IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 17439 of 2011
With
SPECIAL CIVIL APPLICATION NO. 9476 of 2011
With
SPECIAL CIVIL APPLICATION NO. 14889 of 2011
With
SPECIAL CIVIL APPLICATION NO. 14302 of 2011
With
SPECIAL CIVIL APPLICATION NO. 11127 of 2013

For Approval and Signature:
HONOURABLE MR.JUSTICE M.R. SHAH Sd/-
and
HONOURABLE MR.JUSTICE R.P.DHOLARIA Sd/-

==========

1.	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2.	To be referred to the Reporter or not ?	No
3.	Whether their Lordships wish to see the fair copy of the judgment ?	No
4.	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	No
5.	Whether it is to be circulated to the civil judge ?	No

==========

KADWANI FORGE LTD THRO DIRECTOR UTPALBHAI B SAVALIYA & 27....Petitioner(s)

Versus

STATE OF GUJARAT THRO CHIEF SECRETARY & 2....Respondent(s)

==========

Appearance:

Special Civil Application No.17439/2011
MR MIHIR JOSHI, SR. ADVOCATE with MR VIMAL PATEL, ADVOCATE for the petitioner Nos.1 - 28
MR KAMAL TRIVEDI, ADVOCATE GENERAL with MS SANGITA VISHEN, AGP with MR JAIMIN GANDHI, AGP for respondent Nos.1-2
Rule unserved for Respondent No.3

Special Civil Application No.9476/2011
MR PERCY KAVINA, SR. ADVOCATE with MR AS ASTHAVADI, ADVOCATE for the petitioner No.1
MR KAMAL TRIVEDI, ADVOCATE GENERAL with MS SANGITA VISHEN, AGP with MR JAIMIN GANDHI, AGP for respondent Nos.1-3

Special Civil Application No.14889/2011
MR PERCY KAVINA, SR. ADVOCATE with MR AS ASTHAVADI, ADVOCATE for the petitioner No.1
MR KAMAL TRIVEDI, ADVOCATE GENERAL with MS SANGITA VISHEN, AGP with MR JAIMIN GANDHI, AGP for respondent No.1

Special Civil Application No.14302/2011
MR NANDISH A MASHRU, ADVOCATE for the petitioner Nos.1 - 2
MR KAMAL TRIVEDI, ADVOCATE GENERAL with MS SANGITA VISHEN, AGP with MR JAIMIN GANDHI, AGP for respondent No.1

Special Civil Application No.11127/2013
MR UCHIT N SHETH, ADVOCATE for the petitioner Nos.1 - 3
MR KAMAL TRIVEDI, ADVOCATE GENERAL with MS SANGITA VISHEN, AGP with MR JAIMIN GANDHI, AGP for respondent No.1
MR IH SYED, ASSTT. SOLICITOR GENERAL for Respondent Nos.2 - 3

==========

CORAM: **HONOURABLE MR.JUSTICE M.R. SHAH**
and
HONOURABLE MR.JUSTICE R.P.DHOLARIA

Date : 22/07/2014

COMMON CAV JUDGMENT

(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

[1.0] As common question of law and facts arise in this group of petitions, all these petitions are disposed of by this common judgment and order.

[2.0] In all these petitions, respective petitioners have prayed for an appropriate writ, direction, order to quash and set aside the impugned notification dated 29.06.2010 as amended vide notification dated 07.09.2010 issued by the respondent No.2 at Annexure ‘A’ & ‘B’.

It is also further prayed to hold and declare section 11(6) of the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as “VAT Act”) as being unconstitutional and invalid.

It is also further prayed to direct the respondent Nos.1 and 2 to refund the amount of tax paid by the petitioners for illegal reduction of tax credit to the extent of 2% on the taxable turnover of purchases within the State for which tax credit is admissible in respect of the goods sold/resold in the course of inter-state trade and the commerce or the goods used as input including raw material in the manufacture of goods which are sold in the course of inter-state trade and commerce.

For the sake of convenience the facts as stated in the Special Civil Application No.17439/2011 are considered and the said Special Civil Application No.17439/2011 is treated as a lead matter.

[3.0] That the petitioners are engaged in the activity of manufacturing and trading of iron and steel goods specified in Entry 43 of Schedule-II of the VAT Act as well as goods of special importance declared under Section 14 of the Central Sales Tax Act, 1956 (hereinafter referred to as "CST Act").

[3.1] It is the case on behalf of the petitioners that they are registered dealers under the provisions of the VAT Act and are holding certificate of registration granted under VAT Act and are entitled to tax credit on their respective purchases on taxable goods which are sold/resold in the course of inter-state trade and commerce. It is the case on behalf of the petitioners that in view of the policy of the Central Act and introduction VAT Act, the petitioners who are the registered dealers are entitled to tax credit under the VAT Act.

[3.2] That the respondent No.2 by notification dated 31.03.2006 specified the goods mentioned in the Schedule appended thereto which shall not be entitled to any tax credit. It is the case on behalf of the petitioners that therefore the petitioners are entitled to tax credit on taxable turnover of purchases within the State and inter-state trade and commerce.

[3.3] It is the case on behalf of the petitioners that despite the fact that the State has been compensated for the loss of revenue generated in view of the introduction of the VAT Act, the Finance Minister in the speech given on the budget presented for the year 2010-11 proposed to

reduce the tax credit to the extent of 2% on purchase of goods made from within the State and used in inter-state sales only on the ground that the Central Government has not taken any decision regarding payment of compensation being the loss suffered by the State because of reduction in rate of central sales tax for the year 2010-11.

[3.4] It is the case on behalf of the petitioners that anticipating reduction of tax credit contrary to the VAT Act, the representations were made by the Greater Rajkot Chamber of Commerce and Industries as well as by Rajkot Engineering Association. It is the case on behalf of the petitioners that without considering the said representations, the respondent No.2 by exercising powers under Section 11(6) of the VAT Act, has issued a notification dated 29.06.2010 for non-entitlement of tax credit to the extent of 2% on the taxable turnover of purchases in respect of the goods mentioned in the said notification. That the aforesaid notification dated 29.06.2010 has been further amended vide notification dated 07.09.2010 and certain other goods are exempted under the amended notification. It is the case on behalf of the petitioners that despite the representations made requesting the respondent No.2 to withdraw the reduction of tax credit, no further steps are taken and tax credit to the extent of 2% on the taxable turnover of purchases within the State for which tax credit is admissible, in case the goods are sold/resold in the course of inter-state trade and commerce has been denied. Hence, the respective petitioners have preferred the present Special Civil Applications for the aforesaid reliefs.

[4.0] Shri Mihir Joshi, learned Senior Advocate, Shri Percy Kavina, learned Senior Advocate and Shri Uchit Sheth, learned adovocates have appeared on behalf of respective petitioners.

Shri Mihir Joshi, learned Senior Advocate appearing on behalf of

the petitioners has vehemently submitted that section 11(6) of the VAT Act gives the Government power to classify class of goods or dealers and not class of transactions and therefore, the impugned notification which creates class of transactions is ultra vires the VAT Act. It is submitted that in exercise of power conferred by section 11(6) of the VAT Act, the State Government can either specify the goods or it can specify class of dealers. It is submitted that however as per Entry No.2 of the impugned notifications, input tax credit is to be curtailed by 2% if the goods are sold in the course of inter-State trade and commerce or if they are used as input including raw material in the manufacture of goods sold in the course of inter-State trade and commerce. It is submitted that in other words the State Government has effectively specified the class of transactions for which the input tax credit is to be restricted. It is submitted that therefore such specification is beyond the scope of section 11(6) of the VAT Act and therefore, Entry No.2 of the impugned notifications is ultra vires the parent provision of the VAT Act.

[4.1] It is further submitted by Shri Mihir Joshi, learned Counsel appearing for the petitioners that section 11(6) of the VAT Act is ultra vires and violative of Article 14 of the Constitution of India. It is submitted that section 11(6) of the VAT Act gives unbridled power to the executive and therefore, violates Article 14 of the Constitution of India.

[4.2] It is submitted that it is a well settled law that if the legislature grants discretion to the executive then it is necessary that the legislature also must give guidelines to the executive for the exercise of such power. Relying upon the decision of the Hon'ble Supreme Court in the case of **Krishna Mohan (P) Ltd. v. Municipal Corporation of Delhi** reported in **(2003)7 SCC 151** wherein section 116(3) of the Delhi Municipal

Corporation Act, 1957 was declared invalid as it delegated unguided and uncanalized legislative powers to the Commissioner to declare any plant and machinery as part of land or building for the purpose of determination of the rateable value thereof, it is submitted that section 11(6) of the VAT Act is also required to be declared invalid.

[4.3] It is further submitted that section 11(6) of the VAT Act simply gives the State Government power to specify goods and class of dealers which shall not be entitled to input tax credit. It is submitted that the said section does not provide for any guidance so as to under what circumstances such power should be exercised by the Government even though input tax credit is an integral and inseparable part of the value added tax scheme for which the VAT Act has been enacted. It is submitted that therefore section 11(6) of the VAT Act suffers from the vice of excessive delegation and hence it is arbitrary and violative of Article 14 of the Constitution of India.

[4.4] It is further submitted by Shri Mihir Joshi, learned Counsel appearing on behalf of the petitioners that even if the argument of the State Government that the guidance to the power conferred by section 11(6) of the VAT Act is to be derived from the overall scheme and other provisions of the VAT Act and therefore, it cannot be said that the discretionary power given by section 11(6) of the VAT Act is unbridled and excessive is accepted even then the impugned notifications are not in furtherance of the scheme of the VAT Act. It is submitted that the VAT Act envisages payment of tax on value addition at every stage of sales of goods. It is submitted that preamble of the VAT Act states that it is an Act to consolidate and amend the laws relating to the levy and collection of tax on “value added basis” in respect of sale or purchases of goods in the State of Gujarat. It is submitted that therefore while section 7 of the

VAT Act authorizes levy of tax on turnover of sales of a dealer under the VAT Act, section 11 of the VAT Act grants input tax credit of the tax paid on purchases made from within the State subject to the restrictions contained therein. It is submitted that section 13 of the VAT Act stipulates that the net amount of value added tax payable for a period shall be determined after adjustment of tax credit in the manner as may be prescribed. It is submitted that Section 11(6) of the VAT Act thus empowers the Government to provide for an exception to the General Scheme of VAT Act and therefore, such powers can be exercised only in a just and reasonable manner and if the circumstances so warrant. It is submitted that however curtailment of input tax credit by the impugned notifications has been contemplated with the sole objective of augmentation of revenue and not for any other purpose. It is submitted that as such the Finance Minister in the budget speech delivered prior to the issuance of the notification admitted that since the Central Government is yet to compensate the State Government for the loss of revenue because of reduction in rate of central sales tax, the State Government has decided to curtail input tax credit by 2% in case of inter-State transactions.

[4.5] It is submitted that therefore the impugned notifications, by curtailing input tax credit in inter-State transactions, vitiates the fundamental rationale behind introduction of the VAT Act which is to levy tax on value added basis, merely on the ground that the State Government has not received the promised compensation from the Central Government. It is submitted that it is a settled law that if delegated legislation is not judiciously exercised in furtherance of the scheme of the parent statute then it is liable to be struck down on the ground that it does not conform to plenary legislation or that it is manifestly arbitrary. In support of his above submissions, learned

Counsel appearing on behalf of the respective petitioners have heavily relied upon the decision of the Hon'ble Supreme Court in the case of **Dai Ichi Karkaria Ltd. v. Union of India & Ors.** reported in **(2000)4 SCC 57 (para 8)**. Learned Counsel appearing on behalf of the respective petitioners have also relied upon the decisions of the Hon'ble Supreme Court in the case of **P.J. Irani v. State of Madras** reported in **(1962)2 SCR 169** as well as in the case of **Punjab Tin Supply Co. v. Central Government** reported in **AIR 1984 SC 87**.

