IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8572 OF 2015

M/s. Ghodawat Energy Pvt. Ltd., a registered company having its office at B-Gate No.351 to 359, Majale, Taluka – Hatkanangle, District Kolhapur ... Petitioner

Versus

1. The State of Maharashtra, Through the Government Pleader, High Court, Mumbai.

2. The Commissioner of Sales Tax, having his office at 3B-7, 3rd Floor, Old Vikrikar Bhavan, Mazgaon, Mumbai- 400 010.

3. The Deputy Commissioner of Sales Tax, having his Office at Vikrikar Bhavan, Kolhapur

4. The Joint Commissioner of Sales Tax (Appeals), Kolhapur, Maharashtra State, Vikrikar Bhavan, Kolhapur

5. The Maharashtra Sales Tax Tribunal, Vikrikar Bhavan, Mazgaon, Mumbai-10 ... Respondents

WITH
WRIT PETITION NO. 9265 OF 2015

M/s. Ghodawat Energy Pvt. Ltd., a registered company having its office at B-Gate No.351 to 359, Majale, Taluka – Hatkanangle, District Kolhapur ... Petitioner

Versus

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1. The State of Maharashtra, Through]
the Government Pleader, High Court,]
Mumbai.]

2. The Commissioner of Sales Tax, having]
his office at 3B-7, 3rd Floor, Old Vikrikar]
Bhavan, Mazgaon, Mumbai- 400 010.]

3. The Deputy Commissioner of Sales Tax,]
(KOL-VAT-E-002), Vikrikar Bhavan,]
Kolhapur, Maharashtra] ... Respondents

Mr. V. Sridharan, senior counsel with Mr. C.B. Thakar, Mr. Rahul Thakkar, Mr. Girish Kala and Mr. Puneeth Ganapathy for the Petitioner in both the Writ Petitions.

Mrs. Naira Jeejeebhoy, special counsel for the Respondents in both the Writ Petitions.

CORAM : S.C. DHARMADHIKARI &
DR. SHALINI PHANSALKARJOSHI, JJ.

Reserved on : 26th July, 2016

Pronounced on : 4th October, 2016

ORAL JUDGMENT. : [Per S.C. Dharmadhikari, J.]

1 By this petition under Article 226 of the Constitution of India, the petitioners are claiming a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order, or direction as under :

> *"(b) this Hon'ble Court may be pleased to issue a Writ of Mandamus or a Writ in the nature of*

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Mandamus or any other appropriate Writ, order or direction under Article 226 of the Constitution of India :

(i) Quashing of the order of the Respondent No.4 dated 26.6.2015 demanding part payment of Rs.1,41,93,1897/- from the Petition for grant of stay in appeal.

(ii) restraining the Respondents by their servants, agents and subordinates from enforcing the order dated 26.6.2015 passed by the Respondent No.3 directing the Petitioners to make part payment.

....

(f) this Hon'ble Court may be pleased to issue a Writ of Mandamus or Writ in the nature of Mandamus or any other appropriate Writ, order or direction under Article 226 of the Constitution of India

(i) Striking down Clause (10) of Notification No.VAT/1505/CR-382/Taxation-1 dated 21.1.2006 introducing Explanation to Schedule Entry A-45 of the MVAT Act, 2002 as discriminatory and hence ultra vires Article 14 of the Constitution of India."

2 The petitioner also claims a similar relief to quash an order dated 22nd August, 2014, demanding a sum of Rs.3,21,13,742/- from the petitioner on the sale of pan masala containing tobacco for the period (Financial Year) 2005-2006. This order has been passed by respondent No.3.

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3 The writ petition is filed by contending that the petitioner in this writ petition is a private limited company, incorporated and registered under the Indian Companies Act, 1956, having its registered office at the address mentioned herein above.

4 Respondent Nos.1 to 4 are the authorities exercising powers together with the State itself under the Maharashtra Value Added Tax Act, 2002 (for short "MVAT").

5 The petitioner, *inter-alia*, engages itself in the business of manufacturing pan masala. During the period under dispute, namely, Financial Year 2005-2006, the petitioner has manufactured and sold pan masala with or without tobacco. The petitioner claims that it has discharged its VAT liability under the MVAT Act. The petitioner manufactures pan masala not containing tobacco under the brand name "Star Pan Masala" classifiable under Tariff Heading 21069020 of the Central Excise Tariff Act, 1985. The petitioner claims that it has discharged its VAT liability of 12.5% on the sale of such pan masala not containing tobacco.

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At Annexure-A collectively are copies of invoices for sale of such pan masala.

6 The petitioner also manufactured and sold pan masala containing tobacco, commonly known as "*Guthka*" / "*Mawa*" under various brand names. That is classifiable under Tariff Heading 24939990 of the Central Excise Tariff Act, 1985 during the relevant period. The petitioner has claimed exemption on payment of VAT on sale of such pan masala containing tobacco under Schedule Entry A-45 of the MVAT Act, 2002. The relevant period is 1st April, 2005 to 31st March, 2007.

7 The said pan masala containing tobacco is described in column (2) of the First Schedule to The Additional Duties of Excise (Goods of Special Importance) Act,1957 (for short "ADE Act, 1957"). During the period 1st April, 2005 to 28th February, 2006, the petitioners have discharged ADE at 18% on the sale of such pan masala containing tobacco.

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8 For the period 1st April, 2005 to 28th February, 2006, therefore, the petitioners have claimed exemption from payment of VAT on sale of such pan masala containing tobacco under Schedule Entry A-45 of the MVAT Act, 2002.

9 Entry 45 of the Schedule A to the MVAT Act, 2002, as introduced reads as under :

Sr. No.	Name of the Commodity	Conditions & exceptions	Rate of Tax (%)	Date of effect
45	Sugar, fabrics and tobacco as described from time to time in column 3 of the First schedule to the Additional Duties of Excise (Goods of Special Importance) Act, 1957.			31/01/2006

10 However, in exercise of the powers conferred under section 9(1) of the MVAT Act, 2002, the State Government of Maharashtra, vide Notification No. VAT/1505/CR-382/ Taxation-1 dated 21st January, 2006, amended the Schedule A and Schedule C with effect from 1st February, 2006, by inserting Explanation to Schedule Entry A-45 as under :-

> *"Explanation- For removal of doubts, it is hereby declared that tobacco shall not include Pan Masala, that is to say, any preparation containing betel nuts and tobacco and any one or more of the following*

Bombay High Court

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ingredients, namely :-
(i) Lime, and

(ii) Kattha (Catechu)

whether or not containing any other ingredient such as cardamom, copra and menthol."

11 With effect from 1st March, 2006, pan masala containing tobacco falling under 24039990 of the First Schedule to ADE Act, 1957, was liable to additional duty of excise @ 18% under the said Schedule. However, the said tobacco product was exempt from payment of additional duty of excise in view of exemption Notification No.11/2006-C.E. dated 1st March, 2006.

12 Simultaneously, the rate of basic excise duty leviable on such tobacco products under Chapter 24 of the Central Excise Tariff Act, 1985, was suitably increased with no change in total excise duty. In other words, practically there was no exemption from ADE Act, 1957.

13 Consequently, with effect from 1st March, 2006, on sale of pan masala containing tobacco, petitioners paid increased amount of central excise duty. It continued to avail

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exemption from payment of VAT vide Entry A-45 of the MVAT for the period from 1st March, 2006 till 31st March, 2007.

14 Since the said pan masala containing tobacco is described in column (3) of the First Schedule to The Additional Duties of Excise (Goods of Special Importance) Act, 1957, during the relevant period of time, the petitioners have discharged ADE at 18% on the sale of such pan masala containing tobacco. Illustrative copies of the invoices for sale of such pan masala containing tobacco are annexed collectively as Annexure-B of the paper-book.

15 The petitioner was assessed to tax under the provisions of the MVAT Act, 2002, by respondent No.3 for the Financial Year 2005-06 vide assessment order dated 22nd August, 2014. The respondent No.3 disallowed the exemption claimed by the petitioner on pan masala containing tobacco under Schedule Entry A-45 on which the petitioner had paid ADE. The respondent No.3 raised a demand of Rs.3,21,13,742/- on account of sale of Gutkha and Mawa. A copy of the said assessment order dated 22nd August, 2014, is annexed as Annexure-C to the paper-book.

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16 Being aggrieved by the assessment order dated 22nd August, 2014, the petitioner has preferred an appeal before the respondent No.4. During the hearing of the stay application, it was submitted before the respondent No.4 that the petitioners are claiming exemption from payment of VAT only on gutkha and mawa which are tobacco products liable to ADE (GSI) under section 3 of the ADE Act, 1957. Further the petitioner has discharged the ADE (GSI) at 18% as against the residual VAT rate of 12.5% under the MVAT Act, 2002. Further, the State of Maharashtra has been provided a share from the undivided pool of the ADE (GSI) as per the Presidential Order existing during the relevant period of time. Thus, the petitioner has correctly claimed the exemption under Schedule Entry A-45. However, the respondent No.4 formed a *prima facie* view against the petitioner and ordered part payment of Rs.1,60,39,180/- vide order dated 22nd September, 2014. A copy of the order dated 22nd September, 2014 passed by respondent No.4 is annexed as Annexure-D to the paper-book.

17 Being aggrieved by the part payment order of the Respondent No.4, the petitioner filed an appeal before the

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respondent No.5. The respondent No.5, vide order dated 26th June, 2015, in VAT Appeal No.971/2014 relied on the Explanation to Schedule Entry A-45 inserted with effect from 1st February, 2006, to hold that Gutkha or Mawa are covered under Explanation and no exemption is available for such pan masala containing tobacco. Hence, the respondent No.4 ordered part payment of Rs.1,41,93,875/- vide order dated 26th June, 2015. A copy of the said order dated 26th June, 2015, passed by respondent No.5 is annexed as Annexure-E to the paper-book.

