

**(2009) 11 KL CK 0053**

**In the High Court Of Kerala**

**Case No :** W.A. No. 566 of 2007 and WP (C) No's. 7956, 11093, 11332, 19838, 20024, 21015, 21238, 21249, 21517, 21521, 21577, 23895, 24403, 24673, 26097, 26726, 30027 and 37667 of 2007, 1338, 4115, 6378, 10841, 11391, 11812, 13327 and 25494 of 2008 and 22962 and 234

K.M. Jose

APPELLANT

Vs

Assistant Commissioner (Assessment), Value Added Tax and Others

RESPONDENT

**Date of Decision :** 23-11-2009

**Acts Referred:**

Central Sales Tax Act, 1956 — Section 14, 15  
Constitution of India, 1950 — Article 14, 19(1), 199, 200, 207  
Kerala Value Added Tax Act, 2003 — Section 2, 2(43), 3(1), 30, 6

**Citation :** (2010) 30 VST 68

**Hon'ble Judges :** P.R. Raman, J; P.R. Ramachandra Menon, J

**Bench :** Division Bench

**Advocate :** Kurian George Kannanthanam, K.N. Sree Kumar, N.N. Sugunapalan, M.M. Abdul Aziz, A.M. Shaffique, Dale P. Kurien, A. Kumar, S. Anil Kumar, Hariharan Nair, E.K. Nandakumar, A.K. Jayasankar Nambiar, K. John Mathai, P. Benny Thomas, Anil D. Nair, V.P. Sukumar, P.U. Mathen, K.S. Hariharan, Vijayan K.U., Jagan George, Babu Karukapadath, K.N. Sree Kumaran, S. Sujin, K.G. Anil Babu, T. Saji, Manzoor Ali K.A., Babu Joseph Kuruvathazha and K.I. Sageer Ibrahim, for the Appellant; T.T. Muhamood, N.N. Sugunapalan, T.N. Girija, SC, EPF Organisation, Vinod Chandran and P.P. Thajudeen, SC, KSEB, for the Respondent

**Final Decision :** Allowed

## Judgement

P.R. Raman, J.—The challenge made in this batch of writ petitions/writ appeal is against the amendment brought about to Section 6(1)(f) of the Kerala Value Added Tax Act, 2003 as amended by the Kerala Finance Act, 2006 (Act 22 of 2006). Though the amended Act was passed and assent of the Governor was obtained on October 24, 2006, it was given retrospective effect from July 1, 2006. As per Section 6(1)(f) of the Act thus amended, the rate of tax in the case

of transfer of goods involved in the execution of works contract, where the transfer is not in the form of goods, but in some other form, is increased to 12.5 per cent as against four per cent as it stood prior to the amendment. Prior to the amendment, where the goods incorporated in the works contract are separately ascertainable, the tax was levied at the rates applicable to the goods and where the goods incorporated in the works contract are not separately ascertainable, at the rate of 12.5 per cent at all points of sale. Though the grounds urged in these writ petitions are similar except one or two additional grounds are raised in some writ petitions. Since the grounds urged are all against the provision as amended, all these matters were taken together and heard.

2. W.A. No. 566 of 2007 arises out of the judgment of the learned single judge in W.P.(C) No. 4568 of 2007, where also the petitioner challenged mainly the retrospectivity given to the provision. The learned single judge dismissed the writ petition on the basis of the submission made by the learned Government Pleader that the Bills proposing to amend the various fiscal statutes were presented in the form of Finance Bill on July 1, 2006, wherein it was provided that the tax proposals contained therein will have effect from July 1, 2006 and though the Act was enforced only on October 24, 2006 everyone knew that the revised proposals will have effect from July 1, 2006 in view of the specific Clause contained in the Finance Bill. It was observed that it is well-settled that the Finance Act, though passed later, can be given effect from the date of presentation of the Finance Bill, containing the proposals for taxation. We find the dismissal of the writ petition on the aforesaid grounds is based on a mistake of fact and it is fairly submitted by the Special Government Pleader (Taxes) appearing on behalf of the State that the facts so stated on the basis of which the writ petition was dismissed were mistake. It is conceded that there was no proposal as stated earlier and it is only after the Finance Bill was referred to the Special Committee and after discussion, some recommendations were made and finally, the Act was passed incorporating the provision under challenge with retrospective effect. So however, he justified the amendment with retrospective effect, to which we will refer to later. Since the basis on which the writ petition was disposed of having arisen out of a mistaken fact, necessarily we will have to consider the contentions raised in the said writ petition on its merits.

