SUPREME COURT OF INDIA

State of U.P.

Vs.

Jaiprakash Associates Ltd.

C.A.No.3026 of 2004

(H. L. Dattu and Sudhansu Jyoti Mukhopadhaya JJ.)

18.10.2013

JUDGMENT

H.L. DATTU, J.

1. Leave granted.

2. The substantial question of law that requires to be considered and decided in these appeals is, whether grant of rebate of tax by the State Government by issuing a notification in exercise of its powers under Section 5 of Uttar Pradesh Trade Tax Act, 1948 ("the Act", for short) discriminates between the goods imported from neighbouring States and goods manufactured and produced in the State of Uttar Pradesh and therefore contravenes the Constitutional Provisions viz.; articles 301 and 304(a) of the Constitution of India.

3. The lead case is Civil Appeal No. 3026 of 2004. The appellants are public limited companies, manufacturing cement in their manufacturing units in Rewa district situate in the State of Madhya Pradesh after procuring fly-ash from the thermal power stations in the State of Uttar Pradesh and thereafter selling the manufactured product viz. Cement in the districts of State of Uttar Pradesh.

4. The fly-ash is produced from coal combustion and normally dispersed into the atmosphere which contains toxic chemicals that can cause environmental pollution and hazards. Therefore for utilization of fly-ash and to control pollution, cement projects were set up to make use of the fly-ash generated from the power plants.

5. To encourage manufacturers using fly-ash in manufacturing of their products, the Government of Uttar Pradesh in exercise of its powers under Section 5 of the Act, had issued notification dated 18.06.1997, granting "rebate of tax" to the dealers in the State of Uttar Pradesh excluding all other dealers manufacturing cement outside the State of Uttar Pradesh using fly-ash purchased in the State of Uttar Pradesh. Annexure appended to the notification provided for name of the districts and the period for which the rebate will be allowed. The notification prior to its rescinding only specified the percentage of rebate of tax to be granted depending on the content of fly-ash used by the dealers in the manufacturing of cement.

6. On a finding by the Government of Uttar Pradesh on a later date that the notification is vaguely worded, has rescinded the earlier notification dated 18.06.1997, and has issued fresh notification dated 27.02.1998, in exercise of its powers under Section 5 of the Act. Apart from others the notification provides certain conditions which requires to be fulfilled if the manufacturing units intend to take benefit of the notification. The condition No. 1 of the notification specifies that to avail the benefit of rebate, the goods should be manufactured in a unit established in the State of Uttar Pradesh and secondly, such goods shall be manufactured using fly-ash purchased from the thermal power stations situated in the State of Uttar Pradesh. The notification specifically enlists the areas in Uttar Pradesh districts alone for the purpose of the grant of rebate of tax by the Government and therefore restricted the benefit of rebate only to the units manufacturing and producing cement using fly-ash in Uttar Pradesh. The notifications require to be extracted. They are as follows:

> "[S. No. 1263]
>
> Notification No. T.T.-2-1885/XI-9(226)94-U.P. Act-15-48-Order-97, dated 18-6-1997
>
> [Published in U.P. Gazette, dated 18.06.1997]
>
> In exercise of the power under section 5 of the Uttar Pradesh Trade Tax Act, 1948 (U.P. Act No. XV of 1948) the Governor is pleased:-
>
> a) to declare the goods having fly-ash contents of 10 per cent of more by weight to be notified goods for the purposes of this section;

b) to grant a rebate of tax of twenty five percent on goods having fly- ash contents between ten to thirty per cent by weight and a rebate of tax of fifty per cent on the goods having fly-ash contents exceeding thirty percent by weight on the tax levied under the Act in the district mentioned in column-2 Annexure given below for the period mentioned in column-3 of the said Annexure:-

|ANNEXURE | | | | |Serial |Name of District |Period for | |Number | |which the | | | |rebate of tax | | | |will be allowed| |1 |2 |3 | |1. |Banda, Hamipur, Jalaun, Mahoba,|Twelve Years | | |Jhansi, Lalitpur and Shahuji | | | |Nagar | | |2. |Almora, Chamoli, Dehradun, |Twelve Years | | |Fatehpur, Jaunpur, Kanpur | | | |(Dehat), Nanital, Fauri | | | |Garhwal, Pithoragarh, | | | |Sultanpur, Champawat, Tehri | | | |Garhwal, Udham Singh Nagar, | | | |Uttar Kashi and Growth Centre. | | |3. |(i) The Districts of Azamgarh, |Ten Years | | |Ambedkar-Nagar, Bahraich, | | | |Ballia, Barabanki, Deoria, | | | |Etah, Etawah, Faizabad, | | | |Farrukhabad, Ghazipur, Gonda, | | | |Hardoi, Mainpuri, Mathura, Mau,| | | |Moradabad, Padrauna, Pillibhit,| | | |Pratapgarh, Raibareili, Rampur,| | | |Shahjahanpur, Sidharth Nagar, | | | |Sitapur, Unnao, Kaushambi, | | | |Jyotibaphule Nagar, Mahamaya | | | |Nagar and Shravasti | | | |(ii) The area of Allahabad |Ten Years | | |District in South of the river | | | |Jamuna and confluent Ganga | | | |(Excluding the area included | | | |under Municipal Corporation | | | |Allahabad) | | | | |Ten Years | | |(iii) The Taj Trapezium Area | | | | |Ten Years | | |(IV) Greater Noida Industrial | | | |Development area | | | |The Districts of Agra | | | |(excluding Taj Trapezium area),| | | |Aligarh (excluding Tax | | | |Trapezium Area), Allahabad | | | |(excluding the area in south of| | | |rivers Jamuna and confluent | | | |Ganga but including the area | | | |included under Municipal | | | |Corporation Allahabad), | | | |Bareilly, Bhadohl, Bijnor, | | | |Firozabad (excluding Taj | | | |Trapezium area), Ghaziabad | | | |(excluding Greater NOIDA | | | |Industrial Development Area), | | | |Gorakhpur, Haridwar, Kanpur | | | |(Nagar), Lakhimpur Kheri, | | | |Lucknow, Maharajganj, Meerut, | | | |Muzaffarnagar, Saharanpur, | | | |Varanasi, Gautam Budh Nagar, | | | |Chandauli, Mirzapur and | | | |Sonbhadra. | |

