IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Civil Writ Petition No. 21811 of 2014 (O&M)
Date of Decision: 7th August, 2015

M/s Amrit Banaspati Company Limited. …Petitioner

versus

The State of Punjab and others ….Respondents

CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE.
HON'BLE MR. JUSTICE G.S.SANDHAWALIA.

1. Whether Reporters of local papers may be allowed to see the judgment?
2. Whether to be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

Present : Mr. Ashwani Kumar Chopra, Senior Advocate with
Ms. Rupa Pathania, Advocate, for the petitioner.

Mr. Jagmohan Bansal, Addl. Advocate General, Punjab,
for the respondent-State of Punjab and also
for the appellants in VAT Appeal No. 71 of 2014.

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S.J.VAZIFDAR, ACTING CHIEF JUSTICE:-

The petitioners have challenged the constitutional validity of the amendment to section 29 of the Punjab Value Added Tax Act, 2005 (hereinafter referred to as the PVAT Act) by the Punjab Value Added Tax Act, 2013 ((hereinafter referred to as the Amendment Act). They have also sought a writ of certiorari to quash a notice dated 23.09.2014.

The challenge before us was restricted to the constitutional validity of Section 29 as amended. There were several connected petitions. It was agreed that the result in those petitions would follow the result of this petition. We, therefore, also heard all the counsel who appeared in the connected petitions. As all the petitioners restricted the challenge to the constitutional validity of the amended section 29, it is, necessary to refer to

For Subsequent orders see RA-CR-40-CII-2016

the facts only briefly. We will for convenience refer to the facts from this Civil Writ Petition No. 21811 of 2014.

2. The petitioners had set up a plant for manufacturing vanaspati and other edible oils in the State of Punjab. It is registered under the PVAT Act'. Prior thereto the petitioner was also registered under the Punjab General Sales Tax Act, 1948 (PGST Act) and the Central Sales Tax Act, 1956. The PVAT Act was enacted *inter-alia* to provide for the levy and collection of Value Added Tax (VAT) and turnover tax on the sales or purchases of goods and for the repeal of the PGST Act. Upon the PVAT Act coming into force, the petitioner made an application for a registration certificate under that Act which was granted. The petitioner is registered as a "Taxable Person/Registered person" under the provisions of the PVAT Act for the manufacture and sale of its products. It also continues to be registered under the Central Sales Tax Act, 1966 and the rules framed thereunder.

3. The petitioner was issued the impugned notice dated 23.09.2014 for framing the assessment for the assessment year 2006-07 under section 29 of the PVAT Act and under section 9(2) of the Central Sales Tax Act, 1966 by the Excise and Taxation Officer. The facts leading to the issuance of the impugned notice are as follows.

A notice dated 12.08.2011 was addressed to the petitioner by the Excise and Taxation Inspector under Section 29(2) of the PVAT Act and under Section 9(2) of the Central Sales Tax Act stating that upon examination of the petitioner's tax return for the accounting year 2006-07, it was found that the returns were incorrect and incomplete; that there were definitive reasons to believe that the petitioner was liable to pay tax but that it had failed to do so; that it had availed input tax credit which it was not eligible for and that there was mismatch of the data. The notice further states

that it was, therefore, intended to frame the assessment under section 29(2) of the PVAT Act and 9(2) of the Central Sales Tax Act for the accounting year 2006-07 to determine the petitioner's tax liability for the said period.

According to the petitioner, the Excise & Taxation Inspector-cum-Designated Officer realized that the assessment could not be made for the accounting year 2006-07 as it was beyond the period of three years after the date when the annual statement was filed and that there was no extension of time to make the assessment granted by the Commissioner. The officer, therefore, did not pursue the matter any further. The petitioner contends that it has in any event been paying the tax in accordance with law. We are, however, not concerned with the merits in this petition. We confine ourselves to the challenge to the constitutional validity of Section 29. By the impugned notice dated 23.09.2014, the respondents have sought to open the assessment for the year 2006-07.

4. The Department of Legal and Legislative Affairs, Punjab, notified the Punjab Value Added Tax (Second Amendment) Act, 2013 (Amendment Act) on 15.11.2013. By Section 6 of the Amendment Act, Section 29 of the PVAT Act was amended. The Notification dated 15.11.2013 was issued stating that the Amendment Act received the assent of the Governor of Punjab on 15.11.2013. Section 1(2) states that "it shall come into force on and with effect from the date of its publication in the Official Gazette". It was published in the official gazette on 15.11.2013.

5(A) It would be convenient to juxtapose section 29 as it originally stood and as amended with effect from 15.11.2013:-

Before amendment on 15.11.2013 Section 29(4)	**After amendment from 15.11.2013 Section 29(4)**
An assessment under sub section (2) or sub-section (3) may be made within	An assessment under sub-section (2) or sub-section (3), may be made within **(six)**years

(three)years, after the date when the annual statement was filed or due to be filed whichever is later. PROVIDED THAT where circumstances so warrant, the Commissioner may by an order in writing, allow assessment of a taxable person or a registered person after three years, but not later than six years, from the date, when annual statement was filed or due to be filed by such person, whichever is later.	after the date when the annual statement was filed or due to be filed whichever is later. PROVIDED THAT the assessment under sub section (2) or sub-section (3), in respect of which annual statement for the assessment year 2006-07 has already been filed, can be made till the 20th day of November, 2014. **EXPLANATIONS**: (1) The limitation period of six years for an assessment under sub-section (2) or sub-section (3), shall also apply to those cases in which the aforesaid period of six years has yet not expired. (2) It is clarified that prior to commencement of the Punjab Value Added Tax (Second Amendment) Act, 2013, the Commissioner was not required to issue any notice to the concerned person before extending the limitation period of assessment.
	29(10A) Notwithstanding anything to the contrary contained in any judgment, decree or order of any Court, tribunal or other authority, an order passed by the Commissioner under sub-section (4) prior to commencement of the Punjab Value Added Tax (Second Amendment) Act, 2013, shall not be invalid on the ground of prior service of notice or communication of such order to the concerned person.”

It is pertinent to note that there is no provision in the amended section 29(4) corresponding to the proviso to section 29(4) prior to the Amendment Act.

(B) The statement of objects and reasons in respect of the said amendment reads as follows:-

> "**Amendment in Section 29 of the Punjab VAT Act, 2005:-**
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> Due to the provision of self-assessment in Punjab Value Added Tax Act, 2005, cases are selected by the Departmental Officers for the assessment on the basis of certain risk parameters or in which revenue is involved. According to Section 29(4), the assessment of a case has to be framed within 3 years of filing the Annual Statement. It is pertinent to mention here that due to heavy work load and shortage of staff in the Department, by the time the Designated Officer detects a tax due in a particular case, the limitation period of 3 years is near to end. The Commissioner has the power to extend the period of assessment upto 6 years. By exercising this power, limitation periods were extended by the Commissioner in respect of various years which led to a lot of litigation. The Hon'ble High Court and the Hon'ble VAT Tribunal have quashed many such extension orders on technical ground of no prior service of notice to the concerned person before passing an order of such extension of limitation period and not passing individual orders, resulting in a huge revenue loss. Therefore, in order to safeguard the Revenue on account of cases becoming time barred and to undo the effect of the judgment dated 01.09.2009 of the Hon'ble High Court in case of A.B.Sugars Ltd. it has become necessary and expedient to amend sub Section 4 of Section 29 and insert sub section (10-A) in Section 29 of the Punjab VAT Act, 2005."

6. The petitioner contends that under the unamended Section 29(4), the assessment would have been barred by limitation whereas if the amendment is held to have retrospective effect it would not be barred by limitation. The petitioner has, therefore, challenged the constitutional

validity of the amendment introduced by section 6 of the Amendment Act. This brings us to the grounds of challenge to section 29(4) as amended by the Amendment Act.

I. The first contention is that section 29(4) as amended and sub section (10-A) of section 29 are prospective and not retrospective. In the alternative, assuming they are retrospective, the following contentions were raised on behalf of the petitioners:-

II. The amendments do not cure or remove the defects and do not validate the defective action and are, therefore, unconstitutional.

III. The amendments to section 29(4) and the newly added sub section (10-A) to Section 29 reverse/over rule the judgments of this Court and are, therefore, unconstitutional.

IV. Explanation (2) is contrary to the Rules of natural justice and is, therefore, constitutionally invalid and void.

V. Explanation (2) has no relevance to the main section and is, therefore, invalid.

VI. The amendment is harsh, unfair, arbitrary and is excessively and unreasonably retrospective and is, therefore, violative of Articles 14 and 19 of the Constitution.

VII. The proviso to the amended section 29(4) is contrary to the main section and, therefore, illegal and void.

VIII. The amendment is invalid as it extends the period of reassessment even where the original period for assessment has expired.

IX. Explanation (1) makes the old proviso redundant and is, therefore, invalid and irrational.

7. As the statement of objects and reasons candidly state, the object of the amendment is, *inter-alia*, to undo the effect of the judgment passed by a Division Bench of this Court in *A.B.Sugars Limited v. The State of Punjab and others 2010(29) VST 538 (P&H)*. It would be convenient, therefore, before dealing with the submissions, to first refer to that judgment and to two other related judgments.

