

MANU/RH/0199/1990



Equivalent Citation: 1990(2)WLN351

IN THE HIGH COURT OF RAJASTHAN

D.B. Civil Writ Petition No. 1698 of 1989

Appellants: **Sood Enterprises**
Vs.
Respondent: **Union of India (UOI) and Ors.**

Judges/Coram:


A.K. Mathur and B.R. Arora, JJ.

Subject: Sales Tax/VAT


Acts/Rules/Orders:

- CONSTITUTION OF INDIA - Article 14,
- CONSTITUTION OF INDIA - Article 19,
- CONSTITUTION OF INDIA - Article 141,
- CONSTITUTION OF INDIA - Article 269,
- CONSTITUTION OF INDIA - Article 286,
- CONSTITUTION OF INDIA - Article 366

Cases Referred:

- Builders Association of India and Ors. vs. Union of India (UOI) and Ors. MANU/SC/0085/1989 ;
- The Commissioner of Income Tax, Bihar and Orissa vs. Sri Ramakrishna Deo MANU/SC/0059/1958



- Ujagar Prints vs. Union of India (UOI) MANU/SC/0305/1986 ;

- Empire Industries Limited and Ors. vs. Union of India and Ors. MANU/SC/0186/1985 

Disposition:

In Favour of Department

Citing Reference:

Builders Association of India and Ors. vs. Union of India (UOI) and Ors. Discussed
[MANU/SC/0085/1989](#)

Empire Industries Limited and Ors. vs. Union of India and Ors. [MANU/SC/0186/1985](#) Mentioned

Good Year India Limited and Ors. v. The State of Haryana and Ors.	Distinguished
S.R. Chattiar v.P.B.N.N. Nadar and Co.	Mentioned
The Commissioner of Income Tax, Bihar and Orissa vs. Sri Ramakrishna Deo MANU/SC/0059/1958	Mentioned
Ujagar Prints vs. Union of India (UOI) MANU/SC/0305/1986	Discussed

CaseNote:

Rajasthan Sales Tax Act, 1954 and Rajasthan Sales Tax (Amendment) Act 1988 and Rajasthan Sales Tax (Second Amendment) Act 1988 and Rajasthan Sales Tax Rules, 1955 - Rule 29(2)--Validity of--Assessee not keeping proper accounts books--Procedure prescribed for determining labour charges--Held, Rule 29 is not discriminatory or violative of Act.

Considering the nature of the contract, the deductions towards the labour charges shall be allowed by the assessing authority to the limit prescribed in the rule. In order to determine the labour charges when the assessee does not keep proper books of accounts or where the labour charges could not have been determined, the procedure has been provided by this notification by amending Sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Rules. A bona fide assessee, who maintains the proper accounts and where labour charges, can be determined from the accounts of the contractor then these provisions are not applicable. These provisions are merely to assist the assessing authority to provide the mode of assessing the contractor where the labour charges could not be determined or where the account maintained by the assessee contractor are not proper. In this view of the matter, Sub-rule (2) of Rule 29 cannot be said to be, 'many way, discriminatory or violative of the provisions of the Act.

Writ dismissed.

JUDGMENT**B.R. Arora, J.**

1. This writ petition and the writ petitions mentioned in the Schedule, appended to this judgment, involve common questions of law and, there fore, we propose to decide all these writ petitions by this common judgment. For the convenient disposal of all these writ petitions, the facts of D.B. Civil Writ Petition No. 1698/1989 (M/s. Sood Enterprises v. Union of India and Ors.) are taken into consideration.

2. The petitioner is partnership concern and is carrying-on the business of taking building contracts from the various departments of the Central Government as well as of the Rajasthan Government. The petitioner in this writ petition, has challenged the vires of 46th Constitutional Amendment Act, 1982, and consequential amendments made by the Rajasthan Government in the Rajasthan Sales Tax Act, 1954 by the Finance Act of 1987 (Act No. VII of 1987), Rajasthan Sales Tax (Amendment) Act, 1988, Rajasthan Sales Tax (Second Amendment) Act, 1988, and the Notification EX. 2, EX. 3, EX. 4, EX. 6

and EX. 8, issued in pursuance to these amendments. The validity of the amending provisions of the Act Rules, and the Notification have been challenged on various grounds taken in the writ petitions(s).

3. The respondents filed their return to the writ petition and in their return, a stand has been taken that all these grounds raised by the petitioner do not survive because through various amendments made in the Act and the Rules and through various instructions issued in this regard, the grievance of the petitioner has been made good and the grounds raised by the petitioner do not raise any issue between the parties and actually no controversy remains and the controversy raised by the petitioner is purely academic on the face of it and this Court is not expected to decide the question merely for the academic consideration.

4. In order to appreciate the controversy it would be proper to give brief history of the amendments, which are under challenge in

the present writ petition(s). The Parliament, by way of the Constitution (46th Amendment) Act, 1982, amended Article 366 of the Constitution of India by way of adding Clause 29-A to Article 366 of the Constitution.