18 The petitioner has also brought to our notice the following changes which were made by the Taxation Laws (Amendment Act, 2007. These, according to the petitioner, are as under :

19 The Parliament omitted Chapter headings 2401, 2402 and 2403 and sub-heading and tariff item thereunder from the First Schedule to ADE Act 1957 vide section 10, Taxation Laws (Amendment) Act, 2007 (Act No.16 of 2007) effective from 1st April, 2007, without losing share of central

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taxes. This enabled States to levy VAT on tobacco with effect from 1st April, 2007.

20 The objects and reasons of the Taxation Laws (Amendment) Bill, 2007, read as under :

> *"5. The Additional Duties of Excise (Goods of Special Importance) Act 1957, is proposed to be amended to drop tobacco from the First Schedule of the Act, to enable the States to levy VAT on tobacco without losing their share out of the 1% devolution from the Divisible Pool of Central Taxes."*

21 Para (d) of the Press Note dated 29th March, 2007, issued by Press Information of Government of India Bureau is also to the same effect.

22 To give effect to the above amendment, the State of Maharashtra further amended Entry A-45 of the MVAT Act, 2002, to remove all references to tobacco in the said entry with effect from 1st April, 2007.

23 The said Entry A-45 relevant for the period in dispute reads as under :

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Sr. No.	Name of the Commodity	Conditions & exceptions	Rate of Tax (%)	Date of effect
45	Sugar, fabrics and tobacco as described from time to time in column 3 of the First schedule to the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957).		Nil %	1-4-2007 to 31-03-2010

24 Trade Circular 29T of 2007 dated 30th March, 2007, issued by the Commissioner to the effect tobacco and tobacco products were covered under Entry A-45 and were free of tax. The said entry is now amended by removing any reference to tobacco. Consequently, tobacco products like gutkha etc. shall be taxable at 12.5% from 1st April, 2007.

25 The petitioner has, accordingly, discharged VAT on pan masala containing tobacco with effect from 1st April, 2007 under MVAT Act, 2002. Hence, the period after 1st April, 2007 is not subject of this petition.

26 An affidavit-in-reply has been filed by the State in Writ Petition No.9265 of 2015. In the affidavit-in-reply, apart from raising preliminary objections, what has been submitted is

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that the petitioner in writ petition No.9265 of 2015 filed this petition in September, 2015, to impugn the provisions of a Notification dated 21st January, 2006, and the number of which has been set out in the affidavit in paragraph 2(a). It is submitted that there is a delay of more than nine years in filing the petition. The petitioners were aware that an assessment order was passed disallowing the exemption claimed by the petitioners on pan masala containing tobacco. That assessment order was passed on 22nd August, 2014, and notice of demand was raised on the petitioners. Even after the assessment order was served, the petitioners waited for over a year to challenge the provisions of the impugned notification.

27 It is then submitted that prior to this petition being filed, the petitioners preferred an appeal against the assessment order before the Joint Commissioner of Sales Tax (Appeals), Kolhapur. That appeal is still pending. The petitioner has, *inter-alia*, submitted in the grounds of that appeal that it has paid additional duty of excise and the State of Maharashtra has been provided a share from the undivided pool of such duty as per the Presidential Order existing during

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the relevant period of time. Thus, the issues that are arising for consideration in that appeal are similar to those raised in the present petition. For this reason and when there is alternate and efficacious remedy available, already availed of, that we should not entertain this writ petition.

28 Without prejudice to these preliminary objections, it is then submitted that on merits as well, there is no substance in the writ petition. It is submitted that the petitioner is attempting to re-agitate issues already decided by the Hon'ble Supreme Court. An extensive reference is made to the findings and conclusion which can be deduced from the Hon'ble Supreme Court's judgment. Summing up the same, it is submitted that levy of additional excise duties under the ADE Act, 1957, and distribution thereof to the States does not take away the State's power to make law with reference to Entry No.52 or Entry No.54 in List II (State List) to the VIIth Schedule of the Constitution of India. Once it is accepted that the State has a power to tax the goods on which additional excise duties are levied under the ADE, the only issue that arises is the consequence, if any. That would follow when the

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State so imposes the tax. The State may be deprived of its shares in the proceeds of the additional duties of excise for that financial year. This is strictly a matter between the State and the Centre and the Central Government possesses the power to direct otherwise. At best, the submissions of the petitioners amount to an argument for refund which could be easily raised by the State Government. The matter thus is strictly between the Centre and the State Governments and the petitioners cannot in any way be affected or concerned about the same. Once the State is empowered to legislate, then, the issue of constitutional validity of the impugned law does not arise. In the present case, the categorization is justifiable and the alleged retrospective applicability of the impugned provisions is the only point to be adjudicated in the pending appeal.

29 That is why in paragraph 7 of the affidavit-in-reply, it is submitted that Grounds A.1 to E.2 of the petition are without merit and need no consideration at the hands of this Court. The purported Tax Rental Agreement for distribution of additional duties of excise and the levy and distribution of such duties under the ADE Act, do not prohibit the States from

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imposing sales tax on goods covered by the ADE Act and it is not open to the petitioners to re-agitate this issue in the light of the judgment of the Hon'ble Supreme Court.

30 Then, the affidavit-in-reply attempts to distinguish the judgment of the Hon'ble Supreme Court of India in the case of *Godfrey Phillips (India) Limited & Anr. v. State of Uttar Pradesh & Ors. (2005) 2 SCC 515*. The affidavit-in-reply then deals with the grounds with regard to the levy and distribution of additional duties of excise.

31 It is then urged that clause (10) of the impugned Notification is clarificatory. It is in consonance with the ADE Act and the Constitution (Distribution of Revenues) No.5 Order, 2005, (hereinafter referred to as "the said Order"). The said Order is issued under Article 270 of the Constitution. It is, therefore, submitted that there is nothing contrary to the said ADE Act or the Constitution Order insofar as clause (1) of the impugned Notification. It is then elaborated as to how the ADE Act and the said Order provides that no share shall be payable to the State in a year where the State levies any tax or duty on

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sale or purchase of the goods described in column (3) of the First Schedule to the ADE Act. This was reflected in Schedule Entry A-45 of the MVAT Act which, at the relevant time, provided that "sugar, fabrics and tobacco as described from time to time in column (3) of the First Schedule to the Additional Duties of Excise (Goods of Special Importance) Act, 1957" would not be taxed. Therefore Ground V.2 at page 30 of the petition is incorrect in interpreting Schedule Entry A-45 as providing for exemption from levy on all tobacco products when the said Entry explicitly clarifies that it is only tobacco products described in column (3) of the First Schedule of the ADE Act that are exempt. It is submitted that prior to 2001, pan masala, including pan masala containing tobacco was classified under chapter 21 "Miscellaneous Edible Preparations" of the Central Excise Tariff Act, 1985. Note 3 of Chapter 31 defined pan masala as a preparation containing betel-nuts, lime and kattha (catechu) and tobacco whether or not containing any other ingredient, such as, copra and menthol. The said tariff item was numbered as 2106. It was only pursuant to the Finance Act, 2001, that pan masala containing tobacco was classified in Chapter 24 as a tobacco

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product under tariff item 2404.49. This position was reflected in the First Schedule to the ADE Act. Until 2001 pan masala was not included in the First Schedule to the ADE Act. It was only after 2001 that one of the goods described in column (3) of the First Schedule to the ADE Act was "2404.49 Pan masala containing tobacco". This clearly indicates that pan masala containing tobacco is separate and distinct from other tobacco products and forms a separate class of it's own. That pan masala containing tobacco is in a separate class from other tobacco products is also indicated by the fact that pan masala containing tobacco was not one of the tobacco products enumerated in Section 14 of the Central Sales Tax Act, 1956 as goods of special importance in inter-State trade or commerce. The fact that pan masala intrinsically and commercially differs from tobacco and its other variants is also clear from the description of pan masala, which is said to be a preparation containing betel nuts and one or more of the following ingredients, namely lime and kattha (catechu) whether or not containing any other ingredients such as cardamom, copra and menthol. Unlike the other entries in Chapter 24 of the 1985 Act, pan masala may or may not contain tobacco.

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32 The Finance Act, 2005 (18 of 2005) substituted the First Schedule to the ADE Act with a new First Schedule that did not specifically refer to pan masala containing tobacco anywhere in column (3). Therefore, from 2005, pan masala containing tobacco is not a good "described" in column (3) of the First Schedule of the ADE Act. Even according to the petitioners, pan masala containing tobacco is brought within the ambit of the ADE Act only by reference to Note 4 in Chapter 24 of the Central Excise Tariff Act, 1985, read with the reference to the tariff item in Column (2) and is not expressly referred in Column (3) of the First Schedule to the ADE Act.

33 Since pan masala containing tobacco was no longer described in column (3) of the First Schedule to the ADE Act, it no longer fell within the definition of Schedule Entry A-45 in the MVAT Act. The impugned Notification inserted an Explanation to Schedule Entry A-45 to clarify this position. In accordance with well settled principles of law, since the Explanation is merely clarificatory, it applies retrospectively from 2005 when pan masala containing tobacco ceased to be described in column (3) of the First Schedule of the ADE Act.

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34 Thereafter, the affidavit seeks to deal with Grounds V.1 to V.5 at pages 28 to 30 of the petition. It is submitted that though strictly not relevant, these Grounds substantiate the position set out hereinabove inasmuch as that indicates that the Explanation regarding pan masala was also inserted in the Bombay Sales Tax Act and operated retrospectively during the period prior to 2001 when pan masala containing tobacco was not described in column (3) of the First Schedule to the ADE Act. It is in these circumstances that the petitioner is not liable to pay VAT on the sale of gutkha for the Financial Year 2005-2006 when additional duties of excise was applicable on the products and has been discharged by the petitioner whether for the reasons alleged or at all. Grounds S.1 to T.4 and V.1 to W.7 of the petition are denied in the affidavit-in-reply except to the extent indicated hereinabove.

