

(2020) 01 JH CK 0050

In the Jharkhand High Court

Case No : Writ Petition (T) No. 134, 267, 298, 424, 425, 428, 429, 435, 436, 455, 471, 577, 755, 757, 834, 861, 948, 1101, 1227, 1228, 1243, 1318, 1965, 2053, 2130, 2134, 2136, 2641, 2642, 2660, 2661, 2739, 2740, 2743, 2754, 2759, 2935, 2977, 2980, 3008, 3084, 3085

M/s. Ramkrishna Forgings Limited And Ors APPELLANT
Vs

State of Jharkhand And Ors RESPONDENT

Date of Decision : 29-01-2020

Acts Referred:

Jharkhand Value Added Tax Act, 2005 — Section 17(3), 18, 18(2), 18(4)(ii), 18(4)(iii), 18(8), 18(8)(xviii), 40, 40(3), 52(3), 94, 94(3)
Central Sales Tax Act, 1956 — Section 2(g), 2(ja), 3, 4(2), 5(1), 5(2), 5(3), 6A, 6(2), 8(1), 8(2), 9(2), 10, 13(3)
Jharkhand Goods And Services Tax Act, 2017 — Section 65(105)(g), 65(105)(zzd), 65(105)(zzh), 65(105)(zzq), 65(105)(zzzh), 173
Tamil Nadu Value Added Tax Act, 2006 — Section 19, 19(20)
Jharkhand Value Added Tax Rules, 2006 — Rule 26, 26(5), 26(11), 26(11A) , 26(5)
Constitution Of India, 1950 — Article 14, 19(1)(f), 19(1)(g)

Citation : (2020) 01 JH CK 0050

Hon'ble Judges : Deepak Roshan, J;H. C. Mishra, J

Bench : Divison Bench

Advocate : Biren Poddar, Darshana Poddar Mishra, Piyush Poddar, Manav Poddar, Rakhi Sharma, Sumeet Gadodia, Shilpi Sandil, Ranjeet Kushwaha, Nitin Kr. Pasari, Vishakha Gupta, Sidhi Jalan, Vaibhav Vishal, Amrita Sinha, Aditya Khandwal, Ajit Kumar, Atanu Banerjee, Shristi Sinha, Aushi Sarangi, Ranjana Mukherjee, Richa Sanchita, Anmol Deepak, Diwakar Jha

Final Decision : Allowed/ Disposed Of

Judgement

Deepak Roshan, J

1. All the aforesaid writ petitions involve a common question of law, as such, they were heard together and are being disposed of by this common judgment.
2. These batch of writ petitions have been filed by the dealers registered under the provision of the Jharkhand Value Added Tax Act,2005 [hereinafter referred to

as "JVAT Act" in short], primarily challenging the amendments brought in Section-18 of the JVAT Act, 2005 which lays down eligibility towards claim of Input Tax Credit [hereinafter referred to as "ITC" in short]. Further challenge has been made in the writ applications to the amendment made in the Jharkhand Value Added Tax Rules, 2006 [hereinafter referred to as "JVAT Rules"] wherein amendment has been carried in Rule-26 of the said JVAT Rules, 2006 with retrospective effect for giving effect to the amendment carried out under Section-18 of the JVAT Act, 2005 aforesaid.

3. The writ petitioners before this Hon'ble Court are either traders or manufacturers of goods. Since in the batch of the present writ applications the only issue for adjudication is the validity of the amendment carried out under the JVAT Act, and/or JVAT Rules, individual facts of the writ applications are not discussed as the same are not in dispute. However, for proper appreciation of the issues involved in the instant writ applications, it would be appropriate to notice the various amendments carried out under the provision of Section-18 of the JVAT Act, including the amendment carried out under Rule- 26 of the JVAT Rules, which are as under:-

(i) Amendment No.1

Vide notification dated 23.09.2015 an Amendment was carried out in Clause-(ii) of sub-section-4 of Section-18 of the JVAT Act, 2005 and, Clause-(iii) of sub-section-4 of Section-18 of the JVAT Act, 2005, as under:-

Amendment in Section-18-

b) In clause (ii) of sub-section (4), after the existing provision 'Sale in course of inter-State trade and commerce falling under sub-section (1) of Section 8 of the Central Sales Tax Act, 1956 (74 of 1956)', a proviso shall be added in the following manner:-

Provided that the Input Tax Credit on purchases when sold in course of inter State trade or commerce shall be allowed only to the extent of the Central Sales Tax payable under the Central Sales Tax Act, 1956 (74 of 1956).

d) In clause (iii) of sub-section-4, a proviso shall be added in the following manner:-

Provided that the Input Tax Credit on purchases when sold in course of inter State trade or commerce shall be allowed only to the extent of the Central Sales Tax payable under the Central Sales Tax Act, 1956 (74 of 1956).

The aforesaid amendments were initially given retrospective effect with effect from 01.04.2015.

(ii) Amendment No.2

In Section-18 of the JVAT Act, a new clause was inserted vide same gazette notification dated 23.09.2015 which reads as under:-

f) In the existing sub-section (8), after the clause (xvii), a new clause (xviii) , shall be added in the following manner:-

(xviii) 'In respect of goods consumed or burnt up in course of manufacturing process and are not transferred into or existent in the finished product whether as goods or in any other form'

The said amendment was also initially given retrospective effect with effect from 01.04.2015.

(iii) Amendment No. 3

Vide notification dated 08.02.2016, Proviso inserted in Clause-(ii) and (iii) of sub-section(4) of Section-18 which was inserted vide notification dated 23.09.2015 was substituted in the following manner:-

Amendment in sub-section(4) of Section-18

The existing proviso in clause-(ii) of sub-Section(4) of Section-18 shall be substituted in the following manner:-

"Provided that the input tax credit on such purchases when sold in course of interstate trade and commerce shall be allowed only to the extent of Central Sales Tax payable on such sales made under sub-section (1) of Section 8 of The Central Sales Tax Act, 1956 and balance input tax shall not be available for adjustment from any tax, penalty or interest payable"

The existing proviso in clause-(iii) of sub-Section(4) of Section-18 shall be substituted in the following manner:-

"Provided that the input tax credit on such purchases when used for manufacturing or processing or mining of such goods sold in course of interstate trade and commerce shall be allowed only to the extent of Central Sales Tax payable on such sales of such finished or mined goods made under sub-section (1) of Section 8 of The Central Sales Tax Act, 1956 and balance input tax shall not be available for adjustment from any tax, penalty or interest payable"

The aforesaid amendments were also initially given retrospective effect with effect from 1.4.2015.

(iv) Amendment No.4

Vide notification dated 17 th February, 2017, Amendment was carried out under Rule-26 of the JVAT Rules, and the amendment in Rule-26 was carried out in the following manner:-

Amendment in Rule-26

A new sub-rule as sub-rule (11A) shall be inserted after sub- rule (11) in the following manner:-

"Sub-rule (11A)- Where any VAT dealer is making inter-state sales falling under

sub-section(1) as well as sub-section(2) of section(8) of the C.S.T. Act, 1956 and the inputs are common in both, the amount so claimed as input tax credit for the purpose of section 18(4)(ii) and 18(4)(iii) shall be calculated in the following manner:-

(a) For the purpose of calculating input tax credit not admissible for adjustment from any tax payable as mentioned in Section 18(4)(ii) and 18(4)(iii) of the Act, the under mentioned formula shall apply:-

Proportionate input Tax credit on such CST payable on inter-state sales falling under sub-section(1) of Section 8 of the Central Sales Tax Act, 1956 (-) Tax payable on sale under sub-section(1) of Section 8 of the Central Sales Tax Act, 1956.

Where, Proportionate ITC is = $A \times (\text{Multiply}) \text{ CST sale under}$

Section 8(1) of the Central

Sales Tax Act, 1956

C

Where the values of A and C are as mentioned in sub-clause(ii) of sub-rule(5) of Rule 26.

