

**(1997) 12 KAR CK 0010**

**In the Karnataka High Court**

**Case No :** Writ Petition No's. 26445, 30363 and 30364 of 1997

Mycon Construction Limited

APPELLANT

Vs

State of Karnataka and another <BR> G.H. Reddy and  
Associates Vs Deputy Commissioner of Commercial Taxes  
(Assts.), Raichur and another

RESPONDENT

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**Date of Decision :** 15-12-1997

**Acts Referred:**

Constitution of India, 1950 — Article 14, 19 (1) (g), 265, 366 (29A)  
Karnataka Sales Tax Act, 1957 — Section 12 (3), 17 (6)

**Citation :** (1998) 111 STC 322

**Hon'ble Judges :** P. Vishwanatha Shetty, J

**Bench :** Single Bench

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## **Judgement**

P. Vishwanatha Shetty, J.—In Writ Petition No. 26445 of 1997, the petitioner has challenged the constitutional validity of sub-section (6) of section 17 of the Karnataka Sales Tax Act, 1957 as amended by Act No. 5 of 1996 and Act No. 7 of 1997 (hereinafter referred to as "the Act"). In Writ Petition Nos. 30363 and 30364 of 1997, the petitioners, in addition to the challenge made to the constitutional validity of sub-section (6) of section 17 of the Act, have prayed for quashing of the orders of assessments made by the assessing authorities in exercise of the powers conferred on them u/s 12(3) read with section 17(6) of the Act, for the assessment years 1993-94 and 1994-95. Copies of the said assessment orders dated April 14, 1997 and April 11, 1997 have been produced as annexures A and B respectively.

2. Since common questions of law are raised in these petitions, these petitions are taken up together and disposed of by this common order.

3. Before referring to the contentions urged by the learned counsel for the petitioners and the learned Government Advocate, it is useful to refer to the genesis of the provisions of law, which will have a bearing for the disposal of these petitions.

(a) By means of Constitution (46th Amendment) Act, 1982, clause (29A) was introduced to article 366 of the Constitution. Sub-clause (b) of clause (29A) of article 366 reads as under :

"(29A) "tax on the sale or purchase of goods" includes -

(a) .....

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;"

Thereafter, section 5B of the Act came to be introduced to the Karnataka Sales Tax Act (hereinafter referred to as "the Act") by means of Act No. 27 of 1985 with effect from April 1, 1986. The said section reads as hereunder :

"5B. Levy of tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of works contracts. -Notwithstanding anything contained in sub-section (1) or sub-section (3) or sub-section (3-C) of section 5, but subject to sub-section (4), (5) or (6) of the said section, every dealer shall pay for each year, a tax under this Act on his taxable turnover of transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract mentioned in column (2) of the Sixth Schedule at the rates specified in the corresponding entries in column (3) of the said Schedule."

By means of Act No. 14 of 1987, presumably with a view to simplify the assessment proceedings, the State introduced sub-section (6) of section 17 of the Act with effect from April 1, 1988, which reads as hereunder :

"Notwithstanding anything contained in sub-sections (1) to (3), subject to such conditions and in such circumstances as may be prescribed, the assessing authority of the area may, if a dealer liable to tax u/s 5B so elects, accept in lieu of the amount of tax payable by him during any year, under this Act, in respect of works contracts falling under serial number 6 of the Sixth Schedule, by way of composition, an amount at the rate of two per cent. of his total turnover in respect of transfer of property in goods (whether as goods or in some other form) involved in the execution of such works contracts."

Thereafter, by means of Act No. 4 of 1992, sub-section (6) of section 17 of the Act came to be amended with effect from April 1, 1992. The said provision reads as hereunder :

"Notwithstanding anything contained in sub-sections (1) to (3), but subject to such conditions and in such circumstances as may be prescribed, the assessing authority of the area may, if a dealer liable to tax u/s 5B in respect of the works contract specified in column (2) of the table below so elects, accept in lieu of the amount of tax payable by him during the year under this Act, by way of composition an amount at the rates specified in the corresponding entries in column (3) of the table on his total turnover relating to transfer of property in

goods (whether as goods or in some other form) involved in the execution of such works contract."