[4.6] It is further submitted that in the case of P.J. Irani (Supra), section 13 of the Madras Building (Lease and Rent Control) Act, 1949 empowered the State Government to exempt any building or class of buildings from all or any of the provisions of that Act. That the Government passed an order under that section exempting a particular cinema house from the provisions of that Act and in the said decision the Hon'ble Supreme Court confirmed the observation of the High Court to the effect that any order passed by the Government under Section 13 of that Act could be subject to judicial review by the Courts for finding out whether (a) it was discriminatory so as to offend Article 14 of the Constitution of India; (b) the order was made on grounds which were germane or relevant to the policy and purpose of the Act and (c) it was not otherwise malafide.

[4.7] It is submitted that the issuance of impugned notifications under Section 11(6) of the VAT Act merely on the ground that the State Government is yet to receive compensation from the Central Government does not bear any nexus with the scheme of the VAT Act nor does it advance the policy and purpose of the VAT Act, which is to levy tax on value added basis.

[4.8] It is submitted that assuming without admitting that section 11(6) of the Act is a valid piece of legislation, even then the impugned notifications are in defiance of the scheme of the VAT Act. Therefore, they are arbitrary, discriminatory and violative of Article 14 of the Constitution of India.

[4.9] It is further submitted by the learned Counsel appearing on behalf of the respective petitioners that the Parliament and the State legislation are empowered by various provisions of the Constitution to levy tax on citizens of the country and augment revenue. It is submitted that for example the State legislature derives the power to levy tax from Entry 54 of List II of the Constitution of India. It is submitted that augmentation of revenue is thus a legislative and not an executive function and therefore the power conferred upon the State Government under Section 11(6) of the VAT Act cannot be used as a tool for augmentation of revenue as has been done by the impugned notifications.

[4.10] It is further submitted by the learned Counsel appearing for the respective petitioners that as such input tax credit under section 11 of the VAT Act is a statutory right given by the legislature and not an executive exemption. It is submitted that section 11 of the VAT Act entitles registered dealers to avail input tax credit *inter alia* of tax paid on purchases from registered dealers. It is submitted that section 11(3)(a)(ii) enables a dealer to avail input tax credit even if the goods are sold in the course of inter-State trade and commerce. It is submitted that therefore input tax credit is a right conferred upon dealers by the statute itself. It is submitted that infact it is an intrinsic part of the value added tax scheme and tax credit cannot be compared to an executive exemption notification. It is submitted that in the case of **Collector of**

Central Excise v. Dai Ichi Karkaria Ltd. reported in **(1999)7 SCC 448** in the context of the excise law it was observed that Modvat credit is an indefeasible right if it is validly availed.

[4.11] It is submitted that thus the input tax credit once validly availed by the dealers under Section 11 of the VAT Act becomes a statutory right and cannot be wished away as being merely a concession which can be withdrawn at the whim of the executive.

[4.12] It is submitted by the learned Counsel appearing on behalf of the respective petitioners that even if it is accepted that section 11(1)(b) stipulates that the tax credit shall be subject to provisions of sub-section (2) to sub-section (12) and sub-section (6) empowers the State Government to reduce input tax credit, the input tax credit being a statutory right and an integral part of the value added tax scheme, such power given to the executive by section 11(6) of the VAT Act has to be used reasonably and in genuine circumstances.

[4.13] It is submitted that the power cannot be misused to the extent of wiping off the right of tax credit altogether to the extent of 2% in the case of inter-State sale transactions and that too only because the State Government is purportedly yet to receive compensation from the Central Government. It is submitted that therefore this is a flagrant abuse of power which is contemplated in the statute only to provide for exceptions to the right of the input tax credit on case to case basis if the situation and public interest so demands. It is submitted that therefore the impugned notifications are manifestly arbitrary and therefore violative of Article 14 of the Constitution of India.

[4.14] It is further submitted by learned Counsel appearing on

behalf of the respective petitioners that the reduction of input tax credit by the impugned notification affects free flow of inter-State trade and commerce and therefore, it violates Article 301 of the Constitution of India. It is submitted that Article 301 of the Constitution of India mandates the trade, commerce and intercourse throughout the territory of India shall be free. It is submitted that Article 304(b) of the Constitution allows the State Legislatures to impose reasonable restrictions on the freedom of trade, commerce or intercourse with or within the State as may be required in public interest. It is submitted that levy of tax is a restriction on the flow of trade and commerce and therefore, as such levy cannot be tested with reference to Article 304(b) of the Constitution of India so as to ascertain whether it is a reasonable restriction or not.

[4.15] It is submitted that the Hon'ble Supreme Court recently in the case of **State of U.P. & Ors. v. Jaiprakash Associates Ltd.** in **Civil Appeal No.3026 of 2004** decided on **18.10.2013** has held that rebate of tax is also within the purview of taxation and therefore, grant or non-grant can also by held to be discriminatory and violating Article 304 of the Constitution of India. It is submitted that thus reduction of input tax credit can also be examined with reference to Article 301 read with Article 304 of the Constitution. In support of their above submissions, reliance is placed to a decision of the Hon'ble Supreme Court in the case of **Lohara Steel Industries Ltd. v. State of Andhra Pradesh** reported in **(1997)2 SCC 37** wherein exemption notifications issued under the Andhra Pradesh General Sales Tax Act, 1957 were held to be discriminatory and violative of Article 304(a) of the Constitution of India.

[4.16] It is further submitted by learned Counsel appearing on

behalf of the respective petitioners that the reduction of input tax credit relating to the inter-State trade and commerce by the impugned notifications merely because the State Government is yet to receive compensation for reduction of central sales tax from the Central Government is an unreasonable restriction on the flow of inter-State trade and commerce inasmuch as inter-State sale transactions are worse-off vis-a-vis intra-State transactions because of the additional tax burden of 2% by way of reduction of input tax credit. It is submitted that therefore, the impugned notifications violates Article 301 read with Article 304(b) of the Constitution of India.

[4.17] Without prejudice to the above submissions and in the alternative, it is further submitted that in any case the impugned notifications insofar as they require reduction of input tax credit even in respect of goods declared to be of special importance under Section 14 of the CST Act violate Article 286 of the Constitution of India. It is submitted that Article 286(3)(a) of the Constitution of India authorizes Parliament of India to declare goods as of special importance and to impose restrictions and conditions in regard to the power of the States for levy, rates and other incidence of tax on such goods. It is submitted that thus the Parliament has been given authority to impose restrictions on the powers of the State Government to impose tax on sales or purchases of declared goods taking place within the State. It is submitted that pursuant to the powers conferred by the Constitution of India, Parliament has in section 2(c) of the Central Act defined declared goods as those goods which are declared under Section 14 of the Central Act as goods of special importance in inter-State trade and commerce. It is submitted that restrictions of the State in imposing tax on sales or purchases of declared goods are stated in section 15 of the Central Act. It is submitted that on considering section 15 of the Central Act it

imposes restrictions and conditions on the power of the State to impose tax on sales or purchases of declared goods taking place within the State.

[4.18] It is further submitted that an analysis of section 15(b) of the Central Act reveals the following:

(i) On sale or purchase of declared goods tax must have been levied under the State law.

(ii) The goods so purchased must have been resold in the course of inter-State trade and commerce.

(iii) On inter-State sale tax must have been paid under the Central Act.

(iv) In such eventuality, the tax levied under the State law on the earlier transaction of sale or purchase of goods will be reimbursed to the dealer making the inter-State sale.

(v) The reimbursement of tax paid under the State law will be done in the manner and subject to such conditions as may be provided in the State law.

It is further submitted that thus a mandatory condition has been imposed under section 15(b) of the Central Act upon the States that they should refund to the dealers the tax paid on local sales and purchases of declared goods if those goods are resold in the course of inter-State trade and commerce.

It is further submitted that input tax credit admissible under Section 11 of the VAT Act is nothing but refund of tax paid on purchases made from within the State of Gujarat. Insofar as inter-State sale of declared goods is concerned, the provisions of section 11 of the VAT Act are in compliance with Article 286(3) of the Constitution of India read with Section 15(b) of the Central Act.

It is further submitted by the learned Counsel appearing on behalf of the respective petitioners that the impugned notifications issued by

the State Government under Section 11(6) of the VAT Act curtail to the extent of 2% the amount of refund of tax paid on purchases of declared goods as stipulated by Section 15(b) of the Central Act and therefore insofar as declared goods are concerned, the impugned notifications are clearly violative of Article 286 of the Constitution of India.

In support of their above submissions, learned Counsel appearing on behalf of the respective petitioners have heavily relied upon the decision of the Hon'ble Supreme Court in the case of **Manickam and Co. v. State of Tamil Nadu** reported in **39 STC 12 (SC).** It is submitted that in the said case the facts were that the dealer had purchased cotton yarn by paying tax to the vendors under the Tamilnadu General Sales Tax Act, 1959. Cotton yarn so purchased was resold in the course of inter-State trade and commerce. On the inter-State sales tax was paid under the Central Act. The dealer claimed refund of the tax paid on purchases. The same was denied as at the relevant time section 15(b) of the Central Act provided for giving refund instead of reimbursement as it stands now and therefore the interpretation of the lower authorities including the Madras High Court was that the refund can be given only to the dealers who had paid the tax. The High Court held that the dealer had purchased by paying tax to the vendor and therefore it was held that it was not entitled to refund of tax paid on local purchases. The Hon'ble Supreme Court did not accept the view so held by Madras High Court. According to the Hon'ble Supreme Court refund can be given not only to the dealer who had actually deposited the tax to the State but it could not also be to a dealer making inter-State sale because the price charged from such dealer by the seller would normally take into account the sale tax paid by it. While taking this decision, the Hon'ble Supreme Court also relied upon the subsequent amendment whereby the term "refunded" was substituted by "reimbursement" as is the provision which is currently in force and it has observed as under on page 18:

> *"The amended provisions makes it plain beyond any pale of controversy that the tax levied under the State Act in respect of declared goods has to be reimbursed to the person making sale of those goods in the course of inter-State trade and commerce in such manner and subject to such conditions as may be provided in the law in force in that State. According to the notes appended to the statement of objects and reasons of the Bill, which emerged as the amending Act, the amendment made in clause (b) makes it clear that local sales tax would be reimbursed to the person making the sale in the course of inter-State trade and commerce."*

[4.19] Learned Counsel appearing on behalf of the respective petitioners have heavily relied upon the decision of the Hon'ble Supreme Court in the case of **State of Mysore and Ors. v. Mallick Hashim and Co.** reported in **31 STC 358 (SC).** It is submitted that in the said case the Mysore Sales Tax Act read with Rules made thereunder provided for granting refund of tax paid under the Act on purchases of declared goods if the goods were resold in the course of inter-State trade and commerce subject to conditions of filing application in the prescribed form within the prescribed time limit. The dealers who had resold declared goods in the course of inter-State trade and commerce were denied refund of tax paid on purchases either because they had not filed applications or they had filed applications after the expiry of prescribed time limit. That the Hon'ble Supreme Court affirmed the decision of the Mysore High Court that a rule cannot deprive the dealer of the right to get refund, to which it is entitled under section 15 of the Central Act. Thus even when the procedure prescribed under the State Rules was not complied with, Hon'ble Supreme Court has by treating section 15(b) of the Central Act as having an overriding effect held that the dealers are entitled to refund of tax paid on purchases of declared goods if those goods are resold in the course of inter-State trade and commerce.

Making above submissions and relying upon above decisions, it is submitted that impugned notifications which require reduction of input

tax credit to the extent of 2% even when declared goods are sold in the course of inter-State trade and commerce are clearly contrary to section 15(b) of the Central Act and hence, violative of Article 286(3) of the Constitution of India.