35 Without prejudice to the above statements in the affidavit-in-reply, it is then submitted that the tobacco product was admittedly exempt from payment of additional duty of excise in view of the Notification No.11/2006-CE dated 1st March, 2006. The petitioner cannot claim exemption from VAT

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thereafter as is sought to be done I Grounds X.1 to X.5 of the petition.

36 While dealing with Grounds Y.1 to Y.5, it is denied that the States were entitled to levy VAT on tobacco only with effect from 1st April, 2007. The Trade Circular 29T of 2007 dated 30th March, 2007, as well as the Thirteenth Finance Commission Report referred to in Grounds Y and Z.1 of the petition are being deliberately misconstrued by the petitioners and, in any event, are not determinative of the legal position. For all these reasons, it is submitted that no relief should be granted to the petitioners. It has suffered no prejudice. On the other hand, great loss and prejudice would be suffered by the Revenue in the event any relief is granted. This is the affidavit-in-reply filed on 8th February, 2016.

37 A rejoinder affidavit has been filed by one Ravikiran Sokashi, the Director of the petitioner. In the rejoinder affidavit it is submitted as to how the petition should not be dismissed on the preliminary grounds and particularly on delay and laches. It is submitted as to how the petition

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challenges the order dated 20th June, 2015. Therefore, it cannot be said to be not maintainable or barred by delay and laches.

38 Then it is submitted that existence of an alternate remedy is not a bar to the maintainability of the writ petition, particularly when the challenge is to the validity of the Explanation added to Entry A-45 by Notification dated 21st January, 2006. The petitioners' other contention that amendment introduced by the Notification dated 21st February, 2006, effective from 1st March, 2006, can be prospective and not applicable for the period 1st April, 2005 to 28th February, 2006, is also raised in the writ petition.

39 The petitioner then reiterates in this rejoinder the ground that a Notification dated 21st January, 2006, is beyond the powers of the State Legislature / Executive under Article 246(3) of the Constitution read with Entry No.54 of Schedule II. The contentions as raised in the writ petition are reiterated.

40 The petitioner also in paragraph 9 of this affidavit

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relies on Article 261 of the Constitution of India to submit that the State cannot argue and urge anything to the contrary, particularly when it has projected and assured the Central Government / other State Governments that it is complying with the stipulations in Payment Order under Article 270 and is not levying sales tax on commodities covered by the Schedule to the ADE Act. That is why it is entitled to full share of all Central taxes without any reduction whatsoever. If this is how it projects its stand before the Constitutional authority and particularly the Central Government, then, anything to the contrary should not be permitted to be canvassed. Paragraphs 9 and 10 of this rejoinder refer to this position.

41 Thereafter, it is urged that the judgment in the case of *Godfrey Phillips* is squarely applicable to the facts of the present case. All contentions raised in the grounds and in the averments in the writ petition have thus been reiterated.

42 It is on this material that we have to consider the submissions of the learned senior counsel appearing for the petitioners and of the special counsel appearing for the State.

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43 Mr. Sridharan, the learned senior counsel appearing on behalf of the petitioners submits that the Tax Rental Agreement between the Centre and States for collection of additional duties of excise by the Centre, but distribution of the same entirely to the State Governments is reflected from the constitutional scheme itself. Mr. Sridharan would submit that ordinarily the States are entitled to levy sales tax on sale of all goods under Entry No.54 of List II to the VIIth Schedule to the Constitution of India. However, in the National Development Council held in December 1956, the State Governments entered into an arrangement with the Union Government in respect of the levy of sales tax on three commodities, namely, sugar, tobacco and fabrics. As per this arrangement, the Union shall levy additional excise duties on these commodities. The entire additional excise duties levied and collected by the Centre will be disbursed to the States (except the portion in relation to Union territories). On their part, the States were to refrain from exercising their power to levy sales tax on these three commodities. In view of this arrangement, the Centre has been levying and collecting additional excise duty since 1957 and distributing the same

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among the States. The *inter-se* share of the States in accordance with the percentage / ratio laid down by the Finance Commission from time to time is determined so as to give effect to this Rental Agreement.

44 Mr. Sridharan invites our attention to the relevant paragraph from the Tenth Finance Commission Report issued in November, 1994, covering the period from 1st April, 1995 to 31st March, 2000, to explain this Tax Rental Agreement. Paragraph 6.2 of this Report is also reproduced in the petitioners' written submissions.

45 These written submissions are tendered in both the Writ Petitions, but essentially in Writ Petition No.9265 of 2015. It is, therefore, clear that during the subsistence of this Tax Rental Agreement, no State while choosing to impose sales tax on the above commodities shall be eligible to the share in additional duties of excise. Further, if a State chooses to reimpose sales tax on any of the above commodities, then, no sums will be paid to that State as its share in the proceeds from the additional excise duty of that commodity unless the Central Government otherwise directs.

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46 Mr. Sridharan then takes us through the legislative measures to implement the above arrangement prior to 1st April, 2000. He submits that the additional excise duty levied under section 3 of the ADE Act, *inter alia*, on tobacco products is entirely distributed to the States as urged above. In that regard, he relies upon section 3 of the ADE Act and the First Schedule thereof. The tax levied under the ADE Act is also a duty of excise since the taxable event is manufacture. However, the duty levied under the ADE Act is over and above the duty levied under the Central Excise Act and to distinguish it from duties levied under the Central Excise Act popularly, known as additional duties of excise. Then, Mr. Sridharan relies on section 4 of this ADE Act which provides for a distribution of the additional duties of excise among the States. He also relies upon the amendments carried out to the Second Schedule to the ADE Act by Amending Act enacted by the Parliament generally every five years. This is based on the Report of the Finance Commission. The Amending Act, therefore, will indicate the *inter-se* share of the States from the total additional excise duty distributed to the States.

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47 Mr. Sridharan has then contended that the new alternate method of devolution recommended by the Tenth Finance Commission to be effective from 1st April, 1996, is more beneficial to the State. The State Government will get 3% of all Central taxes in lieu of the share towards additional duties of excise. This is apart from 26% of the Central taxes being State's share in Central taxes. Mr. Sridharan then invites our attention to Articles 270, 271 and paragraph 13 of the Report of the Tenth Finance Commission to urge that this would demonstrate that the Finance Commission recommended 25% of the tax collected, including the additional duties of central excise to be distributed to the States as per their share of Central taxes. In addition, the Finance Commission recommended 3% of the total to be distributed to the States as per their share of the additional duties of excise. Mr. Sridharan submits that the Central Government accepted the recommendations of the Tenth Finance Commission. That is how the Constitution (80th Amendment) Act, 2000, was introduced on 25th September, 2000, to implement these recommendations but with some minor modifications. The Constitution (80th Amendment) Act, 2000, was enacted by the

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Parliament and the amendment was asserted on 19th June, 2000. Now, the new Article 270 is substituted with retrospective effect from 1st April,1996. Mr. Sridharan then invites our attention to the Report of the Eleventh Finance Commission of June, 2000, for the period 2000-2005 and to submit that the States were to get 1.5% of the total Central taxes in lieu of their share of additional duties of excise. Mr. Sridharan submits that the recommendations are that if any State levies and collects sales tax on sugar, textile and tobacco it will not be entitled to any share from this 1.5%. Mr. Sridharan also invites our attention to the Constitution (Distribution of Revenues) No.5 Order 2000 issued by the President. Thereafter, he relies on the recommendations in the Report of the Twelfth Finance Commission for the period 2005-2010. Mr. Sridharan submits that even the Constitution (Distribution of Revenues) No.5 Order 2005 implementing the recommendations of the Finance Commission would denote that the State of Maharashtra has been given a share of additional duties of excise on the condition that they will not levy any sales tax on the three commodities referred above. Mr. Sridharan then refers to the scheme set out in the

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Thirteenth Finance Commission Report for the period 2010-2015. He submits that the State of Maharashtra has received its share of 3.5% of all Central taxes. It has accepted throughout this position that it is entitled to this share provided it does not levy VAT on pan masala containing tobacco. Therefore, Mr. Sridharan submits that levy of VAT on pan masala containing tobacco is *ultra vires* the Presidential order and the Constitution. He would submit that the State has also acted contrary to the judgment of the Hon'ble Supreme Court in the case of *Atiabari Tea Company vs. State of Assam AIR 1961 SC 232*. He submits that once the legislative and constitutional scheme is as above, then, any attempt to contravene it has to be disapproved and strongly by the Court. In such circumstances, the Notification dated 21st January, 2006, of the State Government is in clear breach of the Constitution (Distribution of Revenues) Order 2005 made by the President of India under Article 270 of the Constitution of India.

48 Mr. Sridharan then submits that the Hon'ble Supreme Court in the case of *Godfrey Phillips* (supra) has held

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that the State cannot levy sales tax on goods covered by additional duties of excise and relies upon paragraphs 63, 67 and 70 of this judgment.

