IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 18433 of 2017
With
R/SPECIAL CIVIL APPLICATION NO. 20185 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MR.JUSTICE B.N. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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FILCO TRADE CENTRE PVT. LTD
Versus
UNION OF INDIA

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Appearance:
UCHIT N SHETH(7336) for the PETITIONER(s) No. 1,2
JAIMIN A GANDHI(8065) for the RESPONDENT(s) No. 2
MS TRUSHA K PATEL(2434) for the RESPONDENT(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 29/08/2018-05/09/2018
ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitions arise in similar background. For convenience, we may record facts from Special Civil Application No.18433/2017.

2. Petitioner no.1 is a company registered under the Companies Act and would here-in-after be referred to as "the petitioner company". Petitioner no.2 is the Director of the company. Petitioner company is engaged in trading of specialized industrial bearings of various types. The petitioner also imports certain goods. Under the old regime, i.e. before introduction of Goods and Service Tax, the excise duty on local goods or the countervailing duty paid on imports was not to be borne by the petitioners. The credit could be utilised for payment of tax. According to the petitioners, the company has to maintain sufficient stock of different kinds of such bearings, many of which items may not be immediately sold. The petitioners would therefore, have longer cycle of such goods remaining with the petitioners after purchasing from the manufacturer before they are sold.

3. Before introduction of Goods and Service Tax regime ("GST" for short), the petitioners' transactions of purchase and sale of goods were covered under the Central Excise Act 1944, Central Excise Tariff Act 1985 and CENVAT Credit Rules, 2004 ("the Rules of 2004" for short). Under such statutes, a manufacturer would not bear the burden of excise duty on the product manufactured by him. If the petitioners and other

similarly situated first stage dealers were not granted similar benefits in some form or the other, the petitioners' business would become wholly unviable. If the petitioners were loaded with the burden of excise duty, the petitioners' sales to its ultimate consumers or second stage dealers would be commercially non viable. Instead, the purchasers would be made directly from the manufacturer. The law existing prior to introduction of GST therefore, made suitable provisions to ensure that the first stage dealers like the petitioners are not burdened with the excise duty component. We would advert to these provisions in detail at a later stage. Suffice it to record at this stage that as long as the petitioners fulfill the necessary conditions provided in the said Rules of 2004, the petitioners could pass on the credit of the duty paid on the purchases to their purchasers-manufacturers.

4. The Union legislature framed different laws to usher in the GST regime in substitution of the existing Central Excise and Value Added tax provisions and certain other taxing statutes. The Central Goods and Services Tax Act, 2017 ("CGST Act" for short) was brought into effect from 1.7.2017. Section 9 thereof is a charging section providing for levy and collection of tax. Sub-section(1) of section 9 authorises collection of tax called the central goods and service tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption at the prescribed rates not exceeding twenty per cent to be paid by the taxable person.

Section 16 of CGST Act pertains to eligibility and condition for taking input tax credit. Sub-section(1) of section 16 envisages entitlement of tax credit of input tax charged on any registered person on supply of goods or services or both which would be credited to electronic credit ledger of such person. Chapter XX of the CGST Act contains transitional provisions. Section 139 makes provisions for migration of the existing tax payers to the new regime. Section 140 contains provisions for transitional arrangements for input tax credit. Sub-section(3) of section 140 allows several classes of persons including first stage dealers to take credit of the eligible duties of the finished goods held in stock on the appointed day subject to conditions prescribed therein. Clause(iv) of sub-section(3) of section 140 imposes a condition that such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day. It is this condition which has aggrieved the petitioners and the constitutional validity thereof is challenged before us.

5. Case of the petitioners in nutshell is that prior to enactment of IGST Act, the petitioner company as a first stage dealer was not burdened with the excise duty paid on the purchases and this was without any restriction on time during which the goods must be sold. In earlier regime, the first stage dealers were put at part with manufacturers. A registered manufacturer could avail CENVAT credit of tax paid on purchases which

could be utilized towards duty liability of goods manufactured by him. As against this, a first stage dealer or an importer could pass on the credit of tax paid on their purchases to the customers who could utilize such credit against their duty liability on product manufactured by them. Clause(iv) of sub-section(3) of section 140 of the CGST Act has now imposed a condition for availing of such a benefit which not only acts harshly and unjustly to the petitioners and other similarly situated first stage dealers but acts retrospectively. It is also arbitrary and discriminatory.