3. The main prayer in the writ petition is to declare Section 6(1)(f) of the KVAT Act as unconstitutional in so far as it imposes levy of tax at 12.5 per cent in the execution of works contract and transfer is not in the form of goods though goods are not separately assessable and for further consequential reliefs.

4. In W.P.(C) No. 30027 of 2007 there is a further prayer to declare that Section 6(1)(f) as amended by Act 22 of 2006 is ultra vires and unconstitutional in so far as it permits levy of tax on transfer of value of declared goods involved in the execution of works contracts at a rate more than four per cent. Similar prayer is made in W.P.(C) No. 28436 of 2009 and W.P.(C) No. 4125 of 2008.

5. We have heard the learned Counsel M/s. K.U. Vijayan, V.V. Asokan, Dale P.

Kurien, A. Kumar, Babu Karukapadath, V.P. Sukumar, P. Gopinath and Mayankutty Mather on behalf of the petitioners and the learned Senior Special Government Pleader for Taxes, Sri. Vinod Chandran appearing on behalf of the State.

6. Based on the arguments by both sides, we formulate the following points for consideration.

(i) Whether in the absence of any Bill proposed prior to the passing of the enactment, it contravenes the provisions under Article 207 of the Constitution of India.

(ii) Is the prescription of a uniform rate at 12.5 per cent on works contract irrespective of the various goods incorporated in the same which is assessable at a lower rate bad in law?

(iii) In so far as the amendment has been given retrospective effect, is it violative of Article 19(1)(g) of the Constitution of India?

(iv) Even assuming that the Legislature has got power to legislate it with retrospective effect, will the retrospectivity given in the present case give rise to great hardship and therefore, impose unreasonable restriction on the freedom to carry on trade guaranteed under Article 19(1)(g) of the Constitution?

(v) In respect of the declared goods, in the light of the provisions contained in Sections 14 and 15 of the Central Sales Tax Act read with Article 286 of the Constitution of India, is the levy of tax on such declared goods at 12.5 per cent unconstitutional and illegal?

(vi) Whether sale as simplicitor or in execution of the works contract cannot be subjected to different disciplines and is the classification without any intelligible differentia and discriminatory?

7. Before we consider the arguments advanced on both sides, we may state the brief facts relevant for the disposal of these cases.

8. The Kerala Finance Act, 2006 was passed on October 24, 2006. Among other things, the Act brought about an amendment to Section 6(1)(f) with retrospective effect from July 1, 2006. The effect of the amendment is that in the case of transfer of goods involved in execution of works contract where transfer is not in the form of goods but in some other form, the rate of tax will be at 12.5 per cent and when the transfer is in the form of goods, at the rates prescribed under the respective Schedules. Immediately prior to the amendment, as the provisions stood, in the case of transfer of goods involved in the execution of works contract, where the transfer is not in the form of goods but in some other form, where the goods incorporated in the work are separately ascertainable, at the rates applicable to the goods and (iii) where the goods incorporated in the work are not separately ascertainable, at the rate of 12.5 per cent at all points of sale. The Legislature, by a subsequent amendment, added one more proviso after the eighth proviso which provides that "the tax payable under Clause (f), in

respect of transfer of declared goods not in the form of goods but in some other form, shall be at the rates prescribed under the respective Schedules." This proviso was added by Act 21 of 2008 with effect from April 1, 2008, whereby the contention that even in the case of declared goods, prescription of a uniform rate at 12.5 per cent over the rate as prescribed under the Central Sales Tax Act as illegal was remedied. But this proviso was not given any retrospective effect. Therefore, for the period prior to the insertion of the aforesaid proviso, the contention as advanced still remains to be considered.

9. The appellant in W.A. No. 566 of 2007 is the petitioner in W.P.(C) No. 4568 of 2007. He is a building contractor and is an assessee under the Kerala Value Added Tax Act (VAT Act). He is a contractor undertaking works contract with the Government and non-Government establishments based on agreement between the parties. Exhibits P1 to P4 are produced as copies of model agreements in which such works contracts are executed. According to him, "sale" as defined u/s 2(43) of the Act and the incidence of levy is on sale point generally and going by the definition provision, execution of a works contract will not include an element of sale and it is by virtue of Explanation IV that a transfer of property of goods gets involved in execution of a works contract and is deemed to be a sale. In case of such deemed sales, there may be transfer of property in goods either as goods or in some other form, and the agreement entered into for the execution of the works contract itself could be classified as divisible contracts (where materials supplied can be segregated from the labour), indivisible contracts, labour contract, etc., and according to him, as per the rates prior to the amendment, he has undertaken to execute works contract under the agreement between the parties and he had been submitting returns and paying quarterly tax at such rate as prescribed under the earlier enactments. A modification was made to the VAT Act by an amendment brought about in 2006 with effect from July 1, 2006 as a result of which excessive taxation is made. According to him, the tax which would have been payable, had not the amendment been brought about retrospectively, in the previous quarter would be Rs. 52,058. Now that tax had been increased under the Kerala General Sales Tax Act, the total tax would have been Rs. 1,14,153 whereas now the tax amount under the KVAT Act comes to Rs. 2,63,976, which is two times that of the KGST Act and five times that under the pre-amendment Value Added Tax Act. Therefore, according to him, levy of tax by virtue of the amendment brought about is "confiscatory" and "oppressive" and therefore violative of Article 19(1)(g) of the Constitution of India. He has also challenged the amendment especially, the retrospectivity given, as imposing unreasonable restriction on carrying on his trade or business and also on the ground that it will be too harsh if the amendment is brought about with retrospective effect.