A.B.Sugars Ltd. v. The State of Punjab and others was a case under the PGST Act. Under Section 11(3) of the PGST Act, the assessment of a dealer could be framed within three years from the last day prescribed for filing the returns. The Assistant Excise and Taxation Commissioner issued a notice to frame the assessment. The petitioner contended that the matter had become time barred. The assessment, however, was framed. The Assessing Authority observed that in exercise of the powers under Section 11(10) of the PGST Act, an extension had already been granted to frame the assessment. The petitioner challenged the notice on the ground that the Assessing Authority was required to finalize the assessment within three years from the last date prescribed for furnishing the last return in respect of any period. The respondents contended that under Section 11(1) of the PGST Act, the Commissioner was empowered to extend the period of three years for passing an order of assessment for such further period as he deemed fit. Section 11(10) of the PGST Act reads as under:-

> "Section 11 Assessment of Tax
> (1) to (9) ----------
> (10) The Commissioner may for reasons to be recorded in writing, extend the period of three years, for passing the order of assessment for such further period as he may deem it."

The Division Bench held that although the Commissioner was empowered to extend the period of limitation, he had to record the reasons for passing the order granting extension of time and he could not arrive at valid and acceptable reasons unless he afforded the assessee an opportunity of being heard. The Division Bench read into the provision the principles of natural justice as the provision itself was silent on the issue. The Division Bench found that there was no intendment to exclude the principles of natural justice and therefore, it followed that the principles of natural justice are inherent and must be read in Section 11(10) of the PGST Act. As in that case, the assessee had not been afforded an opportunity of being heard, it was held that the order extending the period of limitation could not be relied upon by the respondent-department. The impugned notice and the order extending the time were, therefore, set-aside.

Although the judgment in *A.B.Sugars Ltd.* (supra) was under the PGST Act, the provisions are similar to Section 29(4) of the PVAT Act. The PGST Act stands repealed by the PVAT Act. The ratio, therefore, would apply to the cases under Section 29(4). It was to undo the effect of this judgment that Section 29(4) was amended.

8. It would also be convenient at this stage to refer to the judgment of another Division Bench of this Court in the case of *State of Punjab through Commissioner, Bathinda v. M/s Olam Agro India Ltd. 2013(46) PHT 194 (P&H)*. That was a case under Section 29(4) of the PVAT Act

allowing the respondents' appeal and setting-aside the orders passed by the Assessing Authority and Deputy Excise & Taxation Commissioner (Appeals). A large number of cases were selected for reassessment by invoking Section 29(4) of the PVAT Act. As the period of three years provided for reassessment had expired, it was proposed to invoke the extended period of three years in exercise of the powers under the proviso. This was done by a public notice uploaded on the website of the department informing the assessees in general that the department proposed to invoke the extended period of three years. As no objections were received, notices were issued to the assessees for framing assessments for the financial years concerned therein. Admittedly, individual notices were not served upon the assessees.

The Division Bench noted the judgment in *A.B.Sugars Ltd.* (supra) where it was held that power of extension cannot be invoked without affording the assessee an opportunity of being heard. The Division Bench referred to Rule 86 of the Punjab Value Added Tax Rules, 2005 which provided the manner of serving notices namely, by hand and through courier to the addressee or to any agent duly authorized by him or to a person regularly employed by the addressee in connection with the business in respect of which he is registered as a person and by *e-mail*. The Division Bench held that the rule did not envisage the service of a general notice or by publication on the website of the Department. The Division Bench held that the extension of time in that case was contrary to the judgment in *A.B.Sugars Ltd. case* (supra) and could not be taken note of. The assessment orders being barred by limitation were quashed.

9. A Division Bench of this Court in *Shreyans Industries Ltd. v. State of Punjab and others, 2008 18 VST 493 (P&H),* considered a case

under section 11(3) of the PGST Act which stands replaced by the PVAT Act. Section 11 of the PGST Act dealt with the assessment of tax. Sub section 3 required an order of assessment to be passed within a period of three years from the last date prescribed for furnishing the last return in respect of any period. Sub section (10) of Section 11 of the PGST Act entitled the Commissioner, for reasons to be recorded in writing to extend the period of three years, for passing the order of assessment for such further period as he may deem fit. The Division Bench held that the power of extension of time for completing assessment has to be exercised before the assessment becomes time barred.

10. The provisions of section 29(4) prior to the amendment and as interpreted in the above judgments had not been complied with at least in most cases. Therefore, as a result of these judgments, the period prescribed under Section 29 of the PVAT Act would have expired in several cases. According to the respondents, it was to undo the effect of the judgments that the amendment was introduced.

Whether sub section (10-A) of section 29 and the amendment to section 29(4) are retrospective.

11. The first submission of the learned counsel on behalf of the petitioners is that the opening part of Section 29(4) is prospective and not retrospective. This is clearly not so.

The opening part of section 29(4) as amended read by itself would suggest that the provision is not retrospective and is only prospective. The opening part, however, cannot be read alone. The entire section must be read and so read it is clear beyond doubt and for more than one reason that the section is retrospective.

12. Firstly, the proviso establishes this. It infact goes a step further and provides that the assessment under sub sections (2) or (3) in respect of which the annual statement for the assessment year 2006-07 had already been filed, can be made till 20.11.2014. Thus, the proviso, therefore, permits an additional period for the assessment year 2006-07. The proviso, does deal with the right to make the assessment for the period 2006-07 till 20.11.2014. It, however, far from negates the right to make an assessment for any other period. There is no reason why the legislature intended by the amendment to extend the date for making the assessment only in respect of the assessment year 2006-07. There was nothing special about the assessment year 2006-07. Obviously, therefore, the opening part of the section applied also to the years 2007-08 onwards. Thus the proviso itself establishes that the opening part of section 29(4) is retrospective.

13. This becomes clearer with the first explanation which provides that the limitation period of six years for an assessment under sub sections (2) or (3) is also applicable to those cases in which 'the aforesaid period of six years has not yet expired'. The words "aforesaid period of six years" obviously refer to the period of six years mentioned in the opening part of the section. Had it been the intention of the legislature to make Section 29(4) only prospective, it would have been entirely unnecessary to have the proviso or explanation (1). To construe the opening part of section 29(4) as being prospective would render the proviso and explanation (1) otiose.

14. Faced with this, it was submitted that the opening part of Section 29(4) is prospective and that the proviso and explanation (1) relate only to Section 29(4) prior to the amendment.

15. The submission is unsustainable as it would render the words 'the aforesaid period of six years' in explanation (1) meaningless. There was

no period of six years in Section 29(4) as it originally stood. The period of six years is mentioned only in the amended Section 29(4). The word 'aforesaid' is usually a reference to something named or referred to in an earlier part of the same document. In this case, it is a reference to the period of six years mentioned in the same section.

It can hardly be suggested that the six year period refers to the combined period under the main part of the unamended section and the extension provided therein. The extended period under the unamended section was not as of right. It was dependent upon the exercise of discretion by the Commissioner and in the manner provided therein. More important, the word 'aforesaid' can only refer to the section in which it is used which is the amended section. It is inconsistent with anything but the section in which it is used.

16. In support of the contention that the amendment to Section 29(4) operates only prospectively, learned counsel for the petitioner then relied upon Section 1 of the Amendment Act which reads as under:-

> "1. (1) This Act may be called the Punjab Value Added Tax (Second Amendment) Act, 2013.
>
> (2) It shall come into force on and with effect from the date of its publication in the Official Gazette;
>
> Provided that the amendment of sub-section (1) of section 13 shall come into force on and with effect from the Ist day of April, 2014 and omission of sub-section (1-A) of section 13 shall be deemed to have come into force on and with effect from the 4th day of October, 2013."

It was contended that Section 1 itself made the amendment prospective and not retrospective as sub section (2) of Section 1 expressly states that it shall come into force on and with effect from the date of its publication in the official gazette i.e. 15.11.2013.

17. This argument is misconceived. It confuses the date on which the Amendment Act comes into force for the date with effect from which it comes into force. It confuses the date of the enactment or the date of the commencement of the enactment with the date of the operation thereof. Sub section (2) of Section 1 of the Amendment Act only specifies the date the Amendment Act came into force. It does not deal with the question as to whether the amendment is to operate prospectively or retrospectively. Even a retrospective amendment must come into force on the date on which the amending act comes into force but as stipulated in the amending Act. That is an entirely different thing from the date on which the amendment takes effect or operates. The date on which an Act or an amending Act is enacted is different from the date from which it operates. Thus, the Punjab Value Added Tax (Second Amendment) Act, 2013 came into force to wit it was enacted on 15.11.2013 but with retrospective effect. The extent to which it is retrospective must be determined in terms of the provisions of the Amendment Act.

18. In *Additional Commissioner (Legal) and another v. Jyoti Traders and another, (1999) 2 SCC 77,* it was held:-

> "Commencement of the Act can be different than the operation of the Act though sometimes, both may be the same. The proviso now added to sub-section (2) of Section 21 of the Act does not put any embargo on the Commissioner of Sales Tax not to reopen the assessment if the period, as prescribed earlier, had expired before the proviso came into operation. One has to see the language of the provision. If it is clear, it has to be given its full effect. To reassure oneself, one may go into the intention of the legislature in enacting such provision. The date of commencement of the proviso to Section 21(2) of the Act does not control its retrospective operation. Earlier the assessment/reassessment could have been completed

> within four years of that particular assessment year and now by the amendment adding the proviso to Section 21(2) of the Act it is eight years. The only safeguard being that it is after the satisfaction of the Commissioner of Sales Tax. The proviso is operative from 19-2-1991 and a bare reading of the proviso shows that the operation of this proviso relates and encompasses back to the previous eight assessment years."
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> ...(emphasis supplied).

This judgment answers the issue raised on behalf of the petitioner. It draws a distinction between the commencement of the Act and the operation of the Act. It was contended that as the amending Act stated that it came into force on 15.11.2013, it must be held that the amendment had no retrospective effect and came into operation only on that day. As we have already held there is a difference between the date on which the Act came into force and the date with effect from which the provisions thereof operate. As held in this judgment, the date of commencement does not control its retrospective operation.