49 Mr. Sridharan submits thereafter that the applicability of the ADE Act on pan masala containing tobacco during the Financial Years 2005-2006 and 2006-2007 has to be carefully understood. Prior to the amendment made by the Finance Act of 2001, pan masala containing tobacco fell under Chapter 21 of the Schedule to the Central Excise Tariff Act, 1985. It was **not** falling under the Schedule to the AD Act. There were some disputes regarding the coverage of Entry No. A-15 of Schedule A of the Bombay Sales Tax Act,1959. To place the matters beyond doubt, Maharashtra Act No.51 of 2000 amended Schedule A-15 by adding the Explanation. This Explanation was effective retrospectively only for the period 1st October, 1995 to 30th April, 2001. The amended explanation excluded pan masala whether or not containing tobacco from Schedule Entry A-15. However, post 2001, the Explanation was not applicable and pan masala containing tobacco was being exempted by Entry A-15. The Finance Act 2001 carried

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out certain amendments for pan masala containing tobacco. The said product was excluded from Chapter 21 and included in Chapter 24 of the Central Excise Tariff Act, 1985. It was also included in the First Schedule to the ADE Act. Consequently, the State of Maharashtra did not amend Schedule Entry A-15. The exemption from sales tax was being extended to pan masala containing tobacco since 2001. Mr. Sridharan submits that Chapter 24 of the First Schedule to the Central Excise Tariff Act covers tobacco and tobacco manufactured substitutes. Note 4 of this Chapter 24 of the First Schedule to the Central Excise Tariff Act, 1985, is then referred to by Mr. Sridharan to urge that the rules of interpretation governing the interpretation of the Central Excise Tariff Act would also apply to interpretation of the First Schedule to the ADE Act. On a bare reading of Note No.4 to Chapter No.24 of the First Schedule to the Central Excise Tariff Act it is clear that pan masala containing tobacco is specifically covered under Tariff Head 24039990. Further since the said tariff item is described in column (2) of the First Schedule to the ADE Act, the additional duty of excise covered pan masala containing tobacco. Further, the supplementary Note 1 to Chapter 21

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relating to Miscellaneous Edible Preparations of the First Schedule to the Central Excise Tariff Act specifically excluded pan masala containing tobacco from the ambit of Chapter 21. Chapter Heading 2403 was omitted from the First Schedule to the ADE Act only with effect from 1st April, 2007, vide section 10 of the Taxation Laws (Amendment) Act, 2007 (Act No.16 of 2007) read with the Notification dated 29th March, 2007. The Schedule Entry A-45 was amended with effect from 1st April, 2007, to delete reference to tobacco. Mr. Sridharan took us through all this to emphasize that the Schedules of the Bombay Sales Tax Act, 1959, and the MVAT Act reflected a clear and careful policy. In that regard, he refers to Schedule Entry A-15 of the erstwhile Bombay Sales Tax Act, 1959, and Schedule Entry A-45 of the MVAT Act to submit that the same is an integrated legislation and in tune with the States' understanding of the constitutional scheme and the recommendations of the Finance Commission. Therefore, when section 10 of the Taxation Laws (Amendment) Act, 2007, was enacted to exclude tobacco from the Schedule to the ADE Act effective from 1st April, 2007, then, that has to be synchronized. The synchronization would be that the

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amendment made by Notification dated 21st January, 2006, added an Explanation to Entry A-45 effective from 1st April, 2007, for the purpose of giving effect to the changes in the ADE Act. Elaborating this aspect, Mr. Sridharan would submit that all the three goods, namely, sugar, textiles and tobacco covered by the First Schedule to the ADE Act, 1957, when exempt from sales tax vide Entry No.A-45 of the MVAT Act, 2002, post Notification dated 21st January, 2006, only pan masala containing tobacco is excluded from the ambit of Entry A-45 though it continues to fall in the First Schedule of the ADE Act, 1957. All other products falling under the Schedule to the ADE Act, 1957, were continued to be exempted by Entry A-45. It would demonstrate that exclusion of only pan masala containing tobacco from Entry No.A-45 is contrary to the object underlying this Entry. The predecessor Entry A-15 has been in existence and effective since 1950. The classification introduced by Notification dated 21st January, 2006, has no nexus with the object sought to be achieved by the legislation in the form of Entry A-45. The pan masala containing tobacco has been singled out for this treatment. This is contrary to the fundamental objective of Entry A-45 read with the ADE Act. It

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is also violative of Article 14 of the Constitution of India and the Notification is, therefore, liable to be struck down. From 1st April, 2007, tobacco was omitted from Schedule to the ADE Act, 1957, and, consequently, reference to tobacco was deleted in Entry A-45. This also is in accord with the object of the legislation and is perfectly valid. Therefore, and in any event, the amendment made by Notification dated 21st January, 2006, should be made effective from 1st April, 2007. The result would be that the petitioners will not be liable to pay VAT on sale of gutkha for Financial Years 2005-2006 and 2006-2007 when the ADE Act was covering these products.

50 Mr. Sridharan emphasizes that the Notification, in any event, can be effective only from 1st February, 2006, and not from 1st April, 2005. In that regard, he submits that we must give the Explanation added to Schedule Entry A-45, prospective effect. We should give the same effect only from 1st February, 2006. Section 9 of the MVAT Act which empowers the State Government to amend the Schedule does not contain the power to give it retrospective effect. Mr. Sridharan relies upon the language of section 9 to submit that delegated

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legislation cannot have retrospective effect unless provided in the main section. Mr. Sridharan submits that even if Schedule Entry A-45 is held to exclude tobacco products in terms of the Explanation, such exclusion shall take effect only from 1st February, 2006. The reason is pan masala containing tobacco was indeed covered and fell under the First Schedule to the ADE Act in the Financial Years 2005-2006 and 2006-2007. Mr. Sridharan submits that any submission and based on paragraphs 11 to 15 of the affidavit-in-reply of the respondents is erroneous. The respondents have ignored Note 4 of Chapter 24 of the First Schedule to the Central Excise Tariff Act, 1985, read with Note 2 to the First Schedule to the ADE Act. This is not the error in the reply affidavits of the respondents alone. This is the same error / basis on which the Government issued the Notification dated 21st January, 2006. During the above Financial Years, the First Schedule to the ADE Act applied to all goods falling under Tariff Item 24039990. He once again reiterates that for Financial Year 2005-2006 the tariff item is described in column (2) of the First Schedule to the ADE Act and additional duty of excise is payable on pan masala containing tobacco @ 18%. This position continued in the

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Financial Year 2006-2007. Mr. Sridharan submits that the Notification No.11/2006-CE dated 1st March, 2006, issued by the Central Government clinches the issue. Relying upon the supplementary Chapter Note 1 to Chapter 21 relating to Miscellaneous Edible Preparations of the First Schedule to the Central Excise Tariff Act, Mr. Sridharan submits that it specifically excludes pan masala containing tobacco from the ambit of Chapter 21. Then, it is pertinent to note that the First Schedule to the ADE Act was amended by the Central Government by Notification dated 29th March, 2007. By that Notification, any reference to Tariff Headings 2403 and sub-headings and tariff items thereunder was omitted with effect from 1st April, 2007. All this would demonstrate that ADE was payable on pan masala containing tobacco products upto 31st March, 2007. Hence, it is erroneous to submit that by substitution of the First Schedule to the ADE Act it cannot be urged that ADE Act failed to specifically refer to pan masala containing tobacco in column (3). That is why the State Government erroneously issued the Notification dated 21st January, 2006. The defined and consistent policy of the State Government is given a go-by by the Notification dated 21st

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January, 2006. Therefore, this Notification is contrary to the State Government's policy. It is, therefore, violative of Article 14 of the Constitution of India. Mr. Sridharan has relied on the following judgments in support of the above contentions :

(1) Cannore Spinning & Weaving Mills Ltd. v. CC & CCE & Ors. (1969) 3 SCC 112.

(2) Hukam Chand etc. v. UOI & Ors. (1972) 2 SCC 601.

(3) CIT v. Vatika Township Pvt. Ltd. (2015) 1 SCC 1.

(4) Sedco Forex International Drill Inc. & Ors. v. CIT & Anr. (2005) 12 SCC 717.

(5) UOI v. Martin Lottery Agencies Ltd. (2009) 12 SCC 209.

(6) Dy. CIT v. Core Health Care Ltd. (2008) 2 SCC 465.

(7) State of UP v. Renusagar Power Co. (1998) 4 SCC 59.

(8) Ram Krishna Dalmia & Ors.v. S.R. Tendolkar & Ors. 1959 SCR 279.

(9) Godfrey Phillips India Ltd. v. State of UP (2005) 2 SCC 515.

(10) Kishan Chand Chellaram & Ors. v. Jt. CTO & Ors. 1668(2) STC 367 (Mad.)

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(11) K.C. Gajapati Narayan Deo & Ors. v. State of Orissa 1954 SCR 1.

(12) P. Vajravelu Mudaliar v. Spl. Deputy Collector for Land Acquisition 1965 1 SCR 614.

51 He has also taken us extensively through the provisions of the enactments referred in the foregoing paragraphs, the Constitution and the Objects and Reasons of the Taxation Laws (Amendment) Bill, 2007. Mr. Sridharan has also taken us through the Trade Circulars. All this has been compiled by the petitioners' advocate in two volumes of the compilation.

52 On the other hand, Mrs. Jeejeebhoy, learned special counsel appearing on behalf of the State / Revenue has submitted that as pointed out in the affidavit-in-reply, the writ petitions are not maintainable on account of the remedies available to the petitioners. She has submitted and consistent with the affidavit, particularly the preliminary objection therein, that just because the petitioners raise some issues of legality and validity of the levy does not mean that the statutory remedies should be given a go-by. If the petitioners'

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contentions are properly appreciated they would reveal that the petitioners cannot and do not dispute the competence of the State to issue the Notification. All that the petitioners raise are some issues and pertaining to the interpretation of the same and its retrospective operation. They cannot be said to be outside the purview of the power of the Appellate Authority who the petitioners can definitely approach. In other words, Mrs. Jeejeebhoy would submit that questions of law and fact, so long as they do not touch the constitutionality of the statute itself, can be adjudicated and decided in appeal. Therefore, we should not entertain the writ petitions.

