Association of Pesticides Manufacturers, Andhra Pradesh and Others Vs State of Andhra Pradesh and Others

Writ Petition No. 24532 of 1996

Court: Andhra Pradesh High Court

Date of Decision: Aug. 28, 1997

Acts Referred:
Andhra Pradesh General Sales Tax (Amendment) Act, 1996 â€" Section 5#Constitution of India, 1950 â€" Article 14, 19(1), 19(5), 19(6), 245#Finance Act, 1951 â€" Section 7(2)#Provisional Collection of Taxes Act, 1931 â€" Section 3

Citation: (1997) 5 ALT 69 : (1998) 108 STC 135

Hon'ble Judges: Lingaraja Rath, J; Bhaskara Rao, J

Bench: Division Bench

Judgement

Lingaraja Rath, J.
In this batch of cases petitioners who are registered dealers under the Andhra Pradesh General Sales Tax Act, 1957 are

assailing the provisions of section 21 of A.P. Act No. 27 of 1996 [Andhra Pradesh General Sales Tax (Amendment) Act, 1996] in so far as it

amends the First Schedule of the principal Act increasing the rate of tax leviable on drugs nd medicines from 9 per cent to 10 per cent and on

pesticides and insecticides, etc., from 4 per cent to 5 per cent retrospectively from August 1, 1996.

2. The petitioners state that the Andhra Pradesh Ordinance No. 19 of 1996 which came into effect from August 1, 1996 amended entry 37 of the

First Schedule relating to the drugs and medicines by casting the entry in a new form, but maintaining the rate of tax at the same rate, i.e., 9 per

cent. The Ordinance also inserted a new entry 78-A which relates to pesticides, insecticides, etc. The new entry related to pesticides concentrate

or technical grade pesticide used by the registered manufacturers in the State. The rate of tax remained at the same rate of 4 per cent. Accordingly,

the petitioners collected tax on medicines and drugs as also on pesticides, etc., either at 9 per cent or at 4 per cent as the case may be. Act 27 of

1996 was enacted on October 17, 1996 increasing the rate of tax, u/s 21, by one per cent, so that the tax on drugs and medicines has been raised

to 10 per cent and that on pesticides and insecticides has become 5 per cent. The Act having been given retrospective effect from the date of

Ordinance, steps are being taken for demanding the higher rate of tax from the petitioners. An earlier Writ Petition No. 2425 of 1997 in which the

same question was raised was disposed of on February 14, 1997 by a Division Bench of this Court (to which one of us, honourable Sri Justice

Lingaraja Rath, was a party) rejecting the case taking the view of there being no merit in the case as the Legislature has the right to make a

retrospective levy. In reaching the conclusion reliance was placed on the decisions in Rai Ramkrishna and Others Vs. The State of Bihar, and

Entertainment Tax Officer and Another Vs. Ambae Picture Palace, . It was observed that the decision in Entertainment Tax Officer and Another

Vs. Ambae Picture Palace, , which had considered and explained the decision in D. Cawasji and Co., Mysore Vs. State of Mysore and Another,

holds the field and is binding. Subsequent to the decision in W.P. No. 2425 of 1997, this batch of cases raising similar questions have been listed.

The learned counsel for the petitioners have argued the matter contending that certain questions were not considered while disposing of that writ

petition. The permission to submit a fresh having been accede, the cases have been mainly argued by Sri P. Srinivas Reddy, Sri S. Krishna Murthy,

Mr. N. B. K. Murthy. Some other counsel also made their submissions.

3. In canvassing to declare the levy ultra vires, the learned counsel have urged the the levy has been imposed retrospectively even though it is not

an attempt at validating the earlier illegal levy. The rate of tax has been simply increased from 9 per cent to 10 per cent and 4 per cent to 5 per cent

though even in the Ordinance the rates of the tax had not been increased. It is further urged that such levy retrospectively made is unreasonable and

affects the fundamental rights of trade and business under article 19(1)(g) of the Constitution. It is also urged that even though the Act was

purported to have been published in the Gazette of October 17, 1996 yet the gazette had not been made available till October 31, 1996 for which

the changed law was not known earlier to October 31, 1996 and as such for the period from October 17, 1996 to October 31, 1996 the levy

cannot be made. The levy has also been challenged on the ground of discrimination inasmuch as during the subsistence of the Ordinance, G.O.Ms.