Again, sub-section (6) of section 17 of the Act was further amended by means of Act No. 5 of 1996 with effect from April 1, 1996. The said provision reads as follows :

"Notwithstanding anything contained in section 5B, but subject to such conditions and in such circumstances as may be prescribed, the assessing authority of the area may, if a dealer liable to tax u/s 5B so elects, accept in lieu of the amount of tax payable by him during the year under this Act, by way of composition an amount on the total consideration for the works contracts executed by him in that year in the State in respect of works contract specified in column (2) of the Sixth Schedule at the rates specified in the corresponding entries in column (4) of the said Schedule."

Thereafter, by means of Act No. 7 of 1997, sub-section (6) of section 17 of the Act came to be amended with effect from April 1, 1997. The amendment made to clause (i) of sub-section (6) of section 17 of the Act, reads as hereunder :

"(a) for the words and brackets "on his total turnover relating to transfer of property in goods (whether as goods or in some other form) involved in the execution of such works contract", the words "on the total consideration received or receivable by him in respect of such works contract executed by him in that year in the State", shall be deemed to have been substituted with effect from the first day of April, 1988;

(b) for the words, brackets and figure, "at the rates specified in the corresponding entries in column (4) of the said Schedule", the words "at the rate of four per cent.", shall be substituted."

The said amendment provided for two matters. Firstly, it provided that at the end of section 17(6)(i), the words "at the rate of 4 per cent." were added for the words "at the rates specified in the corresponding entries in column (4) of the said Schedule". The said amendment was prospective in operation. Secondly, it provided that the words "total turnover relating to transfer of property in goods involved in the execution of such works contract" existing from April 1, 1988 up to March 31, 1996 were substituted by the words "the total consideration received or receivable by him in respect of such works contract executed in that year in the State". The said amendment was made retrospective in operation, i.e., with effect from April 1, 1988. By this retrospective amendment, composition tax for the period from April 1, 1988 to March 31, 1996 became payable not on the total turnover of specified goods involved in a works contract, but on the total consideration received or receivable for the works contract.

4. Sri Kishore Mallya, learned counsel, who made the leading arguments in these petitions, primarily made two submissions in support of the prayer of the petitioners that sub-section (6) of section 17 of the Act is liable to be declared as

unconstitutional. Firstly, he submitted that the power of the Legislature to impose tax has to be traced to entry 54 of List II of the Seventh Schedule read with sub-clause (b) of clause (29A) of article 366 of the Constitution of India. It is his submission that the tax under the Act is leviable on transfer of property in goods (whether as goods or in some other form) involved in the execution of the works contract. In other words, it is his submission that it is only in respect of the value of the goods, which are involved in the execution of the works contract, the tax is leviable and not on any other item other than the transfer of goods involved in the execution of the contract. According to Sri Mallya, it is not permissible for the State even in the scheme providing for composition of tax to levy tax on an item where there is no transfer of property in the goods in the execution of a works contract. He points out that sub-section (6) of section 17 of the Act, which provides for payment of tax on total consideration, confers power on the State to levy tax in respect of an item where there is no transfer of goods in the property involved; and, therefore, the said provision is unconstitutional as being violative of sub-clause (b) of clause (29A) of article 366 of the Constitution of India and also being contrary to the mandate contained in section 5B of the Act. In support of his submission, he drew my attention to clause (29A) (b) of article 366 of the Constitution and also section 5B of the Act where it is specifically stated that the tax is leviable only on transfer of property in the goods, whether as goods or in some other form, which is involved in the execution of the works contract. He also relied upon the decisions of the Supreme Court in the case of (1) Builders Association of India and Others Vs. Union of India (UOI) and Others, ; and (2) Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and Others, . He particularly drew my attention to the following observations made in the judgment in the case of Builders Association of India and Others Vs. Union of India (UOI) and Others, , which reads as hereunder :