Clause 29-A of Article 366 reads as under:

-A. 'Tax on the sale or purchase of goods'- includes.

(a) A tax on the transfer otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or otherwise valuable consideration.

(b) A tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a work contract;

(c) A tax on the delivery of goods on hire purchase or any system of payment of installments;

(d) A tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;


(e) A tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) A tax on the supply, by way of or as part of any service or in any other manner whatsoever of goods, being food or any other article for human consumption or any drink whether or not intoxicating-where such supply or service, is for cash, deferred payment or other valuable consideration and such transfer, delivery of supply of any goods shall be deferred to be sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

5. The corresponding amendments in Articles 269 and 286 were also made by this 46th Constitutional Amendment. The State Government thereafter, by the

'Finance Act of 1987 (Act No. 87 of 1987), which will hereinafter be referred as the 'Finance Act, 1987', in order to give effect to the financial proposal of the State Government for the financial year 1987-88, made certain other changes and amended the Rajasthan Sales Tax Act, 1954. By this amendment, definition of the expression 'contract' was amended and the definitions of sale and 'turn-over' were substituted for the existing definitions. Two proviso were also substituted to the definition of 'sale' comprised in Clause 2 (p) of the Rajasthan Sales Tax Act. The State Government, also, by a notification dated May 28, 1987 (EX.2) made certain amendments in the Rajasthan Sales Tax Rules, 1955. After the amendment in the Act and the Rules, the State Government vide notification EX.3 dated May 28, 1983, notified the rate of tax payable by a contractor on his turnover of the works contract. According to this notification, rate of tax on work contract relating to any kind of construction was notified as 2% while with respect to works contract relating to any kind of installation, fittings-out, improvement, overhaul or repair, was notified at 4%. The State Government again, by a notification EX.4 dated March 8, 1988, notified the rates of tax payable by the contractor on his turnover of the works contract as specified in column 2 of the list, on the articles mentioned in the list. The State Government, again, by Rajasthan Sales Tax (Amendment) Act, 1988 (Act No. 9 of 1988) further amended the Sales Tax Act of 1954. Various amendments were made by this Amendment Act, which are challenged by the petitioner in this writ petition. The State Government, in pursuance to these amendments made in the various provisions of the Rajasthan Sales Tax Act, issued notification EX. 6 dated 5th September 1988 and again notified the rate of tax payable by a contractor on his turnover of the works contract relating to dyeing, printing, processing and similar activities. The State Government again, by Rajasthan Sales Tax (Second Amendment) Act, 1988 (Act No. 13 of 1988) further amended the Rajasthan Sales Tax Act, 1954. This Act received the assent of the Governor on 15th October 1988. The State Government, thereafter, issued notification EX. 8 dated November 7, 1988 and granted exemption from the tax payable by the dealer in respect of the goods involved in

the execution of the first works contract where the value of the goods involved does not exceed 15% of the sale-price of the works contract. Various writ petitions were filed before Hon'ble the Supreme Court, challenging the validity of the Constitutional 46th Amendment and the Supreme Court, in the case of Builders' Association of India v. Union of India

MANU/SC/0085/1989  : [1989]2SCR320, vide its judgments dated 31st March, 1989, up-held the validity of the Constitutional 46th Amendment and held as under:

(i) What the Forty-sixth Amendment has done is no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials. It has not conferred on the State a larger freedom than what they had before in regard to their power to levy sales tax under entry 54 of the State List. Sub-clause (b) of Article 366(29-A) cannot be read as being equivalent to a separate entry in List II of the Seventh Schedule to the Constitution enabling the States to levy tax on sale and purchases independent of entry 54 thereof. As the Constitution exists today, the power of the States to levy taxes on sales and purchase of goods including the 'deemed' sales and purchases of good under Clause (29-A) of Article 366 is to be found only in entry 54 and not out-side it.

(ii) In sum, it is declared that sales tax laws passed by the Legislatures of States levying taxes on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract are subject to the restrictions and conditions mentioned in each Clause or sub clause of Article 286 of the Constitution.

(iii) As there are infinite variety of the manifestation of 'works contracts' whatever might be the situational differences of individual cases, the constitutional limitations on the taxing-power of the State as are applicable to 'works contracts' represented by 'building contracts' in the context of the expanded concept of 'tax on the sale or purchase of goods' as constitutionally, defined under Article 366(29-A), would equally apply to other

species of 'works contracts' with the requisite situational modifications, (iv) In so far as works contracts relating to building activities are concerned, the Forty-sixth Amendment has empowered the States to exert its taxing power in an important, area of social and economic life of the community. But in exerting this power particularly in relation to transfer of property in goods involved in the execution of 'work contracts' in building activity, in so far as it affects the housing projects of the under-privileged and weaker Sections of society, the State might perhaps, be pushing its taxation-power to the peripheries of the social limits of the power and, perhaps, even of the constitutional limits of that power in dealing with equals. In such class of cases, 'building activity' really relates to a basic substantial necessity. It would be wise and appropriate for the State to consider whether the requisite and appropriate classifications should not be made of such building activity attendant with such social purposes for appropriate separate treatment.