6. The respondents have appeared and filed the reply in which it is contended that there is a reasonable classification. Such classification need not be scientifically perfect. The wisdom of legislature in imposing such a condition cannot be questioned. Distinction is sought to be drawn between the manufacturers and the dealers by pointing out that in case of manufactures claiming credit co-relation of tax paid goods and the goods sold was not necessary, unlike in case of dealers where such co-relation is essential. In case of dealers, in earlier law, they were entitled to pass on CENVAT credit of the duty paid to the manufacturer to the purchaser. This required co-relation of the goods and the duty paid. In such background, it is contended that “since the physical identification of goods is necessary for the same, so as to ensure that the first stage dealers do not take any undue advantage of such benefit and so as to accommodate the administrative convenience, the stature

has provided for the restriction of 12 months.” The petitioners' case was also distinguished from the case of an unregistered dealer by pointing out that under section 140 of the CGST Act, limited benefits have been granted to unregistered dealers.

7. In background of such facts and pleadings, learned counsel Shri Uchit Sheth for the petitioners raised the following contentions :

1) In the earlier regime, the first stage dealers were put at the same position as the manufactures by removing the burden on such dealers of the duty on manufacture. Under sub-section(3) of section 140 of the CGST Act in respect of goods purchased by a first stage dealer from the manufacturer prior to one year, the dealer is put in disadvantageous position.

2) The distinction drawn in case of the first stage dealer is arbitrary and discriminatory. The first stage dealers are not accorded the same treatment as is given to the manufactures. Our attention was also drawn to certain other provisions of section 140 to argue that even in case of an unregistered dealer, certain benefits are recognised without any reference to time limit. In short, according to the counsel, a first stage dealer is landed in more disadvantageous situation than the manufacturer or even an unregistered dealer by virtue of such provision.

3) Counsel submitted that in respect of CVD also similar position would obtain. CVD is meant to off-set the element of excise duty to put the imports on same pedestal as a local manufacturer. Here also, for any of the imports made prior to one year, CVD component by virtue of section 140(3) of CGST Act would have to be borne by the petitioners.

4) Counsel further submitted that impugned statutory provisions take away the vested right. Under the old regime, the duty borne by the petitioners on the goods purchased from the manufacturer or paid in the form of CVD on imports were granted CENVAT credit which could be utilised for discharge of duty liabilities. Such benefit is withdrawn in respect of goods which are purchased or imported one year before. The law thus acts with retrospective effect. There is no plausible reason or logic provided for making such retrospective tax legislation.

5) In support of his contentions, counsel relied on the following judgments :

i) Decisions in case of **Eicher Motors Ltd. v. Union of India** reported in 1999 (106) ELT 3 (SC) and in case of **Collector of Central Excise, Pune v. Daiichi Karkaria Ltd.** reported in 1999 (112) ELT 353 (SC) were cited to contend that CENVAT credit is form of a duty paid by the concerned person and therefore, such benefit cannot be withdrawn with retrospective

effect. For the same purpose, reference was also made to the decisions of Supreme Court in case of **Jayaswal Neco Ltd. v. Commissioner of Central Excise, Raipur** reported in 2015 (322) ELT 587 (SC) and in case of **Commissioner of Central Excise, Patna v. New Swadeshi Sugar Mills** reported in (2016) 1 Supreme Court Cases 614.

ii) Decisions of Supreme Court in case of **Thermax Private Ltd. v. Collector of Customs** reported in 1992 (61) ELT 352 (SC) and in case of **Hyderabad Industries Ltd. v. Union of India** reported in 1999 (108) ELT 321 (SC) were cited to highlight the nature of CVD and purpose of imposition of the same.

iii) Following decisions were cited to contend that even the taxing statutes must be in conformity with Article 14 of the Constitution :

a) **The State of AP and another v. Nalla Raja Reddy and others** reported in AIR 1967 Supreme Court 1458.

b) **John Vallamattom and another v. Union of India** reported in AIR 2003 Supreme Court 2902.

c) **Kunnathat Thathunni Moopil Nair etc. v. State of Kerala and another** reported in AIR 1961 Supreme Court 552.