10. The petitioner in W.P. (C) No. 11391 of 2008 is a contractor in electrification works and is a dealer registered under the KVAT Act. He filed returns and paid tax u/s 6(1)(f) at the rates applicable to the goods used in the execution of works contract, separately ascertainable at the rate of four per cent and 12.5 per

cent, respectively and by virtue of the amendment, the tax is imposed at a uniform rate at 12.5 per cent. It is also contended that there is no proposal either in the original or revised Finance Bill for amending Section 6(1)(f) as is now done. A substantive provision which enhances the liability, therefore, according to him, cannot be given retrospective effect. He has produced exhibit PI, a copy of the works order issued to him by one of the awarder, M/s. Pioneer Infrastructures Company (P) Ltd., and it is contended that the rate is inclusive of the tax so that once the contract is executed, if retrospectivity is given by increasing rate of tax, it will cause undue hardship to him. However, on a perusal of exhibit PI, at the outset we may state that one of the conditions under Clause 5 is to the effect that the rates are inclusive of all taxes except KVAT on supply items and service tax on labour which will be extra, as applicable. Therefore, the argument as such cannot be accepted. He then referred to the Schedule attached which also shows that the rates indicated do not include value added tax and service tax and therefore, VAT as applicable on supply items as well as service tax at 12.24 per cent on labour will be extra. Thus going by Clause 5 of exhibit P1 read with the Schedule, it is abundantly made clear that the rate of tax will be as applicable on supply items. It is his contention that the impugned amendment is unconstitutional to the extent of its being repugnant to the Central Act and being violative of the principle laid down in Builders Association of India and Others Vs. Union of India (UOI) and Others, and also the decision in Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, , besides being violative of Articles 14 and 19(1)(g) of the Constitution. It is not necessary to refer to the facts in the other writ petitions and the above facts will be sufficient for the purpose of dealing with the contentions raised by the parties.

11. We may now consider the contention against the amendment made to Section 6(1)(f) to the extent uniform rate of tax at 12.5 per cent is imposed even in the case of declared goods governed by the provisions under the Central Sales Tax Act.

12. As already noticed while stating the facts, the Legislature, by an amendment brought about in 2008, has inserted the ninth proviso to Section 6(1)(f) whereby the declared goods are to be taxed only at the rate prescribed under the respective Schedules. In the case of declared goods the rate provided is only four per cent (as of now). Therefore, the vires if any, attached to the application of a uniform rate even in the case of declared goods have been cured by such amendment but only prospectively.

13. In Builders Association's case [1989] 73 STC 370 the apex court considered the relevant provisions in the Constitution namely, Clause (29A) of Article 366 and Clause (3) of Article 286 and held as follows (at page 397):

...Similarly, Clause (3) of Article 286 is also applicable to a tax on a transfer of property referred to in Sub-clause (b) of Clause (29A) of Article 366. Clause (3) of Article 286 consists of two parts. Sub-clause (a) of Clause (3) of Article 286 deals with a tax on the sale or purchase of goods declared by Parliament by law

to be of special importance in inter-State trade or commerce, which is generally applicable to all sales including the transfer, supply or delivery of goods which are deemed to be sales under Clause (29A) of Article 366 of the Constitution. If any declared goods which are referred to in Section 14 of the Central Sales Tax Act, 1956 are involved in such transfer, supply or delivery, which is referred to in Clause (29A) of Article 366, the sales tax law of a State which provides for levy of sales tax thereon will have to comply with the restrictions mentioned in Section 15 of the Central Sales Tax Act, 1956. Clause (b) is an additional provision which empowers Parliament to impose any additional restrictions or conditions in regard to the levy of sales tax on transactions which will be deemed to be sales under Sub-clause (b) or Sub-clause (c) or Sub-clause (d) of Clause (29A) of Article 366 of the Constitution....