Making above submissions and relying upon above decisions it is requested to quash and set aside the impugned notifications as well as to declare section 11(6) of the VAT Act unconstitutional.

[5.0] All these petitions are opposed by Shri Kamal Trivedi, learned Advocate General appearing with Shri Jaimin Gandhi, learned AGP appearing on behalf of the respondent State.

[5.1] It is submitted that section 11 of the VAT Act deals with "tax credit". It is submitted that as per section 11(1) of the VAT Act, the benefit of tax credit is available to a purchasing dealer in a State on his purchase of taxable goods, which are intended for the purposes specified under Section 11(3) of the VAT Act. It is submitted that in view of section 11(6) of the VAT Act, tax credit so granted can be given a go-bye as a whole or can be proportionately reduced with reference to any goods or class of dealers which may be specified in a notification issued in exercise of powers conferred under section 11(6) of the VAT Act, whereas section 11(5) of the VAT Act enumerates 22 instances, which do not classify for any tax credit, at all.

[5.2] It is submitted that section 11(6) of the VAT Act as such does not suffer from the vice of excessive delegation and the same does not confer unbridled powers on the State to be exercised at its absolute discretion without laying down any guidelines as sought to be contended on behalf of the petitioners.

[5.3] It is submitted that the preamble of the VAT Act, objective behind the enactment of the VAT Act, its various provisions and section 11 of the VAT Act itself provide sufficient guidelines for providing benefit of the tax credit. Learned AG has relied upon the decision of the Hon'ble Supreme Court in the case of **Consumer Action Group v. State of T.N.** reported in **(2000)7 SCC 425 (Paras 5, 18 to 21 and 41).** It is submitted by Shri Trivedi, learned AG that in the aforesaid decision the Hon'ble Supreme Court has clearly held that section 113 of the Tamil Nadu Town Planning & Country Planning Act, 1971 does not suffer from the vice of excessive delegation inasmuch as its preamble, objects and reasons and various provisions thereof gave a clear-cut policy and guidelines, to the Government for exercising its power.

[5.4] It is submitted that the nature of power under Section 11(6) is conditional legislation. It is submitted that the legislature cannot constantly monitor the needs and emerging trend in the economy and is not in a position to engage itself in day-to-day regulation and adjustment and hence, power is conferred upon the State Government to provide for issuing a notification either to withdraw the tax credit fully or to reduce it partially and there is no warrant for reading any limitation into this power.

[5.5] It is submitted that as such somewhat similar arguments were advanced before the Hon'ble Supreme Court in the case of **Orient Weaving Mills (P) Ltd. v. Union of India** reported in **AIR 1963 SC 98**. It is submitted that in the aforesaid decision with reference to the power of the delegatee under Rule 8 of the Central Excise Rules, 1944 framed by the Central Government in exercise of powers conferred under Section 37 of the erstwhile Central Excise and Salt Act, 1944 came to be considered by the Hon'ble Supreme Court. It is submitted that in the

said case the Hon'ble Supreme Court has held that the said Rule does not suffer from the vice of excessive delegation of power to examine and is not violative of Articles 14 and 19(1)(f) of the Constitution of India on the ground that that power of exemption granted is uncontrolled and unguided. It is submitted that what is required to be appreciated is that when a subordinate legislation came to be constitutionally upheld, similar arguments can never succeed against plenary legislation, which is involved in the present case.

[5.6] It is further submitted by Shri Trivedi, learned AG that similar provisions are found in Rule 57-A of the Central Excise Rules framed under the Central Excise Act, 1944, popularly known as MODVAT Scheme whereunder, Central Government may by issuing notification specify, for the purpose of allowing credit of any duty of excise etc. as may be specified in the said notification paid on the goods used in or in relation to the manufacture of final product therefrom and for utilizing the credit so allowed towards payment of duty excise leviable on the final product. It is submitted that in the case of **Asian Paints India Ltd. v. Union of India** reported in **2008 (227) ELT 192,** the Madras High Court while dealing with the challenge against the validity of the Rule 57-A as well as the notification issued thereunder and by upholding the same has observed that, "....the Rule, which is generally an extension of statutory provisions can be questioned only if the Rule is over-edged the substantive Act or repugnant to the substantive statutory provisions. In the absence of anything to attribute that the rule which has been framed is repugnant to attribute that the rule which has been framed is repugnant to the main statutory provision, the assessee cannot have any legal right to put in issue a beneficial notification, which confers certain benefit under the Modvat credit scheme in respect of certain category of inputs..."

It is submitted that therefore in view of the above, section 11(6) of the VAT Act is absolutely valid and constitutional.

[5.7] Now, so far as the challenge to notification issued under Section 11(6) of the VAT Act is concerned, it is submitted that the said notifications under challenge and issued under section 11(6) of the VAT Act do not run counter to sections 11(1) and 11(3) of the VAT Act. It is submitted that in fact the provisions of section 11(6) are independent inasmuch as the provisions laid down under Section 11(1) of the VAT Act is subject to the provisions of sub-sections (2) to (12), and similarly, section 11(3)(a) is also subject to the provisions of section 11, i.e. including the provisions of section 11(6) of the VAT Act. It is submitted that therefore consequently it cannot be said that an instruction issued under Section 11(6) of the VAT Act is contrary to the rest of the provisions of section 11 of the VAT Act. In support of his above submissions, Shri Trivedi, learned AG has relied upon the following decisions of the Hon'ble Supreme Court.

1. Union of India v. Jalyan Udyog [AIR 1994 SC 88 (Paras 3, 4, 15 & 18 to 25)]

2. Kasnika Trading v. Union of India [(1995)1 SCC 724 (Paras 9, 21 to 24)]

3. Union of India v. Palivar Electricals (P) Ltd. [(1996)3 SCC 407 (Paras 8 to 10)]

[5.8] Now, so far as the submission on behalf of the petitioners that reduction of input tax credit to the extent of 2% being violative of Article 286(3) of Constitution of India is concerned, it is submitted by Shri Trivedi, learned AG that as such the State Government is not imposing any tax on, or altering the machinery provisions pertaining to tax on, the sale of goods from the State to a destination outside State,

for such sale from the State to a destination outside the State, is governed by the Central Sales Tax Act, 1956. It is submitted that in the instant case the State Government has acted exclusively within the domain of provisions of section 11 of the VAT Act and therefore, has acted constitutionally without violating any of the other provisions.

[5.9] Now, so far as the contention on behalf of the petitioners that the reduction of input tax credit by the impugned notifications affects free flow and inter-State trade and commerce and therefore, it is violative of Article 301 of the Constitution of India is concerned, it is submitted by Shri Trivedi, learned AG that the said plea is not sustainable in law, more particularly, when the rate of the central sales tax fixed by the Central Government has not been touched by the State Government at all.

[5.10] It is submitted that even the plea of the petitioners that industries in the State of Gujarat are placed on an unequal position vis-a-vis the other industries and the traders outside the State of Gujarat, is also not sustainable in law. It is submitted that in the case of **State of Madras v. N.K. Nataraja** reported in **AIR 1969(8) SC 147 (Paras 14 & 17)**, it is categorically held that prevalence of tax on sales of the same commodity cannot be regarded in isolation as determinative of the objects discriminated between one State and another.

[5.11] Now, so far as the reliance placed upon the CST Act and the contention that the impugned notifications are violative of Article 286 of the Constitution is concerned, it is submitted by learned Trivedi, learned AG that there would not be any reimbursement of tax in the instant case since the petitioners have manufactured and sold, new and different goods, since the vital condition for reimbursement under Section 15 is

that the purchase as well as sold goods both should be 'Declared Goods'.

[5.12] Shri Kamal Trivedi, learned AG has also relied upon the decision of the Hon'ble Supreme Court in the case of **Ganga Sugar Corporation Ltd. v. State of Uttar Pradesh & Ors.** reported in **(1980)1 SCC 223 (Paras 40, 42 and 50)** and has submitted that in the said decision the Hon'ble Supreme Court has observed and held that in taxation, the main criteria of intrinsic intricacy and pragmatic plurality persuade the Court, as a realist instrument and respecter of the other two branches, to allow considerable free play although never any play for caprice, mala fides or cruel recklessness in intent and effect.

[5.13] Shri Trivedi, learned AG relying upon the decision of the Hon'ble Supreme Court in the case of **Premium Granites and Another v. State of T.N. And Ors.** reported in **(1994)2 SCC 691 (Paras 55 and 56)** has submitted that in the said decision the Hon'ble Supreme Court has observed while considering the relevant provision under the Tamil Nadu Mineral Concession Rules, 1959 vis-a-vis Article 14 of the Constitution of India that absence of executive guidelines for exercise of the discretion would not render the provision unconstitutional when the guidelines can be gathered from the setting off the statute.

[5.14] Shri Trivedi, learned AG has also relied upon the decision of the Hon'ble Supreme Court in the case of **State of U.P. And Anr. v. Kamla Palace** reported in **(2000)1 SCC 557** and has submitted that as observed by the Hon'ble Supreme Court in the aforesaid decision, the legislature gaining wisdom from historical facts, existing situations, matters of common knowledge and practical problems and guided by considerations of policy must be given a free hand to devise classes – whom to tax or not to tax, whom to exempt or not to exempt and whom

to give incentives and lay down the rates of taxation, benefits or concessions. It is submitted that in the field of taxation if the test of Article 14 is satisfied by generality of the provisions the courts would not substitute judicial wisdom for legislative wisdom.

[5.15] Shri Trivedi, learned AG has also relied upon the decision of the Hon'ble Supreme Court in the case of **Sangam Spinners Limited v. Union of India and Ors.** reported in **(2011)11 SCC 408** in support of his submissions that input tax credit is subject to the provisions under Section 11 of the VAT Act and more particularly section 11(6) of the VAT Act confers powers upon the State Government to give a go-bye as a whole the tax credit was granted or can be partially reduced with reference to any goods or class of dealers which may be specified in a notification issued in exercise of powers conferred under Section 11(6) of the VAT Act and therefore, as such it cannot be said that there is absolutely a vested right in favour of the petitioners to get the tax credit.

[5.16] Shri Trivedi, learned AG appearing on behalf of the State has further submitted that paramount reason for which the respondent No.2 has issued the impugned notification is the public interest and by way of a government policy and this Court may not like to interfere with the same since the same is done with utmost bonafide intention as the State Government has been facing major revenue loss due to lowering the rate of central tax for inter-State trade and commerce under the CST Act, which is reduced by the Central Government to 2% with effect from 01.06.2008. It is submitted that State Government has acted, remaining within four corners of the provisions of section 11 of the VAT Act and in view of the rate of tax for inter-State trade and commerce fixed under the CST Act, which is 2%. It is submitted that the registered dealers who purchase taxable goods from within the Gujarat State would be entitled

to claim tax credit as per the statutory provisions contained in section 11 of the VAT Act. It is submitted that as such reduction in tax credit by 2% would have no bearing or effect on the sales made by the petitioners in the course of inter-State trade and commerce as claimed by the petitioners herein. It is further submitted that even no efforts are made to demonstrate any such effect in sales made by petitioners in the course of inter-State trade and commerce. It is submitted that therefore the State has acted within the four corners of Section 11 of the VAT Act which empowers the State Government to reduce the tax credit wholly or partially and therefore, reduction of 2% is in public interest for the overall growth and development of the State.

[5.17] Now, so far as the reliance placed upon the speech of the Finance Minister, it is submitted that bare perusal of the budget speech of the Finance Minister clearly suggests that reduction of the rate of central sales tax from 4% to 2% had severely affected the tax revenue of the State Government. It is submitted that consequent upon the rate so credited relating to the tax revenue, a decision was taken to reduce the tax credit to the extent of 2% on the purchase of goods so that the inevitable advance planning and the development programme of the State are not adversely affected and adequate funds for the development programme of the State are ensured. It is submitted that thus it cannot be said that only reason behind the reduction of the rate of central sales tax from 4% to 2% was non-receipt of the compensation from the central government.

