**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 4491 OF 2016**

EUROTEX INDUSTRIES AND EXPORTS LIMITED & ANR. .....APPELLANT(S)

VERSUS

STATE OF MAHARASHTRA & ANR. .....RESPONDENT(S)

**W I T H**

**CIVIL APPEAL NO. 4492 OF 2016**

**CIVIL APPEAL NO. 4495 OF 2016**

**CIVIL APPEAL NO. 4497 OF 2016**

**A N D**

**CIVIL APPEAL NO. 4499 OF 2016**

**J U D G M E N T**

**A.K. SIKRI, J.**



These appeals arise from the judgment of the Bombay High Court dated June 10, 2013 by which the High Court has dismissed a batch of writ petitions wherein challenge was laid to the constitutional validity of the Maharashtra Value Added Tax

(Levy, Amendment and Validation) Act, 2009 which amended certain provisions in the Maharashtra Value Added Tax Act, 2002 (for short, the 'MVAT Act') with retrospective effect from April 01, 2005. The High Court has based its judgment by referring to various judgments of this Court which held that Legislature has the power to enact prospectively as well as retrospectively. The appellants do not, and in fact cannot possibly, have any objection at all with this proposition. However, they argue that the High Court has failed to appreciate the effects and consequences and the practical impact of the retrospective amendment on the industrial units which had, in response to the State Government's Scheme, made huge investments in the most extremely backward areas of Maharashtra and which were led to believe that they were entitled to claim exemption from Value Added Tax (for short, 'VAT') on 100% of their production and accordingly did not recover any VAT from their customers. According to them, the effect and consequence of this amendment was that, with retrospective effect from April 01, 2005, industrial units which had made capital investments in very backward areas in the State of Maharashtra and which were earlier entitled to claim VAT exemption benefit on the entire production of their respective industrial units, had their exemption benefit substantially curtailed, being limited to, only a portion of the total production of the unit due to the aforesaid retrospective amendment.

2) It is in this backdrop the issue is as to whether retrospective amendment in the MVAT Act stands the test of constitutionality and is valid in law. Following factual background need to be noted in order to understand the exact nature of controversy and the decisions which are taken by the appellants on the one hand and the respondent on the other.

3) In order to encourage and ensure industrialisation in the backward and underdeveloped areas, Government of Maharashtra had introduced package schemes of incentives to the industrial units for setting up industries in such areas. First scheme in this process is known as the *'Package Scheme of Incentives'* which was introduced in the year 1964. Then came few amended Schemes in the subsequent years. On September 30, 1988, yet another new Package Scheme of Incentives for the period between October 01, 1988 to September 30, 1993 was promulgated with a view to rationalise the scope, scale and mode of release of incentives and accelerate the dispersal of industries from the developed areas of the State to underdeveloped regions. This was notified with effect from May 07, 1993, with which this case relates to.

4) The object of the Scheme was to achieve a dispersal of industries outside the Bombay Thane – Pune belt and to attract them to the underdeveloped and developing areas of the State, particularly, regions away from Bombay Thane – Pune belt. Paragraph 3.8(I)(i)(c) of the Scheme provides as follows:

> "3.8 Gross Fixed Capital Investment -
>
> (I) Gross Fixed Capital Investment shall mean and include, in the case of –
>
> (i) New Fixed Assets – The value of new Fixed Assets acquired at site and paid for:
>
> Explanation –
>
> (a) xx xx xx
>
> (b) xx xx xx
>
> (c) Any acquisition of new Fixed Assets outside the project scheme

> accepted by the Implementing Agency can be considered for the purposes of proportionate incentives during residual eligible period provided such acquisition is not less than 25% of the Gross Fixed Capital Investment at the end of the previous financial year of the Eligible Unit."

5) By Government Resolution (GR) dated July 06, 1994, paragraph 3.8(I)(i)(c) was amended and substituted by deleting the word *'proportionate'* from the Scheme of 1993. As a result, it was stipulated that an acquisition of new fixed assets outside the project scheme accepted by the Implementing Agency could be considered for incentives other than special capital incentives if the acquisition was not less than 25% of the gross fixed capital investment. However, for the purposes of sales tax benefits, the quantum of entitlement would be limited to 75% of that admissible to a new unit. Existing units were also entitled to benefits of the clause.

6) Notwithstanding the deletion of the word *'proportionate'* in the 1993 Scheme, on January 17,1998, Trade Circular was issued by the Commissioner of Sales Tax, which stipulated that under the 1993 Scheme incentives would be given in proportion to the expansion capacity to the total capacity or the investment ratio of new fixed capital investment to the total gross fixed capital investment after the expansion/investment and not on the entire production of an eligible unit covered under such category. Vires of this Circular were challenged by filing writ petitions in the High Court. While these writ petitions were pending, the Maharashtra Sales Tax Tribunal, in its judgment dated March 17, 2001, held that the aforesaid Circular was not validly issued as such an administrative circular could not be issued, which was contrary to the 1993 Scheme, as amended, since such a Scheme was statutory in nature. It may be mentioned that the

aforesaid order of the Tribunal was subsequently upheld by the High Court and it attained finality. To overcome this difficulty, the Legislature brought amendment to the Bombay Sales Tax Act, 1959 with the insertion of Section 41BB. This provision reads as under:

> "41BB.- Proportionate incentives to an Eligible Unit in certain contingencies. –
>
> (1) Notwithstanding anything to the contrary contained in any Package Scheme of Incentives, any Eligible Unit, to whom the Eligibility Certificate has been granted, shall be eligible to draw the benefits in the current year or in any year, whether preceding or succeeding the date of commencement of Section 12 of the Maharashtra Act 22 of 2001, only on that part of its turnover of sales or purchases as may be arrived at by applying the ratio as may be prescribed by the State Government to the total turnover of sales and purchases of the said unit in that year and different ratios may be prescribed for different classes of dealers and different schemes.
>
> (2) The benefits availed of by an Eligible Unit in contravention of sub-section (1), if any, shall be and shall be deemed to have been withdrawn and such unit shall be liable to pay tax in respect of the turnover of sales and purchases in excess of the turnover arrived at under sub-section (1) and accordingly any benefit which is withdrawn shall be recovered as arrears of tax as provided in sub-section (3).
>
> (3) For recovery of arrears of tax as provided in sub-section (2), the Commissioner shall require the unit, by order in writing, to pay the tax, interest and penalty on such turnover on which the benefits are not available and serve on the dealer notice of demand accordingly:
>
> Provided that, no order under this section shall be passed without giving the dealer a reasonable opportunity of being heard.
>
> Explanation. – For the purposes of the provisions contained in section 41BA and 41BB the terms "Existing Unit, Eligible Unit, Implementing Agency, Eligibility Certificate and Certificate of Entitlement' shall have the same meaning as provided in the relevant Package Scheme of Incentives."

It would, however, be pertinent to mention that though Section 41BB provided for grant of proportionate incentives, it could be as prescribed by the State Government by framing rules in this behalf. However, no rules were ever framed.

7) This provision clearly introduced the concept of proportionality, which is also clear from the Statement of Objects and Reasons accompanying the Introduction of that Bill, categorically stipulating that the Act was being amended *'to restrict grant of incentives in proportion to the goods manufactured in the expansion units located in the backward areas of the State'.*

8) In the year 2002, VAT regime was introduced and the State of Maharashtra also enacted the MVAT Act thereby replacing the Bombay Sales Tax Act, 1959. It came into force on April 01, 2005. Section 8(4) of the MVAT Act empowers the State Government to provide for an exemption from payment of the whole of the tax in respect of any class or classes of sales of goods effected by a unit holding a Certificate of Entitlement, as defined in Section 88, to whom incentives are granted under any Package Scheme of Incentives, by way of exemption from payment of tax. Section 93 of the MVAT Act deals with proportionate incentives to an Eligible Unit in certain contingencies. Sub-section (1) thereof, as it originally stood, reads as under:

> "93. Proportionate incentives to an Eligible Unit in certain contingencies. –
>
> (1) Notwithstanding anything to the contrary contained in any Package Scheme of Incentives, any Eligible Unit to whom the Eligibility Certificate has been granted, shall be eligible to draw the benefits in any year, after the appointed day, only on that part of its turnover of sales or purchases as may be arrived at by applying the

ratio as may be prescribed by the State Government to the total turnover of sales and purchases of the said unit in that year and different ratios may be prescribed for different classes of units and different schemes.

xx xx xx"

9) It is this provision which has been amended retrospectively by the Amendment Act of 2009 and is the bone of contention. The amended provision now reads as under:

"(1) Notwithstanding anything to the contrary contained in any Package Scheme of Incentives, any Eligible Unit, to whom the Eligibility Certificate and Certificate of Eligibility have been granted at any time before or after the appointed day, on account of increase in the production capacity or, as the case may be, acquisition of new fixed capital assets, shall be entitled to draw the benefits in any year, only on that part of its turnover of sales or purchases as may be arrived at by applying the provisions of sub-section (1A) to the total turnover of sales and purchases of the said unit in that year.

(1A) In case where the Eligible Unit has, -

(a) maintained separate accounts of sales and purchases and is able to identify the sales and purchases pertaining to the increase in the production capacity or, as the case may be, the said eligible investment, then the portion of the turnover eligible for benefits will be decided solely on the basis of such identification;

(b) not maintained separate accounts of sales and purchases and is not able to identify the sales and purchases in relation to increase in the production capacity or, as the case may be, the said eligible investment, then such benefits shall be calculated after applying the formulae in sub-clause (i) or, as the case may be, sub-clause (ii) given as under:

(i) in case where there is increase in production capacity, then for the Package Scheme of Incentives for 1988 or, as the case may be,

Package Scheme of Incentives for 1993, the formulae shall be as below:

$$\text{Eligible Turnover} = \frac{\text{Turnover x Increase in production capacity}}{\text{Total production capacity after such increase}}$$

(ii) in case where there is no increase in production capacity, then for the Package Scheme of Incentives for 1993, the formulae shall be as below:

$$\text{Eligible Turnover} = \frac{\text{Turnover x New fixed capital investment}}{\text{Total gross fixed capital investments}}$$

(1B) When the eligible turnover comprises of multiple finished products, then, -

(a) the production capacity of each of the finished products shall be separately considered in determining the corresponding eligible turnover, and

(b) eligible turnover shall relate to those products on which the eligible investment has made impact and when eligible investment does not add to production capacity, then it shall apply to all the finished products."

Simultaneously, Section 93A has been inserted to provide that Section 93 shall apply to all the Eligible Units, to whom Eligibility Certificates and Certificates of Entitlement have been issued under any of the Package Schemes of Incentives; if such certificates have been issued on or before the appointed day (1 April 2005), then from the appointed day and in any other case, from the date of effect mentioned in such

certificates.

