.

95. The Committee, thereafter, in view of Jindal Stainless Ltd. v. State of Haryana decided by Constitution Bench oft he Supreme Court considered the allocation of the amount under Section 14 of the Act of 2007 and decided as follows:

(i) The maximum realises of entry tax of crude oil are from Indian Oil Corporation, which is used in Mathura Refinery for petroleum products namely kerosene, petrol, furnace oil etc., which is thereafter sent to its various depots and outlays for supply in different areas. After giving benefit on rebate the realisation of entry tax of diesel and furnace oil are nil. The expenditure on roads, electricity, water, and law and order is made by the State in the development of trade, commerce and industry of the goods of cement, coal, sugar, machinery, imported timber, clinker and other scheduled commodities. The contribution of roads and bridges is very important and thus 150 crores be allocated for construction of roads and bridges apart from other sources.

(ii) The electricity has inherent contribution in development of trade, commerce and industry and thus Rs.150 crores be allocated to electricity department for various electricity projects for the development of trade, commerce and industry of crude oil, natural gas and cigarette n the areas of Mathura Refinery, the areas, where GAIL is functioning and where cigarette is manufacturing.

(iii) The supply of water and sanitation has special place in the development of trade, commerce and industry and thus Rs.75 crores be allocated for the concerned departments in the places, where these goods are traded.

(iv) Rs.75 crores be allotted for concerned department for taking care of water and river pollution and its affect on the health from the pollution caused by the units of crude oil, leather and cigarette.

(v) The Committee has allocated all the amounts realised from the entry tax other than the amount of which the realisation has been stayed by the High Court. As and when the amount will be received, the Committee will make allocations from time to time. The meeting will be convened accordingly at the relevant time.

(vi) It will be proper that the principal payers of the entry tax may also make available any working plan or suggestions on any of the additional items or points for the development of the trade, commerce and industry so that the Committee may consider and take appropriate decisions. Steps be taken accordingly.

96. At the end of the meeting the Chief Secretary laid emphasis to all the departments that the development of trade, commerce and industry is the top priority of the State Government and thus according to the will of the legislature and the judgment of Hon''ble Supreme Court, the current allocation and the allocations to be made in future may be accordingly utilised.

97. In paragraphs 25, 26, 27 and 28 of the counter affidavit the details of the year wise collections of the entry tax under the Act of 2000 and the interest, which has accrued and has been deposited in terms of the orders of Hon''ble Supreme Court dated 9.2.2004 has been given as follows:

25. That the year wise amount collected as entry tax under Uttar Pradesh Tax on Entry of Goods Act, 2000 from the year 1999-2000 to 2003-04 (January 2004) is as under:

Year

Amount received from Entry Tax (correct figures Rs. In Crores)

1999-2000

70.41

2000-01

245.87

2001-02

290.89

2002-03

375.52

2003-04 (January 2004)

252.35

26. That in pursuance to the order dated 9.2.2004 passed by Hon''ble Supreme Court the year wise amount collected as entry tax in a separate interest bearing account being the account No. ''8342-Other deposit-120-Miscellaneous deposit-01-receipts of entry tax'' is as under:

Year

Amount of Entry Tax in Crores (Inter Included)

Interest deposited by the State Government in Crores

2003-04 (From Feb 04)

90.19

2004-05

358.95

4.51

2005-06

562.13

6.31

2006-07

801.04

19.33

2007-08 (Up to Sep.-07)

43.93

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27. That the money collected or to be collected under the new Act as entry tax has to be appropriated to the fund and has to be utilized in the manner provided in the Act and Rules and shall exclusively be spent for facilitating the trade and commerce of goods mentioned in the schedule as class. However, the money deposited in the separate interest bearing account No. 9342-Other deposit-120 Miscellaneous deposit-01-receipts of entry tax'' is being kept separately and has to be utilized according to the direction of the Hon''ble Supreme Court in pending civil appeal.

28. That likewise the amount collected as entry tax from 1.11.99 to 2003-04 is also subject matter of appeal before the Hon''ble Supreme Court and shall be subject to the direction of Hon''ble Supreme Court in pending civil appeals.

98. Shri Kesarwani submits that the entry tax imposed under the Act of 2007, to be non-compensatory and thus violative of Article 301 and 304 of the Constitution of India is incorrect and baseless. The Act of 2007, facially and patently indicates that the benefits, which is quantifiable and measurable is given to the payers of entry tax as a class. The rate of tax regarding goods imported from outside the State, and the goods manufactured within the State is the same. There is no discrimination in the provisions of the Act or the Rules made thereunder between the goods imported from outside the State and those manufactured and produced in the State of U.P. and brought into local areas for consumption, use or sale therein. The Act of 2007 is not violative of Article 301 or 304 of the Constitution of India. In Jindal Stainless Ltd. (2) in paragraph 44 and 45 the Supreme Court has held that whenever a law is violative of Article 301 of the Constitution, the Court has to see whether the impugned enactment facially or patently indicates quantifiable data on the basis fo which the compensatory tax is sought to be levied. The Act must facially indicate the benefit, which is quantifiable or measurable.

99. Shri S.P. Kesarwani submits that the validity of the Act or Rules can be challenged only on two grounds namely lack of legislative competence and violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provisions. As held in Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, and Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, the presumption is always in favour of the constitutionality of an enactment and the burden is upon him, tax it to show that there has been clear transgression of the constitutional principles.

100. Shri Kesarwani submits that in State of Bombay and Anr. v. F.N. Balsara, AIR 1951 SC 318; Moti Das Vs. S.P. Sahi, The Special Officer In Charge of Hindu Religious Trusts and Others, Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others, The Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Girish

Kumar Navalakha and Others, and in State of Bihar and others, etc. etc. Vs. Bihar Distillery Ltd., etc., it was held that an act is presumed to be enacted within the forecorners of the provisions of the Constitution. There is presumption against the constitutionality of the legislature. The burden of proof that the legislature is unconstitutional is heavily upon the person, who challenges it. The endeavour of the Court is to sustain the constitutionality of legislature. The Court should take into consideration all existing circumstances that matter of common knowledge, matter of common report, and history of times. The approach of judicial restraints and presumption of constitutionality requires that the legislature is given the benefit of doubt about its purpose. He further relies upon Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd. and Others etc., State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., The Consumer Action Group and Another Vs. State of Tamil Nadu and Others, and The State of Karnataka and Others Vs. M/s. Drive-in-Enterprises, that there is always a presumption that the legislature does not exceed its jurisdiction and the burden of establishing that legislature has transgressed constitutional mandate such as those relating to fundamental rights is always on the person, who challenges its vires. Unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the Constitution, it must be allowed to stand the true expression of the will of the people. The Court must examine the whole enactment, its object, scope and effect of its provision. If on such adjudication it is found that the enactment falls substantially on a matter assigned to the State legislature, in that event such an enactment must be held to be valid, even though nomenclature of such enactment shows that it is beyond the competence of the State legislature.

101. Shri S.P. Kesarwani submits that power to legislate comprehends power to tax prospectively as well as retrospectively. The legislature has completely removed the entire defects pointed out by this Court in its judgment dated 27.1.2004 in enacting the U.P. Act of 2007 and has passed fresh Act with complete retrospective effect from 1.11.1999. Such a mode of legislation is recognised right from the case of Tata Iron and Steel Co. Ltd. v. State of Bihar 1958 (9) STC 267 upto Welfare Association ARP Maharashtra v. Ranjeet P. Gohil, JT 2003 (2) SC 335. Shri S.P. Kesarwani submits that the U.P. Act of 2007 has been enacted with complete retrospective effect from 1.11.1999 removing the entire basis of the judgment of this Court, by curing all the defects. The tax is proportional and not progressive or regressive and is inconformity with the parameters of compensatory tax as enunciated by the Supreme Court in Jindal Stainless Ltd. (2). The provisions of the Act facially and patently as well as infact provide measurable and quantifiable benefit to the payers of the tax as a class. The entire proceeds of the entry tax has to go to the State Development Fund and is to be spent on the development of the trade. The utilisation has been exclusively reserved for the development or facilities of the trade, commerce and industry under clauses (a) to (g) of Section 14(1) of the Act. The U.P. Tax on Entry of Goods into Local Area (Fund) Rules, 2007 with the composition of the

Committee to supervise the fund and the Accountant General to audit the accounts, ensures and guarantees that the entire proceeds of the levy of entry tax is to be used exclusively for development and for facilitating trade and commerce of the scheduled goods. There is nothing to show nor it has been suggested that the Committee has not allocated the receipts for the purposes of development of trade and commerce of the scheduled goods. The amount allocated from the fund has to be utilised for the purposes approved by the Committee commensurate with the objects and purpose set out in Section 14 of the Act. The Committee also ensures that the tax payers are not required to pay much more than what is collected as entry tax. He submits that the State Government has from time to time exercised by various notifications, the powers to amend the schedule and has granted rebates and adjustments form the sales tax to be paid by the manufacturer/ traders of the goods. The State Government is conscious of its obligations of development of trade and commerce of the scheduled goods and has been acting on the refunds received from the trade from time to time. If there is any allegations that the Committee has not allocated the funds, the Committee invites suggestions for making amendments in the allocations.