14. Though the State had urged a contention that since Sub-clause (b) of Clause (3) of Article 286 of the Constitution refers only to the transactions referred to in Sub-clauses (b), (c) and (d) of Clause (29A) of Article 366, the transactions referred to under those three Sub-clauses would not be subject to any other restrictions set out in Clause (1) or Clause (2) or Sub-clause (a) of Clause (3) of Article 286 of the Constitution. But the apex court held that there is no substance in the said contention. Merely because by virtue of Sub-clause (b) of Clause (3) of Article 286, it is open to Parliament to impose some other restrictions or conditions which are not generally applicable to all kinds of sales, that however, cannot make the other parts of Article 286 inapplicable to the transactions which are deemed to be sales under Article 366(29A) of the Constitution. The apex court, in unambiguous terms held thus (at page 398 of 73 STC):

...We are of the view that all transfers, deliveries and supplies of goods referred to in Clauses (a) to (f) of Clause (29A) of Article 366 of the Constitution are subject to the restrictions and conditions mentioned in Clause (1), Clause (2) and Sub-clause (a) of Clause (3) of Article 286 of the Constitution and the transfers and deliveries that take place under Sub-clauses (b), (c) and (d) of Clause (29A) of Article 366 of the Constitution are subject to an additional restriction mentioned in Sub-clause (b) of Article 286(3) of the Constitution.

15. The restriction imposed u/s 15 of the Central Sales Tax Act is applicable to all sales tax laws which, inter alia, provides that every sales tax law of a State shall, in so far as it imposes or authorizes the imposition of a tax on the sale or purchase of declared goods, be subject to the restrictions and conditions stipulated under Clauses (a) to (d) thereunder. As per Clause (a) the tax payable under the sales tax law of the State in respect of any sale or purchase of such goods inside the State shall not exceed four per cent (as it now stands) of the sale or purchase price thereof. In so far as the period prior to the insertion of the ninth proviso by the Amendment Act of 2008 as noticed earlier is concerned, it has therefore, to be declared that the provisions contained in Section 6(1)(f) will be read down and the tax applicable in the case of declared goods will only be four per cent and not 12.5 per cent.

16. The next question is whether the amendment made to Section 6(1)(f) prescribing a uniform rate at 12.5 per cent is in any way illegal. In *Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others*, the same question as to whether it is permissible for the State Legislature to levy tax on deemed sales falling within the ambit of Article 366(29A)(b) by prescribing a uniform rate of tax for all goods involved in the execution of a works contract, even though different rate of tax are prescribed for sale of goods, arose for consideration. On behalf of the contractors, it was urged that it will not be permissible to impose two different rates of tax in respect of the sale of the same article, one rate when the article is sold separately and a different rate when there is deemed sale in connection with the execution of a works contract. The State, however, sought to justify the levy of a uniform rate of tax to the goods involved in the execution of a works contract though the rate of tax may be different as may be applicable to those goods when sold separately. The apex court observed that in the field of taxation, going by the various decisions, the Legislature is permitted to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes. After referring to various decisions, the apex court opined that "it would therefore be permissible for the State Legislature to tax all the goods involved in the execution of a works contract at a uniform rate which may be different from the rate applicable to individual goods because the goods which are involved in the execution of the works contract when incorporated in the works can be classified into a separate category for the purpose of imposing the tax and a uniform rate may be prescribed for sale of such goods". In the concluding para of the judgment, it was observed that "while fixing the rate of tax it is permissible to fix a uniform rate of tax for the various goods involved in the execution of a works contract which rate may be different from the rate of tax fixed in respect of sales or purchase of those goods as a separate article."

17. This squarely answers the contentions advanced by the petitioners herein that merely because in the case of goods involved in works contract, the rate of tax if assessed separately may be different, there is no reason to hold that a uniform rate for the works contract cannot be prescribed since the works contract by itself forms a class and irrespective of the rate of tax as may be applicable to the goods incorporated in the works contract, it is permissible for the Legislature to prescribe a uniform rate for the works contract. Therefore, we negative the contention raised by the petitioners in this regard.

18. The next point to be considered is as to whether Section 6(1)(f) as amended is violative of Article 207 of the Constitution of India, so long as the amendment is not contained in the Bill proposed originally.