No. 746 dated September 10, 1996 and G.O.Ms. No. 784 dated September 19, 1996 were issued by the Government exempting second and

subsequent sales of drugs, medicines, pesticides and insecticides, etc., from turnover tax payable u/s 5-A and that it is only to compensate such

exemption, as has been given out in the counter-affidavit of the State itself, that the petitioners who are the first sellers are being made to pay the

increased tax. A further ground of attack is that though sales tax is an indirect tax and under the scheme of the Act is intended to be passed on to

the customer, yet because of the retrospective character of the levy, the petitioners are deprived of the benefit of collecting the tax from the

customers. The retrospectivity of the levy being against the very scheme of the Act, should be held ultra vires of the Act as also of the Constitution

being ex facie unreasonable.

4. In the counter-affidavit filed by the State, the levy is justified contending that in the Ordinance No. 19 of 1996, section 5-A was inserted to the

Act levying turnover tax on goods classified under entry No. 37. But before the Ordinance was replaced by an Act, various associations involved

in pharmaceutical trade had approached the Government raising the question claiming that introduction of turnover tax on the sale of

pharmaceuticals would cause great harm to their trade inasmuch as the price of pharmaceuticals was fixed under various price control orders.

Discussion with various official of the Government was held in the matter and a suggestion was advanced by the association that any loss of

revenue arising out of exemption under turnover tax can be offset by increasing the rate of tax under the entry No. 37. Thus acting upon those

representations the rate of tax in entry No. 37 was increased from 9 per cent to 10 per cent and G.O.Ms. No. 746, dated September 10, 1996

was issued exempting turnover tax retrospectively from August 1, 1996. Similarly, the rate of tax on pesticides, etc., was also increased from 4 per

cent to 5 per cent. Simultaneous exemption was granted on second and subsequent sales in G.O.Ms. No. 784 dated September 19, 1996 with

effect from August 1, 1996. The tax liability of the traders in respect of retrospective levy is minimal. The rate of tax has been increased and

exemption on turnover tax was granted simultaneously on specific representations by various traders associations. For such reason retrospective

levy, for which the Legislature undoubtedly has the competence, is neither arbitrary nor unreasonable.

5. Retrospective legislation is a concomitant function of the Legislature. The power to legislate being the constitutional function, any limitation in

discharge of that function has to be found within the Constitution itself. The authority to legislate imbibes the power to legislate both retrospectively

and prospectively unless there is a constitutional bar against retrospective legislation. Once the power to tax is conceded, it is for the Legislature to

decide the scope of the tax; on whom it is to be levied; how it is to be levied; the time from which it is to be levied; and how it is to be collected.

The levy of tax is outcome of the fiscal policy of a Government which it gets sanctioned through the Legislature. The following of a particular

economic policy is attribute of the sovereignty and has to be formulated and pursued by the Government for which it has to conform to the

Constitutional requirements and obtain the legislative back up. There can be hence no inherent limitation to retrospective levy a tax, though of

course such levy in particular circumstances may be challenged on the ground of unreasonableness and as violating the fundamental rights under

article 19(1)(g) or that the tax is confiscatory in nature.

6. A question arose in The Union of India Vs. Madan Gopal Kabra, regarding the liability to Income Tax prior to April 1, 1950 in the State of

Rajasthan. Notice issued under the Act was challenged on the ground that the income prior to April, 1950 was not liable to be charged under the

provisions of any law validly in force in Rajasthan. It was pointed out by the apex Court that while the Constitution is not retrospective, yet it is a

different thing to say that Parliament in exercising the powers under articles 245 and 246 read with Schedule VII is precluded from making a

retroactive law. The question must depend upon the scope of the powers conferred and that must be determined with reference to the terms of the

instrument by which, affirmatively, the legislative powers were created and by which, negatively, they were restricted. The articles read with entry

No. 82 of List I of the Seventh Schedule empower the Parliament to make laws with respect to taxes on income for the whole of the territory of

India and no limitation or restriction is imposed in regard to restrictive legislation. The Parliament is, therefore, competent to make a law imposing

tax on the income of any year prior to the commencement of the Constitution.

7. The decision was reiterated in M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another, that the power conferred upon

the Parliament carried with it the authority to enact a law either prospectively or retrospectively unless there is limitation on that power in the

Constitution.