(v) In respect of the validity of the sales-tax laws of different States and rules made there under, no opinion is being expressed herein. The petitioners are at liberty to approach the authorities under the Sales Tax Act or the High Court concerned for necessary relief. It is open to them to question the validity of the statutory provisions and the Rules made there under before the High Court concerned. When such petitions are filed, the High Courts will proceed to dispose of the cases in the light of this Judgment.

(vi) Article 366 is the definition clause of the Constitution and unless the context otherwise requires, the expressions defined in that article have the meanings respectively assigned to them in that article. If the object of introducing a new definition is to enlarge the scope of that concept then wherever those words occur in the Constitution, they would be construed in the wider sense.

After the judgment of the Supreme Court in Builders' Association of India and Ors.' case (supra), the State Government by its notification S.O.51 dated June 28, 1989 (EX. Rules 2/1) provided that a contractor

shall pay tax on the value of the goods involved in the execution of the works contract at the rates notified for such goods Under Section 5. of the Act. The State Government also issued Rajasthan Sales Tax Amendment Ordinance, 1989 amending Section 2(h) and Section 2(p), respectively, with effect from 1.4.1987. The State Government also amended the last proviso to Section 2(p) as well as the proviso to Section 2(o)(ii). This Ordinance was later on replaced by the Rajasthan Sales Tax Amendment Act, 1989 (Act No. III of 1990). The State Government also, in order to clarify the position in view of the judgment of the Supreme Court, issued instructions regarding levy of sales tax in Rajasthan to all the concerned authorities responsible for executing the provisions of Sales Tax in Rajasthan. These Instructions show the view of Department regarding the levy of sales tax. These instructions were issued of 2nd of August, 1989 and read as under:

GOVERNMENT OF RAJASTHAN
COMMERCIAL TAXES DEPTT. No F.16(22)
Tax/CCT/84/2240 dated 2.8.1989 All Dy.
Commissioners
(Adm./A.E./Appeals/Revisions). All
Commercial Taxes Officers. All Asstt.
Commercial Taxes Officers.

Sub:--Levy of Sales Tax on works
Contracts in Rajasthan.

1.0 In pursuance of 46th Amendment in the Constitution, the Rajasthan Sales Tax Act, 1954 (hereinafter referred to as the Act) was amended from 1st April, 1987 by Act 7 of 1987. For levying tax on works contracts, the Rajasthan Sales Tax Rules, 1955 (hereinafter referred to as the Rules) were also amended and a notification providing for rate of tax on such. contracts was issued on 28.5.1987.

2.0 The levy of tax on work contract gave rise to several controversies in almost all the States including the State of Rajasthan and a large number of representations regarding the levy of tax on works contract have been received from trade and industry, awarders, contractors etc. It was challenged in the Supreme Court by way of writ petitions by the Builders' Association of India and Ors. The Supreme Court decided the case on 31st March, 1989 vide

its judgment reported at (1989) 73 STC 370 and has laid down the basic principles and guide lines for levying tax on works contracts.

3.0 Following the law laid down by the Supreme Court in the case of Builders Association of India and keeping in view the various representations received on the subject, the State Government has issued 5 Notifications on 28th June 1989. By one notification, a new Rule 10B has been inserted in the Rules, which gives an option to the contractors of civil works to claim exemption from tax by paying a notified exemption fee. By another Notification, Sub-rule (2) of Rule 29 of the Rules has been substituted and deductions have been allowed according to the law laid down by the Supreme Court. By the third notification, some parts of Rule 46 have been amended for the purpose of simplification. The fourth notification provides for the rates of tax payable on the goods Involved in the execution of works contracts, and the fifth notification provides for the quantum of exemption fee payable by the contractors who opt for exemption from tax on works contracts.

4.0 For the sake of the guidance of the Departmental Officers and for the sake of the convenience of the awarders and contractors, the following clarificatory instructions are issued:

4.1 Deduction to be allowed from turnover

(1) By the substituted Sub-rule (2) of rules 29 of the Rules, tax shall be computed on the turnover of a contractor after deducting there from


(a) Value of the goods, which are exempted from tax;

(b) Value of the goods which have already suffered tax at the rate prescribed Under Section 5 of the Act; and

(c) all sums paid towards labour charges

(ii) As regards the claims of deduction for exempted goods or tax paid goods, the burden of proof shall be on the contractors to prove the same according to the

provisions of Section 5-D of the Act and according to the ratio of the following Judgments of the Supreme Court:

(a) MANU/SC/0059/1958 
Commissioner of Income Tax v. Rama Krishna Deo

(b) (1968) 21 STC 25 SC S.R. Chattiar V.P.B.N.N. Nadar and Co.