The Retrospectivity

102. In Tata Iron and Steel Company Ltd. v. State of Bihar, 1958 (9) STC 267 the Supreme Court relying upon the economic theory that the sales tax may be an indirect tax on the consumers, but legally it need not be so, examined the provisions of Section 4(1), 2(g), second proviso of the Bihar Sales Tax Act, 1947, as amended in 1948, which amended by Section 3, the old sub-section (1) of Section 4 (the charging sections). The amended definition of sale, applicable from April 1st, 1948 and consequently validating the levy of sales tax, it was held that sales tax is an indirect tax on the consumer. The idea is that seller will pass it on to the purchaser and collect it from them. Replying to the arguments that once the time goes past, the seller loose the chance of realising it from purchaser, the Supreme Court held that argument is not sound as from the point of view of economist and as an economic theory the sales tax may be an indirect tax to the consumer, but legally it need not be so, the primary liability to pay the sales tax under the Act is on the seller. Before the amendment the sellers had no authority to collect the sales tax from the purchaser. He could have put up the price so as to include the sales tax but he could not realise it from the purchaser. The circumstances could not prevent the sales tax imposed on the seller to be any the less sales tax on the sale of goods. After the amendment Act permitted the seller (a registered dealer) to collect the sales tax as a tax from the purchaser but that the amendment did not do away with the primary liability of the seller to pay the sales tax. It was held that sales tax need not be passed on to the purchaser, and this fact does not alter the real nature of the tax, which by the expressed provision of the law is cast upon the seller. The buyer is under no obligation to pay sales tax in addition to the agreed price unless the contract specifically provides otherwise. Relying upon Love v. Norman Wright (Builders)

Ltd., (1944) 1 K.B. 484 it was held that if that be true view of the sales tax, then the Bihar legislature acting within its own legislative field, had the powers of sovereign legislature, and could make its law prospectively as well as retrospectively.

103. In J.K. Jute Mills Co. Ltd. Vs. The State of Uttar Pradesh and Another, the Supreme Court held that in exercise of the power of legislature to enact a law with reference to a topic, it will be competent for the legislature to enact a law, which is either prospective or retrospective. In para 15 the Supreme Court held:

15. The power of a legislature to enact a law with reference to a topic entrusted to it, is, as already stated, unqualified subject only to any limitation imposed by the Constitution. In the exercise of such a power, it will be competent for the legislature to enact a law, which is either prospective or retrospective. In The Union of India Vs. Madan Gopal Kabra, , it was held by this court that the power to impose tax on income under entry 82 of List I in Schedule VII to the Constitution, comprehended the power to impose income-tax with retrospective operation even for a period prior to the Constitution. The position will be the same as regards laws imposing tax on sale of goods, In M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another, this court had occasion to consider the validity of a law enacted by Parliament giving retrospectively operation to laws passed by the State legislatures imposing a tax on certain sales in the course of inter-State trade. One of the contentions raised against the validity of this legislation was that, having regard to the terms of Article 286(2), the retrospective legislation was not within the competence of Parliament. In rejecting this contention, the court observed:

Article 286(2) merely provides that no law of a State shall impose tax on inter-State sales ''except in so far as Parliament may by law otherwise provide.'' It places no restrictions on the nature of the law to be passed by Parliament. On the other hand, the words ''in so far as'' clearly leave it to Parliament to decide on the form and nature of the law to be enacted by it. What is material to observe is that the power conferred on Parliament under Article 286(2) is a legislative power, and such a power conferred on a Sovereign Legislature carries with it authority to enact a law either prospectively or retrospectively, unless there can be found in the Constitution itself a limitation on that power. (p. 1460 (of SCR): (p. 486 of AIR)).

And it was held that the law was within the competence of the legislature. We must, therefore, hold that the Validation Act is not ultra vires the powers of the legislature under entry 54, for the reason that it operates retrospectively.

104. In Rai Ramkrishna and Others Vs. The State of Bihar, the Supreme Court held in para 20 as follows:

20. In this connection, it would be relevant to refer to another fact which appears on the record. Along with the appellants, 18 other bus owners had filed writ petitions challenging the validity of the Act. These petitioners have not appealed

to this Court presumably because their cases fall under the provisions of Section 23(a) of the Act. It is likely that they had paid the amounts, and since the amounts paid under the provisions of the earlier Act are now deemed to have been paid under the provisions of this Act, they did not think it worthwhile to come to this Court against the decision of the High Court. Apart from that, it is not unlikely that other bus owners may have made similar payments and the appellants have, therefore, come to this Court because they have made no payments and so, their cases do not fall under Section 23(a) or may be, their cases fall under Section 23(b). The position therefore, is that the retrospective operation of Section 23(a) and (b) covers respectively cases of payments actually made under the provisions of the earlier Act, and cases pending inquiry, and the retrospective operation of Section 3(3) read with Section 1(3) only applies to cases of persons who did not pay the tax during the whole of the period, or whose cases were not pending; and it is this limited class of persons whose interests are represented by the appellants before us. Having regard to the somewhat unusual circumstances which furnish the background for the enactment of the impugned statute, we do not think that we could accept Mr. Setalvad''s argument that the retrospective operation of the Act imposes restriction on the appellants which contravene the provisions of Article 19(1)(f) and (g). In our opinion, having regard to all the relevant facts of this case, the restrictions imposed by the said retrospective operation must be held to be reasonable and in the public interest under Article 19(5) and (6) and also reasonable under Article 304(b). 105. In Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam, the Supreme Court held in paragraphs 29 and 30 as follows:

29. Then as to the argument about the scheme of Part XIII, we do not see how a statute passed under Article 304(b) would always and necessarily defeat the said scheme if its provisions are made retrospective. It is not disputed by Mr. Pathak that a taxing statute can be if such a statute is passed, it would not be possible for any person to challenge its validity on the ground that it affects the citizens'' fundamental right under Article 19(1)(g). If such a challenge is made, it would be easily met by the plea that a taxing statute, though retrospective in its operation, can be reasonable and in the public interest within the meaning of clause (6) of Article 19. Therefore, if a taxing statute can, in a given case, operate retrospectively and its validity cannot be successfully challenged under Article 19 we do not see how a similar challenge could be sustained against a taxing statute which has been passed under Article 304(b). The freedom of trade guaranteed by Article 301 is not doubt of very great importance to the political and economic unity of the country; but the freedom guaranteed to the individual is not less important; just as in the case of a challenge to the validity of a statute under Article 19 the court has to consider whether the restrictions imposed by the statute are reasonable and in the interest of the general public, so in dealing with a challenge to the validity of a statute passed under Article 304(b), the court has to consider whether the restrictions imposed by the statute are

reasonable and are required in the public interest. The impact of the restrictions on the individual''s right has to be judged in one case, whereas the impact of the restrictions on the freedom of trade has to be judged in the other; but basically, it is the invasion of a guaranteed right whose validity is being examined in either case; and so, if the law can be retrospective in one case, there is no reason why it cannot be retrospective in the other. We are, therefore, satisfied that there is no substance in the plea raised by Mr. Pathak that the Act is invalid solely because it operates retrospectively.

30. It is then faintly suggested that the retrospective operation of Section 3, in substance, changes the character of the tax. The argument is that the proviso to Section 3(2) enables the producer to recover the tax from the purchaser in case the goods are sold to a purchaser before they are carried, whereas such a provision did not exist in the past and in that sense, the retrospective operation changes the character of the tax. We have already noticed that the proviso in question is not retrospective in operation, and so, this argument has to be tested by reference to the remaining portion of Section 3(2). Thus tested, it is difficult to accept it as sound. In this connection, we may refer to the recent decision of this Court in Rai Ramkrishna and Others Vs. The State of Bihar, where a similar plea was rejected and it was pointed out that this Court has consistently held that the mere fact that a validating statute operates retrospectively does not justify the contention that the character of the tax sought to be recovered by such retrospective operation is necessarily changed.

