

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6155 of 2016

Instakart Services Private Limited, a Company incorporated under the Companies Act, 1956 having its registered office at Brigade Manae Court, First Floor, No. 111, Koramangala Industrial Layout, Bangalore- 500095, and Branch Office at Flat No. D5, Shakti Dham Apartment, Chakaram Link Path, Budha Colony, Dist- Patna, Bihar- 800001, through its authorized signatory Goutam Kumar Singh, son of Shri Arbind Kishore Singh, resident of Flat No. 206-C, Vina Vihar Apartment, P.O.+P.S.- Rupaspur, District- Patna.

.... Petitioner

Versus

1. The State of Bihar through the Joint Secretary, Bihar, Patna having its office at Vikash Bhawan, Bailey Raod, Patna.
2. The Commissioner-cum-Principal Secretary, Commercial Taxes Department, Bihar, Patna having its office at Vikas Bhawan, Bailey Road, Patna.
3. The Deputy Commissioner of Commercial Taxes, Patliputra Circle, Patna having its officer at 4th Floor, Pant Bhawan, Bailey Road, Patna.

.... Respondents

With

Civil Writ Jurisdiction Case No. 6206 of 2016

WS Retail Services Private Limited, a Company incorporated under the Companies Act, 1956 having its registered office at Ozone Manay Tech Park, 'B' Block, 9th Floor, Survey No. 56/18 & 55/9, Garvebhavipalya, Hosur Road, Bangalore, through its authorized signatory, Pradeep L. Sankaje, son of Shri Laxman A Sankaje, resident of 23, 11th Main, J.C.Nagar, Mahalaxmipuram, P.O. + P.S. Mahalaxmipuram, Bangalore - 560086.

.... Petitioner

Versus

1. The State of Bihar through the Joint Secretary, Bihar, Patna having its office at Vikas Bhawan, Bailey Road, Patna.
2. The Commissioner-cum-Principal Secretary, Commercial Taxes Department, Bihar, Patna, having its office at Vikash Bhawan, Bailey Road, Patna.
3. The Deputy Commissioner of Commercial Taxes, Patliputra Circle, Patna having its office at 4th Floor, Pant Bhawan, Bailey Road, Patna.

.... Respondents

Appearance :

For the Petitioner	:	Dr. Ashok Saraf, Senior Advocate
(In both cases)		Mr. D.V.Pathy, Advocate
		Mr. Kishore Kunal, Advocate
		Mr. Suman Chetia, Advocate
		Mrs. Manju Jha, Advocate
For the Respondents	:	Mr. Lalit Kishore, PAAG
		Mr. Piyush Lal, AC to PAAG

CORAM: HONOURABLE THE CHIEF JUSTICE

and

**HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

JUDGMENT & ORDER

C.A.V.

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 27-09-2016

The present writ petitions have been filed challenging the levy and collection of *entry tax* on goods brought by the petitioners to the State of Bihar for individual consumers, who reside in the State of Bihar, and which are transacted using electronic commerce portal (*E-commerce*).

2. The petitioners are Private Limited Company and are engaged in the business of providing logistics and delivery services to various individual buyers, who undertake purchase transactions through technology platform of M/s Flipkart Internet Private Limited (in short "Flipkart Internet").

3. The petitioners are registered as a transporter within the provisions of the Bihar VAT Act, 2005. In furtherance of their business objects, the petitioner of C.W.J.C. No.6155 of 2016 entered into an agreement, dated 01.09.2015, and the petitioner of C.W.J.C. No.6202 of 2016 entered into an agreement, dated 01.01.2013, with M/S Flipkart Internet, Bangalore, for providing logistics services to the individual buyers, who are registered on the website of Flipkart Internet Pvt Ltd, viz, www.flipkart.com. Business model, adopted by the petitioner for Flipkart Internet, is that the online portal, www.flipkart.com, works as an *online* market place, whereby

goods of various sellers, who are registered in the respective States, under the VAT/ Central Sales Tax Act laws, are displayed.

4. As per the specific terms of use of the said portal, the goods, which are purchased by the purchaser- customers, are meant for personal use or consumption only and are not for subsequent sale. The customers purchase identified goods from amongst the various goods displayed for sale on the portal. Once the identified/required/desired goods are purchased by a customer and the seller has received the orders from the customer, the petitioners undertake logistics support for such sellers. The sale between the concerned sellers and customers, in the present cases, where the goods are situated outside the State of Bihar, consummates prior to the petitioners' taking delivery for providing logistics support and the appropriate CST is paid on such goods by the concerned seller. Package, along with invoice, is handed over to the petitioners for delivery directly to the customers at the destination addressed.

5. The State legislature of Bihar, enacted the Bihar Tax on Entry of Goods into Local Areas for consumption, Use or Sale Therein Act, 1993, (hereinafter referred to as the "1993 Act"), with a view to levy tax on entry of goods into local areas for consumption, use or sale therein. The Bihar Entry of Goods Into Local Area Rules, 1993, (hereinafter referred to as the "1993 Rules") were framed to give effect to the provisions



of the 1993 Act. However, the 1993 Act was declared *ultra vires* Articles 301 and 304 of the Constitution of India by the judgment of this Court in ***Bihar Chamber of Commerce vs. State of Bihar, (1995) 97 STC 53***. The said judgment of this Court was subsequently reversed by the Supreme Court in ***State of Bihar vs. Bihar Chamber of Commerce***, reported in ***(1996) 9 SCC 136***, wherein it was held, by applying the decision, in ***Bhagatram vs. CST***, reported in ***1995 Supp (1) SCC 673***, that the levy, under the 1993 Act, was compensatory in nature and, hence, did not violate Article 301 of the Constitution.

6. The said decision of the Supreme Court, in ***Bihar Chamber of Commerce*** (supra), was, later on, overruled by the decision of the Constitution Bench of the Supreme Court, in ***Jindal Stainless Ltd. vs. State of Haryana***, reported in ***(2006) 7 SCC 241***.

7. By the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein (Amendment) Act, 2001, the 1993 Act was amended. In terms of the Amendment Act of 2001, the definition of "entry of goods" was amended and the following proviso to Section 2(c) was inserted:

"Provided that in case of such goods which are liable to tax under Section 12(1) of the Bihar Finance Act, 1991, entry of goods shall mean entry of goods into local area from a new place outside the State for consumption, use or sale therein."

8. Amendment was also made in Section 3 by inserting second Proviso to Section 3(2), which read as under:

"Provided further that where an importer of scheduled goods liable to pay tax under the Act, incurs tax liability, at the rate specified under Section 13 of the Bihar Value Added Tax Act, 2005 (Act 27 of 2005), by virtue of sale of imported scheduled goods or sale of goods manufactured by consuming such imported scheduled goods, his tax liability under the Bihar Value Added Tax Act, 2005 (Act 27 of 2005) shall stand reduced to the extent of tax paid under the Act."

9. With the insertion of the second Proviso to Section 3(2) of the 1993 Act, the taxable liability of a person on a scheduled goods imported in the State of Bihar, shall stand reduced to the extent of tax paid under the Act.

10. The 1993 Act was further amended by the Bihar Tax on Entry of Goods Into Local Areas for Consumption, Use or Sale Therein (Amendment) Act, 2003. By this amendment, the maximum rate of *entry tax* was revised from 5% to 20% and a number of other goods were added to the Schedule of the 1993 Act. Further, by another amending Act, namely, Bihar Tax on Entry of Goods Into Local Areas for Consumption, Use or Sale Therein (Amendment and Validation) Act, 2003, an explanation has been added. This Explanation to the definition of "*entry of goods*", goods, coming from outside the territory of India, were also brought within the purview of the Act. Both

the aforesaid amendments of 2003 were made without prior sanction of the President of India.

11. By the Bihar Finance Act of 2006, the 1993 Act was, again, amended by insertion of a proviso to Section 3(2), which stipulated that the facility of adjustment towards sales tax would not be available on goods that were exempted from payment of sales tax in terms of any notification issued under Section 7(3) of the Bihar Finance Act, 1981. The said proviso was inserted retrospectively with effect from 25.02.1993. The proviso, as inserted by the Bihar Finance Act, 2006, reads, as under:

"Provided also that if the sale of such scheduled goods is exempted from tax under any notification issued under sub-section (3) of Section 7 of the Bihar Finance Act, 1981, reduction of his liability under the Bihar Finance Act, 1981 as provided in this section or any notification thereunder, issued shall not be made."

12. In the same year, i.e., in **2006**, pursuant to the decision of the Supreme Court, in ***Jindal Stainless*** (supra), Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein (Amendment) Act, 2006, underwent various amendments in the 1993 Act including amendments to the second Proviso to Section 3(2) extending the adjustments of *entry tax* against also the sales tax liability to the sale of manufactured goods by consuming the imported scheduled

goods.

13. The amendments, so made by the 2001 Act, 2003 Act and 2006 Act, were challenged before this Court in ***Indian Oil Corporation Limited vs. State of Bihar, [2007] 10 VST 140 (Patna)***, and this Court, upon considering the changes made to the 1993 Act by way of the aforesaid amendments, held that the parent 1993 Act, before its amendment, was not compensatory in character and was, therefore, violative of Article 301 of the Constitution. The Court, however, held that the Act was nevertheless saved by virtue of Article 304(b) of the Constitution and the decision, in ***Bihar Chamber of Commerce*** (supra), to that extent, remains subsisting till date. The Court further held that the Amendment Acts 10 of 2001 and 9 of 2003 were bad, because of being violative of Article 304(a) of the Constitution and, further, that amendments had been made without the previous sanction of the President. It was also held that the introduction of imported goods, within the definition of "entry of goods", was bad for being retrospective as also for want of the Presidential sanction/assent. The Court further held that after the 2006 amendment, the levy, under the 1993 Act, acquired the nature of a compensatory tax and the 1993 Act, therefore, is a valid piece of legislation. However, on the question as to whether amendments, made in the 1993 Act, were discriminatory or not, this Court upheld the validity only on the basis that there

was a provision of *set-off* in terms of the second Proviso to Section 3(1) of the 1993 Act.

14. Fresh amendments to the 1993 Act were made by the Bihar Finance Act, 2015, to ensure levy of *entry tax* on goods, brought into the State of Bihar, on account of transactions undertaken by individual consumers through *e-commerce*. By the said Finance Act of 2015, the definition of “*dealer*”, under the 1993 Act, has been substituted as under:

“(b) ‘Dealer’ means any person who, whether regularly or otherwise, in the course of business, buys, sells, supplies, distributes or does anything incidental to such buying, selling, supplying or distributing of goods, directly or indirectly, whether for cash, or for deferred payment or for commission, remuneration or other valuable consideration and it includes-

(A) A local authority;

(B) A Hindu undivided family;

(C) A company, or any society (including a co-operative society), club, firm, association of persons or body of individuals, whether incorporated or not, which carries on such business;

(D) A society (including a cooperative society), club, firm or association which buys goods from, or sells, supplies or distributes goods to its members;

(E) An industrial, commercial, banking

or trading undertaking, whether or not of the

(F) Central Government or of any of the State Governments or of a local authority;

(G) A commission agent, broker, factor, a del-credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of the principal.

Explanation I- Every person who acts as an agent on behalf of a dealer residing outside the State of Bihar and buys sells, supplies or distributes goods in the State or acts on behalf of such dealer as –

(a) A commission agent, broker, factor, a del-credere agent, an auctioneer or any other mercantile agent, by whatever name called; or

(b) An agent for handling goods or documents of title 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 payment; or

(d) A local branch of a firm or company situated outside the State, shall be deemed to be a dealer for the purpose of this Act

Explanation II- A Government which whether or not in the course of business, buys, sells, supplies or distributes goods, directly or

otherwise, for cash or for deferred payment or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purpose of this Act."