(iii) In case of labour charges also, the burden of proof shall be on the contractors. However, where the labour charges are not determinable from the accounts of the contractors or are considered unreasonably high considering the nature of the contract, the assessing authorities shall allow the labour charges according to the table attached to clause (ii) of Sub-rule (2) of Rule 29 of the Rules.

4.2 Operative date for deductions:

(i) It is settled legal position that a judgment of the Supreme Court takes effect from the date of inception of the provisions which were under dispute before the Court and which were adjudicated upon, because the Court does not legislate the law, it only interprets the law. Therefore, the law laid down by the Supreme Court in the case of Builders Association of India shall apply from 28th May 1987, when the tax was levied on works contract in the State of Rajasthan.

(ii) It is also settled legal position that the State Government cannot make the rules retrospectively, until or unless powers have been delegated to it in the Act itself. In view of this legal position and in the absence of express powers for making the rules of deduction retrospectively in the Act, Sub-rule (2) of Rule 29 of the Rules has been amended prospectively. Therefore, this Rule will take care of all the future cases. But, on account of the decision of the Supreme Court, which has got binding force by virtue of Article 141 of the Constitution, the principles laid down in the case of Builders Association of India shall apply from 28th May 1987, when tax on works contract was levied for the first time. This interpretation is also confirmed by the combined reading of Section 3,

Section 2(s) and Section 5(3) of the Act. Section 3 is the charging Section, which provides for levy of tax only on taxable turnover and not on turnover. According to Section 2(s), taxable turnover is arrived at after deducting from the aggregate amount if the proceeds of sale of goods on which no tax is livable under the Act and which have already been subjected to tax under the Act. According to proviso to Sub-section (3) of Section 5, the turnover of a contractor shall be subjected to tax after allowing such deductions as may be prescribed. According to the 'Law of Interpretation' as held by the Supreme Court in the case of Dr. Balinam A aman Hiraj, reported at (1989) 72 STC 384 no Section of an Act can be read in isolation. Accordingly, all these three Sections have to be read together and the only possible inference that emerges from such reading coincides with the decision of the Supreme Court given in the case of Builders Association of India, therefore, all the assessing authorities are instructed that the affect of the said judgment of the Supreme Court should be given from 28th May, 1987 for computing the taxable turnover.

Deduction at source:

(i) According to the amended clause (a) of Sub-rule (2) of Rule 46, in a works contract the awarder in case of its being a Department of any Government, a Corporation, A Government Undertaking, a Co-operative Society, a Local Body, a Trust or a Private or public limited Company responsible for paying any sum to a contractor for carrying out any work, shall, at the time of credit of such sum to the accounts of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft of by any other mode, deduct the amount equal to 3% of such sum towards the tax and shall issue a certificate of deduction of tax to the contractor in Form ST. 45. Such deduction of tax shall be subject to adjustment at the time of assessment of the contractor.

(ii) This amended Sub-rule shall not have retrospective effect and shall apply from 28-6-1989.

4.4 Information by some awarders:

According to the newly inserted Sub-rule 1 (A) of Rule 46, where the gross value of a contract exceeds Rs. 5 lacs, the awardee shall, within one month of the making of the contract, furnish to the assessing authority of the contractor, particulars of the contract in Form S.T.47.

4.5 Rates of tax:

By necessary implication of the Supreme Court judgment in the case of Builders Association of India all Notifications about rates of tax on works contracts issued Under Section 5 of the Act have become ultra vires. Therefore, a new notification has been issued Under Section 5 of the Act on 28th June, 1989 which reiterates the rates of tax already notified Under Section 5 of the Act and which shall be applicable on the goods involved in the execution of works contract from 28.5.1987.

4.6 Option for Civil Contractors:

(i) A new Rule 10-B has been inserted in the Rules from 28th May 1987, and according to this Rule, in case of works contract relating to civil works, the contractors have been given an option to choose exemption from tax on payment of a fee as notified by the State Government. According to the notification issued on 28th June, 1989 which has been made effective from 28.5.87, such contractors may opt for exemption from tax on payment of exemption fee @ 3% on the total value of a works contract. (ii) Such contractor shall make an application to his assessing authority in Form S.T. 1-A within 60 days from 28th June 1989 or from the date of the award of the contract, whichever is later, for granting certificate of exemption from tax. The delay in filing such application may be condoned on payment of a penalty not exceeding Rs. 10001

(iii) If the assessing authority is satisfied that the application of such contractor is covered by Rule 10-B, he shall by an order in writing grant exemption certifying Form S. T. 2-A.

(iv) The exemption fee for such a works contract, as notified by the State Government from time to time shall be

recoverable from the contractor in the following manner

(a) If the awardee is a department of any Government a Corporation, a Government Undertaking, a Cooperative Society a Local Body, a Trust or a Private or Public Limited Company, responsible of paying any sum to such contractor, who has opted for exemption from tax, such awardee shall deduct the exemption fee at such rate as notified by the State Government for time to time from the payment to be made in any manner to such contractor and all the provisions of Rule 46 shall apply mutatis mutandis. For the time being, the rate of such exemption fee is 3 per cent of the total value of a works contract.