10) Section 5 of Amending Act 22 of 2009 contains a validation and savings provision which is as follows:

> "5(1) Notwithstanding anything contained in any judgment, decree or order of any Court or Tribunal to the contrary, any assessment, review, levy or collection of tax in respect of sales or purchases effected by any dealer or person, or any action taken or thing done in relation to such assessment, review, levy or collection under the provisions of the Maharashtra Value Added Tax Act, 2002 (hereinafter in this section referred to as "the Value Added Tax Act"), before the date of the commencement to the Maharashtra Value Added Tax (Levy, Amendment and Validation) Act, 2009 (hereinafter referred to as "the said Act"), shall be deemed to be valid and effective as if such assessment, review, levy or collection or action or thing had been duly made, taken or done under the Value Added Tax Act, as amended by the said Act, and accordingly,-
>
> (a) all acts, proceedings or things done or taken by the State Government or by any officer of the State Government or by any other authority in connection with the assessment, review, levy or collection of any such tax, shall, for all purposes, be deemed to be, and to have always been done or taken in accordance with law;
>
> (b) no suit, appeal, application or other proceedings shall lie or be maintained or continued in any Court or before any Tribunal, officer or other authority, for the refund of any tax so paid, and
>
> (c) no Court, Tribunal, officer or other authority shall enforce any decree or order directing the refund of any such tax.
>
> (2) For the removal of doubts, it is hereby declared that nothing in sub-section (1) shall be construed as preventing a person,-
>
> (a) from questioning in accordance with the provisions of the Value Added Tax Act, as amended by the said Act, any assessment, review, levy or collection of tax referred to in sub-section (1), or
>
> (b) from claiming refund of any tax paid by him in excess of the amount due from him by way of tax under the Value Added Tax Act,

as amended by the said Act.

(3) Nothing in the Value Added Tax Act, as amended by the said Act shall render any person liable to be convicted of any offence in respect of anything done or omitted to be done by him, before the commencement of the said Act, if such act or omission was not an offence under the Value Added Tax Act but for the amendments made by the said Act; nor shall any person in respect of such act or omission be subject to a penalty greater than that which could have been imposed on him under the law in force immediately before the commencement of the said Act."

11) As pointed out in the beginning itself, it is only the retrospective operation of sub-sections (1), (1A) and (1B) of Section 93 of the MVAT Act which is the subject matter of challenge.

12) The High Court has brushed aside the challenge holding the retrospective operation of the said amendment to be permissible on the ground that it was in the nature of a valid legislation and such a legislation can be passed by the Legislature with retrospective effect, more so when the Legislature is empowered to enact the laws retrospectively.

13) Mr. S. Ganesh, learned senior counsel, submitted that chronology of events stated above clearly establishes that the State Government and the tax authorities led all industrial units to a *bona fide* belief, during the relevant period from 2005 to 2009, that the benefit of VAT exemption would be available in respect of the entire production of the industrial unit and not merely a proportionate part thereof. These industrial units were, therefore, disabled and prevented from recovering any VAT on any part of their production, as that would have been illegal and would in fact have constituted a criminal offence. If the same amendment had been made in the year 2005 itself, the

industrial units would have availed of the VAT exemption benefit over a longer period of time and from 2005 onwards would have recovered from their customers VAT on an appropriate proportion of their total production. He argued that the only reason or justification given by the respondents for the retrospective amendment is that the State Government was losing a considerable amount of revenue. This is only because a huge amount of capital investment was made in the extremely backward areas of Maharashtra in response to the State Government's Incentive Scheme. The State Government, thus, fully realised all its objectives and goals under the Incentive Scheme. To then do a somersault and make a significant reduction of the Scheme benefits is entirely unfair, arbitrary and unreasonable. Further, the twin effects of the retrospective amendment are that, first, the industrial units are permanently denied a portion of the exemption benefit to which they are entitled by reason of the capital investment made by them, though the exemption period has years to go before it lapses. Secondly, the industrial units are permanently denied of any opportunity to recover the amount of VAT from their customers only because they were disabled and effectively prevented from recovering it in the relevant period. It is, therefore, submitted that the retrospective amendment is arbitrary, unreasonable and oppressive and, therefore, violates the appellant's fundamental rights under Articles 14 and 19(1)(g) of the Constitution.

14) He argued that where the Government has created the situation which makes it illegal or impossible for a manufacturer/dealer to recover sales tax/VAT from its customers, then no demand for amount of tax can be raised, as held in ***West Bengal Hosiery Association & Ors.*** v. ***State of Bihar & Anr.***, (1988) 4 SCC 134 and ***British Physical***

***Lab India Ltd.*** v. ***State of Karnataka & Anr.***, (1999) 1 SCC 170. In this behalf, he pointed out that throughout the period 2005 to 2009, the appellant and other industries covered by the said exemption, were entitled to claim sales tax exemption benefit on the entire turnover of their respective expanded undertakings, only because no Rule was framed by the State Government, firstly under Section 41BB of the Sales Tax Act and thereafter under Section 85 of the VAT Act. Consequently, the appellant and other industries were effectively disabled and prohibited from recovering sales tax or VAT on any part of their turnover. In fact, if the appellant recovered sales tax on any part of its turnover from its customers, the appellant would have been guilty of a criminal offence under the VAT Act. It is the respondents who are completely responsible for this state of affairs, which could have been put an end to forthwith by merely framing a Rule under Section 41 BB or Section 93. Accordingly, the appellant availed tax exemption on 100% of the turnover of its expanded undertaking and passed on the benefit of exemption to the appellant's customers. In the process, the appellant exhausted its entire tax exemption benefit calculated at 130% of its total fixed capital investment, long before the expiry of the appellant's 15 year exemption period which ended only in 2015. Immediately after exhausting its sales tax exemption benefit limit, the appellant started recovering VAT from its customers and paying over the same to the tax authorities.