Explanation III - Every person engaged in the business of supplying or delivering Scheduled goods to any buyer or importer within the State through any System of electronic commerce or otherwise shall be deemed to be a dealer for the purpose of this Act"

15. Section 3AA has been inserted, in the 1993 Act, empowering the respondents to collect tax from importers in certain cases, which reads as under:

"3AA. Collection of tax from importers in certain cases.— (1) Notwithstanding anything contained in the Act, every person or dealer engaged in the business of delivering or supplying goods to any buyer or importer within the State who are not registered under the Act, through any System of electronic commerce or otherwise shall, at the time of or before delivery of the said Scheduled goods, recover entry tax at the prescribed rate on the said scheduled goods from the buyer or importer of the said goods.

(2) No such delivery of any imported scheduled goods shall be made without recovery of entry tax to be recovered under sub section (1)

(3) The power to recover tax under sub-section (1) shall be without prejudice to any other mode of recovery.

(4) Any person or dealer collecting any amount under sub-section(1) shall, within the prescribed time, deposit the amount so collected into Government Treasury in the manner prescribed for deposit of tax under the Act;

(5) The provisions of sub-section (3), sub-Section (4), sub-Section (5) and sub-Section (6) of Section 40 of the Bihar Value Added Tax Act, 2005 (Act 27 of 2005) relating to collection, deposit and liability of the person or dealer collecting such tax, discharge of liability, recovery and imposition of penalty shall, mutatis mutandis, apply to any amount collected under the provisions of sub-Section

(1)

(6) Every person or dealer collecting tax under the provisions of this section shall, within such period as may be prescribed, furnish to the buyer a certificate to the effect that tax has been collected, and specifying the sum so collected, the rate at which the tax has been collected and such other particulars as may be prescribed.

(7) Every person or dealer collecting tax under the provisions of this section shall prepare within the prescribed time after the end of each month, quarter and year and deliver or cause to be delivered to the prescribed authority such returns in such form and verified in such manner and setting forth such particulars and within such time as may be prescribed.

(8) Every person or dealer, under sub-

section (1), shall maintain true and complete accounts, registers and documents, as may be prescribed, in respect of the scheduled goods handled by him and the documents of title relating thereto and shall produce the said accounts, registers and documents before the prescribed authority as and when required by him.

(9) Every person or dealer responsible for collecting tax, in accordance with the provisions of this section shall apply for and obtain registration under the Act in the manner prescribed under section 5 of the Act."

16. Apart from the above, the earlier applicability of the 1993 Act only to transactions above Rs. 25,000/- has been changed making the Act applicable to transactions with value above Rs. 1,000/-. To give effect to the amendments made in the 1993 Act, changes were made, in exercise of powers under Section 9(1) of the 1993 Act, to the 1993 Rules by S.O. No. 169, dated 21.07.2015. Again, vide Notifications S.O. No. 16 and 18, dated 20.01.2016, issued, in exercise of powers under Section 3(1) of the 1993 Act, various new items were added to the existing Schedule of 1993 Act as well as rate of *entry tax* was revised in certain cases.

17. It is the case of the present petitioners that by the amendments aforesaid, *entry tax*, on the various goods imported by the petitioners, has been imposed at a rate higher than the rate of sales tax under the Bihar VAT Act, 2005.

18. The aforesaid amendments made to the 1993 Act as well as 1993 Rules have been put to challenge in the present writ application contending the same to be *ultra vires* and illegal being violative of Articles 14, 301 and 304(a) of the Constitution.

19. We have heard Dr. Ashok Saraf, learned Senior Counsel assisted by Mr. T. Gulati and Mr. S. Chetia on behalf of the petitioners, and Mr. Lalit Kishore, learned Principal Additional Advocate General, appearing on behalf of the respondents.

20. Contending that the impugned provisions of the 1993 Act, as amended by the Amendment Act of 2015, are discriminatory against goods, which are brought in by the petitioners for personal use or consumption of individual consumers, Dr. Saraf submits that the impugned provisions create a tax or a fiscal barrier on such goods, which are brought in on account of an *inter*-State sale transaction and on which full rate of Central Sales Tax (in short, 'CST') is being paid. The impugned levy of *entry tax* on the goods brought into the State of Bihar, contends Dr. Saraf, is a colorable exercise of power by the State of Bihar to levy sales tax on goods brought into the State of Bihar on account of *e-commerce* transactions. It is submitted by Dr. Saraf that the impugned levy, in pith and substance, being sales tax/VAT, in the garb of levy of *entry tax*, violates Article 286 of the Constitution.



21. Referring to the definition of "*entry of goods*" given under Section 2(c) of the 1993 Act and the charging provisions of Section 3 of the said Act, Dr. Saraf submits that where goods are exigible to tax in terms of sales tax law in the State of Bihar, i.e., the Bihar VAT Act, 2005, entry for the purpose of levy of *entry tax* would be only when the goods are coming from outside the State of Bihar and, in such cases, where the goods move from one local area to another local area, the same is not liable to *entry tax*. This apart, contends Dr. Saraf, that if VAT is paid on the goods brought in from outside the State of Bihar under the Bihar VAT Act, 2005, no *entry tax* is payable inasmuch as the payment of *entry tax* is liable to be *set off* against the VAT liability on such goods. Further, no *entry tax* is levied on goods, which are exempted from payment of VAT in terms of the third Proviso to Section 3(2) of the 1993 Act.

22. Coupled with the above, Dr. Saraf submits that the impugned levy of *entry tax*, in pith and substance, is a tax on goods, which are brought into the State of Bihar on account of *inter-State* sale transactions on which the State of Bihar cannot levy VAT inasmuch as wherever VAT is leviable, there is *set off* against the VAT so payable. The State of Bihar, submits Dr. Saraf, realizing the limitation imposed on it by Article 286(1)(a) of Constitution of India, which prohibits the State from taxing *inter-State* sale transactions has evolved a novel

way of contravening Article 286(1)(a) of Constitution by selectively taxing *inter-State* transactions of sale in the garb of *entry tax*.

23. It is submitted by the learned Senior Counsel, Dr. Saraf, that in terms of Article 286(1)(a), the State does not have the legislative competence to impose tax on sale or purchase of goods, when sale or purchase takes place outside the State; whereas, the impugned proviso, in pith and substance, seeks to levy tax on the sale transactions, which stand already concluded outside the State, and the movement of goods, in the State of Bihar, is only for personal use or consumption for individual consumers.

24. In support of his above submissions, Dr. Saraf, places reliance on the decision of the Gauhati High Court, in ***ITC Ltd vs. State of Assam, (2007) 9 VST 250.*** It is further submitted by Dr. Saraf that the impugned levy of *entry tax* on goods brought by the petitioners to the State of Bihar, for individual consumer on account of *e-commerce* transaction, is discriminatory and thereby violative of Article 14, 19(1)(g) and 304(a) of the Constitution of India.

25. It is further submitted by Dr. Saraf that the impugned levy of *entry tax* on goods, brought into the State of Bihar by the petitioners on account of an *e-commerce* transactions, is discriminatory against such goods violating Article 304 (a) of the Constitution of India. In so far as other



goods, which are brought into the State of Bihar, and which are for further resale or for consumption in the manufacture of goods, a *set off*/reduction of VAT is provided against the payment of *entry tax* to ensure that there is only a single incidence of tax. The effect thereof, submits Dr. Saraf, is that if the CST paid goods are not sold, but are used for personal consumption, the cumulative tax burden on such goods is much higher.

26. In support of his plea that the impugned provisions providing for levy of *entry tax* on the goods brought into the State of Bihar, on account of *e-commerce* transaction, is discriminatory, Dr. Saraf has tried to explain the same by four different situations by giving following examples:

Scenario 1- Tax burden on Goods brought in by a Dealer, registered under the Bihar VAT Act, for the purpose of resale in the State of Bihar: Where goods are brought in for the purpose of resale either on account of a Stock Transfer or on the basis of C-form or a direct inter-State sale, in terms of the second proviso to Section 3 (2), the payment of *Entry tax* under the Act will stand reduced from the VAT to be paid on the goods as under:-

(i) Bihar Dealer, doing resale of Mobile Phone, to end customers in Bihar

Price of Mobile	CST [2%]	ET [5% on A+B]	BVAT [5% on A+B+C]	BVAT after reduction of ET as per proviso to Section 3 (2)	Cost to the Customer
(A)	(B)	(C)	(D)	(E=D-C)	(A+B+C)
10000	200	510	535.50	25.50	10225.50

(i) Bihar Dealer doing resale of Mobile Phone to end customers by bring goods in Bihar though Stock Transfer

Price of Mobile	CST [2%]	ET [5% on A+B]	BVAT [5% on A+B+C]	BVAT after reduction of ET as per proviso to Section 3 (2)	Cost to the Customer
(A)	(B)	(C)	(D)	(E=D-C)	(A+B+C)
10000	NIL	500	525	25	10025

a. Scenario 2- Tax burden on Goods brought in by a Dealer registered under the Bihar VAT Act for the purpose of manufacturing in the State of Bihar: Where goods are brought in for the purpose of manufacturing goods which are to be sold in the State of Bihar, in terms of the second proviso to Section 3 (2), the payment of *Entry tax* under the Act will stand reduced from the VAT to be paid on the manufactured goods as under:-

(ii) Bihar Dealer manufacturing Mobile Phones using raw material brought in from outside Bihar

Total Cost of material	CST [2%] (B)	ET [5% on A+B] (C)	Price Mobile Phone manufactur ed in Bihar	BVAT [5% on D] (E)	BVAT after reduction of ET as per proviso to Section 3 (2) (F = E- C)	Cost to the Customer (A+B+C)
8000	160	408	10000	500	92	10092

(iii) Bihar Dealer doing resale of Mobile

Phone using bring goods in Bihar though Stock Transfer

Total Cost of raw material (A)	CST (B)	ET [5% on A+B] (C)	Price of Mobile Phone manufactured in Bihar	BVAT [5% on D] (E)	BVAT after reduction of ET as per proviso to Section 3 (2) (F = E- C)	Cost to the Customer (A+ B+ C)
8000	NIL	400	10000	500	100	10100

a. Scenario 3- Tax burden on Goods brought in by the Petitioners for personal use or consumption of individual consumers: Where the same mobile phone is brought in by the Petitioner for the personal use or consumption of the consumers in the State of Bihar, CST will be charged at full rate i.e. 5.5% in the State of Karnataka. Further, the *set off/* reduction of *Entry tax* under the second proviso to Section 3 (2) is not available as there is no sale in the State of Bihar and there is a higher burden of tax as

under:-

Price of Mobile	CST [5.5%]	ET [5% on A+B]	BVAT	BVAT after reduction of ET as per proviso to Section 3 (2)	Cost to the Customer
(A)	(B)	(C)	(D)	(E=D-C)	(A+ B+ C)
10000	550	527.50	525	527.50	10527.50

27. It is submitted that in the light of the aforesaid scenarios, the price of mobile phones for the customers will be as under:

Scenario	Price to be paid by the Consumer
Scenario 1 (i): Bihar Dealer doing resale of Mobile Phone to end customers in Bihar	10225.50
Scenario 1 (ii): Bihar dealer doing resale of Mobile Phone to end customers by bring goods in Bihar though Stock Transfer	10025
Scenario 2 (i): Bihar Dealer manufacturing Mobile Phones using raw material brought in from outside Bihar	10092
Scenario 2 (ii): Bihar Dealer doing resale of Mobile Phone using bring goods in Bihar though Stock Transfer	10100
Scenario 3: Tax burden on Goods brought in by the Petitioner for personal use or consumption of individual consumers	10527.50

28. Based on the above illustrations, Dr. Saraf submits that on account of non-availability of set off in terms of proviso to Section 3(2), the imposition of entry tax, by way of impugned provisions, leads to a higher tax burden on such



goods, which are brought into the State of Bihar by the petitioner for personal use or consumption of individual consumers and which are transacted using an *e-commerce* portal. Therefore, the levy of *entry tax*, on the goods so brought into the State of Bihar by the petitioners, acts as a tax or fiscal barrier on the *inter-State* movement of such goods and is also discriminatory against such goods. It has been further submitted that on account of levy, introduced by impugned amendment made in the 1993 Act, goods, purchased by an individual consumer, when bought from any seller outside the State of Bihar using an *e-commerce* portal, will be liable to suffer a higher rate of tax and thereby become costlier for the consumer as compared to the same goods, when purchased from a local *dealer* in the State of Bihar.