"Sub-clause (b) of clause (29A) states that "tax on the sale or purchase of goods" includes among other things a tax on the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract. It does not say that a tax on the sale or purchase of goods included a tax on the amount paid for the execution of a works contract. It refers to a tax on the transfer of property in goods (whether as goods or in some other form) involved, in the execution of a works contract. The emphasis is on the transfer of property in goods (whether as goods or in some other form). The latter part of clause (29A) of article 366 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that takes place as per sub-clauses (a) to (f) of clause (29A), the latter part of clause (29A) says that "such transfer, delivery or supply of any goods" shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. Hence, a transfer of property in goods under sub-clause (b) of clause (29A) is deemed to be a sale of the goods involved in the execution of

works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The object of the new definition introduced in clause (29A) of article 366 of the Constitution is, therefore, to enlarge the scope of "tax on sale or purchase of goods" wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred in sub-clauses (a) to (f) thereof, wherever such transfer, delivery or supply become subject to levy of sales tax. So construed the expression "tax on the sale or purchase of goods" in entry 54 of the State List, therefore, includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also. The tax leviable by virtue of sub-clause (b) of clause (29A) of article 366 of the Constitution thus becomes subject to the same discipline to which any levy under entry 54 of the State List is made subject to under the Constitution."

Sri Mallya also brought to my notice the decision of the Supreme Court in the case of State of Kerala and another Vs. Builders Association of India and others, and submitted that in view of the decision of the Constitution Bench of the Supreme Court in the case of Builders Association of India and Others Vs. Union of India (UOI) and Others, , the decision of the Supreme Court in the case of State of Kerala and another Vs. Builders Association of India and others, cannot have binding effect and this Court should follow the decision of the Constitution Bench of the Supreme Court rendered in the case of Builders Association of India and Others Vs. Union of India (UOI) and Others, . He further pointed out that the decision of the Supreme Court in State of Kerala and another Vs. Builders Association of India and others, turned on the facts of that case on the basis of the provisions contained in Kerala General Sales Tax Act.

(a) Secondly, Sri Mallya submitted that even assuming that sub-section (6) of section 17 of the Act to the extent it has been made prospective in operation, is valid in law, Act No. 7 of 1997 to the extent it makes the said provision retrospective, is liable to be declared as unconstitutional as being violative of the rights guaranteed to the petitioners under articles 14, 19(1)(g) and 265 of the Constitution of India. It is his submission that in view of sub-section (6) of section 17 of the Act providing for composition as it stood prior to Act No. 5 of 1996, the petitioners and various other contractors had opted for composition; and therefore, the petitioners cannot be made liable to pay tax in excess of the one which they had opted as per the provision, which was prevailing prior to April 1, 1996. He further submitted that the authorities of the department having accepted the returns filed under the scheme of composition then existing, cannot now be permitted to go back on the permitted to go back on the returns filed by the petitioner in terms of the scheme of composition on the basis of the impugned provisions, which are made retrospective in operation. He submits that the said provision is highly arbitrary and unreasonable and seriously affects the right to carry on profession or business guaranteed to the petitioners. Elaborating this submission, Sri Mallya contends that sub-section (6) of section

17, as it stood from April 1, 1988 to March 31, 1996, did not suffer from any ambiguity or vagueness, which required the State to amend the legislation retrospectively. Therefore, he submits that when the provisions are clear and unambiguous the parties cannot now be saddled with the higher liability to pay tax retrospectively by virtually changing the incidence of tax. According to him, such a provision is arbitrary in law resulting in violation of the right guaranteed to the petitioners under article 14 of the Constitution of India. He submits that the retrospectivity of the law, in effect, amounts to levy of tax on those elements, which were not taxed or included for levy of tax. He also further submits that this Court in the case of Gounder and Company v. State of Karnataka (Writ Petition Nos. 15958 and 15959 of 1996) and other connected cases disposed of on October 10, 1996, in unequivocal terms, laid down that the State can levy tax only on the value of the goods involved in execution of the contract; and, therefore, by virtue of the impugned provision, which is given retrospectivity in effect, the State intends to levy a tax, which is not permissible to be levied for the period prior to March 31, 1996.

5. Sri Indra Kumar, Sri Narayan, Sri Nazeer, Sri Angadi, Sri A. K. Alur and Sri Srikante Gowda, learned counsel appearing for the petitioners in the other connected matters, supported the submissions made by Sri Mallya. Sri Angadi, learned counsel for the petitioners in the connected matters, also submitted that this Court, on an earlier occasion, when the validity of the circular issued by the Commissioner came to be challenged wherein the Commissioner had directed levy of tax on total consideration of the works contract, has quashed the circular and directed the assessing authority to complete the assessment strictly in terms of the provisions contained in sub-section (6) of section 17 of the Act and without reference to the circular. The learned counsel for the petitioners further submitted that sub-section (6) of section 17 of the Act, under the circumstances, has to be treated as a charging section by itself and has to be read independently and de hors section 5B of the Act with effect from April 1, 1997; and if it is so read, it enables the State to levy a tax on an item, which is not permissible to be levied in times of sub-clause (b) of clause (29A) of article 366 of the Constitution of India. According to them, the acceptance of composition by the State has resulted in a concluded contract which the State cannot be permitted to rescind.