19. It was then contended that the proviso to sub Section (2) of Section 1 of the Amendment Act made it clear that when the legislature wanted to make the enactment retrospective it did so specifically. Section 5 of the Amendment Act was relied upon to illustrate this point as it specifies the date from which it is to operate. Section 6 of the Amendment Act which amended Section 29(4) did not specify the date from which it is to operate. It was submitted that the amendment is, therefore, retrospective.

20. The position is infact quite the contrary. The Amendment Act, 2013 introduced several amendments, each of which operated from a particular date. Section 5 of the Amendment Act which amended Section 13 of the Act did not stipulate when it was to comes into effect. The proviso

obviously, therefore, made it retrospective but only from a particular date. That does not imply that every other provision/amendment operates only prospectively. Each provision must be examined to determine the date from which it operates.

21. The contention that the Section applies only prospectively and in any event applies only in respect of the assessment years in respect whereof the period of limitation for making the assessment under the unamended section has not expired, is, therefore, rejected.

22. The submissions on behalf of the petitioner which we will now deal with proceed on the basis that Section 29 was amended retrospectively.

23. It is well established that the Legislature has the power to enact the laws, including laws dealing with taxation, with retrospective effect.

II. *The amendments do not cure or remove the defects and do not validate the defective action and are, therefore, unconstitutional.*

III. *The amendments to section 29(4) and the newly added sub section (10-A) to Section 29 reverse/over rule the judgments of* this Court and are, therefore, unconstitutional.

24. It was contended, however, that Section 29 as amended is unconstitutional for it permits the reopening of time barred assessments. It is also submitted that assuming that it is permissible by legislation to reopen time barred assessments by enacting a retrospective law, the same can be done only by curing the defect. The amendment to section 29(4) does not cure the defect and infact over rules the judgments of this Court which is impermissible. It is submitted that the proviso and the explanations to Section 29(4) and sub section (10-A) of Section 29 have the effect of overruling the judgments of this Court including the judgment in *A.B.Sugars*

Limited v. The State of Punjab and others (supra), without removing the defect.

25. The judgments relied upon on behalf of the petitioners, which we will now refer to, deal with validating statutes as well as the power of the legislature in respect of judgments of Courts. It is important, however, at the outset to note that the amendment to Section 29 does not validate an invalid statute. Section 29(4) prior to the amendment had never been struck down as being invalid on any ground whatsoever. It had been interpreted in the judgments which we have already referred to. It was held that the power to extend the time under the proviso could not be exercised after the expiry of the period of three years; that the rules of natural justice must be read into the unamended Section and that individual notice to an assessee was mandatory and that a general notice on the website of the department did not meet the requirements of the proviso to Section 29(4) prior to the amendment. The authorities under the PVAT Act had in most cases overlooked these requirements. It is their acts, therefore, which were quashed. The amendment, therefore, does not seek to validate the Act but the manner in which it was implemented.

26. We will presume that the ratio of the judgments on validating Acts apply equally to the amendments/legislation that validate retrospectively the acts of the authorities pursuant to and in implementation of the Act. We will assume, therefore, that even such amendments/legislation would be valid only if the basis of the judgments that quashed such acts is altered so fundamentally that in the altered circumstances the judgment could not have been delivered.

Indeed if an ineffective statute can be validated retrospectively, we see no reason in principle why an invalid action taken under a valid

statute cannot be validated by a retrospective legislation. Such legislation must ofcourse be valid in all other respects. For instance, it must be within the powers of the legislature to enact such an amendment and the amendment must also meet all other tests stipulated in respect of retrospective legislation. We will deal with the parameters for challenging a retrospective legislation taken while considering the submission that the amendments are excessive and unreasonable.

27. This brings us to a consideration of the judgments on validating Acts and in respect of the power of the legislature to over rule judgments of Courts. We will refer to all the judgments in considerable detail, though the ratio of these judgments is clear as the petitioners emphasized the importance of each of them in support of their contentions at considerable length. On the question of validating statutes, the general principle is that the legislature has the power to amend even retrospectively a statute but the validity of such a law depends *inter-alia* upon it removing the defect or lacuna which the Courts had found in the existing law. The Amending Act must so fundamentally alter or change with retrospective effect the conditions on which a judgment was based that in the altered circumstances the judgment would never have been delivered. Further, the legislature cannot by mere declaration overrule a judicial decision. It can, however, render the same ineffective by enacting a valid law within its legislative field fundamentally altering or changing its character retrospectively. As noted in the judgment we will refer to, a changed or altered condition must be such that the previous decision would not have been rendered by the Court if those conditions had existed at the time of declaring a law as invalid. The amendments to Section 29 are not contrary to the ratio of any of these judgments.

For Subsequent orders see RA-CR-40-CII-2016

28. In *Shri Prithvi Cotton Mills Ltd. and another v. Broach Borough Municipality and others, 1969(2) Supreme Court Cases 283,* the Gujarat Imposition of Taxes by Municipalities (Validation) Act, 1963, was passed because of the decision of the Supreme Court in *Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad 1964(2) S.C.R. 608.* Rule 350-A was called in question for rating open lands which provided that the rate on the area of open lands shall be levied at 1 per centum on the valuation based upon capital value. It was held that the word 'rate' meant a tax for local purposes imposed by the local authorities. The rule was declared *ultra vires* the Act itself. The legislature of Gujarat passed the Validation Act seeking to validate the imposition of the tax as well as to avoid any future interpretation of the Act on the lines on which the Rule was construed. Paragraph 4 of the aforesaid judgment reads as under:-

> **"4.** Before we examine Section 3 to find out whether it is effective in its purpose or not we may say a few words about validating statutes in general. When a Legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not

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

29. As we mentioned earlier, the validity of a validating law was held to depend inter-alia upon whether in making the validation it removes the defect which the Courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax. We will apply the ratio of this judgment to the case before us after referring to the other judgments on this point.

For Subsequent orders see RA-CR-40-CII-2016

30. In *Municipal Corporation of the City of Ahmedabad and another v. The New Shrock SPG. and WVG Co. Ltd. 1970(2) Supreme Court Cases 280,* the Supreme Court while dealing with the validity of Section 152-A(3) of the Bombay Provincial Municipal Corporation Act, 1949, held that the section commanded the Corporation to refuse to refund the amount illegally collected despite the orders of the Court and the High Court. It was held that the provision attempted to make a direct inroad into the judicial powers of the State that the legislature can remove the basis of a decision rendered by the competent Court thereby rendering the decision ineffective but the legislature does not have the power to ask the instrumentalities of the State to disobey or disregard the decisions given by the Courts. The judgment refers to the observations of the Supreme Court in *Mahal Chand Sethia v. State of West Bengal, Cr.A.No. 75 of 1969 decided on 10.09.1969* that a Court of law can pronounce upon the validity of any law and declare the same to be null and void and can also strike down or declare invalid any Act or direction of a State Government which is not authorized by law. It was further observed that the position of a Legislature is different in that it cannot declare any decision of a Court of law to be void or of no effect.

31. In *D.Cawasji and Co., Mysore v. State of Mysore and another 1984 (Supp.) Supreme Court Cases 490,* the Supreme Court held:-

> **"17.** In view of the aforesaid judgment and order passed by the High Court amounts collected by the State by way of sales tax on items of excise, health cess and education cess on arrack or special liquor from the appellant became refundable to the appellant. The impugned amendment has been passed, as the Statement of Objects which we have earlier set out clearly indicates to override the judgment of the High Court and to enable the State to hold on to the amount collected as sales tax on excise duty, health cess and

education cess, if any, on arrack or special liquor. It has to be noted that the said judgment of the High Court in the earlier case had become final and conclusive inasmuch as the special leave petition filed against the judgment by the State was withdrawn. The State instead of seeking to test the correctness and effect of the judgment and order of the High Court thought it fit to have the judgment and order nullified by introducing the impugned amendment. The amendment does not proceed to cure the defect or the lacuna by bringing in an amendment providing for exigibility of sales tax on excise duty, health cess and education cess. The impugned amending Act may not, therefore, be considered to be a Validating Act. A Validating Act seeks to validate the earlier Acts declared illegal and unconstitutional by courts by removing the defect or lacuna which led to invalidation of the law. With the removal of the defect or lacuna resulting in the validation of any Act held invalid by a competent court, the Act may become valid, if the Validating Act is lawfully enacted. But the question may still arise as to what will be the fate of acts done before the Validating Act curing the defect has been passed. To meet such a situation and to provide that no liability may be imposed on the State in respect of such acts done before the passing of the Validating Act making such act valid, a Validating Act is usually passed with retrospective effect. The retrospective operation relieves the State of the consequences of acts done prior to the passing of the Validating Act. The retrospective operation of a Validating Act properly passed curing the defects and lacuna which might have led to the invalidity of any act done may be upheld, if considered reasonable and legitimate.

