

CASE DETAILS

NHPC LTD.

V.

STATE OF HIMACHAL PRADESH SECRETARY & ORS.

(Civil Appeal No.3948 of 2009)

SEPTEMBER 06, 2023

[B. V. NAGARATHNA AND UJJAL BHUYAN, JJ.]

HEADNOTES

**Issues for consideration:** (i) Whether, by enacting the Himachal Pradesh Passengers and Goods (Amendment and Validation) Act of 1997, the Himachal Pradesh State Legislature had validly removed the basis of the judgment of the Division Bench of the High Court dated 27.03.1997, whereby the Himachal Pradesh Passengers and Goods Taxation Act, 1955 had been held not to include within its scope the activity of the appellants of providing gratis transport facilities for their employees and their children.

(ii) Whether the activity of the appellants of providing gratis transport facilities for their employees and their children, would now be a taxable activity under Section 3(1-A) of the Amendment and Validation Act of 1997.

**Himachal Pradesh Passengers and Goods Taxation Act, 1955 – Himachal Pradesh Passengers and Goods (Amendment and Validation) Act of 1997 – Validity of the Amendment and Validation Act, 1997 and taxability of transport facility provided by the appellant for their employees and children:**

**Held:** By enacting the Amendment and Validation Act of 1997, the Himachal Pradesh State Legislature has validly removed the basis of the judgment of the Division Bench of the High Court dated 27.03.1997, inter-alia, by amending the definition of the term ‘business’; defining the terms ‘fare’, ‘freight’ and ‘road’; deleting the Explanation to Section 3(1); and inserting Section 3(1A) which brought non-fare paying passengers at par with fare-paying passengers for the purpose of levying tax under the Act – Thus, the Amendment and Validation Act of 1997 is a valid piece of Legislation – The activity of the appellant in providing gratis transportation

to its employees, and their children, would be a taxable activity under Section 3(1-A) of the Amendment and Validation Act of 1997. [Para 23(ii), (iii)]

**Himachal Pradesh Passengers and Goods Taxation Act, 1955 – Himachal Pradesh Passengers and Goods (Amendment and Validation) Act of 1997 – The Division Bench of the High Court passed a judgment dated 27.03.1997 and pointed out lacunae in the Act of 1955 – By way of the Amendment and Validation Act of 1997, amendments were brought about to the Preamble and various provisions of the Act of 1955 with retrospective effect, viz. date of enforcement of the Act of 1955 – When a competent legislature retrospectively removes the substratum or foundation of a judgment to make it ineffective – Valid legislative exercise or not:**

**Held:** A legislature cannot directly set aside a judicial decision – However, when a competent legislature retrospectively removes the substratum or foundation of a judgment to make the decision ineffective, the same is a valid legislative exercise provided it does not transgress on any other constitutional limitation – Such a legislative device which removes the vice in the previous legislation which has been declared unconstitutional is not considered to be an encroachment on judicial power but an instance of abrogation recognised under the Constitution of India – The various decisions of the Supreme Court show that it is open to the legislature to alter the law retrospectively, provided the alteration is made in such a manner that it would no more be possible for the Court to arrive at the same verdict – In other words, the very premise of the earlier judgment should be removed, thereby resulting in a fundamental change of the circumstances upon which it was founded – It would be permissible for the legislature to remove a defect in an earlier legislation, as pointed out by a constitutional court in exercise of its powers by way of judicial review – This defect can be removed both prospectively and retrospectively by a legislative process and previous actions can also be validated. [Paras 11 and 12]

**Constitution of India – Alteration of law retrospectively – Separation of powers between legislature, executive and the judiciary – Power of Judicial Review – Power of Legislature – Rule of Law:**

**Held:** The role of the judiciary in galvanising constitutional machinery characterised by institutional checks and balances, lies in recognising that

while due deference must be shown to the powers and actions of the other two branches of the government, the power of judicial review may be exercised to restrain unconstitutional and arbitrary exercise of power by the legislature and executive organs – The power of judicial review is a part of the basic feature of Constitution which is premised on the rule of law – Unless a judgment has been set aside by a competent court in an appropriate proceeding, finality and binding nature of a judgment are essential facets of the rule of law informing the power of judicial review – In that context, while it may be open to the legislature to alter the law retrospectively, so as to remove the basis of a judgment declaring such law to be invalid, it is essential that the alteration is made only so as to bring the law in line with the decision of the Court – Simply setting at naught a decision of a court without removing the defects pointed out in the said decision, would sound the death knell for the rule of law – The rule of law would cease to have any meaning if the legislature is at liberty to defy a judgment of a court by simply passing a validating legislation, without removing the defects forming the substratum of the judgment by use of a non-obstante clause as a technique to do so. [Para 13]