53 Alternatively and without prejudice the petitioners contentions can be summarized as under :

(a) The impugned Notification levies VAT on pan masala containing tobacco despite the State having received / accepted the share as per the Distribution of Revenue Order No.5 and the levy is, therefore, ultra vires the Presidential Order and hence ultra vires the Constitution. The decision of the Hon'ble Supreme Court in Godrey Phillips (supra) supports the submission of the petitioner inasmuch as it purportedly

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held that States cannot levy sales tax on goods covered by the ADE Act, 1957. The impugned Notification violates Article 14 of the Constitution as the State of Maharashtra has exempted all other goods covered by the ADE Act. The amendment of Schedule Entry A-45 by the impugned Notification is prospective and not retrospective.

(b) The impugned Notification is not *ultra vires* the Constitution. Section 3 of the ADE provides for levy and collection of additional duties. Section 4 of the said Act provides for distribution of additional duties out of the Consolidated Fund of India to the States during each Financial Year in accordance with the provisions of the Second Schedule to the ADE Act. It is well settled that the State Legislature is not deprived of its legislative competence to impose sales tax on goods covered by the ADE Act merely because the State is receiving a portion of the taxes levied and collected under the ADE Act.

(c) Apart from the decision of the Supreme Court in the case of State of Bihar v. Bihar Chamber of Commerce (supra) there are several decisions of the Supreme Court and High

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Court which hold that the State's power to legislate is not curtailed by the ADE Act [See State of Kerala v. M/s. Attesee (1989) Supp 1 SCC 733 at paras 6-8 (page 51, petitioner's Compilation, Volume II); Akay Cones Pvt. Ltd. v. Lt. Governor of Delhi (2003) 129 STC 172 (Delhi DB) at para 41 (Page 325, Petitioner's Compilation, Volume I); M.R. Tobacco Pvt. Ltd. v. Union of India (2006) 14 STC 211 (Delhi DB) at page. 9 (Page 306, Petitioner's Compilation, Volume I)].

(d) The petitioners' reliance on the decision in Godfrey Phillips (supra) is misplaced for the following, amongst other, reasons. In Godfrey Phillips the Supreme Court was concerned with the ambit of Entry 62 of List II to the Constitution (para 3) and not with the legislative competence of the State to impose a tax on sale of goods on account of the enactment of the ADE Act and/or because the State is getting a portion of the taxes levied and collected under the ADE Act, which was the question raised and considered in State of Bihar v. Bihar Chamber of Commerce (supra).

(e) As stated in Godfrey Phillips (supra), the ADE Act has to be read with Article 286 of the Constitution of India.

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Therefore, for Article 286 of the Constitution to apply the goods must be declared to be of special importance in inter-State trade or commerce by the Parliament and the restrictions and conditions must be specified by the Parliament in law. Unlike tobacco, pan masala containing tobacco has never been declared to be a good of special importance in inter-State trade or commerce.

(f) Section 7 of the Act was repealed in 1958 and, therefore, was not in force in 2006, when the impugned Notification was issued. Accordingly, at the relevant time, the ADE Act neither declared any goods to be of special importance nor imposed any restrictions / conditions as envisaged by Article 286 of the Constitution. Notably, pan masala containing tobacco was not even included in the Schedule to the ADE Act at the time section 7 of the ADE Act was in force.

(g) Section 14 of the Central Sales Tax Act, 1956 declares certain goods to be of special importance in inter-State trade or commerce. Section 14(ix) of the Central Sales Tax Act,1956, which referred to tobacco products, was deleted in

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2007. However, even prior to its deletion in 2007, Section 14 did not cover all tobacco products but only listed certain tobacco products as goods of special importance in inter-State trade and commerce as follows:

"unmanufactured tobacco and tobacco refuse covered under sub-heading No.2401.00 cigars and cheroots of tobacco covered under heading No. 24.02, cigarette and cigarillos of tobacco covered under sub heading Nos. 2403.11 and 2403.21 and other manufactured tobacco covered under sub-heading Nos. 2404.11, 2404.12, 2404.13, 2404.19, 2404.21, 2404.29, 2404.31, 2404.39, 2404.41, 2404.50 and 2404.60 of the Schedule to the Central Excise Tariff Act, 1985."

(h) The petitioners' product (pan masala containing gutkha/tobacco) admittedly falls under tariff heading 24039990 of the Central Excise Tariff Act, 1985, which tariff heading was not included in section 14 of the Central Sales Tax Act.

(i) Section 15 of the Central Sales Tax Act, which prescribes certain restrictions and conditions, only applies to

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"declared goods". Section 2(c) of the Central Sales Tax Act clarifies that "declared goods" means goods declared under section 14 of the Central Sales Tax Act to be of special importance in inter-State trade or commerce.

(j) Since section 14 of the Central Sales Tax Act did not include pan masala containing tobacco, neither Article 286 of the Constitution nor section 15 of the Central Sales Tax Act nor the provisions of the ADE Act would in any manner restrict the power of the State to levy sales tax on the said goods. The findings in Godfrey Phillips (supra) are not applicable qua pan masala containing tobacco and the decision in Godfrey Phillips which considers the effect of these provisions is, therefore, clearly inapplicable and irrelevant.

(k) Article 270 of the Constitution, on a plain reading, provides for distribution of net proceeds between the Union and the States. It does not impose any restrictions on the legislative power of the State. All that it does is to authorise the President to do so while prescribing the manner and form of distribution of the net proceeds. In any event and without prejudice to the foregoing, the said Order issued under Article

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270 of the Constitution cannot and does not impinge on the legislative power of the State. The said order merely provides that no share shall be payable to a State in a year where that State levies tax or duty on the sale or purchase of goods described in column (3) of the First Schedule to the ADE Act and any sums paid in excess of the entitlement is recoverable by the Centre. Therefore, the said Order envisages and provides for the imposition of tax or duty on goods described in column (3) of the Schedule to the ADE Act and sets out the consequences of such levy. On a plain reading the said Order does not prohibit the levy of any tax or duty by the State. In the light of the foregoing, it is clear that the petitioners' submissions are not an argument on constitutional invalidity but, at best, an argument on refund to the Central Government of the benefit received by the State. The petitioners are not concerned with what needs to be done with the Centre, especially since the requirement, if any, to make such a refund does not render the law void nor impact the petitioners in any manner. Even assuming the State's share of ADE were refunded to the Centre, the petitioners would not be entitled to refund of ADE paid by it.

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(l) Moreover, without prejudice to the generality of the foregoing, it is submitted that in the present case pan masala containing tobacco was not covered by the said Order and/or Article 270 at the relevant time. Section 116 of the Finance Act, 2005, replaced the Schedule to the ADE Act with a new Schedule that does not describe pan masala in the column. Accordingly, pursuant to the Finance Act, 2005, additional duty of excise paid on p;an masala is by way of a surcharge under section 85. Notably, Article 270 clarifies that it does not apply to any surcharge covered by Article 271 of the Constitution.

(m) The reliance placed by the petitioner on Article 261(1) of the Constitution is also misplaced. As held by the Full Bench of the Punjab High Court in *Firm Gauri Lal Gurdev Das v. Jugal Kishore AIR 1959 Pun. 265 at para 17 : "Article 261(1) merely establishes a rule of evidence and does not deal with jurisdiction".*

(n) Pan masala, on the face of it, is different from tobacco and constitutes a separate class by itself. This is *inter*

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alia clear from the manner in which pan masala has been treated even by the Union Legislature. Illustratively, until 2001, pan masala including pan masala containing tobacco, was classified under Chapter 21 "Miscellaneous Edible Preparations" of the Central Excise Tariff Act,1985. Note 3 of Chapter 21 defined pan masala as a preparation containing betel-nuts, lime and kattha (catechu) and tobacco whether or not containing any other ingredient, such as copra and menthol. The said tariff item was numbered as 2106 (page 90 of the petitioners' compilation) and was not included in the First Schedule to the ADE Act. It was only pursuant to the Finance Act, 2001, that pan masala containing tobacco was classified in Chapter 24 as a separate product under tariff item 2404.49. Note 3 in Chapter 21 was amended to clarify that pan masala covered by Chapter 21 would not have tobacco as an ingredient. A corresponding change was brought about in column (3) of the First Schedule to the ADE Act to include "2404.49 pan masala containing tobacco". Therefore, until 2001 pan masala was not included in either Chapter 24 of the 1985 Act nor in the First Schedule to the ADE Act.

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(o) Without prejudice to the foregoing and assuming whilst denying that additional duties of excise were being levied on pan masala under the ADE Act even after the Finance Act, 2005, all tobacco products covered by the ADE Act were exempt from payment of additional duty of excise pursuant to Notification No.11/2006-CE dated 1st March, 2006. In the circumstances, even gong by the petitioners' case, the petitioners cannot claim exemption from VAT thereafter. In the circumstances, the only issue that arises is whether the explanation to Schedule Entry A-45, introduced by the impugned Notification, operates retrospectively. As set out above, this is an issue that can and ought to be considered by the Appellate Forum under the MVAT Act.

(p) Under the ADE Act section 4 provides for distribution of additional duties among States in accordance with the provision of the Second Schedule.

(q) It is well settled that an exemption is to be strictly construed. Since pan masala containing tobacco was no longer described in column(3) of the First Schedule to the ADE Act, it

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did not fall within the definition of Schedule Entry A-45 in the MVAT Act. Moreover, from 1st April, 2005, pan masala was subject to additional duty of excise under section 85 of the Finance Act, 2005, as set out above. The impugned Notification inserted an Explanation to Schedule Entry A-45 to clarify this position. In accordance with well settled principles of law, since the Explanation is merely clarificatory, it applies retrospectively from 2005 when pan masala containing tobacco ceased to be described in column (3) of the First Schedule of the ADE Act.