15) The learned senior counsel also argued that the exact effect and impact of the impugned retrospective amendment made in 2009 with effect from April 01, 2005 needs to be clearly understood, as under:

(a) The total exemption benefit to which a manufacturer was entitled was, in any event,

limited to 130% of the total eligible Fixed Capital Investment in the expansion, which could be availed of over a long period of 15 years. The effect of the retrospective amendment is that an undertaking which had already availed of the exemption benefit on 100% of its turnover will, as a result of the retrospective amendment, forfeit absolutely a slice of its exemption benefit entitlement, for no fault committed by it at all.

(b) If the said amendment had been made on April 01, 2005 itself (by the simple method of issuing a Rule under Section 93), then the appellant would have availed of tax exemption only on the proportionate portion of its turnover and would have recovered VAT on the balance (taxable) portion of its turnover. As a consequence of the impugned retrospective amendment, the appellant is permanently denied not only a slice of its exemption entitlement (based on its capital investment) but also denied permanently the opportunity to recover VAT from its customers on that proportion of its turnover which is taxable.

(c) There is no warrant or justification at all for the said double adverse impact on all the industries in question. All of them, including the appellant, have duly carried out everything that was expected of them under the prevailing law. They made huge capital investments in the most backward districts of the State of Maharashtra and added significantly to the production and turnover of their undertakings and, thereby, greatly expanded the tax base of the State of Maharashtra.

(d) Counsel for the State of Maharashtra gave no explanation or justification at all for the retrospective amendment except to say that it was for correction of an error or anomaly, which, as already pointed out, was an unstateable argument.

16) Mr. Anil Shrivastav, learned counsel who appeared in Civil Appeal No. 4499 of 2016 additionally argued that the retrospective amendment vide Amendment Act 2009 does not seek to remove an ambiguity or to correct a cause of invalidity but, in essence, seeks to impose a fresh levy of tax on the appellant for the first time, which is unreasonable and arbitrary and is, therefore, liable to be struck down as being *ultra vires* the Constitution of India. His submission in this behalf was that the High Court failed to consider that the sole purpose of the amendment made from retrospective effect was to neutralize the effect of the judgment dated July 27, 2009 and the orders dated October 13, 2008 and June 19, 2009 of the Bombay High Court, which was not permissible. He also submitted that Legislature cannot legislate with the sole object of neutralising or over-ruling the decision of the Court. Another submission of Mr. Shrivastav was that vested rights were created in favour of the appellant and also Doctrine of Promissory Estoppel was applicable in the present case and these aspects precluded the Legislature to make the amendment retrospectively. He referred to number of judgments on the aforesaid propositions.

17) Other counsel, appearing in remaining appeals adopted the above arguments.

18) Learned counsel for the State refuted the aforesaid submissions of the counsel for the appellants and pleaded that well reasoned judgment of the High Court does not require to be interfered with. He argued that from the very beginning, the legislative intent was to allow benefit under Package Scheme of Incentives only on proportionate basis which was reflected in Section 41BB of the Sales Tax Act as well as Section 93 of the MVAT Act. Under these Sections, the State Government was required to formulate the modality for proportionately restricting the grant of benefits under a Package Scheme

of Incentives by prescribing the ratio for computing the part of the turnover of sales and purchase of a unit eligible for such benefits. He pointed out that though no Rules prescribing this ratio were framed by the State Government, instead the Commissioner of Sales Tax issued administrative circular dated January 17, 1998 in this behalf which was quashed by the Courts as impermissible on the ground that 'in the absence of any provision under the 1993 scheme and alternatively, in the absence of any ratio prescribed by the State Government by framing Rules, it was not open to the Deputy Commissioner of Sales Tax to direct the assessee to avail the incentives under the 1993 scheme in proportion to the production attributable to the newly acquired fixed assets.' Referring to the aforesaid quoted portion, learned counsel submitted that the High Court recognized the existence of the legislative intent to restrict the benefits but concluded that there was a lacuna/anomaly in effectuating that intent by not framing any Rules. It is for this reason VAT Act was amended in the year 2009 with retrospective effect to cure the aforesaid deficiency. According to the learned counsel, such a move was within the competence of State Legislature and very much permissible in law. He also referred to various judgments showing that not only Legislature is empowered to enact a law, including a fiscal statute, either prospectively or retrospectively, but Legislature is also empowered to nullify the effect of a judicial decision by changing the law retrospectively by removing the basis on which the decision was founded. The learned counsel emphasised that it is in the public interest to restrict the benefits given under a Package Scheme of Incentives in any year to the proportion of additional capital investment as this balances the burden of tax amongst various sectors and prevents an unsustainable drain of financial resources of the State.

The Legislature in enacting the Validating Act has, in its wisdom, decided that the grant of benefits on a pro rata or proportionate basis is in public interest and subserves the objective of the Package Scheme of Incentives. The Validating Act not only carries out the intent and purpose of Section 93, as originally framed, but also subserves the underlying objectives of the Package Scheme of Incentives as a means of benefiting public interest as well as the State and safeguards against these objectives being nullified by the imposition of a huge financial loss on the State. Another submission of the counsel for the State was that a retrospective enactment cannot be impugned on the ground that the retrospective levy did not afford any opportunity to the dealers to pass on the tax to consumers, as held in ***Hiralal Ratanlal*** v. ***State of Uttar Pradesh***, (1973) 1 SCC 216.

19) Before dealing with the aforesaid contentions of the parties on either side, it would be apposite to traverse through the impugned judgment of the High Court in order to ascertain the reasons which have prevailed with the High Court in rejecting the arguments of the appellants herein.