7. The second notification, dated 27.02.1998 issued by the Government of Uttar Pradesh is extracted and reads as under:-

"[S. No. 1289]

Notification No. T.T.-2-592/XI-9(226)94-U.P. Act-15-48 Order-98, dated 27-2-1998

Whereas, the State Government is satisfied that it is expedient in the public interest so to do:

Now, therefore, in exercise of the powers under section 5 of the Uttar Pradesh Trade Tax Act, 1948 (U.P. Act No. XV of 1948), read with Section 21 of the Uttar Pradesh General Clauses Act, 1904 (U.P. Act No. 1 of 1904), the Governor, with effect from March 1, 1998 is pleased:-

a) to rescind the Notification No. T.T.-2-1885/XI-9(226)94-U.P. Act- 15-48 Order-97, dated June 18, 1997;

b) to grant a rebate of tax of twenty five percent on goods having fly-ash contents between ten to thirty per cent by weight and a rebate of tax of fifty per cent on the goods having fly-ash contents exceeding thirty percent by weight on the tax levied under the Act in the districts mentioned in column-2 Annexure given below for the period mentioned in column-3 of the said Annexure subject to the following condition:-

CONDITIONS

i) Such goods shall be manufactured in a unit established in the area mentioned in column-2 of the Annexure;

ii) Such goods shall be manufactured using fly-ash, purchase or received from the thermal power stations situated in Uttar Pradesh;

iii) the dealer claiming rebate of tax under this notification shall keep records in which following information will be shown:

a) date;

b) name of thermal power stations from which fly-ash is purchased or received;

c) weight of fly-ash;

d) name of manufactured goods;

e) weight of manufactured goods

f) weight of fly-ash used in manufacturing of such goods

g) weight of other goods used in manufacture of such goods;

iv) the total weight of manufactured goods and percentage of fly-ash used, should be mentioned on goods of packing of such goods as far as possible.

|ANNEXURE (Supra) |

Explanation:- The verification of percentage of fly-ash used by fly- ash based industries shall be made on the basis of Government orders issued in this behalf from time to time."

8. To complete the narration, it is apropos to state that the aforesaid notification is rescinded by the State Government with effect from 14.10.2004 by issuing notification dated 14.10.2004.

9. The cement industries situated in the neighbouring States aggrieved by the notification of the Government of Uttar Pradesh, dated 27.02.1998 had approached the High Court by filing Writ Petitions. In that they had sought for quashing of the notification, dated 27.02.1998 insofar as Condition No. 1 (as extracted above) of the notification and other consequential reliefs.

10. The High Court has come to a finding on two broad issues; firstly, whether Condition No. 1 of the notification i.e. the grant of rebate of tax on the sale of cement in the Districts of Uttar Pradesh alone contravenes articles 301 and 304(a) of the Constitution of India. On the aforesaid issue, the Court has concluded that the grant of rebate of tax by the State Government discriminated between the imported goods and the goods manufactured in Uttar Pradesh restricting the free movement of goods from one State to the other and therefore impinges articles 301 and 304(a) of the Constitution of India.

11. The Second question that is considered and decided by the High Court, is, whether doctrine of severability will apply and therefore if Condition No. 1 in the notification violates articles 301 and 304(a) of the Constitution of India; should the notification be struck down in its entirety or merely the impinging condition in the notification. The High Court has relied on the decision of this Court in Loharn

Steel Industries v. State of Andhra Pradesh, (1997) 2 SCC 37, and has come to the conclusion that if certain conditions in the notification violate freedom of trade and commerce, then that portion of the notification restricting rebate of tax to the districts in State of Uttar Pradesh alone is severable. Therefore, the High Court for the reasons stated above has declared the Condition No.1 of the notification as illegal, arbitrary and discriminatory, accordingly has quashed the Condition No.1 of the notification and also granted consequential relief in the form of rebate to the respondents-herein and further has directed that deposits made by the respondents in excess of what was payable was to be refunded with an interest of 10% per annum.

12. Being aggrieved, the Revenue calls in question the correctness or otherwise of the common judgment and order passed by the High Court in a batch of Writ Petitions dated 29.01.2004.

13. Shri Sunil Gupta, learned senior counsel appearing for the appellants contended that the notification issued by the Government provides for grant of rebate to an industry which manufactures cement by using fly-ash as a raw material. The rebate is granted by the Government to encourage industries in removing and re-using fly-ash. Since the notification only provides for rebate, it would not fall within the meaning ascribed to 'any tax' under article 304(a) of the Constitution and would therefore does not contravene the Constitutional Provisions. In aid of his submission, the counsel would heavily rely on the decision of this Court in the case of Video Electronics Pvt. Ltd. v. State of Punjab, (1990) 3 SCC 87. The learned counsel would further argue that rebate and imposition/ exemption are two different concepts. Exemption is an antithesis of 'imposition' and it belongs to the realm of imposition of tax and therefore exemption simpliciter without reason is barred by article 304(a) of the Constitution of India. Rebate, on the other hand, is repayment or refund of an amount and therefore it may not be a subsidy but it is in the form of an incentive or a grant. He further would point out that imposition of tax is different from collection or repayment of tax. In other words, he would submit that there are two different stages:- one would be the imposition and levy of taxes and the other is collection and repayment of taxes. Rebate of tax as such is a repayment of taxes and is certainly not a part of levy or imposition of taxes. He would further submit that for rebate of tax as against non-imposition or exemption at point of tax being common, Part XIII of the Constitution will not apply.

14. In the second limb of the argument, the learned counsel would submit that there are two crutches in the notification, if one of them is taken away the other cannot function independently. Therefore, he would submit that because the

respondents have not challenged Clause(2) and have only challenged Clause(1) of the notification, then while granting relief if one of the condition is declared invalid then both the clauses of the notification are to be struck down.