**Constitution of India – Legislative device of abrogation – Retrospective amendments – Permissibility of:**

**Held:** The device of abrogation, by way of introducing retrospective amendments to remove the basis of a judgment, may be employed when a legislature is under the bonafide belief that a defect that crept into the legislation as it initially stood, may be remedied by abrogation – An act of abrogation is permissible only in the interests of justice, effectiveness and good governance, and not to serve the oblique agenda of defying a court's order, or stripping it of its binding nature. [Para 14]

**Constitution of India – The power of abrogation is to be exercised following principles:**

**Held:** (i) There is no legal impediment to enacting a law to validate a legislation which has been held by a court to be invalid, provided, such a law removes the basis of the judgment of the court, by curing the defects of the legislation as it stood before the amendment; (ii) The validating legislation may be retrospective – It must have the effect that the judgment pointing out the defect would not have been passed, if the altered position as sought

to be brought in by the validating statute existed before the court at the time of rendering its judgment; (iii) Retrospective amendment should be reasonable and not arbitrary and must not be violative of any Constitutional limitations; (iv) Setting at naught a decision of a court without removing the defect pointed out in the said decision is opposed to the rule of law and the scheme of separation of powers under the Constitution of India; (v) Abrogation is not a device to circumvent an unfavourable judicial decision – If enacted solely with the intention to defy a judicial pronouncement, an Amendment and Validation Act of 1997 may be declared as ultra-vires. [Para 15]

**Himachal Pradesh Passengers and Goods Taxation Act, 1955 – Himachal Pradesh Passengers and Goods (Amendment and Validation) Act of 1997 – Import of the Act of 1955 Act as amended by the Amendment and Validation act of 1997:**

**Held:** The Preamble which provides that it has been enacted to provide for levying a tax on passengers and goods carried by road in motor vehicles – Such a tax falls within the legislative field governed by Entry 56 of List II of the Seventh Schedule of the Constitution – Simply for the reason that notices have been issued to the owners or assessment orders have been passed against the owners of the vehicles, it cannot be said that the tax is levied on the motor vehicles – If the persons carried happen to be employees of the owners of the buses, such employees should pay the tax – When the employer, i.e., the owner of the vehicle, does not collect the tax from such employees, he should himself pay it, in discharge of the employer's statutory duty as an agent of the State to collect tax on the basis of the amended provision – Whether to collect the tax payable from the passengers (the employees and their children) or discharge the liability itself is the prerogative of the appellants. [Para 22]

**LIST OF CITATIONS AND OTHER REFERENCES**

*Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality*, A.I.R. 1970 SC 192 : [1970] 1 SCR 388; *State of Tamil Nadu v. Arooran Sugars Ltd.*, (1997) 1 SCC 326 : [1996] 8 Suppl. SCR 193 – followed.

*Indian Aluminium Company Co. v. State of Kerala*, A.I.R. 1996 SC 1431: [1996] 2 SCR 23; *Bakhtawar Trust v. M.D. Narayan*, (2003) 5 SCC

298 : [2003] 1 Suppl. SCR 1; *Madras Bar Association v. Union of India*, (2022) 12 SCC 455; *Dr. Jaya Thakur v. Union of India*, 2023 SCC OnLine SC 813 – relied on.