6. Sri D'Sa, learned Government Advocate, while refuting each one of the grievances made out by learned counsel appearing for the petitioners, submitted that the scheme of composition is a mechanism provided to collect the tax. The object of such a mechanism is to minimise the inconvenience caused to the assesseees and also to the department in computing the figures. He submitted that the provision contained in section 17 of the Act is only an enabling provision where an option is given to the assesseees either to opt for composition or to file regular returns for assessment u/s 5B of the Act. He also points out that the percentage of tax made leviable in the scheme providing for composition, is much less than the percentage of tax made leviable under regular assessment u/

s 5B of the Act. He further submits that the percentage of tax liability under the scheme of composition was only 2 per cent. whereas u/s 5B assessment, the tax liability varies from 4 per cent. to 13 per cent. and, therefore, the scheme for composition is a highly beneficial scheme offered to the assesseees where they are given the choice either to opt for composition or to fall back for regular assessment. According to him, if the entire section 17(6) is viewed in this background, the petitioners cannot have any grievance to challenge the validity of section 17(6) of the Act on the ground that it is unconstitutional; and in so far as the constitutional validity of sub-section (6) of section 17 to the extent it is prospective in operation is concerned, the contention urged by the petitioners is fully covered against them by the decision of the Supreme Court in the case of State of Kerala and another Vs. Builders Association of India and others, .

(a) In so far as the argument based on the contention that the retrospectivity of the provision is unconstitutional is concerned, Sri D'Sa would submit that it is well accepted principle of law that the Legislature has a right to pass a law which could be retrospective in operation, the only limitation being that it should not be contrary to the rights guaranteed under article 14 or other constitutional provisions. He submits that Act No. 7 of 1997 cannot be struck down on the ground that it violates the rights of the petitioner either under article 14 or under article 19 of the Constitution of India. According to him, if the history which ultimately led for the passing of the impugned provision is taken into consideration, it would be clear that at all times, the State intended to levy tax on total consideration in so far as the scheme providing for composition is concerned. In this connection, he drew my attention to the Budget Speech made on the Floor of the House by the Chief Minister of Karnataka, who was also the Finance Minister. The relevant portion of the Budget Speech, referred to by Sri D'Sa, reads as under :

"(i) Extending the facility of payment of tax by way of composition under the Karnataka Sales Tax Act to dealers who are liable to pay tax on transfer of property in goods which are involved in the execution of civil works, an average rate of 2 per cent. will be levied on the total turnover in such cases in lieu of all taxes including turnover tax payable under the Karnataka Sales Tax Act."

He also referred to me the Statement of Objects and Reasons, which reads as hereunder :

"To give effect to the proposals made in the Budget Speech, it is proposed to amend the Karnataka Sales Tax Act, 1957. Hence, the Bill."

From the Budget Speech made by the Chief Minister on the Floor of the House and also on the basis of the Statement of Objects and Reasons, Sri D'Sa would submit that the intention was always to levy tax on the total consideration of the works contract, because the levy of tax percentage imposed under the scheme of composition is much less than the levy of tax percentage provided u/s 5B of the Act. Sri D'Sa also points out that though the circular issued by the Commissioner