20) A perusal of the judgment of the High Court would show that after capturing the essence of the Scheme of 1988, 1993 and statutory provisions in the form of Section 41BB of the Act and amendments thereto from time to time (which have already been stated by us above) and recording the submissions of the counsel for the parties on either side, the High Court dealt with the main issue, viz., 'validating legislation and retrospectivity'. After pointing out that the power to legislate on a subject which falls within the competence of legislature comprehends within its ambit, the enactment of laws with prospective as well as retrospective effect, the High Court also spelled out

another legal principle, namely, where a law suffers from an infirmity which has been noted in the judgment of the High Court, it is permissible for the legislature to remedy the defect by curing the defect which has been found by the Court. This is known as legislation of validating nature, which is constitutionally permissible inasmuch as such validating law is in the nature of removing the defect or vice in the earlier legislation. The High Court thereafter referred to and quoted from various judgments on the aforesaid twin principles, namely, power of the legislature to enact a law prospectively as well as retrospectively AND also to pass a validating enactment. Thereafter, the High Court proceeded to discuss the contention of the appellants that the Amending Act of 2009, in substance, amounted to imposition of a new levy and the imposition of a fresh levy with retrospective effect was violative of Article 14 of the Constitution and repelled that contention after finding that legislative intent was given benefits only on that part of turnover of sales or purchases as may be arrived at by applying the ratio that may be prescribed by the Government. The Government did prescribe this ratio but chose wrong method by issuing administrative circular rather than issuing statutory notification in the form of rules. It is that which is achieved by the validating Act and therefore it was not a new levy.

21) The High Court has also discussed that the aforesaid kind of legislation would be in the nature of validating legislation inasmuch as the very basis of foundation of the earlier decision was sought to be undone.

22) With this we advert to the arguments advanced by the appellants. We have already taken note of those arguments. It is pertinent to point out that at the time of arguments, learned counsel for the appellants had accepted the legal proposition that the

legislature is competent to enact the laws retrospectively. However, Mr. Anil Shrivastav has argued before us that the retrospective amendment does not seek to remove the ambiguity or correct a cause of invalidity but, in essence, it seeks to impose a fresh levy of tax. He has also argued that the sole purpose of amendment made from retrospective effect was to neutralise the effect of the earlier judgment of the Bombay High Court. We are unable to accept the aforesaid submissions and find that the High Court has proceeded to deal with this aspect of the matter in a correct perspective. While repelling the aforesaid contention, the High Court observed that Section 41BB of the Bombay Sales Tax Act was introduced into this statute in the year 2001. This provision was prefaced by a non-obstante provision which was to operate notwithstanding anything to the contrary contained in any Package Scheme of Incentives. This Section specifically provided that eligible unit would be entitled to draw benefits only on that part of its turnover of sales or purchases as may be arrived at by applying the ratio as that would be prescribed by the State Government to the total turnover of sales or purchases of the unit in that year. Thus, Section 41BB of the Act was not an enabling provision, but contained a legislative mandate in the form of restrictions to the effect that notwithstanding anything contained in any Package Scheme of Incentives, an eligible unit holding an eligibility certificate shall be eligible to draw benefits only on that part of its turnover of sales and purchases as would be arrived at by applying the ratio which was to be prescribed by the State Government. Therefore, legislative intent behind the aforesaid provision was clearly manifest i.e. to allow the benefit only on proportional basis. However, at the same time, it was left to the Government to prescribe the ratio on the basis of which only a part of the turnover

of the sales and purchases would qualify for incentives. Likewise, when MVAT Act was enacted, identical provision as contained in Section 41BB of the Sales Tax Act, was incorporated in the form of Section 93(1) of MVAT Act. It is the implementation of this statutory provision where the Government erred. Though, the Government carried out that intention by issuing circular dated January 17, 1998 which provided for benefits only on that part of the turnover of sales or purchases of eligible unit by prescribing the ratio, the manner of doing the same was faulty. Instead of prescribing the same by way of Rules, which was the proper procedure, the purpose was sought to be accomplished by way of an administrative circular in imposing a ceiling on the utilization of incentives under the 1993 scheme in proportion to the production attributable to the newly acquired fixed assets. Because of this legal infirmity this circular was set aside by the High Court. According to the High Court, it is this defect which was sought to be cured by amending the statutory provision itself by making the said amendment retrospectively. On the aforesaid basis, the High Court rejected the contention of the writ petitioners that a new levy was imposed with retrospective effect.

23) It would be of relevance to emphasise that at the time of insertion of Section 41BB by amendment vide Amendment Act 22 of 2001, the Statement of Objects and Reasons accompanying the introduction of the Bill specifically stated that the purpose of the amendment was 'to restrict grant of incentives in proportion to goods manufactured in the expansion units located in the backward areas of the States'. Thus, the legislative intent was manifest by inserting the said provision to provide the incentives to the eligible units on proportionate basis. Similar intention can clearly be discerned from the provisions of MVAT Act. We have already reproduced Section 93(1) of the said Act

which specifically provides for 'proportionate incentive to an eligible unit in certain contingencies'.