Making above submissions and relying upon above decisions, it is requested to dismiss the present special civil applications and to hold that section 11(6) of the VAT Act is neither unconstitutional nor it suffers from vice of excessive delegation and also to hold and declare that the impugned notifications are also not unconstitutional and/or

ultra vires to section 11 of the VAT Act.

[6.0] In the reply to the submissions made by the learned Advocate General appearing on behalf of the State, it is submitted that as such the delegatee cannot pick and choose in a manner so as to frustrate the policy of the parent statute even if the VAT Act is a taxing statute. It is submitted that the argument of the State Government is that since the VAT Act is a taxing legislation, the Government, while acting as a delegatee under Section 11(6) of the VAT Act, has greater flexibility to pick and choose without violating Article 14 of the Constitution of India. It is submitted that it may generally be true that in a taxing statute the Government as a delegatee can exercise greater flexibility with regard to fixation of rates of tax, grant of exemption, etc. However, at the same time the same is not true for a provision such as Section 11(6) of the VAT Act which empowers the Government to provide for an exception to the very policy of the VAT Act which is to levy tax on value added basis. It is submitted that the Government in the present case while simply reducing the input tax credit at the rate of 2% in excess of or inter-State transactions vide the impugned notifications as acted in a cavalier manner without taking into consideration the rationale behind the grant of input tax credit under the VAT Act. It is submitted that therefore such reduction not being in furtherance of any purpose of the VAT Act, the Government should not be allowed to take shelter behind the general theory that State executives are given greater leverage under taxing statutes.

[6.1] Now, so far as the reliance placed upon section 11(5) of the VAT Act by the State Government is concerned, it is submitted that as such section 11(5) of the VAT Act is a non-obstante provision which lists out the circumstances under which input tax credit would not be

admissible to dealers. It is submitted that as such section 11(5) of the VAT Act cannot be compared with the impugned notifications issued by the Government acting as a delegate. It is submitted that exercise of powers by the Government under Section 11(6) of the VAT Act is certainly open to judicial scrutiny on the ground that it is unwarranted and arbitrary.

[6.2] Now, so far as the submission on behalf of the State that the input tax credit is in the nature of concession or exemption or additional benefit given to the dealers and therefore its curtailment by the State Government is not open to challenge is concerned, it is submitted by the learned Counsel appearing on behalf of the petitioners that the State Government has sought to compare the impugned notifications with exemption notifications issued under Section 5A of the Central Excise Act, 1944 and section 25 of the Customs Act, 1962. It is submitted that there is a flaw in the basic premise of this argument of the State Government inasmuch as input tax credit is not an exemption or concession as claimed by the Government but it is part and parcel of the scheme of the VAT Act. It is submitted that infact the preamble of the VAT Act itself says that the objective of the Act is to levy tax on value added basis. It is submitted that therefore the reduction of input tax credit cannot be put at par with withdrawal of an exemption as is sought to be portrayed by the Government. It is submitted that reduction of input tax credit and that too by delegated legislation requires a much stricter judicial scrutiny on the touch stone of the Article 14 of the Constitution of India. It is submitted that the impugned notifications not being in furtherance of the purpose of policy of the VAT Act are therefore arbitrary and it failed to satisfy the requirement of Article 14 of the Constitution of India.

[6.3] Now, so far as the reliance placed upon column No.2 of the Table in the impugned notifications which reads as “description of goods” and the argument on behalf of the Government that the impugned notifications is qua goods and not qua transactions and therefore it is within the scope of section 11(6) of the VAT Act. It is submitted by the learned Counsel appearing on behalf of the respective petitioners that the entire notifications needs to be viewed in its entirety. It is submitted that column No.2 of the notification cannot be read in isolation but it has to be read along with column 4. It is submitted that the notification as a whole is clearly qua transaction and not qua goods and therefore it is submitted that it is beyond the scope of Section 11(6) of the VAT Act.

[6.4] Now, so far as the submissions of learned Advocate General that the impugned notifications would not be applicable to declare goods on a case to case basis and therefore, this Court need not strike down the impugned notifications, it is submitted that it is important to note that while some of the declared goods have been expressly excluded, others have not been excluded. It is submitted that because of the notification as it stands now on the statute book, it will not be legally permissible for the administrative authorities to give full input tax credit in respect of declared goods which are not expressly excluded from the purview of the notification. It is submitted that therefore once it has been conceded by the State that the input tax credit cannot be reduced insofar as declared goods are concerned, the impugned notifications insofar as they apply to declared goods are required to be struck down as violating Article 286(3) of the Constitution of India read with Section 15(b) of the Central Act.

[6.5] Now, so far as reliance placed upon the decisions by the

learned Advocate General referred to hereinabove it is submitted that none of the decisions shall be applicable to the facts of the case on hand and / or of any assistance to the State Government with respect to challenge the impugned notifications.

Making above submissions, it is requested to allow the present special civil applications and grant the reliefs as prayed for.

[7.0] Heard learned Counsels appearing on behalf of the respective parties at length. In this group of petitions the respective petitioners have prayed to declare section 11(6) of the VAT Act being unconstitutional and invalid. Respective petitioners have also prayed for an appropriate writ, direction and order to quash and set aside the impugned notification dated 29.06.2010 as amended by the notification dated 07.09.2010 issued by the State Government in exercise of powers by sub-section (6) of section 11 of the VAT Act by which it is provided that input tax credit shall be reduced to the extent of 2% if the goods are sold/re-sold in the course of inter-State trade and commerce or the goods are used as input including raw material in the manufacture of goods which are sold in the course of inter-State trade and commerce. That with respect to the entries/goods mentioned tax credit is reduced to the extent of 2% is reduced with respect to all the goods excluding the goods specified in Schedule II of the VAT Act, in entries at Sr.Nos.13, 24, 48(i) viz. Isabgul, Jeera, Valyari, Methi, Suva, Ajma, Asaliya, Kalingada seeds, Khas khas, Dhana, Dhana dal, pepper at Sr. Nos.54 and 76.

[7.1] It is the case on behalf of the petitioners that section 11(6) of the VAT Act is unconstitutional and invalid as it gives unbridled power to the executive to specify any goods or class of dealers that shall not be entitled to tax credit as a whole or partial tax credit. It is also the

contention on behalf of the petitioners that section 11(6) of the VAT Act is ultra vires to section 11(1) to 11(5) of the VAT Act as the tax credit provided under Section 11(1) to 11(5) cannot be permitted to be taken away under Section 11(6) of the VAT Act more particularly when without any guidelines / guidance and therefore, the same is violative of Article 14 of the Constitution of India.

[7.2] While considering the challenge to section 11(6) of the VAT Act, first of all the entire section 11 of the VAT Act, which is as under, is required to be considered.

> 11. Tax Credit
>
> (1) (a) A registered dealer who has purchased the taxable goods (hereinafter referred to as the "purchasing dealer") shall be entitled to claim tax credit equal to the amount of,-
>
> (i) tax collected from him, by a registered dealer who has sold such goods to him or the tax payable by him to a registered dealer who has sold such goods to him during the tax period, or
> (ii) tax paid by him during the tax period under [sub-section (1), (2), (5) or (6)] of [section 9, or]].
> (iii) Tax paid by the purchasing dealer under the Gujarat Tax on Entry of Specified Goods into Local Areas Act, 2001.
>
> (b) The tax credit to be so claimed under this sub-section shall be subject to the provisions of sub-sections (2) to (12); and the tax credit shall be calculated in such manner as may be prescribed.
>
> (2) The registered dealer who intends to claim the tax credit shall maintain the register and the books of accounts in such manner as may be prescribed.
>
> (3) (a) Subject to the provisions of this section, tax credit to be claimed under sub-section (1) shall be allowed to a purchasing dealer on his purchase of taxable goods made in the State, which are intended for the purpose of-
>
> (i) sale or re-sale by him in the State;
> (ii) sale in the course of inter-State trade and commerce;
> (iii) branch transfer or consignment of taxable goods to other States (subject to the provision of Sub-clause (b)

below);
(iv) sales in the course of export out of the territory of India;
(v) sales to export oriented units of the units in Special Economic Zoners for sale in the in the course of export out of the territory of India;
(vi) use as raw material in the manufacture of taxable goods intended for (i) to (v) above or in the packing of the goods so manufactured.
(vii) Use as capital goods meant for use in manufacturer of taxable goods intended for (i) to (vi) above subject to the condition that such capital goods are purchased after the appointed day;

Provided that if purchases are used partially for the purposes specified in this sub-section, the tax credit shall be allowed proportionate to the extent they are used for the purposes specified in this sub-section".

(b) Notwithstanding anything contained in this section, the amount of tax credit in respect of a dealer shall be reduced by the amount of tax calculated at the rate of four per cent. on the turnover of purchases-

(i) of taxable goods consigned or dispatched for branch transfer or to his agent outside the State, or

(ii) of goods taxable which are used as raw materials in the manufacture, or in the packing of goods which are dispatched outside the State in the course of branch transfer or consignment or to his agent outside the State.

[(iii) of fuels used for the manufacture of goods.]

Provided that where the rate of tax of the taxable goods consigned or dispatched by a dealer for branch transfer or to his agent outside the State is less than four per cent., then the amount of tax credit in respect of such dealer shall be reduced by the amount of tax calculated at the rate of tax set out in the Schedule on such goods on the '[taxable turnover of purchases within the State].

(4) The tax credit shall not be claimed by the purchasing dealer until the tax period in which he receives from a registered dealer from whom he has purchased taxable goods, a tax invoice (in original) Containing Particulars as may be prescribed under Sub-section (1) of Section 60 evidencing the amount of tax.

(5) Notwithstanding anything contained in this Act, tax credit shall not be allowed for purchases-

(a) made from any person other than a registered dealer under this Act;

(b) made from a dealer who is not liable to pay tax under this Act;

(c) made from a registered dealer who has been permitted under section 14 to pay lump sum amount of tax in lieu of tax.;

(d) made prior to the relevant date of liability to pay tax as provided in sub-section (3) of section 3;

[(dd) made prior to the date of registration;]

(e) made in the course of inter-State trade and commerce;

(f) of the goods (not being taxable goods dispatched outside the State in the course of branch transfer or consignment) which are disposed of otherwise than in sale, resale or manufacture;

(g) of the goods specified in the Schedule I or the goods exempt from whole of tax by a notification under sub-section (2) of section 5;

(h) of the goods which are used in manufacture of goods specified in Schedule I, [or the goods exempt from the whole of the tax by a notification under sub-section (2) of section 5] or in the packing of goods so manufactured;

(i) of capital goods used in the manufacture of goods specified in Schedule I or the goods exempt from the whole of the tax by a notification under sub-section (2) of section 5 or in generation of electrical energy including captive power;

(j) of vehicles of any type and its equipment, accessories or spare parts (except when purchasing dealer is engaged in the business of sales of such goods)

(k) (of the property) or goods not connected with the business of the dealer;

(l) of the goods which are used as fuel in generation of electrical energy meant for captive use or otherwise;

(ll) of petrol, high speed diesel, crude oil and lignite unless such purchase is intended fore resale;]

(m) of the goods which are used as fuel in motor vehicles;

(mm) of capital goods used in transfer of property in goods (whether as goods or in some other form) involved in execution of works contract;

(mmm) of the goods for which right to use is transferred for any purpose (whether or not for a specified period), for cash, deferred payment or other valuable considerations;

(mmmm) made from a dealer after the name of such dealer has been published under sub-section (11) of section 27 or section 97;

(n) of the goods which remain as unsold stock at the time of closure of business;

[(nn) of the goods purchased during the period when the permission granted under clause (a) of sub-section (1) of section 14 has remained valid under clause (b) of that sub-section;]

(o) where original invoice does not contain the details of tax charged separately by the selling dealer from whom purchasing dealer has purchased the goods;

(p) where original tax invoice is not available with purchasing dealer or there is evidence that the same has not been issued by the selling dealer from whom the goods are purported to have been purchased;

[(I)] Notwithstanding anything contained in clause (a) or (b) in this sub-section and subject to conditions as may be prescribed, a registered dealer shall be allowed to claim tax credit in respect of purchase tax paid by him under subsection (1) or (2) of section 9.