29. With regard to the above, Dr. Saraf submits that the artificial distinction and discrimination against the said goods purchased through an *e-commerce* portal arises on account of the second Proviso to Section 3(2), which restricts the *set off* of *entry tax* paid on such goods only to a *dealer*, who is liable to pay VAT under the Bihar VAT Act, 2005. In respect of the aforesaid submissions, reliance has been placed on the decisions of this Court in ***Indian Oil Corporation Limited*** (supra) and ***Food Corporation of India vs. State of Bihar***, reported in **(2008) 2 PLJR 69**.

30. It is submitted by Dr. Saraf that in ***Indian Oil***

Corporation Limited (supra), this Court held that the Act was saved from being held discriminatory against goods, which are brought in on account of an *inter-State* transactions only on account of the proviso to Section 3 (2), which ensured that the goods from other States are given similar tax treatment as that of locally manufactured/ sold goods.

31. However, in the present case, submits Dr. Saraf, the said second Proviso to Section 3(2) is not applicable to the transaction undertaken through *e-commerce* portal inasmuch as the goods, which are brought in by the petitioners, are only for personal use or consumption and not for being sold. Where the individual consumer are not '*dealers*' and do not have liability under the Bihar VAT Act, 2005, the payment of *entry tax*, on such transactions, will be an additional cost on such goods.

32. It is submitted by Dr. Saraf in **Indian Oil Corporation Limited** (supra), this Court held the amendment to the 1993 Act as discriminatory in the case of a petitioner, when the *set off* was not made applicable. Similarly, in **Food Corporation of India** (supra), the Court struck down the notification, whereby *entry tax* was imposed at a rate higher than the rate of sales tax on those goods. Reliance was also placed by Dr. Saraf on the decision of the Supreme Court in **State of U.P. Vs. Jaiprakash Associates Ltd**, reported in **(2014) 4 SCC 17**, wherein the notifications, under the Uttar



Pradesh Trade Tax Act, 1948, granting rebate of tax on goods manufactured, in the State of Uttar Pradesh, were challenged on the ground of being discriminatory against goods imported from neighbouring States and violating Article 301 and 304(a). Placing reliance on the aforesaid decision of the Supreme Court, in ***Jaiprakash Associates*** (supra), it is submitted that *set off*, as granted by proviso to Section 3(2) of the 1993 Act, is in the nature of a rebate.

33. Relying on the decision of the Supreme Court in ***Jaiprakash Associates*** (supra), it is submitted by Dr. Saraf that granting of *set off* of *entry tax* against VAT, payable under the Bihar VAT Act, 2005, is only applicable, when the goods are imported from outside the State for the purpose of *resale* within the State. No such *set off* is available, when goods are imported from outside the State for the purpose of personal use or consumption and, as such, the grant of *set off*, which is in the nature of rebate or exemption, discriminates between the goods, which are imported for the purpose of *resale*, and the goods, which are imported for the purpose of personal use or consumption inasmuch as the goods, which are imported from outside the State for the purpose of use or consumption, has to bear the burden of the CST as well as *entry tax*, whereas the goods, which are imported from outside the State for the purpose of *resale*, do not have to bear the burden of *entry tax* and, as such, the goods, brought in for personal use

or consumption, has to bear higher burden of tax.

34. It is, therefore, submitted by Dr. Saraf that when a *dealer*, who makes a sale of goods from outside the State to a consumer in the State of Bihar, the total burden of tax on him is much higher than a *dealer*, who makes a sale, within the State, to a consumer. This clearly violates Article 304 (a) of the Constitution of India; so contends Dr. Saraf.

35. It is also submitted that the impugned levy of *entry tax* is also discriminatory and unreasonable being violative of Article 14 and 19(1)(g) of the Constitution. It is submitted, in this regard, that it is obligatory on the part of the respondents to give equal treatment to locally sold goods as well as goods, which are purchased by the consumers, on account of an *inter-State* sale; whereas, the effect of the impugned provisions is that higher burden of tax is imposed only on such goods, which are transacted through an *e-commerce* portal and brought in by the petitioners for personal use or consumption by the individual consumers and, therefore, the same is, according to Dr. Saraf, violative of Article 14 and 19(1)(g) of the Constitution of India.

36. Mr. Lalit Kishore, learned Principal Additional Advocate General, appearing on behalf of the respondents, submits that the 1993 Act has already been held to be *compensatory* and, consequently, the issue, as regards the validity of the 1993 Act, according to learned Principal



Additional Advocate General, must be taken to have already been decided by this Court, in ***Indian Oil Corporation*** (supra), and, therefore, the validity of the impugned provisions of the 1993 Act cannot, again, be looked into in the present writ petition. Learned Principal Additional Advocate General also submits that the impugned provisions are merely the machinery provision and, hence, levy of *entry tax*, on *e-commerce* transactions, were all along present in the 1993 Act prior to 2015 and this has already been upheld by this Court, in ***Indian Oil Corporation*** (supra). It is submitted that the levy of *entry tax* is irrespective of the fact whether the goods are brought into the State directly by the consumer/individual buyer thereof or has been imported into the State for subsequent sale and, therefore, contends Mr. Lalit Kishore, the levy cannot be treated as discriminatory on this count.

37. The learned Principal Additional Advocate General submits that the petitioners are also part of the same trade, commerce and industry for which infrastructure is developed and maintained from the proceeds of the levy and, therefore, once the levy has been held to be compensatory, the petitioners cannot challenge the validity of the same. It is contended by the learned Principal Additional Advocate General that the levy of *entry tax*, even if found to be discriminatory, has to be upheld if the *entry tax*, so levied, is found to be compensatory and, hence, the same cannot be challenged on



the ground that the levy of *entry tax* is violative of Article 304(a) of the Constitution of India. Permitting *set off* is not a condition precedent for upholding the validity of the levy of *entry tax*, contends learned Principal Additional Advocate General, because *entry tax* can be levied even if VAT/sales tax is not payable. The learned Principal Additional Advocate General, therefore, contends that the writ petition has got no merit and the same is liable to be dismissed.

38. Reacting to the submissions made on behalf of the respondents, Dr. Ashok Saraf, learned Senior Counsel, submits that the decision of this Court, in ***Indian Oil Corporation*** (supra), has been misconstrued. It is submitted that this Court, in ***Indian Oil Corporation*** (supra), although held that after the 2006 amendment, the levy, under the Act, is compensatory, yet the question as to whether the validity of the levy can be upheld, even if such a compensatory Act is distinctly violative of Article 304(a) of the Constitution, has not been decided by this Court in ***Indian Oil Corporation*** (supra) as the period involved, in the aforesaid case, was prior to the year 2006.

39. It is also submitted by Dr. saraf that the question of *entry tax*, on transactions undertaken through *e-commerce*, and, further, colourable exercise of powers to impose sales tax, under the garb of *entry tax*, were not in issue in ***Indian Oil Corporation*** (supra). Dr. Saraf, learned Senior Counsel,



submits that it is incorrect to say that only machinery provisions have been brought in by the impugned amendments in the Act; rather, contends Dr. Saraf, substantive changes have been made in the 1993 Act to ensure that *entry tax* is levied on transactions of *e-commerce*, where goods are brought into the State of Bihar for personal consumption and use of individual buyers.

40. It is not disputed by the respondents, submits Dr. Saraf, that there was no machinery provision in the 1993 Act prior to the impugned amendments and, therefore, the impugned provisions are seeking to provide for a mechanism to impose *entry tax* on *e-commerce* transactions. Dr. Saraf further submits that the goods, brought into the State of Bihar for personal use or consumption, were, otherwise, not subjected to *entry tax* inasmuch as there was no machinery provision to collect *entry tax* and by creating a specific machinery for collection of *entry tax*, when the goods are sold for personal use or consumption through the medium of *e-commerce*, the provisions seek to create a blatant discrimination against such goods and seek to put a restrain on *e-commerce* transactions.

41. To reboost his submissions, Dr. Saraf points out that the impugned provisions are to ensure that the cumulative burden is higher on such goods, which have been held to be "*fiscal barrier*" by the Supreme Court in ***Jaiprakash***



Associates (supra). Such a fiscal barrier has an immediate and direct effect of ensuring that the goods are not brought in from outside the State of Bihar, by resorting to *e-commerce* for personal use or consumption on payment of CST and thereby a preferential treatment has been accorded by the State of Bihar to the dealers in Bihar, which directly contravenes Article 304(a) of the Constitution. Further, it is submitted that a gross discrimination has been created by selectively creating a machinery for taxing and collecting tax only on *e-commerce* transactions, whereas there was no machinery to collect tax on goods brought in for personal use or consumption through normal means.

42. Having regard to the rival submissions made before us and the materials on record, let us, now, examine the constitutional scheme, with regard to the conduct of trade, commerce and intercourse as contained in Chapter XIII of the Constitution of India. Article 301 to 304 of the Constitution of India, being relevant in this regard, is reproduced as follows:

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

302. Power of Parliament to impose restrictions on trade, commerce and intercourse.- Parliament may by law impose such restrictions on the freedom of trade, commerce or

intercourse between one State and another or within any part of the territory of India as may be required in the public interest.

303. Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce.- (1)

Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

(2) *Nothing in clause (1) shall prevent Parliament from making any law giving, or authorizing the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.*

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 1 [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."

43. Article 1, if we may point out, conceives India as a Union of States and declares that the territory of India shall comprise of the territories of the States, the Union territories and such other territories as may be acquired. It is in the backdrop of the fact that Article 1 conceives India as a Union of States that the constitutional scheme for the conduct of trade, commerce and intercourse, contained in Part XIII, needs to be analysed.

44. What becomes glaringly noticeable to the eyes are the two expressions used in Article 301, namely, "*throughout the territory of India*" and "*subject to the other provisions of the part*". The use of the words "*throughout the territory of India*" shows that Part XIII conceives India as one economic unit. To appreciate as to why Article 301 guarantees freedom of trade, commerce and intercourse "*throughout the territory of India*", the background in which Article 301 came to be enacted needs to be borne in mind.

45. Before the industrial revolution, the society, world



over, was mainly agricultural based. There were small principalities and very little quantity of goods moved from one area to another, because goods were, ordinarily, produced for consumption by the producers themselves, such as, land-owners and their tenants. Petty artisans, normally, produced very little commodities for sale. With the industrial revolution, expansion of industries took place, which gave rise to larger production of goods and this resulted in to faster movement of goods to distant places. The trade-barriers were, therefore, required to be minimized in order to avoid obstructions to the free movement of goods.

46. Because of the fact that the makers of our Constitution conceived India as a strong economic unit, it was but natural for them to introduce into our Constitution a meaningful scheme for growth of industries so as to strengthen economic base of India as a whole. The makers of our Constitution knew that no meaningful growth of industries is achievable unless obstructions, in the movement of the goods, were, if not completely removed, be, at least, reduced as much as possible.

47. It was in an age of struggle that India's struggle for independence achieved success, for, with the end of the Second World War, countries were struggling to overcome the disastrous consequences, which the war had brought. It was an



age, when the people, all over the world, were struggling for space and everyone wanted to have greater say in the governance of their respective countries. British empire had fragmented and struggle to occupy the void created by the fall of the British empire had had fragmented and struggle to occupy the void created by the fall of the British empire intestified. It was in such a period of transition from colonial rule to a rule of self-governance that the constitution of India was in prepared. What our constitution-makers witnessed and experienced had its reflection in our Constitution. The concept of *entry tax* is a concept routed in history. Before the industrial revolution, the society, world over was mainly agriculture based, there were small principalities and very little quantity of goods moved from one area to another, because goods were, ordinarily, produced for consumption by the producers themselves, such as, land-owners and their tenants. Petty artisans, normally, produced very little commodities for sale. With the industrial revolution, industries grew and this resulted into faster movement of goods, which forms an integral and inseparable part of commerce. The situation in India was no different. As the makers of our Constitution conceived India as a strong economic unit, it was but natural for them to knit into the scheme of our Constitution the concept of a meaningful growth of industries so as strengthen economic base of India. This was not possible to achieve unless obstructions in the

movement of the goods were, if not completely removed, be, at least, reduced as much as possible.

