JAYAM & CO. A

v.

ASSISTANT COMMISSIONER & ANR.

(Civil Appeal Nos. 8070-8073 of 2016)

AUGUST 05, 2016 B

[A.K. SIKRI AND R. F. NARIMAN, JJ.]

Tamil Nadu Value Added Tax Act, 2006: s.19(20) – Retrospectivity of, validity – Input Tax Credit – Sub-section (20) of s.19 is altogether new provision introduced for determining the input tax in specified situation, i.e., where goods are sold at a lesser price than the purchase price of goods – ITC is a form of concession granted by virtue of s.19 – When a concession is given by a statute, the legislature has power to make the provision stating the form and manner in which such concession is to be allowed – Sub-section (20) seeks to achieve that – There is no right inherent or otherwise vested with dealers to claim the benefit of ITC but for s.19 of the Act – Therefore, constitutionality of s.19(20) is upheld – However, amendment giving retrospective effect would seek to take away the vested right accrued in favour of dealers in respect of purchases and sales made between 1.1.2007 to 19.8.2010 and is, therefore, struck down. C D E

Partly allowing the appeals, the Court

HELD: 1. Section 19 allows grant of Input Tax Credit (ITC). However, ITC is not allowed on all kinds of transactions. On certain types of sales, no ITC is admissible at all. Nature of those sales where ITC is inadmissible is stipulated in sub-sections (5) to (9) of Section 19. From sub-section (10) onwards, provisions are made to follow the procedure and fulfill the requisite conditions for availing ITC. Sub-section (10) which is couched in negative terms, categorically stipulates that such ITC would be admissible to the registered dealer and he would not be entitled to claim this credit 'until the dealer receives an original tax invoice duly filled, signed and issued by a registered dealer from where the goods are purchased.....'. Further, such original tax invoice should evidence the amount of input tax. So much so, even if the F G H

A **original tax invoice is lost, the obligation cast on the registered dealer is to obtain duplicate or carbon copy of such tax invoice from the selling dealer and only then input tax is allowed. From the aforesaid scheme of Section 19 following significant aspects emerge:- (a) ITC is a form of concession provided by the**
B **Legislature. It is not admissible to all kinds of sales and certain specified sales are specifically excluded. (b) Concession of ITC is available on certain conditions mentioned in this Section. (c) One of the most important condition is that in order to enable the dealer to claim ITC it has to produce original tax invoice, completed in all respect, evidencing the amount of input tax.**
C **[Paras 10, 11][794-G-H; 799-G-H; 800-A-D]**

2. It is a trite law that whenever concession is given by statute or notification etc. the conditions thereof are to be strictly complied with in order to avail such concession. Thus, it is not the right of the 'dealers' to get the benefit of ITC but its a
D **concession granted by virtue of Section 19. Sub-section 10 makes original tax invoice relevant for the purpose of claiming tax. Therefore, under the scheme of the VAT Act, it is not permissible for the dealers to argue that the price as indicated in the tax invoice should not have been taken into consideration but the**
E **net purchase price after discount is to be the basis. When a concession is given by a statute, the Legislature has power to make the provision stating the form and manner in which such concession is to be allowed. Sub-section (20) seeks to achieve that. There was no right, inherent or otherwise, vested with dealers to claim the benefit of ITC but for Section 19 of the VAT**
F **Act. That apart, there were valid and cogent reasons for inserting Section 19(20). Main purport was to protect the Revenue against clandestine transactions resulting in evasion of tax. [Paras 12 and 13][800-D-F, H; 801-A]**

3. Sub-section (20) of Section 19 is altogether new provision
G **introduced for determining the input tax in specified situation, i.e., where goods are sold at a lesser price than the purchase price of goods. The manner of calculation of the ITC was entirely different before this amendment. This is a provision which is made for the first time to the detriment of the dealers. Such a provision, therefore, cannot have retrospective effect, more so,**
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when vested right had accrued in favour of these dealers in respect of purchases and sales made between January 01, 2007 to August 19, 2010. Thus, while upholding the vires of sub-section (20) of Section 19, Amendment Act 22 of 2010 is struck down whereby this amendment was given retrospective effect from January 01, 2007. [Para 18][808-C-F]

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R.C. Tobacco Pvt. Ltd. v. Union of India (2005) 7 SCC 725 : 2005 (3) Suppl. SCR 342; _Tata Motors Ltd. v. State of Maharashtra and Ors._ (2004) 5 SCC 783 : 2004 (2) Suppl. SCR 452; _Commissioner of Income Tax (Central)-I, New Delhi v. Vatika Township Private Limited_ (2015) 1 SCC 1 : 2014 (12) SCR 1037 – referred to.

