
(2013) 06 BOM CK 0120

In the Bombay High Court

Case No : Writ Petition No. 313 of 2010 and Civil Application No. 2227 of 2012

M/s. Jindal Poly Films Ltd. and Another

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 10-06-2013

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 41BA, 41BB
Constitution of India, 1950 — Article 14, 19, 19(1)(g), 226
Life Insurance Corporation Act, 1956 — Section 11(2)
Maharashtra Value Added Tax Act, 2002 — Section 2, 8(4), 88, 88(a), 88(c)

Citation : (2014) 2 ALLMR 709 : (2013) 5 BomCR 676 : (2014) 302 ELT 359 :
(2013) 63 VST 67

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : V. Sridharan, Mr. C.B. Thakkar and Mr. M.M. Vaidya in W.Ps. 7925/12, 313/10, 3909/10, 2889/11 and 2990/11 and CAW No. 2227/12, Mr. Haresh Jagtiani, Mr. Anil D'Souza, Mr. Suprash Jain, Ms. Meenu Daryanani instructed by Haresh Jagtiani and Associates in W.P. 8431/09, Mr. M.S. Bhandari instructed by Smt. Pranjali Bhandari in W.P. 10637/09 and CAW 2472/10 and Mr. Aspi Chinoy and Ms. Chandana Salgaonkar, Ms. Aarti Sathe and Mr. Kalpesh Turalkar in W.P. 5821/10, for the Appellant; D.J. Khambata, Advocate General, Mr. V.A. Sonpal and Mr. B.B. Sharma, AGP for the State, for the Respondent

Judgement

D.Y. Chandrachud, J.—The constitutional validity of the Maharashtra Value Added Tax (Levy, Amendment and Validation) Act, 2009 is challenged. The challenge, during the course of the hearing is to the retrospective operation of the amendment and validation which relates back to 1 April 2005 when the principal legislation came into force.

Package schemes of incentive

Since 1964, the Government of Maharashtra had introduced Package Schemes of Incentives to achieve a dispersal of industries outside the Bombay-Thane-Pune belt and to attract industries to underdeveloped and developing areas of the

State. The Package Scheme of Incentives of 1964 was followed by amended schemes in 1969, 1973, 1976, 1979 and 1983. On 30 September 1988, the State Government notified a new package scheme of incentives for the period between 1st October 1988 and 30 September 1993 with a view to rationalize the scope, scale and mode of release of incentives and accelerate the dispersal of industries from the developed areas of the State to underdeveloped regions. The Package Scheme of Incentives of 1988 was succeeded by a scheme which was notified on 7 May 1993.

Scheme of 1988

2. Under the Package Scheme of Incentives of 1988, areas of the State were classified into groups. Group-A comprised of developed areas where no incentives were available; Group-B comprised of areas where some development had already taken place; Group-C of areas which were less developed than those in Group-B; Group-D of the least developed areas not covered by Groups-A, B and C; and "No Industry Districts" notified by the Government of India. Paragraph 2.5 of the Scheme provided that existing/new units in areas covered by Groups-B, C, D or No Industry Districts which created on or after 1st October, 1988 additional fixed capital investment for additional production or manufacturing facilities either for the manufacture of the same product or for diversification were eligible for incentives subject to a minimum stipulated threshold of additional fixed capital investment. The additional fixed capital investment had to exceed twenty five percent of the gross fixed capital investment and in the case of an expansion, the additional fixed capital investment had to result in an increase of the existing installed capacity by at least twenty five percent. Under paragraph 2.15, the expression "sales tax liability" was defined to include sales tax/additional tax/turnover tax payable by the eligible unit on the sale of finished products. Paragraph 5 provided that the sales tax incentive under Part-I of the Scheme could be by way of exemption or by way of deferral which was admissible to a new unit/pioneer unit as also in the case of expansion or diversification of units set up in Groups B, C or D or No Industry Districts. An exemption was available inter alia in respect of sales tax payable under the Bombay Sales Tax Act, 1959 on the sale of finished products of the eligible unit. The quantum of sales tax incentives was provided for in paragraph 5.2 of the Scheme. For eligible units undertaking expansion or diversification, the quantum was linked to a proportion of fixed capital investment and was for a stipulated period.

Scheme of 1993

3. The Package Scheme of Incentives of 1988 was succeeded by a Scheme of 1993 which was notified by a G.R. dated 7 May 1993. The object of the scheme was to achieve a dispersal of industries outside the Bombay-Thane-Pune belt and to attract them to the underdeveloped and developing areas of the State, particularly, regions away from Bombay-Thane-Pune belt. Paragraph 3.8(I)(i)(c) of the Scheme provided as follows:

3.8 Gross Fixed Capital Investment-

(I) Gross Fixed Capital Investment shall mean and include, in the case of-

-(i) New Fixed Assets-The value of new Fixed Assets acquired at site and paid for;

Explanation-

(a) ...

(b) ...

(c) Any acquisition of new Fixed Assets outside the project scheme accepted by the Implementing Agency can be considered for the purposes of proportionate incentives during residual eligible period provided such acquisition is not less than 25% of the Gross Fixed Capital Investment at the end of the previous financial year of the Eligible Unit.

By a G.R. dated 6 July 1994, paragraph 3.8(I)(i)(c) was amended and substituted by deleting the word "proportionate" from the Scheme of 1993. As a result, it was stipulated that an acquisition of new fixed assets outside the project scheme accepted by the implementing agency could be considered for incentives other than special capital incentives if the acquisition was not less than twenty five percent of the gross fixed capital investment. However, for the purposes of sales tax benefits, the quantum of entitlement would be limited to seventy five percent of that admissible to a new unit. Existing units were also entitled to benefits of the clause.

Administrative Circular: the earlier decision of the Sales Tax Tribunal

4. By a circular of 17 January 1998, the Commissioner of Sales Tax stipulated that under the Scheme of 1993, incentives would be given in proportion of the expansion capacity to the total capacity or the investment ratio of new fixed capital investment to the total gross fixed capital investment after the expansion/investment and not on the entire production of an eligible unit covered under such category.

5. The trade circular was challenged before this Court in a batch of Petitions. In the meantime, the Maharashtra Sales Tax Tribunal in a judgment dated 17 March 2001 inter alia in the case of Pee Vee Textiles 1 set aside in appeals by the assessee the conditions imposed by the Deputy Commissioner of Sales Tax in the entitlement certificate restricting the grant of incentives pro rata or on a proportionate basis.