*A.S. Karthikeyan v. State of Kerala*, (1974) 1 SCC 258 : [1974] 2 SCR 321; *M/s Tata Engineering and Locomotive Co. v. The Sales Tax Officer, Poona* A.I.R. 1979 SC 343 : [1979] 2 SCR 357; *J. K. Jute Mills Co. Ltd. v. State of Uttar Pradesh*, A.I.R. 1961 SC 1534 : [1962] SCR 1; *State of Tamil Nadu v. Board of Trustees of the Port of Madras*, (1999) 4 SCC 630 : [1999] 2 SCR 195; *Commissioner of Sales Tax v. Sai Publication Fund*, (2002) 4 SCC 57 : [2002] 2 SCR 743; *National Agricultural Cooperative Marketing Federation of India Ltd. v. Union of India*, (2003) 5 SCC 23 : [2003] 3 SCR 1; *M/s West Ramnad Electric Distribution Co. v. State of Madras*, A.I.R. 1962 SC 1753 : [1963] SCR 747; *Rai Ramkrishna v. State of Bihar*, A.I.R. 1963 SC 1667 : [1964] SCR 897; *Lohia Machines Ltd. v. Union of India*, (1985) 2 SCC 197 : [1985] 2 SCR 686; *State of Himachal Pradesh v. Yash Pal Garg*, (2003) 9 SCC 92 : [2003] 3 SCR 1056; *Baharul Islam v. Indian Medical Association*, 2023 SCC OnLine SC 79; *M/s. Tirath Ram Rajendra Nath, Lucknow v. State of Uttar Pradesh*, A.I.R. 1973 SC 405; *Hindustan Gum and Chemicals Ltd. v. State of Haryana*, (1985) 4 SCC 124 : [1985] 2 Suppl. SCR 630; *Cheviti Venkanna Yadav v. State of Telangana*, (2017) 1 SCC 283 : [2016] 7 SCR 689 – referred to.

<b>OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES</b>
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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3948 of 2009.

From the Judgment and Order dated 11.12.2008 of the High Court of Himachal Pradesh at Shimla in CWP No.725 of 1998.

With

Civil Appeal Nos. 4738-4743 and 6931 of 2009.

**Appearances:**

S.B. Upadhyay, Sr. Adv., Piyush Sharma, Anuj Sharma, Abhishek Goyal, Shivesh Shrivastava, Yashraj Singh Deora, Priyesh Mohan Srivastava, Abhishek Singh, M/s. Mitter & Mitter Co., Advs. for the Appellant.

Anup Kumar Rattan, AG, Rupinder Singh Thakur, Addl. AG, Puneet Rajta, Karan Kapur, Abhishek Gautam, Vivek Kumar, Baldev Singh, Ms. Radhika Gautam, Kartikeya Rastogi, Ms. Inderdeep Kaur Raina, Abhinav Mukerji, Advs. for the Respondents.

## **JUDGMENT / ORDER OF THE SUPREME COURT**

### **JUDGMENT**

**NAGARATHNA, J.**

These appeals have been filed assailing the final Orders of the High Court of Himachal Pradesh dated 11 December, 2008 and 06 May, 2009, whereby the vires of the Himachal Pradesh Passengers and Goods Taxation Act, 1955 (hereinafter referred to as the “Act of 1955” for the sake of brevity) as amended from time to time, particularly by the Himachal Pradesh Passengers and Goods (Amendment and Validation), Act, 1997 (hereinafter referred to as the “Amendment and Validation Act of 1997” for the sake of brevity) has been upheld and the writ petitions filed by the appellants herein, i.e., Civil Writ Petition Nos. 725 of 1998, 422 of 1998, 401 of 2001, 464-467 of 2001 and 79 of 2007, have been dismissed.

#### ***Bird’s eye view of the controversy:***

2. The controversy in these cases revolves around the question whether, by enacting the Amendment and Validation Act of 1997, the Himachal Pradesh State Legislature has validly removed the basis of the judgment of the Division Bench of the High Court dated 27 March, 1997. In the said judgment, the Act of 1955 had been held not to include within its scope, the activity of the appellants in providing gratis transport facilities for their employees and their children, as the charging provision contained therein, namely, Section 3 (1) and the Explanation thereto were couched in very ambiguous terms.

2.1. These appeals also call for consideration of ancillary arguments in the matter such as legislative competence of the Himachal Pradesh Legislative Assembly to enact the Act of 1955 and the Amendment and Validation Act of 1997, which are stated to be enacted on the strength of Article 246, read with Entry 56 of List II of the Seventh Schedule of the Constitution of India.

2.2 Further, these appeals also call for interpretation of certain provisions of the Act of 1955, as amended by the Amendment and Validation Act of 1997, so as to determine whether the activity of the appellants, would be a taxable activity under Section 3(1-A) of the Amendment and Validation Act of 1997.