Provided where CST payable on such inter-state sales falling under sub-section (1) of Section 8 exceeds the proportionate input tax credit calculated on inter-state sales falling under sub-section (1) of Section 8 of the Central sales Tax, 1956, then the input tax credit shall be allowed only to the extent of proportionate input tax credit on sale under sub-section (1) of Section-8 of C.S.T. Act 1956

(b) For the purpose of calculating proportionate input Tax credit on inter-state sales falling under sub-section (2) of Section 8, the amount not eligible for Input Tax Credit shall be calculated/computed by applying the under mentioned formula-

$A \times (\text{Multiply}) \text{ CST sale under Section 8(2)}$

C

Where the values of A and C are as mentioned in sub-clause(ii) of sub-rule(5) of Rule 26.

Provided further that the input tax credit shall not be available for adjustment, as computed under sub-rule 11A, and shall be deductible from the eligible input tax credit as calculated under the sub-rules 26(5) to rule sub-26(11) as applicable".

4. Initially from amongst the batch of writ applications under consideration, several writ petitions were filed challenging the aforesaid Amendments on various grounds including the ground that said amendments are ultra-vires being

violative of Article 14 of the Constitution of India on the ground that said amendments have been given retrospective effect. Even the amendment made under JVAT Rules, aforesaid were challenged in the said writ petitions on the ground of competence of the delegate State Government to give retrospective effect to the rules , contending inter-alia that Section- 94 of the JVAT Act, does not confer power/jurisdiction upon the delegate State Government to make retrospective amendment in the Rules.

5. During the pendency of the aforesaid writ petitions, State of Jharkhand vide Ordinance contained in notification dated 9th June, 2017 has specified that amendments carried out in Clause (ii) and (iii) of sub-section-4 of Section-18 of the JVAT Act, including the amendment carried out under Section 18(8) of the JVAT Act, shall come into force with effect from 23.09.2015 and not w.e.f. 1.4.2015. Thus, in substance, retrospective operation of the amendments carried out under Section 18(8) of the JVAT Act, was annulled and the said amendment was made effective from the date of insertion of the said provisions under the Act. However, the amendment carried out vide notification dated 8.2.2016 by which substituted proviso was inserted to clause-(ii) and (iii) of sub-section-4 of Section-18 of the JVAT Act, 2005 with effect from 1.4.2015, was made operative with effect from 23.09.2015. Thus, retrospective operation of the proviso inserted vide amendment Act contained in notification dated 8.2.2016 still continued. However, the period of retrospectivity was reduced and the said provision was made operative w.e.f. 23.09.2015 instead of 01.04.2015. The aforesaid ordinance contained in notification dated 9th June, 2017 was converted into an Act in terms of provisions contained under Section 173 of the Jharkhand Goods and Services Tax Act, 2017.

6. Mr. Biren Poddar, learned Senior Advocate and Mr. Sumeet Gadodia, learned Advocate advanced arguments on behalf of the petitioners in the batch of writ applications and such arguments have been adopted by other counsels appearing in the batch of writ petitions on behalf of petitioner. On behalf of the State Government Mr. Ajit Kumar, learned Advocate General assisted by Mr. Atanu Banerjee, learned Senior Standing Counsel-III advanced arguments in all the writ petitions.

7. During initial arguments, learned counsels for the petitioners have contended that proviso inserted under clause(ii) and (iii) of sub-section-4 of Section-18 of the JVAT Act, vide amendment contained in notification dated 23.09.2015 and the substituted proviso inserted vide amendment contained in notification dated 8.2.2016 are ultra-vires Article 14 of the Constitution of India. However, during the course of arguments, challenge to the validity of the said proviso was not pressed and arguments were confined to the retrospective effect given to the proviso inserted in clause (ii) and (iii) of sub-section-4 of Section-18 of the JVAT Act, vide Amending Act contained in notification dated 08.02.2016. Even otherwise it is well settled that although the taxing statute can be challenged on the ground on infringement of Article 14 but in deciding whether the law

challenged is discriminatory, it has to be borne in mind that in matters of taxation the Legislature pauses the large freedom in the matter of classification and wide discretion can be exercised in selecting persons who will be taxed and infringement is not open to take on the mere ground that it taxes some persons and not others.

8. It was strenuously argued by learned counsels for the petitioners that by virtue of substituted proviso inserted vide amending Act contained in notification dated 8.2.2016, for the first time provisions have been incorporated for forfeiture of the balance ITC available by providing in the aforesaid proviso that "balance input tax shall not be available for adjustment from any tax, penalty or interest payable". It has been contended that original proviso inserted vide amending Act contained in notification dated 23.9.2015 did not contain any provision for forfeiture of balance ITC and for the first time, by virtue of amending Act contained in notification dated 8.2.2016 provisions have been incorporated for forfeiture of ITC which has been given retrospective effect from 23.09.2015.

9. It has been vehemently contended that even if ITC is held to be a concession, said concession cannot be withdrawn retrospectively which has an effect of curtailment of vested rights already accrued in favour of dealers in respect of purchases of Inputs for the period between 23.09.2015 to 08.02.2016. In this regard, learned counsels for the petitioners have relied upon a decision of the Hon'ble Supreme Court in the case of Jayam and Company Vs Assistant Commissioner and Anr, reported in (2016) 15 SCC 125 (relevant paragraphs 2, 6, 16 to 19). Further, the constitutional validity of the amendment carried under sub-section 8 of Section 18 of the JVAT Act, vide amending Act dated 23.09.2015 was pressed by the writ petitioners. Mr. Sumeet Gadodia, learned Advocate appearing for the petitioners assailed the constitutional validity of the said amendment by contending inter-alia that said amendment is violating the equality clause enshrined under Article 14 of the Constitution of India. It has been submitted that it is well known principle of law that a Taxing statutes is not beyond the pale of challenge under Article 14 of the Constitution of India and the said amendment is to be decided on the touch stone of Article 14 of the Constitution of India.

10. It has been submitted by learned counsels for the petitioners that by virtue of amendment carried out under Section-18(8) of the JVAT Act, 2005, a sub-clarification is sought to be made between the raw materials eligible for ITC. While referring to the provisions of Section-18(4)(iii) of the JVAT Act, 2005, it has been submitted that it is an admitted fact that raw materials used in the manufacture of goods was eligible for ITC. It has been submitted that a consumable which is burnt up or consumed in the manufacturing process is also species of raw materials. On the strength of the above, it has been contended that by virtue of amendment carried out under Section- 18(8) of the JVAT Act, benefit of ITC is sought to be denied on specified kind of raw materials which can be termed as "consumables" which are burnt up or consumed in the

manufacturing process. It has been contended that such clarification amounts to sub-categorizing the goods of the same genus by allowing ITC on a part of raw materials while denying ITC on such raw materials which are in the nature of consumables.

11. The learned counsels for the petitioners have further assailed the amendment carried out under the JVAT Rules, by virtue of notification dated 17.2.2017 contending that by said notification the machinery provisions have been given retrospective effect i.e. w.e.f. 1.4.2015. It has been contended that Section-94 of the JVAT Act, 2005 contains Rule making power and it is submitted that a bare reading of Section-94 of the Act would reveal that it does not confer on the delegate, namely the State Government, the power to make retrospective Rules. Thus, it has been contended that incorporation of machinery provisions for giving effect to the amended provision with retrospective effect is beyond the delegated legislation and is, thus, without jurisdiction.