Certain other decisions were cited in the context of testing a taxing statute framed by the parliament and the parameters within with the Court would strike down the statute. To the extent necessary, we would refer to these judgments at an appropriate stage.

8. On the other hand, learned ASGs Shri Jaimin Gandhi and Ms. Trusha Patel opposed the petitions. Their contentions were :

1) In taxing statutes, parliament has much greater latitude. The Court would not expect precise or scientific division before approving the classification.

2) It is not a case of hostile discrimination. First stage dealers form a special class. Their position cannot be compared either with the manufactures.

3) Allowing CENVAT credit is in the nature of a concession granted to an assessee and is always made subject to conditions imposed by the legislature. The legislature in its wisdom has made enjoyment of right to take CENVAT credit conditional on fulfilling the conditions which is within the competence of the parliament to do. The petitioners had no vested right to claim the benefit.

4) Putting a reasonable restriction on enjoying such a right would not amount to taking away any vested right with

retrospective effect. Without admitting, the counsel submitted that even if the vested right was being taken away, same had a definite purpose. As pointed out in the affidavit in reply, it was not possible to co-relate the duty paid purchases with the sales made by the first stage dealers for indefinite period of time. The legislature therefore, imposed reasonable condition for enjoyment of such right as long as the purchases were made not prior to one year.

5) In support of the contentions, counsel relied on the following judgments :

i) Heavy reliance was place on the decision of Division Bench of Bombay High Court in case of **JCB India Limited and others v. Union of India and others**, judgment dated 20.3.2018 in Writ Petition No. 3142/2017 and connected matters, in which this very provision came to be challenged. The High Court dismissed the petition upholding the vires of the provisions.

ii) Following judgements were cited in support of the contention that legal incidence of sales tax falls on the dealer, he may, if the law permits, pass it on to the purchaser, however, it is not necessary that the taxing statute must permit it and the tax cannot be declared invalid merely because the provision does not permit the dealer to pass it on purchaser:

a) **M/s.J.K. Jute Mills Co. Ltd. v. State of Uttar Pradesh and another** reported in AIR 1961 Supreme Court1534.

b) **Konduri Buchirajalingam v. The State of Hyderabad** and others reported in AIR 1958 Supreme Court 756.

c) **Associated Cement Co. Ltd. Tamil Nadu v. State of Tamil Nadu and another** reported in (1974) 4 Supreme Court Cases 422.

iii) In support of the contention that merely because the classification leads to disadvantage to the petitioners itself is not a ground to invalidate the statute, reliance was placed on the decision of Supreme Court in case of **State of Bihar and others v. Sachchidanand Kishore Prasad Sinha and others** reported in (1995) 3 Supreme Court Cases 86.

iv) In support of the contention that a taxing statute cannot be challenged on the ground that it is unjust or acts harshly against some, decision of Supreme Court in case of **Union of India and others v. Nitdip Textile Processors Private Limited and another** reported in (2012) 1 Supreme Court Cases 226.

v) Decision in case of **State of W.B and another v. E.I.T.A. India Ltd. and others** reported in (2003) 5 Supreme Court Cases 239 was cited in support of the contention that in taxing statute, the legislature enjoys greater latitude.

vi) On the basis of decisions in case of **Ramrao and others v. All India Backward Class Bank Employees Welfare Association and others** reported in (2004) 2 Supreme Court Cases 76 and in case of **University Grants Commission v. Sadhana Chaudhary and others** reported in (1996) 10 Supreme Court Cases 536, it was canvassed that it is always open for the legislature to introduce a cut-off date for granting any benefit. Merely because such cut-off date creates two classes, would not be a ground to hold that the law is unconstitutional.