15. Thirdly, the learned counsel would contend that the State of Uttar Pradesh has no territorial jurisdiction over the industrial units situate outside the State of Uttar Pradesh and therefore, the notification also inherently does not and cannot give the Uttar Pradesh Authorities any extra territorial jurisdiction. Therefore, it is nigh impossible for the accessing authorities to effectively enforce machinery and procedural provisions. This aspect of the matter is not taken note of is the submission of the learned counsel. Finally concludes, that, rebate is outside the scope of Part XIII and article 304(a) of the Constitution of India, and Section 5 of the Act is a beneficial legislation passed in public interest by the State Government and therefore a liberal approach requires to be adopted by this Court.

16. Per Contra, Shri Dhruv Agarwal, learned senior counsel would contend, that, by reason of the notification all the sales of the Cement in Uttar Pradesh manufactured by cement industries using fly ash for such manufacture outside the State of Uttar Pradesh are subjected to levy of sales tax at the rate of 12.5 per cent, whereas the sales of the cement manufactured by cement industries in Uttar Pradesh are granted rebate of tax from such levy and thus the cement industries outside the State of Uttar Pradesh are clearly discriminated against. It is submitted that this discrimination violates the provisions of articles 301 and 304(a) of the Constitution of India. It is further contended that article 304(a) of the Constitution speaks of imposition of tax and rebate of tax is nothing but a facet of imposition of tax and therefore the provision of article 304(a) of the Constitution is attracted. He would further contend that article 304(a) of the Constitution is not meant to be blanket legislation and that grant of incentives and subsidies for backward areas given under the provisions of the Act are different from rebate of tax given under the notification. He would rely on Shree Mahavir Oils and another v. State of Jammu and Kashmir, (1996) 11 SCC 39, and would submit that the aforesaid case clarified the observations made in the Video Electronics case (Supra), wherein it is observed that exemption without reasons is discriminatory and would directly hit by article 304(a) of the Constitution of India. He would further point out that rebate of tax would have the same effects of an exemption because it would mean refunding the full amount of tax collected. Therefore, rebate is nothing but a concessional rate of tax.

17. The learned counsel, would further argue on the point of severability that while severing, the scope of the provision is enlarged and therefore if the invalid portion

of the notification viz. Condition No.1 of the notification can be severed from the valid portion of the notification without changing the object of the notification, then relying on the principles of D.S. Nakara v. Union of India, 1983 2 SCR 165, the doctrine of severability should be made applicable. Lastly it is submitted that the constitutional validity of a taxing provision cannot be tested on the touch stone of inability in enforcing machinery provision.

18. Shri Ashok H. Desai, learned senior counsel would argue that the primary question for consideration is whether the rebate of tax introduced by the Government of Uttar Pradesh creates a trade barrier/ fiscal barrier or in other words the Government has further insulated itself by creating tariff walls, therefore, impinging article 301 and article 304(a) of the Constitution of India. He would therefore make an effort to show the legislative history and scope of article 304(a) read with article 301 of the Constitution of India. To date back to the historical genesis of the aforesaid articles, he would submit that they were introduced to remove the trade blocks/ barrier that existed between princely States prior to independence but subsequently to foster economic development in the whole of India and to preserve its unity, such economic barriers were restricted which were discriminatory in nature. He would further submit that to understand whether any such tax introduced by the Government is discriminatory or not, the effect and the result of such tax imposed is to be seen. If the overall result or such effect restricts the free movement of goods between the States then it would violate articles 301 and 304(a) of the Constitution of India.

19. He further submits that it is undoubtedly true that it is the prerogative of the State Government to encourage the backward areas in its State by way of incentives but in the instant case the State of Uttar Pradesh does not segregate between backward and developed districts in the State but have rather extended the rebate of tax to even the industrially advanced districts in the State of Uttar Pradesh and further the rebate of tax is in the nature of exemption/ concessional rate of tax and the overall effect of such rebate is that it altogether exempts the dealer manufacturing and producing cement by using fly-ash in Uttar Pradesh from the payment of tax and therefore rebate qualifies as any such ‘tax’ imposed under article 304(a) of the Constitution that would give a discriminatory treatment to two different goods, one originating within the State and the other as the out-of–State goods.

20. The learned counsel would further contend that the concept of rebate of tax is within the realm of taxation and whether it is exemption or repayment by way of a rebate of tax, the only test is, one has to be mindful of its impact as to whether it is

a trade barrier thereby impinging article 304(a) of the Constitution of India. He would further point his finger to Section 5 of the Act and submit that Section 5 of the Act is couched in a manner so as to reflect that it is a rebate of tax. Therefore, the intention of the framers of article 304(a) of the Constitution cannot be overlooked which was only to restrict trade barrier irrespective of their nomenclature used to shield such levy or imposition of tax. It is therefore, he would submit that it is not the words used but the impact on the manufacturer(s). Article 304(a) of the Constitution is therefore a constitutional limitation in itself that prevents a State from discriminating between the goods so imported and the goods so manufactured or produced by the dealers within the State unless the State in public interest impose reasonable restriction under article 304(b) of the Constitution after obtaining Presidential assent. Shri Desai, would therefore submits that the amendment in the notification brought by the Government further does not satisfy the requirements of the aforesaid articles by not obtaining Presidential assent if the legislation is made in public interest.

21. There are three broad issues for our consideration: • firstly, whether the grant of rebate of tax is hit by constitutional limitation on the State legislature under article 304(a) read with article 301 of the Constitution of India, as and when it discriminates between the imported goods and the goods manufactured and produced outside the State.

> • the second issue that arises is, whether the grant of rebate, directly or indirectly restrict the free flow of trade, commerce and intercourse among States by assuming the effects of an exemption/ concession which is nothing but a concept within the scope of taxation.
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> • The third issue is, can only the first condition of the notification be severed if it is found to be violative of article 304(a) of the Constitution of India without striking down the whole of the notification.

