

M/S. JINDAL STAINLESS LTD. AND ANR.

v.

STATE OF HARYANA AND ORS.

JULY 14, 2006

[ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

*Taxation:*

*Compensatory tax—Impugned levy whether compensatory in nature—High Courts examined the issue following two earlier Supreme Court judgments—Such judgments subsequently struck down by a Constitution Bench of Supreme Court—High Courts therefore directed to decide the issue afresh in light of the Constitution Bench judgment—Constitution of India, 1950—Article 301.*

**In all the present appeals and connected matters the basic issue revolves round the judicially evolved concept of “compensatory tax”.**

**In a recent decision, a Constitution Bench of this Court in case of *Jindal Stainless Ltd.* while examining the concept of compensatory tax *vis-a-vis* Article 301 of the Constitution held that the doctrine of “direct and immediate effect” of the impugned law on trade and commerce under Article 301 as propounded in the case of *Atiabari Tea Co. Ltd.* and the working test enunciated in *Automobile Transport’s* case for deciding whether a tax is compensatory or not will continue to apply and the test of “some connection” indicated in the *Bhagatram Rajeevkumar’s* case and followed in the case of *Bihar Chamber of Commerce* is not good law.**

**Directing placing of the present matters for further hearing, the Court**

**HELD: 1.1. In all these matters, the concerned High Courts do not appear to have examined the issue in the proper perspective, as they were bound by the judgments in *Bhagatram’s* case and *Bihar Chambers of Commerce’s* case. [572-G]**

**A** 1.2. At this juncture, it is necessary to take note of what has been stated in the judgment rendered by the Constitution Bench in case of *Jindal Stainless Ltd.* Since relevant data do not appear to have been placed before the High Courts, the parties are permitted to place them in the concerned Writ Petitions within two months. The concerned High Courts shall deal with the basic issue as to whether the impugned levy was compensatory in nature. The High Courts are requested to decide the aforesaid issue within five months from the date of receipt of this order. The judgment in the respective cases shall be placed on record by the concerned parties within a month from the date of the decision in each case pursuant to direction of this Court.

[573-A; 575-B-C]

**C** *Jindal Stainless Ltd. & Anr. v. State of Haryana & Ors.*, (2006) 4 SCALE 300, followed.

*Atiabari Tea Co. Ltd. v. State of Assam*, AIR (1961) SC 232; *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan*, AIR (1962) SC 1406; *M/s.*

**D** *Bhagatram Rajeevkumar v. Commissioner of Sales Tax, M.P. and Ors.*, [1995] Suppl. 1 SCC 673 and *State of Bihar and Ors. v. Bihar Chambers of Commerce and Ors.*, [1996] 9 SCC 136, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3453 of 2002.

**E** From the Judgment and Order dated 21.12.2001 of the High Court of Punjab and Haryana at Chandigarh in C.W.P. No. 6630/2000.

WITH

**F** SLP (C) No. 10003/2004, SLP (C) No. 10007/2004, SLP (C) No. 10156/2004, SLP (C) No. 10164/2004, SLP (C) No. 10167/2004, SLP (C) No. 10206/2004, SLP (C) No.10381/2004, SLP (C) No.10391/2004, SLP (C) No.10404/2004, SLP (C) No. 10417/2004, SLP (C) No. 10501/2004. SLP (C) No. 10563/2004, SLP (C) No.10568/2004, SLP (C) No. 10571/2004, SLP (C) No. 11012/2004, SLP (C) No. 11271/2004, SLP (C) No. 11326/2004, T.C. (C) No. 13/2004, SLP (C) No.14380/2005, C.A. Nos.2608/2003, 2637/2003, 2769/2000, 3144/2004, 3145/2004, 3146/2004, 3314/2001, 3381-3400/1998, 3454/2002, 3455/2002, 3456-3459/2002, 3460/2002, 3461/2002, 3462-3463/2002, 3464/2002, 3465/2002 3466/2002, 3467/2002, 3468/2002, 3469/2002, 3470/2002, 3592/1998, 4471/2000, 4476/2000, 4651/1998, 4954/2004, Writ Petition No. 512/2003, C.A. Nos. 5141/2004, 5143/2004, 5144/2004, 5145/2004, 5147/2004, 5148/2004, 5149/2004, 5150/2004, 5151/2004, 5152/2004, 5153/2004, 5156/2004, 5157/2004, 5158/2004, 5159/2004, 5160/2004, 5162/