providing for levy of tax on total consideration in so far as it related to composition in respect of works contract came to be quashed by this Court, the said circular clearly indicated that the intention of the State has been always to levy tax on total consideration and that was the reason why the Commissioner issued the said circular and when the said circular came to be quashed by this Court and the State was prevented from collecting the tax on the total consideration, the State had to pass the impugned legislation taking away the basis of the judgment and provide for levy of tax retrospectively. He further submits that most of the assessees had opted for composition and paid tax on the basis of the total consideration and such assessments also have become final and if the matter is considered in that angle, there is absolutely no basis or justification for the contentions advanced on behalf of the petitioners that the impugned provision is either arbitrary or unreasonable resulting in violation of article 14 of the Constitution of India. He points out that all these matters clearly indicate that throughout assessees had full knowledge that they would be fastened with the liability to pay tax on total consideration; and what is intended to be done in the impugned legislation was only to set right the lacuna in the existing provision. Sri D'Sa, in support of his submission that it is permissible for the State to make a legislation retrospectively in operation, relied upon the decisions of the Supreme Court in the cases of (1) Ujagar Prints v. Union of India : [1989]179ITR317a(SC) , (2) Empire Industries Limited and Others Vs. Union of India and Others, , (3) Entertainment Tax Officer and Another Vs. Ambae Picture Palace, and (4) Krishnamurthi and Co. etc. Vs. State of Madras, .

7. In the light of the rival contentions advanced by the learned counsel for the parties, the two questions that would fall for my consideration, are -

i) Whether sub-section (6) of section 17 of the Act as amended by means of Act No. 5 of 1996 is unconstitutional and as such, declared to be void ?

(ii) Whether Act No. 7 of 1997, which has made Act No. 5 of 1996 retrospective in operation, is unconstitutional and as such, declared to be void ?

8. In so far as the first question is concerned, though Sri Kishore Mallya and other learned counsel appearing for the petitioners, took great pain and relying upon the decision in Builders Association of India and Others Vs. Union of India (UOI) and Others, , submitted that sub-section (6) of section 17 of the Act to the extent it fastens tax liability on total consideration is liable to be declared as unconstitutional, in my view, the said question is no longer res integra in view of the decision of the Supreme Court in the case of State of Kerala and another Vs. Builders Association of India and others, . In the said decision, the Supreme Court has observed as follows :

"With great respect, we are unable to agree. The first feature to be noticed is that the alternate method of taxation provided by sub-section (7) or (7A) of section 7 is optional. The sub-sections expressly provide that the method of taxation provided thereunder is applicable only to a contractor who elects to be



governed by the said alternate method of taxation. There is no compulsion upon any contractor to opt for the method of taxation provided by sub-section (7) or sub-section (7A). It is wholly within the choice and pleasure of the contractor. If he thinks it is beneficial for him to so opt, he will opt; otherwise, he will be governed by the normal method of taxation provided by section 5(1)(iv). Sub-section (8) provides that the option to come under sub-section (7) or (7A) has to be exercised by the contractor "either by an express provision in the agreement for the contract or by an application to the assessing authority, to permit him to pay the tax in accordance with any of the said sub-sections". In these circumstances, it is evident that a contractor who had not opted to this alternate method of taxation cannot complain against the said sub-sections, for he is in no way affected by them. Nor can the contractor who has opted to the said alternate method of taxation, complain. Having voluntarily, and with the full knowledge of the features of the alternate method of taxation, opted to be governed by it, a contractor cannot be heard to question the validity of the relevant sub-sections or the rules. Sub-sections (8), (11) and (12) of section 7 are incidental and ancillary to sub-sections (7) and (7A) and cannot equally be faulted. Secondly, it is true that the goods transferred in the course of execution of the works contract may be chargeable at different rates under different Schedules appended to the Kerala Act; it may also be that some of them may be "declared goods", the levy of tax upon which is subject to certain restrictions specified in sections 14 and 15 of the Central Sales Tax Act; it may also be that sale of some of the goods may also be subject to Central sales tax. It must yet be remembered that the method of taxation introduced by sub-sections (7) and (7A) is in the nature of composition of tax payable u/s 5(1)(iv)."

I am of the view that the law laid down by the Supreme Court in the case of State of Kerala and another Vs. Builders Association of India and others, fully supports the contention of Sri D'Sa, learned Government Advocate. Sub-section (6) of section 17 of the Act is an alternate method of taxation provided under the Act, which is made optional to the assessee. The said provision gives an option to the dealer, who is liable to tax u/s 5B of the Act, in respect of the works contract executed by him, to accept in lieu of the amount of tax payable by him during the year by way of composition, an amount on total consideration for the works contract executed by him in that year. Therefore, it is clear that there is no compulsion upon any contractor to opt for the method of taxation provided under sub-section (6) of section 17 of the Act. It is entirely left to the choice and absolute discretion of the contractor. As observed by the Supreme Court in the case of State of Kerala and another Vs. Builders Association of India and others, , if the contractor thinks that it is beneficial for him to so opt, he can opt for it; otherwise he will be governed by the normal method of taxation provided u/s 5B. Therefore, I am of the view that the petitioners cannot derive much assistance from the decision of the Supreme Court in the case of Builders Association of India and Others Vs. Union of India (UOI) and Others, , in support of their plea that the provisions of sub-section (6) of section 17 of the Act to the extent it