18. In the instant case, the State instead of remedying the defect or removing the lacuna has by the impugned amendment sought to raise the rate of tax from 6 per cent to 45 per cent with retrospective effect from April 1, 1966 to avoid the liability of refunding the excess amount collected and has further purported to nullify the judgment and order passed by the High Court directing the refund of the excess amount illegally

For Subsequent orders see RA-CR-40-CII-2016

collected by providing that the levy at the higher rate of 45 per cent will have retrospective effect from April 1, 1966. The judgment of the High Court declaring the levy of sales tax on excise duty, education cess and health cess to be bad become conclusive and is binding on the parties. It may or may not have been competent for the State Legislature to validly remove the lacuna and remedy the defect in the earlier levy by seeking to impose sales tax through any amendment on excise duty, education cess and health cess; but, in any event, the State Government has not purported to do so through the Amending Act. As a result of the judgment of the High Court declaring such levy illegal, the State became obliged to refund the excess amount wrongfully and illegally collected by virtue of the specific direction to that effect in the earlier judgment. It appears that the only object of enacting the amended provision is to nullify the effect of the judgment which became conclusive and binding on the parties to enable the State Government to retain the amount wrongfully and illegally collected as sales tax and this object has been sought to be achieved by the impugned amendment which does not even purport or seek to remedy or remove the defect and lacuna but merely raises the rate of duty from 6 per cent to 45 per cent and further proceeds to nullify the judgment and order of the High Court. In our opinion, the enhancement of the rate of duty from 6 per cent to 45 per cent with retrospective effect is in the facts and circumstances of the case clearly arbitrary and unreasonable. The defect or lacuna is not even sought to be remedied and the only justification for the steep rise in the rate of duty by the amended provision is to nullify the effect of the binding judgment. The vice of illegal collection in the absence of the removal of the illegality which led to the invalidation of the earlier assessments on the basis of illegal levy, continues to taint the earlier levy. In our opinion, this is not a proper ground for imposing the levy at the higher rate with retrospective effect. It may be open to the Legislature to impose the levy at the higher rate with prospective operation but levy of taxation at higher rate which really amounts to

For Subsequent orders see RA-CR-40-CII-2016

> imposition of tax with retrospective operation has to be justified on proper and cogent grounds. This aspect of the matter does not appear to have been properly considered by the High Court and the High Court in our view was not right in holding that "by the enactment of Section 2 of the impugned Act the very basis of the complaint made by the petitioner before this Court in the earlier writ petition as also the basis of the decision of this Court in *Cawasji case* [(1969) 1 Mys LJ 461 : (1968) 16 Law Rep 641] that the State is collecting amounts by way of tax in excess of what was authorised under the Act has been removed". We, accordingly, set aside the judgment and order of the High Court to the extent it upholds the validity of the impugned amendment with retrospective effect from April 1, 1966 and to the extent it seeks to nullify the earlier judgment of the High Court. We declare that Section 2 of the impugned amendment to the extent that it imposes the higher levy of 45 per cent with retrospective effect from April 1, 1966 and Section 3 of the impugned Act seeking to nullify the judgment and order of the High Court are invalid and unconstitutional."

It would be necessary, therefore, to test whether the Amendment Act validates the acts declared illegal by removing the basis on which the judgments were delivered and the basis on which the actions were declared or were liable to be declared as illegal.

32. In *Delhi Cloth & General Mills Co. Ltd. and another v. State of Rajasthan and others 1996(2) Supreme Court Cases 449,* the Supreme Court reiterated the aforesaid principles.

33. In *Indian Aluminium Co. etc. v. State of Kerala 1996(7) SCC 637,* the Supreme Court held:-

> **"36.** The validity of the Validating Act is to be judged by the following tests: (*i*) whether the legislature enacting the Validating Act has competence over the subject-matter; (*ii*) whether by validation, the legislature

has removed the defect which the court had found in the previous law; (*iii*) whether the validating law is inconsistent (*sic*consistent) with the provisions of Chapter III of the Constitution. If these tests are satisfied, the Act can confer jurisdiction upon the court with retrospective effect and validate the past transactions which were declared to be unconstitutional. The legislature cannot assume power of adjudicating a case by virtue of its enactment of the law without leaving it to the judiciary to decide it with reference to the law in force. The legislature also is incompetent to overrule the decision of a court without properly removing the base on which the judgment is founded.

40. In *Govt. of A.P.* v. *Hindustan Machine Tools Ltd.*. AIR 1975 SC 2037 the respondent had constructed its factory and other buildings within the limits of Gram Panchayat 'K', without its permission. Gram Panchayat passed a resolution to collect permission fee from the respondent on the capital value of the factory building at a specified rate. They also imposed house tax and demanded payment for the period 1966 to 1969. The writ petition was filed challenging the power to levy house tax and other fees. The A.P. High Court issued a mandamus prohibiting the Gram Panchayat from collecting the amounts. The High Court had held that as per the definition of the house under the Act, the factory and other building was not a house. Against the judgment an appeal was filed in this Court. Pending appeal, the legislature amended the definition of 'house' with retrospective effect so as to eliminate the impediment on which the High Court rested its judgment. It also made validation of the actions by Section 4 of the Validation Act with retrospective effect. On that basis when it was contended in this Court for the respondent that the legislature had overruled or set aside the judgment of the High Court and it was constitutionally impermissible, a Bench of three Judges had held that the State Legislature had not overruled or set aside the judgment of the High Court. It had amended the definition of the house by substituting a new section in the place of an old one, providing a new definition which had retrospective effect,

For Subsequent orders see RA-CR-40-CII-2016

notwithstanding anything contained in any judgment, decree or order of the court or other authority. In other words, this Court had held that the legislature removed the basis of the decision rendered by the High Court so that the decision could not have been given in the altered circumstances.

41. In *I.N. Saksena* v. *State of M.P.* (1976) 3 SCR 237, the State Government amended its memorandum to compulsorily retire a government servant on attaining the superannuation age of 58 years. However, it empowered the Government to retire a government servant on his attaining the age of 55 years. Subsequently, statutory rules under proviso to Article 309 of the Constitution were framed. However, the clause to retire a government servant on attaining the age of 55 years was not incorporated, though the superannuation was retained at 58 years. The appellant judicial officer was compulsorily retired on his completion of 55 years. He successfully challenged the order of retirement which was upheld by this Court. A Constitution Bench of this Court had held that the distinction between legislative act and judicial act is well known. The adjudication of the rights of the parties is a judicial function. The legislature has to lay down the law prescribing the norms or conduct which will govern the parties and transactions to require the court to give effect to that law. Validating legislation which removes the norms of invalidity of action or providing remedy is not an encroachment on judicial power. Statutory rule made under the proviso to Article 309 was upheld. The legislature cannot by a bare declaration, without anything more, directly overrule, reverse or override a judicial decision at any time in exercise of the plenary power conferred on the legislature by Articles 245 and 246 of the Constitution. It can render a judicial decision ineffective by enacting a valid law on a topic within its legislative field, fundamentally altering or changing with retrospective, curative or nullifying effect, the conditions on which such a decision is based. In *Hari Singh* v. *Military Estate Officer*, 1972 RCR (Rent) 508 (SC); (1973) 1 SCR 515, prior to 1958 two alternative

modes of eviction under Public Premises Act were available. When the eviction was sought of an unauthorised occupant by summary procedure the constitutionality thereof was challenged and upheld. The Act was subsequently amended in 1958 with retrospective operation from 16-9-1958. Thereunder only one procedure for eviction was available. It was contended to be a legislative encroachment of judicial power. A Bench of three Judges held that the legislature possessed competence over the subject-matter and the Validation Act could remove the defect which the court had found in the previous case. It was not the legislative encroachment on judicial power but one of removing the defect which the court had pointed out with a deeming date.

46. ..... It was open to the legislature under the constitutional scheme within certain limits, to amend the provisions of the Act retrospectively and to declare what the law shall be deemed to have been. But it was not open to the legislature to say that the judgment of the court properly constituted and rendered, shall be deemed to be ineffective and "the interpretation of the law shall be otherwise than as declared by the court."

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

For Subsequent orders see RA-CR-40-CII-2016

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

For Subsequent orders see RA-CR-40-CII-2016

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. In *National Agricultural Cooperative Marketing Federation of India Ltd. and another v. Union of India and others* (2003) 5 Supreme Court Cases 23, the Supreme Court held:-

"19. In making this change, the legislature does not "statutorily overrule" this Court's decision in *Kerala State Coop. Marketing Federation Ltd.* [(1998) 5 SCC 48, as has been contended by the appellant. Overruling assumes that a contrary decision is given on the same facts or law. Where the law, as in this case, has been changed and is no longer the same, there is no question of the legislature overruling this Court.

20. As has been held in *Ujagar Prints (II)* v. *Union of India* [(1989) 3 SCC 488 at p. 517, para 65:-

"A competent legislature can always validate a law which has been declared by courts to be invalid, provided the infirmities and vitiating infractors noticed in the declaratory judgment are removed or cured. Such a validating law can also be made retrospective. If in the light of such validating and curative exercise made by the legislature

> — granting legislative competence — the earlier judgment becomes irrelevant and unenforceable, that cannot be called an impermissible legislative overruling of the judicial decision. All that the legislature does is to usher in a valid law with retrospective effect in the light of which earlier judgment becomes irrelevant."

35. In *Commissioner of Income Tax (Central)-I, New Delhi v. Vatika Township Private Limited, 2015(1) Supreme Court Cases 1,* the Supreme Court held:-

> **32.** Let us sharpen the discussion a little more. We may note that under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such statutory provisions are labelled as "declaratory statutes". The circumstances under which provisions can be termed as "declaratory statutes" are explained by Justice G.P. Singh in the following manner:
>
> "*Declaratory statutes*
>
> The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES and approved by the Supreme Court. For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word "declared" as well as the word "enacted".' But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduced new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In

determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law."

The above summing up is factually based on the judgments of this Court as well as English decisions.

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.