vii) Referring to the decisions in case of **R.K. Garg v. Union of India and others** reported in (1981) 4 Supreme Court Cases 675 and in case of **Government of Andhra Pradesh and others v. Smt. P. Laxmi Devi (SMT)** reported in (2008) 4 Supreme Court Cases 720, it was argued that State collects tax in exercise of its eminent domain and wisdom of legislature is therefore, not amenable to judicial review.

viii) Our attention was drawn to the decision of Supreme Court in case of **Osram Surya (P) Ltd. v. Commissioner of Central Excise, Indore** reported in (2002) 9 Supreme Court Cases 20, in which first proviso to Rule 57-G of the Modvat Credit Rules was challenged. With introduction of said proviso, a manufacturer would not be allowed to take the modvat credit after six months from the date of the documents specified in the said proviso. Supreme Court while upholding

the validity of the provision held that same does not take away a vested right.

9. On the basis of submissions made before us the following questions arise for our consideration :

1) Whether the impugned provision makes an impermissible distinction between similarly situated persons forming a homogenus class?

2) Whether the provision in question without proper justification takes away the vested right of the petitioners and thus acts with retrospective effect?

Question can be re-framed as to whether the legislation in question imposes a burden with retrospective effect and in absence of any justification for the same, is not a valid statute?

3) On any of the grounds above, whether clause(iv) of sub-section (3) of section 140 of the CGST Act is required to be declared unconstitutional?

10. Before taking up these questions for consideration, we may peruse the statutory provisions applicable more minutely.

11. As is well known in the tax structure existing prior to introduction of GST regime, a manufacturer or producer of a specified product or a provider of input service was allowed to

take credit of the excise duties paid by him. Clause (ij) of Rule 2 of the Rules of 2004 define the term "first stage dealer" as under :

(ij) "first stage dealer" means a dealer, who purchases the goods directly from,-

(i) the manufacturer under the cover of an invoice issued in terms of the provisions of Central Excise Rules, 2002 or from the depot of the said manufacturer, or from premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer, under cover of an invoice; or

(ii) an importer or from the depot of an importer or from the premises of the consignment agent of the importer, under cover of an invoice;"

12. Sub-rule(1) of Rule 3 of the Rules of 2004 empowered a manufacturer or producer of final products or a provider of input service to take CENVAT credit of the excise duty and other duties specified therein. Rule 9 inter-alia provided that CENVAT credit shall be taken by the manufacturer on the basis of documents mentioned therein. Sub-clause(iv) of clause (a) of sub-rule(1) of Rule 9 pertained to an invoice issued by a first stage dealer or a second stage dealer, as the case may be, in terms of of the provisions of Central Excise Rules, 2002. Thus upon the first stage dealer issuing invoice,

his purchaser- manufacturer would be entitled to take CENVAT credit of the duty paid. Like-wise clause(c) of sub-rule (1) of Rule 9 pertained to bill of entry. Sub-rule (4) of Rule 9 enables purchase of input or capital goods from a first stage dealer or second stage dealer, provided certain conditions are fulfilled. Sub-rule(4) reads as under :

"(4) The CENVAT credit in respect of input or capital goods purchased from a first stage dealer or second stage dealer shall be allowed only if such first stage dealer or second stage dealer, as the case may be, has maintained records indicating the fact that the input or capital goods was supplied from the stock on which duty was paid by the producer of such input or capital goods and only an amount of such duty on pro rata basis has been indicated in the invoice issued by him :

Provided that provisions of this sub-rule shall apply mutatis mutandis to an importer who issues an invoice on which CENVAT credit can be taken."

13. As per sub-rule(8) of Rule 9, a first stage dealer or a second stage dealer had to submit within fifteen days from the close of each quarter of a year to the Superintended of Central Excise, a return in the form specified by notification by the Board. In terms of the said rules, thus the incident of duty on manufactured goods was not to be borne by first stage dealer.

