

(1998) 11 KAR CK 0015

In the Karnataka High Court

Case No : Writ Petition No's. 30955-59, 32375-76, 32231, 33148 and 33154-58 of 1998

T.V. Sundaram Iyengar and Sons Ltd. and Another

APPELLANT

Vs

State of Karnataka and Another

RESPONDENT

Date of Decision : 30-11-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 19 (1) (g), 246, 265, 304A
Karnataka Tax on Entry of Goods into Local Areas for Consumption, Use or Sales
Therein Act, 1979 — Section 3 (1)

Citation : (1999) ILR (Kar) 1829

Hon'ble Judges : V.K. Singhal, J

Bench : Single Bench

Advocate : Parasaran, S.R. Indra Kumar, W.P. Nos. 32375-76 of 1998 and G. Sarangan and Parthasarathi, in W.P. No. 32231 of 1998, R.V. Prasad and K. Hemakumar, for Vasan Associates, in W.P. Nos. 30955-59 of 1998, Thirumalesh, in W.P. Nos. 33148 and 33154-58 of 1998, for the Appellant; D'Sa, Government Advocate and K.M. Shivayogiswamy, High Court Government Pleader, for the Respondent

Judgement

V.K. Singhal, J.—All these writ petitions are disposed of by this common order since the controversy involved is common. Validity of notifications dated September 23, 1998, November 9, 1998 and March 31, 1998 have been assailed in these writ petitions beside challenging the validity of Section 3(1) of the Karnataka Tax on Entry of Goods Act, 1979.

2. Controversy is in respect of motor vehicles, parts and accessories and other goods from April 1, 1994 to January 6, 1998.

Validity of Section 3(1) of the Act :

3. Validity of Section 3(1) as amended by Act No. 8 of 1993 conferring power on the State Government to issue notification retrospectively or prospectively has been assailed on the ground that the assent of the President of India as required

by proviso to Article 404(b) of the Constitution of India has not been received.

4. Mr. R.V. Prasad, learned counsel for the petitioners, relied on the judgments given by this Court in the case of Jyothi Home Industries \\. State of Karnataka [1987] 64 STC 254 Kar and Ferro Concrete Company of India (Steels) Ltd. v. State of Karnataka [1987] 64 STC 352. It is further submitted that in view of the judgment given in the case of D.K. Trivedi and Sons v. State of Gujarat AIR 1986 SC 1323 since the controversy is pending before the apex Court the matter may be deferred.

5. So far as the question of validity of Section 3(1) is concerned the matter was examined in detail by a division Bench of this Court in the case of Avinyl Polymers Pvt. Ltd. v. State of Karnataka [1998] 109 STC 26 Kar. It was considered that entry tax is regulatory and compensatory in nature not affecting the movement of goods and therefore the prior sanction or assent of the President of India is not necessary. This view was taken on the basis of the judgment given by the apex Court in the case of State of Karnataka and Another Vs. Hansa Corporation, . In the decision of this Court in Avinyl Polymers Pvt. Ltd. [1998] 109 STC 26 the decision in Bhagatram Rajeev Kumar Vs. Commissioner of Sales Tax, M.P. and Others, was also taken into consideration which has referred to the decision in State of Karnataka and Another Vs. Hansa Corporation, and subsequently been followed in State of Bihar v. Bihar Chamber of Commerce : [1996]2SCR184 .

6. The State of Karnataka came into being on November 1, 1956 pursuant to reorganisation of States. Municipal laws prevailing in different areas of the new State provided for imposition of tax called octroi. Uniform Karnataka Municipalities Act came into force from April 1, 1965. The levy was considered archaic and obnoxious impeding the free-flow of trade by creating bottlenecks. Karnataka was the first State to abolish octroi with effect from April 1, 1979. In order to compensate the loss from abolition of Octroi, Karnataka Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1979 was passed. This Act was enacted under the legislative powers derived from Article 246 of the Constitution of India read with entry 52, List II of the Seventh Schedule to the Constitution and received the assent of the President of India on May 27, 1979. Originally the tax was levied on three items, namely, textiles, tobacco and its products and sugar, etc. Subsequently there has been changes and the position as now stand is that tax could be levied on any items specified in the First Schedule from items 1 to 103. Item No. 103 confers power on the State Government to levy tax on those items which are not specified in item Nos. 1 to 102. The nature therefore of entry tax which also derives its source from entry 52, List II of the Seventh Schedule to the Constitution is only compensatory and has been so held in the case of Avinyl Polymers Pvt. Ltd. [1998] 109 STC 26 . That decision being binding the contention raised by Sri Prasad has no force.