[(II)] Notwithstanding anything contained in clause (d) or (dd) in this sub-section and subject to conditions as may be prescribed, a registered dealer shall be allowed to claim tax credit for the taxable goods held in stock on the date of registration which are purchased after 1st April, 2008 and during the period of one year ending on the date of registration.

[(III)] Notwithstanding anything contained in clause (nn) in this sub-section and subject to conditions as may be prescribed, a registered dealer, whose permission to pay lump sum tax under section 14, -

(a) is no longer valid on account of total turnover exceeding rupees fifty lakhs, or

(b) is cancelled on request by such dealer,

and becomes liable to pay tax under section 7, shall be allowed to claim tax credit for the taxable goods held in stock which are purchased after 1st April 2008 and during the period of one year ending on the date of liability to pay tax under section 7.].

(6) The State Government may, by notification in the Official Gazette, specify any goods or the class of dealers that shall not be entitled to whole or partial tax credit.

(7) Where a registered dealer without entering into a transaction of sale, issues to another registered dealer tax invoice, retail invoice, bill or cash memorandum with the intention to defraud the Government revenue or with the intention that the Government may be defrauded of its revenue, the Commissioner may, after making such inquiry as he thinks fit and giving a reasonable opportunity of being heard, deny the benefit of tax credit, in respect of such transaction, to such registered dealers issuing or accepting such tax invoice, retail invoice, bill or cash memorandum either prospectively or retrospectively from such date as the Commissioner may, having regard to the circumstances of the case, fix.

[(7A Notwithstanding anything contained in this section, in no case the amount of tax credit on any purchase of goods shall exceed the amount of tax in respect of the same goods, actually paid, if any, under this Act or any earlier law, into Government treasury;

Provided that, where purchase tax is shown as payable in the return by the claimant dealer on the purchase of the said goods effected by him, it shall be deemed to have been paid into Government treasury for the purpose of this sub-section;

Provided further that, where the tax levied or leviable under this Act or any earlier law is remitted or to be remitted or, deferred or is deferrable under any tax incentive scheme granted by the Government of Gujarat, then the tax shall be deemed to have been paid into the Government treasury for the purpose of this sub-section."].

(8)(a) If the goods purchased were intended for the purposes specified under sub-section (3) and are subsequently used fully or partly for purposes other than those specified under the said sub-section or are used fully or partly in the circumstances described in sub-section (5), the tax credit, if availed of, shall be reduced on account of such use, from the tax credit being claimed for the tax period during which such use has taken place; and such reduction shall be done in the manner as may be prescribed.

[(b)Where the capital goods referred to in sub-clause (vii) of clause (a) of sub-section (3) are not used continuously for a full period of five years in the State, the amount of tax credit shall be reduced proportionately having regard to the period falling short of the period of five years.

(9) The registered dealer may claim the amount of net tax credit,

which shall be determined in the manner as may be prescribed.

(10) Where any purchaser, being a registered dealer, has been issued with a credit note or debit note in terms of section 61 or if he returns or rejects goods purchased, as a consequence of which the tax credit availed by him in any period in respect of which the purchase of goods relates, becomes either short or excess, he shall compensate such short or excess by adjusting the amount of tax credit allowed to him in respect of the tax period in which the credit note or debit note has been issued or goods are returned, subject to such conditions as may be prescribed.

(11) A registered dealer shall apply fair and reasonable method to determine, for the purpose of this section, the extent to which the goods are sold, used, consumed or supplied, or intended to be sold, used, consumed or supplied. The Commissioner may, after giving the dealer an opportunity of being heard and for the reasons to be recorded in writing, reject the method adopted by the dealer and calculate the amount of tax credit as he deems fit.

(12) Subject to the exceptions as may be prescribed by the rules, any dealer including the Commission agent shall not be permitted to transfer his tax credit to any other dealer or as the case may be, the principal.

Explanation..—For the purpose of this section the amount of tax credit on any purchase of goods shall not exceed the amount of tax actually paid or payable under this Act in respect of the same goods."

On considering the entire section 11 as a whole, as per section 11(1)(a) of the VAT Act, a registered dealer who has purchased the taxable goods shall be entitled to claim tax credit equal to the amount of the tax collected from the purchasing dealer by a registered dealer from whom he has purchased such goods or the tax payable by the purchasing dealer to a registered dealer who has sold such goods to him during the tax period or tax paid by him during the tax period under sub-section (1), (2), (5) or (6) of section 9 or tax paid by the purchasing dealer under the Gujarat Tax on Entry of Specified Goods into Local Areas Act, 2001. However, from section 11(1)(a) of the VAT Act, the tax credit to

be so claimed under the aforesaid sub-section shall be subject to the provisions of sub-section (2) to sub-section (12) of section 11 and the tax credit shall be calculated in such manner as may be prescribed. Meaning thereby the tax credit shall be subject to the provisions of sub-section (2) to sub-section (12) of section 11 which includes sub-section (6) of section 11. Section 11(3)(a) provides under which circumstances the tax credit tobe claimed under sub-section (1) shall be allowed to a purchasing dealer. Sub-section (4) of section 11 provides the circumstances under which the tax credit shall not be claimed by the purchasing dealer. Sub-section (5) of section 11 provides the circumstances under which notwithstanding anything contained in the Act, the tax credit shall not be allowed for the purchases. Sub-section (6) of section 11 permits and/or enables the State Government, by notification in Official Gazette, specify any goods or the class of dealers that shall not be entitled to whole or partial tax credit. Therefore, considering section 11 of the VAT Act as a whole, the tax credit provided under Section 11(1)(a) to a purchasing dealer is conditional one and subject to sub-section (2) to sub-section (12) of section 11 inclusive of sub-sections (3) to (6) of section 11. Therefore, as such it would be for the State Government to specify any goods or the class of dealers that shall be entitled to whole or partial tax credit, by the notification in the Official Gazette. Therefore, it is for the State Government to specify the goods or the class of dealers that shall not be entitled to whole or partial tax credit and it can be said to be the policy decision of the State Government to specify any goods or the class of dealers that shall not be entitled to whole or partial tax credit and the same shall be within the exclusive domain of the State Government for which there need not be any specific guidelines. Therefore, when it is the policy decision of the State Government to specify any goods or the class of dealers that shall not be entitled to whole or partial tax credit and the Act itself confers

the power upon the State Government by notification published in the Official Gazette specifying any goods or the class of dealers that shall not be entitled to whole or partial tax credit and more particularly when the tax credit provided under Section 11(1)(a) shall be subject to the provisions of sub-section (2) to sub-section (12) of section 11, it cannot be said that sub-section (6) of section 11 is unconstitutional or violative of Article 14 of the Constitution of India on the ground that sub-section (6) of section 11 gives unbridled power to the executives, as contended and/or submitted by the petitioners. At this stage statement and object of reasons of the Act also deserves consideration. From the statement and object and reasons it appears that the same is with a view to consolidate and amend the laws relating to levy and collection of tax on value added basis in respect of the sales or purchases of the goods in the State of Gujarat. Therefore, when the statement of object and reasons for Gujarat Value Added Tax Act, 2003 is to consolidate and amend the laws relating to levy and collection of tax on value added basis in respect of the sales or purchases of the goods in State of Gujarat, it is always permissible for the State Government to provide for and/or to specify any goods or the class of dealers that shall not be entitled to whole or partial tax credit. On considering the entire section 11 to be read as a whole, it appears that the intention of the legislature is not to allow the tax credit with respect to all the goods in respect of all the purchasing dealers and the same is conditional one subject to sub-section (2) to sub-section (12) of section 11 inclusive of sub-section (6) of section 11 and Act itself provides that by publication of notification in Official Gazette, the State Government can specify any goods or the class of dealers that shall not be entitled to whole or partial tax credit. Therefore, as such when such powers are provided under Section 11(6) of the VAT Act, considering section 11 as a whole it cannot be said that sub-section (6) of section 11 is unconstitutional and/or ultra vires to Article 14 of the

Constitution of India. Considering section 11 of the VAT Act as a whole and the intention of the legislature to give tax credit subject to sub-section (2) to sub-section (12) of section 11, therefore, it cannot be said that section 11(6) of the VAT Act suffers from the vice of excessive delegation and is arbitrary and/or violative of Article 14 of the Constitution of India.

[7.3] In the case of M/s. Jalyan Udyog and Anr. (Supra), the Hon'ble Supreme Court had an occasion to consider section 25 of the Customs Act i.e. power to grant exemption from duty which confers power upon the Central Government, by notification in the Official Gazette to exempt generally either absolutely or subject to such conditions as may be specified in the notification, goods of any specific description from the whole or any part of the duty of customs leviable thereon and when the exemption notification issued in exercise of powers under Section 25(1) of the Customs Act came to be challenged, in paras 21 to 23, the Hon'ble Supreme Court has observed and held as under:

> *"21. The above analysis of sub-section (1) shows inter alia that an exemption granted may be an absolute one or subject to such conditions, as may be specified in the notification and further that the conditions specified may relate to a stage before the clearance of goods or to a stage subsequent to the clearance of goods. Section 25(1) is a part of the enactment and must be construed harmoniously with the other provisions of the Act. The power of exemption is variously described as conditional legislation [see Jalan Trading Co. Pvt. Ltd. v. Mill Mazdoor Sabha4 and Hamdard Dawakhana v. Union of India5] and also as a species of delegated legislation. Whether it is one or the other, it is a power given to the Central Government to be exercised in public interest. Such a provision has become a standard feature in several enactments and in particular, taxing enactments. It is equally well settled by now that the power of taxation can be used not merely for raising revenue but also to regulate the economy, to encourage or discourage as the situation may call for, the import and export of certain goods as also for serving the social objectives of the State. [Vide Elel Hotels and*

Investments Ltd. v. Union of India (1989)3 SCC 698 : (AIR 1990 SC 1664), Srinivasa Theatre v. Govt. of Tamil Nadu, (1992)2 SCC 643 : (1992 AIR SCW 899) and Subhash Photographics v. Union of India, (!993) 4 J.T. (SC) 116 : (!993 AIR SCW 2871)]. Since the Parliament cannot constantly monitor the needs of and the emerging trends in the economy and is in no position to engage itself in day-to-day regulation and adjustment of import-export trade accordingly, power is conferred upon the Central Government to provide for exemption from duty of goods, either wholly or partly, and with or without conditions, as may be called for in public interest. We see no warrant for reading any limitation into this power. If the public interest demands that the exemption should be absolute, the Central Government can do so. Similarly, if the public interest demands that exemption should be granted only subject to certain conditions it can provide such conditions. Then again if the public interest demands that conditions specified should relate to a stage subsequent to the date of clearance it can do so. The guiding factor is the public interest. The power given by Section 25 to the Central Government to specify conditions which may even relate to a stage subsequent to the clearance of goods clearly shows that the power of exemption can be used even for altering the relevant date prescribed by Section 15. It is this very position which has been clarified by sub-section (3) introduced in the year 1983. In our opinion, sub-section (3) does not provide anything new. It merely elucidates and makes express what is implicit in sub-sections (1) and (2). Sub-section (3) says that a notification under sub-section (1) or (2) may provide "for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable". It further says that "any exemption granted in relation to any goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of customs chargeable on such goods shall in no case exceed the statutory duty". The explanation to sub-section (3)explains the words "form or method" occurring in the sub-section. It says that the form or method in relation to the rate or duty of customs means the basis of duty viz., valuation, weight, number, length, area, volume or other measure with reference to which duty is leviable.