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Case Law Reference

2005 (3) Suppl. SCR 342	**referred to**	**Para 14**
2004 (2) Suppl. SCR 452	**referred to**	**Para 15**
2014 (12) SCR 1037	**referred to**	**Para 17**

D

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 8070-8073 of 2016.

From the Judgment and Order dated 17.07.2013 of the High Court of Judicature at Madras in W. P. (C) Nos. 25952 to 25955 of 2010.

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WITH

C. A. Nos. 8074-75, 8076, 8077-78, 8079-82, 8083-86, 8087-89, 8090-93, 8094-99, 8100, 8105-8114, 8115-116, 8117, 8118, 8119-22, 8123, 8124, 8125-26, 8127-31, 8132-34, 8135-38, 8139-8141, 8142, 8143 and 8144-46 of 2016.

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S. K. Bagaria, V. Giri, Sr. Advs., E. R. Kumar, Sameer Paukh, K. Ajit Singh, Abhishek vinod Deshmukh, Aditya Sharma, Aakansha Nehra, Akash Jindal, Chatanya Safaya, Ms. Shelly Bhasin, Ms. Vasudha Gupta, Ms. L. Kamath, Mahesh Agarwal, Ms. Sadapurna Mukherjee, E. C. Agrawala, F. R. Kumr, Abhishek Vinod Deshmukh, Aditya Sharma, Aakansha Nehra, Akash Jindal, M/s. Parekh & Co., K. V. Vijayakumar, Jayanth Moth Raj, Ms. Malavika J., Sureshan P., Ms. Hemalatha, P. R. Kovilan, Mrs. Geetha Kovilan, Sanand Ramakrishnan, S. Nandakumar,

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A Parivesh Singh, P. Srinivasan, Prateek Gupta, Ranjeet Singh, Naresh Kumar, K. K. Mani, Ms. T. Archana, Gautam Narayan, R. A. Iyer, Shatrajit Banerji, Nikhil Swami, Ms. Divya Swami, Mrs. Prabha Swami, Anil Kaushik, Anand Padmanabhan, Ms. Amritha Sarajoo, Shashi Bhushan Kumar, Advs. for the Appellants.

B Subramonium Prasad, Sr. Adv., B. Balaji, Utkarsh Srivastava, Arvind Athithan, Ram Subramanian, Muthuver Palani, Advs. for the Respondents.

The Judgment of the Court was delivered by

C **A.K. SIKRI, J.** 1. Leave granted.

2. We have heard the matter in detail finally at this stage on all issues that are raised. We are of the opinion that special leave petitions need to be granted only on the issue as to whether sub-section (20) of Section 19 of the Tamil Nadu Value Added Tax Act, 2006 (hereinafter referred to as 'VAT Act') could be given retrospective effect.

D 3. All these appeals arise out of common judgment dated July 17, 2013 rendered in batch of writ petitions. In the writ petitions filed by the appellants (hereinafter referred to as 'dealers'), vires of newly inserted sub-section (20) of Section 19 of the VAT Act, vide amendment brought by Amendment Act 22 of 2013 were challenged. This provision though E came into force on August 19, 2010, by the aforesaid Amendment Act, was given retrospective effect from January 01, 2007 by Tamil Nadu Value Added Tax (Special Provision) Act, 2010 (hereinafter referred to as 'Act, 2010'). The retrospectivity of the provision was also questioned by the dealers. The dealers had argued that this provision is confiscatory F in nature as well as unreasonable and arbitrary and is, therefore, violative of Article 14 and 19(1)(g) of the Constitution and repugnant to the general scheme of the charging provisions of Section 3(2) and 3(3) of the VAT Act. On both the counts, the dealers' challenge has been repelled by the High Court vide impugned judgment July 17, 2013.

G 4. We have heard learned counsel for the parties at length. Before us, Mr. Bagaria, learned senior counsel appearing for the dealers in some of these appeals had also argued that even if the aforesaid provision was valid, it was not properly interpreted by the High Court. We have considered this additional submission as well. We may record, at the outset, that insofar as this submission based on interpretation of this

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provision as well as challenge laid to the constitutional validity of the said provision are concerned, we do not find any merit therein and are of the opinion that the High Court by a well-reasoned and detailed judgment rightly rejected these contentions. It is because of this reason that leave in the special leave petitions is granted only to limited extent as indicated in the beginning of this order. However, before coming to the issue of retrospectivity, we would delve into these two aspects briefly as that discussion would be required in order to understand the question of retrospectivity.