7. Contention of Mr. Prasad that the matter should be deferred in the light of the

judgment in D.K. Trivedi and Sons v. State of Gujarat AIR 1986 SC 1323 has also no force because that decision has not laid down a general proposition of law that in all cases where the matter is pending before the apex Court, the High Court or subordinate courts should stay the proceedings. There is no stay granted by the apex Court in this case for not hearing the matter and simply because in some other case against the decision in Avinyl Polymers Pvt. Ltd. [1998] 109 STC 26 Kar, SLP filed has been admitted cannot be considered to be a ground for deferring the matter till the decision is given by the apex Court. This Court in the case of Karnataka Handloom Development Corporation Ltd. Vs. Addl. Deputy Commissioner of Commercial Taxes, observed that in appropriate cases the writ petition can be kept pending. I do not consider that the present one is an appropriate case for keeping the writ petition pending. The facts of D.K. Trivedi AIR 1986 SC 1323, are also not otherwise applicable to the present case because in that case the High Court of Gujarat directed the petitioners to approach the Supreme Court since similar matters were pending there. No such directions are being given by this Court to the petitioner to approach the Supreme Court, In my view since the matter stands concluded by the division Bench decision of this Court, the prayer for deferring the writ petition from hearing is not accepted.

8. Provisions of Section 3 of the Act have also been challenged on the ground that Section 3 does not provide guidelines regarding issue of notification, fixing the rate of tax and thus it is unconstitutional. Number of items in the First Schedule have been increased to 103 also. Mr. Sarangan, learned counsel submitted that in the case of Jyothi Home Industries v. State of Karnataka [1987] 64 STC 254 (Kar) [App] the validity was examined when the upper rate of tax limit was 2 per cent in the section itself and therefore in the light of the decision in Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others, , that upper limit of rate of tax of 2 per cent was considered proper guidance and insignificant. In that case it was observed that larger statutory discretion placing wide gap between the minimum and maximum rate enabling the Government to fix an arbitrary rate of tax may not be sustained. It is submitted that the discretion of fixing the rate at 2 per cent was insignificant. But here the maximum limit has been enhanced to 5 per cent conferring wide powers on the State Government to pick and chose individual goods or certain category of goods and to fix any rate of tax up to 5 per cent. Since no guidelines have been provided the provisions of Section 3 are liable to be struck down in the light of the observations in Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others, and also Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, . It is also submitted that provisions of Section 5C of the Karnataka Sales Tax Act, 1957 were declared ultra vires of the Constitution by this Court in the case of Shetty Leasing (India) Ltd. v. Union of India [1996] 100 STC 533. Following the judgment in the case of The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another, , the provision has to pass the test of constitutionality and because of wide and far reaching power conferred by

Section 3(1) without any guidance, the provision itself is liable to be struck down as unconstitutional. So far as this contention is concerned it may be observed that Act of 1979 fixed the upper limit of tax in the charging Section 3(1) at 5 per cent. The power to tax could be exercised in respect of goods specified in the First Schedule. The specification of the goods by itself coupled with the maximum rate is a proper guideline for the State Government to issue the notification. The decision relied on by the learned counsel for the petitioners in the case of Corporation of Calcutta and Another Vs. Liberty Cinema, cannot be applied in respect of the power which is being exercised by the State Government. In the case of Corporation of Calcutta and Another Vs. Liberty Cinema, , it was observed that fixing the maximum limit is not the proper guidance. In Municipal Corporation of Delhi Vs. Birla Cotton, Spinning and Weaving Mills, Delhi and Another, the distinction was drawn between the power to be exercised by the State Government and local authorities. It was observed that "there is in our opinion a clear distinction between delegation of fixing the rate of tax like sales tax to the State Government and delegation of fixing rates of certain taxes for purposes of local taxation. The needs of the State are unlimited and the purposes for which the State exists are also unlimited. The result of making delegation of a tax like sales tax to the State Government means a power to fix the tax without any limit even if the needs and purposes of the State are to be taken into account. On the other hand, in the case of a municipality, however large may be the amount required by it for its purposes it cannot be unlimited, for the amount that a municipality can spend is limited by the purposes for which it is created. A municipality cannot spend anything for any purposes other than those specified in the Act which creates it. Therefore in the case of a municipal body, however large may be its needs, there is a limit to those needs in view of the provisions of the Act creating it. In such circumstances there is a clear distinction between delegating a power to fix rates of tax, like the sales tax, to the State Government and delegating a power to fix certain local taxes for local needs to a municipal body."