23. We are equally unable to agree that a legal fiction can be created only by a legislature and not by the executive. Here the Central Government is exercising a power conferred upon it by the Parliament. The provision conferring such power does contemplate and empower the Central Government to create such a fiction, as explained hereinabove. Sub-section (1) as well as sub-section (3) place the matter beyond any doubt. To repeat, the nature of power under Section 25 is conditional legislation or a species of delegated legislation; in exemption notification under Section 25 is

not an executive act. No decision has been brought to our notice in support of the said contention which is raised only in the written submissions.

24. For the above reasons, we see no reason to hold that the said notification travels beyond the four comers of Section 25."

[7.4] In the case of Premium Granites & Anr. (Supra), in paras 55 and 56, the Hon'ble Supreme Court has observed and held as under:

"55. In various statutes, the provision of relaxation or exemption finds place and it has been indicated that such provisions of relaxation and exemption have been noticed and upheld by this Court in some of the statutes. In the MMRD Act itself, there is such provision for relaxation being Section 31.Such provision of relaxation in Karnataka Minor Mineral Concession Rules, 1969 is contained in Rule 66. It has be en rightly contended that where in respect of prohibited categories, the law carves out restriction or relaxation, the purpose is to take out certain exceptions from the prohibited area and keeping certain categories outside the purview of restrictions imposed under other provisions in the Statute. In such circumstances, it will not be appropriate to hold that the exception militates with other provisions and hence should not be permitted. In our view, in interpreting the validity of a provision containing relaxation or exemption of another provision of a statute, the purpose of such relaxation and the scope and the effect of the same in the context of the purpose of the statute should be taken into consideration and if it appears that such exemption or relaxation basically and intrinsically does not violate the purpose of the statute rendering it unworkable but it is consistent with the purpose of the statute, there will be no occasion to hold that such provision of relaxation or exemption is illegal or the same ultra vires other provisions of the statute. The question of exemption or relaxation exhypothesi indicates the existence of some provisions in the statute in respect of which exemption or relaxation is intended for some obvious purpose.

56. There is no manner of doubt that for bringing harmonious construction, reading down a provision in the statute, is an accepted principle and such exercise has been made by this Court in a number of decisions, reference to which has already been made. But we do not think that in the facts and circumstances of the case, and the purpose sought to be achieved by R. 39, such reading down is necessary so as to limit the application of Rule 39 only for varying some terms and conditions of a lease. If the State Government has an authority to follow a particular policy in the matter of quarrying of granite and it

can change the provisions in the Mineral Concession Rules from time to time either by incorporating a particular rule or amending the same according to its perception of the exigencies, it will not be correct to hold that in each and every occasion when such perception requires a change in the matter of policy of quarrying a minor mineral in the State, particular provision of the Mineral Concession Rules is got to be amended. On the contrary, if a suitable provision empowering exemption or relaxation of other provisions in the Mineral Concession Rules is made by confining its exercise in an objective manner consistent with the MMRD Act and in furtherance of the cause of mineral development and in public interest, by giving proper guidelines, such provision containing relaxation or exemption cannot be held to be unjustified or untenable on the score of violating the other provisions of the Mineral Concession Rules."

[7.5] In the case of Palivar Electricals (P) Ltd. (Supra) dealing with the power of exemption in the hands of the Central Government, in paras 9 to 11, the Hon'ble Supreme Court has observed and held as under:

"9. Though Rule 8 does not use the expression "public interest" unlike Section 25 of the Customs Act, both the powers are conceived in public interest. See the Constitution Bench decision in Orient Weaving Mills v. Union of India upholding the constitutional validity of Rule 8. It is observed therein (Para 8 of AIR):

> *"The Act recognises and only gives effect to the well established principle that there must be a great deal of flexibility in the incidence of taxation of a particular kind. It must vary from time to time, as also in respect of goods produced by different processes and different agencies..... It is a function of the State, in order to raise revenue for State purposes, to determine what kind of taxes shall be levied and in what manner. Its function, therefore, is to raise revenues for public purposes. The State naturally is interested in raising all the revenue necessary for public purposes, without sacrificing the legitimate interests of persons and groups, who deserve special treatment at the hands of the State for reasons, which the State may determine, entitling them to be placed in a special case."*

10. We are of the opinion that while examining the challenge to an Exemption Notification under the Central Excises Act, the observations in the decisions aforesaid should be kept in mind, It should also be remembered that generally speaking the Exemption Notification and the terms and conditions prescribed therein represent the polices of the

government evolved to subserve public interest and public revenue. A very heavy burden lies upon the person who challenges them on the ground of Article 14. Unless otherwise established, the Court must presume that the said amendment was found by the Central Government to be necessary for giving effect to its policy (underlying the notification) on the basis of the working of the said Notification and that such an amendment was found necessary to prevent persons from taking unfair advantage of the concession. In fact, in this case, the explanatory note appended to amending Notification says so in so many words. If necessary, the Court could have called upon the Central Government to establish the reasons behind the amendment. (It did not think it fit to do so). It is equally necessary to bear in mind, as pointed out repeatedly by this Court, that in economic and taxation sphere, a large latitude should be allowed to be Legislature. The Courts should bear in mind the following observations made by a Constitution Bench of this Court in R. K. Garg v. Union of India: (SCC pp. 690-91, para 8)

> *"Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person that Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Doud where Frankfurter, J. said in his inimitable style :*
>
> > *'In the utilities tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial difference to legislative judgment. The legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled events-self-limitation can be seen to be the path of judicial wisdom and institutional prestige and stability.'*
>
> *The Court must always remember that "legislation is directed to*

practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry' that exact wisdom and nice adaptation of remedy are not always possible and that 'judgment is largely a prophecy based on meagre and uninterpreted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provided for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The Courts cannot, as pointed out by the United States Supreme Court in Secy. of Agriculture v. Central Roig. Refining Co., be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses, Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must, therefore, adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or possibilities of abuse come to light the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

11. The same principle should hold good in the matter of Exemption Notifications as well, for the said power is part and parcel of the enactment and is supposed to be employed to further the objects of enactment-subject, of course, to the condition that the Notification is not ultra vires the Act, and/or Article 14 of the Constitution of India. (See P. J. Irani v. State of Madras."

[7.6] In the case of Orient Weaving Mills (P) Ltd. and Anr. (Supra), while considering constitutional validity of Rule 8(1) of the Central Excise Rules, 1994 which confers upon the Central Government the power to exempt partly or wholly any excisable goods and the constitutional validity of the same was challenged on the ground that it suffers from the vice of excessive delegation of power to exempt, the

Hon'ble Supreme Court in para 8 has observed and held as under:

> *"8. The petition is substantially based upon the contention that R. 8 suffers from the vice of excessive delegation of powers to the Central Government to exempt partly or wholly any excisable goods, and, secondly, that the power even if constitutional has been invalidly exercised in so far as the notifications aforesaid containing the exemption operating in favour of the 5th respondent have been made. In our opinion there is no substance in either of the two contentions. Rule 8 is as much a part of the statute as S. 37(2) cl. (xvii). It is always open to the State to tax certain classes of goods and not to tax others. The legislature is the best judge to decide as to the incidence of taxation as also to the amount of tax to be levied in respect of different classes of goods. The Act recognises and only gives effect to the well established principle that there must be a great deal of flexibility in the incidence of taxation of a particular kind. It must vary from time to time, as also in respect of goods produced by different processes and different agencies. The same principle has been recognised in S. 23 of the Sea Customs Act (VIII of 1878), which has been applied to excise duty also, by virtue of S. 12 of the Act. The latter section has authorised the Central Government to apply the provisions of the Sea Customs Act to excise duty imposed by the Act with such modifications and alterations as it may consider necessary or desirable to adapt them to circumstances. It is a function of the State, in order to raise revenue for State purposes to determine what kind of taxes shall be levied and in what manner. Its function, therefore, is to raise revenues for public purposes. The State naturally is interested in raising all the revenue necessary for public purposes, without sacrificing the legitimate interests of persons and groups, who deserve special treatment at the hands of the State for reasons, which the State may determine, entitling them to be placed in a special class. The Directive principles of the Constitution contained in Part IV lay down the policies and objectives to be achieved, for promoting the welfare of the people. In the context of the present controversy the following words of Art. 43 are particularly apposite:*
>
> *"- - - - - and in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas."*
>
> *It has rightly been pointed out in the affidavit filed on behalf of the respondents 1-4 that the exemption, granted by the impugned notifications is meant primarily for the protection of petty producers of cotton fabrics not owning more than four power looms from unreasonable competition by big producers, like the petitioner Company. The State has therefore, made a valid classification between goods produced in big establishments and similar goods produced by small powerloom weavers in the mofussil who are usually ignorant, illiterate and poor and suffer from handicaps to which big*

establishments like the petitioner Company are not subject. It has also been pointed out that the exemption was available to individual weavers, who employed not more than five looms on their own account. The fact that they have banded together in a co-operative effort to increase their efficiency and to take advantage of State aid should not count against them. It must therefore, be held that there is no room for the contention that there has been excessive delegation of power to exempt."

[7.7] In the case of Kasinka Trading and Anr. (Supra), in paras 23 and 24 the Hon'ble Supreme Court has observed and held as under:

"23.The appellants appear to be under the impression that even if, in the altered market conditions the continuance of the exemption may not have been justified, yet, Government was bound to continue it to give extra profit to them. That certainly was not the object with which the notification had been issued. The withdrawal of exemption "in public interest" is a matter of policy and the Courts would not bind the Government to its policy decisions for all times to come, irrespective of the satisfaction of the Government that a change in the policy was necessary in the "public interest". The Courts, do not interfere with the fiscal policy where the Government acts in "public interest" and neither any fraud or lack of bona fides is alleged much less established. The Government has to be left free to determine the priorities in the matter of utilisation of finances and to act in the public interest while issuing or modifying or withdrawing an exemption notification under S.25(1) of the Act.

24. It needs no emphasis that the power of exemption under S. 25(1) of the Act has been granted to the Government by the Legislature with a view to enabling it to regulate, control and promote the industries and industrial productions in the country. Where the Government on the basis of the material available before it, bona fide, is satisfied that the "public interest" would be served by either granting exemption or by withdrawing, modi-fying or rescinding an exemption already granted, it should be allowed a free hand to do so. We are unable to agree with the learned counsel for the appellants that Notification 66/79 could not be withdrawn before 31-3-1981. First, because the exemption notification having been issued under S.25(1) of the Act, it was implicit in it that it could be rescinded or modified at any time if the public interest so demands and secondly it is not permissible to postpone the compulsions of "public interest" till after 31st March 1981 if the Government is satisfied as to the change in the circumstances before that date. Since, the Government in the instant case was satisfied that the very public interest which had demanded a

total exemption from payment of customs duty now demanded that the exemption should be withdrawn it was free to act in the manner it did. It would bear a notice that though Notification 66/79 was initially valid only up to 31-3-1979 but that date was extended in "public interest", we see no reason why it could not be curtailed in public interest. Individual interest must yield in favour of societal interest."

[7.8] In the case of **M/s. East India Tobacco Co. v. State of Andhra Pradesh** reported in **AIR 1962 SC 1733**, the Hon'ble Supreme Court has observed that though the taxation law must also pass the test of Article 14, but in deciding whether a taxation law is discriminatory or not, it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects it will tax and that a statute is not open to attack on the ground that it taxes some person or objects and not others. It is observed that it is only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification, that it would be violative of Article 14.