5. The appellants are 'dealers' and registered as such under the provisions of VAT Act. For example, the appellant in Civil Appeal No. 24023-26 of 2013 deals in electronic home appliances. It purchases appliances from local registered dealers on payment of VAT under the VAT invoice issued by the vendors. Thereafter, the appellant re-sells to consumers under VAT invoice charging appropriate VAT on their selling price. It had purchased LCD Televisions from M/s. LG Electronics Private Limited for re-sale. The vendors, i.e., M/s. LG Electronics had charged VAT on the selling price, as per the VAT invoice issued by M/s. LG Electronics to the dealers. Based on the price shown in the invoice, VAT was paid. Under the scheme of VAT Act, as would be seen hereinafter, on re-sale when the VAT is paid by the dealer, the dealer is entitled to avail Input Tax Credit (for short, 'ITC'), i.e., he is entitled to get the credit of the VAT which was paid by the dealer to M/s. LG Electronics on purchase of these T.V. sets from the said vendors.

6. It so happened that after the original tax invoice and availing ITC, the vendor had given discount and purchase credit note was issued for a lesser price. The dealer took into account the price it paid to M/s. LG Electronics after adjusting the discount that was subsequently given to the dealer to arrive at net cost and adding VAT which was limited to the vendors by the dealer, the goods were re-sold at a lesser price. This is illustrated before us in the following manner:

" **PURCHASE DETAILS**

S. No.	Description	Price (Rs.)	Vat (10%) Rs.)
1.	As per Tax Invoice of the Seller	100	10

2.	Less: Discount actually allowed by seller under its applicable incentive/discount scheme by issuing credit note.	10	
	Net purchase price after discount	90	

SALE DETAILS

S. No.	Description	Amount (Rs.)
1.	Sale Price	95
2.	VAT actually on the sale price @ 10%	9.50

"

7. From the aforesaid, it is clear that the dealer had paid to the vendor VAT of Rs. 10/-. However, at the time of re-sale VAT actually allowed was Rs. 9.50. That is the effect of sub-section (20) of Section 19, which reads as under:

> "S. 19(20) Notwithstanding anything contained in this section, where any registered dealer has sold goods at a price lesser than the price of the goods purchased by him, the amount of the input tax credit over and above the output tax of those goods shall be reversed."

8. First submission of the dealer was that the price could not have been taken as per the tax invoice but net price at which it was ultimately purchased after discount should have been taken. In the given illustration, it was Rs. 90/-. On this basis, argument raised on interpretation was that since the goods were purchased at Rs. 90/- and sold at Rs. 95/-, sub-section (20) of Section 19 had no application at all. Detail submissions were made with reference to the provisions of Sale of Goods Act to buttress the submission that net purchase price would be the "price" of goods. However, according to the Revenue, purchase price had to be

taken as Rs. 100/-, as mentioned in the original tax invoice, without deducting the discount of Rs. 10/- allowed by the issuing of credit note. On this basis, the Revenue took the decision that since the goods were purchased at Rs. 100/- but sold at Rs. 95/- (Section 19(20) became applicable). The High Court has accepted the contention of the Revenue. As mentioned above, detailed reasons in this behalf are given. Suffice it to state that as per the scheme of the VAT Act itself, it is the price as per the tax invoice which has to be taken into consideration. In view of this Specific Statutory Scheme, general principles laid down in the Sale of Goods Act would not be applicable.

9. We may mention that Section 19 deals with ITC and this Section is to be understood keeping in view the entire scheme of the VAT Act. VAT Act, obviously, deals with payment of value added tax on the goods sold by the dealers. It is not necessary to go into definitions of various expressions like 'business', 'dealer', 'goods', 'sale', 'turnover' etc. Since we are concerned with grant of ITC, we would reproduce the definitions of those expressions which are relevant for this purpose. These are:

> "S. 2(24) "input tax" means the tax paid or payable under this Act by a registered dealer to another registered dealer on the purchase of goods including capital goods in the course of his business.
>
> S. 2(36) "tax invoice" means an invoice issued by a registered dealer who sells taxable goods to another registered dealer in the State showing the tax charged separately and containing such details as may be prescribed.
>
> S. 2(41) "turnover" means the aggregate amount for which goods are bought or sold, or delivered or supplied or otherwise disposed of in any of the ways referred to in clause (33), by a dealer either directly or through another, on his own account or on account of others whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce, other than tea and rubber (natural rubber latex and all varieties and grades of raw rubber) grown within the State by himself or on any land in which he has an interest whether as owner, unsufructuary mortgage, tenant or otherwise, shall be

A excluded from his turnover.