48. Before India became independent, the western world, particularly, Europe was fragmented into small principalities having toll-barriers imposing toll taxes and these toll-barriers caused obstructions to the movement of goods. Such obstructions to the free flow of goods from one principality to another caused hindrance to the growth of industries and commerce in those countries. Gradually, therefore, these trade barriers were started being removed. Having witnessed the history of development of industries all over the world, and in order to give India strong economic base, the makers of our Constitution incorporated, in Part XIII, a specific constitutional scheme for conduct of trade, commerce and intercourse. It is in the backdrop of these historical realities that the present writ petitions have to be considered.

49. No wonder, therefore, that the trade, commerce and intercourse were guaranteed to be free *throughout the territory of India*, which, as Article 1 reflects, consists of various States and Union territories.

50. However, as the conduct of every facet of life needs some regulations and regulatory measures, the freedom of trade, commerce and intercourse, too, could not have been left absolutely free or completely without any regulation. It is in

this light that the words "Subject to the other provisions of this part", occurring in Article 301, need to be read. Some of these aspects of our Constitutional scheme succinctly surface from the decision of the Constitution Bench, in ***Atiabari Tea Company Limited v. State of Assam (AIR 1961 SC 232)***, wherein the Court, at paragraph 33, observed as follows:

"In drafting the relevant Articles of Part XIII there makers of the Constitution were fully conscious that economic unity was absolutely essential for the stability and progress of the federal policy which has been adopted by the Constitution for the governance of the country. Political freedom which had been won, and political unity which had been accomplished by the Constitution, had to be sustained and strengthened by the bond of economic unity. It was realised that in course of time different political parties believing in different economic theories or ideologies may come in power in the several constituent units of the Union, and that may conceivably give rise to local and regional pulls and pressures in economic matters. Local or regional fears or apprehensions raised by local or regional problems may persuade the State Legislature to adopt remedial measures intended solely for the protection of regional interests without due regards to the their effect on the economy of the nation as a whole. The object of Part XIII was to avoid such a possibility. Free movement and exchange of goods throughout the territory of India is essential for the economy of the nation and for sustaining and improving licensing standards of the



country. The provision contained in article 301 guaranteeing the freedom of trade, commerce and intercourse is not a declaration of mere platitude, or the expression of a pious hope of a declaratory character ; it is not also a mere statement of direction principle of State policy ; it embodies and enshrines a principle of paramount importance that the economic unity of the country will provide the main sustaining force for the stability and progress of the political and cultural unity of the country. In appreciating the significance of these general considerations we may profitably refer to the observations made by Cardozo, J. , "was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together and that in the long run prosperity and salvation are in union and not division."

51. From the above observations made in ***Atiabari Tea Company Limited*** (supra), it is clear that our Constitution makers wanted to ensure freedom of movement and exchange of goods *throughout the territory of India* in order to strengthen the economic base of the nation and for sustaining and improving the living standard of our countrymen.

52. Pointing out that by granting freedom of trade throughout India, Article 301, aims at, primarily, removing the barriers in the movement or transportation part of the goods, the Supreme Court, in ***Atiabari Tea Company Limited***

(supra), observed as follows:

"49. Let us now revert to article 301 and ascertain the width and amplitude of its scope. On a careful examination of the relevant provisions of Part XIII as a whole as well as the principle of economic unity which it is intended to safeguard by making the said provisions, the conclusion appears to us to be inevitable that the content of freedom provided for by article 301 was larger than the freedom contemplated by s. 297 of the Constitution Act of 1935, and whatever else it may or may not include, it certainly includes movement of trade which is of the very essence of all trade and is its integral part. If the transport or the movement of goods is taxed solely on the basis that the goods are thus carried or transported that, in our opinion, directly affects the freedom of trade as contemplated by article 301. If the movement, transport or the carrying of goods is allowed to be impeded, obstructed or hampered by taxation without satisfying the requirements of Part XIII the freedom of trade on which so much emphasis is laid by article 301 would turn to be illusory. When art. 301 provides that trade shall be free throughout the territory of India primarily is the movement or the transport part of trade must be free subject of course to the limitations and exceptions provided by the other articles of Part XIII. That we think is the result of article 301 read with the other Articles in Part XIII".

53. Alive to the fact that fiscal barriers impede free flow of goods and that the growth of trade or commerce is not

possible to achieve unless the movement of goods is made free from unreasonable fiscal barriers, Article 301 seeks to ensure that tax shall not be imposed on movement of goods solely for the reason that the goods are carried to or transported through a given State, for, if such restrictions are not avoided, the freedom of trade cannot be achieved.

54. Addressing, therefore, the question as to whether tax laws are excluded from the provisions of Part XIII and whether tax laws are immune from the freedom guaranteed under article 301, the Supreme Court, in **Atiabari Tea Company Limited** (supra), observed:

"50. Thus the intrinsic evidence furnished by some of the Articles of Part XIII shows that taxing laws are not excluded from the operation of article 301 ; which means that tax laws can and do amount to restrictions freedom from which is guaranteed to trade under the said Part. Does that mean that all tax laws attract the provisions of Part XIII whether their impact on trade or its movement is direct and immediate or indirect and remote? It is precisely because the words used in article 301 are very wide, and in a sense vague and indefinite that the problem of construing them and determining their exact width and scope becomes complex and difficult. However ; in interpreting the provisions of the Constitution we must always bear in mind that the relevant provision "has to be read not in vacuo but as occurring in a single complex instrument in which one part may throw light on another". (Vide..

James v. Commonwealth of Australia (1936) A.C. 578, 613). In construing article 301 we must, therefore, have regard to the general scheme of our Constitution as well as the particular provisions in regard to taxing laws. The construction of article 301 should not be determined on a purely academic or doctrinaire considerations ; in construing the said article we must adopt a realistic approach and bear in mind the essential features of the separation of powers on which our constitution rests. It is a federal constitution which we are interpreting, and so the impact of article 301 must be judged accordingly. Besides, it is not irrelevant to remember in this connection that the article we are construing imposes a constitutional limitation on the power of the Parliament and State Legislatures to levy taxes, and generally, but for such limitation, the power of taxation would be presumed to be for public good and would not be subject to judicial review or scrutiny. Thus, considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions ; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of article 301. The argument that all taxes should be governed by article 301 whether or not their impact on trade is immediate or mediate direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld. If the said argument is accepted it would mean, for instance,



that even a legislative enactment prescribing the minimum wages to industrial employees may fall under Part XIII because in an economic sense an additional wage bill may indirectly affect trade or commerce. We are, therefore, satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by article 301 a rational and workable test to apply would be: Does the impugned restriction operate directly or immediately on trade or its movement? It is in the light of this test that we propose to examine the validity of the Act under scrutiny in the present proceedings."

55. From the above observations made in **Atiabari Tea Company Limited** (supra), it is clear that the Supreme court answered, in the negative, the question as to whether the tax laws are immune from the operation of Article 301. Having held that tax laws were not immune from the operation of the Article 301 or, for that matter, the constitutional scheme, embodied in Part XIII, the Constitution Bench, in **Atiabari Tea Company Limited** (supra), clarified that it is not all taxes, which will hit Article 301, but only such taxes, which, directly and immediately, restrict trade, for, it is only direct restrictions causing impediments to the movement of goods that Article 301 seeks to avoid and nullify. It is in this light that the following further observations, made in **Atiabari Tea Company Limited** (supra), need to be read.

"51. We do not think it necessary or



expedient to consider what other laws would be affected by the interpretation we are placing on article 301 and what other legislative entries would fall under Part XIII. We propose to confine our decision to the Act with which we are concerned. If any other laws are similarly challenged the validity of the challenge will have to be examined in the light of the provisions of those laws. Our conclusion, therefore, is that when article 301 provides that trade shall be free throughout the territory of India it means that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States themselves. It is the free movement or the transport of goods from one part of the country to other that is intended to be saved, and if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of article 301, and its validity can be sustained only if it satisfies the requirements of article 302 or article 304 of Part XIII. At this stage we think it is necessary to repeat that when it is said that the freedom of the movement of trade cannot be subject to any restrictions in the form of taxes imposed on the carriage of goods or their movement all that is meant is that the said restrictions can be imposed by the State Legislatures only after satisfying the requirements of article 304(b). It is not as if no restrictions at all can be imposed on the free movement of trade."

56. What, thus, surfaces from the above discussion, is that Article 301 guarantees freedom of trade, commerce and



intercourse *throughout the territory of India*. It is, however, not freedom from all laws that Article 301 aims at protecting; rather, it guarantees freedom only from such laws, which restrict or impede the movement or transportation of goods or adversely affect the activities of trade and commerce amongst the States.

57. In effect, Article 301 casts an obligation on the legislative power of the Parliament and the States to ensure that the trade, commerce and intercourse throughout India shall be free. Article 301, therefore, refers to freedom from laws, which go beyond regulations, and which put restrictions or prevent movement beyond States or within the States, for, Article 301 applies not only to *inter-State* trade, commerce and intercourse, but also to *intra-State* trade, commerce and intercourse.

58. What may, now, be pointed out is that though Article 301 restrains both the Union Legislature and the State Legislatures from enacting laws including tax laws, which create hindrance to the freedom of trade, commerce and intercourse throughout India, Article 302 permits the Union Legislature to impose, by law, such restrictions on these freedoms as may be required in public interest. Article 303, however, clarifies that neither Parliament nor the Legislature of States shall have the power to make any law giving or authorizing the making of any discrimination between one



State and another by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule. In other words, Article 303 clarifies that even in public interest, Parliament is not authorized to make laws giving preference to one State over the other. This restriction is, however, subject to one exception, the exception being that the Parliament is left with the discretion to make laws giving preferential treatment or making discriminatory provisions if such laws become necessary for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.

59. Thus, a State Legislature, apart from the limitation imposed by Article 301, has the limitation of not making laws to give preference or make discrimination between one State and another, while making laws, in exercise of its powers, relating to trade, commerce and intercourse. However, this limitation, on the State Legislature, is lifted in two cases, namely, that the State may, under Article 304(a), impose, on goods, imported from sister States or Union territories, any tax to which similar goods, manufactured in its own State, are subjected, but not so as to discriminate between the imported goods and the goods manufactured in the State. In other words, Article 304(a) authorizes State Legislature to impose non-discriminatory tax on goods imported from sister States even if such law interferes with the freedom of trade, commerce and intercourse guaranteed by Article 301. The ban



imposed, under Article 303(1), stands lifted even when discriminatory restrictions are imposed by the State Legislature if the legislation fulfils three conditions, which Article 304(b) embodies, namely, that such restrictions shall be reasonable, the same shall be in public interest and, above all, no Bill or amendment for the purpose of Clause (b) or for making amendment thereto shall be introduced or moved in the Legislature of any State without previous sanction of the President. To be more precise, one can point out that even restrictions, which may be reasonable and are also in public interest, cannot be imposed on the freedom of trade and commerce unless prior sanction of the President has been obtained by the State before introduction of the Bill or before making the legislation.

60. In short, while Article 301 guarantees freedom of trade and commerce throughout India, this freedom is not absolute, for, in an orderly society, the conduct of trade and commerce cannot be left completely free from regulations.

61. Regulatory measures, therefore, cannot be regarded as impediments in the freedom of trade and commerce. It is for this reason that the Constitution Bench, in ***Atiabari Tea Co. Ltd.*** (supra), makes it clear that though tax laws are not immune from Article 301, all tax laws do not infringe Article 301.