19. We may refer to Article 207(1) of the Constitution of India as per which a Bill or amendment making provision for any of the matters specified in Sub-clauses (a) to (f) of Clause (1) of Article 199 shall not be introduced or moved except on

the recommendation of the Governor, and a Bill making such provision shall not be introduced in a legislative council provided that no recommendation shall be required under this Clause for the moving of an amendment making provision for the reduction or abolition of any tax. Article 199 of the Constitution deals with definition of "money bills" as per which a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the Clauses enumerated thereunder. The imposition, abolition, remission, alteration or Regulation of any tax is one such matter. Therefore, as per Article 207(1) read with Article 199, there admits no doubt that, any Bill or amendment making provision for imposition of tax shall not be introduced except on the recommendation of the Governor. But as rightly pointed out by the Special Government Pleader, Article 255 is a curative provision and the absence of any recommendation made by the Governor by itself will not invalidate any Act of Parliament or the State Legislature, or any provisions contained in such Act shall be invalid if subsequently assent to the Act was given where the recommendation required was either by Governor or the President. In this case, the Amendment Act has been assented to by the Governor. A Constitution Bench of the honourable Supreme Court in *Jawaharimal Vs. State of Rajasthan and Others*, held thus:

The next question to consider is whether an Act which suffers from the infirmity that it does not comply with the requirements of Article 255, can be validated by subsequent legislation. There are two answers to this question. Article 255 provides, inter alia, that no Act of the Legislature of a State and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to the Act was given by the President later. The position with regard to the laws to which Article 255 applies, therefore, is that if the assent in question is given even after the Act is passed, it serves to cure the infirmity arising from the initial non-compliance with its provisions. In other words, if an Act is passed without obtaining the previous assent of the President, it does not become void by reason of the said infirmity; it may be said to be unenforceable until the assent is secured.... Besides, it is plain that the Legislature may, in a suitable case, adopt the course of passing a subsequent law reintroducing the provisions of the earlier law which had not received the assent of the President, and obtaining his assent thereto as prescribed by the Constitution....

20. The same position has been reiterated in *A.B. Abdul Kadir and Others Vs. State of Kerala*, wherein also similar observation was made that the requirement of the provision regarding sanction of the President has been satisfied. It was held thus:

...It is no doubt true that the assent of the President was given subsequent to the passing of the Bill by the Legislature, but that fact would not affect the validity of the impugned Act in view of the provisions of Article 255 of the Constitution.

21. In *State of Karnataka v. Hansa Corporation* [1980] 4 SCC 697 in paragraph

36, while considering as to whether the proviso to Article 304(b) was satisfied or not, because of the obligation imposed by the proviso to obtain Presidential sanction before introducing the Bill or amendment for the purpose of Clause (b) of Article 304 in the Legislature of a State, it was observed thus:

...It cannot be gainsaid that Presidential sanction was not obtained before introducing the Bill which was ultimately enacted into the impugned Act but after the Bill was enacted into an Act the same was submitted to the President for his assent and it is common ground that the President has accorded his assent. If prior Presidential sanction is a sine qua non, the requirement of the proviso is not satisfied but in this context it would be advantageous to refer to Article 255 which provides that no Act of parliament or of the Legislature of a State and no provision in any such Act shall be invalid by reason only that some recommendation or previous sanction required by the Constitution was not given if assent to that Act was given by the President. Now, in this case it is common ground that the President did accord his sanction to the impugned Act. Therefore, the requirement of the proviso is satisfied.

22. In the light of the discussion as above and in the light of the aforesaid decisions of the apex court and the clear provisions contained under Article 255 of the Constitution of India and when the Governor has assented to the enactment in terms of Article 200 of the Constitution, we find no merit in the contention that merely because prior recommendation or assent was not obtained, there is any infirmity in the Act.

23. The next question to be considered is as to whether there is any merit in the contention that a taxing statute cannot be given retrospective effect. The contention raised on behalf of the petitioners is that sales tax is an indirect tax realisable from the consumer and the idea being that the seller can pass it on to his purchaser and collect it from them and if that is the nature of the sales tax then, it cannot be imposed retrospectively after the sale transaction has been concluded by the passing of title from the seller to the buyer, for it cannot, at that stage, be passed on to the purchaser. When the seller collects the sales tax from the purchaser on the occasion of the sale and once that time goes past, the seller loses the chance of realising it from the purchaser and if it cannot be realised from the purchaser, it cannot be called sales tax. The very same contention was raised and considered by the apex court in *The Tata Iron and Steel Co., Ltd. Vs. The State of Bihar*, and negatived. The apex court held as follows (at page 268 of STC):

From the point of view of the economist and as an economic theory, sales tax may be an indirect tax on the consumers, but legally it need not be so. Under the 1947 Act the primary liability to pay the sales tax, so far as the State is concerned, is on the seller....