Explanation I: "Agricultural or horticultural produce" shall not include such produce as has been subjected to any physical, chemical or other process for being made fit for consumption, save mere cleaning, grading, sorting or dying;

B *Explanation II:* Subject to such conditions and restrictions, if any, as may be prescribed in this behalf—

(i) the amount for which goods are sold shall include any sums charged for anything done by the dealer in respect of the goods sold at the time or,or before the delivery thereof;

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(ii) any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers shall not be included in the turnover;

Explanation III: Any amount, realised by a dealer by way D of sale of his business as a whole, shall not be included in the turnover;

Explanation IV: Any amount, charged by a dealer by way of tax separately without including the same in the price of the goods sold, shall not be included in the turnover"

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10. After giving the definitions of various terms under Section 2, Sections 3 to 12 deal with levy of taxes on various kinds of transactions. For example, Section 3 deals with levy of taxes on sale of goods; Section 4 talks about levy of taxes on transfer of right to make use of any goods F for any purpose and Section 5 prescribes the levy of tax on transfer of goods involved in works contract. From Section 13 onward, some concessions/ deductions are allowed. Section 13 deals with deduction of tax at source in works contract. Section 14 is about the reversal of tax credit. Likewise, Section 15 deals with those sales which are G exempted from tax. In this scheme of deductions and concessions comes Section 19 which allows grant of ITC. Pertinently, however, scrutiny of this provision reveals that ITC is not allowed on all kinds of transactions. On certain types of sales, no ITC is admissible at all. Nature of those sales where ITC is inadmissible is stipulated in sub-sections (5) to (9) of

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Section 19. For understanding this pertinent aspect of the scheme, at this juncture, we reproduce Section 19 in its entirety as under:

"Input tax credit

(1) There shall be input tax credit of the amount of tax paid or payable under this Act, by the registered dealer to the seller on his purchases of taxable goods specified in the First Schedule:

PROVIDED that the registered dealer, who claims input tax credit, shall establish that the tax due on such purchases has been paid by him in the manner prescribed.

(2) Input tax credit shall be allowed for the purchase of goods made within the State from a registered dealer and which are for the purpose of —

(i) re-sale by him within the State; or

(ii) use as input in manufacturing or processing of goods in the State; or

(iii) use as containers, labels and other materials for packing of goods in the State; or

(iv) use as capital goods in the manufacture of taxable goods;

(v) sale in the course of inter-State Tax Act, 1956 (Central Act 74 of 1956);

(vi) agency transactions by the principal within the State in the manner as may be prescribed.

3(a) Every registered dealer, in respect of purchases of capital goods, for use in the manufacture of taxable goods, shall be allowed input tax credit in the manner prescribed.

(b) Deduction of such input tax credit shall be allowed only after the commencement of commercial production and over a period of three years in the manner as may be prescribed. After the expiry of three years, the unavailed input tax credit shall lapse to Government.

A (c) Input tax credit shall be allowed for the tax paid under section 12 of the Act, subject to clauses (a) and (b) of this sub-section.

(4) Input tax credit shall be allowed on tax paid or payable in the State on the purchase of goods, in excess of three
B percent of tax relating to such purchases subject to such conditions as may be prescribed,—

(i) for transfer to a place outside the State otherwise than by way of sale; or

(ii) for use in manufacture of other goods and transfer to a
C place outside the State, otherwise than by way of sale:

PROVIDED that if a dealer has already availed input tax credit there shall be reversal of credit against such transfer.

(5) (a) No input tax credit shall be allowed in respect of
D sale of goods exempted under section 15

(b) No input tax credit shall be allowed on tax paid or payable in other States or Union Territories on goods brought into this State from outside the State.

(c) No input tax credit shall be allowed on the purchase of
E goods sold as such or used in the manufacture of other goods and sold in the course of inter-State trade or commerce falling under sub-section (2) of section 8 of the Central Sales Tax Act, 1956 (Central Act 74 of 1956).

(6) No input tax credit shall be allowed on purchase of capital
F goods, which are used exclusively in the manufacture of goods exempted under section 15.

Provided that on the purchase of capital goods which are used in the manufacture of exempted goods and taxable goods, in put tax credit shall be allowed to the extent of its
G usage in the manufacture of taxable goods in the manner prescribed.