62. The question, which, naturally, arises is this: what can be these laws, which may hit Article 301 or be treated as infringement of the guarantee given by Article 301? Since it is the movement part of the goods, which Article 301 guarantees, the Supreme Court makes it clear, in ***Atiabari Tea Company Limited*** (supra), that only such tax laws, which, directly and immediately, impact the free flow of trade and commerce that will be impermissible under Article 301. However, a law, which has direct and immediate impact on the movement of goods, can be saved only if it falls in any of the permissible restrictions, which Articles 302, 303 and 304 perceive.

63. It may also be noted that in ***Atiabari Tea Company Ltd.*** (supra), the three appellants before the Supreme Court were tea companies, two of whom carried on the trade of growing tea in Assam and the third one carried on its trade at Jalpaiguri. They carried their tea to Calcutta in order that it might be sold, in Calcutta, for consumption and sale outside India. Tea, produced in Jalpaiguri, had to move through a few miles of the territory of the State of Assam. Besides the tea, which was carried by railways, a substantial quantity of tea was also carried by road or by inland waterways and, as such, became liable to pay tax leviable under the Assam Taxation (on goods carried by roads or inland waterways) Act, 1954, for, this Act levied tax on certain goods,

such as, tea, which was carried by road and inland waterways. The principal ground of attack on the legislation was that it violated the provisions of Article 301 and was not saved by Article 304(b). It is of immense importance to note that in ***Atiabari Tea Company Ltd.*** (supra), three views were expressed. The views, expressed in ***Atiabari Tea Company Ltd.*** (supra), by the learned Chief Justice BP Sinha, which the Supreme Court, in its subsequent judgment in ***Automobile Transport (Rajasthan) Ltd.*** (supra), described as the narrow view, was that taxation simpliciter was not within the ambit of Article 301 and a tax, on the movement of goods or passengers, did not necessarily connote impediment or restraint in the matter of trade and commerce. Drawing a distinction between laws of taxation, which are enacted for the purpose of general revenue, and taxation laws, which are enacted for the purpose of making discrimination or giving preference, the learned Chief Justice took the view that taxing statutes, enacted for the purpose of general revenue, were outside the purview of Article 301 and it is only those laws of taxation, which were made for the purpose of making discrimination or giving preference, which fall within the ambit of Article 301. The learned Chief Justice concluded these views in the following words:

Thus, on a fair construction of the provisions of Part XIII, the following propositions

emerge : (1) trade, commerce, and intercourse throughout the territory of India are not absolutely free, but are subject to certain powers of legislation by Parliament or the Legislature of a State; (2) the freedom declared by Article 301 does not mean freedom from taxation simpliciter, but does mean freedom from taxation which has the effect of directly impeding the free flow of trade, commerce and intercourse ; (3) the freedom envisaged in Article 301 is subject to non-discriminatory restrictions (Article 392); (4) even discriminatory or preferential/legislation may be made by Parliament for the purpose of dealing with an emergency like a scarcity of goods in any part of India (Article 303(2)); (5) reasonable restrictions may be imposed by the Legislature of a State in the public (Interest (Article 304(b); (6) non-discriminatory taxes may be imposed by the Legislature of a State on goods imported from another State of other States, if similar taxes are imposed on goods produced or manufactured in that State (Article 304(a); and lastly (7) restrictions imposed by existing laws have been continued, except in so far as the President may by order otherwise direct (article 305). (pp. 831-832).

64. The other view, which may be called the third view as expressed by Shah, J, and described, in ***Automobile Transport (Rajasthan) Ltd.*** (supra), as the widest view was that the freedom, contemplated under Article 301, was freedom of trade, commerce and intercourse in every aspect of all such activities, which constitute commerce and intercourse



and not merely restrictions on the movement or transportation part of goods. Shah J (as his Lordship then was) expressed his view thus, *"The guarantee of freedom of trade and commerce is not addressed merely against prohibitions, complete or partial ; it is addressed to tariffs, licensing, marketing regulations, price-control, nationalization, economic or social planning, discriminatory tariffs, compulsory appropriation of goods, freezing or stand-still orders and similar other impediments operating directly and immediately on the freedom of commercial intercourse as well. Every sequence in the series of operations which constitutes trade or commerce is an act of trade or commerce and burdens or impediments imposed on any such step are restrictions on the freedom of trade or commerce and intercourse. What is guaranteed is freedom in its widest amplitude - freedom from prohibition, control, burden or impediment in commercial intercourse."*

65. However, the majority, in ***Atiabari Tea Company Ltd.*** (supra), differed from what the learned Chief Justice had concluded and did not accept as the correct proposition that tax laws are governed by Part XII of the Constitution and were outside Part XIII. The majority did not also agree with the views expressed by Shah, J. Hence, speaking for the majority, in ***Atiabari Tea Company Ltd.*** (supra), Gajendragadkar, J, observed as follows:



"It is a federal constitution which we are interpreting, and so the impact of Article 301 must be judged accordingly Besides, it is not irrelevant to remember in this connection that the Article we are construing imposes a constitutional limitation on the power of the Parliament and the State Legislatures to levy taxes, and generally ; but for such limitation, the power of taxation would be presumed to be for public good and would not be subject to judicial review or scrutiny. Thus, considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions ; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld."

66. In short, thus, in ***Atiabari Tea Company Ltd.***

(supra), while the narrow view was to the effect that unless a tax law is enacted for the purpose of making discrimination or giving preferential treatment, such a law would not fall within the purview of Article 301, the majority view was that apart from discrimination or preferential treatment, it was the movement or transport part of goods, which Article 301 seeks to make free and, hence, any such law, which, directly and

immediately, restrict the free flow or movement of goods would fall within the ambit of Article 301. The third view expressed by Shah, J, was that it is not merely movement part of the goods, which Article 301 seeks to make free, but also trade and commerce, in all its varied aspects and in all its activities, shall be free.

67. In *Automobile Transport (Rajasthan) Ltd.* (supra), which is a decision of 7 Judges Bench, the correctness of the majority view, expressed in ***Atiabari Tea Company Ltd.*** (supra), came to be questioned. Having examined all the three views, as indicated hereinabove, the majority, in ***Automobile Transport (Rajasthan) Ltd.*** (supra), held that the widest view, expressed by Shah, J, being based on purely textual interpretation of Part XIII of the Constitution of India, was not the correct view, for, this view ignores altogether, amongst others, the reality that the freedom of trade, commerce and intercourse in a society, regulated by law, must be understood in the context of working of an orderly society and the effect of such a view, if conceded to, would be that even when a. State Legislature wishes to control or regulate trade, commerce and intercourse in such a way as to facilitate its free movement, it must, nevertheless, proceed to make a law under Article 304(b) and that no such Bill can be introduced or moved in the Legislature of the States without



the previous sanction of the President. In other words, the views of Shah, J, if acceded to, would mean that even when a Bill seeks to impose restrictions in order to facilitate trading or commercial activities, such a Bill has to receive sanction of the President under Article 304(b). Such an interpretation, according to the majority, in ***Automobile Transport (Rajasthan) Ltd.*** (supra), would, if accepted, result into stoppage of every Bill undermining thereby effective legislation, which may, at times, be, otherwise, urgent in nature. Pointing to the difficulties in accepting the views expressed by Shah, J, the court, in ***Automobile Transport (Rajasthan) Ltd.*** (supra), observed as follows:

"11. The most serious objection to the widest view canvassed before us is that it ignores altogether that in the conception of freedom of trade, commerce and intercourse in a community regulated by law freedom must be understood in the context of the working of an orderly society. The widest view proceeds on the footing that Article 301 imposes a general restriction on legislative power and grants a freedom of trade, commerce and intercourse in all its series of operations, from all barriers, from all restrictions, from all regulation, and the only qualification that is to be found in the Article is the opening clause, namely, subject to the other provisions of Part XIII. This in actual practice will mean that if the State Legislature wishes to control or regulate trade, commerce and intercourse



in such a way as to facilitate its free movement, it must yet proceed to make a law under Article 304(b) and no such bill can be introduced or moved in the Legislature of a State without the previous sanction of the President. The practical effect would be to stop or delay effective legislation which may be urgently necessary. Take, for example, a case where in the interests of public health, it is necessary to introduce urgently legislation stopping trade in goods which are deleterious to health, like the trade in diseased potatoes in Australia. If the State Legislature wishes to introduce such a bill, it must have the sanction of the President. Even such legislation as imposes traffic regulations would require the sanction of the President. Such an interpretation would, in our opinion, seriously affect the legislative power of the State Legislatures which power has been held to be plenary with regard to subjects in List II. The States must also have revenue to carry out their administration and there are several items relating to the imposition of taxes in List II. The Constitution-makers must have intended that under those items the States will be entitled to raise revenue for their own purposes. If the widest view is accepted, then there would be for all practical purposes, an end of State autonomy even within the fields allotted to them under the distribution of powers envisaged by our Constitution. An examination of the entries in the lists of the Seventh Schedule to the Constitution would show that there are a large number of entries in the State list (List II) and the Concurrent list (List III) under which a State Legislature has power to



make laws. Under some of these entries the State Legislature may impose different kinds of taxes and duties, such as property tax, sales tax, excise duty, etc., and legislation in respect of anyone of these items may have an indirect effect on trade and commerce. Even laws other than taxation laws, made under different entries in the lists referred to above, may indirectly or remotely affect trade and commerce. If it be held that every law made by the Legislature of a State which has repercussion on tariffs, licensing, marketing regulations, price control, etc., must have the previous sanction of the President, then the Constitution in so far as it gives plenary power to the States and State Legislatures in the fields allocated to them would be meaningless. In our view the concept of freedom of trade, commerce and intercourse postulated by Article 301 must be understood in the context of an orderly society and as part of a Constitution which envisages a distribution of powers between the States and the Union, and if so understood, the concept must recognize the need and the legitimacy of some degree of regulatory control, whether by the Union or the States. this is irrespective of the restrictions imposed by the other Articles in Part XIII of the Constitution. We are, therefore, unable to accept the widest view as the correct interpretation of the relevant articles in Part XIII of the Constitution."

68. As regards the narrow view expressed by the learned Chief Justice, in **Atiabari Tea Company Ltd.** (supra), which was to the effect that taxing laws were governed by the

provisions of Part XII and except when a tax law is made under Article 304(a), Article 301 did not come into play or, in other words, none of the provisions of Part XIII, except Article 304(a), extended to taxing laws, it may be pointed out that the majority, in ***Automobile Transport (Rajasthan) Ltd.*** (supra), did not accept this view ; rather, accepting the majority views expressed in ***Atiabari Tea Company Ltd.*** (supra), the majority, in ***Automobile Transport (Rajasthan) Ltd.*** (supra), held thus, *"It would appear from what we have stated above that this interpretation consists of two main parts: one part is that taxation simpliciter is not within the terms of Article 301 and the second part is that Article 301 must take colour from the provisions of Article 303 which, it is said, is restricted to legislation with respect to entries relating to trade and commerce in any of the lists in the Seventh Schedule. In Atiabari Tea Co. Case [1961] 1. S.C.R. 809 this Court deal with the correctness or otherwise of this narrow interpretation and by the majority decision held against it. The majority judgment in the Atiabari Tea Co. Case (1961) 1 S.C.R. 809, deals, with the arguments advanced in support of the interpretation in detail and as we are substantially in agreement with the reason given in that judgment, we do not think that any useful purpose would be served by repeating them. It is enough to point out that though the power of levying tax is essentially for the very existence of government,*



its exercise may be controlled by constitutional provisions made in that behalf. It cannot be laid down as a general proposition that the power to tax is outside the purview of any constitutional limitations. We have carefully examined the provisions in Part XII of the Constitution and are unable to agree that those provisions exhaust all the limitations on the power to impose a tax. The effect of Article 265 was considered in the majority decision and it was pointed out that the power of taxation under our Constitution was subject to the condition that no tax shall be levied or collected except by authority of law. Article 245 which deals with the extent of laws made by Parliament and by the Legislatures of States expressly states that the power of Parliament and of the State Legislatures to make laws is, 'subject to the provisions of this Constitution'. The expression subject to the provisions of this Constitution" is surely wide enough to take in the provisions of both Part XII and Part XIII. In view of the provisions of Article, 245, we find it difficult to accept the argument that the restrictions in Part XIII of the Constitution do not apply to taxation laws. As to the argument that Article 301 must take colour from Article 303, we are unable to accept as correct the argument that the provisions of Article 303 must delimit the general terms of Article 301. It seems to us that so far as Parliament is concerned, Article 303(1)carves out an exception from the relaxation given in favour of Parliament by Article 302 ; the



relaxation given by Article 302 is itself in the nature of an exception to the general terms of Article 301. It would be against the ordinary canons of construction to treat an exception or proviso as having such a repercussion on the interpretation of the main enactment so as to exclude from it by implication what clearly falls within its express terms.