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14. With the introduction of GST replacing several taxing statutes, it became necessary to make provisions for switching over

from the old to the new regime which, in legal parlance, often times, is referred to as transitional provisions. Such transitional provisions are contained in Chapter XX of CGST Act. As noted, as per sub-section (1) of section 139 from the appointed day, every person registered under any of the existing laws and having a valid Permanent Account Number would be issued a certificate of registration on provisional basis subject to conditions. Under sub-section (2) of section 139 final certificate of registration would be granted in prescribed format subject to fulfillment of conditions which may be prescribed. Section 140 also contained in said Chapter XX is of considerable importance for us and carries caption note Transitional arrangement for input tax credit. Sub-section (3) of section 140 reads as under:

"140. Transitional arrangements for input tax credit.

(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012—Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely:—

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;

(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and

(v) the supplier of services is not eligible for any abatement under this Act:

Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed."

15. As per this provision, several classes of persons including a first stage dealer would be entitled to take in his credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to fulfillment of conditions specified therein. The petitioners have no grievance about any of the conditions except condition No. (iv) which provides that such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day. This condition

would limit the eligibility of a first stage dealer to claim credit of the eligible duties in respect of goods which were purchased from the manufacturers prior to twelve months of the appointed day.

16. While considering the rival contentions with respect to the constitutionality of this provision, we may broadly refer to the contours of the Court's powers in holding a law made by the legislation as unconstitutional and the limits of such powers. In case of ***Budhan Choudhry and ors vs. State of Bihar*** reported in AIR 1955 Supreme Court 191, seven Judge Bench of the Supreme Court held and observed that when Article 14 forbids class legislation, it does not forbid reasonable classification. However, for the classification to be reasonable, two conditions must be fulfilled viz. (i)that the classification must be founded on a intelligible differentia which distinguishes persons or things that are grouped together from this legal difference of the credit and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question.

17. In case of ***The State of Jammu & Kashmir vs. Triloki Nath Khosa and ors*** reported in AIR 1974 SC 1 the Constitution Bench of the Supreme Court upheld the legislation classifying Assistant Engineers into Degree-holders and Diploma-holders for the purpose of promotion. It was observed that classification on the basis of educational qualifications made

with a view to achieving administrative efficiency cannot be said to rest on any fortuitous circumstances and one has always to bear in mind the facts and circumstances in order to judge the validity of a classification. It was observed that there is a presumption of constitutionality of a statute. The burden is on one who canvasses that certain statute is unconstitutional to set out facts necessary to sustain the plea of discrimination and to adduce cogent and convincing evidence to prove those facts. In order to establish that the protection of the equal opportunity clause has been denied to them, it is not enough for the petitioners to say that they have been treated differently from others, not even enough that a differential treatment has been accorded to them in comparison with other similarly circumstanced. Discrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis.

18. On the question of the grounds on which a law framed by the legislation i.e. the parliament of the State assembly the decision of three Judge Bench of Supreme Court in case of ***State of A.P. And ors vs. Macdowell and Co. and ors*** reported in (1996) 3 SCC 709 held the field and was often referred. In the said judgement, the Supreme Court had opined that the grounds for striking down a statute framed by the legislature are only two viz. (1) lack of legislative competence, or (2) violation of fundamental rights or any other constitutional provision. If enactment is challenged as violative of Article 14,

it can be struck down only if it is found that it is violative of the equality clause or the equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6). No enactment can be struck down by just saying that it is arbitrary or unreasonable. 'Arbitrariness' is an expression used widely and rather indiscriminately-an expression of inherently imprecise import. Hence, some or the other constitutional infirmity has to be found before invalidating the Act. An enactment cannot be struck down on the ground that the Court thinks it unjustified. Parliament and legislatures, composed as they are of the representatives of the people and supposed to know and be aware of the need of the people and every what is good and bad for them. The Court cannot sit on the judgement over their wisdom.