35. We would also like to reproduce hereunder the following observations made by this Court in *Govind Das* v. *ITO* (1976) 1 SCC 906, 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 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 prospective only. (emphasis supplied)"

36. In *Controller of Estate Duty v. M.A.Merchant and others 1989(1) SCC 499,* the Supreme Court reiterated the same principle with the same qualification. Paragraph-8 of the judgment relied upon by the petitioners reads as follow:-

> "**8.** The new Section 59 came into force from 1-7-1960. Much earlier, on 26-2-1960 the assessment on the accountable person had already been completed. There is a well settled principle against interference with vested rights by subsequent legislation unless the legislation has been made retrospective expressly or by necessary implication. If an assessment has already been made and

> completed, the assessee cannot be subjected to re-assessment unless the statute permits that to be done. Reference may be made to *Controller of Estate Duty, West Bengal* v. *Smt Ila Das*[(1981) 132 ITR 720 (Cal HC)] , where an attempt to reopen the estate duty assessment consequent upon the insertion of the new Section 59 of the Estate Duty Act was held infructuous." (emphasis supplied).

The sentence emphasized illustrates our observation.

37. In *S.T.Sadiq v. State of Kerala and others 2015 SCC online 99,* the Supreme Court held that it is settled law that the legislature cannot directly annul a judgment of a Court and that the legislative function consists in 'making' a law and not in 'declaring' what the law shall be. In the words of R.F.Nariman J.:-

> *'If the legislature were at liberty to annul judgments of courts, the ghost of bills of attainder will revisit us to enable legislatures to pass legislative judgments on matters which are inter-parties. Interestingly, in England, the last such bill of attainder passing a legislative judgment against a man called Fenwick was passed as far back as in 1696. A century later, the US Constitution expressly outlawed bills of attainder [see: Article 1 Section 9].*
>
> *It is for this reason that our Constitution permits a legislature to make laws retrospectively which may alter the law as it stood when a decision was arrived at. It is in this limited circumstance that a legislature may alter the very basis of a decision given by a court, and if an appeal or other proceeding be pending, enable the Court to apply the law retrospectively so made which would then change the very basis of the earlier decision so that it would no longer hold good. However, if such is not the case then*

legislation which trenches upon the judicial power must necessarily be declared to be unconstitutional."

38. The Supreme Court also referred to the judgment in re; *Cauvery Water Disputes Tribunal, 1993 Supp (1) SCC 96,* where it was held that the legislature cannot set-aside an individual decision inter-parties and affect their rights and liabilities alone and that such an act on the part of the legislature amounts to exercising the judicial power of the State and to the functioning as an Appellate Court or Tribunal. The emphasis on behalf of the petitioners on these observations was unnecessary for it is not even the petitioner's case that the amendment seeks to set-aside an individual decision inter-parties or that it seeks to affect their rights and liabilities alone. In the case before the Supreme Court it was found that the provisions impugned therein aimed only on directly upsetting a final judgment of the Supreme Court inter-parties.

39. Relying upon these judgments, several submissions were made to challenge the amendment to Section 29(4).

40. It was contended that the amendments tantamount to reversing the decision of this Court in exercise of judicial powers which the legislature does not possess. It was further submitted that the ineffective or invalid clause had not been removed and therefore, the validation of the acts which would have been illegal in view of the said judgments cannot be said to have been validated.

41. In *Prithvi Cotton Mills Ltd.* (supra), it was observed that sometimes the legislature gives its own meaning and interpretation of law under which the tax was collected and by legislative fiat makes the new meaning binding on Courts. It was held that this was one of the methods that the legislature may follow to neutralize the effect of the earlier decision of

the Court which becomes ineffective after the change of the law. By providing its own meaning and interpretation of the law, the legislature does not say what the provision meant when the Court had interpreted it by the judgment and said what is meant. What the legislature does by the amendment is to say now i.e. on the enactment of the amendment, what the section means and how it is to be interpreted and to make that meaning or interpretation applicable retrospectively. In doing so the legislature does not reverse the judgment. It removes the basis on which it was pronounced by legislative fiat and not de hors legislative fiat.

42. This resolves an apparent conflict with the rule that once the legislation leaves Parliament it is the Courts and the Courts alone that can interpret the provisions thereof. This rule is not inconsistent with what we have just said. Parliament cannot interpret the legislation except by exercising its legislative powers. Interpreting legislation is the domain of the Courts and to enact laws is that of Parliament. Thus Parliament cannot interpret the law enacted by it except by legislative fiat. There is, therefore, no conflict between the two principles. Infact, when the Parliament gives its own meaning or interpretation to a provision it does not encroach upon the Courts' domain to interpret the laws enacted by it but infact interprets the provisions by giving it its own meaning by legislative fiat. Parliament could have done so originally. It can do so subsequently by an amendment both prospective and retrospective.

43. This method has been adopted in the present case. The original proviso was construed by this Court as requiring a notice to be served upon the assesse for the Commissioner to decide whether or not to allow assessment of a taxable person or a registered person after three years from the date when the annual statement was filed or was due to be filed by the

assessee. The basis of this judgment has been neutralized. The legislature has given its own meaning and interpretation of Section 29 prior to the amendment. This it has done by explanation (2) to sub section (4) of Section 29 and by sub section (10-A) of Section 29.

44. Explanation (2) clarifies that prior to the commencement of the Amendment Act, the Commissioner was not required to issue notice to the concerned person before extending the limitation period of assessment. We do not read this clarification as a declaration that the judgments were wrong. The legislature has by legislative fiat given its own interpretation of the law and made it binding upon the Courts. It was sufficient for the legislature to enact only a clarificatory amendment. By doing so, the legislature has not overruled the judgments of this Court. It has removed the basis on which the judgments were delivered.

45. In *A.B.Sugars Ltd. case* (supra), the Division Bench held that the rules of natural justice must be read into the proviso to Section 29. This was in view of the fact that the proviso was silent on the issue and the rules of natural justice were not excluded either expressly or by necessary intendment. By explanation (2) and sub section (10-A) of the amended Section, the basis of the judgment has been nullified by providing that it was not necessary for the Commissioner to give any notice to extend the time for making the assessment.

The legislature has given its own meaning or interpretation of the original proviso. By doing so it has not merely declared that the decisions of this Court shall not bind the parties concerned. By giving its own meaning or interpretation to section 29, the legislature does not merely state that the section did not mean what the Courts said it meant but has furnished its own meaning and interpretation of the section and has made

that meaning and interpretation applicable retrospectively. By virtue of the amendment, therefore, the judgments of this Court have not been reversed. The basis on which the judgments were delivered has, however, been removed.

46. Explanation (2) could have been enacted in the original section itself if the legislature had contemplated the ratio of the said judgment. It could have been enacted in the original section itself that a notice for extension was not necessary. The clarificatory amendment in explanation (2) was probably necessary as although the proviso to the unamended section had been done away with in the amended section, the effect of the judgment remained. The legislature obviously wanted to do away with the same.

47. What is even more important is this. We have already held that the opening part of Section 29(4) as amended operates retrospectively. Thus, the period for making an assessment within six years after the date when the annual statement was filed or due to be filed whichever is later stands extended under the opening part of the section itself as it is retrospective. We held that it was retrospective in view of the proviso and explanation (1) to the amended Section. Thus, in any event, the period of six years under the amended section was to apply retrospectively. Explanation (2) is, therefore, merely clarificatory. Even if Explanation (2) and sub-section (10-A) are held to be unconstitutional it would make no difference. They in any event indicate the intention or object of the legislature that the amended provisions are with retrospective effect. There is no reason why a provision which is held to be invalid cannot be an aid to ascertaining the object or the intention of the legislature. The intention of the legislature is one thing and the legality of a legislation is another. The intention or object of the legislature may be valid but the mode or manner of enacting it may not be. The invalid

mode of implementing the object does not even reflect adversely upon the legality and validity of the intention or the object. Even if the enactment is invalid it can nevertheless disclose the object of the legislation. In that event the purpose would be equally served by the opening part of section 29(4) as amended and by Explanation (1).

48. It was contended that sub section (10-A) of section 29 is nothing but a validating provision though it is not stated to be so in as many words. It was contended that sub section (10-A) has the effect of over-ruling the said judgments without curing the defects pointed out therein.

We do not agree. We will assume sub section (10-A) conveys such an impression. That, however, is only if sub section is read by itself. Reading it by itself would be incorrect. It must be read alongwith the rest of the section. So read it is clear that the defect in the actions i.e. the manner in which the proviso to the unamended section 29(4) was implemented is removed. Explanation (2) removes the defect as by legislative fiat the legislature provided that the Commissioner was not required to issue any notice to the concerned person before extending the limitation period of assessment prior to the commencement of the amendment Act. Further, as we have also held the opening part of section 29(4) is itself retrospective in any event.

49. It is also contended that time for making the assessment under the old proviso could be extended by three years *inter-alia* only upon the order for the same being communicated. This requirement has not been taken care of by the amendment.

50. This argument overlooks sub-section (10-A) of section 29. It also overlooks the fact that the opening part of the amended section 29(4) is itself retrospective as is the explanation (1) thereto.

IV. Explanation (2) is contrary to the Rules of natural justice and is, therefore, constitutionally invalid and void.

51. Relying upon the judgment of the Supreme Court in *Union of India v. Tulsiram Patel and others 1985(3) SCC 398,* it was contended that the explanation (2) being contrary to the rule of natural justice is constitutionally invalid. Even assuming this to be so, it would make no difference. As we mentioned earlier, even the opening part of the amended section 29(4) is retrospective. In the result, it would make no difference to the respondent's right to complete the assessment within the time specified in the amended section 29(4). The opening part of the amended section 29(4) does not require an extension. It provides a period of six years.

V. Explanation (2) has no relevance to the main section and is, therefore, invalid.

52. It was contended on behalf of the petitioner that explanation (2) has no relevance to the main section and is, therefore, invalid. It was contended that an explanation must be in respect of an existing substantial provision.