(7) No registered dealer shall be entitled to input tax credit in respect of—

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(a) goods purchased and accounted for in business but utilised for the purpose of providing facility to the proprietor or partner or director including employees and in any residential accommodation; or

(b) purchase of all automobiles including commercial vehicles, two wheelers and three wheelers and spare parts for repair and maintenance thereof, unless the registered dealer is in the business of dealing in such automobiles or spare parts; or

(c) purchase of air-conditioning units unless the registered dealer is in the business of dealing in such units.

(8) No input tax credit shall be allowed to any registered dealer in respect of any goods purchased by him for sale but given away by him by way of free sample or gift or goods consumed for personal use.

(9) No input tax credit shall be available to a registered dealer for tax paid or payable at the time of purchase of goods, if such—

(i) goods are not sold because of any theft, loss or destruction, for any reason, including natural calamity. If a dealer has already availed input tax credit against purchase of such goods, there shall be reversal of tax credit; or

(ii) inputs destroyed in fire accident or lost while in storage even before use in the manufacture of final products; or

(iii)inputs damaged in transit or destroyed at some intermediary stage of manufacture.

(10) (a) The registered dealer shall not claim input tax credit until the dealer receives an original tax invoice duly filled, signed and issued by a registered dealer from whom the goods are purchased, containing such particulars, as may be prescribed, of the sale evidencing the amount of input tax.

(b) If the original tax invoice is lost, input tax credit shall be allowed only on the basis of duplicate or carbon copy of

A such tax invoice obtained from the selling dealer subject to such conditions as may be prescribed.

(11) In case any registered dealer fails to claim input tax credit in respect of any transaction of taxable purchase in any month, he shall make the claim before the end of the
B financial year or before ninety days from the date of purchase, whichever is later.

(12) Where a dealer has availed credit on inputs and when the finished goods become exempt, credit availed on inputs used therein, shall be reversed.

C (13) Where a registered dealer without entering into a transaction of sale, issues an invoice, bill or cash memorandum to another registered dealer, with the intention to defraud the Government revenue, the assessing authority shall, after making such enquiry as it thinks fit and giving a
D reasonable opportunity of being heard, deny the benefit of input tax credit to such registered dealer who has claimed input tax credit based on such invoice, bill or cash memorandum from such date.

(14) Where the business of a registered dealer is transferred
E on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the business to a joint venture with the specific provision for transfer of liabilities of such business, then, the registered dealer shall be entitled to transfer the input tax credit lying unutilized in his accounts to such sold, merged, amalgamated, leased or
F transferred concern. The transfer of input tax credit shall be allowed only if the stock of inputs, as such, or in process, or the capital goods is also transferred to the new ownership on which credit has been availed of are duly accounted for, subject to the satisfaction of the assessing authority.

G (15) Where a registered dealer has purchased any taxable goods from another dealer and has availed input tax credit in respect of the said goods and if the registration certificate of the selling dealer is cancelled by the appropriate registering authority, such registered dealer, who has availed
H by way of input tax credit, shall pay the amount availed on

the date from which the order of cancellation of the registration certificate takes effect. Such dealer shall be liable to pay, in addition to the amount due, interest at the rate of two per cent, per month, on the amount of tax so payable, for the period commencing from the date of claim of input tax credit by the dealer to the date of its payment.

(16)The input tax credit availed by any registered dealer shall be only provisional and the assessing authority is empowered to revoke the same if it appears to the assessing authority to be incorrect, incomplete or otherwise not in order.

(17)If the input tax credit determined by the assessing authority for a year exceeds tax liability for that year, the excess may be adjusted against any outstanding tax due from the dealer.

(18)The excess input tax credit, if any, after adjustment under sub-section (17), shall be carried forward to the next year or refunded, in the manner, as may be prescribed.

(19) Where any registered dealer has availed input tax credit and has goods remaining unsold at the time of stoppage or closure of business, the amount of tax availed shall be reversed on the date of stoppage or closure of such business and recovered.

(20)Not withstanding any thing contained in this section, where any registered dealer has sold goods at a price lesser than the price of the goods purchased by him, the amount of the input tax credit over and above the output tax of those goods shall be reversed. "

11. From sub-section (10) onwards, provisions are made to follow the procedure and fulfill the requisite conditions for availing ITC. For the purposes of this particular issue, sub-section (10) is the material provision. This provision, which is couched in negative terms, categorically stipulates that such ITC would be admissible to the registered dealer and he would not be entitled to claim this credit 'until the dealer receives an original tax invoice duly filled, signed and issued by a registered dealer from where the goods are purchased.....'. Further, such original tax

A invoice should evidence the amount of input tax. So much so, even if the original tax invoice is lost, the obligation cast on the registered dealer is to obtain duplicate or carbon copy of such tax invoice from the selling dealer and only then input tax is allowed.