19. In the recent judgement of the Supreme Court in case of ***Shayra Bano vs. Union of India and ors*** reported in (2017) 9 SCC 1, Rohinton Fali Nariman, J., however, expressed a somewhat different view. It was observed that a statute can also be struck down if it is manifested arbitrary. It was observed as under:

"101. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers v. Union of India, (1985)

1 SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

20. It is well settled that as long as the legislation has necessary competence to frame a law and the law so framed is not violative of the fundamental rights enshrined in the constitution or any of the constitutional provision, the Court would not strike down the statute merely on the perception that the same is harsh or unjust. Particularly, in taxing statutes the Courts have recognized much greater latitude in the legislation in framing suitable laws. Reference in this respect can be made to the well known judgement of Supreme Court in case of ***R.K.Garg vs. Union of India and ors (supra)*** it was observed as under:

"8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion

etc. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrine or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislature judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Dond 354 US 457 where Frankfurter, J. said in his inimitable style:

> In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial difference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events-self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.

The court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry" that exact wisdom and nice adoption of remedy are not always possible and that "judgment is largely a prophecy based on meagre and un-interpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There,

may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture v. Central Reig Refining Company 94 Lawyers Edition 381 be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

21. It is equally well settled that wherever the parliament has the power to frame a statute it also includes the power to make the law retrospective. In other words, the parliament also has wide powers to frame the laws including taxing statutes with retrospective effect. However, the Courts have recognized certain inherent limitations in framing retrospective tax legislations.

22. In ***Tata Motors Ltd vs. State of Maharashtra and ors*** reported ***(2004) 5 SCC 783,*** it was observed that it is

undoubtedly true that the legislature has the powers to make laws retrospectively including tax laws. Levies can be imposed or withdrawn but if a particular levy is sought to be imposed only for a particular period and not prior or subsequently, it is open to debate whether the statute passes the test of reasonableness at all.

23. In ***Commissioner of Income Tax vs. Vatika Township petitioner. Ltd reported*** in 367 ITR 466 the Constitution Bench of the Supreme Court observed as under:

"31. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in Phillips vs. Eyre[3], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

32. The obvious basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule as was observed in the decision reported in L'Office

Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co.Ltd[4]. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.

33. We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India & Ors. v. Indian Tobacco Association[5], the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra & Ors.[6] It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are confronted with any such situation here."

24. In case of ***Jayam and Co. vs. Assistant Commissioiner and anr*** reported in *(2016) 15 SCC 125*, the Supreme Court noted **as approval** observations made in case of **R.*C.Tobacco (P.) Ltd vs. Union of India*** reported in (2005) 7 SCC 725 as under:

"14. With this, let us advert to the issue on retrospectivity. No doubt, when it comes to fiscal legislation, the Legislature has power to make the provision retrospectively. In R. C. Tobacco Pvt. Ltd. v. Union of India, this court stated broad legal principles while testing a retrospective statute, in the following manner:

"(i) A law cannot be held to be unreasonable merely because it operates retrospectively;

(ii) The unreasonability must lie in some other additional factors;

(iii) The retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it can be held to be unreasonable as to violate constitutional norms;

(iv) Where taxing statute is plainly discriminatory or provides no procedural machinery for assessment and levy of tax or that is confiscatory, courts will be justified in striking down the impugned statute as unconstitutional;

(v) The other factors being period of retrospectivity and degree of unforeseen or unforeseeable financial burden imposed for the past period;

(vi) Length of time is not by itself decisive to affect retrospectivity."

25. We may now come to the nature of the right enjoyed by the petitioner as a first stage dealer prior to introduction of GST and the changes made by the new law concerning the petitioner's right to enjoy such benefits. As already recorded, the statutory provisions till enactment of goods and service tax statutes recognized the right of the petitioner to pass on credit of the duty on manufactured goods purchased from manufacturers. In some form or the other the burden of duty element of the goods so purchased or the CVD value of the imported goods would be shifted from the petitioner-company as first stage dealer. Duty element suffered on the goods purchased from manufacturers would be neutralized at the time of sale of such goods by the dealer. In case of ***Eicher Motors Ltd vs. Union of India (supra)***, the Supreme Court considered the nature of Modvat credit and observed that if on the inputs the assessee had already paid the taxes on the basis that when the goods are utilized in the manufacture of further products as inputs thereto, then the tax on these goods get adjusted which are finished subsequently. The Court therefore