(b) In case of an awardee being not covered by sub-clause (a), the exemption fee shall be recoverable from the contractor in installments payable in a period not exceeding one year from the date of the issue of the exemption certificate:

Provided that where the stipulated period for completion of such works contract exceeds the period of one year, the assessing authority may, with in previous approval of the By. Commissioner (Adm.), extend the period of payment of installments, but not exceeding the stipulated period of completion of the works contract or three years, whichever is earlier.

5.0 All Heads of the Department and Presidents/Secretaries of different trade Organizations are requested to further circulate the contents of this circular to their subordinates or to their members, as the case may be, in order to ensure better comprehension, of the revised legal position with regard to tax on works contract by all concerned.

sd/- (Prriyardashi Thakur)
Commissioner, Commercial Taxes
Department, Rajasthan, Jaipur.

6. In view of the supersession and withdrawal of the notifications EX. 3, EX. 4, EX. 6 and further amendments made in the Act and the Rules as well as from the facts

that the respondents have issued certain instructions vide EX. R.2/2 clarifying the position of the Department regarding the levy of sales tax to the concerned authorities responsible for execution of the provisions of the Sales Tax, only the following points remain to be considered and decided by this Court:

(i) Whether the validity of Article 366(29-A) of the Constitution of India can be looked into by this Court even after the Judgment of the Hon'ble Supreme Court in Builders Association v. Union of India

MANU/SC/0085/1989 : [1989]2SCR320, wherein the Validity of this amendment was up-held? (ii) Whether provisions of Section 7(2-c) of Rajasthan Sales Tax Act, which provide for the deduction of the sales tax at source from the bills of works contracts is discriminatory and is violative of Article 14 of the Constitution of India?

(iii) Whether the amendment in the taxing statutes can be made retrospectively and whether sales tax can be charged in the case of works contract prior to 24.4.1988 (iv) Whether the Notification dated 28th June, 1989 can be issued without making corresponding amendment in the Rajasthan Sales Tax Act and Rules in accordance with the judgment of the Hon'ble Supreme Court in Builders Association of India's case and whether the sales tax can be charged?

(v) Whether the petitioners are entitled for any refund?

(vi) Whether the Notification dated 28th June, 1989 fixing the exemption as the payment of 3% sales tax is valid?

(vii) Whether the Notification Section 34 dated 28th June 1989 fixing condition of the labour charges can be issued.

So far as the other contentions raised by the petitioner in the writ petition are concerned, they do not survive in view of the supersession of the Notifications EX. 3, EX. 4, EX. 6, and various amendments made in the Rajasthan Sales Tax Act and the Rules and in view of the instructions EX. R.2/2 issued by the respondents to the

concerned assessing authorities because the relief prayed-for by the petitioner has already been granted by the respondents and no dispute, in fact, with respect to these questions really survives, This Court is not expected to go into the validity of the provisions which are not in existence and have been superseded already by amendment and also resolved the controversy by issuing instructions granting the relief. When actually no dispute remains to be decided between the petitioner(s) and the respondents then the Court is not expected to decide the questions for academic purposes, only. The grievance of the petitioner is that only the administrative instructions have been issued by the respondents to various authorities granting the relief to the petitioner but no corresponding amendment has been made in the Act and the Rules, and, therefore, this Court should decide these questions also. When the instruction have already been issued by the respondents granting relief to the petitioners and the authorities are acting-upon those instructions and the relief's have already been granted to the petitioner, as such no grievance of the petitioners remains to be decided. The petitioners are availing the benefits of the instructions and therefore they cannot be permitted to question the validity of the instructions. When the petitioner has no grievance in respect of these contentious and is getting the relief then merely because amendments in the corresponding provisions have not been made, the question of the validity of the provisions is not required to be considered.

7. Now we propose to take the points raised. by the petitioner which remain to be decided.

I) The petitioner has challenged the validity of Article 366(29-A) of the Constitution of India on various grounds which were not taken note of by the Hon'ble Supreme Court while deciding the case of Builders Association of India v.

Union of India MANU/SC/0085/1989 : [1989]2SCR320. The contention of the learned Counsel for the provisions of Article 366(29-A) of the Constitution of India has not been judged by the Hon'ble Supreme Court...these points and no