12. It has been further submitted by the learned counsels for the petitioners that since the Rule making power does not authorize the State Government to give retrospective effect to the Rules, the said rule which contains machinery provision can be applicable only with prospective effect i.e. from 17.2.2017. As a corollary to the above, it has been contended that since the machinery provisions for carrying out the effect of the amendment would be deemed to come into force only w.e.f. 17.2.2017, it would not be open to the Assessing Authority to arbitrarily make assessment or forfeiture of ITC without any machinery provision prior to 17.2.2017. It has been further submitted that under Section 18(2) of the JVAT Act, provisions have been incorporated for availment of ITC and it has been provided in the said section that a registered dealer is entitled to ITC to be calculated in such manner, as may be prescribed. It has been contended that in absence of any guidelines contained under the Act for calculation of ITC, the same would be governed by the Rules containing the machinery provisions, and thus, in absence of machinery provisions being incorporated in the rules prior to 17.2.2017, the amendment carried out under the Act cannot be given effect to and is unworkable and hence, no forfeiture of ITC can be made for the period commencing from 23.09.2015 to 16.2.2017.

13. Reliance has been placed by the petitioners on the following decisions:-

(1) Regional Transport Officer, Chittore Vs Associated Transport Madras(P) Ltd and Ors, reported in (1980) 4 SCC 597, relevant paragraph- 3 and 4.

(2) Accountant General & Anr Vs. S. Doriswamy & Ors, reported in (1981) 4 SCC 93, relevant paragraph- 4 and 7;

(3) Commissioner of Central Excise & Customs, Kerala Vs. Larsen & Tubro Ltd, reported in (2016) 1 SCC 170, relevant paragraphs-29, 30, 31,32, 33, 35, 37, 38, 39 and 41.

(4) Jayam and Company Vs Assistant Commissioner and Anr, reported in (2016)

15 SCC 125 (relevant paragraphs 2, 6, 16 to 19);

(5) Union of India & Ors Vs N.S. Rathnam & Sons, reported in (2015) 10 SCC 681, relevant paragraph 1, 12, 13 to 21.

14. Mr. Ajit Kumar, learned Advocate General and Mr. Atanu Banerjee, learned Sr. Standing Counsel-III have opposed the prayer made in the writ applications and have contended that the impugned amendments made under the JVAT Act, are well within the legislative competence of the State Government and the said amendments are required to be upheld by this Hon'ble Court.

15. It has been submitted by learned counsels for the respondents that pursuant to a meeting of the Committee of the Secretaries/ Commissioner of the Commercial Taxes Department held on 13.2.2012, it was agreed to make provisions for ITC retention on all inter-State sales in the light of the decision of the Government of India not to grant any compensation against revenue loss on account of Central Sales Tax for the period 2011-12 onwards. It has been submitted that pursuant to the minutes of the said meeting, proviso was inserted in clause(ii) and (iii) of sub-Section (4) of Section 18 of the JVAT Act, vide Amending Act contained in notification dated 23.9.2015 providing, inter-alia, that the benefit of ITC on CST sales would be available only to the extent of Central Sales Tax payable on such sales made under sub-Section(1) of Section-8 of The Central Sales Tax Act, 1956[hereinafter referred to as "CST Act"].

16. It has been submitted that although by virtue of aforesaid amendment itself contained in the notification dated 23.09.2015, benefit of ITC was restricted only to the extent of Central sales Tax payable, but, in order to make the said provision more effective, substituted proviso was inserted in clause (ii) and (iii) of sub-Section(4) of Section 18 of the JVAT Act, wherein it was specifically provided that "balance ITC shall not be available for adjustment from any tax, penalty or interest payable". The learned Advocate General has submitted that initially the amendment carried out vide Amending Act contained in notification dated 23.9.2015 was given retrospective effect, but, subsequently the retrospective operation of the said Act was removed and said amended provision was made effective with effect from 23.9.2015 itself. However, it has been admitted that substituted proviso which was inserted vide Amending Act contained in Notification dated 8.2.2016, even after subsequent amendment, still has retrospective effect at least with effect from 23.9.2015. However, the said retrospective effect given to the amended proviso is sought to be justified by submitting inter-alia that said substituted proviso was merely clarificatory in nature. It has been submitted that by virtue of the original provision inserted by amending Act dated 23.9.2015 benefit of ITC was already restricted only to the extent of CST payable under Section- 8(1) of the CST Act, and subsequent proviso which inserted the provisions of forfeiture of balance available ITC was, in substance, to give effect to the original provision which was already inserted. It is in this background that it has been contended that substituted proviso is merely clarificatory in nature.

17. It has been further submitted that ITC is in the nature of concession and even if the substituted proviso inserted vide amending Act dated 8.2.2016 has been given retrospective operation with effect from 23.9.2015, the same is well within the legislative power of the State Government. In order to buttress the said contention the learned Advocate General has relied upon the decision of the Hon'ble Supreme Court in the case of Jayam and Company Vs Assistant Commissioner and Anr, reported in (2016) 15 SCC 125 to contend that ITC is in the nature of concession.

18. Further reliance has been placed to the decision of Hon'ble Supreme Court in the case of "Satnam Overseas (Export) Vs. State of Haryana and Anr, reported in (2003) 1 SCC 561 to contend inter-alia that if the competence of the Legislature is well established, then it is also well established that the Legislature can legislate retrospectively.

19. With regard to the challenge made to the amended provisions of Section-18(8) of the JVAT Act, it has been submitted that the State Legislature in its wisdom has denied ITC on such goods which are burnt up in the course of manufacturing process and not transferred or existent in the finished product. It has been submitted that ITC is in the nature of concession and it is well within the legislative competence of the State Government to withdraw such concession by restricting availability of ITC on certain goods. It has been submitted that withdrawal of exemption is a matter of policy and there is limited scope of interference by the Courts in the policy decision of the State which has been necessitated in the public interest. In this regard, reliance has been placed by the learned counsels for the respondents to the following decisions:-

- Union of India Vs. Jalyan Udyog, AIR 1994 SC 88= (1994) 1 SCC 318, relevant para- 3,4,15 and 18 to 25;
- Kasinka Trading & Ors Vs. Union of India, reported in (1995)1 SCC 274, relevant para- 9, 21 to 24.
- Union of India Vs. Paliwal Electricals Pvt. Ltd, reported in (1996) 3 SCC 407, para- 8 to 10.

20. The learned Advocate General while placing reliance upon Section-94 of the JVAT Act, 2005, more particularly the provisions contained under sub-Section 3 of Section-94 has contended that a bare reading of the said provisions would nowhere suggest that the State Government does not have powers to make Rules with retrospective effect. It has been contended that power conferred upon the State Government to frame Rules were to generally carry out the purposes of the Act and since, by virtue of the impugned amendments, more particularly substituted proviso inserted in clause (ii) and (iii) of sub-section-4 of Section-18 of the JVAT Act, 2004 which provides for forfeiture of ITC, Rules were amended with retrospective effect to give effect to the said amended proviso. While placing reliance over sub-section(3) of Section-94, it was contended that said provision provides inter-alia that every Rule framed under Section- 94 is required to be

laid before the State Legislature and the State Legislature can modify such Rule or even annul the Rule. On the strength of said provision, it has been contended that Section 94 gives sufficient indication that Rule making power conferred upon the State Government did not restrict the State Government to frame Rules with retrospective effect for carrying out the purposes of the Act.

21. In addition, it has been argued by the learned Advocate General that even in absence of the amended Rules inserted vide notification dated 17.2.2017, the Rule which was existent under the JVAT Rules itself contained machinery provision which was sufficient for determining the forfeited amount of ITC as provided by insertion of the proviso in Clause-(ii) and (iii) of sub-section(4) of Section-18 of the Act. Reliance has been placed by the learned Advocate General to the formula contained under Rule- 26(5) of the JVAT Rules, which reads as under:-

Rule- 26. Computation of Input Tax Credit:-

...