***Brief facts of the case:***

3. Since the controversy involved in these appeals is identical, the appeals are being disposed of by way of this common judgment. For the sake of convenience, the facts of the lead matter, i.e., Civil Appeal No. 3498 of 2009 shall be narrated as under:

3.1. The facts in a nutshell are that the Act of 1955 was enacted by the Himachal Pradesh Legislative Assembly with a view to levy tax on passengers and goods carried by road in certain motor vehicles in the State of Himachal Pradesh. The said Act received Presidential assent on 25 November, 1955.

3.2. The appellant, NHPC Ltd. is engaged in the generation of electricity and has various projects in the State of Himachal Pradesh. Many project sites are situated at different locations in the interiors of Himachal Pradesh. These work sites are not properly serviced by any public transport system or regular taxis. The residential colonies of the staff employed at the various project sites are located at far of distances from the project sites. Therefore, as a welfare measure, the appellant, NHPC Ltd. provides transport facilities to its employees in order to enable them to reach their respective work sites from their residential colonies and for their children to travel to and from their schools, comfortably. It is to be clarified at this juncture that the transport facilities were being provided free of cost, for the exclusive use of the employees of the appellant and their children and members of the public were not permitted to use the said transport facilities. The buses utilized for such purpose were owned and operated by the appellant-NHPC Ltd.

3.3. The Assessing Authority under the Act of 1955, Respondent No. 3 herein, assessed the liability of the appellant-NHPC Ltd. to pay passenger tax under the Act for the years 1984-1985 to 1986-1987 and 1987-1988 to 1990-1991 in respect of the activity of providing transport facilities to its employees and their children. Assessment Orders were passed on 01

October, 1992 stipulating the liability of the appellant, NHPC Ltd. to pay passenger tax under the Act of 1955, on the premise that its employees and their children were passengers under the Act and therefore, the appellant was liable to pay passenger tax for providing them with transport facilities as described hereinabove. It is to be stated at this juncture that the Assessment Orders were passed on the assumption that every bus of the appellant, NHPC Ltd. was plying on every day of the relevant years; a passenger travelled on every seat of every bus; and every employee travelled the full distance shown in the logbook.

3.4. The appellant filed Revision Application before the Commissioner, Excise and Taxation, Himachal Pradesh, Respondent No. 2 herein, challenging the Assessment Orders dated 01 October, 1992. The same was dismissed on the ground that a revision application would not be maintainable and it would be appropriate to instead, file an appeal.

3.5. In the said background, the appellant, NHPC Ltd. filed Writ Petition No.1733 of 1995 before the High Court, challenging the vires of the Act of 1955, and the assessments made in accordance with the provisions thereof. The pertinent contentions raised by the appellant in the said Writ Petition may be encapsulated as under:

- i. That under the Act of 1955, no tax can be levied on the appellant as its employees and their children were being carried in the appellant's buses, without any fare or consideration. That passenger tax as contemplated under the Act of 1955 was to be levied only on fare-paying passengers against tickets issued by the owner of the motor vehicles, who is engaged in the business of carrying passengers for hire and reward.
- ii. That no rate or fare had been specified by the competent authority under the Motor Vehicles Act, 1939 (hereinafter referred to as "MV Act" for short) for the routes on which the appellant's buses plied, nor had any contractual rate been agreed upon between the appellants and its employees. Therefore, the charging provision, i.e., Section 3 (1) of the Act of 1955 and the Explanation thereto would not be attracted.



- iii. That in passing the Assessment Orders dated 01 October, 1992, erroneous and baseless assumptions had been made to the effect that every bus of the appellant, NHPC Ltd. was plying on every day of the relevant year; a passenger travelled on every seat of every bus; every employee travelled the full distance shown in the logbook; and every passenger was paying a fare of Rs. 1.15 per kilometer.
- iv. That even if the assessee was liable to pay tax under the Act of 1955, they would not be liable to pay surcharge under Section 3A of the Act as the said provision would not be applicable to the appellants. Further, Section 3A of the Act of 1955 was unconstitutional and suffered from excessive delegation of powers to the State Government to prescribe the rate of surcharge leviable, without laying down any guideline on the basis of which surcharge was to be prescribed.