finding has been given by the Supreme Court on these points and, therefore, this Court is competent to judge the validity of the provision of Article 366(29-A) of the Constitution on these points. In support of his contention, the learned Counsel for the petitioner has relied-upon the judgment of Good Year India Limited and Ors. v. The State of Haryana and Ors. 1989 (31) STL 49 (SC) wherein it has been held that precedent is an authority only for the point it actually decides and not for other which even logically follows from it and a decision on a question which has not been argued cannot be treated as a precedent. We have gone through the judgment of the Hon'ble Supreme Court in the Good Year India Limited and others' case but in our view that judgment does not apply to the present case. So far as the contention Which has not been raised before the Court and no finding has been given by the Court on those points, these points can be agitated and can be decided by the Court, but in the present case the validity of the provisions of Article 366(29-A) of the Constitution of India was under consideration before the Hon'ble Supreme Court and the Supreme Court, after considering the provisions of Article 366(29-A), up-held the validity of the 46th Amendment. When the Hon'ble Supreme Court has up-held the validity of the 46th Amendment of the Constitution, this court is not expected to again go into and decide the question whether the 46th Amendment is a valid piece of legislation or not. Taking into account the other grounds of attack questioning the validity, in our view, this Court cannot, again, judge the validity of the provisions of Article 366(29-A) of the Constitution, The 46th Amendment of the Constitution is, thus, perfectly legal and valid.

(II) Now, the question whether the provisions of Section 7(2-C) of the Rajasthan Sales Tax Act, which provides for the deduction of sales tax from the bills of works contract is discriminatory or is violative of Article 14 of the Constitution, is concerned, it has been contended by the learned Counsel for the petitioner that this provision has been made by which the works contractors have been subjected to tax deduction at source when no such similar procedure exists for any other class/categories of dealers, traders and

manufacturers. According to the learned Counsel for the petitioner, such provision for deduction at source has not been authorized under the 46th Constitution Amendment nor under the Rajasthan Sales Tax Act, 1954 prior to the insertion of Section 7 (2-C) of the Act. Before dealing with his controversy, it will be better to refer Section 5(3) and Section 7(2-C) of the Rajasthan Sales Tax Act, which read as under:

(3) Notwithstanding anything contained in this Act in the case of works contract, the turn over of such contract shall be subjected to tax.

Provided that such deduction, as may be prescribed, may be allowed to a contractor while determining his tax liability.

(2-C) Notwithstanding anything contained in this act, in the case of a works contract the tax may be deducted in such manner and in such circumstances as may be prescribed from every bill of payment to a contractor.

From a bare perusal of Section 5(3) and Section 7(2-C) of the Act, it is clear that Section 5(3) of the Act is a charging Section and it creates a liability for tax in the case of a works contract and/provides that a then over of such works contract shall be subjected to tax. Section 7(2C) deals with the question that how the tax in the case of a works contract is to be deducted. It provides that the tax may be deducted in such manner and in such circumstances as may be prescribed from every bill of a payment to a contractor. Section 7(2-C) of the Rajasthan Sales Tax Act deals with the deduction of the tax at source. Thus Section 7(2-C) of the Act is being a provision which provides the machinery how the tax is to be recovered and, therefore, such provision should be construed in a manner which makes it workable. Section 7(2-C) of the Act provides only a mode of collection of tax at source and when the legislature thought it proper to provide a particular mode for the collection of the tax then it cannot be said that Section 7(2-C) of the Act is outside the legislative competence of the legislature. The method of Collection of tax or deduction of tax at source does not affect the essence of the duty but is only

relates to the machinery of collection for administrative purposes. The legislature has the power to create machinery and to provide a mode of collection of tax. Whether to deduct a tax at source of impose a liability on a particular person to collect and pay to the department in order to recover the tax or to prevent the evasion of payment of the tax, such powers of the legislature providing recovery of tax by a particular procedure and the authorities have been recognized by the Apex Court. When a particular mode has been provided by the legislature for the recovery of the tax, it cannot be said that it is in any way discriminatory. Section 7(2-C) of the Act is only a mode of recovery of sales tax and it is meant to secure the Government revenue. It is nothing but in the form of an advance tax. The principle of recovery of advance tax is not new. The concept of advance tax finds place in the provisions of Section 1954 (C) of the Income Tax Act, also. The provisions only provide that in a case of works contract, the tax may be deducted in such manner and under such circumstances as may be prescribed from every bill of a payment to a contractor. According to this provision the deduction of the sales tax has to be made from the bills of the contractor at the time of the payment of the bills. The case of the petitioner is that the purchasers are entitled to make the payment while in the presents case, the amount has to be deducted from the bills of the awarder or the contractor. This provision has been made in order to deduct the tax at source so that the revenue of the Government may be secured. A provision has been made in Section 5(3) of the Act itself which provides that such deductions made from the bills of the petitioner while determining the tax liability, exemption will be allowed to the awarder is not entitled to make the payment. That deduction will be allowed to the petitioner at the time his assessment order is passed, but so far as the deduction of tax at source is concerned that cannot be said in any way, to be illegal. The law for taxation sometimes has to provide the mode for collection of tax at a convenient place. So far as the question that this deduction of tax has been provided only in cases of works contractors and not in the cases of other contractors, suffice it to say that it is merely a machinery provision which provides for the collection of the tax