5 (i) Where any VAT dealer buys and sells the goods in the same form, the input tax credit can be claimed fully in respect of all the taxable goods purchased for every tax period excluding the tax paid on the purchase of any goods mentioned in sub-section(8) of Section-18. Such VAT dealer is required to make a declaration in Annexure-A of Form JVAT 200 for every tax period along with tax return.

(ii) Where any common inputs like packing material are used commonly for sales of taxable and exempt goods (goods in Schedule-I), the VAT dealer shall repay Input Tax related to exempt element of common inputs after making adjustment in the Annual Return by filing Annexure-B of Form JVAT 204 by applying a formula. The eligible Input Tax Credit for this sub-rule as well as for other transactions in this Rule shall be calculated/computed, by applying the under mentioned formula, i.e.-

$$A \times B \div C$$
 ['A' multiplied by 'B' and divided by 'C']

C

Where---

(A) Is the total amount of input tax paid at each tax rate for the tax period; excluding the tax paid on the purchase of any goods mentioned in negative list in Appendix-I and as defined under Section 2(xxviii)

(B) Is the "that part of turnover", which qualify for Input Tax Credit under the provisions of this Act for the respective tax period, which shall included:

i) Zero rated sales of any goods falling within the scope of sub-section (1) or (3)a of Section-5 of the Central Sales Tax Act, 1956 and

ii) Inter-state sales of taxable goods falling within the scope of Section 3 of the

CST Act,

but shall not include:

- i) Purchase price of goods taxable under Section 10 of the CST Act;
- ii) Transaction falling under Section 5(2), Section 6-A and Section 6(2) of the CST Act, 1956,
- iii) Value of transfer of a business as a whole;
- iv) [The value of intra-state stock transfer]

(C) is the 'total turnover' as defined under the Act during the period, but shall not include-

- i) Purchase price of goods taxable under Section 10 of the Act;
- ii) Transaction falling under Section 5(2), Section 6-A and Section 6(2) of the CST Act, 1956,
- iii) Value of transfer of a business as a whole
- iv) [xxx]

(iii) This sub-rule is not applicable, if the VAT dealer is making exempt transactions.

22. By comparing the formula prescribed under the existing Rule 26(5) with the formula prescribed under newly inserted Rule 26(11A) of the Rules, it has been contended that, in substance, this formula is the same and hence, there was adequate machinery provision already existing under the rules for computation of forfeited amount of ITC in terms of amendment carried out under the JVAT Act.

23. The learned Advocate General further while relying upon the decision of the Hon'ble Supreme Court in the case of Mahim Patram(P) Ltd V. Union of India, (2007) 3 SCC 668, has contended inter-alia that even if there does not exist any machinery provision for giving effect to the amendments carried out under the JVAT Act, the said amendment cannot be said to be unworkable.

24. We have heard learned counsels for the parties and have gone through the amendments carried out under the JVAT Act and Rules including the judgments cited by the parties. In our opinion, the following questions of law arise for consideration in the present batch of writ applications, which are as under:-

(I) Whether the amendments made to the provision of Section 18(4)(ii) and Section 18(4)(iii) of the JVAT Act vide amendment notification dated 8.2.2016, to the extent proviso has been inserted by providing, inter-alia, that ITC shall be available only in respect of tax paid on CST sales under section 8(1) of the CST Act, and the balance ITC shall be forfeited is wholly arbitrary, confiscatory in nature being violative of Article 14 of the Constitution of India;

(II) Whether the retrospective effect granted with effect from 23.09.2015 to the substituted proviso inserted to clause(ii) and (iii) of sub-Section 4 of Section 18 of the JVAT Act, vide Amending Act dated 8.2.2016 has an effect of interfering with the vested right already accrued in favour of writ petitioners in respect of purchase and sales made between the period 23.09.2015 to 07.02.2016, and, is liable to be struck down as being violative of Articles 14 and 19(1)(g) of the Constitution of India;

(III) Whether Amendment carried out in sub-section 8 of Section 18 of the JVAT Act, wherein a new clause (xviii) has been inserted after existing clause (xvii) of the aforesaid section, is ultra-vires and violative of Articles 14 and 19(1)(g) of the Constitution of India;

(IV) Whether insertion of Rule 26(11A) under the JVAT Rules, vide notification dated 17.2.2017 with retrospective effect i.e. from 01.04.2015, is ultra-vires to the provision of Section 94 of the JVAT Act, being beyond the powers of the delegate i.e. the State of Jharkhand;

(V) If the answer to issue No. (IV) is in affirmative, whether in absence of machinery provision for giving effect to the amendments made in section 18(4) (ii) and 18(4)(iii) of the JVAT Act, upto 16.2.2017, the said provisions are unworkable and cannot be acted upon.

Questions No. I and II

25. We have already in the preceding paragraphs of the judgment quoted in detail the various amendments carried out under the JVAT Act and Rules. It is an undisputed fact that amendments carried out by insertion of proviso to clause(ii) and clause(iii) of sub-section 4 of Section 18 of the JVAT Act vide amendment notification dated 23.09.2015 was substituted by insertion of new proviso vide amendment act contained in notification dated 8.02.2016.

26. During the course of arguments the learned counsels for the petitioners have not pressed their challenge to the insertion of proviso to clause (ii) and (iii) of section 18(4) of the JVAT Act and have confined their challenge to the retrospective effect being granted to the substituted proviso inserted vide notification dated 08.02.2016 which have been given retrospective effect with effect from 23.09.2015. Accordingly we have been called upon to answer the aforesaid issue with regard to amendment having been given retrospective effect.

27. The learned counsels appearing for the petitioners contended inter-alia that the effect of the substituted proviso inserted vide notification dated 8.2.2016 is that for the first time provisions have been incorporated under the Act for forfeiture of balance ITC remaining with a dealer after availing ITC on purchase of goods when sold in course of inter-State trade and commerce under section 8(1) of the CST Act. Per contra, it has been submitted by the counsel for the State that said substituted proviso is merely clarificatory in nature in as much as by virtue of proviso which was inserted vide amending Act dated 23.09.2015,

already provisions were incorporated restricting the availability of ITC on purchase of goods only to the extent of Central sales Tax payable under the CST Act and hence, the substituted proviso which provided for forfeiture of balance ITC was only a consequential action and was, thus, clarificatory in nature.

28. We have given our anxious consideration to the aforesaid submissions and we are of the opinion that proviso which has been inserted vide amending Act dated 8.2.2016 cannot be said to be clarificatory in nature, as, it for the first time provides for forfeiture of ITC by providing inter-alia that ITC on goods purchased when sold in course of inter-state trade and commerce, shall be allowed only to the extent of CST payable under section 8(1) of the CST Act, 1956 and "balance input tax shall not be available for adjustment from any tax, penalty or interest payable".

29. Looking into the scheme of JVAT Act, particularly provision of Section- 17 read with the provision of Section 52(3) of the JVAT Act, it would transpire that under the provision of the JVAT Act, Section-17 (3) provided for carrying forward of the amount of ITC which remained unadjusted to the next tax period. Further, section 52(3) inserted vide notification dated 19.09.2014 specifically provided, inter-alia, that where excess ITC for a financial year is carried forward for adjustment against tax due for subsequent tax period and such credit remain unadjusted even after a period of 24 months from the close of the year for tax period, dealer may opt to claim refund of the amount of such excess ITC. For the sake of ready reference, provision of Section-17(3) and 52(3) of the JVAT Act is quoted hereunder:-

"17. Tax payable:-

.....

(3) If the amount calculated under sub-section(1) is a negative quantum-

(a) the same shall be adjusted against the tax liability, if any, under the Act as well as under the Central Sales Tax Act, 1956.

(b) any amount of credit, remaining even after such adjustment shall be carried forward to the next tax period.

Section-52- Refund

(3)(i) Where any excess input tax credit for a financial year is carried forward for adjustment against the tax due for subsequent tax period or periods and such credit or part thereof remains unadjusted even after a period of 24 months from the close of the year for tax period for which the return showing the excess input tax credit, the dealer may opt to claim refund of the amount of such input tax by way of assessment, re-assessment or audit assessment.