3.6. By the Judgment and Order dated 27 March, 1997, the Division Bench of the High Court allowed Civil Writ Petition No.1733 of 1995 filed by the appellant and directed the Respondents to refund the tax collected under the provisions of the Act of 1955. The pertinent findings of the Division Bench of the High Court are culled out hereinunder:

- i. That the scheme of the Act of 1955 was to levy a tax on passengers of certain motor vehicles only. Intention of the legislature could be gathered from the various definitions contained in Section 2 of the Act, and the same was to make the Act applicable only to persons who carried on the business of transport. The definition of 'owner' would fortify such finding, as 'owner' was defined to mean a person holding a permit under the Motor Vehicles Act.
- ii. That the liability of the assessee was to be determined for the years 1984-1985 to 1986-1987 and 1987-1988 to 1990-1991. Prior to 31 May, 1988, 'motor vehicle' was defined to mean "a public service vehicle or public carrier, or private carrier or a trailer attached to any such vehicle." Further, the definition of 'passenger' excluded from its scope the driver, conductor and employee of the owner of the motor vehicle. Therefore, the appellant's buses would not be covered under the definition of 'motor vehicle', as defined

at the relevant point of time. That on applying the definition of the expressions, ‘motor vehicle’ and ‘passenger’ to the charging provision, the appellant would not be liable for tax under the Act of 1955.

- iii. That as regards the period between 31 May, 1988 and 30 September, 1990, the scope of the definition was expanded only to include any vehicle used in contravention of the provisions of the Motor Vehicles Act for carriage of passengers or goods or both, for hire and reward. Since the appellant’s buses were not used for carriage of passengers for hire or reward, appellant would not be liable to discharge tax under the Act.
- iv. That from 01 October, 1990, the definition of ‘motor vehicle’ was enlarged to include any ‘transport vehicle,’ which, as defined under the Motor Vehicles Act, 1988 (hereinafter, “MV Act, 1988” for the sake of convenience) means “a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.” That although the said definition of ‘motor vehicle’ would cover the buses of the appellant, the Explanation to Section 3 (1) of the Act of 1955 would not permit such an application.
- v. That the Explanation to Section 3 (1) of the Act of 1955 introduced a legal fiction requiring assessments to be made on the assumption that even passengers who did not actually pay a fare, were being carried at the normal rate chargeable on the concerned route. That there was no definition of ‘route’ for the purposes of the Act and the definition of ‘route’ under the MV Act could not be referred to as the routes on which the appellant’s buses plied were not ‘routes’ in the sense defined under the MV Act. Hence, ‘route’ could not be equated to any ‘road’ so as to hold the appellant-assessee liable to pay tax under the Act of 1955. That for charging tax, by invoking the Explanation to Section 3(1), routes were required to be prescribed, but since no routes had been prescribed, the Explanation could not come to the rescue of the respondent Authorities.

- vi. Further, in the absence of any prescription as to what the ‘normal rate’ would be, the Respondent Authorities could not have levied tax on the appellant based on artificial assumptions. That there was no basis to warrant the Authorities from taking into account the fare payable in the adjoining areas, in calculating the ‘normal rate.’
- vii. That the charging provision could not be given effect to unless the terms ‘route’ and ‘normal rate’ had been expressly and unambiguously defined.

3.7. A Special Leave Petition filed by the Respondents before this Court, assailing the judgment of the High Court dated 27 March, 1997 was dismissed by an Order dated 28 July, 1997.

3.8. In that background, on 13 August, 1997, the Himachal Pradesh Passengers and Goods (Amendment & Validation) Ordinance was promulgated. The Himachal Pradesh Legislative Assembly passed the Amendment and Validation Act of 1997 on 27 September, 1997 with a view to remove the basis of the judgment of the Division Bench of the High Court dated 27 March, 1997. By virtue of the Amendment and Validation Act of 1997, definitions of the terms ‘business’, ‘fare’, ‘freight’ and ‘passenger’ were amended. Further, definitions of terms such as ‘Private Service Vehicle’, ‘road’, ‘Transport Vehicle’, came to be introduced. Explanation (1) to Section 3 (1) of the Act of 1955, which was the charging provision in the said Act, was omitted and Sub-section (1A) was inserted in Section 3, which was to serve as a charging provision. The nuances of the amendments introduced by the Amendment and Validation Act of 1997 shall be adverted to at a later stage.