24) It would also be of significance to take note of relevant provisions in respect of Package Scheme of Incentives. Chapter XIV of the MVAT Act contains provisions in regard to the Package Scheme of Incentives. Section 88(a) defines the expression "Certificate of Entitlement" as a certificate issued by the Commissioner in respect of sales tax incentives under the relevant Package Scheme of Incentives. The expression "Eligibility Certificate" is defined in Section 88(c) to mean inter alia a certificate granted by SICOM or Director of Industries in respect of sales tax incentives under a Package Scheme of Incentives designed by the State Government. An eligible unit under clause (b) of Section 88 is defined to mean an industrial unit in respect of which an eligibility certificate is issued. The expression "Package Scheme of Incentives" under clause (e) of Section 88 includes the 1988 and 1993 schemes. Section 89(1) stipulates that where an eligibility certificate has been recommended to an eligible unit by the implementing agency under any Package Scheme of Incentives declared by the State Government, such eligible unit may apply for grant of a certificate of entitlement to the Commissioner. The Commissioner is empowered to grant a certificate of entitlement under sub-section (2) of Section 89 on being satisfied that the unit satisfies the requirements as may be prescribed. Section 90(a) stipulates that a certificate of entitlement would stand cancelled on the date on which: (i) The incentives including the cumulative quantum of benefits availed of exceed the monetary ceiling fixed for the eligible unit; or (ii) The period for which a certificate of entitlement was granted to an eligible unit expires; or (iii) The certificate of registration granted to an eligible unit has

been cancelled. Subsection (1) of Section 91 stipulates that where a certificate of entitlement has been granted to a unit under a Package Schemes of Incentives and such unit is entitled to receive benefits for any period which is to end after the appointed day, then notwithstanding anything contained in the scheme, benefits shall be availed of only in accordance with the Act, rules and notifications issued thereunder.

25) It is in the aforesaid backdrop/Scheme of things Section 93(1) follows providing for proportionate incentives. Once we find that from the very beginning the statutory scheme itself provided for proportionate incentive and this legislative intent was expressed even in the Objects and Reasons, it cannot be said that there was no provision of this nature prior to 2009 and such a provision was inserted for the first time in the year 2009.

26) Coming to the argument of the appellants that the effect of 2009 amendment was to neutralise or overrule the decision of the Court, we do not find it to be so. The High Court has rightly analysed the earlier judgment of the Sales Tax Tribunal in ***Pee Vee Textiles*** case which was followed by the Division Bench of the High Court as well as its own earlier judgment in ***Mirc Electronics Limited*** case. It may be noted that the High Court in ***Pee Vee Textiles*** case recognised the fact, after going through the Statement of Objects and Reasons, explaining the purpose of Section 41BB in Sales Tax Act in the following words:

> "30. … 'it is clearly stated that the said section is introduced with a view to restrict grant of incentives in proportion to the goods manufactured in the expansion unit located in the backward areas of the State' …"

27) Thus, while rendering the judgment in the case of ***Pee Vee Textiles***, the High Court accepted that the very intent behind Section 41BB of Sales Tax Act was to restrict grant of incentive in proportion to the goods manufactured in the expansion unit. Notwithstanding the same, the only reason for quashing the circular was that the effect of the aforesaid provision was given in the form of an administrative order, whereas the law requires that the proper mode was to effectuate the same by framing Rules. This is the basis of the judgment and it is this basis which has taken away by the legislative amendment retrospectively. In these circumstances, it cannot be said that intention was to nullify the judgment of the Court. Clear intention was to rectify the earlier error committed by the Executive in not implementing the legislative intent in the form of subordinate legislation i.e. statutory rules and, trying to achieve the same by administrative action.

28) Counsel for both the sides have cited many judgments on the subject of validating legislation. In fact, most of these judgments are common, which are referred to by both the sides. The attempt was to read the ratio of those judgments in their own way. However, once the factual premise becomes apparent, the law stated in these judgments clearly leans in favour of the respondent. Instead of referring to all these judgments, our purpose would be served by taking note of few such judgments which are directly applicable.

29) In ***Rai Ramkrishna*** v. ***State of Bihar***, AIR 1963 SC 1667 which is a judgment of the Constitution Bench, the principle was explained in the following manner:

"The other point on which there is no dispute before us is that the

> legislative power conferred on the appropriate legislatures to enact law in respect of topics covered by the several entries in the three Lists can be exercised both prospectively and retrospectively. Where the legislature can make a valid law, it may provide not only for the prospective operation of the material provisions of the said law, but it can also provide for the retrospective operation of the said provisions. Similarly, there is no doubt that the legislative power in question includes the subsidiary or the auxiliary power to validate laws which have been found to be invalid. **If a law passed by a legislature is struck down by the Courts as being invalid for one infirmity or another, it would be competent to the appropriate legislature to cure the said infirmity and pass a validating law so as to make the provisions of the said earlier law effective from the date when it was passed.** This position is created as firmly established since the decision of the Federal Court in the case of *United Provinces* v. *Atiqa Begum*. 1940 FCR 110
>
> *(emphasis added)*"

30) We would also like to quote the following passage from another Constitution Bench judgment in the case of ***Epari Chinna Krishna Moorthy*** v. ***State of Orissa*** , AIR 1964 SC 1581:

> "10. …The argument is, the power to grant exemption having been conferred on the State Government it was validly exercised by the State Government and though the legislature may withdraw such exemption, it cannot do so retrospectively. It is obvious that if the State Government which is the delegate of the legislature can withdraw the exemption granted by it, the legislature cannot be denied such right. But it is urged that once exemption was validly granted, the legislature cannot withdraw it retrospectively, because that would be invalidating the notification itself. We are not impressed by this argument. What the legislature has purported to do by S.2 of the impugned Act is to make the intention of the notification clear. Section 2 in substance declares that the intention of the delegate in issuing the notification granting exemption was to confine the benefit of the said exemption only to persons who actually produce gold ornaments or employ artisans for that purpose. We do not see how any question of legislative incompetence can come in the present discussion. And, if the State Government was given the power either

> to grant or withdraw the exemption, that cannot possibly affect the legislature's competence to make any provision in that behalf either prospectively or retrospectively. Therefore, there is no substance in the argument that the retrospective operation of S.2 of the impugned Act is invalid."