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2004, 5163/2004, 5164/2004, 5165/2004, 5166/2004, 5167/2004, 5168/2004, 5169/2004, 5170/2004, Writ Petition (C) No. 574/2003, C.A. Nos. 5740/2002, 5858/2002, 6331/2003, 6383-6421/1997, 6422-6435/1997, 6436/1997, 6437-6440/1997, 7658/2004, 8241/2003, 8242/2003, 8243/2003, 8244/2003, 8245/2003, 8246/2003, 8247/2003, 8248/2003, 8249/2003, 8250/2003, 8251/2003, 8252/2003, 918/1999, SLP (C) No.9496/2004, SLP (C) No.9569/2004, SLP (C) No.9883/2004, SLP (C) No.9891/2004, SLP (C) No. 9898/2004, SLP (C) No. 9904/2004, SLP (C) No. 9910/2004, SLP (C) No. 9911/2004, C.A. Nos. 997-998/2004, SLP (C) No.9976/2004, SLP (C) No.9993/2004, SLP (C) No.9998/2004, SLP (C) No.9999/2004, C.A.Nos. 1956/2003, 2633/2003, 2638/2003, 3720-3722/2003, SLP (C) No.10153/2004.

Ajay Siwach, AAG, Aruneshwar Gupta, Addl. Genl. (Rajasthan) Shanti Bhushan, R.F. Nariman, J.N. Dubey, A.M. Singhvi, Dinesh Dwivedi, T.L. Viswanath Iyer, A.K. Ganguli, S. Ganesh, A.S. Garg, Jayant Bhushan, Ejaz Maqbool, Vikas Singh, Taruna Singh, Abhijit Sinha, Anurag Dubey, K.B. Upadhayay, Meenesh Dubey, Manish Kumar, S.R. Setia, Dhruv Agarwal, Praveen Kumar, P.K. Bansal, Rajeev Agnihotri, K. Mishra, Rajeev Dubey, S.W.A. Qadri, Rashmi Singh, Gaurav Bhatia, S. Prasad, Gopalkrishnan, R.K. Virmani, Rashmi Virmani, L.R. Singh, Ankit Singhal, Nikhil Nayyar, Ravinder Narain, S. Sharma, Meghalee Barthakur, A. Aggarwal, Kanika Gomber, Rajan Narain, V.N. Koura, Paramjeet Banepal, A. Mariarputham, Mini N. Nair, Gopal Singh, Nishakant Pandey, P.V. Dinesh, U.A. Rana, Prashant Thakur (for Gagrat & Co.), Kuldeep Kumar Singh, Amit Mahajan D.N. Ray, Sumita Ray, Kavin Gulati, Rana Mukherjee, Rashmi Singh, T. Mahipal, B.V. Desai, Rahul Gupta, N. Kanungo, R.K. Khanna, R. Khanna, Jhanvi Warah, S. Kant, V.N. Koura, Paramjeet Banipal, Aruna Mathur (for Arputham, Aruna & Co.), Pradeep Dahiya, Sandeep Sharma, T.V. George, Kamakshi S. Mehlwal, Naveen Kumar Singh, Praveen Kumar, Roy Abraham, Seema Jain, H. Lal, M.P. Vinod, Ajay K. Jain, P.K. Bansal, Pankaj Kumar Singh, Vinod K. Tiwari, K.L. Janjani, H.K. Puri, Ujjawal Banerjee, S.K. Puri, V.M. Chauhan, Devashish Bharukha, Ramesh Chander Agarwal, Hans Bharukha, R.C. Kohli, Pramit Saxena, Anurdha Rustagi, Sandeep. Kaadambari, Vikas Tomar, Gaurav Agrawal, Prashant Kumar, Rajiv Tyagi, Himanshu Mehta, Balender, L.K. Bhushan, Jasleen Oberori, Rahul Prasamna Dave, Devajyoti Bhattacharya, Indra Sawhney, Indu Malhotra, P.N. Puri, R.K. Maheshwari, Vinoo Bhagat, B. Vijayalakshmi Menon, K.B. Sasiprabhu, K.V. Mohan, Rajesh Kumar, Tarun Johri, Vishwajit Singh, Nikhil Nayyar, Romy Chacko, Abhish Kumar, C.N. Sree Kumar, Guntur Prabhakar, Sushil Kumar Jain, S.B. Upadhayay, Shrish Kumar Misra, Kirti Renu Mishra, Shakil Ahmed Syed, K.S. Rana, B.K. Satija, Sanjay R. Hegde, Sanjay Kapur, Subramonium