3(ii) Where a dealer opts for such refund under sub-section 3(i), he shall make an application that effect to the prescribed authority within such time and such manner as may be prescribed;

3(iii) Any refund covered under this sub-section shall be granted in such manner and subject to such conditions and restrictions as may be prescribed".

Thus, under the scheme of the JVAT Act, excess ITC was allowed to be carried forward for the subsequent tax period for adjustment against tax liability and even provisions were made for refund of such excess ITC if the same remained unadjusted even after a period of 24 months.

30. A perusal of the provision of Section 18(4)(ii) and 18(4)(iii) of the JVAT Act, without insertion of substituted proviso would reveal that although in the aforesaid un-amended provisions also, provisions were incorporated for availing ITC in respect of "sales" falling under section 8(1) of the CST Act, 1956, but there was no provision which provided for forfeiture of the balance Input Tax paid on purchase of goods. In fact, the formula which was prescribed under the JVAT Rules, under rule 26(5) which provided for computation of eligible ITC also did not provide for any confiscation of remaining ITC. The same can be understood by the following illustrations in respect of a trading dealer.

Total purchases made

Rs.10,000/-

Total Input Tax paid @ 5%

Rs.500/- (A)

Total Sales u/s 8(1)

Rs.15,000/- (B)

Total inter State Sales

Rs.15,000/- (C)

Total CST paid

Rs.300/-

Eligible ITC as per formula under Rule 26(5) of the JVAT Rules, 2006

A x B i.e. 500 x 15000

C 15,000/-

Rs.500/-

ITC which was permitted to be adjusted = Rs.500-300(CST liability).

Balance - Rs.200/- was permitted to be carried forward for the next financial year.

31. By insertion of substituted proviso for the first time under the JVAT Act, a provision has been inserted for forfeiture of the amount of Rs.200/- which is not available for adjustment from the amount of any tax, penalty or interest payable. Thus, the said amendment has an effect of curtailing the vested right

which has accrued upon the dealer and cannot be said to be merely clarificatory in nature. The learned Advocate General has relied upon the decision of the Hon'ble Apex Court in the case of "Commissioner of Income Tax (Central)-I , New Delhi Vs Vatika Township Private Limited, reported in (2015) 1 SCC 1", in respect of his contention that the amendment carried out by insertion of substituted proviso is merely clarificatory in nature. In fact from bare reading of the said judgment where the Hon'ble Apex Court has enumerated the general principle concerning retrospectivity, it would be evident that the Hon'ble Apex Court while referring to a catena of decisions have held that it is settled rule of interpretation that a statute unless it expressly so provides, cannot have retrospective operation which has an effect to take away or impair the existing right or create new obligation or impose a new liability otherwise than as regards matter of procedure.

32. As we have already held above, present amendment has an effect of introducing the provision of forfeiture of ITC for the first time and hence, it creates new obligation and/or liability and thus, it cannot be said to be merely clarificatory. It is true that where the legislative competence of the State legislature is not under question, Legislature has ample power to give retrospective effect to the provision. However, it is a settled law that provisions which are made for the first time to the detriment of a dealer cannot be given retrospective effect when vested right accrued in favour of dealer is sought to be taken away. Such amendment cannot be given retrospective effect. In this regard we would like to place reliance upon a judgment of the Hon'ble Supreme Court in the case of "Jayam and Company Vs. Assistant Commissioner & Ors (Supra)". The said judgment has been relied by the learned counsels for the petitioners and the respondents both. In the said judgment of the Hon'ble Supreme Court, amendments carried out under Section- 19 of the Tamil Nadu Value Added Tax Act, 2006, which had an effect of restricting the claim of ITC by a dealer, was under consideration before the Hon'ble Apex Court. The Hon'ble Apex Court in the said judgment has held that ITC is in the nature of concession and whenever concession is given by a statute or notification etc, condition thereof are required to be strictly complied with in order to avail benefit of such concession. In the said judgment, the Hon'ble Supreme Court rejected the contention to the challenge made to the amendments carried out under the Act restricting benefits of ITC. The Hon'ble Supreme Court while upholding the vires of sub-section 20 of Section- 19 of the Tamil Nadu Value Added Tax Act, 2006, was pleased to set aside and struck down the said amendment to the extent it was given retrospective effect. Paragraph-19 of the said judgment reads as under:-

"19. When we keep in mind the aforesaid parameters laid down by this Court in testing the validity of retrospective operation of fiscal laws, we find that the amendment in question fails to meet these tests. The High Court has primarily gone by the fact that there was no unforeseen or unforeseeable financial burden imposed for the past period. This is not correct. Moreover, as can be seen, sub-

section (20) of Section 19 is altogether new provision introduced for determining the input tax in a specified situation i.e. where goods are sold at a lesser price than the purchase price of goods. The manner of calculation of ITC was entirely different before this amendment. In the example, which has been given in the earlier part of the judgment, "dealer" was entitled to ITC of Rs. 10 on resale, which was paid by the dealer as VAT while purchasing the goods from the vendors. However, in view of Section 19(20) inserted by way of amendment, he would now be entitled to ITC of Rs.9.50. This is clearly a provision which is made for the first time to the detriment of the dealers. Such a provision, therefore, cannot have retrospective effect, more so when vested right had accrued in favour of these dealers in respect of purchases and sales made between 1.1.2007 to 19.08.2010. Thus, while upholding the vires of sub-section(20) of Section 19, we set aside and strike down Amendment Act 22 of 2010 whereby this amendment was given retrospective effect from 1.1.2007."

(Emphasis supplied)

33. In view of discussions held aforesaid, we declare that the substituted provisos inserted vide notification dated 08.02.2016 are not clarificatory in nature and, has an effect of curtailing the vested right of the dealers in respect of purchases and sales of goods made between the period 23.09.2015 to 07.02.2016 and is, thus declared ultra vires to the extent said provisos have been given retrospective effect. In other words, these provisions are held to be intra vires w.e.f. 7.2.2016 only and onwards.

Question No.III.

34. By virtue of the amending Act dated 23.09.2015, a new clause (xviii) was inserted in sub-section-8 of section 18 of the JVAT Act, which has an effect of denying ITC on such goods which are consumed or burnt up in the manufacturing process and is not transferred into or existent in the finished product. The said provision reads as under:-

" 18- Input Tax Credit-

.....

.....

(8) No input tax credit under sub-Section (1) shall be claimed or be allowed to a registered dealer-

....."

(xviii) 'In respect of goods consumed or burnt up in course of manufacturing process and are not transferred into or existent in the finished product whether as goods or in any other form'

35. Arguments have been advanced by learned counsel for the petitioners that by virtue of said amendment, raw materials which are in the nature of

consumables, have been denied benefit of ITC and the said classification sought to be made is wholly violative of Article 14 of the Constitution of India as the said classification amounts to sub-categorizing the goods of the same genus. It has been submitted that the Hon'ble Supreme Court in catena of decisions have held that taxing statutes are not beyond the pale of challenge under Article 14 of the Constitution of India and on the strength of the above, it has been contended that classification sought to be made by the State Government by denying ITC on consumables which are also raw materials, is not based on intelligent differentia and is not a reasonable classification. Extensive reliance has been placed on the judgment of the Hon'ble Supreme Court rendered in the case of "Union of India and Ors Vs N.S. Rathnam & Sons(Supra)".