24. Though in the earlier enactment, the seller had no authority to collect sales tax, subsequently, the dealer is enabled to collect the sales tax and in the

present case, Section 30 of the VAT Act provides such collection, thus enabling the seller to pass on the tax liability to the consumer. But that circumstance by itself could not prevent the sales tax imposed on the seller to be levied on the sale of goods. Further, the fact that the registered dealer need not, if he so pleases or chooses, collect the tax from the purchaser and sometimes by reason of competition with other registered dealers he may find it profitable to sell his goods and to retain his old customers even at the sacrifice of the sales tax. Therefore, it is not as though the sales tax need be passed on to the purchaser invariably and this will not in any way alter the real nature of the tax which by the express provisions of the law, is cast upon the seller. The liability to pay tax is not passing on to the buyer. Therefore, the contention that merely because the dealer is enabled to collect tax from his customer, it is not a reason to hold that the liability is always on the buyer.

25. In the decision of a Constitution Bench of the apex court in *Rai Ramkrishna and Others Vs. The State of Bihar*, it was held thus (page 179 of ITR):

The other point on which there is no dispute before us is that the legislative power conferred on the appropriate Legislatures to enact law in respect of topics covered by the several entries in the three Lists can be exercised both prospectively and retrospectively. Where the Legislature can make a valid law, it may provide not only for the prospective operation of the material provisions of the said law but it can also provide for the retrospective operation of the said provisions. Similarly, there is no doubt that the legislative power in question includes the subsidiary or the auxiliary power to validate laws which have been found to be invalid....

26. Another Constitution Bench of the apex court in *Jawaharmal Vs. State of Rajasthan and Others*, has held thus:

It is well recognised that the power to legislate includes the power to legislate prospectively as well as retrospectively, and in that behalf tax legislation is no different from any other legislation. If the Legislature decides to levy a tax, it may levy such tax either prospectively or even retrospectively. When retrospective legislation is passed imposing a tax, it may, in conceivable cases, become necessary to consider whether such retrospective taxation is reasonable or not. But apart from this theoretical aspect of the matter, the power to tax can be competently exercised by the Legislature either prospectively or retrospectively!"; and that is precisely what Section 2 has done in the present case. Therefore, there is no substance in the argument that Section 2 of the Act is invalid.

27. That takes us to the next question as to whether in the present case the retrospectivity could in any way be said to be unreasonable or in contravention of any of the fundamental rights guaranteed under Article 19(1)(f) of the Constitution of India. It is contended that in so far as the right to pass on the liability to the consumer as enabled by the provisions contained in Section 30 of

the VAT Act is virtually taken away when the provision is given retrospective effect and therefore, it imposes unreasonable restriction to carry on the trade as guaranteed under Article 19(1)(g) of the Constitution of India. There is nothing to show that the right as such is taken away as contended, to which aspect we will refer to later. The apex court, in paragraph 25 of the very same decision cited above held as follows (at page 772 of 50 ITR):

...We have already stated that the power to make laws involves the power to make them effective prospectively as well as retrospectively, and tax laws are no exception to this rule. So, it would be idle to contend that merely because a taxing statute purports to operate retrospectively, the retrospective operation per se involves contravention of the fundamental right of the citizen taxed under Article 19(1)(f) or (g). It is true that cases may conceivably occur where the court may have to consider the question as to whether excessive retrospective operation prescribed by a taxing statute amounts to the contravention of the citizens' fundamental right; and in dealing with such a question, the court may have to take into account all the relevant and surrounding facts and circumstances in relation to the taxation....

28. Considering the legislative background in that case, the court opined that there is no element of unreasonableness involved in the retrospective operation of Clause (b) of the proviso added by the said Section to Section 3(1) of the principal Act.

29. In *Ujagar Prints v. Union of India* [1989] 74 STC 401 it was held by the apex court as follows (at page 430):

...A competent Legislature can always validate a law which has been declared by courts to be invalid, provided the infirmities and vitiating factors 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....

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 the wisdom of, the retrospective legislation.

In *Empire Industries Limited and Others Vs. Union of India and Others*, , this Court has 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 apportioning the costs of Government among those who benefit from it.

In testing whether a retrospective imposition of a tax operates so harshly as to violate the fundamental rights under Article 19(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 statutes 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 Limited and Others Vs. Union of India and Others*, held that the retroactivity of the amending provisions was not such as to incur any infirmity under Article 19(1)(g)....

30. In *State of Rajasthan v. J.K. Udaipur Udyog Ltd.* [2004] 137 STC 438 the Supreme Court had occasion to consider as to whether availing of exemption scheme already involved prohibits collecting tax from the customers or that they had not collected the sales tax from customers by itself is a ground for holding that there is any unreasonable restriction or undue hardship caused. In that context, it was held as follows (at page 457):

The mere circumstances that the respondent-companies having availed of the exemption scheme were prohibited from collecting the tax from its customers, or that they had not collected the sales tax from their customers (which assertion is strongly disputed by the appellants), is of no consequence. The primary liability to pay the sales tax is on the seller. The seller may or may not be entitled to recover the same from the purchaser. The State Government is entitled to recover the same from the respondent-companies irrespective of the fact that the respondent-companies may have lost the chance of passing on their liability to pay sales tax to their purchasers.