8. The submission of the learned counsel for the petitioners however is that retrospective taxation is upheld only when such step is taken to validate

an earlier illegal levy and not to impose a tax retrospectively for the first time. If at all such retrospective levy is to be made, it has to be justified for

proper and cogent reasons. The submission is not factually correct. The Constitution Bench decision in Chhotabhai Jethabhai Patel and Co. Vs.

The Union of India and Another, is an exact case on the point. On February 28, 1951, Bill No. 13 of 1951 containing fiscal proposals of the

Government for the fiscal year beginning with April 1, 1951 was introduced in the House of People. In the Bill provision had been made for

amending Central Excise Act (Act 1 of 1944) by way of alteration of duties on ""tobacco manufactured and unmanufatured"" providing that

unmanufactured tobacco other than flue-cured and ordinarily used otherwise than for the manufacture of cigarettes"" (which included tobacco

intended for manufacture of biris) should be charged with excise duty of 8 annas per lb., and it also imposed a new duty of excise on biris varying

from 6 to 9 annas per lb. depending upon the weight of tobacco contained in the biris. As soon as the declaration was made under the provisions

of section 3 of the Provisional Collection of Taxes Act, 1931 in respect of the provisions imposing the duty on tobacco under clause 7 of the Bill,

the appellants paid excise duty at the rates imposed under the Bill and obtained clearance certifies in regard to the tobacco moved from their

warehouses from and after March, 1951. The Bill was made into law as the Indian Finance Act, 1951 (Act 23 of 1951) on April, 28, 1951. But in

passing the Bill, changes were effected on the suggestion of the Select Committee. In the Finance Act, excise on biris was abandoned and the duty

on unmanufactured tobacco (other than flue-cured and used in the manufacture of cigarettes) was increased to 14 annas per lb. from the rate of 8

annas per lb. in the Bill. Consequential provisions were enacted in section 7(2) of the Finance Act which read as under :

The amendments made in the Central Excises and Salt Act, 1944, sub-clause (1) shall be deemed to have effect on and from the 1st March,

1951 and accordingly :-

(a) refund shall be made of all duties collected which would not have collected, if the amendment had come into force on that day, and

(b) recoveries shall be made of all duties which have not been collected but which would have been collected if the amendment had so come into

force.

9. In pursuance of the Finance Act, demand was made upon the appellants for payment of the duty payable by them after giving credit for the

refund of the duty paid on biris which had been deleted by the Act. The demand was contested by filing writ petitions in the High Court urging

retrospective operation of section 7(1) and sub-section (2) as illegal, ultra vires and unconstitutional. The matter ultimately came before the apex

Court. Negativing the contention advanced that retrospective levy is per se unreasonable and violative of articles 19(1)(f) read with article 19(5),

the court took the view that the fact that imposition of duty retrospectively deprived the right of passing it on to others, did not make an

unreasonable restriction on the exercise of the fundamental right to hold property and that under the Indian Constitution infraction of the rights to

property is to be tested not by the flexible rule of ""due process"" but on the more precise criteria set out in article 19(5). Mere retrospectivity in the

imposition of the tax cannot per se render the law unconstitutional on the ground of its infringing the right to hold property under article 19(1)(f) or

depriving the person of property under article 31(1). If on the one hand, the tax enactment in question were beyond the legislative competence of

the Union or of a State, necessarily different considerations arise. Such unauthorised imposition would undoubtedly not be a reasonable restriction

on the right to hold property besides being an unreasonable restraint on the carrying on of business, if the tax in question is one which is laid on a

person in respect of his business activity.

What was said in respect of articles 19(1)(f) and 31(1) would apply with equal force to the submissions advanced on the basis article 19(1)(g)

read with article 19(6).

10. Malwa Bus Service (Private) Limited and Others Vs. State of Punjab and Others, is a case where the retrospective levy made under the

Punjab Motor Vehicles Taxation Act, 1924 was in question. The Act was amended in 1981 raising the maximum limit of tax to Rs. 35,000 per

year retrospectively with effect from October 1, 1980. A new section 3-A was inserted authorising the State Government to issue notifications u/s

3(1) raising the rate of tax retrospectively with effect from October 1, 1980. Pursuant to the amended section, the State Government issued

notification in March, 1981 raising the tax to Rs. 500 per seat subject to the maximum of Rs. 35,000 from October 1, 1980. Upholding the levy,

the court was of the view that merely because the budget estimates showed excess of income over expenditure, it cannot be said that the

enhancement is expropriatory and not compensatory in character. The Act was held to be not confiscatory in character and that it was not possible

to hold the impugned levy as an unreasonable restriction on the freedom of the petitioners to carry on the business. The court observed that it

cannot be said that merely because a business becomes uneconomical as a consequence of new levy, the levy would be an unreasonable restriction

on the fundamental right to carry on the business.