In present case also, as seen earlier, the legislature had given power to the State Government to prescribe the ratio/proportion in which the benefit was to be given. The State Government acted thereupon, but exercised the power in a wrong manner. In order to achieve what was intended by the statutory provision, the State legislature itself remedied the situation by amending the Section retrospectively. The ratio of the aforesaid judgment, thus, squarely applies to the fact situation of the present case.

31) The law on validating legislation was again explained by this Court in ***Hiralal Ratanlal***. In that case, Section 3-D of the U.P. Sales Tax Act, 1948 levied a single point tax on the turnover of first purchases made by a dealer in the case of foodgrains including cereals and pulses. A notification was issued providing for a levy on first purchases of foodgrains at a certain rate. The Appellant in that case was the dealer in split or processed foodgrains and dal. The legislature enacted validating legislation after a decision of the Allahabad High Court. This validating legislation was held to be a valid exercise of the legislature, in the following manner:

> "…the amendment of the Act was necessitated because of the Legislature's failure to bring out clearly in the principal Act its intention to separate the processed or split pulses from the unsplit or unprocessed pulses. Further the retrospective amendment became necessary as otherwise the State would have to refund large sums of money. The contention that the retrospective levy did not afford any opportunity to the dealers to pass on the tax payable to the consumers, has not much validity. The tax is levied on the dealer; the fact that he is allowed to pass on the tax to the consumers or he is

generally in a position to pass on the same to the consumer has no relevance when we consider the legislative competence."

32) We would also like to reproduce the following discussion from the judgment of this Court in ***Bakhtawar Trust*** v. ***M.D. Narayan***, (2003) 5 SCC 298:

> "25. …it is open to the legislature to alter the law retrospectively, provided the alteration is made in such a manner that it would no more be possible for the Court to arrive at the same verdict. In other words, the very premise of the earlier judgment should be uprooted, thereby resulting in a fundamental change of the circumstances upon which it was founded.
>
> 26. Where a legislature validates an executive action repugnant to the statutory provisions declared by a court of law, what the legislature is required to do is first to remove the very basis of invalidity and then validate the executive action. In order to validate an executive action or any provision of a statute, it is not sufficient for the legislature to declare that a judicial pronouncement given by a court of law would not be binding, as the legislature does not possess that power. A decision of a court of law has a binding effect unless the very basis upon which it is given is so altered that the said decision would not have been given in the changed circumstances."

33) It may also be useful to refer to the judgment in the case of ***Indian Aluminium Co.*** v. ***State of Kerala***, (1996) 7 SCC 637 wherein the Court culled out the principles laid down on this aspect by taking note of earlier judgments on the issue. We would like to reproduce the same:

> "56. From a resume of the above decisions the following principles would emerge:

(1) The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transactions and require the court to give effect to them;

(2) The Constitution delineated delicate balance in the exercise of the sovereign power by the legislature, executive and judiciary;

(3) In a democracy governed by rule of law, the legislature exercises the power under Articles 245 and 246 and other companion articles read with the entries in the respective lists in the Seventh Schedule to make the law which includes power to amend the law.

(4) Courts in their concern and endeavour to preserve judicial power equally must be guarded to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free play in their joints so that the march of social progress and order remains unimpeded. The smooth balance built with delicacy must always be maintained;

(5) In its anxiety to safeguard judicial power, it is unnecessary to be overzealous and conjure up incursion into the judicial preserve invalidating the valid law competently made;

(6) The court, therefore, needs to carefully scan the law to find out; (a) whether the vice pointed out by the court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution.

(7) The court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the legislature. Therefore, they are not encroachment on judicial power.

(8) In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the legislature is competent to recover the invalid tax validating such a tax on removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the court or the direction given for recovery thereof.

(9) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same."

34) The aforesaid judgment has been followed by this Court in ***Assistant Commissioner of Agricultural Income Tax & Ors.*** v. ***Netley 'B' Estate & Ors.***, (2015) 11 SCC 462.

To the same effect is the judgment of this Court in ***R.C. Tobacco (P) Ltd.*** v. ***Union of India***, (2005) 7 SCC 725.

35) Adverting to the arguments of Mr. Ganesh, it may be mentioned at the outset that no such submissions were raised in the High Court. The thrust of the argument of Mr. Ganesh was that this amendment has rendered the industrial units disbelieved and prevented them from recovery of VAT on any part of their production. There has to be a factual foundation for such an argument. In any case, we do not find any merit in the argument. It was specifically pointed out by the learned counsel for the respondent that all these appellants have availed the proportionate benefit which was permissible under the statutory provision. The intention now is to claim benefit on the entire turnover of their respective expanded undertaking which was, in any case, not permissible. Furthermore, such an argument of not able to pass on the burden on the consumer is untenable. Way back in the year 1961, a Constitution Bench of this Court in ***J.K. Jute Mills Co. Ltd.*** v. ***State of Uttar Pradesh***, AIR 1961 SC 1534 laid down the following principle:

> "(i) Where there is a sale of goods, the state legislature is competent to impose a tax and, subject to constitutional limitations, such a tax can be imposed even on sales which have taken place prior to the enactment:
>
> > "But where the transaction is one of sale of goods as known to law, the power of the State to impose a tax thereon is plenary and unrestricted subject only to any limitation which the Constitution might impose, and in the exercise of that power, it will be competent to the legislature to impose a tax on sales which had taken place prior to the enactment of the legislation."