31. In *D.G. Gose and Co. (Agents) Pvt. Ltd. Vs. State of Kerala and Another*, a Constitution Bench of the apex court, held as follows:

13. We may as well put aside the other argument that the Act is unconstitutional as it was passed on April 2, 1975 - but has imposed a tax on buildings with retrospective effect from April 1, 1973.

14. *Craies on Statute Law*, Seventh Edition, has stated the meaning of "retrospective" at page 387 as follows:

A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. But a statute "is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time

antecedent to its passing".

It has however not been shown how it could be said that the Act has taken away or impaired any vested right of the assessee before us which they had acquired under any existing law, or what that vested right was. It may be that there was no liability to building tax until the promulgation of the Act (earlier the ordinances) but mere absence of an earlier taxing statute cannot be said to create a "vested right", under any existing law, that it shall not be levied in future with effect from a date anterior to the passing of the Act. Nor can it be said that by imposing the building tax from an earlier date any new obligation or disability has been attached in respect of any earlier transaction or consideration. The Act is not therefore retrospective in the strictly technical sense.

15. What it does is to impose the building tax from April 1, 1973. But as was held in *Bradford Union v. Wilts* [1868] 3 QB 604 at page 616, if the language of the statute shows that the Legislature thinks it expedient to authorise the making of retrospective rates, it can fix the period as to which the rate may be retrospectively made.

16. This Court had occasion to examine the validity of the retrospective levy of sales tax in *The Tata Iron and Steel Co., Ltd. Vs. The State of Bihar*, and it was held that that was not beyond the legislative competence of the State Legislature.

17. Nor can the choice of April 1, 1973 as the date of imposition of the building tax be assailed as discriminatory with reference to Article 14 of the Constitution. It will be enough for us to refer in this connection to the following passage from this Court's decision in *Union of India (UOI) and Another Vs. Parameswaran Match Works and Others*, which was a case under the Central Excises and Salt Act, 1944,-

The choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line or a point there must be and there is no mathematical or logical way of fixing it precisely, the decision of the Legislature or its delegate must be accepted unless we can say that it is very wide of the reasonable mark. See *Louisville Gas & E. Co. v. Coleman* [1927] 277 US 32 per justice Holmes.

32. In this case, it should be noticed that retrospectivity is given only for a period of three months. The Act amending the provisions u/s 6 got approval of the Governor on October 24, 2006. Therefore, it cannot be said that the period to which retrospectivity is given is too long or unreasonable to hold that it imposes any hardship and that any unreasonable restriction to carry on the trade is imposed. On the part of the State, it is contended that though the proposed amendment was not in the form of a Bill presented earlier, it is however maintained that when the matter was referred to the subject committee, the subject committee after deliberation submitted certain recommendations and it was accordingly, that the amendment was brought out. As already pointed out

earlier, the assent of the Governor having been obtained, there is no infirmity affecting the validity of the enactment in the light of Article 255 of the Constitution of India. So also, the period of three months from July 1, 2006 to October 24, 2006 is not a period to be reckoned with, to say that the retrospectivity has caused much undue hardship or unreasonable restriction. Whenever a legislation is assailed on the ground of imposing unreasonable restriction, it is for the person who assails it as discriminatory to establish that it is not based on a valid classification and the burden is heavier in the field of taxing statute. In this case, going by the averments made in the writ petition and the exhibits produced, it has not been demonstrated to show that the retrospective operation given to the statute, limited to a period of three to four months, has resulted in imposing unreasonable restriction to carry on the trade. Any taxing statute, while imposing a tax or increasing the rate of tax, no doubt, will cause some additional burden. That by itself is no reason to construe the provision as imposing unreasonable restriction.

33. In W.P.(C) No. 11391 of 2008, exhibit P1 produced itself would show that the contract is inclusive of all taxes excluding KVAT. In the case of W.A. No. 566 of 2007, it is stated that the contract is for a period of four years. But the contract as such is not produced. Whether the contract is inclusive or exclusive of the tax itself is a matter which would have been proved by producing a copy thereof. In a contract where the rate agreed upon is exclusive of the tax it has to be further shown that within this three months period right to recover tax from the awarder is lost. When the enactment was passed and got assent of the Governor, in October, 2006, if it was prospectively valid, the retrospectivity could have been urged to be imposing any hardship only if it is further shown that these three months period, was very relevant and credible in the factual situation so as to impose additional burden on the taxpayer. No such attempt is made. In these circumstances, we do not find that the retrospectivity given to Section 6(1)(f) imposing the tax at the rate of 12.5 per cent is imposing any undue hardship to the dealer.