Section 41BB

6. On 27 March 2001, the Budget for 2001-02 introduced the provisions of Section 41BB by proposing an amendment to the Bombay Sales Tax Act, 1959. Section 41BB which was inserted by Maharashtra Act 22 of 2001 provided as follows:

41BB.--Proportionate incentives to an Eligible Unit in certain contingencies.--(1) Notwithstanding anything to the contrary contained in any Package Scheme of Incentives, any Eligible Unit, to whom the Eligibility certificate has been granted, shall be eligible to draw the benefits in the current year or in any year, whether preceding or succeeding the date of commencement of section 12 of the Maharashtra Act 22 of 2001, only on that part of its turnover of sales or purchases as may be arrived at by applying the ratio as may be prescribed by the State Government to the total turnover of sales and purchases of the said unit in that year and different ratios may be prescribed for different classes of dealers and different schemes.

-(2) The benefits availed of by an Eligible Unit in contravention of sub-section (1), if any, shall be and shall be deemed to have been withdrawn and such unit shall be liable to pay tax in respect of the turnover of sales and purchases in excess of the turnover arrived at under sub-section (1) and accordingly any benefit which is withdrawn shall be recovered as arrears of tax as provided in subsection (3).

-(3) For recovery of arrears of tax as provided in sub-section (2), the Commissioner shall require the unit, by order in writing, to pay the tax, interest and penalty on such turnover on which the benefits are not available and serve on the dealer notice of demand accordingly;

Provided that, no order under this section shall be passed without giving the dealer a reasonable opportunity of being heard.

Explanation.-For the purposes of the provisions contained in section 41BA and 41BB the terms "Existing Unit, Eligible Unit, implementing Agency, Eligibility Certificate and Certificate of Entitlement" shall have the same meaning as provided in the relevant Package Scheme of Incentives.

The Statement of Objects and Reasons accompanying the introduction of the Bill stipulated that the Bombay Sales Tax Act, 1959 was being amended "to restrict grant of incentives in proportion to goods manufactured in the expansion units located in the backward areas of the State.

The decision in Pee Vee Textiles

7. Following its decision in Pee Vee Textiles, The Sales Tax Tribunal declined to make a reference to this Court on an application filed before it by the Commissioner of Sales Tax. A Sales Tax Application was thereafter filed u/s 61 of the Bombay Sales Tax Act, 1959 (The Commissioner of Sales Tax vs. Pee Vee Textile Ltd.)². A Division Bench of this Court in a judgment dated 13th October 2008 dealt with the issue as to whether the Deputy Commissioner of Sales Tax was justified in imposing conditions in the entitlement certificate so as to place a ceiling on the utilization of the quantum of incentives proportionately to the total quantity of finished products produced. The Division Bench held that the condition restricting the utilization of incentives in each year proportionate to the

finished products attributable to the fixed assets newly acquired by the existing unit had not been incorporated either in paragraph 3.8 of the Package Scheme of Incentives of 1993 or in the provisions of the Bombay Sales Tax Act, 1959. The Division Bench noted that whereas paragraph 3.8 originally provided for the grant of incentives to a unit acquiring new fixed assets on a proportionate basis, this requirement was deleted with effect from 6 July 1994. Moreover, for the grant of incentives under the Scheme of 1993, an increase in production was not required. The Division Bench dealt with the amendment that was made to the provisions of the Act by the insertion of Section 41BB in 2001, but came to the conclusion that since no rules were framed by the State Government, the Deputy Commissioner was not justified in imposing a ceiling on the utilization of incentives in proportion to production attributable to the newly acquired fixed assets. The Division Bench held as follows:

It is pertinent to note that with a view to impose ceiling on the utilization of incentives by an eligible unit under different schemes, by Finance Act, 2001 section 41BB has been inserted into the BST Act, thereby empowering the State Government to prescribe different ratios for different classes of dealers under different schemes. In the Statement of Objects & Reasons for inserting Section 41BB in the B.S.T. Act, it is clearly stated that the said Section is introduced with a view to restrict grant of incentives in proportion to the goods manufactured in the expansion unit located in the backward areas of the State. However, for the reasons best known to the State Government, till date no Rules have been framed prescribing different ratios for different class of dealers under different schemes. In these circumstances, the argument that the Dy. Commissioner was justified in imposing ceiling on the utilization of the incentives under the 1993 scheme in proportion to the production attributable to the newly acquired fixed assets cannot be accepted.³

MVAT Act, 2002

8. The Maharashtra Value Added Tax Act, 2002 ("the MVAT Act") was enacted by the State Legislature and came into force on 1 April 2005. Section 8(4) empowers the State Government to provide for an exemption from the payment of the whole of tax in respect of any class or classes of sales of goods effected by a unit holding a certificate of entitlement as defined in Section 88 to whom incentives are granted under any Package Scheme of Incentives, by way of exemption from the payment of tax.

9. Chapter XIV of the MVAT Act contains provisions in regard to the Package Scheme of Incentives. Section 88(a) defines the expression "Certificate of Entitlement" as a certificate issued by the Commissioner in respect of sales tax incentives under the relevant Package Scheme of Incentives. The expression "Eligibility Certificate" is defined in Section 88(c) to mean inter alia a certificate granted by SICOM or Director of Industries in respect of sales tax incentives under a Package Scheme of Incentives designed by the State Government. An eligible unit under clause (b) of Section 88 is defined to mean an industrial unit

in respect of which an eligibility certificate is issued. The expression "Package Scheme of Incentives" under clause (e) of Section 88 includes the 1988 and 1993 schemes. Section 89(1) stipulates that where an eligibility certificate has been recommended to an eligible unit by the implementing agency under any Package Scheme of Incentives declared by the State Government, such eligible unit may apply for grant of a certificate of entitlement to the Commissioner. The Commissioner is empowered to grant a certificate of entitlement under sub-section (2) of Section 89 on being satisfied that the unit satisfies the requirements as may be prescribed. Section 90(a) stipulates that a certificate of entitlement would stand cancelled on the date on which: (i) The incentives including the cumulative quantum of benefits availed of exceed the monetary ceiling fixed for the eligible unit; or (ii) The period for which a certificate of entitlement was granted to an eligible unit expires; or (iii) The certificate of registration granted to an eligible unit has been cancelled. Subsection (1) of Section 91 stipulates that where a certificate of entitlement has been granted to a unit under a Package Schemes of Incentives and such unit is entitled to receive benefits for any period which is to end after the appointed day, then notwithstanding anything contained in the scheme, benefits shall be availed of only in accordance with the Act, rules and notifications issued thereunder.