106. In Epari Chinna Krishna Moorthy, Proprietor, Epari Chinna Moorthy and Sons, Berhampur, Orissa Vs. State of Orissa, the Supreme Court while dealing with the retrospective operation of the Orissa Sales Tax Validation Act of 1961 held in para 7 as follows:

7. The first argument which has been urged before us by Mr. Sastri is that since the exemption was granted by the State Government by virtue of the powers conferred on it by Section 6, it was not open to the legislature to take away that exemption retrospectively. Section 4 of the parent Sales-tax Act is the charging section and Section 6 is the section which confers on the State Government power to issue a notification exempting from the tax the sale of any, goods or class of goods and likewise withdraw any such exemption subject to such conditions and exemptions as it may deem fit. The argument is, the power to grant exemption having been conferred on the State Government it was validly exercised by the State Government and though the legislature may withdraw such exemption, it cannot do so retrospectively. It is obvious that if the State Government which is the delegate of the legislature can withdraw the exemption granted by it, the legislature cannot be denied such right. But it is urged that once exemption was validly granted; the legislature cannot withdraw it retrospectively, because that would be invalidating the notification itself. We are not impressed by this argument. What the legislature has purported to do by Section 2 of the impugned Act is to make the intention of the notification clear.

Section 2 in substance declares that the intention of the delegate in issuing the notification granting exemption was to confine the benefit of the said exemption only to persons who actually produce gold ornaments or employ artisans for that purpose. We do not see how any question of legislative incompetence can come in the present discussion. And, if the State Government was given the power either to grant or withdraw the exemption, that cannot possibly affect the legislature''s competence to make any provision in that behalf either prospectively or retrospectively. Therefore, there is no substance in the argument that the retrospective operation of Section 2 of the impugned Act is invalid. 107. In Hiralal Rattanlal Vs. State of U.P. and Another etc. etc., the Supreme Court did not accept the argument that the retrospective levy can be made only after affording opportunity to the dealers, who had passed on the tax payable to the consumers. It was held that tax is levied on the dealer; the fact that he has allowed to pass on the tax to the consumers or he is generally in a position to pass on the same to the consumer has no relevance, when the Court has to consider the legislative competence and an Act, which validates levy retrospectively. In Tilock Chandra Prasan Kumar the High Court of Allahabad had struck down the levy of sales tax on split or process food grains and ''Dal'' holding that ''Dal'' purchased by the petitioner before it could be said to be a commodity, essentially different form the ''Arhar'', ''Dal'' purchased by ''Dal'' mills and accordingly the purchases effected by the petitioner could not be regarded as first purchase. The Government of U.P. issued an Ordinance (U.P. Sales Tax Amendment and Validation Ordinance, 1970) adding Explanation-II to Section 3(D) as well as Section 7 of the Act. The Ordinance was later enacted as an Act. The Amendment Act removing the defects by the Explanation to Section 3(D) and providing for a deeming clause that the split or processed food grains such as in the form of ''Dal'' shall be deemed to be different from unsplit or unprocessed food grains, at validating provisions to the Principal Act vide Section 7. The challenge to the retrospective levy on the ground that it was validation of Article 19(1) (f) and (g) was repealed.

108. In Empire Industries Limited and Others Vs. Union of India and Others, after noticing that the petitioners have already paid excise duty demanded from them from time to time and they have also gathered duties from consumers, upheld the amendment levying excise duty retrospectively. The Supreme Court observed in paragraphs 49 and 50 as follows:

49. Imposition of tax by legislation makes the subjects pay taxes. It is well recognised that tax may be imposed retrospectively. It is also well settled that that by itself would not be an unreasonable restriction on the right to carry on business. It was urged, however, that unreasonable restrictions would be there because of the retrospectivity. The power of the Parliament to make retrospective legislation including fiscal legislation are well settled. (See Krishnamurthi and Co. etc. Vs. State of Madras, . Such legislation per se is, not unreasonable. There is no particular feature of this legislation which can be said to create any unreasonable restriction upon the petitioners.

50. In the view we have taken of the expression ''manufacture'', the concept of process being embodied in certain situation in the idea of manufacture, the impugned legislation is only making ''small repairs'' and that is a, permissible mode of legislation. In 73rd Volume of Harward Law Review p. 692 at p. 795, it has been stated as follows:

It is necessary that the legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called ''small repairs''. Moreover, the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the legislature''s or administrator''s action had the effect it was intended to and could have had, no such right would have arisen. Thus, the interest in the retroactive curing of such a defect in the administration of government outweighs the individual''s interest in benefiting from the defect. The Court has been extremely reluctant to override the legislative judgment as to the necessity for retrospective taxation, not only because of the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of government among those who benefit from it. 109. In M/s Ujagar Prints v. Union of India 1989 (3) SCC 488 following Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others, the Supreme Court held in para 65 and 66 as follows:

65. There is really no substance in the grievance that the retroactivity imparted to the amendments is violative of Article 19(l)(g). A competent legislature can always validate a law which has been declared by Courts to be invalid, provided the infirmities and vitiating infactors noticed in the declaratory-judgment are removed or cured. Such a validating law can also be made retrospective. If in the light of such validating and curative exercise made by the Legislature -granting legislative competence -the earlier judgment becomes irrelevant and unenforceable, that cannot be called an impermissible legislative overruling of the judicial decision. All that the legislature does is to usher in a valid law with retrospective effect in the light of which earlier judgment becomes irrelevant. (See Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others,

66. Such legislative expedience of validation of laws is of particular significance and utility and is quite often applied, in taxing statutes. It is necessary that the legislature should be able to cure defects in statutes. No individual can acquire a vested right from a defect in a statute and seek a windfall from the legislature''s mistakes. Validity of legislations retroactively curing defects in taxing statutes is well recognised and Courts except under extraordinary circumstances would be, reluctant to override the legislative judgment as to the need for and wisdom of the retrospective legislation. In Empire Industries Limited and Others Vs. Union of India and Others, this Court observed:

...not only because of the paramount governmental interest in obtaining adequate revenues, but also, because taxes are not in the nature of a penalty or a contractual obligation but rather, a means of opportioning the costs of government amongst the who benefit from it''.

In testing whether a retrospective imposition of a tax operates so, harshly as to violate fundamental rights, under Article l9(1) (g) the factors considered relevant include the context in which retroactivity was contemplated such, as whether the law is one of validation of taxing statute struck down by, Courts for certain defects; the period of such retroactivity, and the degree and extent of any unforeseen or unforeseeable financial burden imposed for the past period. etc. Having regard to all the circumstances, of the present case, this Court in Empire Industries'' case held that the retroactivity of the Amending provisions was not such as to incur any infirmity under Article 19(l)(g). We are in respectful agreement with that view.

110. In Welfare Association A.R.P., Maharashtra v. Ranjit P. Gohil JT 2003 (2) SC 335 the Supreme Court again following Shri Prithvi Cotton Mills Ltd. (Supra) held in paragraphs 43, 44, 45 and 46 as follows:

43. In Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others, a legislation by way of Validation Act was passed because of a decision of the Court declaring a certain imposition of tax as invalid. The question arising before the Court was, when a Legislature sets out to validate a tax declared by a Court to be illegally collected under an ineffective or an invalid law, then how is the validity of such Validation Act to be tested? It was held that 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. The Constitution Bench held : Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others, At P. 195, Para 4 of Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others,

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 re-enacted law. Sometimes the

Legislature gives its own meaning and interpretation of the law under which 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)

44. 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.

45. In Indian Aluminium Co. etc. etc. Vs. State of Kerala and others, 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 this Court. This 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 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 Indian Aluminium Co. etc. etc. Vs. State of Kerala and others,

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

(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.

(Emphasis supplied)

46. In State of Tamil Nadu Vs. M/s. Arooran Sugars Ltd., the Constitution Bench made an exhaustive review of all the available decisions on the point and summed up the law by holding :- State of Tamil Nadu Vs. M/s. Arooran Sugars Ltd.,

It is open to the Legislature to remove the defect pointed out by the Court or to amend the definition or any other provision of the Act in question retrospectively. In this process it cannot be said that there has been an encroachment by the Legislature over the power of the judiciary. A Court''s directive must always bind unless the conditions on which it is based are so fundamentally altered that under altered circumstances such decisions could not have been given. This will include removal of the defect in a statute pointed out in the judgment in question, as well as alteration or substitution of provisions of the enactment on which such judgment is based, with retrospective effect.

111. In Widia (India) Ltd. v. State of Karnataka AIR 2003 SC 3094 the Supreme Court held that if the levy is not discriminatory, no consent is required for the validating act for giving retrospectivity of the validity to the levy.