34. In the case of other writ petitions also, we do not find any plea as such is taken up that virtually the right to pass on the tax liability or to recover the same from the buyer is taken away by the amendment. Be that as it may, as we have already stated, the mere fact that a taxpayer could not pass on the liability to the consumer, when the very liability is on the dealer and not on the consumer, is no reason as already held to invalidate a legislation on that ground.

35. As often said, there is "no equity in taxation" and the words which are used in "taxation" are clear. One cannot find out the intention and object of the statute and to find out the hardship which may cause, if this provision is otherwise valid. As observed in the earlier paragraphs of the judgment, being a taxing statute, hardship is no more relevant; but we have considered this aspect only in the background of the plea raised as against retrospectivity.

36. Even though in W.A. No. 566 of 2007 arising from the judgment in W.P.(C)

No. 4568 of 2007, it is contended that the amount of tax liable to be paid after the amendment is "five times" of the tax paid earlier for the quarter April 1, 2006 to June 31, 2006 under the pre-amendment Value Added Tax Act, as we have already stated, the quantum of tax that is imposed by giving retrospective effect, no doubt, may cause an additional burden on the taxpayer. But as already held, there is no equity in taxation and the amount of tax that has to be paid in no way can be said to be an expropriation of property. Further, this is in the realm of a works contract. As already held by the apex court in one of the decisions referred to earlier, it is open to the taxpayer either to bear it himself rather than passing it to the ultimate consumer or it may be a case where still after the amendment it could be revised, provided such claim is raised within the period of limitation and subject to the contract. Unless it is shown that within a period of three years any such claim is raised for such recovery, this contention based on the above fact, will not in any way advance the case of the petitioners to show that any hardship has been caused to them.

37. In such circumstances, we find no merit in the writ appeal and the writ petitions challenging the retrospectivity to the amendment. They are accordingly dismissed.

#### Conclusions

38. In the above facts and circumstances and on the basis of the reasons as given above, we hold that (i) Section 6(1)(f) as introduced by Act 22 of 2006 is well within the legislative competency of the State, (ii) that the retrospective operation given from July 1, 2006 to October 24, 2006 does not impose any unreasonable restriction in the matter of freedom of trade or impose any undue hardship, and (iii) merely because Section 6(1)(f) was introduced without a previous Bill being introduced with the recommendation of the Governor, the infirmity, if any, stands cured once the assent is obtained under Article 200 of the Constitution of India in the light of the specific provision contained in Article 255 of the Constitution, (iv) that in so far as the rate of tax in respect of declared goods in excess of the rate as provided u/s 15 of the Central Sales Tax Act will be unconstitutional, we hold that the ninth proviso added to Section 6(1)(f) being clarificatory in nature and in that context it will be effective from the date on which Section 6(1)(f) was brought into force and thus save the provision from being ultra vires of the Constitution and consequently we declare the rate of tax applicable to declared goods shall always be at the same rate as provided under the CST Act and that (v) prescription of uniform rate of tax in the transfer of goods and execution of works contract where transfer is not in the form of goods but in some other form at the rate of 12.5 per cent and when the transfer is in the form of goods at the rate prescribed for the respective Schedules, is legal and valid.

39. It is contended that retrospectivity to the provision imposing higher rate of tax was stayed by this Court by way of an interim order and therefore, they pray for a direction that no interest be payable if any, on the arrears of tax, due

during that period. It is well-settled that no order of the court shall prejudice the right of either parties. But then for the period between July, 2006 to October, 2006 is concerned, tax is sought to be collected with retrospective effect. In other words, only after the introduction of the provision the tax became due. So we direct that no interest shall be payable for any tax due for the said period. However, whether any waiver of interest or reduction of interest rate should be given for the subsequent period is certainly not a matter to be considered by this Court in these writ petitions. We are not expressing any opinion on the merits of the contention in the individual cases and that is always a matter which the assessee can take up at the time of assessment proceedings before the appropriate authority.

40. Accordingly, in the light of the above, we allow W.P.(C) No. 30027 of 2007 where the only challenge is regarding the imposition of higher rate of tax in respect of the declared goods. W.P.(C) No. 4115 of 2008 and W.P.(C) Nos. 11332 of 2008, 11093 of 2007, 13327 of 2008 and W.P.(C) No. 23436 of 2009 are partly allowed and it is declared that the liability to pay tax on the declared goods is only four per cent.