held that a right accrued to the assessee on the date when the paid tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. This concept was further elaborated by the Supreme Court in case of Collector of ***Central Excise, Pune vs. Dai Ichi Karkaria Ltd*** (supra) observing that it is clear from the Modvat Rules that a manufacturer obtains credit for the excise duty he paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. The Rules do not make any provision for reversal of the credit. The credit is therefore, indefeasible. The Supreme Court therefore, reiterated that a credit under the Modvat scheme is as good as tax paid. In case of ***Jayswal Neco Ltd vs. Commissioner of Central Excise, Raipur*** reported in 2015 (322) LET 587 (SC), these principles were applied to hold that even in a situation where on account of delay in payment of duty within stipulated time the facility of payment of excise duty in installments on fortnightly basis is suspended, the assessee could pay the duty through CENVAT credit.

26. In case of ***Indusr Global Ltd vs. Union of India*** reported in 2014 (310) ELT 833 Guj Division Bench of this Court was considering vires of Rule 8 (3A) of the Central Excise Rules,

2002 which provided that if an assessee defaults in payment of duty beyond thirty days from the date prescribed under sub-rule (1) then notwithstanding anything contained in the sub-rule(1), the assessee shall pay excise duty for each consignment at the time of removal without utilizing the CENVAT credit till the assessee pays the outstanding amount including interest. The Court while striking down such Rule unconstitutional observed as under:

"31.This extreme hardship is not the only element of unreasonableness of this provision. It essentially prevents an assessee from availing cenvat credit of the duty already paid and thereby suspends, if not withdraws, his right to take credit of the duty already paid to the Government. It is true that such a provision is made because of peculiar circumstances the assessee lands himself in. However, when such provision makes no distinction between a willful defaulter and the rest, we must view its reasonableness in the background of an ordinary assessee who would be hit and targeted by such a provision. As held by the Supreme Court in the case of Eicher Motors Ltd (supra) an assessee would be entitled to take credit of input already used by the manufacturer in the final product. In the said case, the Supreme Court was dealing with rule 57F which was introduced in the Central Excise Rules, 1944 under which credit lying unutilized in the Modvat credit account of an assessee on 16th March 1995 would lapse. Such provision was questioned. The Supreme Court held that since excess credit could not have been utilized for payment of the excise duty on any other product, the unutilised credit was getting accumulated. For the utilization of the credit, all vestitive facts or necessary incidents thereto had taken place prior to 16.3.1995. Thus the assessees became entitled to take the

credit of the input instantaneously once the input is received in the factory of the manufacturer of the final product and the final product which had been cleared from the factory was sought to be lapsed. The Supreme Court struck down the rule further observing that if on the inputs the assessee had already paid the taxes on the basis that when the goods are utilized in the manufacture of further products as inputs thereto then the tax on those goods gets adjusted which are finished subsequently. Thus a right had accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. We may also recall that in the case of Dai Ichi Karkaria Ltd (supra) it was reiterated that a manufacture obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable produce immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product."

27. These judgements would thus indicate that the right that the petitioner had to pass on the credit of excise duty paid on goods purchased at the time of sale of such goods was a vested right. It was as good as the duty paid by the assessee to the Government revenue which could be utilised by the purchasers of such goods from the petitioner against future liabilities of course subject to fulfillment of conditions. When the new regime was therefore introduced through goods and service tax statutes, through migration these existing rights were being adjusted in terms of provisions contained in sections 139 and 140 of the CGST Act. The legislature also recognized such existing rights and largely protected the same by allowing