3.9. Accordingly, the Authorities constituted under the Act, issued notices to the appellant for recovery of tax under the provisions of the Amendment and Validation Act of 1997, in respect of the appellant’s activity of providing transport facilities to its employees and their children.

3.10. The appellant challenged the vires of the Amendment and Validation Act of 1997 and the assessments made thereunder, as also of the Act of 1955 by filing Civil Writ Petition No. 725 of 1998 before the High Court. The primary grounds of challenge were as under:

- i. That the Act of 1955 as well as the Amendment and Validation Act of 1997 are unconstitutional inasmuch as they seek to levy tax on vehicles, which is contrary to Entry 56, List II of Seventh Schedule of the Constitution of India.
- ii. That the definitions of ‘passenger’, ‘business’, ‘fare’ and ‘road’ are artificial and unnatural, as also contrary to the purpose and object of the Act and hence, ultra-vires.
- iii. That employees of the appellant and their children would not be covered by the definition of “passenger”, as appearing in the Amendment and Validation Act of 1997, inasmuch as they are carried free of charge.

3.11. By the impugned judgment dated 11 December, 2008, the High Court of Himachal Pradesh dismissed Civil Writ Petition No. 725 of 1998 filed by the appellant and upheld the vires of the Act of 1955 as amended from time to time, particularly by the Amendment and Validation Act of 1997. The pertinent findings of the Division Bench of the High Court may be epitomized as under:

- i. The Court did not find favour with the contention of the Petitioner that the impugned legislations had the effect of taxing the vehicles, carrying passengers or goods and, hence, the State Legislature does not have the competence to enact it. It was held that from a reading of the Preamble of the Act and also various provisions thereof, it was clear that the Act seeks to impose tax, not on motor vehicles, but on the passengers and goods carried therein. That the import of the Act could be gathered from the Preamble which provides that it has been enacted to provide for levying a tax on passengers and goods carried by road in motor vehicles. That simply for the reason that notices have been issued to the owners or assessment orders have been passed against the owners of the vehicles, it could not be said that the tax is levied on the motor vehicles.

- ii. That the Preamble of the Act of 1955 provided that the same was an Act to provide for levying tax on passengers and goods carried by road in 'certain' motor vehicles. The word 'certain' is omitted by the Amendment and Validation Act of 1997. That this change in no way suggests that the scope of the Act was amended to include taxation on vehicles, instead of on the passengers and goods carried therein.
- iii. That the defect in the Explanation to Section 3(1) of the Act of 1955, which was noted by the Division Bench of the High Court in passing the judgment dated 27 March, 1997, had also been removed by omitting the said Explanation and inserting Section 3(1A) in the Amendment and Validation Act of 1997, which seeks to bring non-fare paying passengers at par with fare paying passengers. Further, the Competent Authority as well as Schedule I to the Amendment and Validation Act of 1997 prescribe the fare and freight for different categories of motor vehicles and for different roads and the higher of the two would apply.
- iv. That Section 3(1A) of the Amendment and Validation Act of 1997, when read with the amended definition of the term 'business' would leave no scope for doubt that all kinds of passengers and goods carried in private service vehicles are subject to taxation, under the Act, irrespective of whether such passengers or goods were being carried for hire or reward. Therefore, the Amendment and Validation Act of 1997, covers non-fare paying passengers (such as the appellant's employees and their children) as also goods and material belonging to the appellant themselves.

Aggrieved by the aforesaid judgment of the High Court, which has been followed by the High Court in its subsequent Order dated 21 July, 2009 in CWP 79 of 2007, the present appeals have been filed.

***Submissions:***

4. We have heard Sri S.B. Upadhyay, learned Senior Counsel along with instructing counsel for the appellant(s) in Civil Appeal No. 3948 of 2009; Sri Yashraj Singh Deora, learned counsel for the appellant(s) in Civil Appeal Nos. 4738-4743 of 2009 and Civil Appela No. 6931 of 2009 and Sri

Anup Kumar Rattan, learned Advocate General for the State of Himachal Pradesh along with instructing counsel. We have perused the material on record.