9. Even in the case of Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others, , referred to above it was observed that as the Act applies to sales or purchases of different commodities it had become necessary to give some discretion to the Government in fixing the rate. Conferment of reasonable power of discretion by statute was approved in the case of KHANDIGE SHAM BHAT AND ANOTHER Vs. AGRICULTURAL Income Tax OFFICER, KASARAGOD, AND ANOTHER., . It cannot be considered that there is a wide gap between the minimum and the maximum enabling the Government to arbitrarily fix the rate. In the case of Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, , it was observed that if the statute itself indicates persons or things to whom provisions are intended to apply, leaving the discretion to the State Government to select and classify the persons or things laying down policy or guidance for exercise of discretion by the Government, the constitutional validity of such provision was upheld. The guidance which has been provided by Section 3(1) is

not only maximum limit of tax but even items have been specified in the First Schedule. Restrictions have been imposed on the State Government not to levy tax in respect of goods which are specified in the Second Schedule as provided u/s 3(6) of the Act. The tax could be levied if the entry of the goods is in the local area for consumption, use or sale therein and thus the restrictions prescribed by the section are sufficient for proper guidance of the State Government. The power of the State Government could not be compared with that of Municipal Corporation as has been held in the cases of Municipal Corporation of Delhi Vs. Birla Cotton, Spinning and Weaving Mills, Delhi and Another, and Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others, referred to above. If the power is capable of being exercised reasonably it can be exercised unreasonably also and only in that case the court can interfere. However, 5 per cent rate of tax provided u/s 3(1) of the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993 empowering the State Government to notify different rates of entry tax for different commodities mentioned in the Schedule subject to ceiling of 5 per cent was held not arbitrary or with unguided power regarding specification of rate of tax [State of Bihar v. Bihar Chamber of Commerce : [1996]2SCR184 . This contention therefore has no force and is rejected.

10. Notification dated March 31, 1998 (in W.P. Nos. 33148 of 1998 and 33154 to 33158 of 1998):

So far as the validity of notification dated March 31, 1998 is concerned it may be observed that it was on account of various defects which were found by this Court that the notification starting from March 31, 1994 was struck down. In order to have compliance of the judgment of this Court notification dated January 7, 1998 was issued which provided rate of tax on entry of goods into a local area for consumption, use or sale therein. This was brought in consonance with the judgment given by this Court and as such this notification remained in force from January 7, 1998 to March 31, 1998. On March 31, 1998 another notification was issued providing levy of tax for entry of goods into local area for consumption, use or sale therein. The mistake pointed out by the judgment of this Court that the tax is not levied on entry of goods which are meant for sale and imported goods alone were subjected to tax, but similar goods manufactured in other parts of the State when brought into the local area were not subjected to tax were rectified in this notification. No illegality exist in the notification and therefore I am of the view that the notification dated March 31, 1998 or January 7, 1998 cannot be validly challenged.

Notification dated 23rd September, 1998:

11. Mr. Parasaran, learned Senior Advocate has challenged the notification dated September 23, 1998 on the ground that in respect of motor vehicles specific provisions exist u/s 4B of the Act and therefore that power cannot be exercised u/s 3 of the Act. It is further submitted that the provisions of Section 4B start with a non obstante clause "notwithstanding anything contained in Section 3" and as

such the provisions of Section 4B hold the field in respect of levy of tax on entry of motor vehicles into the local area for use or sale therein by an importer. I have considered this argument. Section 3(1) and Section 4B operate in different fields. Section 3 is applicable to dealers who are registered or liable to be registered u/s 3(2) of the Act. But Section 4B is applicable to any person who may or may not be a dealer. The word "person" has been defined u/s 4-A(e) and importer has been defined u/s 4-A(c) of the Act who are made liable u/s 4B of the Act. Thus, an individual who imports a vehicle from outside the State may not be a dealer who is liable to pay tax u/s 4B. If the power is exercised u/s 3(1) by the State Government then the persons other than dealers are not liable to tax. Notification u/s 4B could make a person who is not a dealer liable to pay tax. This is also confirmed from the provisions of Section 4D which makes it clear that if any person is causing entry of motor vehicle into the local area within the period of 15 months from the date of registration of such vehicle outside the State of Karnataka and the entry in the State is occasioned as a result of shifting the place of residence such person has been exempted. Legislature has made distinction between dealers (registered or liable to be registered) and other persons. In respect of motor vehicles for which tax is sought to be levied on persons then a notification u/s 4B is necessary, but if the tax is to be restricted on dealers alone, then that power could be exercised u/s 3(1). The non obstante clause will operate only if there is conflict between Sections 3 and 4B. The decision in the case of The South India Corporation (P) Ltd. Vs. The Secretary, Board of Revenue Trivandrum and Another, and decision in the case of Union of India (UOI) and Another Vs. G.M. Kokil and Others, relied on by the learned counsel have no application because the two provisions are operating in different fields and there is no conflict in the two clauses. The effect of the word "notwithstanding" in Section 4B is that this section will operate in its own sphere and Section 3 will not be impediment in its operation. Section 3 is to yield to Section 4B. The notification dated September 23, 1998 cannot be considered to have been issued u/s 4B under which power for retrospective amendment is not available. In these circumstances, I do not consider that the notification dated September 23, 1998 is to be considered u/s 4B and giving retrospective effect is to be declared illegal.