On the aforesaid principles settled by the Supreme Court, we do not find that the provisions of Section 17 of the Act validating levy of the entry tax w.e.f. 1.11.1999 suffers from vice of lack of legislative competence or violation of any of the fundamental rights. The tax has already been levied and collected and has been deposited in a separate interest bearing account under the orders of the Supreme Court by the State Government. The amount will be spent for the development of the trade. The challenge to Section 17 retrospectively validating the levy thus fails. We also do not find any substance in the argument of Shri S.P. Gupta that since the U.P. Act of 2000 levying entry tax was unconstitutional, it has to be treated as still borne and any amount collected under an Act, which is constitutionally invalid and still borne cannot be validated. The argument misses the point that the legislature was not incompetent to enact the Act. Entry 52 of List-II of the 7th Schedule, read with Article 246, gives sufficient powers to the State to levy entry tax on goods in local areas. Levy was found to be violative of Article 301 on the grounds that the Act did not facially or patently or otherwise indicate nor it could be demonstrated on facts that the amount of compensatory tax collected would be and was spent quantitatively or measurably on the trades of scheduled goods from which it was collected. The defects in the Act namely that the object and reasons in the charging section provided for the levy to be used for general revenue and the Act not facially or patently indicating that the levy will be spent on the development of the trade, invalidated the levy and not the Legislative Act. The State legislature could have brought an amendment and to validate the levy. Instead it brought a new legislation, which has removed all the defects, pointed out in the levy of entry tax. The State had legislative competence to validate the levy of entry tax retrospectively with effect from the date, when the Ordinance of 1999 was enacted w.e.f. 1.11.1999.

The Local area

112. Entry 52 of List-II of the 7th Schedule is legislative field for levy of tax by the State on the entry of goods into a local area for consumption, use or sale therein. The local areas is defined under Section 2(d) of the Act of 2007 as follows:

(d)''local area'' means the territorial area of,:

(i) a Municipal Corporation under the Uttar Pradesh Municipal Corporation Act,1959;

(ii) a Municipality under the Uttar Pradesh Municipalities Act, 1916;

(iii) a Zila Panchayat or a Kshettra Panchayat under the Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961;

(iv) a Gram Panchayat under the United Provinces Panchayat Raj Act, 1947;

(v) a Cantonment under the Cantonments Act, 1924;

(vi) any Industrial Development Area under the Uttar Pradesh Industrial Area Development Act, 1976;

(vii) an Industrial Township by whatever name called,

(viii) any other local authority by whatever name called under an Act of the Parliament or the State Legislature.

113. Reference order made by learned counsel appearing for the petitioners to the provisions of Article 243(w), 243(x) and 243(y), 243(z) inserted by Constitution (74th) Amendment Act, 1992 (w.e.f. 1.6.1993) in submitting that the Legislature of a State may by law endow the municipalities that such powers and authorities as may be necessary to enable them to function as institution of self-governance; and for devolution of powers and responsibilities upon municipalities subject to such conditions as may be specified therein, for preparation of plans for economic development and social justice and performance of functions and implementation of schemes as may be entrusted to them including those in relation to the matters listed in the 12th Schedule. Article 243(x) gives powers to the municipalities to impose tax. The legislature may by law authorise any municipality to levy, collect and appropriate such tax out of tolls and fees in accordance with such procedure and subject to such limits to assign to a municipality such tax, duties, tolls and fees levied and collected by the State Government for such purpose and subject to such conditions and limits, Finance Commission under Article 243(y) to review the financial position of the municipalities, Article 243(z) provides for audit of accounts of municipalities. The State Government has usurped the powers and the functions entrusted specifically to the municipalities for legal self-governance. It is submitted that the items mentioned in 12th Schedule overlap the items mentioned in Section 14(1) of the Act.

114. It is also submitted that local area as defined in the Act to include municipality corporation, a municipality, a zila panchayat or kshetra panchayat, a gram panchayat, a cantonment, any industrial development area, is different from the industrial township under Section 2(d)(vii). An industrial township is different in class in as much as it does not have an elected body and is not a local authority. It is submitted that industrial township notified by the State Government is a class by itself and cannot be treated as local area. The reference to industrial township for the purposes of levy and collection of entry tax and its expenditure as compensatory tax, is not valid. It is submitted that unless an area is administered by local body, it cannot be classified and treated as local area. Industrial area notified by the State Government such as industrial area for Hindalco, there can be no levy of entry tax. The entry tax being a compensatory tax, the services in the notified industrial area are provided by the industry. The State Development Fund does not provide for any allocation for such industrial area and thus no services could be and are provided in such

industrial areas to justify the levy. Reliance has been placed on Diamond Sugar Mills Ltd. v. State of U.P. AIR 1961 SC 752. In this judgment the Supreme Court held with reference to Section 3 of U.P. Sugarcane Cess Act, 1956 that the proper meaning to be attached to the words ''local area'' in Entry 52 of the State List, when the area is a part of the State imposing the liability, is an area demonstrated by local body like a municipality, a District Board, a Local Board, a Union Board, a Panchayat or the like. The premises of a factory, therefore, is not a local area. As there is no other entry either in the State list or concurrent list in which the impugned liability could fall, it was held that there was no scope from the conclusion that the liability was as the legislative competence of the State legislature.

115. In Widia (India) Ltd. and Others Vs. The State of Karnataka and Others, , the Supreme Court while considering the provisions of the Karnataka Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act of 1979 held:

33. Last contention only requires to be narrated for being rejected, as it cannot be disputed that ''industrial area'' is either within the area of Municipal Corporation, or within the area of municipal limits or panchayat limits. The establishment of industrial area is for limited purpose and Section 3 of the Karnataka Industrial Areas Development Act, 1966 specifically provides that the State Government may by notification declare any area to be an industrial area for the purposes of the said Act. But it is nowhere provided that the said area would cease to be part and parcel of either Municipal Corporation or the area of Municipality or Panchayat. Therefore, the High Court rightly rejected this contention. 116. The notification establishing the industrial area, for a limited purpose, therefore, does not take it out or carve out a separate area for which there may be no Municipal Corporation, Municipality or Panchayat. The entire State is divided into local areas for the purposes of self-governance. We, therefore, do not find substance in the argument of Shri V.K. Upadhyay, Shri Dhruv Agrawal or Shri Manish Goyal that notification declaring an area to be industrial area or the entrustment of the duties to be performed in respect of the items in Schedule-12, will in any way invalidate the levy of entry tax.

117. In M/s Indian Oil Corporation Ltd. and Anr. v. State of U.P. and Ors. 2004 UPTC 170 this Court observed in para 86 to 91 as follows:

86. In this connection we may refer to the decision of Mr. Justice Jackson of the U.S. Supreme Court in H.P. Hood and Sons Inc V Du Mond, 336 US 525 who observed : ''This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in Baldwin v. Seelig 294 US (511), 527, ''what is ultimate is the principal that one State in its dealings with another may not place itself in a position of economic isolation''.

87 In this connection we may refer to the Commerce Clause in Article 1 Section 8(3) of the U.S. Constitution which states:

Congress shall have power... to regulate commerce with foreign nations and amongst the several states. 88. The above provision in the U.S. Constitution is no doubt different from Article 301 of our Constitution but the decisions of the U.S. Supreme Court relating to the commerce clause, have dealt with the evil of economic isolation and protectionism while at the same time recognising that incidental burden on interstate commerce may be unavoidable when the state legislates to safeguard the health and safety of its people.

89. The Australian Constitution contains a provision which is more similar to Article 301 than the Commerce Clause in the U.S. Constitution. Section 92 of the Australian Constitution states.

Trade commerce and intercourse among the states shall be absolutely free. 90. Section 99 states that the Commonwealth ''shall not by any law or regulation of trade, commerce or revenue give preference to one State or any part thereof over other States or any part thereof.'' Thus Section 92 of the Australian Constitution is similar to Article 301 of our Constitution, whereas Section 99 of the Australian Constitution is similar to Article 303(1) of our Constitution.

91. The decisions of the Australian High Court in this connection are hence apposite. They have been referred to in Chapter 5 of the Book ''Australian Federal Constitutional Law'' by Colin Howard and Chapter 9 of the book on Australian Constitutional Law by Fajgenbaum and Hanks.

118. The provision of the U.S. Constitution that gives the Congress exclusive powers over trade activities amongst the state and with foreign countries and Indian tribes is contained in Article 1 Section 8, Clause (3), empowering the Congress ''to regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes''. The term commerce as used in the Constitution means business or commercial exchanges in any and all of its forms between citizens of different states, including purely social communications between citizens of different states by telegraph, telephone, or radio, and the mere passage of persons from one state to another for either business or pleasure. The commerce clause was designed to eliminate an intense rivalry between the groups of those states that had tremendous commercial advantage as a result of their proximity to a major harbor, and those states that were not near a harbor. The disparity was the source of constant economic battles among the states. The exercise by Congress of its regulatory power has increased steadily with the growth and expansion of industry and means of transportation.