53. A retrospective amendment does not necessitate the continued existence of the old law in the same terms. There may yet arise the need to validate an Act or the acts performed thereunder. The need to do so may well be the same as the need that exists where the original provision is retained.

In the present case, for instance, the legislature decided against permitting any extension of time to make the assessment. The question of the original proviso continuing in the amended provision, therefore, did not

arise. It was necessary to introduce the explanation nevertheless with respect to acts already done or performed prior to the amendment. It is for this reason also that it was found necessary to issue a clarification which the legislature did by enacting explanation (2). If the explanation had been enacted prior to the amendment and if it had been valid, which we think it would have been, there is no reason for it not to be valid merely because the legislature has decided against such a proviso in the amended statute.

54. Learned counsel for the petitioners relied upon the following observation of the Supreme Court in *Sulochana Amma v. Narayanan Nair 1994(2) SCC 14:-*

> **"8.** It is settled law that explanation to a section is not a substantive provision by itself. It is entitled to explain the meaning of the words contained in the section or clarify certain ambiguities or clear them up. It becomes a part and parcel of the enactment. Its meaning must depend upon its terms. Sometimes it would be added to include something within it or to exclude from the ambit of the main provision or some condition or words occurring in it. Therefore, the explanation normally should be so read as to harmonise with and to clear up any ambiguity in the same section."

These observations are in the context of an enactment where there is a substantive provision and an explanation. The case before us is an unusual one where the substantive provision was removed by the amendment but an explanation was necessary in respect of the original substantive provision.

> *VI. The amendment is harsh, unfair, arbitrary and is excessively and unreasonably retrospective and is, therefore, violative of Articles 14 and 19 of the Constitution.*

55. It was contended that the amendment must be struck down as unconstitutional on the ground that it is unreasonable, excessive and harsh.

In support of this contention, two judgments were relied upon on behalf of the petitioners which we will now refer to.

56. In *National Agricultural Cooperative Marketing Federation of India Ltd. and another v. Union of India and others* (2003) 5 Supreme Court Cases 23, the Supreme Court held:-

> "**27.** The main thrust of the appellant's argument has been to the constitutionality of the amendment. The substitution in 1998 of the phrase "grown by" in Section 80-P(2)(*a*)(*iii*) of the Act to operate from 1968, it is argued, amounts to a new levy and an unforeseen financial burden imposed on apex societies like the appellant with effect from the past 30 years. If this were so doubtless the Court may have considered the amendment to be excessively and unreasonably retrospective violating the appellant's fundamental rights under Articles 19(1)(*g*) and 14 of the Constitution. But in fact the grievance is unfounded. (emphasis supplied."

57. In *R.C.Tobacco (P) Ltd. and another v. Union of India and another (2005) 7 Supreme Court Cases 725*, the Supreme Court held:-

> **"21.** A law cannot be held to be unreasonable merely because it operates retrospectively. Indeed even judicial decisions are in a sense retrospective. When a statute is interpreted by a court, the interpretation is, by fiction of law, deemed to be part of the statute from the date of its enactment. The unreasonability must lie in some other additional factors. 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 so unreasonable as to violate constitutional norms:
>
> "Where for instance, it appears that the taxing statute is plainly discriminatory, or provides no procedural machinery for assessment and levy of the tax, or that it is confiscatory, courts would be justified in striking down the impugned statute as unconstitutional. In such cases, the character of the

material provisions of the impugned statute is such that the court would feel justified in taking the view that, in substance, the taxing statute is a cloak adopted by the legislature for achieving its confiscatory purposes." (See *Rai Ramkrishna* v. *State of Bihar* [(1964) 1 SCR 897 : AIR 1963 SC 1667] , SCR p. 910.)

The question to be answered therefore is whether Section 154, which is in terms retrospective, is ex facie discriminatory, or so unreasonable or confiscatory that it violates Articles 14 and 19 of the Constitution. (emphasis supplied).

22. The factors which are generally considered relevant in answering this question are: (*i*) the context in which retrospectivity was contemplated, (*ii*) the period of such retrospectivity, and (*iii*) the degree of any unforeseen or unforeseeable financial burden imposed for the past period." (emphasis supplied).

The validity of the amendment Act, therefore, must be tested on the basis of the tests laid down in the above judgments. We will presume, therefore, that if an amendment is found to be excessive and unreasonably retrospective, unduly oppressive and confiscatory, plainly discriminatory, violating the appellant's fundamental rights, it would be open to challenge. As we will demonstrate, the amendment cannot by any stretch of imagination be held to be so unreasonable or excessive as to warrant it being declared invalid.

58. In support of this contention, firstly detailed tables were prepared to indicate the last dates for filing the last quarterly returns, the last dates for filing the annual statements and the last dates for assessment. The table also indicates the date upto which the accounts are to be retained, the date upto which the audit can be conducted and the date upto which the assessment can be framed both before and after the Amendment Act of

15.11.2013 in respect of the assessment years 2006-07, 2007-08 and 2008-09. The said dates were also stated in respect of the year 2009-10. The dates were based on Sections 28(3), 29(4), 44 of the Punjab Value Added Tax Act, 2005, Rules 36(1),41 and 47 of the Punjab Value Added Tax Rules, 2005 and Rule 6 of the Central Sales Tax (Punjab) Rules, 1957.

59. It is not necessary to set out the accurate, illustrative and well prepared table. Nor is it necessary to set out the provisions of the PVAT or the Punjab Value Added Tax Rules, 2005 and the Central Sales Tax (Punjab) Rules, 1957, as contended by the petitioner. They indeed provide that an assessee was bound to keep and maintain its books of account for a period beyond the last date of assessment as per the unamended section. However, the last date of assessment as per the amended section is well beyond the last date upto which the assesse was bound to keep and maintain its books of account under the unamended section.

For the year 2006-07, the assessee is not bound to keep the books after 31.03.2013. The amendment, however, extends the period of assessment to 20.11.2014. For the year 2007-08, the assessee is bound to keep the books upto 31.03.2014. The amendment, however, extends the period of assessment to 20.11.2014. Thus, if a notice under Section 29(2) is given even on the basis of the amendment before 31.03.2014, an assessee would have kept the books but if it is given after 31.03.2014 it is possible that the assessee would not have preserved the books. For the years 2008-09 and 2009-10, this situation would not arise as everything would be back in place. For instance, under Rule 47 of the PVAT Rules, 2005, the notice for the purpose of provisional assessment must provide a time period of not less than 10 days for production of such accounts and documents as may be specified in the notice and a person who has been served such a notice is

required to produce on the specified date and time accounts and documents as mentioned in the notice.

The petitioners contend that for the years 2006-07 and 2007-08 it is possible that the assessee may not have preserved the books beyond the period that they were statutorily bound to. The petitioner in this petition for instance submits that it had sold its edible oil business and the manufacturing facility to another entity as an inseparable whole and as a going concern on slump sale basis with effect from 10.02.2012. The reference pertains to the assessment year 2006-07. It would, therefore, be very difficult for it to locate the original records pertaining to this period. The amendment, however, extends the date for completing the assessment, beyond the period for which the books were to be preserved statutorily. Thus, if in respect of these assessment years, a notice is given for assessment, such assessees would be prejudicially affected for they would be unable to produce the books. In that event, they may be subjected to a best assessment for no fault of theirs. This, it is contended, is unfair, arbitrary and unduly excessive.

60. This may well be a difficulty in the way of an assessee. It is not, however, such an insuperable difficulty as to render the enactment unconstitutional. If the books are not available because they were destroyed or are otherwise unavailable to the assessee prior to the amendment, it would always be open to the assessee to bring this to the notice of the Assessing Authority who must take the same into consideration. It would be open to the assessee to take this factor as a defence and a justification for not having preserved the books. Obviously, in such cases, an adverse inference cannot be drawn against the assessee. The validity of the amendment, therefore,

cannot be struck down on the ground that it is unconstitutional for this reason.

VII. The proviso to the amended section 29(4) is contrary to the main section and, therefore, illegal and void.

61. It was contended on behalf of the petitioner that the proviso introduced by the amendment is contrary to the main section and is therefore, illegal and unconstitutional. In support of this contention, the petitiones relied upon the following observation of the Supreme Court in *J.K.Industries Ltd. and others v. Chief Inspector of Factories and Boilers and others, 1996(6) Supreme Court Cases 665*:-

> "**33.** A proviso to a provision in a statute has several functions and while interpreting a provision of the statute, the court is required to carefully scrutinize and find out the real object of the proviso appended to that provision. It is not a proper rule of interpretation of a proviso that the enacting part or the main part of the section be construed first without reference to the proviso and if the same is found to be ambiguous only then recourse may be had to examine the proviso as has been canvassed before us. On the other hand an accepted rule of interpretation is that a section and the proviso thereto must be construed as a whole, each portion throwing light, if need be, on the rest. A proviso is normally used to remove special cases from the general enactment and provide for them specially.
>
> **34.** A proviso qualifies the generality of the main enactment by providing an exception and taking out from the main provision, a portion, which, but for the proviso would be a part of the main provision. A proviso must, therefore, be considered in relation to the principal matter to which it stands as a proviso. A proviso should not be read as if providing something by way of *addition* to the main provision which is*foreign* to the main provision itself.

> **35.** Indeed, in some cases, a proviso, may be an exception to the main provision though it cannot be inconsistent with what is expressed in the main provision and if it is so, it would be ultra vires of the main provision and struck down. As a general rule in construing an enactment containing a proviso, it is proper to construe the provisions together without making either of them redundant or otiose. Even where the enacting part is clear, it is desirable to make an effort to give meaning to the proviso with a view to justify its necessity.
>
> **36.** While dealing with proper function of a proviso, this Court in *CIT* v. *Indo Mercantile Bank Ltd.* [AIR 1959 SC 713 : (1959) 36 ITR 1] opined:
>
> > "The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment."
> >
> > This view has held the field till date."