12. Notification dated September 23, 1998 has been made applicable for the transactions between April 1, 1994 to January 6, 1998. Mr. Prasad, learned counsel, has argued that the notification is liable to be struck down being violative of Articles 14 and 19(1)(g) and 265 of the Constitution of India as it is confiscatory in nature and is in excess of the power delegated by Section 3(1). It is submitted that Section 3(1) of the Act empowers the rule-making authority to issue notification prospectively or retrospectively but this power cannot be construed as conferring power on the rule-making authority to bring out notifications to fill in a hiatus for a past period and unless the notification is in force on the date when it is issued it cannot be considered to be a valid exercise of power.

13. So far as this contention is concerned, it can be observed that Section 3(1) confers the power to issue notification prospectively or retrospectively. The word "retrospectively" is sufficient to include power of the delegated authority to issue a notification for the past period alone. Since the notification from January 7, 1998 was already issued and was not declared invalid by any court, therefore the delegated authority considered it proper to issue a notification for the period from April 1, 1994 to January 6, 1998 removing the defects pointed out by this Court. Interpretation of the learned counsel for the petitioner that the notification with the power for retrospective issue of notification could be exercised only when the notification is applicable for the current transaction and is in force on the date of its issue cannot be considered to be proper. The powers u/s 3(1) of the Act have to be interpreted that the word "retrospective" therein is used to specify the rate of tax for a past period irrespective of the fact that whether for the subsequent period the delegated authority wants to continue that notification or not. The contention therefore has no force.

14. The notification dated September 23, 1998 has also been assailed on the ground that it is violative of Article 19(1)(g) as tax is now sought to be levied in respect of those goods which are brought from other areas of State of Karnataka and is made applicable for the goods which are meant for sale. Reliance is placed on the judgments given in the cases of State of Kerala v. Mega Traders [1997] 107 STC 1 (Ker); Shri Krishna Enterprises and Others Vs. State of Andhra Pradesh and Others, , Shew Bhagwan Goenka Vs. Commercial Tax Officer and Others, , The State of Andhra Pradesh Vs. V.V. Rama Rao and Company, , Mega Traders v. State of Kerala [1991] 83 STC 59 (Ker), Krishnamurthi and Co. etc. Vs. State of Madras, and Bengal Paper Mill Co. Ltd. and Another Vs. Commercial Tax Officer and Others, .

15. The notification is stated to impose a fresh levy in respect of entry of goods from other local areas of the State of Karnataka into the local area and also for the goods which are imported from outside and are meant for sale. Reliance is placed on the decision reported in D. Cawasji & Co. v. State of Mysore [1985] 58 STC I (SC) wherein it was observed that it may be open to the Legislature to impose levy at higher rate with retrospective effect, but levy of tax at higher" rate which really amounts to imposition of tax with retrospective operation has to be justified on a proper and cogent ground. It was found in this case that the State Government instead of removing the defect or lacuna, retrospective operation was given to save refund of tax. It is stated that it is an encroachment upon the legislative field and there is complete non-application of mind and therefore the notification is not reasonable.

The Kerala High Court in Mega Traders v. State of Kerala [1991] 83 STC 59 held that "whenever the Legislature has the competence to enact a taxing statute it is also said to be competent to enact laws with retrospective effect. Retrospective taxation has to be within certain narrow confines so as to be upheld by courts. Where certain retrospective taxation partakes of the character of a confiscatory