36. We have carefully perused the amendment carried out under sub-section-8 of section-18 of the JVAT Act and we are of the opinion that said amendment is not violative of Article 14 of the Constitution of India as it is based on reasonable classification and intelligible differentia. The Hon'ble Supreme Court in catena of decisions including the decision relied upon by the writ petitioners in the case of Union of India and Ors Vs N.S.Rathnam & Sons (Supra) have held that justiciability of particular tax enactment can be decided on the touchstone of Article 14 of the Constitution of India. However, the Hon'ble Supreme Court in the said judgment while referring to its earlier judgment have quoted with approval the principle that in a taxing statute the State Government enjoys greater latitude. It may impose a tax on a class of people, whereas it may not do so in respect of the other class. Reference in this regard may be made to the judgment passed in the case of Aashirwad Films Vs. Union of India, reported in (2007) 6 SCC 624).We reject the submission of learned counsels for the petitioners, that by the amendment unreasonable classification has been made by creating classes within class of raw materials, i.e. consumable raw materials and un-consumable raw materials.

37. The Hon'ble Supreme in the case of "Jayam and Company Vs. Assistant Commissioner & Ors (Supra)" have held that ITC is in the nature of concession and it is open for the State Government to prescribe conditions and restrictions for availing benefit of suchconcession. In the case of "Kasinka Trading and Anr (Supra)", in para 23 the Hon'ble Supreme Court has observed and held as under:-

"23. The appellants appear to be under the impression that even if, in the altered market conditions the continuance of the exemption may not have been justified, yet, Government was bound to continue it to give extra profit to them. That certainly was not the object with which the notification has been issued. The withdrawal of exemption "in public interest" is a matter of policy and the courts would not bind the government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the "public interest". The Courts, do not interfere with the fiscal policy where the Government acts in "public interest" and neither any fraud or

lack of bona fides is alleged much less established. The Government has to be left free to determine the priorities in the matter of utilisation of finances and to act in the public interest while issuing or modifying or withdrawing an exemption notification under S.25(1) of the Act. (Emphasis supplied)

38. In the backdrop of the aforesaid judgment of the Hon'ble Supreme Court when we examined the scope of the Amendment brought by the State of Jharkhand, it would be evident that by virtue of said amendment the State Government is putting restrictions on the availability of ITC on such raw materials which are consumed or burnt up and not found existent in the finished product. Thus, specified class of raw materials has been excluded for being eligible for claiming benefit of ITC. The aforesaid decision being in the nature of policy decision, wherein reasonable classification has been made between two kinds of raw material, that is , raw materials found existent in the finished product and raw materials consumed or burnt up and not being found in the finished product, the same cannot be said to be unreasonable classification attracting the vice of Article 14 of the Constitution of India. Thus, the challenge to the amended provisions contained under section- 18(8)(xviii) fails having no merit.

Question No.IV.

39. One of the main questions for adjudication in the instant writ application is the competence of the delegate i.e. the State Government to frame Rules prescribing machinery provision with retrospective effect. In order to determine the aforesaid question, it would be proper to quote the provision of Section-94 of the JVAT Act, which reads as under:-

"94. Power to make Rules - (1) Without prejudice to any power to make rules contained elsewhere in this Act, the State Government may make rules generally to carry out the purposes of this Act and such rules may include rules for levy of fees for any of the purposes of this Act.

(2) In making any rules the State Government may direct that a breach thereof shall be punishable with fine not exceeding two thousand rupees, and when the offence is 53 continuing one, with a daily fine not exceeding one hundred rupees during the continuance of the offence.

(3) Every rule made under this Section shall be laid as soon as may be after it is made before the State Legislature while it is in the session for a total period of fourteen days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, the State Legislature agrees in making any modification in the rule or the State Legislature agrees that the rule should not be made and notify such decision in the Official Gazette, the rule shall from the date of publication of such notification effect only in such modified form or be of no effect, as the case may be so however that any such modification or annulment shall be without prejudice to the validity of anything previously done

or omitted to be done under that rule.

40. A bare reading of the said provision would reveal that the delegate has not been conferred powers to frame rules with retrospective effect. It is settled law that unless Statute conferring powers to make Rules, provides for making Rules with retrospective operation, Rules made pursuant to that power can have prospective operation only. (see Accountant General & Anr Vs. S. Doriswamy & Ors (Supra)

41. The Hon'ble Supreme Court in its recent decision rendered in the case of Federation of Indian Mineral Industries and Ors Vs Union of India and Ors, reported in (2017) 16 SCC 186, vide paragraph - 26 has held as under:-

"26. The power to give retrospective effect to subordinate legislation whether in the form of rules or regulations or notifications has been the subject matter of discussion in several decisions rendered by this Court and it is not necessary to deal with all of them---indeed it may not even be possible to do so. It would suffice if the principles laid down by some of these decisions cited before us and relevant to our discussion are culled out. These are obviously relatable to the present set of cases and are not intended to lay down the law for all cases of retrospective operation of statutes or subordinate legislation. The relevant principles are:

(i) The Central Government or the State Government (or any other authority) cannot make a subordinate legislation having retrospective effect unless the parent statute, expressly or by necessary implication, authorises it to do so. [Hukam Chand Vs. Union of India and Mahabir Vegetable Oils (P) Ltd Vs. State of Haryana]

(ii) Delegated legislation is ordinarily prospective in nature and a right or a liability created for the first time cannot be retrospective effect [Panchi Devi V. State of Rajasthan]

(iii) As regards a subordinate legislation concerning a fiscal statute, it would not be proper to hold that in the absence of an express provision a delegated authority can impose a tax or a fee. There is no scope or any room for intendment in respect of a compulsory exaction from a citizen [Ahmedabad Urban Dev. Authority Vs. Sharadkumar Jayanti Kumar Pasawalla and State of Rajasthan V Basant Agrotech (India) Ltd]

Thus it is well settled law that the State Government cannot make subordinate legislation by giving it retrospective effect unless the parent statutes expressly or by necessary implications authorises it to do so.

42. The learned Advocate General during the course of arguments placed much reliance upon the provisions of Section- 94(3) of the JVAT Act, to contend inter-alia that since the rules are required to be placed before the State Legislature, the same by itself necessarily implies that the Rule making power conferred upon the State Government enabled the State Government to frame rules with

retrospective effect.

43. In our opinion, the said contention raised by the learned Advocate General is not tenable in the eyes of law in view of judgment of the Hon'ble Apex Court in the case of "Regional Transport Officer, Chittore Vs Associated Transport Madras(P) Ltd and Ors(Supra)". In the said judgment exactly similar question arose before the Hon'ble Apex Court wherein the Rules which were to be framed by the delegate were required to be placed before the State Legislature, which could have affirmed the Rules with or without modification. In the said case, similar arguments were advanced that since in the Act provisions were incorporated for placing the Rule on the table of the State legislature for its approval, there was sufficient indication to infer that retrospectively in the Rule making power was implicit. The aforesaid contention was expressly repelled by the Hon'ble Supreme Court in its aforesaid judgment as under:-

"4. The legislature has no doubt a plenary power in the nature of enactment of statutes and can itself make retrospective laws subject, of course, to the constitutional limitation. But it is trite law that a delegate cannot exercise the same power unless there is a special conferment thereof to be spelled out from the express words of the delegation or by compelling implication. In the present case the power under Section 4(2) does not indicate either alternative. The position has been considered by the High Court at length and there is no need for us to go through the exercise over again. Indeed, considerable reliance was placed by learned counsel for the appellant on two circumstances. He argued that the impugned rule was framed in pursuance of a resolution passed by the legislature. The fact does not have any bearing on the question under consideration except for us to make the observation that the State Government should have been more careful in giving effect to the resolution and should not have relied upon its delegated power which did not carry with it the power to make retrospective rules. The second ground pressed before us by learned counsel for the appellant is that the rules had to be placed on the table of and approved by the legislature. This was sufficient indication, in his submission, for us to infer that retrospective in the rule-making power was implicit. We cannot agree. The mere fact that the rules framed had to be placed on the table of the legislature was not enough, in the absence of a wider power in the section, to enable the State Government to make retrospective rules. The whole purpose of laying on the table of the legislature the rules framed by the State Government is different and the effect of any one of the three alternative modes of so placing the rules has been explained by this Court in *Hukam Chand V. Union of India*, Mr. Justice Khanna speaking for the Bench observed: (SCC p 606, para-13).