11. The observations made in the decision in The Assistant Commissioner of Urban Land Tax and Others Vs. The Buckingham and Carnatic Co.

Ltd., etc., , are apt in the context :

It is not possible to put the test of reasonableness into the strait-jacket of a narrow formula. The objects to be taxed, the quantum of tax to be

levied, the condition subject to which it is levied and the social and economic policies which a tax is designed to subserve are all matters of political

character and these matters have been entrusted to the Legislature and not to the courts. In applying the test of reasonableness it is also essential to

notice that the power of taxation is generally regarded as an essential attribute of sovereignty and constitutional provisions relating to the power of

taxation are regarded not as grant of power but as limitation upon the power which would otherwise be practically without limit.

12. In Rai Ramkrishna and Others Vs. The State of Bihar, , their Lordships observed as under :

..... 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. This is illustrated by the decision of this Court in the case of Kunnathat

Thathunni Moopil Nair Vs. The State of Kerala and Another, where a taxing statute was struck down because it suffered from several fatal

infirmities. On the other hand, we may refer to the case of Raja Jagannath Baksh Singh Vs. The State of Uttar Pradesh and Another, where a

challenge to the taxing statute on the ground that its provisions were unreasonable was rejected and it was observed that unless the infirmities in the

impugned statute were of such a serious nature as to justify its description as a colourable exercise of legislative power, the court would uphold a

taxing statute.

13. Their Lordships in The Assistant Commissioner of Urban Land Tax and Others Vs. The Buckingham and Carnatic Co. Ltd., etc., went on to

observe that as a general rule it may be said that so long as a tax retains its character as a tax and is not confiscatory, or extortionate the

reasonableness of the tax cannot be questioned.

14. It would hence appear that a taxing statute cannot be held either to be confiscatory or to be unreasonable impinging upon article 19(1)(g)

unless the objectives of it is found to be so serious in nature as to inescapably pint to a colourable exercise of the legislative power, i.e., a complete

unwarranted departure from the constitutionally sanctioned authority. When legislation would be regarded as having over-stepped its limits of

reasonableness, straying into forbidden area, has to be considered in the background of the legislation itself. But it can be safely said that unless the

breach is so pronounced, apparent, and grave, it cannot be declared to be nullity for having over-stepped the constitutional limit. Since there is a

presumption of the constitutionality of the statute, the striking down of the legislation would be a rare exercise only upon conclusion of real violation

of the constitutional sanction. From time to time, the judicial wisdom of the apex Court has handed down the caution in declaring a statute ultra

vires. We have already adverted to some of the cases. In Epari Chinna Krishna Moorthy, Proprietor, Epari Chinna Moorthy and Sons,

Berhampur, Orissa Vs. State of Orissa, , it was held that while it is true that in considering the question as to whether legislative power to pass an

Act retrospectively has been reasonably exercised or not, it is relevant to enquire how the retrospective operation operates. But it would be

difficult to accept the argument that because the retrospective operation may operate harshly in some cases, the legislation itself is invalid.

15. The question as to whether a long period of retrospectivity would make a statute unreasonable was considered in the decision in Rai

Ramkrishna and Others Vs. The State of Bihar, . It was argued that where the length of the retrospectivity was long, i.e., 11 years, the restriction

was unreasonable. The court observed :

We do not think that such a mechanical test can be applied in determining the validity of the retrospective operation of the Act..... That is why we

think the test of the length of time covered by the retrospective operation cannot by itself be treated as a decisive test.

16. Jawaharmal Vs. State of Rajasthan and Others, , was again a case where the challenge to the retrospectivity on the ground of such statute as

involving an element of unreasonableness for violating the fundamental rights under article 19(1)(f) and (g) of the Constitution was rejected.

17. In M/s. Pankaj Jain Agencies Vs. Union of India and others, , the court decided that enhancement of duty cannot be said to be violative of

article 19(1)(g) on the ground of excessiveness.