From the aforesaid scheme of Section 19 following significant
B aspects emerge:-

(a) ITC is a form of concession provided by the Legislature. It is not admissible to all kinds of sales and certain specified sales are specifically excluded.

(b) Concession of ITC is available on certain conditions mentioned
C in this Section.

(c) One of the most important condition is that in order to enable the dealer to claim ITC it has to produce original tax invoice, completed in all respect, evidencing the amount of input tax.

D 12. It is a trite law that whenever concession is given by statute or notification etc. the conditions thereof are to be strictly complied with in order to avail such concession. Thus, it is not the right of the 'dealers' to get the benefit of ITC but its a concession granted by virtue of Section 19. As a fortiorari, conditions specified in Section 10 must be fulfilled. In that hue, we find that Section 10 makes original tax invoice relevant
E for the purpose of claiming tax. Therefore, under the scheme of the VAT Act, it is not permissible for the dealers to argue that the price as indicated in the tax invoice should not have been taken into consideration but the net purchase price after discount is to be the basis. If we were dealing with any other aspect *do hors* the issue of ITC as per the Section
F 19 of the VAT Act, possibly the arguments of Mr. Bagaria would have assumed some relevance. But, keeping in view the scope of the issue, such a plea is not admissible having regard to the plain language of sections of the VAT Act, read along with other provisions of the said Act as referred to above.

G 13. For the same reasons given above, challenge to constitutional validity of sub-section (20) of Section 19 of VAT Act has to fail. When a concession is given by a statute, the Legislature has power to make the provision stating the form and manner in which such concession is to be allowed. Sub-section (20) seeks to achieve that. There was no right, inherent or otherwise, vested with dealers to claim the benefit of ITC

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but for Section 19 of the VAT Act. That apart, we find that there were valid and cogent reasons for inserting Section 19(20). Main purport was to protect the Revenue against clandestine transactions resulting in evasion of tax. High Court has discussed this aspect in detail and our task would be accomplished in reproducing those paras as we are concurring with the discussion:

> "64. Let us now point out the background/reasons for inserting Section 19(20) by Amendment Act 22 of 2010, by referring to the Chart, the sample instance is detailed in the Chart in paragraph (34). Let us recapitulate the entries in the Chart. Based on the sale price, i.e., Rs. 36,780/- in the tax invoice, an amount of Input Tax Credit, i.e., Input Tax Credit of Rs. 4m597.50 was available to the petitioner when he re-sells goods. Based on the Credit Note, the same goods are re-sold within the State at a lesser price than what was purchased, i.e., Rs. 33,777.78 (taking into account discount price, there is a profit margin for the dealer) and thereby the output tax payable to the Government is reduced, leaving excess Input Tax Credit at the hands of the dealer. The said excess credit in the hands of the dealer might be adjusted to their other liabilities or might claim refund of the said excess Input Tax Credit. Taking excess Input Tax Credit and later in the guise of credit note giving discount and reducing the price of the goods which reduces the Output tax payable to the Government dwindles State revenue.
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> 65. Learned Advocate General contended that seller and buyer coalition is issuing purchase invoice at an escalated price thereby taking benefit of excess Input Tax Credit and later in the guise of credit notes giving discount, reduced the price of the same goods and thereby reducing the output tax payable to the Government creates a dent of the State revenue. Learned Advocate General further submitted that excess Input Tax Credit available in the hands of the dealer is being adjusted to their other liabilities and the dealer might also make a claim of refund of Input Tax Credit as per Section 19(18) of the Act which were ultimately resulted in creating dent on the State revenue.

66. To contend as to how the so called discount and reduction of sale price caused revenue loss to the Government, the learned Advocate General has drawn our attention to the illustration stated in paragraph (6) of the counter which reads as under:-

" Purchase price of 10

Washing Macines	... Rs.	1,00,000/-
Tax paid on purchase at 12.5% (ITC allowed)	... Rs.	12,500/-
Sale price after discount	... Rs.	75,000/-
tax payable on sales at 12.5%	... Rs.	9,375/-
Excess ITC available (Difference between ITC and Output Tax)	... Rs.	3,125/-
	Rs. 12,500 - Rs.9,375	
Excess ITC Adjusted	... Rs. 3,125/-"	

67. As rightly contended by the learned Advocate General, the "Input Tax Credit" adjusted in the above illustration comes to Rs. 3,125/- in a single transaction and that it would run to several lakhs and crores for a year for a single dealer. The excess Input Tax Credit earned by the petitioners is being adjusted against the outstanding tax due or carried forward to next year or refunded. If this trend is allowed to continue, the concept of VAT that meant for payment of tax on every value addition gets defeated.