4.1. Learned Senior Counsel Sri Upadhyay, appearing on behalf of the appellant(s) in Civil Appeal No. 3948 of 2009 submitted as under:

- i. That the impugned judgment of the High Court of Himachal Pradesh has not properly appreciated the import of the Amendments made to the Act of 1955 by way of the Amendment and Validation Act of 1997 inasmuch as the High Court has upheld the said Act of 1997, by losing sight of the fact that the said Act does not remove the basis of the judgment passed by the High Court earlier, by which, the Explanation to Section 3 (1) of the Act of 1955 was deleted and the further amendments were made by inclusion of Section 3 (1A) and certain other provisions. That the High Court has proceeded on a misplaced interpretation of the Act of 1955, as amended by the Amendment and Validation Act of 1997 to hold that the latter Act, seeks to impose tax on passengers and not motor vehicles and that the said Act covers non-fare paying passengers as well which it cannot do so.
- ii. Elaborating the aforesaid contention, learned senior counsel submitted that the Amendments made to the Act of 1955 do not take into consideration the fact that the buses and other motor vehicles of the appellants herein which are used to ferry their employees to work sites and children of their employees to schools are free of charge and without collecting any fare from the passengers. They travel gratis and therefore, in that sense, are not passengers at all. Nevertheless, the incidence of tax are on the appellants who are the owners of the buses and other vehicle who have been levied the tax despite the fact that they are not collecting any tax or any fare from their “passengers” who are none other than their employees and children of their employees. Therefore, the Act itself does not apply to the appellants and hence, they are not liable to pay any tax under the Act.
- iii. It was further submitted that the High Court has failed to understand the import of the amendments made to the Act of

1955 as the said amendments in no way can mulct any liability to pay tax on the appellants herein. That the true import of the Act of 1955, as amended by the Amendment and Validation Act of 1997 is to levy and collect tax on motor vehicles, transgressing Article 246, read with Entry 56 of List II of the Seventh Schedule of the Constitution of India. The said legislative Entry pertains to “taxes on goods and passengers carried by road and inland water ways.” The said Entry therefore authorises the State Legislatures to levy, *inter-alia*, passenger tax. That the incidence of a passenger tax levied on the strength of Entry 56 of List II of the Seventh Schedule, must be on the passengers and not on the vehicles in which passengers are carried or on the owners of such vehicles. That it is open to the Legislature to provide a convenient machinery or method for collection of such tax. Therefore, the tax can be recovered from the owner or operator of the vehicle, only when, such owner or operator can pass on the burden of the tax to the passengers but not otherwise. In this regard, reliance was placed on *A.S. Karthikeyan vs. State of Kerala, (1974) 1 SCC 258* with a view to bring out the differences between a tax on the income of the operators vis-à-vis passenger tax. That in the present case the incidence of the tax is on the appellants who are the owners of the buses, and not on the passengers. The appellants’ role in the present case cannot be to collect the tax from the passengers and deposit the same with the Respondent Authorities as no fare is collected from the passengers, but to still discharge the tax liability out of their own coffers.

- iv. That fundamentally, ‘passenger’ means a person who travels by paying a fare to the owner or operator of the vehicle, vide *M/s Tata Engineering and Locomotive Co. vs. The Sales Tax Officer, Poona, A.I.R. 1979 SC 343*. Therefore, a non-fare paying employee of the operator, or a school-going child of such employee, is not a passenger within the meaning of the constitutional entry.
- v. That the Amendment and Validation Act of 1997 had introduced sub-clauses (ii) and (iii) to Section 2 (aa) of the Act which defines

‘business’. That the said sub-clauses are brought within the scope of the term ‘business’:

- a) any trade, commerce, or manufacture, or any adventure or concern in the nature of trade, commerce, or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain of profit and whether or not any gain or profit actually accrues from such trade, commerce, manufacture, adventure or concern *vide* Section 2 (aa) (ii); and,
- b) any transaction in connection with or incidental or ancillary to such trade, commerce, manufacture, adventure or concern *vide* Section 2 (aa) (iii).

That notwithstanding the fact that the scope of the term ‘business’ has been widened, sub-clauses (ii) and (iii) to Section 2 (aa) are to be read in harmony with sub-clause (i) thereof, which provides that ‘business’ includes the business of carrying passengers and goods by motor vehicles. That if ‘business’ is held to mean just any trade, commerce, manufacture, adventure or concern, sub-clause (i) of Section 2 (aa), which specifies the nature of business, would become redundant.