22. Before dealing with the respective contentions raised before us, we shall set out the relevant Provisions of the Act. The dictionary clause defines ‘dealer’, ‘manufacturer’, ‘tax’ ‘trade tax’ etc. The definitions are therefore extracted and it reads as under:

> “(bb) “Trade Tax” means a tax payable under this Act on sales or purchases of goods, as the case may be;

(c) “dealer” means any person who carries on in Uttar Pradesh (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods directly or indirectly, for cash or deferred payment or for commission, remuneration or other valuable consideration and includes –

(i) a local authority, body, corporate, company, any co- operative society or other society, club, firm, Hindu undivided family or other association of persons which carries on such business;

(ii) a factor, broker, arhati, commission agent, del credere agent, or any other mercantile agent, by whatever name called and whether of the same description as herein before mentioned or not, who carries on the business of buying, selling, supplying or distributing goods belonging to any principal, whether disclosed or not;

(iii) an auctioneer who carries on the business of selling or auctioning goods belonging to any principal, whether disclosed or not, and whether the offer of the intending purchaser is accepted by him or by the principal or nominee of the principal;

(iv) a Government which, whether in the course of business or otherwise, buys, sells, supplies or distributes goods, directly or otherwise, for cash or for deferred payment or for commission, remuneration or other valuable consideration;

(v) every person who acts within the State as an agent of a dealer residing outside the State, and buys, sells, supplies or distributes goods in the State or acts on behalf of such dealer as-

(a) a mercantile agent as defined in Sale of Goods Act, 1930; or

(b) an agent for handling of goods or documents of title relating to goods; or

(c) an agent for the collection or the payment of the sale price of goods or as a guarantor for such collection or such payment;

(vi) a firm or a company or other body corporate, the principal office or headquarters whereof is outside the State, having a branch or office in the State, in respect of purchases or sales, supplies or distribution of goods through such branch or office;

[(vii) every person who carries on the business of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(viii) every person who carries on the business of 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;

[(n) “tax” includes an additional tax and the composition money accepted under Section 7-D];

[(e-1) “manufacture” means producing making , mining, collecting, extracting, altering, ornamenting , finishing, or otherwise processing, treating or adapting any goods; but does not include such manufactures or manufacturing processes as may be prescribed;]

[(ee) 'Manufacturer' in relation to any goods means the dealer who makes the first sale of such goods in the State after their manufacture and includes:--

(i) a dealer who sells bicycles in completely knocked down form;

(ii) a dealer who makes purchases from any other dealer not liable to tax on his sale under the Act other than sales exempted under Sections 4, 4-A and 4-AAA.]

[(h) 'Sale', with its grammatical variations and cognate expressions, means any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) for cash or deferred payment or other valuable consideration, and includes—

(i) a transfer, otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods (whether as goods, or in some other form) involved in the execution of a works contract;

(iii) the delivery of goods on hire purchase or any system of payment by instalments;

(iv) a 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;

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

(vi) 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 or deferred payment or other valuable consideration;]"

23. Section 3 of the Act is the charging provision. Section 3-A provides for the rate of tax payable by a dealer under the Act. Section 4 of the Act provides for grant of general exemption for the purposes of the Act. Section 4-A of the Act provides for grant of exemption from trade tax when the State Government is of the opinion that it is necessary so to do for increasing the production of any goods or for promoting the development of any industry in the State. Section 4–AA provides for concession in the rate of tax to certain industrial units not exceeding twenty-five per cent on the sale of goods manufactured by such industrial unit which provides employment to the persons belonging to the scheduled caste and scheduled tribe, and other backward classes. Section 4AAA authorizes the State Government to grant special concession to certain industrial undertakings in special situations and circumstances. Section 5 of the Act authorizes the State Government to grant rebate of tax on certain purchases or sales if it is satisfied that it is in the public interest so to do by issuing a notification allow a rebate up to the full amount of tax on the sale or purchase of any goods or the sale or purchase of such goods by such person or class of persons as may be specified in the notification. Section 5 is relevant for the purpose of this case and therefore the same is extracted:

"Sec. 5 – Rebate of tax on certain purchases or sale:

1. Where the State Government is satisfied that it is expedient in the public interest so to do, it may by notification, and subject to such conditions and restrictions as may be specified therein, allow a rebate up to the full amount to ;

a) the sale or purchase of any goods,

b) the sale or purchase of such goods by such person or class or persons as may be specified in the said notification.

2. The rebate under sub-Section (1) may be allowed with effect from a date prior to the notification.

24. Section 5 of the Act is in three parts. Firstly, it authorizes the State Government that if it is satisfied that grant of rebate of tax is expedient in the public interest it may do so by issuing the notification and secondly, that the notification may allow a rebate up to the full amount of tax levied on a specified point of sale or purchase of any goods or the sale or purchase of such goods by such person or class of persons. Lastly, the notification may also impose such conditions or restriction for availing the benefit under the notification.

25. In exercise of such power, as we have already noticed, the State Government has issued notification dated 27.02.1998 reducing the tax liability of the dealers by twenty five per cent on goods having fly-ash contents between 10 to 30 per cent weight and has reduced the tax liability of the dealer by fifty per cent on goods having fly-ash contents exceeding thirty per cent by weight. Further, the notification states that such reduction is available in the districts mentioned in the column 2 and for the period mentioned in the column 3 of the annexure to the notification. A tax rebate/ tax cut is a reduction in taxes. The immediate effect of such rebate or tax cut decreases the real revenue of the Government and an increase in the real income of those whose tax rate has been lowered.