119. The Commerce Clause authorizes Congress to regulate commerce in order to ensure that the flow of interstate commerce is free from local restraints imposed by various states. When Congress deems an aspect of interstate commerce to be in need of supervision, it will enact legislation that must have some real and rational relation to the subject of regulation. Congress may

constitutionally provide for the point at which subjects of interstage commerce become subjects of state law and, therefore, state regulation.

120. The U.S. Constitution places some limits on state power, the states enjoy guaranteed rights by virtue of their reserved powers pursuant to the Tenth Amendment. A state has the inherent and reserved right to regulate its domestic commerce. However, that rights must be exercised in a manner that does not interfere with, or place a burden on, interstate commerce, or else Congress may regulate that area of domestic commerce in order to protect interstate commerce from the unreasonable burden. Although a state may not directly regulate, prohibit, or burden interstate or foreign commerce, it may incidentally and indirectly affect it by a bona fide, legitimate, and reasonable exercise of its police powers. The exclusive power of the Congress to regulate foreign and interstate commerce, the presence or absence of congressional action determines whether a state may act in a particular field. The nature of the subject of commerce must be examined in order to decide whether Congress has exclusive control over it. If the subject is national in character and importance, thereby requiring uniform regulation, the power of Congress to regulate it is plenary, or exclusive. The Courts have played role of applying national interest against State interest in any subject.

121. In Southern Pacific Co. v. Arizona 325 U.S. 761, 65 S.Ct. 1515 the U.S. Supreme Court held that an Arizona statute that prohibited railroads within the state from having more than 70 cars in a freight train, or 14 cars in a passenger train, was unconstitutional. The purpose of the legislation, deemed a safety measure, was to minimize accidents by reducing the lengths of trains passing through the State. Practically speaking, however, the statute created an unreasonable burden on interstate commerce, as trains entering and leaving the state had to stop at the borders to break up a 100-car freight train into two trains and to put on additional crews, thus increasing their operating costs. The U.S. Supreme Court held that the means used to achieve safety was unrealistic and that the increase in the number of trains and train operators actually enhanced the likelihood of accidents. It balanced the national interest in the free flow of interstate commerce by a national railway system, against the state interest of a dubious safety measure. it decided that the value

122. In United States v. Lopez, 514 U.S. 549 : 115 S. Ct.1624 : 131 L.Ed.2d 626 (1995) the Supreme Court ruled that the Congress had exceeded its Commerce Clause power in enacting the Gun-Free School Zones Act, 1990, which prohibited the possession of firearms within 1,000 feet of a school. The Court noted that Act was criminal statute that had nothing to do with commerce and that it did not establish any jurisdictional authority to distinguish it from similar State legislations. Because the Statute did not substantially affect interstate commerce, it went beyond the scope of commerce clause. The Court attempted to create a special protection for the States for providing the heightened scrutiny of federal legislation that regulates areas of traditional concern of the states.

123. In United States v. Bishop Processing Co. 287 F. Supp. 624 (D.C. Md.1968) the Federal Court in U.S. decided that moving of air pollution across state lines from Maryland to Delaware constituted interstate commerce that is subject to congressional regulation. The plaintiff, the United States sought an injunction under the federal Clean Air Act (1955) to prevent the operation of the Maryland Bishop Processing Company, a fat rendering plant, until it installed devices to eliminate its emission of noxious odors. The Court overruled plant owners that the Congress was powerless to regulate their business because it was clearly an intrastate activity. Foul-of the operation of a uniform, efficient railway system significantly outweig he d that of a state law that has minimal effect. smelling air pollution adversely affects business conditions, depresses property values, and impedes industrial development. These factors interfere with interstate commerce, thereby bringing the plant within the scope of the provisions of the federal air-pollution law. In U.S. the power of Congress to regulate commerce also extends to contracts that substantially relate to interstate commerce. The Congress may regulate the rights and liabilities of employers and employees, as labour disputes adversely affect the free flow of commerce, it may regulate transportation across state lines. If party of the journey passes through an adjoining state, then the transportation is interstate commerce, as long as the travel across state lines is not done solely to avoid state regulation. For a sale of goods to constitute interstate commerce, interstate transportation must be involved. Once goods have arrived in one state from another state, their local sale is not inter state commerce. The discrimination, if it is more than merely burdensome, interstate commerce, may come within the powers of the U.S. Congress. The statutes, which make reasonable qualifications made by States do not violate commerce clause. A State statute affected interstate commerce is not upheld merely because it applies equally to and does not discriminate between residents and non-residents of the State, as it can otherwise unduly burden interstate commerce. The Interstate Commerce Act of 1987 enacted by the Congress to promote and facilitate commerce by ensuring equitable interaction between carriers and the public provided for creation of the Interstate Commerce Commission, which has jurisdiction and supervision of such carriers and modes of transportation as rail, roads, express delivery companies and heading car companies. The Commission had the power to enforce the statutory requirements with a certificate of public convenience and necessity be obtained.

The Discussion

124. The Indian Oil Corporation brings the entire crude oil from abroad or produced offshore, through bulk tankers or carriers. It has its own infrastructure and offshore unloading SBM facilities in the Gulf of Kutch for unloading tanker vessels carrying crude oil from Bombay High and other offshore fields, and by unloading carriers from Middle East and other regions. The entire crude oil is brought through underground pipeline, which are maintained, supervised and ensured by the Corporation. The argument that the goods namely the crude oil brought to underground pipeline cannot be treated as entry of goods into a

definite local area, is not convincing. A similar question came up for consideration in Kunwar Ram Nath and Others Vs. Municipal Board, Pilibhit, in which the question of payment of octroi on cane delivered at railway site inside the factory premises was in issue. The Supreme Court held that the essential feature of the cesses referred to in Entry No. 49 of List-II are on the entry of goods into a definite local area and the requirement that the goods should enter for the purpose of consumption, use or sale therein. It was observed following the Federal Court judgment in Punjab Flour and General Mills Co. Ltd. Lahore v. The Chief Officer, Corporation of the City of Lahore and the Province of the Punjab, AIR 1947 FC 14, that the manner by which the goods to be subjected to such cesses, may enter is not of any consequence and is no ground for suggesting that entry of goods by earth or air is in less contemplated than their entry by water-ways or road. Hence we are of the opinion that the manner of entry of goods namely by air, road, water ways or underground is not material. What matters for the purposes of the charging section of the Act of 2007, is the entry of goods into a definite local area for purposes of consumption, use or sale therein. This also answers the argument of Shri K.N. Kumar, learned counsel for the Railways that the entry of goods into local area by rail road will not attract the levy of entry tax.

125. Railways is dealer under Section 2(d)(4). It is engaged in commercial activity in bringing goods for its use and consumption into a local area. The railway is thus liable to pay entry tax. In Karya Palak Engineer, C.P.W.D., Bikaner Vs. Rajasthan Taxation Board, Ajmer and Others, the Supreme Court held that the exemption of Union Property from State under Article 285 of Constitution of India, does not extend to exemption from levy of indirect tax. In Sea Customs Act. Re AIR 1963 SC 1760, a nine-Judge Bench of Supreme Court opined by a majority that Article 286 envisaged immunity from direct taxes, and not from indirect taxes such as sales tax. In M/s. N.M. Goel and Co. Vs. Sales Tax Officer, Rajnandgaon and another, another nine Judge Bench affirmed the decision in Sea Customs Act case.

126. The reference to Article 285 of the Constitution of India by Shri K.N. Kumar, learned counsel for the railway, thus is made to be rejected as it applies to the property of Union and not to the notified goods brought into a local area by railways for its consumption, attracting entry tax under the Act of 2007. Similarly we find that the reference to Sections 184 and 185 of the Indian Railways Act is also not of help in challenging the levy of entry tax as these sections have no application to entry tax levied by the State Government on the entry of goods into local area under the Act made with reference to Entry 52 in List-II of the 7th Schedule.