69. Having, thus, agreed with the views expressed by the majority, in ***Atiabari Tea Company Ltd.*** (supra), the 7 Judges Bench, in ***Automobile Transport (Rajasthan) Ltd.*** (supra), further held that regulatory measures, which do not impede the freedom of trade, commerce and intercourse, and compensatory taxes for use of the trading facilities are not hit by Article 301, for, such regulatory measures or compensatory taxes, instead of hampering trade, commerce and intercourse, facilitate them. In short, in the opinion of the majority, in ***Automobile Transport (Rajasthan) Ltd.*** (supra), regulatory measures, which do not impede freedom of trade, commerce and intercourse, are not hit by Article 301 nor can compensatory taxes, which are imposed for providing trading facilities to the traders, as a class, be said to be violative of Article 301. The majority view so expressed, in ***Automobile Transport (Rajasthan) Ltd.*** (supra), run as under:

"14. After carefully considering the arguments advanced before us we have come to the conclusion that the narrow interpretation canvassed



for on behalf of the majority of the State cannot be accepted, namely ; that the relevant articles in Part XIII apply only to legislation in respect of the entries relating to trade and commerce in any of the lists of the Seventh Schedule. But we must advert here to one exception which we have already indicated in an earlier part of this judgment. Such regulatory measures as do not impede the freedom of trade, commerce and intercourse and compensatory taxes for the use of trading facilities are not hit by the freedom declared by Article 301. They are excluded from the purview of the provision of Part XIII of the Constitution for the simple reason that they do not hamper trade, commerce and intercourse but rather facilitate them. We have, therefore, come to the conclusion that neither the widest interpretation nor the narrow interpretation canvassed before us are acceptable. The interpretation which was accepted by the majority in the Atiabari Tea Co. case (1961) 1. S.C.R. 809, is correct, but subject to this clarification. Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Article 301 and such measures need not comply with the requirements of the proviso to Article 304(b) of the Constitution."

70. Having laid down the parameters of the freedom guaranteed under Article 301, the majority examined the scheme of the Act, which was under challenge in **Automobile**

Transport (Rajasthan) Ltd. (supra) and having found that the tax imposed by the enactment, questioned therein, was compensatory in nature, it upheld the enactment. This aspect can be discerned from the observations made in paragraph Nos. 19 and 20, which run as follows:

"19. The taxes are compensatory taxes which instead of hindering trade, commerce and intercourse facilitate them by providing roads and maintaining the roads in a good state of repairs. Whether a tax is compensatory or nor cannot be made to depend on the preamble of the statute imposing it. Nor do we think that it would be right to say that a tax is not compensatory because the precise or specific amount collected is not actually used to providing any facilities. It is obvious that if the preamble decided the matter: then the mercantile community would be helpless and it would be the easiest thing for the Legislature to defeat the freedom assured by Article 341 by stating in the preamble that it is meant to provide facilities to the tradesmen. Likewise actual user would often be unknown to tradesmen and such user may at some time be compensatory and at others not so. It seems to us that a working test for deciding whether a tax is compensatory or not is to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities. It would be impossible to judge the compensatory nature of a tax by a meticulous test, and in the

nature of things that cannot be done."

"20. Nor do we think that it will make any difference that the money collected from the tax is not put into a separate fund so long as facilities for the trades people who pay the tax are provided and the expenses incurred in providing them are born by the State out of whatever source it may be. In the cases under our consideration the tax is based on passenger capacity of commercial buses and loading capacity of goods vehicles ; both have some relation to the wear and tear caused to the roads used by the buses. In basing the taxes on passenger capacity or loading capacity, the Legislature has merely evolved a method and measure of compensation demanded by the State, but the taxes are still compensation and charge for regulation."

71. The scope of Article 301, 302, 303 and 304 was again explained by the Supreme Court, in ***Jindal Stainless Ltd vs State of Haryana, (2006) 7 SCC 241***, at para 32, 33, 34 and 35 as under:

"32. Article 301 states that subject to the other provisions of Part XIII, trade, commerce and intercourse throughout India shall be free. It is not freedom from all laws but freedom from such laws which restrict or affect activities of trade and commerce amongst the States. Although Article 301 is positively worded, in effect, it is negative as freedom correspondingly creates general limitation on all legislative power to ensure that trade,



commerce and intercourse throughout India shall be free. Article 301, therefore, refers to freedom from laws which go beyond regulations which burdens, restricts or prevents the trade movement between States and also within the State. Since "freedom" correspondingly imposes "limitation", we have the doctrine of "direct and immediate effect" of the operation of the impugned law on the freedom of trade and commerce in Article 301 as enunciated in Atiabari Tea Co.

33. *Article 301 is, therefore, not only an authorisation to enact laws for the protection and encouragement of trade and commerce amongst the States but by its own force creates an area of trade free from interference by the State and, therefore, Article 301 per se constitutes limitation on the power of the State. Article 301 is, however, subject to the other provisions of Articles 302, 303 and 304. It states that subject to other provisions of Part XIII, trade, commerce and intercourse throughout India shall be free.*

34. *Article 301 is binding upon the Union Legislature and the State Legislatures, but Parliament can get rid of the limitation imposed by Article 301 by enacting a law under Article 302. Similarly, a law made by the State Legislature in compliance with the conditions imposed by Article 304 shall not be hit by Article 301. Article 301 thus provides for freedom of inter-State as well as intra-State trade and commerce subject to other provisions of Part XIII and correspondingly it imposes a general limitation on the legislative*

powers, which limitation is relaxed under the following circumstances:

(a) Limitation is relaxed in favour of Parliament under Article 302, in which case Parliament can impose restrictions in public interest. Although the fetter is limited enabling Parliament to impose by law restrictions on the freedom of trade in public interest under Article 302, nonetheless, it is clarified in clause (1) of Article 303 that notwithstanding anything contained in Article 302, Parliament is not authorised even in public interest, in the making of any law, to give preference to one State over another. However, the said clarification is subject to one exception and that too only in favour of Parliament, where discrimination or preference is admissible to Parliament in making of laws in case of scarcity. This is provided in clause (2) of Article 303.

(b) As regards the State Legislatures, apart from the limitation imposed by Article 301, clause (1) of Article 303 imposes additional limitation, namely, that it must not give preference or make discrimination between one State or another in exercise of its powers relating to trade and commerce under Entry 26 of List II or List III. However, this limitation on the State Legislatures is lifted in two cases, namely, it may impose on goods imported from sister State(s) or Union Territories any tax to which similar goods manufactured in its own State are subjected but not so as to discriminate between the imported goods and the goods manufactured in the State [see clause (a) of Article 304]. In other words, clause (a) of Article



304 authorises a State Legislature to impose a non-discriminatory tax on goods imported from sister State(s), even though it interferes with the freedom of trade and commerce guaranteed by Article 301. Secondly, the ban under Article 303(1) shall stand lifted even if discriminatory restrictions are imposed by the State Legislature provided they fulfil the following three conditions, namely, that such restrictions shall be in public interest; they shall be reasonable; and lastly, they shall be subject to the procurement of prior sanction of the President before introduction of the Bill.

35. *Broadly, the above analysis of the scheme of Articles 301 to 304 shows that Article 304 relates to the State Legislature while Article 302 relates to Parliament in the matter of lifting of limitation, which, as stated above, flows from the freedom of trade and commerce guaranteed under Article 301. Article 304 also confers upon the State Legislature power to lift the limitations imposed on it by Article 301 and clause (1) of Article 303. This aspect is important because the doctrine of "direct and immediate effect" which is mentioned in *Atiabari Tea Co.* emerges from the concept of "limitation" embodied in Article 301. It is this doctrine of direct and immediate effect which constitutes the basis of the working test propounded vide para 19 (of AIR) in *Automobile Transport*. Therefore, whenever the law is impugned as violative of Article 301, the courts will have to examine the effect of the operation of the impugned law on the inter-State and the intra-State*

movement of goods, which movement constitutes an integral part of trade."

72. From the aforesaid observations of the Supreme Court in ***Jindal Stainless*** (supra), it is clear that the State Legislature apart from the limitation imposed by Article 301, also suffers from additional limitation, which is imposed by clause (1) of Article 303, namely, the State must not give preference or make discrimination between one State or another in exercise of its powers relating to trade and commerce under Entry 26 of List II or List III. However, this limitation on, the State Legislatures, is lifted in two cases, namely, it may impose on goods imported from sister State(s) or Union Territories any tax to which similar goods, manufactured in its own State, are subject to, but not so as to discriminate between the imported goods and the goods manufactured in the State. In other words, clause (a) of Article 304 authorises a State Legislature to impose a non-discriminatory tax on goods imported from sister State(s), even though it interferes with the freedom of trade and commerce guaranteed by Article 301. Secondly, the ban, under Article 303(1) would stand lifted even if discriminatory restrictions are imposed by the State Legislature provided that such provisions fulfil the following three conditions, namely, that such restrictions shall be in public interest; such restrictions shall be reasonable; and, lastly, such restrictions shall be subject to the

obtaining of prior sanction of the President before introduction of the Bill.

73. If we analyse the scheme of Article 301 to 304 of Constitution of India, it will become transparent that Article 301 provides that the trade, commerce and intercourse, throughout India, shall be free. Article 302 empowers the Parliament to impose restrictions on trade, commerce and intercourse between one State and another or within any part of the territory of India as may be required in public interest. As such, Article 302 deals with imposition of restrictions on freedom of trade, commerce and intercourse between one State and another within any part of the territory of India and Parliament alone has been empowered by Article 302 to impose such restrictions in freedom of trade, commerce and intercourse as may be required in public interest.

74. Article 303 deals with discrimination and, in such cases, neither the Parliament nor the Legislature has been empowered to make any law authorising or giving any preference to one State over another or making any discrimination between one State and another by virtue of any entry relating to trade and commerce in any of the lists in the Seventh Schedule. However, clause (2) of Article 303 empowers the Parliament to make any law, giving or authorizing the giving of any preference, or making, or



authorizing the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. As such, while making any discrimination between one State and another or giving preference to one State over another, Parliament alone can make such a law only when it is necessary to do so for the purpose dealing with a situation arising out of scarcity of goods in any part of the territory of India. No such liberty has, however, been granted to the State legislature under any circumstances to give preference to one State over another or making any discrimination between one State and another.

75. Article 304 has two parts. Whereas Article 304(a) deals with discrimination, 304(b) deals with restrictions. Since Article 303 (1) totally prohibits the State from making any discrimination between two States or giving preference to one State over another, Article 304(a) gives some relaxation to the State legislature by declaring that notwithstanding anything in Article 301 or 303, the State legislature may, by law, impose on goods imported from other States or Union territories any tax to which similar goods manufactured or produced in the State are, subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced. As such, if the State legislature imposes on goods imported from



other States or Union territories, any tax to which similar goods, manufactured or produced in the State, are, subject, so, however, not to discriminate between goods so imported and goods so manufactured or produced within the State, the same will not amount to discrimination as contemplated in Article 303(1) of the Constitution of India.