but so far as the liability part is concerned, that has been provided in Section 5(3) of the Sales Tax Act. This provision encompasses not only the private individuals but all the persons entering into works contract. It ay involve the individuals and the companies, and others, also. Futher-more, in order to provide the machinery for the evasion of tax if a particular mode of recovery of tax has been provided in a particular class of persons then it cannot be said of be, in any way, discriminatory. It is no doubt true that the guarantee of equal protection applies against substantive as will as procedural laws but a procedure different from that laid down by the ordinary law in respect of a particular class of persons can be prescribed for a particular class of persons if the discrimination is based on a reasonable classification having regard to the objective which the legislature had in view and the policies underlying it. If the provisions in the case are in accordance with the policy, which has been formulated, and the objective, which it seeks to accomplish, then the provision cannot be condemned as arbitrary or violative of article 14 of the Constitution. In the present case, the provisions have been made in order to prevent the evasion of tax and to provide a mode for the recovery of the tax. In a works contract, works contractors themselves form a class and, thus, there is no question of any discrimination. Moreover, Article 14 does not apply in procedural matter unless it results in prejudice to the person. In our view, no prejudice has been caused to the petitioner or any work contractor and, therefore, the provisions of Section 7(2-C) of the Act are intra-vires and are not discriminatory or arbitrary.

(III) The next point raised by the petitioner is that the amendment of the taxation statute cannot be made retrospective. It has been argued by the learned Counsel for the petitioner that the definition of the 'works contract' was inserted by the legislature for the first time orv 28th May, 1987 by the Rajasthan Sales Tax Act (First Amendment). According to him, as the definition of 'works contract' has been substituted with effect from 22nd April, 1988, therefore, the tax on works contract can be charged with effect from 22.4.1988 only and not prior to that. Vide Rajasthan

Sales Tax Amendment Act, 1988 (Act No. IX of 1988), a new Clause (i) in Section 2 was added in the Rajasthan Sales Tax Act from 1st April, 1987, providing the definition for 'works contract' which reads as under:


(u)--works contract' includes any agreement for the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, overhauling, repair or commissioning of any movable or immovable property for cash, deferred payment or other valuable consideration, but excludes a works contract purely of labour or service.

The case of the petitioner is that prior to the amendment made on 22nd April, 1988, as there was no definition of works contract and, therefore, no sales tax could have been charged on the works contract, while the legislature has given retrospective effect to the definition with effect from 01.04.1987. Now, so far as the question: whether retrospective effect can be given to the taxation statute or not, that stands concluded by the judgment of the Apex Court in *M/s Ujagar Prints v.*

U.O.I. MANU/SC/0305/1986  : [1989]179ITR317a(SC) , wherein the Hon'ble Supreme Court has observed as under:

(30). There is really no substance in the grievance that the retroactivity imparted to the amendments is violative of Article 19(1)(g). A competent legislature can always validate a law which has been declared by Courts to be invalid, provided the infirmities and vitiating factors noticed in the declaratory judgment are removed or cured. Such a validating law can also be made retrospective. If in the light of such validating and curative exercise made by the Legislature-granting legislative competence-the earlier judgment becomes irrelevant and unenforceable, that cannot be called an impermissible legislative overruling of the judicial decision. All that the legislature does is to unseat in a valid law with retrospective effect in the light of which earlier judgment comes irrelevant.

Such legislative expedience of validation of laws is of particular significance and utility and is quite often applied, in taxing statutes. It is necessary that the legislature should be able to cure defects in statutes. No individual can acquire a vested right from a defect in a statute and seek a windfall from the legislature's mistakes. Validity of legislations retroactively curing defects in taxing statutes is well recognized and courts, except under extraordinary circumstances, would be reluctant to override the legislative judgment as to the need for and wisdom of the retrospective legislation. In *Empire Industries Limited v. Union of India* 1985 Supp. (I) SCR 292 at

p. 327: MANU/SC/0186/1985  : [1986]162ITR846(SC) at p. 678 this Court observed:

...not only because of the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of government amongst those who benefit from its.

In testing whether a retrospective imposition of a tax operates so harshly as to violate fundamental rights under Article 19(1)(g), the factors considered relevant include the context in which retroactivity was contemplated such as whether the law is one of validation of taxing statute struck down by courts for certain defects; the period of such retroactivity and the degree and extent of any unforeseen or unforeseeable financial burden, imposed for the past period etc. Having regard to all the circumstances of the present case, this Court in *Empire Industries* case held that the retroactivity of the Amending provisions was not such as to incur any infirmity under Article 19(1)(g). We are in respectful agreement with that view.

It is, thus, not in dispute that retrospective operation can be given to the taxing statutes, also. Even otherwise, in the present case, this argument is not available to the petitioner. In view of the provisions of Section 2 (e) of the Rajasthan Sales Tax Act, which were already in existence prior to the insertion of Clause (u) to Section 2 of the Act, which provides a definition of the works contract. Section

2(e) of the Act gives the definition of the word 'contract' or 'works contract' and reads as under:

(e) Contract (or works contract) means any agreement for carrying out for cash or deferred payment or other valuable consideration (I) the construction, fitting out, improvement or repair of any building, road, bridge, or other immovable property; (II) the Installation, or repair of any machinery affixed to a building or other immovable property; or (Hi) the overhauling or repair of any motor vehicle.