A Prasad, Vinay Kumar Garg, Abhijit Sengupta, Kavita Wadia, R. Sathish, K.R. Nambiar, Baby Krishnan, B.V. Deepak and M.T. George for the appearing parties.

B **ARIJIT PASAYAT, J.** These appeals and certain connected matters were initially heard by a two-Judge Bench of this Court. The matters were referred to a larger Bench by order dated 26.9.2003 as the Bench hearing the matters doubted the correctness of the views expressed in *M/s. Bhagatram Rajeevkumar v. Commissioner of Sales Tax, M.P. and Ors.*, [1995] Suppl. 1 SCC 673 which was relied on in a subsequent decision in *State of Bihar and Ors. v. Bihar Chambers of Commerce and Ors.*, [1996] 9 SCC 136. The matters were dealt with by a Constitution Bench to decide with certitude the parameters of the judicially evolved concept of ‘Compensatory Tax’ vis-a-vis Article 301 of the Constitution of India, 1950 (in short the ‘Constitution’).

C The Constitution Bench in *Jindal Stainless Ltd. & Anr. v. State of Haryana & Ors.*, (2006) 4 SCALE 300 speaking through one of us (Kapadia, D J) concluded as follows :

49. In our opinion, the doubt expressed by the referring Bench about the correctness of the decision in *Bhagatram’s* case [1995] Suppl. 1 SCC 673 followed by the judgment in the case of *Bihar Chamber of Commerce* [1996] 9 SCC 136 was well-founded.

E 50. We reiterate that the doctrine of “direct and immediate effect” of the impugned law on trade and commerce under Article 301 as propounded in *Atiabari Tea Co. Ltd. v. State of Assam*, AIR (1961) SC 232 and the working test enunciated in *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan*, AIR (1962) SC 1406 for deciding whether a tax is compensatory or not vide para 19 of the report, will continue to apply and the test of “some connection” indicated in para 8 of the judgment in *Bhagatram Rajeevkumar v. Commissioner of Sales Tax, M.P.* [1995] Suppl. 1 SCC 673 and followed in the case of *State of Bihar v. Bihar Chamber of Commerce*, [1996] 9 SCC 136, is, F in our opinion, not good law. Accordingly, the constitutional validity of various local enactments which are the subject matters of pending appeals, special leave petitions and writ petitions will now be listed G for being disposed of in the light of this judgment.

H In all these appeals and connected matters the basic issue revolves round the concept of “Compensatory Tax”. In all these matters the concerned

High Courts do not appear to have examined the issue in the proper perspective, as they were bound by the judgments in *Bhagatram's* case (supra) and *Bihar Chambers of Commerce's* case (supra). A

At this juncture, it is necessary to take note of what has been stated in paragraphs 42 to 45 of the judgment rendered by the Constitution Bench, which read as follows : B

42. To sum up, the basis of every levy is the controlling factor. In the case of "a tax", the levy is a part of common burden based on the principle of ability or capacity to pay. In the case of "a fee", the basis is the special benefit to the payer (individual as such) based on the principle of equivalence. When the tax is imposed as a part of regulation or as a part of regulatory measure, its basis shifts from the concept of "burden" to the concept of measurable/quantifiable benefit and then it becomes "a compensatory tax" and its payment is then not for revenue but as reimbursement/recompense to the service/facility provider. It is then a tax on recompense. Compensatory tax is by nature hybrid but it is more closer to fees than to tax as both fees and compensatory taxes are based on the principle of equivalence and on the basis of reimbursement/recompense. If the impugned law chooses an activity like trade and commerce as the criterion of its operation and if the effect of the operation of the enactment is to impede trade and commerce then Article 301 is violated. C D E