54 For the above reasons, therefore, Mrs. Jeejeebhoy would submit that the writ petitions be dismissed.

55 For properly appreciating the rival contentions, it would be proper and worthwhile if we first refer to the constitutional provisions and thereafter the respective Acts.

56 As far as the Constitution is concerned, the parties have referred and relied upon the following Articles and the Entries in List II to the VIIth Schedule of the Constitution.

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57 For ready reference we reproduce them :

> *"**269. Taxes levied and collected by the Union but assigned to the States**.- (1) Taxes on the sales or purchase of goods and taxes on the consignment of goods shall be levied and collected by the Government of India but shall be assigned and shall be deemed to have been assigned to the States on or after the 1st day of April, 1996 in the manner provided in clause (2).*
>
> *Explanation.- For the purposes of this clause, -*
>
> *(a) the expression "taxes on the sale or purchase of goods" shall mean taxes on sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce;*
>
> *(b) the expression "taxes on the consignment of goods" shall mean taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.*
>
> *(2) The net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to Union territories, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which the tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.*
>
> *(3) Parliament may by law formulate principles for determining when a sale or purchase of, or consignment of, goods takes place in the course of inter-State trade or commerce.*
>
> ***270. Taxes levied and distributed between the Union and the States.**- (1) All taxes and duties referred to in the Union List, except the*

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duties referred to in the Union List, except the duties and taxes referred to in articles 268, 268A and 269, respectively, surcharge on taxes and duties referred to in article 271 and any cess levied for specific purposes under any law made by Parliament shall be levied and collected by the Government of India and shall be distributed between the Union and the States in the manner provided in clause (2).

(2) Such percentage, as may be prescribed, of the net proceeds of any such tax or duty in any financial year shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax or duty is leviable in that year, and shall be distributed among those States in such manner and from such time as may be prescribed in the manner provided in clause (3).

(3) In this article, "prescribed" means-

(i) until a Finance Commission has been constituted, prescribed by the President by order, and

(ii) after a Finance Commission has been constituted, prescribed by the President by order after considering the recommendations of the Finance Commission.

***271. Surcharge on certain duties and taxes for purposes o the Union**.-Notwithstanding anything in articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India.*

....

***286. Restrictions as to imposition of tax on the sale or purchase of goods**.-(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place-*

(a) outside the State; or

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(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes pace in any of the ways mentioned in clause (1).

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of ,-

(a) 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; or

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause (b), sub-clause (c) or sub-clause(d) of clause (29A) of article 366,

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.

... ...

LIST II – State List

... ...

52. Taxes on the entry of goods into local area for consumption, use or sale therein.

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provision of entry 92A of List I."

58 Mr. Sridharan's contentions can very well be appreciated if we analyse the Articles of the Constitution at the threshold. Mr. Sridharan has referred to the three Articles

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reproduced above, namely, 269, 270 and 271 which fall under Part XII titled as “Finance, Property, Contracts and Suits”. It is common ground that Article 264 of the Constitution in which this Chapter I – 'Finance' opens with a sub-heading 'General' defines the Finance Commission to mean a Finance Commission constituted under Article 280. Article 265 which also falls in the Part declares that taxes not to be imposed, save by authority of law. Article 266 deals with consolidated funds and public accounts of India and of the States. Article 267 is titled 'Contingency Fund'.

59 Then comes a sub-heading of this Part, namely, “Distribution of Revenues between the Union and the States”. Article 268 deals with duties levied by the Union but collected and appropriated by the States. By clause (2) it clarifies that such stamp duties and such duties of excise on medicinal preparations as are mentioned in the Union List shall be levied by the Government of India, but shall be collected as set out particularly in that clause. Clause (2) of Article 268 states that the proceeds in any financial year of any such duty leviable within any State shall not form part of the Consolidated Fund of

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India, but shall be assigned to that State. Then comes Article 268A which was inserted by Constitution (88th Amendment) Act, 2003 (section 2) and is titled as 'Service tax levied by Union and collected and appropriated by the Union and the States', but this Article has yet to be enforced.

60 Article 269 which we have reproduced deals with taxes levied and collected by the Union but assigned to the States. There has been a substitution of this Article by the Constitution (80th Amendment) Act, 2000. Now, with effect from 9th June, 2000, this Article and divided into three clauses states that the taxes on the sale or purchase of goods and taxes on the consignment of goods shall be levied and collected by the Government of India, but shall be assigned and shall be deemed to have been assigned to the States on or after the 1st day of April, 1996 in the manner provided in clause (2). Therefore, the explanation below it defines the words and expressions "taxes on sale or purchase of goods and taxes on the consignment of goods and both take place in the course of inter-State or commerce. Thereafter, by clause (2), it is stated that the net proceeds in any financial year of any such tax except

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insofar as those proceeds represent proceeds attributable to Union territories, shall not form part of the Consolidated Fund of India but shall be assigned to the States which the tax is leviable in that year and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law and the determination has to be by formulation of principles and that is provided by clause (3). Article 270 which also had been substituted by the same Constitutional Amendment Act deals with taxes levied and distributed by the Union and the States. One would, therefore, clearly appreciate and understand that this is a scheme of distribution of the Revenue between the Union and the States and for that distribution to take place and be effective it had to be clarified that which duties could be levied by the union but collected and appropriated by the States, which taxes levied and collected by the union can be assigned to the States and the taxes levied and distributed between the Union and the States. It is in Article 270 that one finds that there is a reference to all taxes and duties referred to in the Union List except those duties and taxes referred in the preceding Articles, surcharge on taxes and duties referred to in

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Article 271 and any fees levied for any specific purposes shall be levied and collected by the Government of India and shall be distributed between the Union and the States in the manner provided in clause (2) of Article 270. Therefore, the scheme is to distribute the taxes and duties except those in clause (1) in accordance with the manner provided in clause (2). It is in clause (2) of Article 270 that we find a reference to the percentage of distribution. The manner of such percentage has to be prescribed by the Finance Commission and till a Finance Commission has been constituted, it can be prescribed by the President by Order and after the Finance Commission has been constituted, it shall be prescribed by the President by Order after considering the recommendations of the Finance Commission.

61 Article 271 deals with surcharge on certain duties and taxes for purposes of Union and opens with a non obstante clause. Therefore, notwithstanding anything in Articles 269 and 270, the Parliament may any time increase any of the duties or taxes referred to in those Articles by a surcharge for the purpose of the union and the whole proceeds of any such

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surcharge shall form part of the Consolidated Fund of India. We are really not concerned with the other Articles of this Part for the simple reason that we are then taken through the miscellaneous financial provisions. Though they follow Article 280 which is titled as 'Finance Commission' what is referred therein is Article 286. It is clear that there are restrictions as to imposition of tax on the sale and purchase of goods and no law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase taxes place (a) outside the State; or (b) in the course of the import of the goods into, or export of the goods out of, the territory of India. Once again, the principles for formulating as to when such sale or purchase of goods takes places and in the ways mentioned in clause (1) of Article 286 is left to the Parliament and who shall may by law do so.

62 By Article 286(3), it is clarified that any law of a State shall insofar as it imposes or authorises the imposition of (a) a tax on the sale or purchase of goods, being a tax of the nature referred to in Article 366 (29A) sub-clauses (b), (c) or (d), then, such imposition or authorising of the imposition

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would be subject to such restrictions and conditions in regard to the system of levy, rates and other incidence of tax as Parliament may by law specify.

63 The constitutional provisions, so far referred, to our mind to not indicate that the State is denuded, much less divested of its power to levy and impose a tax on sale or purchase of goods. Therefore, Schedule VII List II Entry 54 authorises the State Legislature to impose taxes on sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I.

64 We have no hesitation in agreeing with Mrs. Jeejeebhoy when she submits that these constitutional provisions create no embargo on the State's power to impose tax on the sale or purchase of pan masala containing tobacco.

65 The writ petition is filed to strike down clause (10) of the Notification dated 21st January, 2006.

66 That Notification, to the extent relevant, reads as under :

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"... ... ...

(10) In Entry 45, in column (2), the following Explanation shall be added, namely:-

Explanation:- For removal of doubts, it is hereby declared that Tobacco shall not include Pan Masala, that is to say any preparation containing Betel Nuts and Tobacco and any one or more of the following ingredient, namely :-

(i) Lime; and (ii) Kattha (catechu),whether or not containing any other ingredients such as Cardamom, Copra and Menthol."

67 Therefore, in Entry 45 in the Maharashtra Value Added Tax Act, 2002, in column (2), the Explanation as above shall be added.

68 A bare perusal of this would indicate that the doubts were sought to be removed. The doubts whether tobacco would include pan masala. That has been clarified by declaring that tobacco shall not include pan masala i.e. to say any preparation containing betel-nuts and tobacco and any one or more of the ingredients in sub-clause (1) to clause (10). To be precise the Government of Maharashtra amended by the Notification with effect from 1st February, 2006, Schedules A and C appended to the Maharashtra Value Added Tax Act in terms of the powers

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conferred by section 9(1) of the MVAT Act. That power is of adding or modifying or deleting any entry in the schedule. The power is of amendment of the Schedule as above and equally to reduce or enhance the rates of tax or for specifying the rates of tax or for specifying the rates of tax where nil rates are specified.

69 Mr. Sridharan also relies upon the Constitution (Distribution of Revenues) No. 5 Order, 2005. That is issued in exercise of the powers conferred by Article 270. That is issued by the President after having considered the recommendations of the Twelfth Finance Commission. That is setting out the percentage of the net proceeds of the taxes and duties referred to in clause (1) of Article 270 other than service tax which are to be assigned to the States under clause (2) of that Article in each financial year commencing on and after the first day of April, 2005, but ending before the first day of April, 2010. The percentage is 29½% to be distributed among the States as per the table.