68. In order to protect the revenue and with a vie to curb the clandestine transactions resulting in evasion of tax, in respect of second and subsequent sales, Section 19(20)was introduced, where any dealer has sold goods at a price lesser than the price of the goods purchased by him, the amount of "Input Tax Credit" over and above the output tax of those goods, shall be reversed.

69. Constitutional Validity of fiscal legislation:- When there is a challenge to the constitutional validity of the provisions

of a Statute, Court exercising power of judicial review must be conscious of the limitation of judicial review must be conscious of the limitation of judicial intervention, particularly, in matters relating to the legitimacy of the economic or fiscal legislation. While enacting fiscal legislation, the Legislature is entitled to a great deal of latitude. The Court would interfere only where a clear infraction of a constitutional provision is established. The burden is on the person, who attacks the constitutional validity of a statute, to establish clear transgression of constitutional principle. Observing that the law relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc., in *R.K. Garg* vs. *Union of India* [(1981) 4 SCC 675, this Court held as under:

xxx xxx xxx xxx xxx"

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***[1], 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 unforseen or unforseeable financial burden

[1] (2005) 7 SCC 725

A imposed for the past period;

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

15. At the same time, this Court has also held that retrospective legislation would be admissible in cases of validation laws, i.e., where B the laws as initially passed was held to be inoperative by the court and when there is a new provision inserted, it should normally be prospective. We may refer to the judgment of this Court in ***Tata Motors Ltd.*** v. ***State of Maharashtra and others***[2]. In that case, the appellant – assessee company, manufactured motor vehicle chassis and spare parts. It C procured steel in primary form covered by Entry 6 of Schedule B to the Bombay Sales Tax Act, 1959 for use in the manufacturing process which resulted also in iron and steel crap which was covered by the said entry. Therefore, in Assessment Year 1982-83, the appellant therein claimed set-off of a certain amount in terms of Rule 41-E for the quantum of iron and steel purchased which was converted into iron and steel scrap. The D claim was allowed. Subsequently, Maharashtra Act 9 of 1989 was enacted and by Sections 26 and 27, the benefit of Rule 41-E was denied altogether for the period 1-7-1981 to 31-3-1988 where the manufactured goods falling under Schedule B were in the nature of waste goods/scrap goods/ by-products. The validity of such retrospective amendment to Rule 41- E E was unsuccessfully challenged before the High Court. The High Court took the view that the impugned amendment of Rule 41-E was clarificatory to remove the doubts in interpretation. However, by the Bombay Sales Tax (Amendment) Rules, 1992 Rule 41-E was amended. That amendment removed the exclusionary clause of goods manufactured out of waste or scrap goods or products and restored the position as it F stood prior to 1981. The appellant's appeal and another connected appeal were heard simultaneously.

The appellant – assessee contended that retrospective operation of a provision depriving the assessee of the vested statutory right and covering a long period (eight years in that case) imposed a *prima facie* G unreasonable restriction and was, therefore, unconstitutional. More so, when the original provision was subsequently reintroduced deleting the amendments and there was no material to justify the special treatment given for the said eight years. The respondent State could not meet the

H [2] (2004) 5 SCC 783

said contention. The assessee company further contended that since the CST Act had not been extended to Dadra and Nagar Haveli, where the assessee's branch office was located, the requirement under Rule 41-D for registration of the assessee under the CST Act in that place was impossible of performance and should, therefore, be ignored.

16. Though the latter contention was rejected, the first contention noted above, touching upon the retrospectivity of the amendment, was accepted and while allowing the appeal the matter was dealt with in the following manner:

> "15. It is no doubt 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. In the present case, the High Court sustained the enactment by adverting to *Rai Ramkrishna case* when the benefit of the rule had been withdrawn for a specific period. The learned counsel for the State contended that the amendments had been made to overcome certain defects arising on account of the decision of the Tribunal in regard to the modalities of working out the relief. But, the impugned amendment brought about by Section 26 is not for that purpose. Assuming that it was the legislative policy not to grant set-off in respect of waste or scrap material generated, it becomes difficult to appreciate the stand of the State in the light of the fact that the original rule continued to be in operation (with certain modifications) subsequent to 1-4-1988. The reason for withdrawal of the benefit retrospectively for a limited period is not forthcoming. It is no doubt true that the State has enormous powers in the matter of legislation and in enacting fiscal laws. Great leverage is allowed in the matter of taxation laws because several fiscal adjustments have to be made by the Government depending upon the needs of the Revenue and the economic circumstances prevailing in the State. Even so an action taken by the State cannot be so irrational and so arbitrary so as to introduce one set of rules for one period and another set of rules for another