62. We do not see how this judgment supports the petitioner's contention. It infact militates against it. As held in paragraph-33, a section and the proviso must be construed as a whole and the proviso is used to remove special cases from the general enactment and provide for them specially. The reliance upon the last sentence in paragraph-34 is also not well founded. In the present case, the proviso qualifies the situation that would arise out of the main section. Though an assessment under sub sections (2) and (3) of Section 29 may be made within six years, this would not be so in respect of the assessment year 2006-07. For the assessment year

2006-07, the assessment can be made till 20.11.2014. It is not foreign to the main provision. It is infact directly in respect thereof. But for the proviso the main section could not have operated in respect of the assessment year 2006-07. By virtue of the proviso, the assessment can also be made in respect of the assessment year 2006-07 till 20.11.2014. There is no inconsistency between the main provision and the proviso. The proviso merely grants a further period for making the assessment in respect of the year 2006-07. The proviso does precisely what the judgment says it must-it removes the special case viz. the assessment year 2006-07 from the general enactment which provides for the other assessment years and provides for this assessment year specifically.

63. The judgment of a Division Bench of this Court in *M/s Haryana Organics etc. v. State of Haryana 2003(1) Punjab Law Reporter 265* is of no assistance to the petitioner either. Paragraph 35 which is relied upon reads as under:-

> "35. I have considered the rival contentions and have perused the authorities cited before me. On the basis of the authoritative pronouncements of the Supreme Court as noticed above, it is clear that the entry in the Notification has to be interpreted on the basis of the plain language used in the same without having any recourse to any assumptions or presumptions or intendment. Each word has to be given a meaning and can not be considered to be superfluous or unnecessary. If the interpretation on the basis of the plain language used in this entry leads to some difficulty, it is for the legislature or the rule making authority to take the corrective measures. The courts can not give it an interpretation on equitable considerations or presumptions or assumptions in order to make up the deficiencies therein to overcome such difficulty. It is also well settled that an exception or a proviso must, *prima*

> *facie*, be read and considered in relation to the principal matter to which it is a proviso or an exception. It cant not be considered as separate or independent provision. A proviso can not take away specific rights given by the main provision. The proper function of an exception is to except and deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case only. In other words, an exception takes out a portion which, but for such exception, would fall within the main provision. The controversy in the present petition has, therefore, to be considered in the light of the aforesaid settled rules of construction."

64. The proviso does not take away any right given by the main provision. There is no right given in respect of the assessment year 2006-07 in the main provision which is taken away by the proviso. The proviso merely grants further time for making an assessment in respect of the year 2006-07. The proviso is infact an exception to the main section. But for this exception an assessment in respect of the year 2006-07 could not have been made by 20.11.2014.

65. Paragraph 15 of the judgment of the Supreme Court in *Binani Industries Ltd. Kerala v. Assistant Commissioner of Commercial Taxes VI Circle Banglore and others 2007(15) SCC 435* does not carry the petitioner's case further either. It reads as under:-

> "**15.** The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in *Mullins* v. *Treasurer of Survey* [(1880) 5 QBD 170 : 42 LT 128] (referred to in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory* v. *Subhash Chandra Yograj Sinha* [AIR 1961 SC 1596] and *Calcutta Tramways Co. Ltd.* v. *Corpn. of Calcutta* [AIR 1965 SC 1728]) when one finds a

proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule.

> "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso."

said Lord Watson in *West Derby Union* v. *Metropolitan Life Assurance Society*[1897 AC 647 : 77 LT 284 (HL)] . Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See *A.N. Sehgal* v. *Raje Ram Sheoran* [1992 Supp (1) SCC 304, *Tribhovandas Haribhai Tamboli* v. *Gujarat Revenue Tribunal*, (1991) 3 SCC 442 and *Kerala State Housing Board* v.*Ramapriya Hotels (P) Ltd.* (1994) 5 SCC 672).

"This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant." (*Coke upon Littleton*, 18th Edn., p. 146)

> "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails.... But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as

> a whole" (per Lord Wrenbury in *Forbes* v. *Git* [(1922) 1 AC 256 : 1921 All ER Rep Ext 770 (PC)."

66. The extended period for making the assessment in respect of the year 2006-07 is not by implication from the proviso. It arises from the plain and clear language of the proviso. The proviso clearly carves out an exception to the main provision itself. The judgment infact supports the respondents' case. The proviso is in terms of this judgment as but for the proviso the enacting part of the section would have included the subject matter of the proviso by disallowing the assessment in respect of the year 2006-07. The proviso was enacted to take this part out of the purview of the main/enacting part of the section. The proviso expressly qualified the enacting part of the section and created an exception to it.

VIII. The amendment is invalid as it extends the period of reassessment even where the original period for assessment has expired.

67. The next question is whether by an amendment the legislature is entitled to extend the period for assessment even though the original period for assessment has expired. The judgment of the Supreme Court in *Additional Commissioner (Legal) and another v. Jyoti Traders and another 1999(2) SCC 77* supports the respondents' case that it can. In that case, the assessment in respect of one of the parties for the year 1985-86 under the U.P.Trade Tax Act, 1948 was completed on 27.11.1989 and in respect of the other party was completed on 28.02.1990. The period for assessment or re-assessment which was four years under Section 21 of that Act for the said assessment expired on 31.03.1990. Section 21 of the Act underwent an amendment and the provision in that respect came into force with effect from

19.02.1991. The amendment prescribed the period of eight years. Taking advantage of the amendment, the authorities issued notices to the parties for reassessment. Paragraph-25 of the judgment reads as under:-

> **"25.** The two decisions in the cases of *Ahmedabad Manufacturing & Calico Printing Co. Ltd.* (1963) 48 ITR 154] and *Biswanath Jhunjhunwalla* [(1996) 5 SCC 626] are more closer to the issue involved in the present case before us. They laid down that it is the language of the provision that matters and when the meaning is clear, it has to be given full effect. In both these cases, this Court held that the proviso which amended the existing provision gave it retrospectivity. When the provision of law is explicit, it has to operate fully and there could not be any limits to its operation. This Court in *Biswanath Jhunjhunwalla case* [(1996) 5 SCC 626] said that if the language expressly so states or clearly implies, retrospectivity must be given to the provision. Under Section 34 of the Income Tax Act, 1922, it is the service of the notice which is the sine qua non, an indispensable requisite, for the initiation of assessment or reassessment proceedings where income had escaped assessment. That is not so in the present case. Under sub-section (1) of Section 21 of the Act before its amendment, the assessing authority may, after issuing notice to the dealer and making such inquiry as it may consider necessary, assess or reassess the dealer according to law. Sub-section (2) provided that except as otherwise provided in this section, no order for any assessment year shall be made after the expiry of 4 years from the end of such year. However, after the amendment, a proviso was added to sub-section (2) under which the Commissioner of Sales Tax authorises the assessing authority to make assessment or reassessment before the expiration of 8 years from the end of such year notwithstanding that such assessment or reassessment may involve a change of opinion. The proviso came into force w.e.f. 19-2-1991. We do not think that sub-section (2) and the proviso added to it leave anyone in doubt that as on the date when the proviso

came into force, the Commissioner of Sales Tax could authorise making of assessment or reassessment before the expiration of 8 years from the end of that particular assessment year. It is immaterial if a period for assessment or reassessment under sub-section (2) of Section 21 before the addition of the said proviso had expired. Here, it is the completion of assessment or reassessment under Section 21 which is to be done before the expiration of 8 years of that particular assessment year. Read as it is, these provisions would mean that the assessment for the year 1985-86 could be reopened up to 31-3-1994. Authorisation by the Commissioner of Sales Tax and completion of assessment or reassessment under sub-section (1) of Section 21 have to be completed within 8 years of the particular assessment year. Notice to the assessee follows the authorisation by the Commissioner of Sales Tax, its service on the assessee is not a condition precedent to reopen the assessment. It is not disputed that a fiscal statute can have retrospective operation. If we accept the interpretation given by the respondents, the proviso added to sub-section (2) of Section 21 of the Act becomes redundant. Commencement of the Act can be different than the operation of the Act though sometimes, both may be the same. The proviso now added to sub-section (2) of Section 21 of the Act does not put any embargo on the Commissioner of Sales Tax not to reopen the assessment if the period, as prescribed earlier, had expired before the proviso came into operation. One has to see the language of the provision. If it is clear, it has to be given its full effect. To reassure oneself, one may go into the intention of the legislature in enacting such provision. The date of commencement of the proviso to Section 21(2) of the Act does not control its retrospective operation. Earlier the assessment/reassessment could have been completed within four years of that particular assessment year and now by the amendment adding the proviso to Section 21(2) of the Act it is eight years. The only safeguard being that it is after the satisfaction of the Commissioner of Sales Tax. The proviso is operative from 19-2-1991 and a

For Subsequent orders see RA-CR-40-CII-2016

> bare reading of the proviso shows that the operation of this proviso relates and encompasses back to the previous eight assessment years. We need not refer to the provisions of the Income Tax Act to interpret the proviso to Section 21(2) the language of which is clear and unambiguous and so is the intention of the legislature. We are, thus, of the view that the High Court was not right in quashing the sanction given by the Commissioner of Sales Tax and notices issued by the assessing authority in pursuance thereof."