legislation, or where the retrospective operation of the taxing statute imposes an unreasonable burden, then courts would be reluctant to protect its retrospectivity". Unexpected liability in respect of transactions which have taken place and are subjected to fresh charge or liability sought to be taxed by retrospective amendment were considered ultra vires of the Constitution by the Calcutta High Court in *Shew Bhagwan Goenka v. Commercial Tax Officer* [1973] 32 STC 368. In *The Assistant Commissioner of Urban Land Tax and Others Vs. The Buckingham and Carnatic Co. Ltd., etc.,*, it was observed that "as a general rule it may be said that so long as a tax retains its character as a tax and is not confiscatory, or extortionate the reasonableness of the tax cannot be questioned. It is not possible to put the test of reasonableness into the straitjacket of a narrow formula. The objects to be taxed, the quantum of tax to be levied, the conditions subject to which it is levied and the social and economic policies which a tax is designed to subserve are all matters of political character and these matters have been entrusted to the Legislature and not to the courts. In applying the test of reasonableness it is also essential to notice that the power of taxation is generally regarded as an essential attribute of sovereignty and constitutional provisions relating to the power of taxation are regarded not as grant of power but as limitation upon the power which would otherwise be practically without limit."

16. The only thing which could be observed in this regard is that the notification which was issued on March 31, 1994 provided tax on an importer if the goods are brought in the local area for use and consumption only. This Court found that the notification is discriminating between the goods which are manufactured in the State and outside the State. Similar goods manufactured in other local areas were not subjected to tax if they were brought in the local area while goods from outside the State were brought to tax. This was considered violative of Article 401 of the Constitution. It was found that the provisions of Section 3(1) authorises the delegated authority to levy tax when goods are brought in the local area for consumption, use and sale. The word "sale" was not used in the notification and as such the notification was considered bad in law. This defect which was pointed out by the judgment was also rectified in the notification dated September 23, 1998. The Legislature is competent to enact a provision retrospectively or prospectively. Delegated authority can exercise its power for levy of tax retrospectively when it is so authorised by the statute. Delegation of power to make retrospective subordinate legislation is not in dispute. The exercise of that power cannot be successfully challenged Under Article 19(1)(g). Amendment by Act No. 8 of 1993 in Section 3(1) to the expression "retrospectively" or prospectively was held improper in *Avinyl Polymers v. State of Karnataka* [1998] 109 STC 26 (Kar). If the notification is brought to cure the defect, then retrospective operation of the notification cannot be considered as unreasonable or violative of Article 19(1)(g) of the Constitution of India. The only thing which has to be seen is as to whether the tax is confiscatory or unreasonable. Mere retrospectivity by itself is not unreasonable. Similarly if the

assessee is not able to pass on the burden of tax to the consumer because of the retrospective operation of the provisions of law, the provisions cannot be considered as violative of Article 19(1)(g) of the Constitution. Retrospective amendment of law on the ground that seller cannot pass on the burden to the purchaser was held not the ground for declaring it invalid in *The Tata Iron and Steel Co., Ltd. Vs. The State of Bihar*, , *K.M. Mohamad Abdul Khader Firm Vs. State of Tamil Nadu and Others*, and *S. Kodar Vs. State of Kerala*, . The Legislature and the delegated authority when authorised have the power to cure the defect which is well-recognized by various decisions of the apex Court including that of *Empire Industries Limited and Others Vs. Union of India and Others*, , *Ujagar Prints v. Union of India* AIR 1989 SC 516, it was observed that "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 can always validate a law which has been declared by courts to be invalid, provided the infirmities and vitiating factors noticed in the declaratory judgment are removed or cured. Such a validating law can also be made retrospective. If in the light of such validating and curative exercise made by the Legislature--granting legislative competence--the earlier judgment becomes irrelevant and unenforceable, that cannot be called an impermissible legislative overruling of the judicial decision. All that the Legislature does is to usher in a valid law with retrospective effect in the light of which earlier judgment becomes irrelevant (See *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*, .

Such legislative expedience of validation of laws is of particular significance and utility and is quite often applied in taxing statutes. It is necessary that the Legislature should be able to cure defects in statutes. No individual can acquire a vested right from a defect in a statute and seek a windfall from the Legislature's mistakes. Validity of legislations retroactively curing defects in taxing statutes is well-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*, 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,"

In Entertainment Tax Officer and Another Vs. Ambae Picture Palace, it was observed that "though it is not for the State to justify or explain the necessity for the amendment even in relation to retrospectivity of the Act but obviously, on the face of it, there appeared to be a change of policy by a succeeding Government on the policy pursued by its predecessor. Surely the successor Government can have different rules from their predecessor including the matters relating to taxation or mode of taxation or basis of taxation or objects of taxation, etc. No explanation was required from the State for the amending Act having retrospective effect".