76. However, if the State imposes any tax on the goods imported from other States or Union Territories to which similar goods manufactured or produced in the State are not subject to, then, the same will not be permissible inasmuch as the same would amount to discrimination and/or giving preference to one State over another, which, now Article 303(1) of the Constitution, totally stands prohibited as far as State legislatures are concerned. Article 304(b) deals with restrictions.

77. Although Article 302 empowers only the Parliament to impose such restrictions on freedom of trade, commerce and intercourse as may be required in public interest, 304 (b) gives certain relaxation to the State legislature inasmuch as Article 304(b) provides that the State legislature may impose such reasonable restrictions on freedom of trade, commerce and intercourse in view of public interest with a condition that no Bill or amendment for the purpose of imposing restrictions on the freedom of trade, commerce and

intercourse shall be introduced or moved in the State legislature without the previous sanction of the President.

78. Article 304(b) does not, thus, deal with discrimination between two States or giving preference to one State over another, which is totally prohibited by Article 303(1) of the Constitution subject to relaxation provided in Article 304(a) of the Constitution. Hence, to save any law from being violative of Article 301 of the Constitution, the fiscal State legislation must not be discriminatory meaning thereby it should not discriminate between two States or give preference to one State over another and, by virtue of Article 304(a) of the Constitution, must not impose tax on the goods imported from other States or Union territories, when similar goods manufactured or produced in the State, are not subject to such tax so as to discriminate between goods manufactured and produced within the State and also not to put restrictions on the movement of goods except when such restrictions are reasonable or in public interest subject to the condition that previous assent of the President is taken before any amendment or Bill is introduced.

79. Although a compensatory tax may not amount to restriction on freedom of trade, commerce and intercourse, yet the same may be discriminatory if the State imposes any tax on the goods imported from other States, while not imposing

tax on goods manufactured and produced within the State and thereby making a discrimination between the goods imported and goods manufactured and produced within the State.

80. A microscopic examination of scheme of Article 301 to 304 of the Constitution of India will clearly reveal that the framers of our Constitution never intended that under the guise of imposing compensatory tax, the State can discriminate between goods imported from outside the State and goods manufactured and produced within the State by imposing a discriminatory tax. If that is made permissible, then, the State can impose taxes on goods imported from other States and Union territories, while not imposing such tax on the goods manufactured and produced within the State on the ground that such tax is for the purpose of providing trading facility and the same is compensatory in nature. If that is permitted, Article 303 (1) and 304(a) of the Constitution shall become nugatory.

81. It needs to be further noted that Article 304 clearly provides that in order to save a law from being not violative of Article 301 or 303 of Constitution of India, both the conditions of Article 304(a) and 304(b) are required to be fulfilled. Whereas condition of Article 304(a) relates to Article 303, the conditions of Article 304(b) relate to Article 301.

82. If a compensatory tax is imposed, which is



discriminatory in nature and violative of Article 304(a) of the Constitution, such a compensatory tax will not be sustainable, being violative of Article 303(1) of the Constitution. Consequently, such a discriminatory compensatory tax cannot be saved from being declared *ultra vires* simply on the ground that the same is compensatory in nature. It is only non-discriminatory tax, which imposes reasonable restrictions on the freedom of trade, commerce and intercourse and which is in public interest and while imposing such tax, the Bill or amendment introduced in the State legislature has received the previous assent of the President, then, the same can be said to be valid.

83. A discriminatory tax, in our view, even if compensatory in nature, cannot be said to be *intra vires* inasmuch as the same shall be violative of Article 303(1) of the Constitution of India. The matter can be explained from another angle. When even the Parliament has no power to discriminate between one State and another or give preference to one State over another except in a limited case, how the State legislature can be permitted to make such discrimination or give preference to one State over another only on the ground that the said taxes are compensatory in nature.

84. This Court, in ***Indian Oil Corporation*** (supra), has not decided the issue as to whether the State can impose



discriminatory taxes only on the ground that the same is compensatory in nature. This Court, in **Indian Oil Corporation** (supra), held that after the 2006 Amendment, the levy, under the 1993 Act, acquired the nature of compensatory tax. Though it was held that amendments introduced in the 1993 Act by the Act of 2001 and 2004, were bad, because the same were violative of Article 304(a) of the Constitution of India; when both the amendments were made without the prior assent of the President. Since the period involved in the Writ petition was from 2001 to 2006, the Court has not examined the issue as to whether the levy, in question, has acquired the nature of compensatory tax after the 2006 amendment, and whether the levy can be valid, though the same was violative of Article 304(a) of the Constitution of India for being discriminatory. Hence, the decision of this Court, in **Indian Oil Corporation** (supra), shall not come in the way of deciding the issue raised in the present writ application.

85. While examining the provisions of the 1993 Act and the amendment introduced by the Finance Act of 2015, what appears from the statement, object and reasons of 2015 is that the Amendment of 2015 was introduced as a measure of augmenting the revenue of the State. Though the 1993 Act was enacted for the purpose of levy of tax on entry of goods into local area in the State of Bihar for consumption, use or sale



therein in exercise of powers traceable to Entry 52 of the State List, the fact remains that the Bihar VAT Act, 2005, was enacted to levy tax on sale and purchase of goods in the State of Bihar, which is a legislation traceable to Entry 54 of the State List, yet the common and broad objectives of both the amendments appear to be to earn revenue for the State, which is apparent from the provisions of Section 7(iii) of the 1993 Act, which makes provision for *set off* of *Entry tax* against the VAT payable on the said goods in the State.

86. It is of immense importance to note that the amount of *entry tax* paid by an importer, while importing goods from the outside the State to the State of Bihar, is liable to be *set off* against the VAT payable in the State. Viewed from this angle, we find considerable force, in the submission made by Dr. Saraf, learned Senior Counsel for the petitioner, that the levy is a colourable exercise of powers and though *entry tax* is, now, claimed to be compensatory in nature, the legislative objective and scheme of the enactment is to be realize sales tax/VAT, in advance, inasmuch as the payment of *entry tax* so made is liable to be *set off* against the VAT payable inside the State.

87. With regard to the above, the decision of the Kerala High Court, in ***Sri Krishna Marbles and Granites v. State of Kerala, 137 STC 481***, may be referred to, wherein it

was held as under:

"It is clear from the operation of Section 4 that once the item brought in respect of which entry tax is paid is sold in Kerala, the dealer who is liable to pay sales tax need pay so much of the sales tax after reducing the entry tax paid on the very same item. In other words, the payment of entry tax goes to reduce the petitioner's sales tax liability to the extent of the amount of entry tax paid. The payment of sales tax is essentially governed by final determination in the form of assessment and entry tax paid goes only as a credit towards liability for sales tax or in other words, sales tax is demanded after reducing the entry tax paid by the petitioner. Therefore the entry tax collected at the check-post is virtually in the form of advance payment of sales tax and there is no need to determine the entry tax liability in respect of goods brought by a registered dealer for resale in the State."

88. We are in respectful agreement with the decision of the Kerala High Court in ***Sri Krishna Marbles and Granites v. State of Kerala*** (supra). The same view has been taken by the Gauhati High Court in ***ITC Limited*** (supra) decided by one of us {Chief Justice}. We respectfully agree with the observations made, conclusions arrived at and the decision rendered in ***ITC Limited*** (supra).

89. While examining the contention of the petitioner



that the levy of the *entry tax* on goods brought into the State of Bihar, on account of *e-commerce* transaction, is discriminatory and violative of Article 304(a) of the Constitution of India compared to the goods, which are brought into the State of Bihar for sale or consumption in the manufacture of goods, it is to be noted that a *set off* is provided against the payment of *entry tax* against the VAT liability to ensure that there is only single incidence of tax. However, such *set off* has not been made available, when the goods, on the basis of transaction through *e-commerce* portal, are imported from outside the State to the State of Bihar for the purpose of personal use or consumption.

90. On account of non-availability of *set off* in terms of the second Proviso to Section 3(2) of the 1993 Act, the imposition of *entry tax*, by way of the impugned provisions, leads to a higher burden of tax on such goods, which are brought into the State of Bihar by the petitioners for personal use or consumption of individual consumer, which are transacted using *e-commerce* portal. The goods, purchased by an individual consumer into the State of Bihar using *e-commerce* portal, will be liable to suffer higher rate of tax and thereby becomes costlier for the consumer as compared to the same goods, when purchased from a local *dealer* in the State of Bihar.

91. Situated thus, the artificial distinction and discrimination against the said goods, purchased through an *e-commerce* portal, arises on account of the second Proviso to Section 3(2), which restricts the *set off of entry tax* paid on such goods only to a *dealer*, who is liable to pay VAT under the Bihar VAT Act.

92. It is crystal clear that the second Proviso to Section 3(2) is not applicable to a transaction undertaken by *e-commerce* portal inasmuch as the goods, brought in by the petitioners, are only for personal use or consumption and not for being sold, when the individual consumers are not *dealer* and do not have liability under the Bihar VAT Act, the payment of *Entry tax*, on such transaction will be an additional cost on such goods. Similar situations had been dealt with, in ***Indian Oil Corporation*** (supra), where, in the case of one of the petitioners, it was held by this Court as under :

"53. But Mr. K.N. Jain appearing for M/s Harinagar Sugar Mills Limited submitted that the Advocate-General's submission was only with reference to goods that were brought into a local area for sale whereas entry tax was leviable also on goods brought into a local area not for sale but for consumption or use, He further submitted that consumption or use may be in two ways. The goods brought into a local area may be used as raw material for producing a new commodity for sale or they may be consumed as they are, as in the case



of his client, the petitioner in C.W.J.C. No. 6540 of 2002. In these two cases, the provision of set-off in the sales tax liability would not apply and in these two cases, therefore, the Act was quite discriminatory with regard to the goods imported from other States. The submission of Mr. Jain cannot be said to be without substance. Therefore, while agreeing with the submission of the Advocate-General that there was no discrimination against goods imported from other States insofar as those goods were brought for resale, it has to be held that there was an apparent discrimination against goods imported from other States for the purpose of consumption or use. I., therefore,, conclude that the amendment in the definition of "entry of goods" with effect from November 5, 2001 did introduce an element of discrimination against goods imported from other States that were brought to the local area for consumption or use."

93. Again, this Court, in ***Food Corporation of India*** (supra), held that in the event the imported goods are found to be taxed at a higher rate than the local goods, the same will be discriminatory. The relevant observations, appearing, in this regard, in ***Food Corporation of India*** (supra), read as follows:

8. It is to be noted that only six goods were listed under the schedule to the Parent Act, 1993 and paddy, rice and wheat (the subject of the levy in this case) were not among the scheduled



goods. Paddy, rice and wheat were not included in the schedule even when it was expanded by Amending Act 10 of 2001 (with effect from 5.11.2001) and further by Amending Act 9 of 2003 (with effect from 22.08.2003). But the second Amendment Act (Act 9 of 2003) inserted Section 3A that empowered the State Government to amend or alter the Page 0770 schedule of the Act or to add anything in it by issuing a notification. In exercise of the power under Section 3A of the Act, the State Government issued notification No. SO 34, dated 1.4.2006 by which paddy, rice, wheat, pulses, flour, atta, maida, suji and besan were added at Serial No. 25 of the Schedule. On the same date, the State Government issued another notification bearing No. SO 32 in exercise of the power under Section 3(1) of the Act fixing the rate of entry tax on paddy, rice, wheat etc. at 4% of their value. It is an admitted position that at that time the rate of sales tax on paddy, rice, wheat etc. was 1%. In other words, the rate of entry tax on the goods in question was higher than the rate of sales tax by 3%.