makes the tax payable on the total consideration of the works contract executed by the contractor, is unconstitutional. On the other hand, the decision of the Supreme Court, in the case of State of Kerala and another Vs. Builders Association of India and others, , as observed by me earlier, is a direct answer to negative the submission made by the learned counsel appearing for the petitioners. Therefore, I am unable to accede to the submission of learned counsel for the parties that sub-section (6) of section 17 of the Act as amended by Act No. 5 of 1996 is liable to be declared as unconstitutional.

9. The only other question, which requires to be considered, is with regard to the validity of Act No. 7 of 1997.

10. As noticed earlier, the challenge to Act No. 7 of 1997 is made on the ground that the said provision is arbitrary and violative of the right guaranteed to the petitioners under articles 14 and 19(1)(g) of the Constitution of India. While learned counsel appearing for the petitioners, on principle, do not dispute that the Legislature has the power to make law both prospectively and retrospectively, they submit that in so far as the impugned provision, which provides for imposition of tax retrospectively, is concerned, firstly it is in the nature of an additional tax imposed and secondly, it seriously affects the property right guaranteed to the petitioners inasmuch as they are liable to pay additional tax though they have opted for composition as per the provision, which stood prior to the impugned provision.

10A. It is well-settled that the Legislature has power to make legislation both prospectively and retrospectively. As observed by me earlier, this position is also not seriously disputed by the learned counsel appearing for the petitioners. The taxing statute also is no exception to the well-settled principle that the Legislature has the power to make law retrospectively. Therefore, the only question that would emerge for consideration in these petitions, is whether the impugned provision, which is retrospective in operation, is violative of the rights guaranteed to the petitioners under articles 14 and 19(1)(g) of the Constitution of India. In my view, the grievance made by the petitioners on this question requires to be negated on two grounds. Firstly, it is the case of the State as contended by the learned Government Advocate that throughout, the State intended to levy tax in so far as composition is concerned on a total sale consideration. The Budget Speech made by the Chief Minister, who was also the Finance Minister, on the Floor of the House and the Statement of Objects and Reasons given support this claim made by the State. Further, the circulars issued by the Commissioner, though they came to be quashed by this Court, also support the claim of the State that the State and its authorities throughout intended to levy tax on total consideration so long as it relates to composition. Under these circumstances, when this Court, in the case of Gounder and Company (Writ Petitions Nos. 15958 and 15959 of 1996 decided on October 10, 1996) has taken the view that on the plain reading of section 17(6) of the Act, as it stood prior to the impugned provision, it was not permissible for the State to