Thus, in the interim period, there were two definitions of the works contract and prior, to 30.3.1987, Section 2(e) was already in existence, which also includes the works contract. There was, therefore, in our view, no gap and the tax on the works contract could have been levied even prior to that. The argument of the petitioner on this point, in our view, has no force and is liable to be rejected.

8. The next point raised by the learned Counsel for the petitioner that notification dated 28th June, 1989, could not have been issued by the Government without making corresponding amendments in the Rajasthan Sales Tax Act and the Rules in view of the judgment of the Hon'ble Supreme Court in Builders Association of India. In our view, the amendment was made merely to enable the State Legislature to enact the law imposing tax in the cases of works contract and after the amendments, various provisions have been inserted in the Rajasthan Sales Tax Act and the Rules by way of amendments. The Hon'ble Supreme Court has upheld the validity of the 46th Constitutional Amendment Act. In our view, after the judgment of the Supreme Court, the State Government is competent to issue the Notification dated 28th June 1989 without making further amendments in the Rajasthan Sales Tax Act and the Rules, which has rightly been issued.

9. Now, comes the question: whether the petitioner is entitled for any refund? As we have already held above that the amendment to the taxation statutes can be made retrospectively and we have also held that there was no gap with respect to the charging provisions in the case, of

works contract as prior to the amendment, Section 2(e) provides the definition for contract and 'works contract' also. As the tax has not been charged illegally from the petitioner, therefore, the petitioner is not entitled for any refund.

10. The next question raised by the counsel for the petitioner that vide Notification dated 28th June, 1989, S.O. 52 published in the Rajasthan Gazette Extraordinary Part IV C-II dated 1st July, 1989, by which the exemption from tax on the transfer of property or goods (whether as goods or in some other form) involving works contract has been granted on the condition that the contractor claiming the exemption holds a valid certificate of exemption with reference to the contracts for Which the exemption is claimed on payment of exemption fee at the rate of 3% of the total value of such works contract, that the rate of tax levied by this notification is excessive. It is not in dispute that the rate of tax on various items under the Sales Tax Act is provided upto 10%. In our view, this Exemption Fee of 3% on the total value of works contract cannot be said to be, in any way, excessive. Moreover, the payment of this Exemption Fee is not binding on the works contractors. If the works contractors wanted to avail of the benefit of exemption they can make payment of the tax at the rate of 3% on the total turnover and if they do not want to avail the benefit, they can pay the tax as per law. As the Notification docs not bind the petitioner to compulsorily deposit the amount of 3% and obtain the exemption, in our view, this Notification S.O. 52 of 28.6.89, therefore, cannot be said to be, in any way, violative or discriminatory or illegal.

11. Now, remains the last question to be decided: Whether the condition fixed by the State Government in respect to the labour charges in S.O. 52 dated 28th June, 1989 can be issued or not? These instructions were published in the Rajasthan Gazette Extraordinary Part IV C-II dated 1st July 1989. Vide this notification, the amendment to Sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Rules. 1955 was made. Sub-rule (2) of Rule 29 reads as under:

(2)-in case of a works contract tax shall be computed on the turnover of the contractor after deducting

(i) The value of the goods transferred in execution of works contract, whether as goods or in some other form, which have already suffered tax at the rate prescribed Under Section 5 or which are exempted from tax Under Section 4 of the Act.

(ii) All sums towards labour charges, which are directly co-related with the goods, property in which has passed in the execution of works contract, whether as goods or in some other form:

Provided that where the labour charges are not determinable from the accounts of the contractors, or are considered unreasonably high considering the nature of the contract, the deductions towards labour charges shall be allowed by the assessing authority according to the limits prescribed in column 3 for the type of contract specified in column 2 of the table given below:

According to the proviso to Sub-rule (2) of Rule 29 in the, case where the labour charges are not determinable from the accounts of the contractor or are considered unreasonably high, considering the nature of the contract, the deductions towards the labour charges shall be allowed by the assessing authority to the limit prescribed in the rule. In order to determine the labour charges when the assessee docs not keep proper books of accounts or where the labour charges could not have been determined, the procedure has been provided by this notification by amending Sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Rules. A bona fide assessee, who maintains the proper accounts and where labour charges can be determined from the accounts of the contractor then these provisions are not applicable. These provisions are merely to assist the assessing authority to provide the mode of assessing the contractor where the labour charges could not be determined or where the account maintained by the assessee contractor are not proper. In this view of the matter, Sub-rule (2) of Rule 29 cannot be said to be, many way, discriminatory or violative of the provisions of the Act.

12. Thus, in the result, we do not find any merit in this writ petition and the writ petitions mentioned in the Schedule and they are dismissed. No order as to costs.

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