9. Here, it may be recalled that in *M/s Indian Oil Corporation Ltd. and M/s Harinagar Sugar Mills Ltd.*, it was argued that following the amendment in the definition of 'Entry of Goods' with effect from 5.11.2001 (by Amending Act 10 of 2001), the Act had become discriminatory against goods imported from outside the State. The Advocate General rebutted the contention submitting that the charge of discrimination



overlooked the fact that simultaneously with the amendment in the definition of 'Entry of Goods', a provision was introduced (vide second proviso to Sub-section 2 of Section 3) for giving credit for entry tax levied and collected towards the sales tax payable on the sale of those goods. He submitted that the Act was provided with an internal balancing mechanism that saved it from being discriminatory against goods imported from other States. In that case, it was pointed out that atleast in case of paddy, wheat and rice, the rate of entry tax was higher than the rate of sales tax with the result that paddy, rice and wheat imported from outside the State suffered a higher incidence of tax compared to paddy, rice and wheat procured from within the State. The Advocate General countered the submission by taking the stand that if for some goods the rate of entry tax was higher than the rate of sales tax then that might be a ground to challenge the notification fixing the rate of entry tax under Sub-section (i) of Section 3 of the Entry tax Act but on that basis, it could not be argued that the Act was itself discriminatory or violative of Article 304(a) of the Constitution. It thus becomes plain and clear that in order to save the Act from the vice of discrimination against paddy, wheat and rice imported from outside the State, the notification No. SO 32, dated 1.4.2006 fixing the rate of entry tax on those goods at 4% of their value must be struck down for being higher than the rate of sales tax on those goods. This is another important ground on which this writ petition is bound to succeed.



94. In the light of law, which we have discussed above, especially, the decisions, in **Indian Oil Corporation** (supra) and **Food Corporation of India** (supra), it becomes apparent that no *set-off* is available, when goods are brought in, on transactions of *e-commerce* portal, for personal use or consumption of individual consumer as per the second Proviso to Section 3(2) of the 1993 Act. Consequently, such goods will face a higher burden of tax and, accordingly, it will be discriminatory against the goods brought from other States to the State of Bihar. Such discrimination will directly contravene Article 304(a) read with Article 303 of the Constitution of India.

95. The creation of tax barrier and imposition of higher rate of tax on the goods from other States, as compared to locally sold goods, has been dealt with by the Supreme Court in a catena of decisions. **Shree Mahavir Oil Mills vs. State of J&K, (1996) 11 SCC 39, is a case**, wherein, on account of a series of notifications, the manufacturers of edible oil, in other States, were liable to pay sales tax at 8% on sale affected by them in the State of J & K, while the local manufacturers were fully exempted, the Supreme Court, while quashing the said exemption on the ground of being violative of the provisions embodied in Article 301 and Article 304(a), held as under:

"Article 301 declares that "subject to the

other provisions of this part, trade, commerce and intercourse throughout the territory of India shall be free". An exception is, however, provided in favour of Parliament by Article 302 which says that "Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India, as may be required in the public interest". The power conferred upon the Parliament by Article 302 is, however, qualified by a rider provided in clause (1) of Article 303 which says that the power conferred upon the Parliament by Article 302 shall not however, empower the Parliament - or the legislature of State - "to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of any discrimination between one State or another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule". Clause (2) of Article 303, is in the It is not very clear why clause (1) of Article 303 uses the words "nor the legislature of a State" when Article 302 does not refer to the legislature of a State at all. Probably, the idea was to declare affirmatively in the interest of removing any doubt - that even a legislature of a State shall not have the power to make any law giving or authorizing the giving of any preference to one estate over another or making or authorising the making of any discrimination between one state and another by virtue of their power to make a law with reference to the entries relating to trade and commerce in the Seventh schedule. Further, the*

additional of words "by virtue of any entry relating to trade and commerce of any of the Lists in the Seventh Schedule" at the end of the clause have also given rise to a good amount of controversy, which we shall refer to later, to the extent relevant nature of a classification. It says that "nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India". Article 304 deals with the power of the State legislatures. It begins with a non-obstante clause "Notwithstanding anything in article 301 or article 303". Article 303 was also referred to in this non-obstante clause evidently for the reason that clause (1) of Article 303 refers to "the legislature of a State" besides referring to Parliament. Article 304 contains two clauses. Clause (a) states that "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". The wording of this clause is of crucial significance. The first half of the clause would make it appear at first flush that it merely states the obvious: one may indeed say that the power to levy tax on goods imported from other States or Union territories flows from Article 246 read with Lists II and III in the Seventh



Schedule and not from this clause. That is of course so, but then there is a meaning and a very significant principle underlying the clauses if one reads it in its entirety. The idea was not really to empower the State legislatures to levy tax on goods imported from other States and Union territories - that they are already empowered by other provisions in the Constitution - but to declare that power shall not be so exercised to discriminate against the imported goods vis-a- vis locally manufactured goods. The clauses though worded in positive language has negative aspect. It is, in truth, a provision prohibiting discrimination against the imported goods. In the matter of levy of tax - and this is important to bear in mind - the clause tells the State Legislatures - 'tax you may the goods imported from other States/Union Territories but do not, in that process discriminate against them vis-a- vis goods manufactured locally'. In short, the clause says levy of tax on both ought to be at the same rate. This was and is a ringing declaration against the States creating what may be called "tax barriers" - or fiscal barrier", as they may be called - at or along their boundaries in the interest of freedom of trade, commerce and intercourse throughout the territory of India, guaranteed by Article 301. As we shall presently point out, this clause does not prevent in any manner the States from encouraging or promoting the local industries in such manner as they think fit so long as they do not use the weapon of taxation to discriminate against the imported goods vis-a-vis the locally manufactured goods. To repeat, the clause bars the

States from creating tax barriers - or fiscal barriers, as they can be called - around themselves and/or insulate themselves from the remaining territories of India by erecting such 'tariff walls'. Part-XIII is premised upon the assumption that so long as a State taxes its residents and the residents of other States uniformly, there is no infringement of the freedom guaranteed by Article 301; no State would tax its people at a higher level merely with a view to tax the people of other States at that level. And it is this clause which has a crucial bearing on this case. Now coming to clause (b), it empowers the legislature of the State to make a law and "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". (This proviso has, of course, to be read along with Article 255 which says that if the Act receives the assent of the Presidents the non-compliance with the requirement of obtaining the previous sanction to the introduction of the Bill is cured.) Though in appearance this clause reads like conferring on the State Legislatures a power akin to the power conferred upon the Parliament by Article 302, there are certain distinctions. Firstly, while Article 302, does not use the expression "reasonable" before the word "restrictions," this clause does. Secondly, this power can be exercised by the State Legislature only with the "previous sanction" of the President-



which means the Union Ministry, or with the assent of the President, as explained above. It is probably our history which impelled the founding fathers to lay store by the Central Government in the matter of imposing restrictions, or reasonable restrictions, as the case may be on the freedom guaranteed, it is worthy of notice, is "throughout the territory of India" and not merely between the States as such; the emphasis is upon the oneness of the territory of India. Part-XIII starts with this concept of oneness but then it provides exceptions to that rule, as stated above, to meet certain emerging situations. As a matter of fact, it can well be said that clause (a) of Article 304 is not really an exception to Article 301, notwithstanding the non-obstante clause in Article 304 and that it is but a re-statement of a facet of the very freedom guaranteed by Article 301, viz., power of taxation by the States. (We need not refer to the other articles in Part-XIII for the purposes of this case)."

96. Again, in ***Jaiprakash Associates*** (supra), wherein the Notifications, under the Uttar Pradesh Trade Tax Act, 1948, granting rebate of tax to goods manufactured, in the State of Uttar Pradesh, were challenged on the ground of being discriminatory against goods imported from neighbouring States and violating Article 301 and 304(a), the Supreme Court had this to say:

"38. 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.

....

46. 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'.

....

52. 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.

.....

54. 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.

...

56. 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.

...

62. 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.

97. It needs to be borne in mind that in ***Jaiprakash Associates*** (supra), the Supreme Court held that the object of Article 304(a) of the Constitution is to prevent imported goods being discriminated by imposing a higher tax thereon than on local goods. It has been held that what Article 304(a) demands is that the rate of taxation on local goods as well as imported goods must be the same. This is designed to discourage the State from creating the State barriers or fiscal barriers at its boundaries.

98. The Supreme Court has, in no uncertain words clarified, in ***Jaiprakash Associates*** (supra), that 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 nation/States in several jurisdictions and also in international trade and policy.

99. Discrimination is spoken of in terms of effect and intention behind such discrimination. The Supreme Court has held, in ***Jaiprakash Associates*** (supra), that effect of a tax should not such that two like goods are given discriminatory treatment. 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.



100. When Article 304(a) ensures only equal rate for incoming goods, 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) gets attracted. These are simple cases of hostile discrimination. However, one has to determine whether a particular tax is discriminatory or not within the meaning of Article 304(a), 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 effect of rebate of tax is such that they fall within the meaning of concessional rates of tax so as to discriminate between imported goods and local goods, the same would amount to discrimination within the meaning of 304(a) of the Constitution. The *set off*, as given in Section 3(2) of the 1993 Act, cannot be used as a device or weapon so as to make a discrimination in the rate of tax by repaying or by allowing *set off* to one class of *local dealers* of the *entry tax* paid against the VAT payable and not allowing the benefit of *set off* to *outside dealers*. Such a situation squarely falls within the ambit of Article 304(a) of the Constitution of India.

101. By giving *set off* under second Proviso to Section 3(2) of the 1993 Act, a favourable treatment is given to one class of *dealers* within the State, barring the *dealers*, similarly placed outside the State, supplying goods to the State of Bihar



in course of inter-State trade and commerce, the effect whereof is that no *entry tax* is payable by a *dealer* making resale of the said goods inside the State, but, on the other hand, the *dealers*, who are supplying goods from outside the State to consumers, have to pay full *entry tax* as well as central sales tax. The net effect of the impugned provisions is that the cumulative burden of taxes, on goods imported from outside the State, is higher than the said goods produced within the State. This is what is known as *fiscal barrier* and such *fiscal barrier* has a direct and immediate effect of ensuring that goods are brought in from outside the State of Bihar for personal use or consumption on payment of CST and thereby making a discrimination between the *dealers* of one State and another, which is clearly violative of Article 304(a) of the Constitution.

102. In the present case, respondents have not disputed that there is a higher burden of tax on goods brought in by the petitioners for individual consumers through *e-commerce* transactions; but the State has tried to defend the same by contending that since the levy is compensatory in nature, the State has the power to impose such discriminatory tax.

103. As discussed in the preceding paragraphs of this judgment, we are unable to agree with the effect of the



submissions of the learned Principal Additional Advocate General that in case of compensatory tax, the State has the power to resort to discrimination. Even if the levy is compensatory in nature, the compensation cannot be demanded more from an *outside dealer* than a *local dealer*. There cannot be any discrimination between an *outside dealer* and a *local dealer*. Since the impugned provisions clearly discriminate between an *outside dealer* and *local dealer* by imposing higher burden of tax on goods supplied by *outside dealer* than a *local dealer*, the same is clearly hit by Article 304(a) of the Constitution of India.

104. Since we have already held the impugned provisions to be discriminatory and violative of Article 304(a) of the Constitution of India read with Article 303 of Constitution of India, it is not necessary to examine the other contentions advanced on behalf of the petitioner.

105. In the result and for the forgoing reasons, these writ petitions are allowed. The impugned provisions of the Bihar Finance Act, 2015 (Bihar Act 9 of 2015), amending the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993 and the Rules made thereunder and Notifications S.O. 176 & 18 both, dated 20.01.2016, are declared as *ultra vires* to the Constitution and are accordingly quashed. We hold that no tax can be levied on entry of goods

into local areas, in terms of the impugned provisions, over the transactions, made on *e-commerce* portals, for personal use or consumption of individual consumer.

106. However, there shall be no order as to costs.

(I. A. Ansari, CJ)

Chakradhari Sharan Singh, J: I agree.

(Chakradhari Sharan Singh, J)

Pawan/-

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