17. The notification dated September 23, 1998 therefore is a valid piece of legislation which has cured the defect pointed out by this Court. It may however be observed that it was not the intention of the delegated authority during the period from April 1, 1994 to January 6, 1998 to realise the tax in respect of entry of goods from other areas of the State in the local area or where goods were meant for sale and as such it is declared that the tax shall not be levied or collected under the notification dated September 23, 1998 if the goods have been brought within the local area from other local areas of the State and also if the goods are imported from outside the State of Karnataka and are meant for sale. There is no non-application of mind or encroachment upon the legislative field, subject to the observations made above.

18. Mr. R.V. Prasad also raised another ground that item No. 4 of the notification dated September 23, 1998 has used a different language than item No. 80 of the First Schedule to the Act. I have perused both the entries. In the notification the words "other than those specified in the Second Schedule" is not mentioned in respect of raw material. This contention also has no force because there is an explanation below the notification dated September 23, 1998 and the said notification has further been amended retrospectively by notification dated November 9, 1998 and in the explanation it is provided "do not include exempted goods which are specified in the Second Schedule". This is substantial compliance and as such this contention has no force.

19. Mr. Sarangan submits that notification dated January 7, 1998 was issued prospectively and this also affirms the intention of the Government that there is no intention to levy tax with retrospective effect. By notification dated March 31, 1998, notification dated January 7, 1998 has been cancelled and a fresh notification levying tax from April 1, 1998 has been issued specifying all the goods as were specified in the notification dated January 7, 1998 except parts and accessories of motor vehicles which also affirms the intention of the Government not to charge the levy of entry tax with retrospective effect. Another notification No. FD 225 CET 98, dated November 9, 1998 has been issued with retrospective effect and levy of tax on motor vehicle is restricted to the period

from April 1, 1994 to March 31, 1995. It is stated that the SLP against the judgment in Avinyl Polymers Pvt. Ltd. v. State of Karnataka [1998] 109 STC 26 (Kar) is still pending and there was no justification or compelling reasons/ authority to issue the notification with retrospective effect from April 1, 1994. It is submitted that at the most the revenue, in accordance with notification dated March 31, 1994 could have brought amendment justifying the retrospective notification, but fresh charge which has been created is without application of mind. The notification has the consequence of destroying the business as a whole and has devastating impact. Huge liability could not have been anticipated.

It is further submitted that the delegated authority has usurped the jurisdiction of the Legislature and that the notification dated September 23, 1998 could not have been issued because the earlier notifications are still the subject-matter of dispute before the apex Court. The State Government have no jurisdiction to withdraw the notification and issue fresh notification. It is submitted that u/s 3(6) no tax can be levied under the Act on any goods specified in the Second Schedule. In the notification dated September 23, 1998 explanation (1) has been given wherein it is stated that raw material shall not include exempted goods which are specified in the Schedule and the other items as mentioned therein and such other goods as the State Government may notify from time to time. The said notification therefore has gone beyond the power conferred by the statute as no power of exclusion is provided. By notification dated November 9, 1998 in explanation (I) for the word "shall" the words "Second Schedule" is substituted with retrospective effect. This power of exclusion is also not with the declarative authority and therefore notification dated September 23, 1998 is usurping the jurisdiction of the Legislature of the exclusion or exemption of the goods in the Second Schedule which rests with the State Legislature is without jurisdiction. So far as this contention is concerned, it may be observed that Section 3(6) clearly provides that no tax shall be levied on the goods which are specified in the Second Schedule. Second Schedule contains list of exempted goods. Explanation to the notification dated September 23, 1998 is only a clarificatory notification that even the goods which are specified in the Second Schedule if are used as raw material no tax would be levied. The delegated authority has not encroached upon the legislative power of the Legislature and this contention has no force. Even if the matter is pending in court, the State Government is not precluded to issue fresh notification during the pendency of the matter before the apex Court.

20. It is further submitted that in the second proviso of notification dated March 31, 1998 it is mentioned that the raw material, component parts and other inputs will not include certain items mentioned therein and such other goods as may be notified by the State Government from time to time. The proviso is generally an exception to the main clause. Item No. 3 refers to raw material, component parts and other inputs which are used in the manufacture of intermediate or finished products, etc. The second proviso which has excluded number of items and such other goods as may be notified by the State

Government from time to time, is an exception to those goods which fall under First Schedule and are raw material, component parts and inputs but have been excluded for the purpose of levy of tax. The power of exemption could be exercised by the State Government by specification or it could be by exclusion also. If an item is excluded from the levy of tax, then it is outside the charging section and no illegality can be said to have been committed in the notification dated March 31, 1998.