127. We may make reference here to the objections taken by Shri S.P. Kesarwani appearing for the State of U.P that tobacco being res extra commercium, the argument that imposition of entry tax under the Act of 2007 violates 301 is not available to ITC as manufacturer of tobacco. In Godawat Pan Masala Products

I.P. Ltd. and Another Vs. Union of India (UOI) and Others, while dealing with challenge to the validity of the notifications issued by the Food (Health) Authority under Section 7(4) of the Prevention of Food Adulteration Act, 1954, banning the manufacturing of sale, search and distribution of Pan Masala and Gutkha, it was held by the Supreme Court in paragraph 53 that the gamut of legislation enacted in India, which deals with tobacco does not suggest that the Parliament has ever treated the substance ''pan'' in the impugned notification as an article res extra commercium, nor has the Parliament attempted to ban its use absolutely. The States have not banned chewing tobacco or other tobacco products, which contained almost 100% tobacco. The tariff schedule of central sales tax contains several entries, which deal with tobacco and ''pan masala''. In the face of these legislative measures seeking to levy restrictions and control the manufacture and sale of tobacco and its allied products as well as ''pan masala'', it is not possible to accept that the article itself has been treated as ''res extra commercium''. Whether an article is to be prohibited as ''res extra commercium'', is a matter of legislative policy, and must arise out of an Act of legislature and not by a mere notification issued by an executive authority. 113A Section 4 of the Act of 2007 provides for levy of entry tax for the purpose of development of trade, commerce and industry in the State to be collected on entry of goods specified in the schedule into a local area for consumption, use or sale thereof from any place outside that local area at such rate not exceeding 5% of the value of the goods as specified by the State Government. The tax is provided to be continued to be levied under sub-section (2) till such time as it is required to improve infrastructure within the State such as power, road, market condition etc. with a view to facilitate better market conditions for trade, commerce and industry. Section 14(1) of the Act provides for the proceeds of the levy to be appropriated to the funds namely, the U.P. Trade Development Fund under sub-section (2), and shall be utilised exclusively for development of facilitating the trade, commerce and industry to include the activities specified in sub-section (a) to sub-section (g). The entire entry tax collected has to be spent on development or facilitating trade or commerce of the goods mentioned in the Schedule of the Act. Section 14(2) read with the U.P. Tax on Entry of Goods into Local Areas (Fund) Rules, 2007, provides for utilisation of money of the fund and the manner of utilisation of the fund to be determined by the Committee constituted under Rule 4 to be known as the U.P. Trade Development Fund Management Committee headed by the Chief Secretary, Government of India with the provisions under Rule 5, of the accounts of the fund to be maintained by the Accountant General, UP and the Finance Department under sub-rule (4); the surrender of the amount with intimation to Accountant General-I (Lekha Hakdari), if the amount is not spent by the end of the financial year under sub-rule (5); the receipts and expenditure to be ledgerised by the Accountant General, UP under sub-rule (6), and the audit of the accounts of the fund to be made by the Accountant General (Lekha Parikshak) UP. Sub-rule (7) ensures that the funds shall not be utilised for the purposes other than specified exclusively for the development or facilitating the trade, commerce and industry in the State of UP.

128. The statement of objects and reasons, the manner and method levy and collection of the entry tax, and its utilisation exclusively for development for facilitating the trade, commerce and industry in the State of UP; the credit of the entire entry tax levied and collected to the UP Trade Development Fund, the manner of utilisation of the UP Trade Development Fund Management Committee under Rule 4 of the Rules of 2007, the maintenance of the accounts and its audit by the Accountant General, UP, facially and patently satisfies the tests of the entry tax laid down in Jindal Stainless Limited (2). In our opinion the defects, pointed out by this Court in IOC v. State of UP decided by this Court on 27.1.2004 declaring the Act of 2000 to be violative of Article 301 and 304 of the Constitution of India have been fully cured. The new Act of 2007 has not been enacted as a Validating Act. It is a new legislation, which does not allow the collections of entry tax to augment the general revenue of the State. It provides for, ensures and guarantees the utilisation of entire entry tax levied and collected for facilitating the trade and commerce.

129. The old Act of 2000 and the new Act of 2007 were not introduced or moved in the legislature of the State of UP with the previous sanction of the President. The Act of 2007, therefore, has to stand the test of levying a tax on entry of goods in the State, to be compensatory tax for saving it from the mandate of Article 301, envisaging economic unity of the nation. The levy of entry tax under the new Act also must stand the test of the scheme of Part XIII of the Constitution of India, under Article 301 to 304 inasmuch as even if the bill was introduced in the legislature with the previous sanction of the President, the restrictions imposed by the impugned Act have to be non-discriminatory, reasonable and in public interest.

130. The petitioners in this batch of writ petitions have not challenged the levy of entry tax on the grounds that it is discriminatory, unreasonable or against the public interest. The challenge is confined to the tests laid down for a compensatory tax in the Jindal Stainless Limited (2) vs. State of Haryana namely that the Act of 2007 does not patently or facially indicate that the collection shall be utilised for the benefit of trade or commerce and further that the levy of entry tax is not based on the recompense/reimbursement, as the measurable/ quantifiable benefits are not provided to be given to the payers.

131. As observed by us, the objects and reasons and the provisions of the Act of 2007 clearly provide that the entire collection of the entry tax has to be credited to the U.P. Trade Development Fund, to be used exclusively for facilitating trade, commerce and industry and that the amount realised shall not be used for the purposes other than those specified in sub-section (1) of Section 14 of the Act. The distribution of entry tax so collected and credited to the UP Trade Development Fund by the UP Trade Development Fund Management Committee, to the local bodies and its expenditure through the local bodies is also not seriously in dispute. The argument, that the funds should be utilised only for the purpose of the benefits, which must directly be given to the trades of the

scheduled goods on the entry of which in the local areas, the entry tax is collected, does not carry much weight. The tests of a valid compensatory tax as laid down in Jindal Stainless Limited (2) do not provide for any such strict conditions of utilisation. In paragraph-43 in Jindal Stainless Limited (2) the Constitution Bench of Supreme Court observed that in the context of Article 301 compensatory tax is a compulsory contribution levied broadly in proportion to the special benefits derived to defray the costs of regulation or to meet the outlay incurred for some special advantage to trade, commerce and intercourse. It may incidentally bring in net revenue to the Government but that circumstance is not an essential ingredient of compensatory tax. Further, the Supreme Court observed in paragraph-49 that the concept of compensatory taxes was propounded in the case of Automobile Transport in which the compensatory taxes were equated with regulatory tax. In that case a working test for deciding, whether the tax is compensatory or not, was laid down. In that judgment, it was observed that one has to enquire, whether the trade as a class is having the use of certain facilities for the better conduct of the trade/business. This working test remains unaltered even today. It was thereafter observed in paragraph-50 that some connection test as propounded in Bhagatram Rajeev Kumar''s case is not applicable to the concept of compensatory tax. The Constitution Bench concluded that the doctrine of direct and immediate effect of the impugned law on trade and commerce under Section 301 as propounded in Atiabari Tea Company Limited and the working test enunciated in Automobile Transport (Raj.) Limited will continue to apply and the test of some connection indicated in Bhagatram Rajeev Kumar and Bihar Chamber of Commerce is not good law.

132. In the present case we find that the provisions of the new Act of 2007, patently and facially indicate the benefit of the entry tax to the trade and commerce, which is quantifiable and measurable. The entire amount of entry tax collected and credited to the UP Trade Development Fund has to be utilised exclusively for facilitating the trade, commerce and industry, and is not to be used for the purpose other than those specified in sub-section (1) of Section 14. There are sufficient provisions in the Act and the Rules to ensure the utilisation of the amount for the benefit of trade and commerce.

133. There are no averments or any allegation made by the petitioners that the amount collected as entry tax has not been allocated by the U.P. Trade Development Fund Management Committee for the development of trade and commerce and that the money has been diverted or has been used for a purpose other than such development of trade and commerce. No material has been placed by the petitioners to contradict the factual and legal position under the Act nor there is any tangible material to demonstrate that the entry tax causes any discrimination, is unreasonable or is against public interest.

134. The levy and collection of entry tax in the State of UP under the old Act of 2000 was successfully challenged by the companies manufacturing and trading in scheduled goods. The Act was declared as ultra vires to Articles 301 and 304 of

Constitution by Division Bench of this Court by judgment dated 27.1.2004. While staying the operation of the judgment the Supreme Court directed that subject to appellants depositing all taxes that may be realised by the appellant from the respondents after 27.1.2004 in a separate interest bearing account, the amount and the interest accrued will be held subject to further orders of the Court. On remand a Division Bench of this Court, despite the data produced by the State of expenditure of the amount of entry tax by its distribution to the local bodies in paragraph-9 of the judgment in the tables, held that there was not an iota of evidence/material on record to give required data/statistics to establish that the amount collected as tax and its expenditure on providing additional/special advantages/facility provided to trade in particular mentioned under the Schedule of the Act. It was held that in the absence of such a data it was not possible for the Court to hold that the entry tax is a compensatory tax. We may observe here that on the concessions of learned Advocate General recorded in paragraph-25 that bridges and roads are general facilities to all and sundry and not for scheduled traders, the Court presumed that the expenditure to the trade in particular was not by way of justifying the compensatory tax. The Court further presumed that the expenses made by the local bodies are not the expenses for providing additional/specific advantage/facility provided to trades in particular mentioned under the Schedule of the Act. The enquiry of the Court was not to find out whether the amount has been spent on the facility provided to trade or commerce but whether the facility provided was to trades in particular mentioned under the Schedule of the Act, with reference to the amounts collected under the Act of 2000. The order, in pursuance of the directions of the Supreme Court on remand, was made on 8.1.2007, whereas the UP Ordinance No. 35 of 2007 was promulgated by the Governor of UP on 24.9.2007, and the UP Act No. 30 of 2007 replaced the Ordinance on 04.3.2008. The findings given by the Division Bench in pursuance to the order of remand in relation to the old Act are still under consideration in the pending Special Leave to Appeals in the Supreme Court.