26. To appreciate the first issue before us, it is necessary to extract articles 301 and 304 of the Constitution of India. The said articles are as under:-

"301. Freedom of trade, commerce and intercourse.—Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

304. Restrictions on trade, commerce and intercourse among States — Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law—

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

27. Article 304(a) of the Constitution is an exception to article 301 of the Constitution of India. Article 304(a) does not prevent levy of tax on goods; what is prohibited is such levy of tax on goods as would result in discrimination between goods imported from other States and similar goods manufactured or produced within the State. The object is to prevent imported goods being discriminated against by imposing a higher tax thereon than on local goods. What article 304(a) demands is that the rate of taxation on local as well as imported goods must be the same. This is designed to discourage States from creating State barriers or fiscal barriers at the boundaries. Article 304(a) of the Constitution empowers the State to levy tax, with an intent that Part XIII of the Constitution does not affect the power of taxation given under Part XII of the Constitution. It is to preserve and protect the broad object of article 301 of the Constitution, article 304(a) only limits the power of the State legislature from imposing such taxes that would discriminate between imported goods and domestic goods and restrict free movement of goods between States. The broad issue whether article 304(a) is an exception to article 301 of the Constitution of India is discussed in the case of Atiabari Tea Co. Ltd. v. The State of Assam and Ors; AIR (1961) SC 232; it was about the Constitutionality of the Assam Taxation (on goods carried by Roads or Inland Waterways) Act, 1954 (Act XIII of 1954) which was challenged by the appellants from whom tax was demanded under the Act for carriage of tea in chests, from Sibsagar district in Assam and from Jalpaiguri in West Bengal, to Calcutta over the waterways of State of Assam. The constitutional objection against the Act was that it was covered by the inhibition implied by the freedom enunciated in article 301 and that it could be saved from being struck down only if it satisfied the condition prescribed in article 304(b).

28. In the majority judgment, Gajendragadkar, J., as he then was, accepted the appellant's contention that article 301 embraced freedom from all kinds of impediments and burdens on commerce including those imposed by tax laws; and a tax law also, in order to survive, must, satisfy the conditions laid down in clause (b) of article 304. As the learned Judge pointed out, there was ample evidence in

the text of Part XIII itself to show that it dealt with impediments caused by taxation as well as in other ways. Article 304(a) saved certain taxes on goods from the operation of articles 301 and 303, implying thereby that in the absence of the provision in article 304(a) those laws would be hit by article 301 or 303 of the Constitution of India. Justice Hidayatullah, in the Atiabari Case dissented and observed: "Article 304(a) imposes no ban but lifts the ban imposed by articles 301 and 303 subject to one condition." This observation led to controversy and the use of the word 'ban' was understood as giving enormous power to the State to legislate overlooking the economic unity of the nation which was prioritized in article 301 of the Constitution of India. Therefore, in the case of State of Kerala v. Abdul Kadir; it was further clarified that only on a finding that the tax offended article 301 the question whether it was saved by article 304(a) arose.

29. Again, article 304(a) of the Constitution admits two exception in favour of the State legislature to the rule that trade, commerce, and intercourse throughout the territory of India shall be free. Clause(b) to article 304(a) is an exception which enables a State legislature to impose such "reasonable restrictions" on the freedom of trade, commerce and intercourse as may be required in the "public interest". But no bill or amendment for the purpose of clause(b) shall be introduced or moved in the legislature of a State without the previous sanction of the President.

30. The Principle of 'non- Discriminatory tax' as provided in article 304(a) of the Constitution of India is a sine-qua–non to free movement of goods between nations/States in several jurisdictions and also in international trade and policy. Discrimination as explained under World Trade Organization ("WTO", for short) jurisprudence is spoken of in terms of effect and intention behind such discrimination. Intent is referred to as 'aim' or 'motive' or 'purpose' of such discrimination and the other factor commonly associated with discrimination is 'effect' that is whether a measure has a discriminatory effect (also known as the disparate impact) against imports (as explained in the famous case of Japan v. Alcohol, panel report). WTO members are free to choose any system of taxation they deem appropriate provided that they do not impose on foreign products taxes in excess of those imposed on like products. The effect of tax should not be such that two like goods are given discriminatory treatment.

31. At the same time, it cannot be doubted that rising of protective walls may be justified in international trade. The Government can and has been providing such protectionist measures all these years to encourage the growth and establishment of industries in the country and to protect them from competition from foreign manufacturers. But unlike the international trade policies and the commerce clause

in United States Constitution, our Constitution provides for regulating inter-State trade and commerce. The Parliament can take all protective measures under article 302 of the Constitution of India as may be required in public interest. But there are certain obvious differences between the powers conferred to the Parliament under article 302 and State legislature under article 304(a) of the Constitution. The powers given to the State legislature are not unrestricted and are bound to function within limitations stipulated under article 304(a) of the Constitution of India. The powers even under article 304(b) are to be exercised sparingly and after fulfilling all the conditions of article 304 of the Constitution of India. The power conferred under article 304(a) although an exception to article 301 of the Constitution, but is not a blanket power intended to be conferred to the State legislature.

32. To decide the issue at hand, it is pertinent to discuss, whether rebate of tax has the same effects of concessional rate of tax.

33. Article 304(a) ensures only equal rate of tax for incoming goods. So if such goods are taxed at a higher rate or where they are taxed at any rate when indigenous goods enjoy concessional rate of tax, article 304(a) is attracted. They are simple cases of hostile discrimination. Therefore, whether a particular tax is discriminatory within the meaning of this clause, the effect of the tax on the flow of goods from outside the taxing State has to be taken into consideration and, if the overall effects of rebate of tax is such that they fall within the meaning concessional rate of tax. A detailed discussion on the effects and scope of rebate is done in the following paragraphs under the head Issue 2 in the judgment.

ISSUE 2

34. To answer the second issue we need to discuss the concept of 'rebate of tax' and its overall impact on the trade, commerce and intercourse in the context of the case pleaded by the parties.