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70 We need not refer to Articles 270 to 281 of the Constitution prior to 2000 and Article 270 to 281 of the Constitution post 2000 for the simple reason that we are considering the question about the State Legislature's power to tax pan masala with tobacco. Prior to that we must refer to Schedule A.

71 Schedule A of the Maharashtra Value Added Tax Act, 2002, is referable to the substantive provisions contained in section 5 of the MVAT Act. Section 5 states that subject to the other provisions of the MVAT Act and the conditions or exceptions, if any, set out against each of the goods specified in column (3) of the Schedule A, **no** tax shall be payable on the sales of any goods specified in column (2) of that Schedule. It is in that context we must see the entries in Schedule A. Once they are referable to section 5 and no tax is payable on the sales of any goods specified in column (2) of that Schedule, then all that one has to find is whether there are any other provisions of the Act, namely, MVAT Act and the conditions or exceptions, if any, set out against each of the goods specified in column (3) in so far as pan masala with or without tobacco. It

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is conceded as far as the name of the commodities in Entry A-45, is concerned, they are sugar, fabrics and tobacco as declared from time to time in column (3) of the First Schedule to the ADE Act. An Explanation has been added by the Notification and which we have reproduced above – Clause (10) of the Notification dated 21st January, 2006. this entry never included Pan Masala and that is clarified by explaining that tobacco referred therein shall not include Pan Masala. What is meant by Pan Masala is then explained and clarified by the Explanation.

72 Mr. Sridharan has relied upon the Additional Duties of Excise (Goods of Special Importance) Act, 1957. That Act has been numbered as Act No.58 of 1957 and it has been brought into effect on 24th December, 1957. It is an Act to provide for the levy and collection of additional duties of excise on certain goods and for the distribution of a part of the net proceeds thereof among the States in pursuance of the principles of distribution formulated and the recommendations made by the Finance Commission. The term "additional duties" is defined in section 2 clause (a) to mean a duty of excise levied

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and collected under sub-section (1) of section 3 of the ADE Act. Section 3 sets out the levy and collection of additional duties and these shall be in respect of goods described in column (3) of the First Schedule to the ADE Act produced or manufactured in India and on all such goods lying-in-stock within the precincts of any factory, warehouse or other premises where the said goods were manufactured, stored or produced or in any premises appurtenant thereto. There shall be levied and collected duties of excise at the rate or rates specified in column (4) of this Schedule on these goods. These are additional duties and that is clarified by sub-section (2) of section 3 for they are in addition to duties of excise chargeable on such goods under the Central Excise Act or any other law for the time being in force. Then, there is a provision for distribution of additional duties among States and that has not been done in accordance with the provisions of the Second Schedule to the ADE Act. As far as the petitioners' are concerned they do not dispute that they are manufacturers of pan masala not containing tobacco under the brand name “Star Pan Masala” classifiable under Tariff Heading 21069020 of the Central Excise Tariff Act, 1985. They have discharged VAT

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liability on sale of such pan masala not containing tobacco. It is conceded that the sale of this pan masala and not containing tobacco is not a subject matter of the writ petitions. The petitioners in these petitions are concerned with pan masala containing tobacco normally known as Gutkha / Mawa under various brand names. The said pan masala containing tobacco was classifiable under Tariff Head 24039990 of the Central Excise Tariff Act, 1985 during the relevant period.

73 However, on the petitioners' own showing until 2001, Chapter 21 of the Central Excise Tariff Act, 1985, dealt with "Miscellaneous Edible Preparations". Note 3 of Chapter 21 defined pan masala to mean any preparation containing betel-nuts and any one or more of the ingredients, namely, lime, kattha (catechu) and tobacco, whether or not containing any other ingredients such as cardamom, copra and menthol. The description of goods so far as Chapter 21 is concerned is divided into heading number, sub-heading number, description of goods, rate of duty. Heading No.21.06 was titled as pan masala. There is a separate entry for betel-nut powder known as "supari". As far as the ADE Act is concerned, that has a

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Schedule and annexed to it, styled as First Schedule. The petitioners rely upon Chapter 24 of the Central Excise Tariff Act, 1985, in which after the Finance Act 2001, it classified pan masala containing tobacco as 2404.09. Mrs. Jeejeebhoy is right in submitting that pan masala on the face of it is different from tobacco and constitutes a separate class by itself. We have perused Chapters 21 and 24 of the Central Excise Tariff Act and as appearing in the compilation tendered by the petitioners from pages 88 to 90, 93, 96 and 101. The corresponding Note, namely, Note No.3 in Chapter No.21 was amended to clarify that pan masala covered by Chapter 21 would not have tobacco as an ingredient. Corresponding to that was the change brought about in column (3) to the First Schedule of the ADE Act to include Tariff Entry 2404.49, namely, pan masala containing tobacco (page 111 of the petitioners compilation). Thus until 2001, pan masala was not included in either page 24 of the Central Excise Tariff Act nor in the the First Schedule to the ADE Act.

74 We also agree with Mrs. Jeejeebhoy when she contends that even after pan masala was brought within the

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purview of the ADE Act, it was never declared by the Parliament to be one of the goods of special importance in inter-State trade and commerce covered by sections 14 and 15 of the Central Sales Tax Act, 1956. We also agree with her that from 2005, the levy of additional duties of excise on pan masala was by way of a surcharge for the purpose of the Union and the entry describing pan masala in the column to the First Schedule to the ADE Act was deleted. From the entry itself, it is apparent that pan masala containing tobacco is known to the commercial world as different from tobacco. Pan masala is said to be a preparation containing betel-nuts and one or more of the ingredients referred above. Unlike the other entries in Chapter 24 of the 1985 Act, essentially dealing with tobacco, pan masala may or may not contain tobacco.

75 The essential complaint is that having been included as above in the First Schedule to the ADE Act, the State is denuded of its power to levy MVAT on pan masala containing tobacco.

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76 If we have to decide this issue, we must find out some prohibition in the Constitution and by which VAT on pan masala containing tobacco cannot be levied.

77 We are in agreement with Mrs. Jeejeebhoy that the petitioners arguments must be focusing on the constitutional validity and must establish and prove that this levy is *ultra vires* the Constitution.

78 We have, in detail, referred to the constitutional provisions only to deal with this contention.

79 Mr. Sridharan with great emphasis and all persuasive ability at his command submits that the State of Maharashtra has received/accepted the share as per distribution of Revenue Order No.5 and hence levy of VAT on pan masala containing tobacco is *ultra vires* the Presidential Order and *ultra vires* the Constitution. We are unable to agree with him. On the own showing of Mr. Sridharan, he analyses the Constitution (Distribution of Revenues) No.5 Order 2000 issued by the President in his oral and written arguments

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(refer paragraphs 15.1 to 15.3) but concedes that under this scheme of distribution the State which levies the sales tax on one on the commodities liable to additional duties of excise, such State shall not be eligible for the share on all other commodities also. Apart from the fact that tobacco is described and referred to in the Schedule to the ADE Act and pan masala containing tobacco being a distinct commodity known to the commercial world, we do not think that this argument, even if accepted, would demonstrate and prove that the levy is unconstitutional. At best that can impact the share of the State Government in the revenues or taxes levied and collected by the Centre in the State of Maharashtra. The entire constitutional scheme and as pressed into service by Mr. Sridharan will not enable us to conclude that levy of VAT on pan masala containing tobacco is *ultra vires* the Constitution. There is no embargo and of the nature specified in Article 286 of the Constitution of India and pressed into service. All that is pressed into service is the Tax Rental Agreement between the Centre and the States for collection of additional duties of excise by the Centre, but distribution of the same entirely to the State Governments, the legislative measures followed to

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implement the arrangement as above prior to 1st April, 2000, and thereafter. The 1980 Amendment Act to the Constitution, the Report of the Eleventh Finance Commission, Twelfth Finance Commission for the period 2005-2010 and the further Finance Commissions. We have already noted the argument that the State of Maharashtra has received / accepted the share as per this Presidential Order. However, we do not find that all this would come to the aid of Mr. Sridharan in establishing and proving his case that the levy is *ultra vires* the constitutional scheme and the Articles noted above.

80 Mr. Sridharan's emphasis on the judgment of *Godfrey Phillips* (supra) is misplaced.

81 *Godfrey Phillips* is a five-Judge judgment delivered by the Hon'ble Supreme Court. That concerned the manufacturers, dealers or sellers of tobacco and tobacco products. That challenged the composition and levy of a luxury tax on tobacco and tobacco products by treating them as luxuries within the meaning of the word in Entry 62 of the State List (List II). That is an exclusive power of the State

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Legislature to make laws with respect to taxes on luxuries including taxes on entertainments, amusements, betting and gambling. Several States enacted legislation which they claim is referable to the right to tax luxuries under this Entry. The Hon'ble Supreme Court was concerned with the Uttar Pradesh Tax on Luxuries Act, the Andhra Pradesh Tax on Luxuries Act and the West Bengal Tax on Luxuries Act. The Hon'ble Supreme Court referred to all the State Acts and then noted the contentions. The constitutional scheme insofar as the Entry No.54 of List II is concerned, that has not been touched at all (see para 59). Thereafter, in para 60 of this judgment the limitation on States jurisdiction to levy sales tax placed by Article 286 has been referred. Then, in paragraph 63, there is a reference made to the Taxation scheme on tobacco. Then from paragraph 64, the ADE Act and its charging section is referred. Therefore, there shall be levied and collected in respect of the goods, namely, sugar, tobacco and cotton fabrics etc., the levy of additional duties of excise and its collection. In paragraph 65, the Hon'ble Supreme Court held that no State can levy luxury tax on items covered by section 3 of the ADE Act in respect of the goods for the same taxable event, namely,