impose tax on items which do not relate to transfer of goods in the execution of a works contract, the impugned provision came to be incorporated into the Act making the liability retrospective in operation. In other words, when this Court, on consideration of section 17(6) of the Act, as it stood prior to the amendment, has taken the view that the State could levy tax only on transfer of property in the goods involved in the execution of a works contract, the impugned provision was required to be passed by the State. Such a provision was necessitated to be incorporated into the Act as contended by the learned Government Advocate for the State, to take away the basis of the decision of this Court. In the case of Gounder and Company (Writ Petitions Nos. 15958 and 15959 of 1996 decided on October 10, 1996), as stated earlier, this Court has taken the view that under the provisions, as then stood, the State could levy tax only on transfer of property in goods in execution of a works contract. Under these circumstances, I am unable to accede to the submission made by the learned counsel appearing for the petitioners that since the language of section 17(6) prior to the amendment was clear and unambiguous in terms, the question of taking away the basis of the judgment does not arise. The principle underlying taking away the basis of the judgment, must be understood to mean that curing or rectifying the defect in the law pointed by the Court. In the case of Gounder and Company (Writ Petitions Nos. 15958 and 15959 of 1996 decided on October 10, 1996), this Court has taken the view that as per the law then stood, the State could levy tax only on transfer of property in goods involved in the works contract. As noticed, the said defect has been cured by providing retrospectively that the tax could be levied on total consideration. Secondly, the contention of the petitioners also requires to be negated on the ground that retrospective amendment made in the facts and circumstances, must be held to be reasonable and not violative of the rights guaranteed to the petitioners either under article 14 or under article 19(1)(g) of the Constitution of India. This is because, as pointed out by me earlier, at all point of time, the State intended to levy tax in so far as composition is concerned on total consideration. It is also not in dispute that the petitioners in these petitions, have been assessed on the basis of the total consideration involved in the execution of works contract; and it may be on the basis of the circular issued by the Commissioner. It is also the case of the State that in almost all the case where the assessments have been completed, the composition has been made on the basis of the total consideration for the works contract executed by a contractor. It is relevant to point out that the tax payable by an assessee, who opts for composition, is much less than the tax payable by an assessee, who is required to be assessed u/s 5B of the Act. In this background, the only question is whether the impugned provision would result in arbitrariness and violation of the rights guaranteed to the petitioners either under article 14 or under article 19(1)(g) of the Constitution of India. If the petitioners and several other assessees, like the petitioners, at all point of time, were informed or indicated by the authorities, once they opt for composition, they are liable to pay tax on total consideration for works contracts executed by them and at a later stage, the State, by virtue of the judgment of this Court Gounder and Company v. State of

Karnataka (Writ Petitions Nos. 15958 and 15959 of 1996 decided on October 10, 1996), is prevented from levying tax on total consideration, on a proper understanding of the law then prevailing; and in that situation, if law is made retrospective in operation permitting the State to levy tax on total consideration, can it be said that the said provision is unreasonable ? In my view, the answer should be in the negative because there is absolute no prejudice or hardship caused to the assesseees who have opted for composition. In this connection, though a contention is advanced that the State is imposing a new tax in the guise of making a provision retrospective in operation, the said contention also cannot be accepted. No serious prejudice or hardship is caused to the petitioners because the levy of tax on the assessee who opts for composition, is much less than the tax required to be paid by the assessee, who is required to be assessed u/s 5B of the Act. Further it is, necessary to point out that the respondents, in the statement of objections at paragraph 6, have stated that having regard to the facts and circumstances of the case, this Court may permit any works contractor to opt for such assessment u/s 5B of the Act. The relevant portion of the statement of objections filed by the State, reads as follows :

"The hardship proposition pleaded by this or any other petitioner is untenable and is liable to be rejected. Needless to state, it would be open to this honourable Court in the interest of justice to permit any works contractor to opt back to an assessment u/s 5B."

Therefore, from the stand taken by the State, even on this day, it is clear that the State is not keen to cause any prejudice or hardship to the petitioners on account of the impugned provision and they have no objection for this Court permitting the petitioners to opt for assessment u/s 5B of the Act. The Supreme Court, in the case of Ujagar Prints : [1989]179ITR317a(SC) , has observed as follows :

"There is really no substance in the grievance that the retroactivity imparted to the amendments is violative of article 19(1)(g). A competent Legislature always validate a law which has been declared by courts to be invalid, provided the infirmities and vitiating factors noticed in the declaratory judgment are removed or cured. Such a validating law can also be made retrospective. If in the light of such validating and curative exercise made by the Legislature - granting legislative competence - the earlier judgment becomes irrelevant and unenforceable, that cannot be called an impermissible legislative overruling of the judicial decision. All that the Legislature does is to usher in a valid law with retrospective effect in the light of which earlier judgment becomes irrelevant (See : Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others, .

Such legislative experience of validation of laws is of particular significance and utility and is quite often applied in taxing statutes. It is necessary that the Legislature should be able to cure defects in statutes. No individual can acquire a vested right from a defect in a statute and seek a windfall from the Legislature's

mistakes. Validity of legislations retroactively curing defects in taxing statutes is well-recognized and courts, except under extraordinary circumstances, would be reluctant to override the legislative judgment as to the need for, and the wisdom of the retrospective legislation. In *Empire Industries Limited and Others Vs. Union of India and Others*, ;[1985] Supp 1 SCR 292 , this Court observed :

"..... not only because of the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of Government among those who benefit from it."