10. Section 93(1) of the Maharashtra Value Added Tax Act, 2002 as it originally stood, read as follows:

93. Proportionate incentives to an Eligible Unit in certain contingencies.--(1) Notwithstanding anything to the contrary contained in any Package Scheme of Incentives, any Eligible Unit to whom the Eligibility Certificate has been granted, shall be eligible to draw the benefits in any year, after the appointed day, only on that part of its turnover of sales or purchases as may be arrived at by applying the ratio as may be prescribed by the State Government to the total turnover of sales and purchases of the said unit in that year and different ratios may be prescribed for different classes of units and different schemes.

The Amending and Validation Act

11. The provisions of Sub-section (1) of Section 93 were substituted by Maharashtra Act 22 of 2009. Section 3 of the Amending Act provides that Sub-section (1) of Section 91, as originally enacted, shall be substituted by sub-sections (1), (1A) and (1B) and shall be deemed always to have been substituted. As amended, sub-sections (1), (1A) and (1B) of Section 93 read as follows:

(1) Notwithstanding anything to the contrary contained in any Package Scheme of Incentives, any Eligible Unit, to whom the Eligibility Certificate and Certificate of Eligibility have been granted at any time before or after the appointed day, on account of increase in the production capacity or, as the case may be, acquisition of new fixed capital assets, shall be entitled to draw the benefits in any year, only on that part of its turnover of sales or purchases as may be arrived at by

applying the provisions of subsection (1A) to the total turnover of sales and purchases of the said unit in that year.

(1A) In case where the Eligible Unit has,-

-(a) maintained separate accounts of sales and purchases and is able to identify the sales and purchases pertaining to the increase in the production capacity or, as the case may be, the said eligible investment, then the portion of the turnover eligible for benefits will be decided solely on the basis of such identification;

-(b) not maintained separate accounts of sales and purchases and is not able to identify the sales and purchases in relation to increase in the production capacity or, as the case may be, the said eligible investment, then such benefits shall be calculated after applying the formulae in sub-clause (i) or, as the case may be, sub-clause (ii) given as under:-

-(i) in case where there is increase in production capacity, then for the Package Scheme of Incentives for 1988 or, as the case may be, Package Scheme of Incentives for 1993, the formulae shall be as below:-

-(ii) in case where there is no increase in production capacity, then for the Package Scheme of Incentives for 1993, the formulae shall be as below:-

(1B) When the eligible turnover comprises of multiple finished products, then,-

-(a) the production capacity of each of the finished products shall be separately considered in determining the corresponding eligible turnover, and

-(b) eligible turnover shall relate to those products on which the eligible investment has made impact and when eligible investment does not add to production capacity, then it shall apply to all the finished products.

Simultaneously, Section 93A has been inserted to provide that Section 93 shall apply to all the Eligible Units, to whom Eligibility Certificates and Certificates of Entitlement have been issued under any of the Package Schemes of Incentives; if such certificates have been issued on or before the appointed day (1 April 2005), then from the appointed day and in any other case, from the date of effect mentioned in such certificates.

12. Section 5 of Amending Act 22 of 2009 contains a validation and savings provision which is as follows:

5. (1) Notwithstanding anything contained in any judgment, decree or order of any Court or Tribunal to the contrary, any assessment, review, levy or collection of tax in respect of sales or purchases effected by any dealer or person, or any action taken or thing done in relation to such assessment, review, levy or collection under the provisions of the Maharashtra Value Added Tax Act, 2002 (hereinafter in this section referred to as "the Value Added Tax Act"), before the date of the commencement to the Maharashtra Value Added Tax (Levy, Amendment and Validation) Act, 2009 (hereinafter referred to as "the said Act"),

shall be deemed to be valid and effective as if such assessment, review, levy or collection or action or thing had been duly made, taken or done under the Value Added Tax Act, as amended by the said Act, and accordingly,-

-(a) all acts, proceedings or things done or taken by the State Government or by any officer of the State Government or by any other authority in connection with the assessment, review, levy or collection of any such tax, shall, for all purposes, be deemed to be, and to have always been done or taken in accordance with law;

-(b) no suit, appeal, application or other proceedings shall lie or be maintained or continued in any Court or before any Tribunal, officer or other authority, for the refund of any tax so paid, and

-(c) no Court, Tribunal, officer or other authority shall enforce any decree or order directing the refund of any such tax.

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

-(a) from questioning in accordance with the provisions of the Value added Tax Act, as amended by the said Act, any assessment, review, levy or collection of tax referred to in subsection (1), or

-(b) from claiming refund of any tax paid by him in excess of the amount due from him by way of tax under the Value Added Tax Act, as amended by the said Act.

-(3) Nothing in the Value Added Tax Act, as amended by the said Act shall render any person liable to be convicted of any offence in respect of anything done or omitted to be done by him, before the commencement of the said Act, if such act or omission was not an offence under the Value Added Tax Act but for the amendments made by the said Act; nor shall any person in respect of such act or omission be subject to a penalty greater than that which could have been imposed on him under the law in force immediately before the commencement of the said Act.

The challenge

The provisions of Amending Act 22 of 2009 have been called into question in this batch of petitions under Article 226 of the Constitution. The challenge during the course of the submissions is to the retrospective operation of the provisions of Sub-sections (1), (1A) and (1B) of Section 93.

13. The following submissions have been urged in support of the Petitions by Mr. V. Sridharan, Learned Senior Counsel:

-(i) Though the legislature has the power to enact legislation both prospectively as well as retrospectively, the reasonableness of retrospective legislation can be scrutinized in the facts of each case;

-(ii) In the present case, what is in issue is not a tax imposed but an incentive

scheme. An unambiguous benefit was available under the Package Scheme of Incentives of 1993 in accordance with the intent of the scheme. In such a situation, it is not open to the State Legislature to withdraw a benefit which has been provided only because a power is available;

-(iii) The legislature can enact validating legislation when there is a manifest intent to levy a tax, but when a legislative enactment has been struck down by the Court. In such a situation, what a validating enactment does is to remove the deficiency or the cause of invalidity. However, a fresh levy of tax or the withdrawal of an exemption, unambiguously granted is never permissible even by way of validating legislation;

-(iv) A validating enactment only legalizes a levy already imposed, but does not impose a fresh tax;

-(v) The state legislature has by enacting Section 93 in its amended form, sought to collect a tax after the Petitioners have taken the benefit of the exemption and passed on the benefit, which is unreasonable.;

-(vi) For the subsequent years, the assessee cannot collect the tax from its customers because the legislation contemplates that it should have been collected earlier;

-(vii) The retrospective amendment to Section 93 does not seek to remove an ambiguity or to correct a cause of invalidity but in essence seeks to impose a fresh levy for the first time which is unreasonable and arbitrary;

-(viii) Under Sub-section (2) of Section 93, the assessee would be liable to pay not only the tax, but also interest and penalty which is manifestly unreasonable.