35. 'Rebate' as defined in the New International Websters' pocket dictionary and Bloomsbury Concise English Dictionary is "discount", to allow as a deduction from a gross amount. It is a discount repaid to the payer. Rebate as defined in corpus Juris Secundum, Vol. 52 C.J Pg. 1189 is as under:-

> " The etymological or dictionary meaning of the term includes any discount or deduction from a stipulated payment, charge, or rate not taken as in advance of payment, but handed back to the payer after he has paid the

stipulated sum, even when such discount or deduction is equally applied to all from whom such payment is demandable"

36. The concept of rebate of tax in the instant case is akin to concessional/ reduced rate of tax. Rebate is though ex-hypothesi in the nature of subsidy and other incentives given by the Government but conceptually rebate of tax and incentives are different and it needs to be explained in reference to the purpose and nature of such rebate of tax introduced by the legislature. The legislation in respect of a rebate has taken different forms, one of them is a partial rebate in the tax, where the deduction is given partially on the gross amount and the other is the power reserved for the Government to permit rebate in respect of any goods to the full amount of the tax levied at any point in the series of sales of such goods. A dealer who is entitled to a rebate under any notification will collect the tax from the consumers at the point of purchase and then have to pay the full amount of sales tax due on his turnover in that quarter; and claim rebate in terms of the notification in accordance with the provision in the rules. However, the claim for rebate need not necessarily be handed back to the payer after he has paid the stipulated sum, it can also be paid in advance of payment. It is nothing but a remission or a payment back or it is sometimes spoken of as a discount or a drawback. It cannot be disputed that it is the discretion of the State Government, through its legislature, to grant rebate to the full amount of sales tax, unless its power of taxation is limited by Constitutional provisions. In the facts of the present case, the legislature authorizes the State Government under Section 5 of the Act to issue notification in the public interest to grant rebate up to the full amount of the tax levied on any specific point in the series of sales/ purchase of such goods. Such rebate is only extended to the districts in State of Uttar Pradesh. The Government of Uttar Pradesh has the power to refund or discount to the full amount of rate of sales tax levied on a dealer, provided the power to discount does not overall has effects of a weapon of taxation that would discriminate between the goods imported and manufactured in Uttar Pradesh as laid down in article 304(a) of the Constitution.

37. The discrimination through a weapon of taxation is explained in the case of Shree Mahavir Oil Mills (supra). The case pertains to unconditional and total exemption from tax on edible oil granted to in- State manufacturers by the State Government. Such an exemption was held discriminatory and violative of articles 301 and 304(a) of the Constitution of India. This case further clarifies the position in Video Electronics case (supra). The Court observed that States are certainly free to impose tax on subjects which fall under List II of the Seventh Schedule of the Constitution, but power shall not be exercised to bring about discrimination between the imported goods and the similar goods manufactured in that State and

concluded that total exemption granted in favour of small-scale industries in Jammu and Kashmir producing edible oil is not sustainable in law. It clarified the exception carved out by the three judges bench in the case of Video Electronics Ltd. v. State of Punjab; 1989 SCR Supp.(2) 731, where it explained that notification issued by two States (Punjab and Haryana) in that case exempting new units, established in new areas specified the exemption to be provided to a special class to whom exemption was provided for a specific period on specific conditions and was not extended to all producers of goods and therefore did not offend the freedom guaranteed under articles 301 and 304 of the Constitution. Similarly in the case of Punjab notification, it was held that since the exemption is for certain specific goods and also because an overwhelmingly large number of local manufacturers of similar goods are subject to a sales tax; it cannot be said that the local manufacturers were favored against the outside manufacturers and further the exemption was granted for a limited period of five years. The above case also laid down that while judging whether a particular exemption granted by the State offends articles 301 and 304, it is necessary to take into account the economic backwardness of a State and the need for concessions and subsidies to such new industries for their development. Therefore, this case clarified that the limited exception created in the said judgment, if extended to all will rob the salutary principle underlying Part XIII of the Constitution and further it is not possible to go on extending the limited exception. It is with this observation, this Court in the above case, held the exemption to be violating article 304(a) read with article 301 of the Constitution of India.

38. Article 304(a) is a provision that deals with taxation. It places goods imported from sister States on a par with similar goods manufactured or produced within the State in regard to State taxation in the allocated field. The object of article 304(a) was to limit the power of taxation by States so as to prevent discrimination against imported goods by imposing taxes on such goods as a higher rate than is borne by indigenous goods. The tax referred to in article 304(a) is a 'tax on goods'. The word "tax" and "taxation" as said by Justice Weaver of the Iowa Supreme Court in the case of State v. Chicago & N. W. R. Co., 128 Wis 449, 108 N. W. is referred to as all sorts of exaction which swell the public funds. Taxation in its broadest and most general sense, includes every charge or burden imposed by the sovereign power upon persons, property or property right, for the use and support of the Government and to enable it to discharge its appropriate functions, and in that broad definition there is included a proportionate levy upon persons or property and various other methods or devices by which revenue is extracted from persons and property. The term 'tax' is to be read in all-embracing and sweeping sense. Such methods or device used by the Government from time to time are not

ordinarily open to serious questions but their scope and application vary according to the nature of the subject under discussion and the circumstances under which they are used. 'Rebate of tax' in the instant case is such a device or weapon of taxation used by the Government from time to time which is though not in question in all situations but their validity is tested in the touchstone of article 304(a) of the Constitution in the circumstance under which they are used. If the rebate of tax by way of repayment to the full amount of tax levied qualifies within the same meaning as that of exemption, then such discount would a fortori mean discrimination on the rate of tax by repaying by way of a rebate to one class of local dealers the whole amount of sales tax paid and on the other hand the outside dealers are taxed higher in absence of the benefit of rebate. This situation squarely falls within the meaning of 'discrimination' as contemplated under article 304(a) of the Constitution of India.

39. It is for the aforesaid reasons, it is pertinent to analyze the nature and scope of concessional/ reduced rate of tax/ exemption by drawing inspiration from their understanding in other jurisdictions and under what circumstance could a rebate be termed a hindrance to or as interfering with the freedom of trade, commerce or intercourse. In appreciating the effects of an exemption parallel to a rebate of tax, we may refer to the observation made in Congressional Budget and Fiscal Operations, 2 U.S.C.A.§ 622 , where exemptions is understood to have been in the category known as "tax expenditures" because the revenues lost by such exemptions are similar to direct expenditures made by the government, the only difference being that they are made through the tax system and not the legislative appropriations process. These tax expenditure programmes are sometimes defined as "subsidies provided through the taxation systems," but the broadest definition includes all categories of "deductions, credits, exclusions, exemptions, preferential tax rates and tax deferrals." Justice Wayne in the case of Jefferson Branch Bank v. Skelly; 66 U.S. 436 while explaining the power of legislature where not forbidden by Constitution explained, that the legislature has the power to exempt from taxation according to its views of public policy provided no constitutional provisions are violated. The United States Constitution under the Equality and uniformity clause mandates that where the Constitution requires taxation to be equal and uniform, it is held in most States that the legislature must tax all such persons or property and cannot grant any exemptions unless the power to exempt is expressly conferred by the Constitution. In some states, however, the contrary is held but even in such states it is held that exemptions are not valid unless including all property and persons of the same class whether such person as subject to such exemption is inside the State or situated outside the State.