21. A contention is also raised that after the judgment given in Avinyl Polymers Pvt. Ltd. v. State of Karnataka [1998] 109 STC 26 (Kar) there was no notification in force and therefore from that date no tax should be levied. This contention has no force because when a retrospective legislation or a notification is issued after curing the defect the period during which on account of the judgment of this Court tax could not be levied now could be levied by virtue of such legislative amendment.

22. I.E. Newspapers (Bombay) Private Ltd. v. Union of India (1), (1986) 159 ITR 856 (SC) is also relied on the ground that there is non-application of mind and the notification is unreasonable. Observations by Diplock L.J. in Mixnam Properties Ltd. v. Chertsey UDC (1964) 1 QB 214, were considered by the apex Court which are to the effect that "The various grounds upon which subordinate legislation has sometimes been said to be void.....can, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation, to be valid, must be shown to be within the powers conferred by the statute. Thus the kind of unreasonableness which invalidates a bye-law is not the antonym of "reasonableness" in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say : "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires....." If the courts can declare subordinate legislation to be invalid for "uncertainty", as distinct from unenforceable.....this must be because Parliament is to be presumed not to have intended to authorise the subordinate legislative authority to make changes in the existing law which are uncertain....." On the point of "reasonable" the observations of Lord Greene in the case of Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1948) 1 KB 223 wherein it is observed that "It is true the discretion must be exercised reasonably. Now what does that mean ? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.

Warrington, L.J. in *Short v. Poole Corporation* (1926) 1 Ch. 66 gave the example of the red-haired teacher dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith ; and in fact, all these things run into one another."

23. The contention that there is non-application of mind or the notification is unreasonable has also no substance as it was on account of the judgment being given by this Court by which a notification was struck down, the delegated authority has exercised the power to issue the notification retrospectively rectifying the defect pointed out by this Court. It cannot be said that the issue of notification is unreasonable or without application of mind.

24. Reliance is placed on the decision given in the case of *Income Tax Officer, Alleppey Vs. M.C. Ponnose and Others*, on the observations of Willes, J. in *Phillips v. Eyre* [1870] 40 LJR 28 that ".....no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law." It was observed, the courts will not ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of legislation. Amendment of the definition of "tax recovery officer" was held not conferring power on the State Government to issue the notification with retrospective effect.

25. In *Bengal Paper Mill Co. Ltd. v. Commercial Tax Officer, Calcutta* [1976] 38 STC 163, the Calcutta High Court has declared retrospective amendment of the definition of "business" imposing fresh taxes on transactions of certain types and in certain articles of merchandile was struck down as regular were found not entitled in law of sales tax after long lapse of time.

The Kerala High Court in *Mega Traders v. State of Kerala* [1991] 83 STC 59 Ker declared retrospective amendment having the effect for 5 years as invalid considering its character of confiscatory legislation and unreasonable and unexpected fresh burden.

26. Levy of tax on garlic for the first time with retrospective effect was held unconstitutional though levy of tax on agarbathis with retrospective effect by violating the Act was held reasonable and not arbitrary in *State of Kerala v. Mega Traders* [1997] 107 STC 1 (Ker).

27. Taxation statute could not be arbitrary and oppressive and at the same time the court cannot for obvious reasons meticulously scrutinise the burden of different persons or interest *KHANDIGE SHAM BHAT AND ANOTHER Vs. AGRICULTURAL Income Tax OFFICER, KASARAGOD, AND ANOTHER., .*

28. The power of Legislature to enact the law with reference to topics entrusted

to it is subject to only limitations imposed by the Constitution in exercise of such power and such power was upheld and can be exercised either prospective or retrospective [see *Rai Ramkrishna and Others Vs. The State of Bihar*, and *J.K. Jute Mills Co. Ltd. Vs. The State of Uttar Pradesh and Another*, . This Court in *Karnataka Seeds v. State of Karnataka* [1992] 86 STC 491 Kar held that Legislature has full power to enact taxing law with retrospective operation and simply because the dealer did not collect tax from the purchaser would not affect his liability to pay tax and will not invalidate the levy of tax with retrospective effect. In *Y.V. Srinivasamurthy v. State of Mysore* AIR 1959 SC 894 it was observed that the courts have no concern with the wisdom of the Legislature and it was found dangerous precedent to allow the view of the members of the court.