The fact that the rules framed under the Act have to be laid before each House of parliament would not confer validity on a rule if it is made not in conformity with Section 40 of the Act . It would appear from the observation on pages 304 to 306 of the Sixth Edition of *Craies on Statute, Law* that there are three kinds of laying:-

- (i) Laying without further procedure;
- (ii) Laying subject to negative resolution;
- (iii) Laying subject to affirmative resolution.\

The laying referred to in sub-section(3) of Section 40 is of the second category because the above sub-section contemplates that the rules would have effect unless modified or annulled by the House of Parliament. The act of the Central Government in laying the rules before each House of Parliament would not, however, prevent the courts from scrutinising the validity of the rules and holding them to be ultra vires if on such scrutiny the rules are found to be beyond the rule-making power of the Central Government."

(Emphasis supplied)

44. In view of discussions made herein above, we are of the firm opinion that provision of Section- 94 of the JVAT Act, 2005 does not confer any power to the State Government to frame any Rule with retrospective effect and thus, the State Government, while enacting the machinery provision for giving effect to the amendment carried out in clause(ii) and (iii) of sub-section-4 of Section 18 of the JVAT Act with retrospective effect i.e. w.e.f. 1.4.2015 have exceeded its jurisdiction, and to that extent amended Rule is ultra vires the provisions of Section 94 of the JVAT Act, 2005. Accordingly, we declare that Amendment carried out under the JVAT Rules, 2006 vide amending Notification dated 17.2.2017 by which Rule 26(11A) was inserted shall have only prospective operation with effect from 17.2.2017 and the provision contained in the aforesaid notification to the extent it gives retrospective application of the said Rule is hereby quashed and set aside as beyond the competence of the delegate i.e. the State Government .

Question No. V

45. Since in the preceding paragraphs of our judgment, we have already answered issued No.IV in affirmative, an important and vital question has arisen with regard to the workability of the amended proviso inserted in clause(ii) and (iii) of sub-section-4 of Section 18 of the JVAT Act, for the period commencing from 23.09.2015 to 16.2.2017. The Hon'ble Supreme Court in catena of decisions have already held that in absence of machinery provision, it would not be open to the Assessing Authority to arbitrarily assess to tax the assessee.

46. In the case of "Heinz India Private Limited and Anr Vs. State of Uttar Pradesh and Ors, reported in (2012) 5 SCC 443", the Hon'ble Supreme Court has dealt in detail the importance of the machinery provision for assessment of taxes and fees recoverable under a taxing statute. In the said judgment the Hon'ble Supreme Court while relying upon several earlier decisions of the Apex Court has held that if the Act is silent as to the machinery and procedure to be followed in making the assessment and, leaves it to the Executive to evolve the requisite machinery and procedure, then the whole thing, from beginning to end, is

treated as of a purely administrative character. It has been held that an imposition of tax which is in the absence of a prescribed machinery and the prescribed procedure would partake of the character of a purely administrative affair and can be challenged as contravening Article 19(1)(f) of the Constitution of India. The said judgment of the Hon'ble Supreme Court in the case of "Heinz India Private Limited" has been quoted with approval by the Hon'ble Supreme Court in its subsequent decision rendered in the case of "Commissioner of Central Excise & Customs, Kerala Vs. Larsen & Tubro Ltd (Supra)". In the said judgment, the Hon'ble Supreme Court was considering the decision of the Hon'ble Delhi High Court which upheld the leviability of service tax on indivisible works contract prior to its introduction on 1.6.2007 of the Finance Act, 2007. The Hon'ble Delhi High Court has upheld the levy of service tax on indivisible works contract even prior to its introduction under the Finance 1994 vide Finance Act, 2007 with effect from 1.6.2007 by declaring , inter-alia that existing provision of the Finance Act 1994 itself was sufficient to levy service tax on indivisible works contract.

47. While answering the question regarding absence of machinery provision in the Finance Act and its corresponding rules for computation of leviability of tax on indivisible works contract, the Hon'ble Delhi High Court relied upon the judgment of Hon'ble Supreme Court in the case of "Mahim Patram(P) Ltd V. Union of India", to arrive at a proposition that even when rules are not framed for computation of tax, tax would be leviable. It may be indicated at this stage, that the learned Advocate General during his arguments has also placed extensive reliance on the judgment of the Apex Court in the case of "Mahim Patram (P) Ltd (Supra)". The Hon'ble Supreme Court in the case of "Larsen & Tubro Ltd" has reiterated the importance of machinery provision for assessment of tax, etc, and has even explained the ratio of the judgment rendered in the case of "Mahim Patram (P) Ltd (Supra)". The Hon'ble Supreme Court in the said judgment has clearly held that judgment in the case of "Mahim Patram (P) Ltd (Supra)". does not lay down the principle that in absence of any rule being framed, assessment proceeding can be carried out and tax can be assessed. Relevant extract of the judgment of the Hon'ble Supreme Court is quoted hereunder:-

"29. In the aforesaid judgment, it was held that the levy of service tax in sections 65(105)(g), (zzd), (zzh), (zzq) and (zzzh) is good enough to tax indivisible composite works contract. Various judgments were referred to which have no direct bearing on the point at issue. In para 23 of this judgment, the second Gannon Dunkerley judgment is referred to in passing without noticing any of the key paragraphs set out hereinabove in our judgment. Also, we find that the judgment in G.D. Builders went on to quote from the judgment in Mahim Patramn (P) Ltd v. Union of India, to arrive at the proposition that even when rules are not framed for computation of tax, tax would be leviable'

"30. We are afraid that the Delhi High Court in G.D. Builders case completely

misread the judgment in Mahim Patram Case. This judgment concerned itself with works contracts being taxed under the Central Sales Tax Act. What was argued in that case was that in the absence of any rule under the provisions of the Central Act, the determination of sale price would be left to the whims and fancies of the assessing authority. This argument was repelled by this Court after setting out Section 2(g) and 2(ja), which define "sale" and "works contract....."

"32. In the aforesaid judgment in G.D. Builders case, it was found that Section 9(2) of the Central Sales Tax Act conferred powers on officers of the various States to utilise the machinery provisions of the States' sales tax statute for purpose of levy and assessment of Central sales tax under the Central Act. It was also noticed that the State Government itself had been given power to make Rules to carry out the purpose of the Central Act so long as the said Rules were not inconsistent with the provisions of the Central Act. It was found that, in fact, the State of Uttar Pradesh had framed such Rules in exercise of powers under Section 13(3) of the Central Act as a result of which the necessary machinery for the assessment of Central sales tax was found to be there. The Delhi High Court judgment unfortunately misread the aforesaid judgment of this Court in Mahim Patram case to arrive at the conclusion that it was an authority for the proposition that a tax is leviable even if no Rules are framed for assessment of such tax, which is wholly incorrect. The extracted passage from Mahim Patram case only referred to rules not being framed under the Central Act and not to rules not being framed at all. The conclusion therefore in para 36(2) of the Delhi High Court judgment is wholly incorrect. Para 36(2) reads as follows: (G.D. Builders case, SC Online Del)

"36.. (2) Service tax can be levied on the service component of any contract involving service with sale of goods, etc. Computation of service component is a matter of detail and not a matter relating to validity of imposition of service tax. It is procedural and a matter of calculation. Merely because no rules are framed for computation, it does not follow that no tax is leviable"

"33. The aforesaid finding in G.D. Builders case is in fact contrary to a long line of decisions which have held that where there is no machinery for assessment, the law being vague, it would not be open to the assessing authority to arbitrarily assess to tax the subject. Various judgments of this Court have been referred to in the following passages from Heinz India (P) Ltd v. State of U.P. This court said: (SC p 45-57, para- 15-21)

"15. This court has in a long line of decisions rendered from time to time, emphasised the importance of machinery provisions for assessment of taxes and fees recoverable under a taxing statute. In one of the earlier decisions on the subject a Constitution Bench of this Court in K.T.Mopil Nair V. State of Kerala examined the constitutional validity of the Travancore-Cochin Land Tax Act (15 of 195). While recognising what is now well settled principle of law that a taxing statute is not wholly immune from attack on the ground that it infringes the

equality clause in Article 14, this Court found that the enactment in question was violative of Article 14 of the Constitution for inequality was writ large on the Act and inherent in the very provisions under the taxing section thereof. Having said so, this Court also noticed that the Act was silent as to the machinery and the procedure to be followed in making the assessment. It was left to the executive to evolve the requisite machinery and procedure thereby making the whole thing, from beginning to end purely administrative in character completely ignoring the legal position that the assessment of a tax on person or property is a quasi-judicial exercise."