On these grounds it has been urged that the amending and validating provisions offend Articles 14 and 19(1)g of the Constitution.

14. The following submissions have been urged by Mr. Aspi Chinoy, Learned Senior Counsel:

-(i) A conscious decision was taken by the State Government when the Package Scheme of Incentives of 1993 was amended on 6 July 1994 not to provide for proportionality;

-(ii) This was reiterated when an enabling provision was made in 2001 by enacting Section 41BB of the Bombay Sales Tax Act, 1959. However, the enabling power u/s 41BB was not exercised by the state since no rules were framed;

-(iii) In 2005, a draft rule, Rule 85, was notified, but the draft rule was withdrawn on a representation submitted by the trade as a result of which the decision to exclude proportionality was reiterated;

-(iv) The Sales Tax Department, by means of an administrative decision, sought to impose a norm of proportionality which was struck down by this Court. The decision to exclude proportionality was a conscious decision of the State

Government to encourage incentives in less developed areas and to ensure dispersal of industries;

-(v) The Amending Act of 2009 does not validate something which was done in the past nor does it effectuate an earlier intent of the legislature. Retrospective effect can be given to a curative or validating statute. On the other hand, if a fiscal provision or scheme granted relief to a citizen and the citizen enjoys the benefit of the scheme to which he is legally entitled, the withdrawal of such a benefit validly and unambiguously granted and enjoyed, must necessarily in the absence of supervening circumstances be held to be unreasonable and arbitrary, particularly in a situation such as the present where the consequence is the levy of interest and penalty.

Submissions adopting the arguments have been urged by other learned Counsel, including Mr. Harish Jagtiani, Senior Advocate, Mr. M.S. Bhandari and Mr. C.B. Thakkar, Counsel.

15. On the other hand, it has been urged by the Learned Advocate General that:

(i) Where there is a manifest intention to tax, but as a consequence of a judicial decision, the will of the legislature has not been implemented, a validating legislation can be enacted to cure the deficiency and to do what was always intended;

(ii) There is no vested right in an assessee to receive a windfall benefit and the true test is as to whether as a result of a retrospective enactment, a new tax is being imposed;

(iii) With the introduction of Section 41BB of the Bombay Sales Tax Act, 1959 and Section 93(1) in its original form in the Maharashtra Value Added Tax Act, 2002, the legislative intent to grant proportionate incentives was clear. Section 41BB and Section 93(1) were not enabling provisions or facilitative, but were restrictive in nature;

(iv) The validation of an infirmity is always permissible so long as a legislative provision reflects an intent to tax and does not constitute an imposition of a new levy;

(v) The basis of the judgment of the Division Bench of this Court in Pee Vee Textiles was that the principle of proportionality could not be enforced in the absence of rules. This basis was cured by the amended provisions of Section 93(1) by which proportionality has been mandated and a formula for the computation of proportionate incentives has been provided;

(vi) In view of the settled principle of law laid down in judgments of Constitution Benches of the Supreme Court, the length of time over which an amendment is retrospective does not determine its constitutional validity. Similarly, the fact that the tax cannot be passed on by a dealer is of no consequence to its validity; and

(vii) Section 93(1)(A) provides only a machinery or mechanism for the

computation of proportionate incentives and does not impose a fresh levy. In the circumstances, the test which has been enunciated for striking down an amendment by way of validating legislation, is not met in the facts and circumstances of the present case.

16. The rival submissions now fall for consideration.

Validating legislation and retrospectivity

17. The power to legislate on a subject which falls within the competence of the legislature comprehends within its ambit, the enactment of laws with prospective as well as retrospective effect. Where a law suffers from an infirmity which has been noted in the judgment of a court, it is permissible for the legislature to remedy the defect by curing the defect which has been found by the Court. Legislation of a validating nature is constitutionally permissible because what in substance the legislature seeks to achieve is to enact a valid piece of legislation that removes the defect or vice in the earlier legislation. While the legislature cannot issue a mandate simpliciter to override the judgment of a court, it is always open to the enacting legislature to cure a deficiency that was noted in the existing legislation so as to set right an anomaly. Validating legislation assumes a retrospective character because the object of the law is to cure a defect that was noted in the original enactment and to remove the cause or foundation for a declaration of invalidity of legislative or executive action. Such a law must of necessity possess a retrospective character since the object of validating legislation is to enact the legislative provision absent the features which had rendered the provision vulnerable or incapable of fulfilling the object of the legislature.

18. In *J.K. Jute Mills Co. Ltd. Vs. The State of Uttar Pradesh and Another*, a Constitution Bench of the Supreme Court laid down the following principles:

(i) Where there is a sale of goods, the state legislature is competent to impose a tax and, subject to constitutional limitations, such a tax can be imposed even on sales which have taken place prior to the enactment:

But where the transaction is one of sale of goods as known to law, the power of the State to impose a tax thereon is plenary and unrestricted subject only to any limitation which the Constitution might impose, and in the exercise of that power, it will be competent to the legislature to impose a tax on sales which had taken place prior to the enactment of the legislation.

(ii) Though ordinarily a sales tax is intended to be passed on to the buyer, the power of the legislature is not conditional on the burden being passed on:

It is no doubt true that a sales tax is, according to accepted notions, intended to be passed on to the buyer, and provisions authorising and regulating the collection of sales tax by the seller from the purchaser are a usual feature of sales tax legislation. But it is not an essential characteristic of a sales tax that the seller must have the right to pass it on to the consumer, nor is the power of

the legislature to impose a tax on sales conditional on its making a provision for sellers to collect the tax from the purchasers. Whether a law should be enacted, imposing a sales tax, or validating the imposition of sales tax, when the seller is not in a position to pass it on to the consumer, is a matter of policy and does not affect the competence of the legislature. This question is concluded by the decision of this court in *The Tata Iron and Steel Co., Ltd. Vs. The State of Bihar*, .

(iii) The legislature has a plenary power, subject to constitutional limitations to enact a law which is prospective or retrospective:

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.