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goods stored on manufacture, just by describing the goods as luxury goods. Then, in paragraph 67, the Hon'ble Supreme Court held thus :

> *"67. However, while widening the scope of Entry 54 of List II, the powers of the States to levy such tax are subjected to a corresponding restriction as a consequence of the constitutional curbs imposed on sales tax under Article 286 read with Sections 14 and 16 of the Central Sales Tax Act,1956 and the ADE Act, 1957. The tax leviable by virtue of sub-clause (a) of clause (29-A) of Article 366 of the Constitution thus becomes subject to the same discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution. The position is the same when we look at Article 286 of the Constitution. If any declared goods which are referred to in Section 14 of the Central Sales Tax Act, 1956, are involved in such transfer, supply of delivery, which is referred to in clause (29-A) of Article 366, the sales tax law of a State which provides for levy of sales tax thereon will have to comply with the restrictions mentioned in Section 15 of the Central Sales Tax At, 1956."*

82 We do not see how any of these paragraphs would support and lend credence to the arguments of Mr. Sridharan before us. The Hon'ble Supreme Court merely declares that while widening the scope of Entry No.54 of List II, the powers of the State to levy such tax are subjected to a corresponding restriction as a consequence of the constitutional curbs imposed on sales tax under Article 286 read with sections 14 and 15 of the Central Sales Tax Act, 1956, and the ADE Act,

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1957. In paragraph 70 the Hon'ble Supreme Court declared further and held that even if tobacco is an article of luxury, a tax on its supplies is the exclusive competence of the State but subject to the above constitutional curbs. Therefore, Mrs. Jeejeebhoy is right in submitting that the reference to this judgment and the emphasis on the above observations therein is misplaced. Mr. Sridharan would like to rely on these observations but he must demonstrate as to how the curbs in the constitutional and statutory provisions noted above take within its import the levy of VAT on pan masala containing tobacco. The difficulty in Mr. Sridharan's way is obvious inasmuch as there is nothing in the judgment of *Godrey Phillips* which would dilute the pronouncement in the case of *State of Bihar vs. Bihar Chamber of Commerce (1996) 9 SCC 136*. Mr.Sridharan would submit that this judgment cannot be of assistance. Not only this but the other judgments are sought to be distinguished by urging that they are relating to a period prior to 1st April, 2000, when distribution in Central taxes was not governed by the Constitution (Distribution of Revenues) Order issued by the President. We are not concerned here with the period but we are concerned with the interpretation of the

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constitutional provisions and its impact on the subject levy. We cannot brush aside the dictum in the case relied upon, particularly the *State of Bihar* (supra) where the Hon'ble Supreme Court emphatically declares that the ADE Act is also not a law made under and with reference to Article 252 of the Constitution, which Article empowers the Parliament to make a law with respect to any matter mentioned in List II, if two or more States pass resolutions requesting the Parliament to make a law in that behalf. We cannot do better then reproduce the relevant paragraphs of the *State of Bihar* (supra) and which are rightly pressed into service by Mrs. Jeejeebhoy.

> *"27. Section 3 provides for levy and collection of additional duties. Section 4 provides for distribution of additional duties among the States. It says that during each financial years there shall be paid out of the Consolidated Fund of India to the States, in accordance with the provisions of the Second Schedules such sums, representing a part of the net proceeds of the additional duties levied and collected during that financial year, as are specified in the Schedule. Section 5 says that any expenditure incurred under the Act shall be charged to the Consolidated fund of India. Section 6 confers the rule-making power upon the Central Government. The proviso to Rule (2) in the Second Schedule to the Act is of crucial relevance to us. Rule (2) along with its proviso reads thus:*
>
> > *"During each of the financial years commencing on and after the Ist day of April, 1974 there shall be paid to each of the States specified in*

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column 1 of the Table below such percentage of the net proceeds after deducting therefrom a sum equal to 1.41 per cent of the said proceeds as being attributable to Union Territories, as is set out against it in column 2.

Provided but if during the financial year there is levied and collected in any State a tax on the sale or purchase of sugar, tobacco, cotton fabrics. woollen fabrics. rayon or artificial silk fabrics or one or more of them by or under any law of that States no sums shall be payable to that State under this paragraph in respect of that financial year unless the Central Government by special order otherwise directs."

28. The proviso states that if during a given financial years a State levies and collects a tax on the sale or purchase of scheduled goods or on any one or more of the scheduled goods by or under a law of that States no sums shall be payable to that state under this paragraph in respect of that financial year, unless the Central Government by special order directs otherwise. There is no reference in the Act or in the Statement of Objects and Reasons to any tax other than the tax on sale or purchase of goods. There is no ambiguity in the language of the proviso to Rule (2), which is a part of the statute.

29. The A.D.E. Act is enacted by the Parliament with reference to Entry 84 in List-I of the Seventh Schedule to the Constitution whereas the impugned enactment is made by the State with reference to Entry 52 in List-II. The power to levy taxes on sale or purchase of goods is conferred upon the States and the States alone by Entry 52 in List II. The Parliament cannot make a law either with reference to Entry 52 or for that matter with reference to Entry 54. The A.D.E. Act is also not a law made under and with reference to Article 252 of the Constitution, which article powers the Parliament to make a law with respect to any matter mentioned in List- II, if two or more States pass resolutions requesting the Parliament to make a law in that behalf. The

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impugned Act is also not relatable to any of the Articles 249 to 253 which are in the nature of exceptions to the normal rule that Parliament can make no law with respect to the entries in List-II. If so, it follows that the State legislatures are not denuded or deprived of their power to make a law either with reference to Entry 52 or with reference to Entry 54 in List-II. That power remains untouched and unaffected. All that the Parliament has said by enacting the A.D.E. Act is that it will levy additional duties of excise and distribute a part of the proceeds among the State provided the States do not levy taxes on sale or purchase of the scheduled commodities. The Parliament has also provided the consequence that follows if any State levies tax on sale or purchase of scheduled commodities; all that happens is that the State will be deprived of its share in the proceeds of additional duties of excise for that financial year. Even this is subject to the power of the Central Government to direct otherwise. The Parliament could not, and did not, prohibit any State from making any law or levying any tax which a State can levy by virtue of the entries in List-II. The decision of this Court in State of Kerala v. M/s. Attesee [Agro Industrial Corporation] (1989 Suppl.(1) S.C.C. 73 : AIR 1989 SCC 222) does bear out our understanding. At Page 744, this Court observed:

> *"The 1957 Act also has a bearing on the sales tax levy of various States. By levying sales tax on an item covered by the schedule to the 1957 Act, the State will have to forego its share on distribution of the proceeds of the additional excise duty levied. Whether it should impose sales tax on an item of declared goods, limited by the restrictions in Section 15 pf the CST Act and at the risk of losing a share in the additional excise duty levied in respect of those very items, is for the State to determine. As pointed out by Sri Poti, it was open to the Kerala Legislature to decide - and it did so also - that on some items there should be one or other of the levies or both of them and to modify these levies depending upon its financial exigencies. But these factual or periodical variations do not detract from the*

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> *basic reality that the policy of sales tax levy on declared goods has to keep in view, and be influenced by, the provisions of the CST Act and the 1957 Act."*

83 Therefore, it is not only in this judgment, but in other judgments where the Supreme Court holds that the State's power to legislate is not curtailed by the ADE Act. If that is not curtailed, then, any reliance on the constitutional scheme of distribution of revenues and taxes cannot be of assistance. That would probably deprive a State of its share in the revenue even if a tax is levied and collected in that State, but would not denude it of its power which is otherwise traceable to the constitutional provisions referred above. Apart from the fact that we do not find the levy to be such as would deprive the State of its share even in Central taxes, we are not in agreement with Mr. Sridharan that VAT on pan masala containing tobacco is *ultra vires* the Constitution.

84 We are in agreement with Mrs. Jeejeebhoy that *Godfrey Phillips* is more on the ambit and scope of ADE Act and its reading along with Article 286 of the Constitution of India. The levy in this case is also not affected by sections 14 and 15

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of the Central Sales Tax Act, 1956. None of the constitutional provisions pressed into service by Mr. Sridharan and reproduced in the foregoing paragraphs indicate that the legislative power of the state is in anyway curbed or curtailed.

85 Once the above view is taken, we are not then required to opine and hold whether clause (10) of the impugned Notification is clarificatory. We have found that to be in consonance with the provisions of the ADE Act and the Presidential Order. Even otherwise, we are in agreement with Mrs. Jeejeebhoy that this clause is clarificatory. It only clarifies the existing position in law.

86 Having taken care of all the arguments of the petitioners, we do not find it necessary to express an opinion on the ambit and scope of Article 261 of the Constitution. The other judgments dealing with sugar and its listing or insertion in the ADE Act, 1957, the impact thereof are all not relevant for our purpose. The principle that sub-ordinate legislation cannot be given retrospective effect equally is of no assistance in the facts and circumstances of the present case. We are not

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concerned here with tobacco but a product (pan masala) containing tobacco. Hence, the effect of the explanation as above need not be considered at all.

87 In the view that we have taken above, we agree with Mrs. Jeejeebhoy that the petitions have no merit. Rule is discharged in each of them. There would be no order as to costs.

88 At this stage, in Writ Petition No. 8572 of 2015, a request is made by the learned senior counsel appearing for the petitioner that time to comply with the order of part payment be extended by a period of six weeks. This request is opposed by the respondents' counsel.

89 Having heard the learned counsel appearing for both sides, we are of the view that interest of justice would be served if the time to make payment is extended by a period of six weeks from today. If it is made and compliance is reported, the tribunal shall decide the appeal in accordance with law.

DR. SHALINI PHANSALKAR JOSHI, J. ***S.C. DHARMADHIKARI, J.***

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