migration thereof in the new regime. In the process, however, a condition was imposed to enable the assessees in the nature of first stage dealer such as the present petitioner-company viz. that the invoices or other prescribed documents on the basis of which credit was claimed were issued not earlier than twelve months immediately preceding the appointed day. In effective terms, this condition restricted the enjoyment of existing credit in respect of goods purchased not prior to one year of the appointed day. In relation to all goods purchased prior to such day, no credit would be available under the credit ledger to be maintained under the CGST Act. Such credit would be lost. Undoubtedly, therefore, this condition has retrospective operation and takes away an existing right. This by itself may not be sufficient to hold the provision as ultra vires or unconstitutional. However, in addition to these findings, we also find that no just reasonable or plausible reason is shown for making such retrospective provision taking away the vested rights. Had the statutory provision given a time limit from the appointed day for utilization of such credit, the issue would stand on an entirely different footing. Such a provision could be seen as a sunset clause permitting the dealers to manage their affairs for which reasonable time frame is provided. The present condition however without any basis limits the scope of a dealer to enjoy existing tax credits in relation to purchases made prior to one year from the appointed day. No such restriction existed in the prior regime. Merely the stated grounds in the affidavit in reply that the

provision is introduced since physical identification of goods is necessary so as to ensure that the first stage dealers do not take any undue advantage of such benefit and also to accommodate the administrative convenience would not be sufficient. Firstly, as noted, there was no such restriction in the CENVAT Credit Rules or analogous provisions of similar rules in the past. Since decades therefore the credits would be available to a first stage dealer on all purchases towards the manufacturing duty. No time frame of the past dealings was envisaged under such rules. The same grounds of physical identification of goods preventing undue advantage being taken and the administrative convenience would exist even then. Secondly, no limitation of time is prescribed in the proviso to sub-section (3) of section 140 where a dealer is not in possession of any invoice or any other document evidencing payment of duty in respect of inputs in which case credit at the prescribed rate would be granted.

28. The judgement of the Supreme Court in case of **Osram Surya (petitioner) Ltd vs. Commissioner of Central Excise, Indore** reported in (2002) 9 SCC 20 involved different facts. It was a case in which, first provisio which was introduced in Rule 57-G of the MODVAT Credit Rules was challenged. By virtue of this provisio a manufacturer would not be allowed to take MODVAT credit after six months from the date of the documents specified therein. It was on this background the

Supreme Court had, while upholding the validity of the provision held and observed that the same did not take away a vested right. The important distinction in the present case as compared to the facts of our case is that the Legislature, by introducing a condition for enjoyment of an existing right, provided prospective time limit of six months which did not exist earlier. In other words, from the date of introduction of the proviso, the benefit of utilization of CENVAT credit under certain circumstances would be restricted to a period of six months. This provision thus, did not act with retrospective effect.

29. We are conscious that the Bombay High Court in case of ***JCB India Limited and others v. Union of India and others***(supra) has taken a different view. We have given our detailed reasons for the view that we have adopted. Needless to record, we are unable to adopt the line chosen by the Bombay High Court in case of *JCB India Limited and others v. Union of India and others*(supra).

30. To sum up we are of the opinion that the benefit of credit of eligible duties on the purchases made by the first stage dealer as per the then existing CENVAT credit rules was a vested right. By virtue of clause (iv) of sub-section (3) of section 140A such right has been taken away with

retrospective effect in relation to goods which were purchased prior to one year from the appointed day. This retrospectivity given to the provision has no rational or reasonable basis for imposition of the condition. The reasons cited in limiting the exercise of rights have no co-relation with the advent of GST regime. Same factors, parameters and considerations of "in order to co-relate the goods or administrative convenience" prevailed even under the Central Excise Act and the CENVAT Credit Rules when no such restriction was imposed on enjoyment of CENVAT credit in relation to goods purchased prior to one year.

31. In the conclusion we hold that though the impugned provision does not make hostile discrimination between similarly situated persons, the same does impose a burden with retrospective effect without any justification.

32. For all these reasons we find that clause (iv) of sub-section (3) of section 140 is unconstitutional. We therefore strike down the same. Petitions are allowed and disposed of.

33. At the request of learned counsel for the Revenue this judgement shall stand stayed upto 31.10.2018.

(AKIL KURESHI, J)

(B.N. KARIA, J)

Raghu/JYOTI V. JANI