18. In the background of this discussion, it is to be seen whether the restrospective increase in the rate of tax by one per cent is per se so

unreasonable as to declare the provisional ultra vires. It has to be first of all stated that no attempt has been made by the petitioners to show,

except for making a blanket submission, that the marginal rise of one per cent is an unreasonable legislation and that how the provision operates so

drastically unreasonably which must compel a judicial declaration of its invalidity. The period of retrospective operation is itself too small, i.e., from

August 1, 1996 to October 17, 1996 or October 31, 1996 as the petitioners claim. This itself is not such an unreasonable period which would

ipso facto warrant a pronouncement of its nullity. The reason advanced in the counter-affidavit for the retrospective operation is understandable

and cannot be said to be perfunctory. It has been said that after the Ordinance was issued along with section 5A introducing turnover tax, there

were representations made by various trading associations on consideration of which the Government thought of exempting particular items from

the turnover tax and to compensate the same by introducing retrospective levy at the first point of sale. It is true that the petitioners did not make

any representations since the turnover since tax was to be realised not from them, but from the subsequent sellers. But only because the tax which

was originally purported to be collected from one category of dealers was shifted later to another category of dealers, that cannot by itself be a

cogent reason to declare the law in that regard to be bad. It is the prerogative of the Government, as has been seen earlier, to determine the scope

and application of the tax, the policy of the taxation, etc. There is no inherent incompetence to levy the tax on the petitioners retrospectively, to

offset the loss caused by granting of exemption which had been done by G.O.Ms. No. 746. The Government orders were issued during the

pendency of the Ordinance and hence when the Act was enacted to replace the Ordinance, corrective measures were taken to re-coup the loss

because of the exemption granted.

19. Taxation is not merely a process of raising revenue, but is also a tool in social engineering which may be adopted in the wisdom of the

Legislature, to classify the tax-payers into different grades and to collect higher tax from one group in comparison to the other. There is nothing

wrong in the Legislature choosing the shift the higher portion of the burden of tax to one group, considering the harshness and its relative hardship,

in comparison to be suffered by the other. It is of course true that it is possible to be urged by the group from whom the exaction is made that the

disadvantageous treatment is not sustainable because of the basis of the classification itself being faulty and unreal. But such a question does not

arise. No attempt has been made to show how the shifting of the burden to compensate the loss in the turnover tax is unreasonable.

20. It was observed by the Constitution Bench in S. Kodar Vs. State of Kerala, , justifying graded system of tax :

And, to make his tax heavier, both absolutely and relatively, is not arbitrary discrimination, but an attempt to proportion the payment to capacity

to pay and thus to arrive in the end at a more genuine equality. The economic wisdom of a tax is within the exclusive province of the Legislature.

The only question for the court to consider is whether there is rationally in the belief of the Legislature that capacity to pay the tax increases, by and

large, with an increase of receipts.

21. Strenuous arguments have been advanced on behalf of the petitioners that the increase in the rate of tax retrospectively is inconsistent with the

scheme of the Act. For the purpose reliance is placed upon the definitions of ""turnover"" u/s 2(s), ""Issue of Bills"" dealt with u/s 13-C, ""Prohibition

against collection of tax in certain cases"", dealt with u/s 30-B. Reliance is also placed on section 30-C which provides for imposition of penalty for

contravening certain provisions.

22. It is argued that in the present scheme of the Act, the sales tax is intended to be passed on to the customers and that the earlier decision of the

Supreme Court in Central Wines, Hyderabad Vs. Special Commercial Tax Officer, holds the field no longer. For the purpose of the present case,

it is not necessary to go into the question whether the tax can be passed on to the customer. Even such contention of the petitioner is accepted, yet

that can hardly be a feature to hold the retrospective increase of tax as ultra vires. A provision in an Act cannot be held ultra vires because it is

contrary to some other provision of the same Act. The power to legislate being plenary for the Legislature, it can legislate in any way to suit

different contingencies. A legislation can be ultra vires only if it is not within the legislative competence or if it violates any of the fundamental rights

or any other constitutional provision. Merely because the tax is not able to be passed on to the customers, it would not render the legislation itself

void.