40. Exemption as we normally understand has two-fold impact. First, exemptions/ concessional rate of tax affect consumer choice by impacting relative pricing and, thus, materially altering the economic balance. It is because consumption will tend to shift towards untaxed items, the prices of those items and the items used to produce them will increase while the prices of taxed items will decrease relatively. Second, such exemptions unfairly burden some businesses either within the same industry or in other competing industries.

41. Rebate is another such device used by the Government which when given on the rate of tax to the full amount of tax levied, it gives favourable treatment to one class of dealers situated within the state barring the dealers similarly placed outside the State manufacturing goods using the same raw material. The grant of such rebate has the colour of exemption/ concessional rate of tax along with the same deleterious effects of an exemption.

42. Therefore, the test to be applied to determine whether rebate is within the realm of tax defined in article 304(a) of the Constitution of India so as to say that it discriminates between the two class of goods: locally manufactured goods and the imported goods when both the class of dealers meet the conditions required to qualify for the grant of rebate i.e. the use of fly-ash, is the overall effect or impact of such rebate on the manufacturer. This issue is no longer res-integra and is discussed in several cases including in the case of Firm A.T.B Mehta Masjid & Co v. State of Madras and Anr., AIR1963 SC 928, where the question for consideration was whether Rule 16 of the Madras General Sale Tax Rules, 1939 subjected tanned hides and skins outside the State, and sold within the State to a higher rate of tax than the tax imposed on hides or skins tanned and sold within the state and therefore violating article 304(a) of the Constitution. This Court observed that to determine whether the rule was discriminatory, the effect of this rule is to be seen. The result therefore is that the sale of hides or skins which had been purchased in the State and then tanned within the State is not subject to any further tax. Hides and skins tanned within the State are mostly those which had been purchased in their raw condition in the State and therefore on which tax had already been levied on the price paid by the purchaser at the time of their sale in the raw condition. If the quantum of tax had been the same, there might have been no case for grievance by the dealer of the tanned hides and skins which had been tanned outside the State. The grievance arises on account of the amount of tax levied being different on account of the existence of a substantial disparity in the price of the raw hides or skins and of those hides or skins after they had been tanned, though the rate is the same under Section 3(1)(b) of the Act. If the dealer has purchased the raw hide or skin in the State, he does not pay on the sale price of

the tanned hides or skins, he pays on the purchase price only. If the dealer purchases raw hides or skins from outside the State and tans them within the State, he will be liable to pay sales-tax on the sale price of the tanned hides or skins. He too will have to pay more for tax even though the hides and skins are tanned within the State, merely on account of his having imported the hides and skins from outside. Therefore, the Court held that this rule on this ground alone is discriminatory of article 304(a) of the Constitution of India.

43. The above principle was re-iterated in the case of W.B. Hosiery Association and others v. State of Bihar; (1988) 4 SCC 134 and in the case of H. Anraj v Government of Tamil Nadu; (1986) 1 SCC 414; wherein the effect of an exemption was discussed. The issue before the Court was that the locally manufactured goods within the State were exempted but those manufactured in other States and imported into the State were subjected to a high rate of tax. The hosiery manufacturers and dealers in the State of West Bengal in their prayer in the writ petition asked for a direction asking the respondents to forbear from levying or imposing or collecting any sales tax on the sale of hosiery goods imported into Bihar from other States. The State Government by a notification exempted dealers from sales tax of hosiery goods manufactured and produced in the State of Bihar whereas levied sales tax on the dealers outside the State. This Court opined that from the commercial or normal point of view, such a discriminatory levy of sales tax would have an effect that would be bound to affect the free flow of hosiery goods from outside State into the State of Bihar and would therefore violate article 301 read with article 304(a) of the Constitution of India.

44. The above decision is also followed in the case of Western Electronics and Another v. State of Gujarat and others, 1988 2 SCC 568; and in the case of Loharn Steel Industries v. State of Andhra Pradesh; (1997) 2 SCC 37 wherein the impact of exemption on the manufacturer was such that the manufactures outside Andhra Pradesh had to pay a higher rate of tax as compared to the manufacturers in Andhra Pradesh because of the entire tax exemption granted to the all re-rolled steel products sold in the Andhra Pradesh and manufactured out of tax paid raw-material purchased in the State of Andhra Pradesh. Therefore, the notification in this case was considered to be violating article 304(a) of the Constitution of India.

45. This Court in the case of State of U.P. and another v. Laxmi Paper Mart and others, AIR 1997 SC 950 has explained that exempting the exercise books made from paper purchases within Uttar Pradesh produced within the State and the levying of the tax on the exercise books produced outside Uttar Pradesh and sold in Uttar Pradesh at the rate of 5% is discriminatory and offends clause(a) of article

304 of the Constitution of India. Again in Lakshman v. State of Madhya Pradesh; 1983 3 SCR 124, the petitioner was nomad grazier belonging to Gujarat who wandered from place to place with his cattle. State of Madhya Pradesh did not like this and imposed a higher duty for out-of-State cattle owners. The levy was found invalid by the Court.