19. In *Rai Ramkrishna and Others Vs. The State of Bihar*, Justice P.B. Gajendragadkar (as the Learned Chief Justice then was) speaking for a Constitution Bench of the Supreme Court formulated the principle thus:

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. If a law passed by a legislature is struck down by the Courts as being invalid for one infirmity or another, it would be competent to the appropriate legislature to cure the said infirmity and pass a validating law so as to make the provisions of the said earlier law effective from the date when it was passed. This position is created as firmly established since the decision of the Federal Court in the case of AIR 1941 16 (Federal Court)

The judgment in *Rai Ramkrishna* is also an authority for the principle that judicial review must be exercised with circumspection and caution when a taxing statute is challenged on the ground that it violates Articles 14 or 19. A statute which is plainly discriminatory or one which provides no machinery for assessment and levy or an enactment which is confiscatory in character may be rendered vulnerable:

The quantum of tax levied by the taxing statute, the conditions subject to which it is levied, the manner in which it is sought to be recovered, are all matters within the competence of the legislature, and in dealing with the contention raised by a citizen that the taxing statute contravenes Article 19, courts would naturally be circumspect and cautious. Where for instance it appears that the taxing statute is plainly discriminatory, or provides no procedural machinery for assessment and levy of the tax, or that it is confiscatory, Courts would be

justified in striking down the impugned statute as unconstitutional. In such cases, the character of the material provisions of the impugned statute is such that the Court would feel justified in taking the view that, in substance, the taxing statute is a cloak adopted by the legislature for achieving its confiscatory purposes.⁷

The decision in *Rai Ramkrishna* has also laid down that the length of time over which a statute is retrospective in operation is not decisive as to its constitutionality. A validating enactment may conceivably operate retrospectively over a length of time, but that again is not a decisive test. The observations of the Supreme Court in that regard are as follows:

We do not think that such a mechanical test can be applied in determining the validity of the retrospective operation of the Act. It is conceivable that cases may arise in which the retrospective operation of a taxing or other statute may introduce such an element of unreasonableness that the restrictions imposed by it may be open to serious challenge as unconstitutional; but the test of the length of time covered by the retrospective operation cannot, by itself, necessarily be a decisive test. We may have a statute whose retrospective operation covers a comparatively short period and yet it is possible that the nature of the restriction imposed by it may be of such a character as to introduce a serious infirmity in the retrospective operation. On the other hand, we may get cases where the period covered by the retrospective operation of the statute, though long, will not introduce any such infirmity. Take the case of a Validating Act. If a statute passed by the legislature is challenged in proceedings before a court and the challenge is ultimately sustained and the statute is struck down, it is not unlikely that the judicial proceedings may occupy a fairly long period and the legislature may well decide to await the final decision in said proceedings before it uses its legislative power to cure the alleged infirmity in the earlier Act. In such a case, if after the final judicial verdict is pronounced in the matter the legislature passes a Validating Act, it may well cover a long period taken by the judicial proceedings in Court and yet it would be inappropriate to hold that because the retrospective operation covers a long period, therefore, the restriction imposed by it is unreasonable. That is why we think the test of the length of time covered by the retrospective operation cannot by itself be treated as a decisive test.⁸

20. A year after the decision in *Rai Ramkrishna*, another Constitution Bench of the Supreme Court in *Epari Chinna Krishna Moorthy, Proprietor, Epari Chinna Moorthy and Sons, Berhampur, Orissa Vs. State of Orissa*, considered the constitutional validity of a Sales Tax Validation Act enacted by the legislature in the State of Orissa. A notification had been issued under the Orissa Sales Tax Act under which gold ornaments were ordered to be exempted from sales tax when the manufacturer selling them charged separately for the value of the gold and the cost of manufacture. The Orissa High Court held that the expression "manufacturer" meant the first owner of the finished product for whom it was

made either by his paid employee or even by independent artisans on receipt of raw materials and labour charges. After the judgment of the Orissa High Court, the State Legislature enacted validating legislation to the effect that notwithstanding anything contained in any judgment, decree or order of any Court, the expression "manufacturer" occurring in the schedule to the notification shall always be deemed to have meant a person who by his own labour works up materials into suitable forms and a person who owns or runs a manufactory for the purpose of business. The intention of the Government in issuing the notification was not to give the benefit of the exemption to traders or shopkeepers who were only commission agents and who did not personally produce gold ornaments. The submission before the Supreme Court in challenge to the legislation was that an exemption was granted in exercise of a statutory power and while the legislature may withdraw an exemption, it could not do so retrospectively. Rejecting the submission, Chief Justice P.B. Gajendragadkar speaking for the Constitution Bench of the Supreme Court held as follows:

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 S. 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 S. 2 of the impugned Act is invalid.¹⁰

21. In *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*, the Supreme Court upheld the constitutional power of the legislature to validate a tax declared by the Court to be illegally collected under an ineffective or invalid law, so long as the case for its ineffectiveness or invalidity is removed. Chief Justice M. Hidayatullah speaking for the Constitution Bench held thus:

When a Legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively.

The most important condition, of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the 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.¹²

In *Hiralal Rattanlal Vs. State of U.P. and Another etc. etc.*, a Bench of four learned Judges of the Supreme Court held as follows:

...there is no justification for the contention that the Legislature has usurped any judicial power. The Legislature has not purported either directly or by necessary implication to overrule the decision of the Allahabad High Court in *Tilock Chand Prasan Kumar's* case (*supra*). On the other hand it has accepted that decision as correct; but has sought to remove the basis of that decision by retrospectively changing the law. This Court has pointed out in several cases the distinction between the encroachment on the judicial power and the nullification of the effect of a judicial decision by changing the law retrospectively. The former is outside the competence of the Legislature but the latter is within its permissible limits. From the statement of objects and reasons, it appears that in the principal Act, the legislative intent was not clearly brought out. By means of the Amending Act the Legislature wanted to make clear its intent.¹⁴

In that case, Section 3-D of the U.P. Sales Tax Act, 1948 levied a single point tax on the turnover of first purchases made by a dealer in the case of foodgrains including cereals and pulses. A notification was issued providing for a levy on first purchases of foodgrains at a certain rate. The Appellants were dealers in split or processed foodgrains and dal. The legislature enacted validating legislation after a decision of the Allahabad High Court. In that context, the Supreme Court observed as follows:

...the amendment of the Act was necessitated because of the Legislature's failure to bring out clearly in the principal Act its intention to separate the processed or split pulses from the unsplit or unprocessed pulses. Further the retrospective amendment became necessary as otherwise the State would have to refund large sums of money. The contention that the retrospective levy did not afford any opportunity to the dealers to pass on the tax payable to the consumers, has not much validity. The tax is levied on the dealer; the fact that he is 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 we consider the legislative competence.¹⁵

The judgment is thus also an authority for the proposition that the fact that the dealer upon whom the tax is imposed, is not in a position to pass on the tax on his consumers has no relevance to the competence of the legislature. An amendment is permissible even when the principal Act fails to bring out clearly the intention of the legislature.