The Supreme Court held that the proviso shall operate from 1991. A bare reading of the proviso shows that the operation thereof relates and encompasses back to previous eight assessment years. As we noted earlier, the assessment year in the case before the Supreme Court was 1985-86. The amendment came into force in the year 1991. The four year period originally prescribed would have expired prior to the date of the amendment. Despite the same, the Supreme Court held that the amendment was applicable to the respondents.

68. On behalf of the petitioners, several judgments were cited in support of their submission that if the assessment period is over, the assessee acquires a vested right which cannot be disturbed by retrospective amendment which extends the period for assessment or reassessment after the original period of assessment or reassessment has expired. The judgments do not support the submission made in such unqualified term. Each of the judgments which we will now refer to qualifies this proposition to the effect that it is subject to the provisions providing to the contrary.

69. In *S.S.Gadgil v. Messrs. Lal and Co. AIR 1965 SC 171,* the Supreme Court dealt with the case of *Tomlinson v. Bullock, (1879) 4 QBD 230* and *English v. Cliff, 1914-2 Ch 376.* In paragraph-6, the Supreme Court

observed that if the right to act under the earlier statute had come to an end it could not revived by the subsequent amendment which extended the period of limitation unless otherwise provided. The operative words are 'unless otherwise provided'. In other words, it was not held that even if it was otherwise provided, the principle would apply.

70. In *J.P.Jani, Income Tax Officer, Circle IV, Ward-G, Ahmedabad and another v. Induprasad Devshanker Bhatt, AIR 1969 SC 778,* the Supreme Court held that it was not permissible to construe section 297(2)(d)(ii) of the Income Tax Act, 1961 as reviving the right of the Income Tax Officer to reopen an assessment which was barred under the old Act, for that would tantamount to giving a retrospective operation to the section which was not warranted by the express language of the section or by necessary implication of the section. The Supreme Court applied the well known rule of interpretation that unless the terms of the statute expressly so provide or unless there is a necessary implication, retrospective operation should not be given to the statute so as to affect, alter or destroy any right already acquired or to revive any remedy already lost by efflux of time. These observations do not support the submission that Parliament is incompetent to introduce such an amendment. The judgment only holds that such an interpretation ought not to be placed upon the provision unless the express language thereof warrants it or it is warranted by necessary implication.

71. Paragraph 5 of the judgment of the Supreme Court in *State of Tamilnadu v. Star Tobacco Co. 1974(3) S.C.C. 249* is not relevant to the point at all. The question was whether the jurisdiction to reopen the assessment was a question of procedure or power. The question was as to

who had the jurisdiction to reopen the assessments. It was held that such a question cannot be considered as a question of procedure.

72. Mr. Mittal relied upon paragraph-8 of the judgment of the Supreme Court in *Controller of Estate Duty, Gujarat I, Ahmedabad v. M.A.Merchant, Accountable person of late Shri A.G.Merchant, Majirawadi Road, Bhavnagar and others, 1989 Supp.(1) Supreme Court Cases 499,* which reads as under:-

> **"8.** The new Section 59 came into force from 1-7-1960. Much earlier, on 26-2-1960 the assessment on the accountable person had already been completed. There is a well settled principle against interference with vested rights by subsequent legislation unless the legislation has been made retrospective expressly or by necessary implication. If an assessment has already been made and completed, the assessee cannot be subjected to re-assessment unless the statute permits that to be done. Reference may be made to *Controller of Estate Duty, West Bengal* v. *Smt Ila Das*[(1981) 132 ITR 720 (Cal HC)] , where an attempt to reopen the estate duty assessment consequent upon the insertion of the new Section 59 of the Estate Duty Act was held infructuous." (emphasis supplied).

The amendment to Section 29 clearly is retrospective. Our earlier observation based on the words emphasized by us, therefore, apply in respect of this judgment as well.

73. Paragraphs 14 and 15 of the judgment of the Supreme Court in *K.M.Sharma v. Income Tax Officer, Ward 13(7), New Delhi, 2002(4) Supreme Court Cases 339,* cited on behalf of the petitioners also infact support the respondents' case. Paragraphs 14 and 15 read as follows:-

"**14.** A fiscal statute, more particularly, on a provision such as the present one regulating period of limitation must receive strict construction. Law of limitation is intended to give certainty and finality to legal proceedings and to avoid exposure to risk of litigation to a litigant for an indefinite period on future unforeseen events. Proceedings, which have attained finality under existing law due to bar of limitation cannot be held to be open for revival unless the amended provision is clearly given retrospective operation so as to allow upsetting of proceedings, which had already been concluded and attained finality. The amendment to sub-section (1) of Section 150 is not expressed to be retrospective and, therefore, has to be held as only prospective. The amendment made to sub-section (1) of Section 150 which intends to lift the embargo of period of limitation under Section 149 to enable the authorities to reopen assessments not only on the basis of orders passed in the proceedings under the IT Act but also on order of a court in any proceedings under any law has to be applied prospectively on or after 1-4-1989 when the said amendment was introduced to sub-section (1). The provision in sub-section (1) therefore can have only prospective operation to assessments, which have not become final due to expiry of period of limitation prescribed for assessment under Section 149 of the Act.

15. To hold that the amendment to sub-section (1) would enable the authorities to reopen assessments, which had already attained finality due to bar of limitation prescribed under Section 149 of the Act as applicable prior to 1-4-1989, would amount to giving sub-section (1) a retrospective operation, which is neither expressly nor impliedly intended by the amended sub-section."

Our aforesaid observations apply equally to this judgment. In this case, it was held that a retrospective operation of the amended sub section was neither expressly nor impliedly intended. Infact it was held that the proceedings which have attained finality under the existing law due to a bar of limitation cannot be held to be open for revival 'unless the amended

provision is clearly given retrospective operation so as to allow upsetting of proceedings which had already been concluded and attained finality'.

The principle, therefore, is that the proceedings which have attained finality under the existing law due to a bar of limitation cannot be held to be open for revival 'unless the amended provision is clearly given retrospective operation so as to allow upsetting of proceedings, which had already been concluded and attained finality'.

74. The judgment of the Supreme Court in *Dharappa v. Bijapur Cooperative Milk Producers Societies Union Ltd. 2007(9) SCC 109,* is not relevant to the issue. The Supreme Court held where the right to file an action has come to an end on expiry of the period of limitation and thus becomes barred by limitation, it does not revive by a later limitation Act, even if it provides a longer period of limitation. Even as regards this rule, the Supreme Court held that it was subject to any express statutory provisions to the contrary.

75. In *T.Kaliamurthi and another v. Five Gori Thaikal Wakf and others, 2008(9) SCC 306*, the Supreme Court dealt with the Wakf Act, 1954 and the Wakf (Amendment Act) 1984. The Supreme Court observed that although it is true that under Section 6 of the General Clauses Act, the repeal of an enactment will not affect any right, privilege, obligation or liability acquired or incurred under the repealed enactment, this provision cannot be resorted to if a different intention appears and therefore, Section 6 cannot be applied to every repealed provision or enactment regardless of the intention of the legislature and the language used in the repealing provision. We do not see how these observations can be of any assistance to the petitioners.

76. In *Bharat Petroleum Corporation Ltd. v. State of Punjab and another, 2010(3) VST, 201,* a Division Bench of this Court framed the following question:-

> *"(B) Whether the rights vested in the assessee acquired on 30.4.2005 would extinguish by an amendment made by Act No. 10 of 2005 w.e.f. 12.5.2005 although the amendment has not been given retrospective effect or could the time barred assessment be re-opened on the basis of statutory extension of time."*

Thus the parties proceeded on the basis that the amendment had not been given retrospective effect. The judgment does not support the petitioners' submission.

IX. Explanation (1) makes the old proviso redundant and is, therefore, invalid and irrational.

77. It was contended that if the amendment is given effect to from 01.04.2006 as is sought to be done by the proviso and explanation (1) to the amended section, the proviso in the unamended section becomes redundant. The amendment, therefore, is contrary to the law in so far as it seeks to operate from a date prior to 15.11.2013.

78. The purpose and the effect of the entire amendment was to obviate the consequences of the proviso to the unamended section. The old proviso in so far as it required, as interpreted by the said judgment, the issuance of a notice and the extension to be within the original period of assessment was rendered redundant.

79. Mr. Bansal submitted that the amendment was curative. He submitted that under section 28 an audit and examination can be carried out within six years from the date of furnishing of the accounts under the unamended section 29, the assessment was to be done within three years.

Under the old proviso, the time could be extended by another three years but only after complying with the certain conditions as held in the said judgments. If those provisions were not complied with, the extension could not be granted. Thus, according to him, the amendment would bring the section 29(4) inconformity with section 28.

We will assume that the requirements are as submitted by Mr. Bansal. If, however, the amendments were unconstitutional and illegal for any reason, this purported endeavour would not have rendered the amendment valid.

80. In the circumstances, the petition is dismissed.

81. We mentioned at the outset that in several connected writ petitions, the counsel agreed that the result of those writ petitions would follow the result of this writ petition. However, in some of those writ petitions, the challenge is also to the show cause notices issued and/or assessment orders made. It is clarified that all the contentions on-merits are kept open and the petitioners concerned in all the connected writ petitions are relegated to the appropriate remedy in respect thereof except on the grounds already dealt with in this judgment. All the petitioners concerned in the connected writ petitions are granted four weeks time from today to enable them to adopt the appropriate proceedings. In cases where the assessment orders have already been passed, coercive steps shall not be taken upto and including 21.09.2015.

(S.J.VAZIFDAR)
ACTING CHIEF JUSTICE

(G.S.SANDHAWALIA)
JUDGE

07.08.2015
'Ravinder'

Whether to be referred to the Reporter or not.	√ **Yes.**	No.

For Subsequent orders see RA-CR-40-CII-2016