[7.9] In the case of **Gujarat Ambuja Cements Ltd. and Anr. v. Union of India and Anr.** reported in **(2005)4 SCC 214**, the Hon'ble Supreme Court has observed that because of the inherent complexity of fiscal adjustment of diverse elements in the field of taxation, the legislature is permitted a large discretion in the matter of classification to determine not only what should be taxed but also the manner in which the tax may be imposed. It is observed that courts are extremely circumspect in questioning the reasonability of such classification except where there is writ on the statute perversity or madness in the method or gross disparity.

[7.10] In the case of **Union of India and Ors. v. Nitdip Textile Processors Private Limited and Anr.** reported in **(2012)1 SCC 226**, the Hon'ble Supreme Court has observed that a taxation statute, for the

reasons of functional expediency and even otherwise, can pick and choose to tax some. It is further observed that a power to classify being extremely broad and based on diverse considerations of executive pragmatism, the Judicature cannot rush in where even the Legislature warily treads. It is further observed that all these operational restraints on judicial power must weigh more emphatically where the subject is taxation.

[7.11] Now, so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of Krishna Mohan (P) Ltd. (Supra) by the learned Counsel appearing on behalf of the petitioners is concerned, the said judgment would not be of any assistance in view of the discussion with respect to the tax credit under Section 11 of the VAT Act more particularly when the input tax credit itself is subject to the provisions of section 11(2) to section 11(12) of the VAT Act. Similarly, the decision of the Hon'ble Supreme Court in the case of Dai Ichi Karkaria Ltd. (Supra) and other decisions in the case of P.J. Irani (Supra) and Punjab Tins Supply Company (Supra) relied upon by the learned Counsel appearing on behalf of the petitioners also would not be of any assistance to the petitioners considering the facts and circumstances of the case, more particularly scheme of input tax credit under Section 11 of the VAT Act.

[7.12] Now, so far as the contention on behalf of the petitioners that the input tax credit once validly availed by the dealers under Section 11 of the VAT Act becomes a statutory right and cannot be wished away as being merely a concession which cannot be withdrawn at the whim of the executive is concerned, the same has no substance. It is required to be noted that as such it is not a case of once the input tax credit availed and thereafter taken away by the executives. As observed

hereinabove, the input tax credit itself is subject to sections 11(2) to 11(12) of the VAT Act.

For the reasons stated above, it cannot be said that section 11(6) of the VAT Act is unconstitutional on the ground of excessive delegation of powers and/or violative of Article 14 of the Constitution of India.

[8.0] Now, so far as the challenge to the impugned notification/s is concerned, it is required to be noted that as such section 11(6) of the VAT Act can be said to be an independent provision, which authorizes and/or permits the State Government vide notification in the Official Gazette, to specify any goods or the class of dealers that shall not be entitled to whole or partial tax credit. As held hereinabove section 11(6) of the VAT Act is neither unconstitutional nor violative of Article 14 of the Constitution of India. Under the circumstances and more particularly when the input tax credit under Section 11(1) of the VAT Act is subject to the provisions of section 11(2) to section 11(12) of the VAT Act, the impugned notification/s cannot be said to be *dehors* the provisions of VAT Act.

[8.1] Now, so far as the contention on behalf of the petitioners that reduction of input tax credit to the extent of 2% by the impugned notifications is violative of Article 286(3) of the Constitution is concerned, the same has no substance. It is required to be noted that by impugned notifications as such the State Government is not imposing tax on, or altering the machinery provisions pertaining to tax on, the sale of goods from the State to a destination outside State. In the present case the State Government has provided input tax credit under Section 11 of the VAT Act and has reduced the input tax credit to the extent of 2% on the eventuality as mentioned in the said notifications i.e. if the

goods are sold outside the State, in exercise of powers under Section 11(6) of the VAT Act. It is required to be noted that as such for sale from State to a destination outside the State, it is governed by the CST Act and by impugned notifications the State Government has not touched the said sales tax. Under the circumstances, it cannot be said that the impugned notifications are violative of Article 286(3) of the Constitution of India as alleged.

Similarly, even the contention on behalf of the petitioners that the impugned notifications are violative of Articles 301, 303 and 304 also cannot be accepted. By the impugned notifications the State has not touched the rate of central sales tax fixed by the State Government.

[8.2] While considering the challenge to the impugned notification on the ground that they violate Articles 14, 286(3), 301 and 304 of the Constitution of India, the decision of the Hon'ble Supreme Court in the case of **M/s. Vrajlal Manilal & Co. & Anr. v. State of Madhya Pradesh & Anr.** reported in **AIR 1986 SC 1085** is required to be referred to. While considering the challenge to the constitutional validity of the amendments to section 8 of the M.P. General Sales Tax Act on the ground that the same are violative of Articles 14, 286(3), 301 and 304 of the Constitution of India while upholding the constitutional validity of the amendment to section 8 of the M.P. General Sales Tax Act, the Hon'ble Supreme Court in paras 12, 14, 16 to 20 has observed and held as under:

> *"12. So far as the challenge under Article 14 is concerned, the submissions made in support thereof were that by the impugned amendments tendu leaves were discriminated against hostilely as compared with other raw materials in that the rate of tax on the sales and purchases of tendu leaves was made much higher than the rate of tax on the sales and purchases of other raw materials, not only within the State of Madhya Pradesh but also as compared with the rate of tax in the neighbouring Sates, and that there was no reasonable basis for making a distinction between tendu leaves and other raw materials*

inasmuch as the only use to which tendu leaves were put was as a raw material in the manufacture of bidis. As pointed out by Lord Greene delivering the opinion of the Judicial Committee of the Privy Council in Mohanlal Hargovind of Jubbulpore v. Commr. of Income-tax, C.P. and Berar, Nagpur (1948-49) 76 Ind App 235, 237; AIR 1949 PC 311, bidies are country-made cigarettes composed of tobacco contained or rolled in leaves of a tree, known as tendu leaves, which fulfil a corresponding function in the finished cigarette to that played by a cigarette paper. Thus, without the use of tendu leaves bidis cannot be manufactured. Until the amendment to section 8 made by the 1968 Act, for the purpose of levying tax on the sales and purchases of tendu leaves the State of Madhya Pradesh had throughout treated tendu leaves in the same manner as other raw materials. From this, however, it does not follow that there was any constitutional or legal obligation upon the State to continue doing so for all time. The structure of our Constitution is federal in character. A salient feature of such a. Constitution is the distribution of legislative and administrative powers between the federated unit and the federating units, that is, between the Central or Federal Government and the State or Provincial Governments. In keeping with its federal character, our Constitution has bifurcated the field of taxation as regards sales and purchases of goods between the Union and the State. Under clause. (1) of Article 246 of the Constitution, Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to the Constitution which is headed the "Union List". Under clause (2) of the same Article, the Legislature of any State has the exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II of the Seventh Schedule to the Constitution which is headed the "State List". The M.P. Sales Tax Act was enacted after the Constitution was amended by the Constitution (Sixth Amendment) Act, 1956. Under the Constitution as so amended taxes on the sale or purchase of newspapers and on advertisements published therein and taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce, fall within the exclusive legislative field of Parliament under Entries 92 and 92A respectively in the Union List. while under Entry 54 in the State List taxes on the sale or purchase of goods other than newspapers fall within the exclusive legislative field of the State Legislatures, subject to the provisions of Entry 92A in the Union List. It is unnecessary to dilate upon this subject for all that is required to be done is to quote the following passage from the judgment of this Court in Khazajan Chand v. State of Jammu and Kashmir (1984) 2 SCR 858 (at pages 873-4): (AIR 1984 SC 762 at p. 769) :

"Our Constitution is federal in its structure and a salient feature of a federal polity is distribution of legislative and administrative powers between the federated unit and the federating units, that is, between

the federal Government and the State Governments. Thus, matters in respect of which our Constitution- makers felt that there should be uniformity of law throughout the country have been placed by them in the Union List (List I in the Seventh Schedule to the Constitution) conferring exclusive power upon Parliament to make laws with respect thereto, while matters which they felt were of local concern and may require laws to be made having regard to the particular needs and peculiar problems of each State have been assigned to the State Legislatures by placing them in List II of the Seventh Schedule, that is, the State List. Inter-State trade and commerce is a matter which affects all the States in India and thus the whole country. It is for this reason that in the Seventh Schedule to the Constitution the subject of taxes on the sale or purchase of goods taking place in the course of inter-State trade or commerce has been put in List I and made a Union subject. Taxes on the sale or purchase of goods taking place within the State affect only those. who carry on the business of buying and selling goods within the State and, therefore. this subject has been put in List II of the Seventh Schedule, namely, the State List. Sales tax is the biggest source of revenue for a State and it is for the State to decide how and in what manner it will raise this revenue and to determine which particular transactions of sale or purchase of goods taking place within that State should be taxed and at what rates, and which particular transactions of sale or purchase of goods should be exempted from tax or taxed at a lower rate having regard to the subject-matter of sale, as for instance, where particular goods constitute necessities for the poorer classes of people or where the goods in question are of such a nature as are required to be exempted from tax or taxed at a lower rate in order to encourage a local industry. Consideration of these matters must, from the nature of things differ from State to State. Similarly, it is for each State to determine the methods it will adopt to collect its revenue from this source and to decide which methods would be most efficacious for this purpose. The provisions of the sales tax law of each State must. therefore. necessarily differ in various respects from the provisions of sales tax laws of other States. If the provisions of the legislation of every State on a particular topic are to be identical in every respect, there is no purpose in including that topic in the State List and it may as well be included in the Union List. Merely because the provisions of a State law differ from the provisions of other State laws on the same subject cannot make such provisions discriminatory."

Further, as pointed out by this Court in State of Orissa v. Titaghur Paper Mills Company Ltd, (1985) 3 SCR 26. 65 : (AIR 1985 SC 1293) a State is free when there is a series of sales in respect of the same goods to tax each one of such sales or purchases in that series or to levy the tax at one or more points in such series of sales or purchases. Legislations of all States in this respect are not uniform.

some States having adopted a single-point levy, others a two-point levy, and yet others a multi-point levy.

14. Arguments such as those advanced before us have been consistently rejected by this Court. We need give only four instances. In T. G. Venkataraman v. State of Madras, (1969) 2 SCC 299 : (AIR 1970 SC 508) it notification issued under the Madras General Sales Tax Act, 1959, which imposed tax on sales of cane jaggery and exempted sales of palm jaggery, was challenged on the ground that it violated Article 14 because it was discriminatory and opposed to equal treatment under Article 14. This challenge was repelled by the Court holding that cane jaggery and palm jaggery were commercially different commodities. In Jaipur Hosiery Mills (P) Ltd., Jaipur v. State of Rajasthan (1971) 1 SCR 386: (AIR 1971 SC 1330) a notification issued under the Rajasthan Sales Tax Act, 1950, which exempted from tax the sale of any garment the value of which did not exceed four rupees but excluded "hosiery products and hats of all kinds" from this exemption, was challenged under Article 14. Repelling this challenge, this Court held (at pages 397-8)(of SCR) : (at pp. 1330-31 of AIR) :

"It is well settled that although a taxing statute can be challenged on the ground of infringement of Art. 14 but in deciding whether the law challenged is discriminatory it has to be borne in mind that in matters of taxation the legislature possesses the large freedom in the matter of classification. Thus wide discretion can be exercised in selecting persons or objects which will be taxed and the statute is not open to attack on the mere ground that it taxes some persons or objects and not others. It is only when within the range of its selection the law operates unequally and cannot be justified on the basis of a valid classification that there would be a violation of Art. 14."

In Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 3 SCR 130: (AIR 1983 SC 10 19). the constitutional validity of sub-section (3) of section 5 of the Bihar Finance Act, 1981, was challenged inter alia under Article 14. Subsection (1) of section 5 provided for the levy of a surcharge, in addition to the tax payable, on every dealer whose turnover during a year exceeded rupees five lakhs while sub-section (3.) of section 5 prohibited such a dealer from collecting the amount of surcharge payable by him from the purchasers. This challenge was repelled. In the course of the judgment this Court said (at page 190 of SCR) : (at pp. 1046-47 of AIR) :

"On questions of economic regulations and related matters, the Court must defer to the legislative judgment. When the power to tax exists, the extent of the burden is a matter for discretion of the law-makers. It is not the function of the Court to consider the propriety or justness of the tax, or enter upon the realm of legislative policy. If the evident

intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied. The equality clause in Art. 14 does not take from the State power to classify a class of persons who must bear the heavier burden of tax. The classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequalities."

In Khazajan Chand v. State of Jammu and Kashmir (AIR 1984 SC 762) a challenge to section 8(2) of the Jammu and Kashmir General Sales Tax Act, 1962, on the ground that it was violative of Article 14 as it hostilely discriminated against dealers in the State of Jammu and Kashmir as compared with dealers in other States in the matter of the rate at which interest was payable when default was made in payment of tax by the prescribed time was negatived by this Court.

16.In support of the challenge under Article 14, it was further contended that without amending the definition of "raw material" given in clause (1) of section 2 of the M.P. Sales Tax Act, a different rate of tax cannot be levied upon tendu leaves. Section 8 was amended both by the 1968 Act and the 1971 Act but the definition of "raw material" was not amended and it continued to remain the same.We are unable to understand what difference this makes. By section 8 tendu leaves are expressly excluded from the concessional rate of tax in respect of other raw materials. Clause (1) of section 2 defines the term "raw material".This cannot, however, prevent the State from taxing different classes of raw materials at different rates. If this contention of the Appellants was to be accepted, it would lead to the absurd result that as goods are defined in clause (g) of section 2 to mean all kinds of movable property excluding certain specific articles mentioned therein,section 6 and Schedule II to the M.P. Sales Tax Act which provide for different rates of tax on different classes of goods are also bad in law. This contention is thus wholly without any substance.

17.Turning now to the challenge under Article 286(3) to the validity of the impugned amendments, we find this challenge to be as hollow and untenable as the challenge under Article 14. Clause (3) of Article 286, after its amendment by the Constitution (Sixth Amendment) Act, 1956, provided as follows :
"(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of, a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."
Clause (3) of Article 286 was substituted by the Constitution (Forty-

sixth Amendment) Act, 1982. Clause (3) as so substituted does not affect the position so far as goods declared by Parliament by law to be of special importance in inter-State trade or commerce are concerned

18. In pursuance of the power conferred by Article 286(3) Parliament has declared by section 14 of the Central Sales Tax Act, 1956 (Act No. LXXIV of 1956), certain goods to be of special, importance in inter-State trade or commerce. Amongst the goods so declared is "tobacco, as defined in Item No. 4 of the First Schedule to the Central Excises and Salt Act, 1944". The relevant provisions of the said Item No. 4 are as follows:
"4. Tobacco-
'Tobacco' means any form of tobacco, whether cured or uncured and whether manufactured or not, and includes the leaf, stalks and stems of the tobacco plant, but does not include any part of a tobacco plant while still attached to the earth.
@page-SC1096
I. Unmanufactured tobacco -
x x x x
II. Manufactured tobacco -
x x x x x x"

Under the sub-heading "Manufactured tobacco" are set out cigars and cheroots, cigarettes, and bidis in the manufacture of which any process has been conducted with or without the aid of power. Tendu leaves nowhere feature in the said Item No. 4 though tobacco and bidis do. It is, therefore, tobacco and bidis which are goods of special importance in inter-State trade and commerce and not tendu leaves. Tendu leaves cannot by any stretch of imagination be equated with bidis or tobacco just as cigarette paper used for rolling cigarettes cannot be equated by any stretch of imagination with cigarettes or tobacco. This being the position, it is wholly unnecessary to consider the other arguments advanced in support of this challenge.

*19. The challenge to the impugned amendments under Articles 301 and 304 of the Constitution was that by taxing tendu leaves at a higher rate than in the neighbouring States, the cost of bidis manufactured in the State of Madhya Pradesh increased considerably and thus it impeded *the freedom of trade and commerce throughout the territory of India. Article 301 provides as follows :*
"301. Freedom of trade, commerce and intercourse.-
Subject to the other provisions of this Part, trade, commerce and intercourse throughout. the territory of India shall be free."

Under clause (b) of Article 304 of the Constitution, the Legislature of a State may. by law impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be

required in the public interest. The Bill or any amendment of an Act for the purposes of clause (b) is, however, not to be introduced or moved in the legislature of a State without the previous sanction of the President. It may be mentioned. that the M.P. Sales Tax Act had received the assent of the President on February 27, 1959, but neither the 1968 Act not the 1971, Act was submitted to the President for his sanction and the question, therefore, of either of these Acts receiving the sanction of the President, cannot arise.

20.The only question, therefore, is whether taxing the sales and purchases of tendu leaves at a higher rate than in the neighbouring States violates Article 301 by impeding the free trade and commerce in tendu leaves throughout the territory of India. An increase in the rate of tax on the sales and purchases of tendu leaves would necessarily result in an increase in the cost of manufacture of bidis and consequently in their sale price. An increase in the rate of tax on a particular commodity cannot per se be said to impede free trade and commerce in that commodity.In State of Kerala v. A. B. Abdul Kadir (1970) 1 SCR 700 : (AIR 1970 SC 1912), after referring to and explaining the earlier decisions on this subject, this Court held as follows (at page 710) (of SCR) : (at p. 1918 of AIR)

"*As we have already pointed out it is well established by numerous authorities of this Court that only such restrictions or impedimentswhich directly and immediatelyimpede the free flow of trade, commerce and intercourse fall within the prohibition imposed by Art. 301. A tax may in certain cases directly and immediately restrict or hamper the flow of trade, but every imposition of tax does not do so. Every case must be judged on its own facts and in its own setting of time and circumstances.*"

[8.3] Now, so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of Lohara Steel Industries Ltd. (Supra) is concerned, it is required to be noted that in the said case an exemption notification was amended to restrict the exemption to products of steel re-roller situated within the State which was found to be violative of Article 304(a) of the Constitution. That is not the case here. It is required to be noted that in the said decision the Hon'ble Supreme Court has specifically observed and held that there is no need to strike down the entire tax exemption which is granted to all re-rolled steel products sold in the State of Andhra Pradesh and manufactured out

of tax paid raw material purchased in the State of Andhra Pradesh. The decision of the Hon'ble Supreme Court in the case of Manickam and Company (Supra) and Mallick Hashim and Co. (Supra) relied upon by the learned Counsel appearing on behalf of the petitioners are concerned, the same shall not be applicable with respect to the impugned notifications and the reduction of input tax credit to the extent of 2% if the goods sold out of Gujarat.

[8.4] Even the reliance placed upon the decision of the Hon'ble Supreme Court in the case of State of U.P. and Ors. v. Jayprakash Associates Ltd. in Civil Appeal No.3026 of 2004 relied upon by Shri Mihir Joshi, learned Counsel appearing on behalf of some of the petitioners in support of his submission that the impugned notifications are in violation of Article 304(1) of the Constitution of India is concerned, it is required to be noted that in the case before the Hon'ble Supreme Court it was found that grant of rebate tax by the State Government discriminates between imported goods and the goods manufactured in the Uttar Pradesh restricting the free movement of goods from one State to other and therefore, infringes Articles 301 and 304(a) of the Constitution of India. Under the circumstances, the said decision as such shall not be applicable to the facts of the case on hand.

[9.0] Now, so far as the contention on behalf of the petitioners that on the basis of the speech made by the Finance Minister on the floor of the house that as the Central Government reduced the rate of central sales tax and the Central Government though agreed has failed to compensate the said losses on account of reduction in the central sales tax, it has necessitated to reduce the input tax credit to the extent of 2% on sale of goods outside State of Gujarat and the contention on behalf of the petitioners that aforesaid cannot be ground to reduce the input tax

credit to the extent of 2% is concerned, at the outset it is required to be noted that as such entire speech as a whole is required to be considered. The relevant extract of the speech with respect to value added tax reads as under:

> ***"Value Added Tax***
> *The Central Sales Tax (CST) is levied by the Central Government but the powers to collect and retain CST are vested in the State Government. The rate of Central Sales Tax (CST) was reduced by the Central Government from 4% to 3% w.e.f. 1/4/2007 and 3% to 2% w.e.f. 1/6/2008. The State has suffered loss of thousands of crores of tax revenue due to this reduction.*
>
> *The Central Government had agreed to pay compensation to the States for the losses on account of reduction in Central Sales Tax (CST). Accordingly, a formula was declared by the Central Government. But the States have suffered losses due to subsequent, unilateral changes made by the Central Government in the formula. Deficiencies in the original formula have not been correct despite repeated representations. Further, the Central Government has not paid full consideration to the State as per the formula. More than Rs.2200 crores are yet to be paid by the Central Government to the State Government towards compensation. Further, the Central Government has not taken any decision regarding payment of compensation for the year 2010-2011. The tax revenue of the State is adversely impacted due to this view of the Government of India. Advance planning has become necessary to ensure that the Development Programmes of the State are not adversely affected due to this reduction in tax revenue and consequent uncertainity so created relating to the tax revenue. In this context, to ensure adequate funds for the Development Programmes of the State, I propose the following:*
>
> *As per the provisions of the VAT Act, a registered dealer is entitled to tax credit of the tax paid on local purchases when he sells goods. Present provisions allow tax credit of the tax paid on local purchases while making interstate sales. Similarly, tax credit of raw material is allowed when taxable manufactured goods are sold interstate. Thus, the tax credit is allowed on goods purchased from within the State at the applicable rate when goods are sold interstate.*
>
> *I propose to reduce tax credit to the extent of 2% on purchases of goods made from within the State and used in interstate sales.*

> *This proposal will be implemented with effect from 1/7/2010 and will be considered by the State Government in case the Central Government decides to compensate for the losses of the Central Sales Tax (CST) revenue for the year 2010-2011. This proposal will not result in any additional tax burden on the people of the State."*

From the aforesaid it appears that the impugned notifications are issued reducing the input tax credit to the extent of 2% on the goods supplied outside State of Gujarat in the larger public interest and to ensure adequate funds in the development programme of the State. Reduction of the rate of central sales tax from 4% to 3% with effect from 01.04.2007 and from 3% to 2% with effect from 01.06.2008 and the failure on the part of the Central Government to compensate the State for the losses on account of the aforesaid reduction can be said to be one of the cause and/or reason. It appears that as the State has suffered loss of thousands of crores of revenue due to the said reduction and the Central Government failed to compensate the said losses and it has been found that the tax revenue of the State has been adversely affected, when the impugned notifications are issued it can neither be said to be arbitrary nor illegal and/or unconstitutional.

[10.0] For the reasons stated above, neither section 11(6) of the VAT Act nor the impugned notifications restricting the input tax credit to the extent of 2% of goods made from within the State and used in the inter-State sales meaning thereby on sale of goods made from within the State and used in inter-State sales can be said to be unconstitutional and/or arbitrary and/or excessive delegation of powers. The impugned notifications are absolutely within the powers conferred on the State under Section 11(6) of the VAT Act and the same is in the larger public interest and with a view to see that the development programmes of the

State are not adversely affected due to reduction in tax revenue. In view of the reduction of central sales tax by the State Government and Central Government failed to compensate the State for the losses on account of reduction in central sales tax.

[11.0] In view of the above and for the reasons stated above, all these petitions fail and they deserve to be dismissed and are, accordingly, dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

Sd/-
(M.R. SHAH, J.)

Sd/-
(R.P. DHOLARIA, J.)

Ajay