135. A large number of writ petitions, which are connected to this batch of writ petitions, were filed challenging the Act of 2007. In almost all the writ petitions, which are pending challenging the old Act or were filed after the UP Ordinance No. 35 of 2007, came into force and which was later converted into Act, interim orders have been passed. Almost all the petitioners are enjoying the protection of interim orders on the strength of the judgment by which the old Act of 2000 was declared ultra vires and on the basis of the findings recorded by the Division Bench on remand under the old Act of 2000. In the circumstances the State Government could not effectively collect the entry tax on the entry of scheduled goods.

136. In the counter affidavits filed in Writ Petition Nos. 1484 of 2007 I.T.C. Limited vs. State of UP and others and Writ Petition No. 1284 of 2008 (Gail (India) Pvt. Limited vs. State of UP and Others the year-wise amount collected as entry tax from 1999 to 2000, to January 2004 is given in paragraph 25 and the amount of interest deposited by the State Government of the amount of entry

tax collected upto September, 2007 has been given in the charts. From these deposits and interest, held by the State Government in pursuance to the interim orders passed by the Supreme Court and the stay of realisation entry tax in almost all the writ petitions, the insistence of burden of proof of expenditure of the amount is totally uncalled for. The State has to first collect the entry tax, only then it can prove the utilisation and the expenditure on trade and commerce to justify the levy as compensatory tax. The argument of proof of expenditure on trades is like putting the cart before the horse. We, therefore, do not find that in this batch of writ petitions the State could have shown by way of discharging its burden, the proof of expenditure of the entry tax collected to justify the tax as compensatory tax. The provisions in the Act of 2007, and the guarantees given by legislation, is sufficient, at this stage for the utilization of the amount, to satisfy the test of the tax being compensatory tax.

137. The judgments given by the High Courts of the States of Gujarat, Orissa, Madhya Pradesh, Gauhati High Court (at Itanagar), Andhra Pradesh and Chattisgarh have upheld the entry tax. The High Court of the State of Bihar has upheld the retrospective levy of entry tax before the Validation and Amendment Act was passed. The High Court of the States of Jharkhand, Kerela, Karnataka, Tamilnadu, Punjab and Haryana, Rajasthan, West Bengal and Uttranchal High Courts have declared the entry fee in their States as ultra vires Article 301 and not saved by Article 304 of the Constitution of India. All the High Courts have tested the legislations in their States levying entry tax on the touch stone of the tests laid down in Jindal Stainless Limited (2), in their respective legislations. We need not distinguish the judgments of the High Courts, which have declared the entry tax levied in their States ultra vires as all the judgments were rendered in the context of the statutory provision of the Acts in their States. It is sufficient to state that in U.P. the Act of 2007, satisfies these tests.

138. When the constitutional validity of any legislation of the State levying compensatory tax, as violative of Article 301, is under challenge, the imposition of such tax has to be examined, with reference to the entire scheme of Part XIII of the Constitution of India. The tax is compensatory, to save it from the vice of violating Article 301, not only if it is by way of recompense/ reimbursement to the trades, it is also required to be tested on the touchstone of Article 304 (a) and (b), namely that it is not discriminatory, unreasonable and is enacted for public purpose. The expression compensatory tax is not to be examined in a narrow sense of giving substantial or one to one benefit to the tax payer.

139. The tax to be violative of Article 301, has to be non-compensatory and also violative of Article 304 (a) and (b), in the sense that even if the levy is imposed by a legislation, introduced with the sanction of the President, it still has to be non-discriminatory, unreasonable and against public purpose.

140. In other words, the tax has to be non-discriminatory, reasonable and levied in public interest even if such legislation was moved with the assent of the President. It is not gainsaid to say, it is valid, if it is compensatory as it provides

measurable and quantifiable benefits to the trade and commerce.

141. In Video Electronics Pvt. Ltd. and Another and Weston Electronics Ltd. and Another Vs. State of Punjab and Another, Justice Sabyasachi Mukherjee, the then Chief Justice speaking for the three Judge Bench, referred to Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another, A. Hazee Abdul Shakoor and Co. v. State of madras, AIR 1964 SC 1729 ; Andhra Sugars Ltd. and Another etc. Vs. State of Andhra Pradesh and Others, and State of Madras v. N.K. Natraja Mudliar, AIR 1969 SC 147 and observing with approval The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, that if a law directly and immediately impose tax for general revenue purposes on the movement of trade, it would be violating the freedom. The Court will have to ascertain whether the impugned law in a given case affects directly the said movement, or indirectly and remotely affects it.

142. The Supreme Court in M/s Video Electronics Pvt. Ltd. (para 20) further observed that the question is how to harmonise the construction of several provisions of the Constitution. If a particular provision being taxing provision or otherwise impedes directly or immediately the free flow of trade within the Union of India, then it will be violative of Article 301 of the Constitution. It is further to be borne in mind that Article 301 enjoins that trade, commerce and intercourse throughout territory of India shall be free. The first question, therefore which one has to examine is whether the sales tax provision (exemption etc.), in these cases directly and immediately restricts free flow of trade and commerce within the meaning of Article 301 of the Constitution of India, read with Article 304. The observations of the Supreme Court in Atiabari?s case as also observation made in Automobile Transport Rajasthan?s case, cannot be read in isolation. The Supreme Court held that Part XIII of the Constitution cannot be read in isolation. It is part and parcel of a single constitutional instrument envisaging a federal scheme and containing general scheme conferring legislative powers in respect of matters relating to List-II of the 7th Schedule of the States. It also confers plenary powers on States to raise revenue for its purpose and does not require that every legislation of the State must obtain assent of the President. The Constitution of India is an organic document. It must be so construed that it leaves and adopts itself to the exigencies of the situation, in a growing and evolving society economically, politically and socially. The meaning of the expressions used there must, therefore, be so interpreted that it attempts to solve the present problem of distribution of power and rights of different States in the Union of India, and anticipate future contingencies that might arise in a developing organism. Constitution must be able to comprehend the present at the relevant time and anticipate the future, which is natural and necessary corollary for a growing and living organism. That must be part of constitutional adjudication. Hence, the economic development of States to bring these into equality with all other States and thereby develop the economic unity of India is one of the major commitment or goals of the constitutional aspirations of this land. For working of an orderly society economic equality of all the States is as

much vital as economic unity. The Supreme Court then held in paras 21, 22 and 28 as follows:

21. The taxes, which do not directly or immediately restrict or interfere with trade, commerce and intercourse throughout the territory of India, would therefore be excluded from the ambit of Article 301 of the Constitution. It has to be borne in mind that sales tax has only an indirect effect on trade and commerce. Reference may be made to the Constitution bench judgment of this Court in Andhra Sugars Ltd. and Another etc. Vs. State of Andhra Pradesh and Others, where this Court observed that normally a tax on sale of goods does not directly impede the free movement of transport. See also the observations in State of Madras Vs. N.K. Nataraja Mudaliar, (supra) it was observed that a tax on sale would not normally offend Article 301. That article made no distinction between movement from one part of State to another part of the same State and movement from one State to another. In this connection, reference may also be made to the observations in The Bengal Immunity Company Limited Vs. The State of Bihar and Others, (supra). Both the preceding cases clearly establish that if a taxing provision in respect of intra-State sale does not offend Article 301, logically it would not affect the freedom of trade in respect of free flow and movement of goods from one part of the country to the other under Article 301 as well.