22. In *The Government of Andhra Pradesh and Another Vs. Hindustan Machine Tools Ltd.*, a Bench of three learned Judges of the Supreme Court. observed as follows:

The power of the Legislature to pass a law postulates the power to pass it prospectively as well as retrospectively, the one no less than the other. Within the scope of its legislative competence and subject to other constitutional limitations, the power of the Legislature to enact laws is plenary. In *United Provinces Vs. Atiqa Begum*, Gwyer, C.J. while repelling the argument that Indian Legislatures had no power to alter the existing laws retrospectively (the Federal Court) observed that within the limits of their powers the Indian Legislatures were as supreme and sovereign as the British Parliament itself and that those powers were not subject to the "strange and unusual prohibition against retrospective legislation". The power to validate a law retrospectively is, subject to the limitations aforesaid, an ancillary power to legislate on the particular subject.¹⁷

In *Bakhtawar Trust and Others Vs. M.D. Narayan and Others*, a Bench of two learned Judges of the Supreme Court has held that:

...it is open to the legislature to alter the law retrospectively, provided the alteration is made in such a manner that it would no more be possible for the Court to arrive at the same verdict. In other words, the very premise of the

earlier judgment should be uprooted, thereby resulting in a fundamental change of the circumstances upon which it was founded.

26. Where a legislature validates an executive action repugnant to the statutory provisions declared by a court of law, what the legislature is required to do is first to remove the very basis of invalidity and then validate the executive action. In order to validate an executive action or any provision of a statute, it is not sufficient for the legislature to declare that a judicial pronouncement given by a court of law would not be binding, as the legislature does not possess that power. A decision of a court of law has a binding effect unless the very basis upon which it is given is so altered that the said decision would not have been given in the changed circumstances.¹⁹

23. In pursuance of a policy announced by the Union Government in 1997 for the development of industries in the north-eastern region of the country by giving a package of incentives including an exemption from excise duties, several notifications exempting excisable goods were issued. The Petitioners before the Supreme Court in *R.C. Tobacco Pvt. Ltd. and Another etc. Vs. Union of India (UOI) and Others*, had set up units in a specified growth centre and claimed the benefit of an exemption notification which was initially allowed, but subsequently disallowed. During the pendency of the proceedings before the High Court, the Finance Act of 2003 was enacted by Parliament by which exemptions available to manufacturers of cigarettes were rescinded retrospectively. As a consequence, the excise duty which was refunded to the Petitioners became liable to be recovered; no further refunds could be made and the Petitioners became liable to pay excise duty which was not paid when the exemption was in force. This was challenged inter alia on the ground that no reasons were given for retrospectively removing a benefit which was consciously granted. While repelling the challenge Hon^{ble} Mrs. Justice Ruma Pal, delivering the judgment of the Supreme Court held as follows:

A law cannot be held to be unreasonable merely because it operates retrospectively. Indeed even judicial decisions are in a sense retrospective. When a statute is interpreted by a court, the interpretation is, by fiction of law, deemed to be part of the statute from the date of its enactment. The unreasonability must lie in some other additional factors. The retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it can be held to be so unreasonable as to violate constitutional norms:

Where for instance, it appears that the taxing statute is plainly discriminatory, or provides no procedural machinery for assessment and levy of the tax, or that it is confiscatory, courts would be justified in striking down the impugned statute as unconstitutional. In such cases, the character of the material provisions of the impugned statute is such that the court would feel justified in taking the view that, in substance, the taxing statute is a cloak adopted by the legislature for achieving its confiscatory purposes." (*See Rai Ramkrishna and Others Vs. The State of Bihar*,

The Supreme Court observed that the intention behind the grant of the package of incentives including an exemption from the payment of excise duties was to stimulate further industrial growth in the area so that an enduring benefit of providing employment opportunity to the local populace and to the economic welfare of the State was sustained. In that context, the Supreme Court observed thus:

The High Court may have been right in construing the exemption notification as it stood. Yet the respondent can contend that the words should have been used in the exemption so as to provide for sufficient safeguards to ensure that the benefit of exemption was granted only to those industries which would in turn permanently invest in the State. By the retrospective enactment this defective expression of the object of the policy, was rectified.²²

The judgment upheld a rescission of an exemption notification with retrospective effect on the ground that as originally framed the notification had not provided sufficient safeguards that would have ensured the achievement of the object underlying the policy of incentives. A defective expression of the object of the policy was held to be permissibly rectifiable by a retrospective amendment.

24. In his seminal work titled the Principles of Statutory Interpretation ²³ Justice G.P. Singh has succinctly summarised the position thus:

... the Supreme Court has rejected constructions advanced in respect of validation Acts which if accepted would have led to the conclusion that the Legislature failed to achieve the object of validating prior executive acts which it avowedly had as expressed in the preamble and also apparent from other provisions of the Acts in question *Krishna Chandra Gangopadhyaya and Others Vs. The Union of India and Others*, . A validating Act may even make ineffective judgments and orders of competent courts provided it by retrospective legislation removes the cause of invalidity or the basis which had led to those judgments. *Bhubaneshwar Singh and Bimla Devi Poddar and Others Vs. Union of India (UOI) and Others*, .

25. Bennion on Statutory Interpretation ²⁶ defines the purpose of a Validation Act as follows:

Validation Acts A validation Act removes actual or possible voidness, disability or other defect by confirming the validity of anything which is or may be invalid.

26. On behalf of the Petitioners reliance has been placed on the dissenting judgment of Hon^{ble} Mr. Justice A.N. Sen in *Lohia Machines Ltd. and Another Vs. Union of India (UOI) and Others*, The dissenting judgment, also, it must be noted, has extensively relied upon the judgments of the Constitution Benches in *Epari Chinna Krishna Moorthy and Rai Ramkrishna (supra)* as well as the decision in *Hiralal Ratanlal (supra)*. Hon^{ble} Mr. Justice A.N. Sen observed in the course of his judgment that the validating Act does not, in fact, have the effect of imposing a fresh tax with retrospective effect since it only legalises a levy already

imposed. Hence, in substance and effect, there is no imposition of a new tax. Emphasising the same position, a judgment of the Supreme Court in *Escorts Limited and Others Vs. Union of India and others*, held as follows:

The second question can arise only if it is assumed that there was an ambiguity or doubt as to interpretation that was retrospectively clarified by the legislature. But it is common ground before us that, even on this hypothesis, the validity of the amendment cannot be challenged. This is indeed beyond all doubt: See *Rai Ramkrishna and Others Vs. The State of Bihar*, *The Assistant Commissioner of Urban Land Tax and Others Vs. The Buckingham and Carnatic Co. Ltd., etc.*, *Krishnamurthi and Co. etc. Vs. State of Madras*, *Hiralal Rattanlal Vs. State of U.P. and Another etc. etc.*, and *Shiv Dutt Rai Fateh Chand and Others Vs. Union of India (UOI) and Another*, . Even the Bombay decision in *Commissioner of Income Tax Vs. Mico Products Pvt. Ltd.*, on which the assessee heavily rely, concedes, in our opinion rightly, this position. The assessee may have some possible case only if the earlier statutory provisions can be said to have been unambiguously in favour of the assessee and the 1980 amendment had radically altered the provisions to cast a new and substantial burden on the assessee with retrospective effect. 29

27. On the basis of these observations, it was sought to be urged on behalf of the Petitioners that the Amending Act of 2009, in substance, amounts to the imposition of a new levy and that the imposition of a fresh levy with retrospective effect is violative of Article 14. Another limb of the same submission is that a conscious decision had been taken by the State Government on more than one occasion not to apply the principle of proportionality in determining the allowability of incentives under the package scheme. Hence, it is urged that the introduction of the mandate of proportionality by the amendment to Section 93 in 2009 would be violative of Article 19(1)(g) of the Constitution.

28. We are unable to accede to the submission. Section 41BB of the Bombay Sales Tax Act, 1959 was introduced into the statute in 2001. Section 41BB was prefaced by a non-obstante provision which was to operate notwithstanding anything to the contrary contained in any Package Scheme of Incentives. Section 41BB provided that any eligible unit to whom an eligibility certificate has been granted shall be eligible to draw benefits only on that part of its turnover of sales or purchases as may be arrived at by applying the ratio as may be prescribed by the State Government to the total turnover of sales or purchases of the unit in that year. Section 41BB was not an enabling provision, but enacted a restriction to the effect that notwithstanding anything contained in any Package Scheme of Incentives, an eligible unit holding an eligibility certificate shall be eligible to draw benefits only on that part of its turnover of sales and purchases as would be arrived at by applying the ratio which was to be prescribed by the State Government. The legislative intent on the proportionality of allowable benefits is hence evident in Section 41BB. Section 41BB, however, left it to the government to prescribe the ratio on the basis of which only a part of the turnover of sales

and purchases would qualify for incentives. When the Maharashtra Value Added Tax Act, 2002 was enacted, a specific provision was incorporated in Section 93(1). Section 93 was described in its heading as providing for proportionate incentives to an eligible unit in certain contingencies. Section 93(1) in its original form also made the legislative intent clear which was that an eligible unit would be eligible to draw benefits only on a proportional part of its turnover of sales or purchases as would be arrived at by applying the ratio which was to be prescribed by the State Government. Both Section 41BB of the erstwhile Bombay Sales Tax Act, 1959 and Section 93(1) as enacted in the MVAT Act, 2002 disclosed a legislative intent to allow the benefits only on a proportionate part of the turnover.

29. In the judgment of the Division Bench of this Court in *Pee Vee Textiles*, notice was taken of the fact that in the statement of objects and reasons explaining the basis for inserting Section 41BB in 2001, "it is clearly stated that the said section is introduced with a view to restrict grant of incentives in proportion to the goods manufactured in the expansion unit located in the backward areas of the State". This legislative intent, as held in the judgment of the Division Bench, was not effectuated by the framing of rules by the State Government. Finding that there were no rules prescribing the ratio which would determine the proportion of the total turnover of sales and purchases of the unit that would be allowable for incentives, the Division Bench in its judgment dated 13th October 2008 came to the conclusion that the Deputy Commissioner was not justified by means of an administrative circular in imposing a ceiling on the utilization of incentives under the 1993 Scheme in proportion to the production attributable to the newly acquired fixed assets. This anomaly also led to the quashing of the administrative circular issued by the State Government on 17 January 1998 by a judgment of a Division Bench dated 19 June 2009 in *Mirc Electronics Limited vs. State of Maharashtra*.³⁰

30. The note which was put up before the State Cabinet by the Principal Secretary, (Revenue) in August 2009 stated that as a result of the decision of this Court for a period of five years after 1 April 2005, there was a revenue implication of an amount of nearly rupees five hundred crores. Counsel appearing on behalf of the Petitioners criticised this approach and submitted that the object was only to override the judgment of this Court. The fact that the decision of this Court would result in serious revenue implications was certainly not a matter that was extraneous to the legislative process. In *Hiralal Ratanlal* (supra), the Supreme Court noted that the retrospective amendment had become necessary as otherwise the State would have to refund large sums of money. This was, in the view of the Supreme Court, not a reason which would impinge upon the constitutional validity of a retrospective amendment that was adopted by the State Legislature.

31. Essentially, the issue before the Court is as to whether the validating legislation has cured the vice that was noted in the judgment of this Court.

Alternately, whether the same judgment could have been rendered despite the amended provisions of the law. The judgment of the Division Bench in Pee Vee Textiles noted that the legislative intent embodied in Section 41BB of the Bombay Sales Tax Act, 1959 could not be effectuated in the absence of rules framed by the State Government prescribing the ratio for the grant of proportionate incentives. This anomaly has been corrected by the state legislature by the enactment of Maharashtra Act 22 of 2009. The fact that a draft rule which had been formulated at an anterior point in time had not been converted into an operative piece of subordinate legislation cannot possibly override the power of the state legislature to enact legislation which falls within its legislative competence. There can be no estoppel against the legislature. It is legitimately open to the legislature to enact validating legislation with retrospective effect to cure a deficiency which was noted in the judgment of the Court as a result of which the legislative intent of granting incentives pro rata could not be effectuated. The legislature has stepped in to cure the deficiency. The validating legislation and the amendment lay down the manner in which proportionate incentives would be computed. Such a course of action is legitimately open and cannot be regarded as being arbitrary or as violative of Articles 14 or 19(1)(g) of the Constitution. The principle of allowing pro rata incentives subserves the object of the legislation. If the legislature has, as in the present case, determined that the purpose of the Package Schemes of Incentives should or would be achieved by allowing incentives to be computed on a proportional basis, that legislative assessment cannot be regarded as unconstitutional.