**BURDEN ON THE STATE:**

43. Applying the above tests/parameters, whenever a law is impugned as violative of Article 301 of the Constitution, the Court has to see whether the impugned enactment facially or patently indicates quantifiable data on the basis of which the compensatory tax is sought to be levied. The Act must facially indicate the benefit which is quantifiable or measurable. It must broadly indicate proportionality to the quantifiable benefit. If the provisions are ambiguous or even if the Act does not indicate facially the quantifiable benefit, the burden will be on the State as a service/facility provider to show by placing the material before the Court, that the payment of compensatory tax is a reimbursement/recompense for the quantifiable/ measurable benefit provided or to be provided to its payer(s). As soon as it is shown that the Act invades freedom of trade it is necessary to enquire F G

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A whether the State has proved that the restrictions imposed by it by way of taxation are reasonable and in public interest within the meaning of Article 304(b) [See: para 35 of the decision in the case of *Khyerbari Tea Co. Ltd. and Anr. v. State of Assam* reported in AIR (1964) SC 925].

B SCOPE OF ARTICLES 301, 302 and 304 VIS-A-VIS COMPENSATORY TAX:

C 44. As stated above, taxing laws are not excluded from the operation of Article 301, which means that tax laws can and do amount to restrictions on the freedom guaranteed to trade under Part-XIII of the Constitution. This principle is well settled in the case of *Atiabari Tea Co.*, AIR (1961) SC 232. It is equally important to note that in *Atiabari Tea Co.*, AIR (1961) SC 232, the Supreme Court propounded the doctrine of “direct and immediate effect”. Therefore, whenever a law is challenged on the ground of violation of Article 301, the Court has not only to examine the pith and substance of the levy but in addition thereto, the Court has to see the effect and the operation of the impugned law on inter-State trade and commerce as well as intra-State trade and commerce.

E 45. When any legislation, whether it would be a taxation law or a non-taxation law, is challenged before the court as violating Article 301, the first question to be asked is: what is the scope of the operation of the law? Whether it has chosen an activity like movement of trade, commerce and intercourse throughout India, as the criterion of its operation? If yes, the next question is: what is the effect of operation of the law on the freedom guaranteed under Article 301? If the effect is to facilitate free flow of trade and commerce then it is regulation and if it is to impede or burden the activity, then the law is a restraint. After finding the law to be a restraint/restriction one has to see whether the impugned law is enacted by the Parliament or the State Legislature. Clause (b) of Article 304 confers a power upon the State Legislature similar to that conferred upon Parliament by Article 302 subject to the following differences:—

G (a) While the power of Parliament under Article 302 is subject to the prohibition of preference and discrimination decreed by Article 303(1) unless Parliament makes the declaration under Article 303(2), the State power contained in Article 304(b) is made expressly free from the prohibition contained in Article 303(1) because the opening words of

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Article 304 contains a non-obstante clause both to Article 301 and Article 303. A

(b) While the Parliament's power to impose restrictions under Article 302 is not subject to the requirement of reasonableness, the power of the State to impose restrictions under Article 304 is subject to the condition that they are reasonable. B

(c) An additional requisite for the exercise of the power under Article 304(b) by the State Legislature is that previous Presidential sanction is required for such legislation.

Since relevant data do not appear to have been placed before the High Courts, we permit the parties to place them in the concerned Writ Petitions within two months. The concerned High Courts shall deal with the basic issue as to whether the impugned levy was compensatory in nature. The High Courts are requested to decide the aforesaid issue within five months from the date of receipt of our order. The judgment in the respective cases shall be placed on record by the concerned parties within a month from the date of the decision in each case pursuant to our direction. C D

Place these matters for further hearing in third week of January, 2007.

B.B.B.

Matter placed for further hearing.