23. The question has also been answered by the Supreme Court on several occasions. In J.K. Jute Mills Co. Ltd. Vs. The State of Uttar Pradesh

and Another, , it was observed that where the transaction is one of sale of goods, the power of State to impose a tax thereon is plenary and

unrestricted and subject only to any limitation which the Constitution might impose, and in the exercise of that power, it would be competent for the

Legislature to impose tax on sales which had taken place prior to the enactment of the legislation. The court pointed out that though sales tax is

intended to be passed on to the consumer, yet it is not an essential characteristic of a sales tax that the seller must have a right of passing it on to

the consumer, nor is the power of the Legislature to impose a tax on sales conditional on its making a provision for sellers to collect the tax from

the purchasers. Whether the laws should be enacted, imposing a sales tax or validating the imposition of sales tax, when the seller is not in a

position to pass it on to the consumer, is a matter of policy and does not affect the competence of the Legislature. The court approved its earlier

decision, in the context in The Tata Iron and Steel Co., Ltd. Vs. The State of Bihar, . The court answered the question saying :

It was finally urged on the basis of sections 8-A, 14 and rule 23 of the U.P. Sales Tax Act that they contemplated only a prospective legislation

and that those sections would be impossible of compliance under the present legislation. This is a consideration which is wholly foreign to the

present question. The point which we have got to decide is whether the Validation Act is ultra vires. That has to be determined solely on the

construction of entry 54 in List II in the Seventh Schedule, and any other provisions of the Constitution bearing on the question. Even assuming that

the provisions of the U.P. Sales Tax Act XV of 1948 contemplate a levy of tax in futuro, that does not affect the power of the Legislature under

entry 54 to enact a law with retrospective operation. It can only result in those provisions being unenforceable as regards the levy under the

impugned notification. Dealing with a similar contention in M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another, , this

Court observed :

It is also contended that under the Sales Tax Acts, the levy of tax is annual and the rules contemplate submission of quarterly returns and payment

of taxes every quarter on the admitted turnover, and that a conditional legislation under which payment of tax will become enforceable in futuro

would be inconsistent with the scheme of the Act and the rules. But this argument, when examined, comes to no more than this that the existing

rules do not provide a machinery for the levy and the collection of taxes which might become payable in future, when Parliament lifts the ban.

Assuming that that is the true position, that does not affect the factum of the imposition, which is the only point with which we are now concerned.

That the States will have to frame rules for realising the tax which becomes now payable is not a ground for holding that there is, in fact, no

imposition of tax." (Page 1454 of SCR; page 483 of AIR).

None of the grounds urged by petitioner in support of the contention that the Validation Act is ultra vires can be sustained. In the result we must

hold that the Validation Act is ultra vires, and the impugned notification dated March 31, 1956, stands validated by it. This petition must therefore

be dismissed with costs.

Petition dismissed.

24. Reliance was also placed by Sri P. Srinivas Reddy, learned counsel for the petitioners in Krishnamurthi and Co. etc. Vs. State of Madras, .

The argument was repelled in Hiralal Rattanlal Vs. State of U.P. and Another etc. etc., while also rejecting retrospective levying being violative of

article 19(1)(g).

25. In S. Kodar Vs. State of Kerala, , the Court while negativing the challenge to retrospective levy ruled that the amount or rate of tax is a matter

exclusively within the legislative judgment and as long as a tax retains its avowed character and does not confiscate property to the State under the

guise of a tax, its reasonableness is outside the judicial ken. This decision reaffirmed the decision in J.K. Jute Mills Co. Ltd. Vs. The State of Uttar

Pradesh and Another, .

26. Shri Krishna Enterprises and Others Vs. State of Andhra Pradesh and Others, , has been placed reliance upon by Mr. M. V. K. Murthy

where it was observed that the incidence of sales tax is ordinarily passed on to the customer and in the event of accepting the retrospective

amendment a liability would be created without affording any opportunity to the assessee to pass on the incident of the tax and in such

circumstances, there was no justification for review of the judgment it had earlier rendered. In the judgment the court had held that the benefit of

the Constitution (46th Amendment) Act which had been extended by way of adoption by the APGST Act, 1957 up to September 13, 1985, was

available to the dealers provided they satisfied the appropriate authority that they came within the exemption of section 6 of the Constitution (46th

Amendment) Act. Under such circumstances the review was refused making the observation relied upon by Mr. Murthy.

27. We may now refer to some of the citations relied upon by the learned counsel for the petitioners. Assailing the retrospective levy on the

argument that the Statement of Objects and Reasons must convey proper and cogent reasons for justifying the levy, reliance was placed on the

following observation made in D. Cawasji and Co., Mysore Vs. State of Mysore and Another, :

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 imposition of tax with retrospective operation has to be justified on proper and cogent grounds.