32. Reliance was sought to be placed on behalf of the Petitioners on a concurring judgment of Chief Justice M.H. Beg in *Madan Mohan Pathak and Another Vs. Union of India (UOI) and Others*, The extract from the concurring judgment on which reliance has been placed is as follows:

It is true that, in the instant case, it is a provision of the Act of Parliament and not merely a governmental order whose validity is challenged before us. Nevertheless, we cannot forget that the Act is the result of a proposal made by the Government of the day which, instead of proceeding u/s 11(2) of the Life Insurance Corporation Act, chose to make an Act of Parliament protected by emergency provisions. I think that the prospects held out, the representations made, the conduct of the Government, and equities arising therefrom, may all be taken into consideration for judging whether a particular piece of legislation, initiated by the Government and enacted by Parliament, is reasonable. 32

33. In *Madan Mohan Pathak's* case, a settlement was arrived at between the Life Insurance Corporation and its employees in relation to various issues, including the payment of bonus on 24 January 1974. Bonus was paid to Class III and IV employees for two years until 31 March 1975, but not thereafter. In a writ proceeding filed before the Calcutta High Court by the Association of Employees, a Learned Single Judge issued a writ of Mandamus, directing LIC to act in

accordance with the terms of settlement and a writ of prohibition restraining LIC from refusing to pay the cash bonus along with the salary for the month of April 1976. In the meantime, legislation was enacted during the pendency of a Letters Patent Appeal by which it was provided that the settlement in so far as it related to the payment of an annual cash bonus to Class III and IV employees shall not have any force or effect from 1 April 1975. The Letters Patent Appeal was withdrawn before the Calcutta High Court as a result of which, the mandamus issued by the Learned Single Judge attained finality. In this context, Hon"ble Mr. Justice P.N. Bhagwati, speaking for the majority, held as follows:

The error committed by the Life Insurance Corporation was that it withdrew the Letters Patent Appeal and allowed the judgment of the learned single Judge to become final. By the time the Letters Patent Appeal came up for hearing, the impugned Act had already come into force and the Life Insurance Corporation could, therefore, have successfully contended in the Letters Patent Appeal that, since the Settlement, in so far as it provided for payment of annual cash bonus, was annihilated by the impugned Act with effect from April 1, 1975, Class III and Class IV employees were not entitled to annual cash bonus for the year April 1, 1975 to March 31, 1976 and hence no writ of mandamus could issue directing the Life Insurance Corporation to make payment of such bonus. If such contention had been raised, there is little doubt, subject of course to any constitutional challenge to the validity of the impugned Act, that the judgment of the learned single Judge would have been upturned and the writ petition dismissed. But on account of some inexplicable reason, which is difficult to appreciate, the Life Insurance Corporation did not press the Letters Patent Appeal and the result was that the judgment of the learned single Judge granting writ of mandamus became final and binding on the parties. It is difficult to see how in these circumstances the Life Insurance Corporation could claim to be absolved from the obligation imposed by the judgment to carry out the writ of mandamus by relying on the impugned Act. 33

This is the basis and foundation which led to the decision and is of utmost significance. An isolated sentence in the concurring judgment cannot be torn out of context.

34. Reliance has been placed on a judgment of a Learned Single Judge of the Karnataka High Court in Shamanur Kallapa vs. State of Karnataka. (2004) 136 STC 132 In that case, a retrospective amendment was introduced by the state legislature in 2001 by which Entry 31-B of the Fifth Schedule to the State Act dealing with sugar was amended so as to insert the words "produced or manufactured in India". Hon"ble Mr. Justice H.L. Dattu (as His Lordship then was) held that as a result of the retrospective amendment "for the first time, tax is sought to be imposed on imported sugar by inserting the words "produced and manufactured in India" after the word "sugar" in Entry 31-B of the Fifth Schedule retrospectively from the inception of the statute itself". 35 Thus what was in issue before the Karnataka High Court was the imposition for the first time of a

tax on imported sugar. This was an unexpected and unforeseen liability since on the date of the transaction there was no charge or liability under the Act. A similar position arose before the Kerala High Court in a judgment of a Learned Single Judge in *Mega Traders vs. State of Kerala*, (1991) 83 STC 59 where what was imposed was held to be an "unreasonable and unexpected fresh burden". 37 The judgment of a Division Bench of this Court in *Olympic Oil Industries Ltd. and another Vs. State of Maharashtra and others*, has been relied upon in support of the proposition that the retrospective withdrawal of an exemption from sales tax would be violative of Article 14 of the Constitution since the unit having not collected tax from the parties to whom goods were sold would have to bear the exaction from its own resources. In our respectful view, this part of the reasoning of the Division Bench in *Olympic Oil Industries* is contrary to the judgments of the Supreme Court both in *Hiralal Ratanlal* and in *R.C. Tobacco*.

35. For these reasons, we have come to the conclusion that there is no merit in the challenge to the constitutional validity of Maharashtra Act 22 of 2009 by which inter alia the provisions of sub-sections (1), (1A) and (1B) came to be substituted by way of an amendment to Section 93. The legislature has not transgressed the limitations on its constitutional power while enacting the validating legislation. There is, however, one aspect with which we propose to deal separately. Sub-section (2) of Section 93 has enacted that the benefit, if any, availed of by an eligible unit in contravention of sub-section (1) shall be and shall be deemed to have been withdrawn and the unit would be liable to pay tax, including penalty and interest, if any, in respect of the turnover of the sales and purchases in excess of the turnover arrived at under sub-section (1). The retrospective operation of the penalty with effect from 1 April 2005 would, in our view, be harsh. A penalty is in the nature of a penal or quasi penal exaction. A penalty cannot be imposed merely because it is lawful to do so. The imposition of a penalty for the period prior to the amendment of Section 93 with retrospective effect would be arbitrary.

36. We, however, do not find any merit in the challenge to the liability to pay interest. An assessee who has retained or availed of benefits to which he is not entitled in law, can legitimately be required to pay interest by the terms of a fiscal enactment. For these reasons, we are of the view that the provisions of Section 93(2) to the extent to which they contemplate the imposition of a penalty with retrospective effect would to that extent be arbitrary. The provision in regard to the imposition of a penalty u/s 93(2) would consequently operate only prospectively. We accordingly dispose of the Petitions by upholding the constitutional validity of Maharashtra Act 22 of 2009, save and except for the imposition of a penalty u/s 93(2) which will take prospective effect.

The Petitions are accordingly disposed of. There shall be no order as to costs.

1 Appeals 48, 89 and 111 of 2000

2 Sales Tax Application 8 of 2007 in Reference Application 90 of 200

3At para 26
6At para 10
7At para 12
8At para 17
10At para 7 page 1584.
12At para 4 pages 286-287
14At para 16 page 222
15At para 21 pages 223 & 224
17At para 10 pages 278 and 279
19At paras 25 & 26 pages 311 and 312
21At para 21 page 737
22At para 25 page 738
2311th Edition 2008 page 48
26Fifth Edition page 189
29At para 17 pages 265 & 266
29Writ Petition 818 of 2001
32At para 34 page 87
33At para 8 page 65
35At para 36 page 151
37At para 26 page 81