In *The Assistant Commissioner of Urban Land Tax and Others Vs. The Buckingham and Carnatic Co. Ltd., etc.*, it was observed thus :

"As a general rule it may be said that so long as a tax retains its character as a tax and is not confiscatory or extortionate, the reasonableness of the tax cannot be questioned. It is not possible to put the test of reasonableness into the strait jacket of a narrow formula. The objects to be taxed, the quantum of tax to be levied, the conditions subject to which it is levied and the social and economic policies which a tax is designed to subserve are all matters of political character and these matters have been entrusted to the Legislature and not to the courts. In applying the test of reasonableness it is also essential to notice that the power of taxation is generally regarded as an essential attribute of sovereignty and constitutional provisions relating to the power of taxation are regarded not as grant of power but as limitation upon the power which would otherwise be practically without limit."

In *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*, it was observed as under :

"When a Legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where

jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding upon courts. The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the Legislature and legal and adequate to attain the object of validation. If the Legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a validating law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax."

In *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, it was observed that now it is clear that it is not unconstitutional for the Legislature to leave to the executive to determine the details relating to the working of taxation laws such as selection of persons on whom tax is to be levied, rate at which it has to be charged in respect of different classes of goods and the like.

29. In *Commercial Tax Officer and others Vs. M/s. Biswanath Jhunhunwala and another*, retrospective amendment was held applicable not only to incomplete assessment but also to assessment which had attained finality by reason of the expiry of original time-limit before its amendment. In *Olympic Oil Industries Ltd. and another Vs. State of Maharashtra and others*, retrospective amendment on August 1, 1985 with effect from May 24, 1985 providing for cessation of liability on the basis of certificate issued to edible oil units under the incentive scheme was held neither arbitrary nor unreasonable or confiscatory and not even violative of Articles 14, 19(1)(g) and 304A of the Constitution. However, demand of tax for the said period was held not reasonable. Review petition on account of retrospective amendment creating liability on the hoteliers without affording any opportunity based on the incidence of tax was dismissed by the apex Court (see *Shri Krishna Enterprises v. State of Andhra Pradesh* [1990] 76 STC 67 AP).

30. Retrospective amendment to remove the defect in the language found by the High Court was held valid piece of legislation not contravening Article 19 of the Constitution of India in *Krishnamurthi and Co. etc. Vs. State of Madras*, . Similarly the U.P. Sales Tax (Amendment and Validation) Act of 1971 retrospectively creating liability by removing the basis of the decision declaring the notification invalid was held proper in *Tirath Ram Rajindra Nath, Lucknow Vs. State of U.P. and Another*, . Since Section 3(1) authorises to issue notification retrospectively and the delegated authority has exercised such power to remove

the defect pointed out by this Court, such retrospective notification cannot be held to be illegal in any manner.

31. Notification dated November 9, 1998 :

The validity of notification dated November 9, 1998 is also assailed. In that notification motor vehicles of all kinds and parts and accessories thereof including chassis of motor vehicles have been subjected to tax at 5 per cent for the period from April 1, 1994 to March 31, 1995. Subject to the observations made above there is no incongruity in the notification in this regard. However, entry 2A has prescribed rate of tax on parts and accessories of motor vehicles, but excluding parts and accessories of tractors and power tillers at 8 per cent for the period from April 1, 1995. This power which has been exercised u/s 3 of the Act of 1979 could not be exercised. The maximum limit of rate of tax for which notification can be issued u/s 3 is 5 per cent and therefore entry 2A is declared ultra vires the powers of Section 3(1) of the Act.

32. The writ petitions are disposed of with the following observations :

(1) The provisions of Section 3(1) of the Act are not ultra vires of the Constitution of India on the ground that no guidelines for prescribing rate of tax has been given and the provisions are compensatory in nature and do not require the assent of the President of India.

(2) Notifications dated March 31, 1998 and January 7, 1998 are valid piece of legislation.

(3) Notification dated September 23, 1998 has not been issued u/s 4B of the Act, but has been issued u/s 3(1) and as such retrospective effect could have been given.

(4) Notification dated September 23, 1998 cannot be considered to be invalid on the ground that it was not in force on the date of issue and was made applicable for past transactions only.

(5) Notification dated September 23, 1998 is a valid piece of legislation. It is however declared that tax shall not be levied or collected for the period from April 1, 1994 to January 6, 1998 for entry of goods in local area when the goods are brought from other areas of the State of Karnataka and also when the goods have been imported from outside the State of Karnataka and are meant for sale.

(6) Entry 2-A by notification dated November 9, 1998 prescribing rate of tax at 8 per cent from April 1, 1995 is ultra vires the power of Section 3(1) of the Act.

(7) In cases where assessments were already framed, the assessee would be free to file appeals within four weeks and where notice alone has been issued, they may submit objections within the aforesaid period.