46. Rebate, therefore, as it is defined in the case of Estate of Bernard H. Stauffer, Bonnie H. Stauffer, Executrix, v. Commissioner of Internal Revenue, 48 U.S. T.C. 277, means abatement, discount, credit, refund, or any other kind of repayment. Rebates have been normally used as justifiable incentives given by the Government to stimulate small industries or newly established industries. But to understand Rebate of tax as rebate per se would be a misnomer. Rebate of tax is the rebate on rate of tax and is essentially the arithmetic of rate. The term 'rate' is often used in the sense of standard or measure. It is the tax imposed at a certain measure or standard on the total turnover of the goods. Rate, in other words is the relation between the taxable turnover and the tax charged. Rebate of tax or exemption is distinguished from non-imposition or non-liability in the case of A.V. Fernandez v. The State of Kerala; AIR 1957 SC 657 wherein the Court held that in rebate of tax, the sales or purchases would have to be included in the gross turnover of the dealer because they are prima facie liable to tax and the only thing which dealer is entitled to in respect thereof is the deduction from the gross turnover in order to arrive at the net turnover on which the tax can be imposed. On the other hand, in the case of non-imposition or non-liablity, the sales or purchases are exempted from taxation altogether. The Legislature cannot enact a law imposing or authorizing the imposition of a tax thereupon as they are not liable to any such imposition of tax. If they are thus not liable to tax, no tax can be levied or imposed on them and they do not come within the purview of the Act at all. The very fact of their non-liability to tax is sufficient to exclude them from the calculation of the gross turnover as well as the net turnover on which sales tax can be levied or imposed.

47. The exemption or rebate of tax is therefore within the purview of taxation. In the instant case, if the grant of rebate of tax by the State Government under Section 5 of the Act is to the full amount of tax levied, then for the dealers manufacturing cement using fly-ash outside the State of Uttar Pradesh but selling it in Uttar Pradesh, though the State Government contends that the rate of tax is same for the dealers inside Uttar Pradesh and outside Uttar Pradesh, but the overall effect is that there is no tax levied on the net turnover after deductions being made from the gross turnover but, on the other hand, the dealers manufacturing or producing cement using fly-ash outside Uttar Pradesh are taxed at the rate of 12.5%.

Therefore, it can be said that the rebate of tax is in the nature of exemption and the instant case can be decided on the basis of catena of decisions of this Court where blanket exemption without reasons are said to be discriminatory and violating article 304(a) of the Constitution of India.

ISSUE 3:-

48. To decide the third issue, the concept of severability needs to be noticed. Doctrine of severability provides that if an enactment cannot be saved by construing it consistent with its constitutionality, it may be seen whether it can be partly saved. The doctrine of severability was considered in the case of RMD Chamarbaugwala v. Union Of India, AIR 1957 SC 628; in which it was observed that "when a statute is in part void, it will be enforced as against the rest, if that is severable from what is invalid". The Court also observed seven propositions of severability, out of which, one of them provided that if the valid and the invalid portions are distinct and separate that after striking out what is in-valid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. The principles of severability was also discussed in the case of A. K. Gopalan v. State of Madras, AIR 1950 SC 27, wherein the Court observed that what we have to see is, whether the omission of the impugned portions of the Act will "change the nature or the structure or the object of the legislation". In the facts of the present case, striking down Clause (1) of the notification alone does not change the object of the legislation. It is a notification passed in public interest and therefore even if Clause (1) of the notification is expunged, leaving behind the rest of the notification intact, the purpose of the Government to grant rebate to provide incentive to the manufacturing units using fly-ash is not lost.

49. This doctrine was also enunciated in the case of D.S. Nakara (supra). The question that arose was whether, for the purpose of application of the liberalized pension rules, the Government of India could stipulate March 31, 1979 as the date for dividing Government employees into two classes: one class who had retired before March 31, 1979 who would not be entitled to the benefits of the liberalized pension rules and the other class who retired after March 31, 1979 who would be entitled to such benefits. One of the questions that came up for consideration is whether a specified date could be severed if it is found to be wholly irrelevant and arbitrary. This Court observed that, if the event is certain but its occurrence at a point of time is considered wholly irrelevant and arbitrary and having an undesirable effect of dividing homogeneous class and of introducing the discrimination, the same can be easily severed and set aside. The Court further

opined that while examining a case under article 14 of the Constitution, the approach is removal of arbitrariness and if that can be brought about by severing the mischievous portion the Court ought to remove the discriminatory part retaining the beneficial portion. The Court therefore concluded that severance never limits the scope of legislation but rather enlarges it.

50. In the light of the observation made by this Court, we are of the opinion that the condition No. 1 is discriminatory and violates article 304(a) of the Constitution of India and therefore needs to be severed from the rest of the notification which can operate independently without altering the purpose and the object of the notification.

51. The learned counsel, Shri Gupta, would argue that since the assessing authorities would not be in a position to verify the claim for grant of rebate of tax by manufacturers of cement using fly-ash outside the State of Uttar Pradesh, the benefit under the notification cannot be extended to them. We do not agree. The explanation appended to the notification authorises the assessing authorities to verify the claim that may be made by the manufacturers including the fact whether an assessee(s) satisfy the conditions prescribed in the notification. If they do not fall within the parameters of the notification the assessing authority can always reject the claim of the manufacturers.

52. Further we may also refer to the submission of Shri Dhruv Agarwal, who would rely on the observations of this Court in the case of G.B. Prabharkar Rao v. State of Andhra Pradesh, 1985 Supp. SCC 432; wherein the age limit of retirement was first raised and then reduced which created an administrative chaos and therefore merely because it created an administrative chaos the provision reducing the age could not have been declared invalid. On the basis of the aforesaid submission, he would submit that the machinery provisions cannot be used to test the constitutional validity of a statute because the liability is always created through substantive provisions. We agree with the submission made by, Shri Dhruv, and are of the opinion that issue of territoriality should not be a factor to determine the constitutional validity of the notification.

53. In view of the aforesaid discussion, we hold ‘rebate of tax’ granted by the State Government to cement manufacturing units using fly-ash as raw material in a unit established in the districts of State of Uttar Pradesh alone is violative of the provisions contained in articles 301 and 304(a) of the Constitution of India. We further declare that the notification would also apply to respondent(s)- cement manufacturing units.

54. With these observations and directions, all the civil appeals are disposed of. There shall be no order as to costs.

Ordered accordingly.