A period by amending the laws in such a manner as to withdraw the benefit that had been given earlier resulting in higher burdens so far as the assessee is concerned, without any reason. Retrospective withdrawal of the benefit of set-off only for a particular period should be justified on some tangible and rational ground, when challenged on the ground of unconstitutionality. Unfortunately, the State could not succeed in doing so. The view of the High Court that the impugned amendment of Rule 41-E was of clarificatory nature to remove the doubts in interpretation cannot be upheld. In fact, the High Court did not elaborate as to how the impugned legislation is merely clarificatory. In that view of the matter, although we recognise the fact that the State has enormous powers in the matter of legislation, both prospectively and retrospectively, and can evolve its own policy, we do not think that in the present cases any material has been placed before the Court as to why the amendments were confined only to a period of eight years and not either before or subsequently and, therefore, we are of the view that the impugned provision, namely, Section 26 deserves to be quashed by striking down the words "not being waste goods or scrap goods or by-products" occurring in the said Section 26 of Maharashtra Act 9 of 1989 and the authorities concerned shall rework assessments as if that law had not been passed and give appropriate benefits according to law to the parties concerned."

17. The entire gamut of retrospective operation of fiscal statues was revisited by this Court in a Constitution Bench judgment in ***Commissioner of Income Tax (Central) – I, New Delhi*** v. ***Vatika Township Private Limited***[3] in the following manner:

> "33. A Constitution Bench of this Court in *Keshavlal Jethalal Shah* v. *Mohanlal Bhagwandas* [AIR 1968 SC 1336 : (1968) 3 SCR 623], while considering the nature of amendment to Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act as amended by Gujarat Act 18 of 1965, observed as follows: (AIR p. 1339, para 8)

[3] (2015) 1 SCC 1

"8. ... The amending clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional jurisdiction was before the amendment derived from Section 115 of the Code of Civil Procedure, and the legislature has by the amending Act not attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act."

34. It would also be pertinent to mention that assessment creates a vested right and an assessee cannot be subjected to reassessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective. (See *CED* v. *M.A. Merchant* [1989 Supp (1) SCC 499 : 1989 SCC (Tax) 404] .)

35. We would also like to reproduce hereunder the following observations made by this Court in *Govind Das* v. *ITO* [(1976) 1 SCC 906 : 1976 SCC (Tax) 133] , while holding Section 171(6) of the Income Tax Act to be prospective and inapplicable for any assessment year prior to 1-4-1962, the date on which the Income Tax Act came into force: (SCC p. 914, para 11)

"*11*. Now it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of the *Laws of England* (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that

'all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective operation should not be given to a statute

A so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. *If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as* B *prospective only.*'" (emphasis supplied)

18. When we keep in mind the aforesaid parameters laid down by this Court in testing validity of retrospective operation of fiscal laws, we find that the amendment in-question fails to meet these tests. The High Court has primarily gone by the fact that there was no unforseen or C unforeseeable financial burden imposed for the past period. That is not correct. Moreover, as can be seen, sub-section (20) of Section 19 is altogether new provision introduced for determining the input tax in specified situation, i.e., where goods are sold at a lesser price than the purchase price of goods. The manner of calculation of the ITC was D entirely different before this amendment. In the example, which has been given by us in the earlier part of the judgment, 'dealer' was entitled to ITC of Rs. 10/- on re-sale, which was paid by the dealer as VAT while purchasing the goods from the vendors. However, in view of Section 19(20) inserted by way of amendment, he would now be entitled to ITC of Rs. 9.50. This is clearly a provision which is made for the first time to E the detriment of the dealers. Such a provision, therefore, cannot have retrospective effect, more so, when vested right had accrued in favour of these dealers in respect of purchases and sales made between January 01, 2007 to August 19, 2010. Thus, while upholding the vires of sub-section (20) of Section 19, we set aside and strike down Amendment F Act 22 of 2010 whereby this amendment was given retrospective effect from January 01, 2007.

19. Appeals are partially allowed to the aforesaid extent. No orders as to costs.

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Devika Gujral Appeals partly allowed.

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