22. It has to be examined whether difference in rates per se discriminates so as to come within Arts. 301 and 304(a) of the Constitution. It is manifest that free, flow of trade between two States does not necessarily or generally depend upon the rate of tax alone. Many factors including the cost of goods play an important role in the movement of goods from one State to another. Hence the mere fact that there is a difference in the rate of tax on goods locally manufactured and those imported would not amount to hampering of trade between the two States within the meaning of Article 301 of the Constitution. As is manifest, Article 304 is an exception to Article 301 of the Constitution. The need of taking resort to exception will arise only if the tax impugned is hit by Arts. 301 and 303 of the Constitution. If it is not then Article 304 of the Constitution will not come into picture at all. See the observations in State of Madras Vs. N.K. Nataraja Mudaliar, of the report. It has to be borne in mind that there may be differentiations based on consideration of natural or business factors which are more or less in force in different localities. A State might be allowed to impose a higher rate of tax on a commodity either when it is not consumed at all within the State or if it is felt that the burden falling on consumers within the State, will be more than that. and large benefit is derived by the revenue. The imposition.of a rates of sales tax is influenced by various political, economic and social factors. Prevalence of differential rate of tax on sales of the same commodity cannot be regarded in isolation as determinative of the object to discriminate between one State and another. Under the Constitution originally framed revenue from sales tax was reserved for the States.

28. Concept of economic barrier must be adopted in a dynamic sense with changing conditions. What constitutes an economic barrier at one point of time often cease to be so at another point of time. It will be wrong to denude the people of the State of the right to grant exemptions which flow from the plenary powers of legislative heads in list II of the 7th Schedule of the Constitution. In a federal polity, all the States having powers to grant exemption to specified class for limited period, such granting of exemption cannot be held to be contrary to the concept of economic unity. The contents of economic unity by the people of India would necessarily include the power to grant exemption or to reduce the rate of tax in special cases for achieving the industrial development or to provide tax incentives to attain economic equality in growth and development. When all the States have such provisions to exempt or reduce rates the question of economic war between the States inter se or economic disintegration of the country as such does not arise. It is not open to any party to say that this should be done and this should not be done by either one way or the other. It cannot be disputed that it is open to the States to realise tax and thereafter remit the same or pay back to the local manufacturers in the shape of subsidies and that would neither discriminate nor be hit by Article 304(a) of the Constitution. In this case and as in all constitutional adjudications the substance of the matter has to be looked into to find out whether there is any discrimination in violation of the constitutional mandate.

143. Now if the entry tax is not to be violative of Article 301, as it is compensatory tax, the test being recompense to trades, it must also stand the test of non-discrimination, reasonableness and public interest as well. We cannot say that the tax, if it is compensatory and is thus not violative of Article 301, if it discriminatory in the sense as in Article 304(a), and is unreasonable and against public interest as in Article 304(b).

144. Another test, which we visualize is whether such tax adversely affects the trade, commerce and intercourse by way of putting a barrier or obstruction in trade. The freedom of trade, commerce and intercourse is violated if it affects the free movement of trade and commerce between the States and has an impact on the overall economic growth of the nation. Chapter XIII of the Constitution seeks to achieve economic unity and growth of the nation as a whole, by removing artificial barriers. We may not, therefore, look to justify the tax, if it is a barrier and not to judge it only by the manner of its expenditure. If a tax impose a barrier, or is discriminatory, unreasonable, and is not levied in public interest, it cannot be justified on the ground that the amount levied and collected is spent by way of quantifiable and measurable benefits on the trades. In such case the power to levy entry tax, even if it is traced to Entry 52 of List II would be a colourable exercise of legislative power.

145. A question may be asked, that if the entire tax has to be spent on the trades, which has to pay it, then why impose such a tax? Let the tradesmen spent the money in equal measure for improving services and facilities for

themselves. Can it be said that the roads, bridges, embankments, ports or wharfs, lighting, policing, safety measures, controls, communication, environmental control, hill development, and tribal welfare measures, if utilized by general public, whether living in that local area or not, take away or deny such benefits to the trades. Will it not be a narrow approach to justify such tax. In such case we may be looking to the Constitution of India justifying a tax, only for development of trade, commerce and industry dehorse its objects clause (Preamble), fundamental rights, fundamental duties and directive principles of State policy.

146. The Constitution of India is a living, dynamic and organic document. It protects rights and enforces duties on the people living in a democratic, socialist republic and sets out the framework of governance with central object of achieving the freedoms and human development. The powers of the States to legislate, and tax by legislation may not be interpreted to give benefits of such levies to only those trades, who pay such tax, deviating from the very purpose of economic development and constitutional governance. The tax even if it is compensatory cannot be justified, if it is levied for benefit of only those, who pay it. The disbursement of a part of it, without defining its percentage or ratio, for the benefit of general public, will not take away or destroy its character. It will still remain a compensatory tax, which may not be levied to discriminate, or be contributed to general revenue without any specific benefit to trades.

147. We may also observe that unless it is shown by the payers of the tax that the motive of levy is to cause discrimination in trade and commerce, to put a barrier on trade and commerce, or has been levied with an oblique purpose, such as political or to give advantage to a person or class of persons, the tax satisfying the scheme of Part XII of the Constitution of India would be valid.

148. Like all indirect taxes, the entry tax is passed on and is ultimately paid by the consumer. The amendments to the U.P. Act of 2007, allowing the tax to be passed on to the consumer and giving credit of such tax in the levy of the sales tax, the ultimate payer is the consumer. The consumers of the goods, or goods manufactured from such scheduled goods, when the entry tax is paid on the entry of scheduled goods into a local area in the State, have to bear its burden. It does not stand to reason, that in such a case the entry tax as compensatory tax should be justified only by its expenditure on the tradesmen of the goods brought into local areas. When the consumers of products made of crude oil, natural gas, tobacco, cement, coal, machinery goods, etc. (scheduled goods) have to pay the price of these goods, in the cost of which the entry tax is included, why the services or facility, be concentrated and provided under the Act or otherwise, to the trades or the prayers of such tax. If the imposition of entry tax does not act as barrier of trade, and is not discriminatory, unreasonable or against public interest, the share in the utilization, of the amount so collected by the people of the State living in these local areas as ultimate payer of the entry tax would not make the tax violative of Article 301.

149. We are further of the opinion that every manufacturing facilities or trade on large scale, such as ITC, Indian Oil Corporation, Hindalco etc. puts a tremendous strain on the infrastructure of the State. The opportunities of development increase, with corresponding increase on the demand by the people involved and benefited from these activities, on local bodies. The persons living in the industrial areas and those associated with the local areas of which such industrial areas are the part, needs infrastructural services such as roads, bridges, water, electricity, schools, hospitals and police stations etc. The utilization of the fund, to which the amount of entry tax is to be credited, for providing these facilities and services in local areas in the State should be treated as facilities and services to the payers of the entry tax. Mr. Manish Goyal is not wrong when he submits that all the development conceived in Section 14 of the Act of 2007 is to be provided by local bodies, under Article 243W of the Constitution of India in implementation of the schemes in the 12th Schedule. He, however, does not appreciate that the development of these schemes require funds. The implementation of these schemes have not been taken away from the local bodies. The U.P. State Development Fund constituted under sub-section (2) of Section 14 in which entire collection of entry tax is credited, will be spent in these local areas, through the local bodies, to be spent by them for development of trade and commerce. The Act of 2007 and the Rules of 2009 provide for sufficient guidelines for utilisation of such fund by and through the local bodies.

Conclusion

150. For the reasons given as above, we hold that the State of U.P. did not lack legislative competence in enacting U.P. Tax on Entry of Goods into Local Areas Act, 2007, imposing entry tax on the entry of scheduled goods into the local areas for consumption, use or sale thereunder. The provisions of the Act patently and facially indicate and that there are sufficient guidelines and guarantees under the Act for ensuring that the entire amount of entry tax collected and credited to the U.P. State Development Fund is utilised only for the purposes of its reimbursement to facilitate the trade, commerce and industry. The State Government has also established that the entire amount of entry tax is by way of reimbursement / recompense to the trade, commerce and industry, in the local areas of the State of U.P. provides quantifiable/ measurable benefits to its payers. The levy under the Act, 2007 is also not discriminatory, unreasonable or against public interest. The levy of entry tax under the Act, therefore, does not violate the freedom of trade, commerce and intercourse guaranteed under Article 301 of the Constitution of India. Section 17 of the Act validating the amount of entry tax levied, assessed, realized and collected under the U.P. Tax on Entry of Goods Act, 2000, is also valid and authorises the State to keep the entire amount, for the purposes of its utilisation for facilitating trade, commerce and intercourse in the local areas of the State.

151. We may observe by way of clarification that in these writ petitions we have confined our enquiry to the constitutional validity of the U.P. Tax on Entry of

Goods into Local Areas Act, 2007, and whether the entry tax is compensatory in nature, which does not violate the freedom of trade, commerce and intercourse under Article 301 of the Constitution of India. We have not examined the other issues namely the validity of the notices, assessments, rebates, exemption and the liability of the traders, and manufacturers of the scheduled goods to pay entry tax. All other questions, will remain open to be considered by the competent authorities under the Act in accordance with law.

152. All the writ petitions are consequently dismissed. The interim orders are discharged.