(ii) Though ordinarily a sales tax is intended to be passed on to the buyer, the power of the legislature is not conditional on the burden being passed on:

> "It is no doubt true that a sales tax is, according to accepted notions, intended to be passed on to the buyer, and provisions authorising and regulating the collection of sales tax by the seller from the purchaser are a usual feature of sales tax legislation. But it is not an essential characteristic of a sales tax that the seller must have the right to pass it on to the consumer, nor is the power of the legislature to impose a tax on sales conditional on its making a provision for sellers to collect the tax from the purchasers. Whether a law should be enacted, imposing sales tax, or validating the imposition of sales tax, when the seller is not in a position to pas it on to the consumer, is a matter of policy and does not affect the competence of the legislature. This question is concluded by the decision of this court in *Tata Iron & Steel Co. Ltd.* v. *State of Bihar*, (1958) SCR 1355: (AIR 1958 SC 452)."

(iii) The legislature has a plenary power, subject to constitutional limitations to enact a law which is prospective or retrospective:

> "The power of a legislature to enact a law with reference to a topic entrusted to it, is, as already stated, unqualified subject only to any limitation imposed by the Constitution. In the exercise of such a power, it will be competent for the legislature to enact a law, which is either prospective or retrospective."

36) It would also be pertinent to point out that in ***R.C. Tobacco (P) Ltd.*** case, this Court authoritatively pronounced the fact that the dealer upon whom the tax is imposed is not in a position to pass on tax on the consumers, is of no relevance to the competence of the legislature. Following observations in this behalf may be noted:

> "48. The petitioners who were admittedly in Group A have refuted this and contend that their relationship with the large cigarette companies was on a principal-to-principal basis and that under their agreements they alone would be liable to pay the excise duty now demanded by the respondents under Section 154.
>
> 49. We are not in a position to determine the disputes raised. However, we cannot lose sight of the fact that although excise duty like other indirect taxes may be passed on to the customer of the goods under the law as it now stands, it is the manufacturer of the excisable goods to whom the Excise Authorities will look for payment. How the manufacturer will adjust its liability with its customers does not concern the respondents nor can they be asked to recover their dues from persons who may have ultimately taken over the responsibility to pay the excise duty as a result of an agreement with the manufacturer. (*See* in this connection *State of Rajasthan* v. *J.K. Udaipur Udyog Ltd.* [(2004) 7 SCC 673] SCC at p. 692.)"

37) It would also be relevant to point out that in ***R.C. Tobacco (P) Ltd.***, this Court upheld recission of an exemption notification with retrospective effect as originally framed notification has not provided sufficient safeguards that would have ensured the achievement of the object underlying the policy of incentives. The Court held that it was permissible to rectify a defective expression of object of the policy by a retrospective amendment.

> "26. The exemption notifications were issued under Section 5-A of the Central Excise Act, 1944 as a delegate of Parliament. In a cabinet form of Government, the executive is expected to reflect the views of the legislature. It would be impossible for the legislatures to deal in detail and cater to the innumerable problems which may arise in implementing a statute. When the power of subordinate legislation is conferred by Parliament in certain matters it can only lay down the policy and guidelines and expect that what is done by the executive is in keeping with such policy. It does of course retain control over its

delegate and can exercise that control by repealing the action of the delegate. [*Sita Ram Bishambhar Dayal* v. *State of U.P.*, (1972) 4 SCC 485 : 1974 SCC (Tax) 294 : (1972) 2 SCR 141; *M.K. Papiah & Sons* v. *Excise Commr.*, (1975) 1 SCC 492 : 1975 SCC (Tax) 128] Consequently, if the executive has failed to carry out the object of Parliament, such control may be exercised by retrospectively enacting what the executive ought to have achieved."

38) In view of the aforesaid factual and legal discussion, reliance by Mr. Ganesh on the judgments of this Court in ***West Bengal Hosiery Association & Ors.*** is totally untenable as they are not applicable in the context of this case.

39) We, thus, do not find any merit in any of these appeals as we find that High Court has appropriately dealt with the issue upholding the validity of the impugned amendment. As a result, these appeals fail and are dismissed with cost.

**.....J.**
**(A.K. SIKRI)**

**.....J.**
**(ABHAY MANOHAR SAPRE)**

**NEW DELHI;**
**MAY 08, 2017.**

REVISED

ITEM NO.1B COURT NO.8 SECTION III
(FOR JUDGMENT

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 4491/2016

EUROTEX INDUSTRIES & EXPORTS LTD & ANR. Appellant(s)

VERSUS

STATE OF MAHARSHTRA & ANR Respondent(s)

WITH
C.A. No. 4492/2016

C.A. No. 4495/2016

C.A. No. 4497/2016

C.A. No. 4499/2016

Date : 08/05/2017 These appeals were called on for pronouncement of judgment today.

Counsel for the
Parties: Ms. Ramni Taneja, Adv.
Mr. Anil Shrivastav, Adv.

Mr. Arjun Harkauli,Adv.

Mr. Nikhil Nayyar,Adv.

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Mr. K.S. Mahadevan, Adv.

**Mr. Aniruddha P. Mayee,Adv.**

**Mr. Nishant RamakantraoKatneshwarkar,Adv.**
**Mr. Kunal A. Cheema, Adv.**
**Mr. Yogesh K. Ahirrao, Adv.**

**Hon'ble Mr. Justice A.K. Sikri pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice Abhay Manohar Sapre.**

**The appeals are dismissed in terms of the signed reportable judgment.**

**Pending application(s), if any, stands di sposed of accordingly.**

**(Ashwani Thakur)** **(Mala Kumari Sharma)**
**COURT MASTER** **COURT MASTER**
**(Signed reportable judgment is placed on the file)**

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| | |
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**(Signed reportable judgment is placed on the file)**