28. This case was considered by the earlier judgment in W.P. No. 2425 of 1997 explaining that what was observed in the case by the apex Court

was that in the facts and circumstances of the case, to enhance levy from 6 percent to 45 per cent with retrospective effect was arbitrary and

unreasonable. The enhancement in that case had been made to overcome the decision of the High Court wherein certain assessments had been

found untenable in law and the Government was under an obligation to refund the collection. To obviate such difficulty, tax was enhanced

retrospectively which the apex Court found in the circumstances to be arbitrary and unreasonable. The Amendment Act did not proceed to cure e

defect or lacuna by bringing an amendment providing for exigibility of sales tax on excise duty, health cess and education cess. There was no

attempt for remedying the defect or removing the lacuna. The Amendment Act had merely sought to raise the rate of tax from 6 per cent to 45 per

cent with effect from April 1, 1966. Thus the object of the amendment was only to nullify the judgment of the High Court and to enable the State

Government to retain the amount wrongfully and illegally collected as sales tax. In the circumstances, the impost had been held as arbitrary and

unreasonable. The observations were considered in a later case in Entertainment Tax Officer and Another Vs. Ambae Picture Palace, . While

explaining the background in which the observations in D. Cawasji''s case [1985] 58 STC 1 (SC), were made, the court observed as under :

Though it is not for the State to justify or explain the necessity for the amendment even in relation to retrospectivity of the Act but obviously, on

the face of it, there appeared to be a change of policy by a succeeding Government on the policy pursued by its predecessor. Surely the successor

Government can have different rules from their predecessor including the matters relating to taxation or mode of taxation or basis of taxation or

objects of taxation, etc. No explanation was required from the State for the amending Act having retrospective effect.

29. The decision in Empire Industries Limited and Others Vs. Union of India and Others, , replied upon by Sri S. Krishnamurthy does not say

anything different than what has been discussed earlier and indeed it reiterates the same view that imposition of tax by legislation makes the subject

pay taxes, that it is well recognised that tax may be imposed retrospectively, and that it is also well-settled that that by itself would not be

unreasonable restriction on the right to carry on the business. The Constitution Bench decision in Ujagar Prints v. Union of India ,, was relied upon

by Sri S. Krishnamurthy. The Bench observed as under :

In testing whether a retrospective imposition of a tax operates so harshly as to violate the fundamental rights under article 19(1)(g), the factors

considered relevant include the context in which retroactivity was contemplated such as whether the law is one of validation of taxing statutes

struck down by courts for certain defects; the period of such retroactivity, and the degree and extent of any unforeseen or unforeseeable financial

burden imposed for the past period.

The observations do not help the petitioners in any way. The observations are only reiteration of the same principles as has been seen earlier.

30. Sri P. Kodandaram, learned counsel for some of the petitioners has placed reliance on a decision in Commissioner of Income Tax Vs. Mico

Products Pvt. Ltd., in which observation was made as under :

.....normally, unless there are compelling reasons for making a retrospective amendment in public interest, such a retrospective amendment is

not enacted. And when a retrospective amendment is enacted without any compelling reasons of public interest, it runs the risk of being declared

unreasonable or arbitrary and violative of articles 14 and 19(1)(g) of the Constitution of India. When a retrospective amendment does not validate

a defective law or fill up any lacuna in the existing law, the length of the retrospective operation of a fresh levy does become relevant while

considering the extent of hardship which the assessees would suffer.

31. The length of retrospective levy though is a factor for consideration, that by itself is not a decisive test as has been affirmed by the decisions in

Rai Ramkrishna and Others Vs. The State of Bihar, and in S.K. Verma Vs. Mahesh Chandra and Another, . But as it is on facts also even if such

a test is applied, there is no material to hold the levy as unreasonable.

32. Only one other submission of the learned counsel remains. It has been argued that though the Amendment Act was gazetted on October 17,

1996 yet it was not made available till October 31, 1996 and hence the law cannot be said to be operative until October 31, 1996 and that as

such the levy from October 17, 1996 to October 31, 1996 is not collectible. The argument has no force. It has been rightly pointed out by the

learned Government Pleader that since the law is retrospective from August 1, 1996, it hardly matters whether the gazette was made available or

not. Except an averment in the affidavit, nothing is shown that the gazette was not made available till October 31, 1996. Whatever it may be, as the

increase in rate of levy is retrospective in character, such a fact even if correct, would have no bearing on the question.

In the result, the writ petitions have no merit and are dismissed with costs. Hearing fee Rs. 500 in each case.

33. Writ Petition dismissed.