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

The same is the principle laid down by the Supreme Court in the case of *Empire Industries Limited and Others Vs. Union of India and Others*, . This is what has been observed by the Supreme Court at paragraphs 49 and 50 :

"It has therefore to be borne in mind that the petitioners have already paid excise duty demanded of them from time to time and the present petitioners have gathered the duties from the consumers.

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

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

"It is necessary that the Legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called "small

repairs". Moreover, the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the Legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen. Thus, the interest in the retroactive curing of such a defect in the administration of Government outweighs the individual's interest in benefiting from the defect ..... The court has been extremely reluctant to override the legislative judgment as to the necessity for retrospective taxation, not only because of the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of Government among those who benefit from it."

If the justification sought to be made out by the State is considered in the light of the law enunciated by the Supreme Court in the cases, referred to above, I am of the opinion that there is no justification for the grievance made out by the petitioners. The decision of the Kerala High Court in the case of *Mega Traders v. State of Kerala* [1991] 83 STC 59 KER relied upon by the learned counsel appearing for the petitioners, in my view, is of no assistance to the petitioners. That is a case where the levy of tax was retrospectively amended from 5 per cent. to 10 per cent. for a period spreading more than 5 years. In the facts and circumstances of the case, the Kerala High Court, no doubt, took the view that it was not permissible for the State to levy the tax retrospectively. In the instant case, as observed by me earlier, that is not the situation. It is not the case where the rate of tax is sought to be enhanced as in the case of *Mega Traders* [1991] 83 STC 59 KER. This is a case where option is given to the assessee to opt for composition where the percentage of rate of tax is not varied. Since this Court took the view that the State could levy tax under the provisions then stood prior to the amendment, only on transfer of goods involved in the execution of a works contract, and not on total consideration for the works contracts executed, even in respect of the assessees, who have opted for composition, and since the taxes were levied and collected on the basis of total consideration, the impugned provision came to be made. Therefore, in my view, by virtue of the impugned provision, the State is neither making an attempt to impose additional tax as seriously contended by the learned counsel for the petitioners nor is it violative of the rights guaranteed to the petitioners under articles 14 and 19(1)(g) of the Constitution.

11. One another contention advanced by the petitioners, which is required to be considered, is whether the nature of transaction is in the nature of contract as sought to be made out by the petitioners and whether the respondents are making an attempt to deviate from the contract. In my view, there is no justification for the submission made that the State, by accepting the offer made by the assessees for composition, has accepted the contract and after the conclusion of the contract, the State cannot be permitted to deviate therefrom. The levy of tax is made by virtue of the provisions of the Act. Section 17(6) of the Act provides for a scheme of composition, which is a method or a machinery

provided for recovery of the tax. It is an enabling provision or a choice given to the assesseees to opt for composition. It is by virtue of the provision of the law, the assesseees are given option for composition and the State only accepts the return filed for composition. Such a type of transaction, in my view, cannot be tanned as a concluded contract entered into between the parties. Therefore, there is no merit in the above submission of the learned counsel for the petitioners.

12. In the light of the above discussion, these petitions are liable to be rejected.

13. However, in view of the categorical statement made by the State in the statement of objections stating that this Court can permit the petitioners to opt for regular assessment u/s 5B; and I have taken that factor as one of the factors to come to the conclusion that the impugned provision in no way results in arbitrariness or violation of the right guaranteed to the petitioners either under article 14 or under article 19(1)(g) of the Constitution; it is necessary to reserve liberty to the petitioners to opt for regular assessment u/s 5B of the Act notwithstanding the fact that they had opted for composition u/s 17(6) of the Act, if the petitioners, within 12 weeks from today, make an application to the concerned assessing authority that they may be assessed as provided u/s 5B of the Act, and further direct the assessing authorities to proceed to assess the petitioners and all others, who are not before the Court, as provided u/s 5B of the Act. This direction is binding on the State and its assessing, revising or appellate authorities wherever an application is made seeking assessment u/s 5B of the Act and they are directed to pass appropriate orders suitably modifying the assessments.

14. Therefore, rule issued in each of these petitions is discharged and the petitions are dismissed. However, no order is made as to costs.

15. Petitions dismissed.