48. In view of aforesaid decisions of the Hon'ble Supreme Court it is abundantly clear that in absence of machinery provision no assessment of tax and forfeiture of input tax can be sustained in the eye of law.

49. During the course of arguments the learned Advocate General has vehemently sought to distinguish the aforesaid judgment of the Hon'ble Supreme Court by contending , inter-alia, that in the said judgment of the Hon'ble Supreme Court machinery provisions were held to be necessary for the purpose of computation of tax whereas in the present case by virtue of the amended proviso only the benefit of ITC is being restricted/forfeited and hence, there is no requirement of machinery provision for giving effect to the amended proviso. At the outset, we would like to state here that said argument advanced by the learned Advocate General is itself contrary to the intent of the State Government by which the State Government itself framed necessary rules containing the machinery provision for giving effect to the provisions inserted in clause(ii) and (iii) of sub-Section 4 of Section-18 of the JVAT Act. Not only the State Government framed rules for giving effect to the aforesaid amendments but even the said rules were framed with retrospective effect. This itself clearly demonstrates that machinery provisions were inserted for denying benefit of ITC from being carried forward for adjustment from any tax, penalty or interest therein.

50. In the preceding paragraphs of our judgment, we have already stated that prior to introduction of the substituted proviso in clause(ii) and (iii) of sub-section 4 of Section-18 of the JVAT Act, there was no provision for forfeiture of ITC under the Act and said provision has been inserted for the first time. The effect of the said proviso is to forfeit ITC by making it unavailable from being adjusted against liability of tax, interest and penalty. Thus, in substance, machinery provisions which were prescribed for the first time by virtue of Rule 26(11A) of the JVAT Rules laying down mechanism by which amount of forfeited ITC can be determined, the said provision of the JVAT Act could not be enforced.

At this stage, it would be appropriate to refer to Section 18(2) of the JVAT Act, 2005 which reads as under:-

"18. Input Tax Credit - (1).....

(2) The input tax credit to which the registered dealer is entitled shall be the

amount of tax paid by the registered dealer to another registered dealer, on his turnover of purchases made during any tax period, intended to be used for the purposes and subject to the conditions as specified in sub Section (3), sub-Section (4), sub-Section (5) and sub-Section (6) and calculated in such manner as may be prescribed". (Emphasis supplied)

51. As already stated above, for the first time provisions were made for forfeiture of ITC vide Rule 26(11A) of the JVAT Rules, which provided for forfeiture of excess ITC amount over and above the tax payable under Section 8(1) of the CST Act. In absence of machinery provisions contained in Rule 26(11A), excess ITC over and above the amount of tax payable under Section- 8(1) of the CST Act, 1956 was available for adjustment against tax, penalty and interest liability. Thus, the amount of ITC available partaked the character of tax as it was available for adjustment against the output tax liability. Reference in this regard may further be made to Statutory Form JVAT 200 which contains format for filing quarterly return. In the return column prescribed under the rules, there was no provision for incorporating the amount towards forfeited ITC which have been subsequently introduced in view of amendment carried out in the Rules vide notification dated 17.2.2017. In the return format applicable for the month of March, 2017 onwards, separate column has been inserted for forfeiture of ITC including ITC on consumables as under:-

58(A)

ITC not admissible (forfeited ITC) for the current tax period.

58(B)

ITC not admissible(forfeited ITC)(For the previous Tax period)

58(C)

Less: ITC erroneously availed on consumables during previous tax periods.

52. During the course of arguments, the learned Advocate General also tried to contend inter-alia that formula prescribed in the earlier Rule was sufficient to determine the amount of forfeited ITC of a dealer. We do not agree to the aforesaid submission of the learned Advocate General in view of clear distinction between the two formula as contained under Rule 26(5) and newly inserted Rule 26(11A). The learned Advocate General has also argued though feebly that JVAT Act itself contains provision for computation of ITC. We are not persuaded by the said argument of the learned Advocate General as we have not been shown any provision under the JVAT Act which itself contains machinery provision for computation of ITC. To the contrary, Section 18(2) of the JVAT Act, specifically provides inter-alia that ITC shall be calculated in such manner as may be prescribed.

53. In view of the discussions made hereinabove, we are of the firm opinion that in absence of machinery provision having been prescribed by the State of

Jharkhand for giving effect to the proviso inserted in clause(ii) and (iii) of sub-section 4 of Section 18 of the JVAT Act, the said provisos were unworkable between the period 23.09.2015 till 16.02.2017 and during the said period no assessment could be made and for the said period no forfeiture of ITC can take place and the computation of ITC is to be made for the said period in terms of existing Rule i.e. Rule 26(5) JVAT Rules, including the formula prescribed therein. Any assessment order, scrutiny order, etc, passed in respect of the writ petitioners having an effect of forfeiture of ITC are hereby declared illegal and quashed for the period 23.09.2015 till 16.2.2017.

54. In view of cumulative facts and circumstances mentioned hereinabove, we summarise our judgment as follows:-

(I) The challenge to the proviso inserted to clause (ii) and Clause (iii) of sub-section 4 of Section 18 of the JVAT Act, fails in view of the fact that the petitioners have not pressed the same during the course of their arguments.

(II) Retrospective effect given to the proviso inserted to clause(ii) and Clause(iii) of sub-section 4 of Section 18 of the JVAT Act, vide Amendment Act contained in Notification dated 8.2.2016, is hereby, set aside and struck down and it is declared that said provision shall have prospective effect with effect from 8.2.2016 only.

(III) The challenge to the provision contained in clause

(xviii) of sub-Section 8 of Section 18 of the JVAT Act, fails and the said provision is declared intra vires and within the legislative competence of the State Government.

(IV) It is declared that the State Government has no power to frame rules with retrospective effect, and accordingly, the retrospective effect given to Rule 26(11A) of the JVAT Rules vide amending notification dated 17.2.2017 with effect from 1.4.2015, is hereby quashed and set aside, and it is declared that Rule 26(11A) shall have only prospective operation w.e.f. 17.2.2017 and onwards.

(V) In view of fact that Rule 26(11A) has been declared to be prospective in operation i.e. w.e.f. 17.2.2017, it is hereby declared that for the period 23.09.2015 to 16.2.2017 proviso inserted to clause(ii) and Clause (iii) of sub-section 4 of Section 18 of the JVAT Act cannot be given effect to in absence of any machinery provision and no forfeiture of ITC shall be given effect to during the period 23.09.2015 to 16.2.2017, and any scrutiny order/assessment order and/or any order having effect of forfeiture of ITC for the aforesaid period are hereby quashed and set aside.

55. Consequently, all the 98 aforesaid writ applications are accordingly, allowed in part, to the extent indicated above. Pending interlocutory applications also stand disposed of.