- vi. That if sub-clauses (ii) and (iii) to Section 2 (aa) are interpreted to include even businesses other than the business of carrying passengers, the said sub-clauses would be violative of Article 14 of the Constitution on two counts. First, a person or entity who/which does not carry the business of carrying passengers and goods by motor vehicles, would be treated at par with a person or entity who/which carries on such business. Second, a person or entity who/which does not carry on a business with a profit motive, would be treated at par with a person or entity who/which carries on a business with a profit motive. In both the circumstances, unequals would be treated equally and this is opposed to the Constitutional mandate of equality under the law.



- vii. That the definitions of ‘business’, ‘passenger’, ‘road’, ‘fare’ and ‘freight’ under the Amendment and Validation Act of 1997 are artificial and insertion/substitution of such definitions is an illegal attempt to bring the Amendment and Validation Act of 1997 within the scope of Entry 56 of List II of the Seventh Schedule to the Constitution.
- viii. Reliance was placed on *J.K. Jute Mills Co. Ltd. vs. State of Uttar Pradesh, A.I.R. 1961 SC 1534* to contend that when a statute has been enacted by a State Legislature, outside the permissible field of legislation, merely using artificial terminology so as to bring the legislation within the scope of a particular legislative Entry would not save the same from being declared to be unconstitutional.
- ix. That the Amendment and Validation Act of 1997 did not remove the basis of the judgment of the Division Bench of the High Court dated 27 March, 1997, by curing the defects and plugging the lacunae in the Act of 1955. Rather, it has been enacted with the oblique motive of destroying the finality, force and effect of the said judgment of the High Court, which has been affirmed by this Court.

4.2. Sri Yashraj Singh Deora, learned counsel for the appellants in Civil Appeal Nos. 4738-4743 of 2009 and Civil Appeal No. 6931 of 2009 adopted the submissions of learned Senior Counsel Sri Upadhyay and further contended as under:

- i. That in order to be covered under the definition of ‘business’ provided under the Amendment and Validation Act of 1997, the trade, commerce, manufacture of the assessee, or the transactions connected therewith or incidental thereto must have some connection with the business of carrying passengers and goods by road. When the term ‘business’ is construed in such a manner, the main activities of the respective appellants, would not amount to carrying on business, as the same do not relate to the activity of carrying passengers and goods by road. That in a case where the main activity does not amount to ‘business’, then the connected, incidental or ancillary activities would also not amount to ‘business’ unless an independent intention to conduct

business in these connected, incidental or ancillary activities is established by the revenue, vide *State of Tamil Nadu vs. Board of Trustees of the Port of Madras, (1999) 4 SCC 630; Commissioner of Sales Tax vs. Sai Publication Fund, (2002) 4 SCC 57*. That in the present case, there is no material to establish that the ancillary activity of providing transport facilities to their employees and their children is conducted with an independent intention to conduct business through such activity. Therefore, in the present case, neither the main activity of the appellants, nor the ancillary activity of providing transport facilities to their employees and their children, would amount to ‘business’ as defined under the Amendment and Validation Act of 1997.

- ii. Referring to the various amendments brought about by the Amendment and Validation Act of 1997 and contrasting them with the unamended provisions, it was contended that the said Act has not removed the basis of the judgment of the Division Bench of the High Court dated 27 March, 1997, nor has it cured the defects in the Act of 1955. That such an enactment is simply contradictory to the decision of the High Court, without addressing the underlying reasoning of the Court.
- iii. That the retrospective effect of forty-two years, given to the Amendment and Validation Act of 1997 is totally unreasonable and arbitrary. That particularly in relation to taxation statutes, retrospectivity cannot be excessive or harsh, vide *National Agricultural Cooperative Marketing Federation of India Ltd. vs. Union of India, (2003) 5 SCC 23*. That on this ground alone, the Amendment and Validation Act of 1997 may be struck down as being unconstitutional.

With the aforesaid submissions, learned Senior Counsel and learned counsel for the appellants prayed that the impugned judgments be set aside and the Act of 1955, as amended by the Amendment and Validation Act of 1997, be struck down as being arbitrary, illegal and unconstitutional.

5. Per contra, Sri Anup Kumar Rattan, learned Advocate General for the State of Himachal Pradesh supported the impugned judgment and submitted that the High Court had proceeded to pass the impugned orders

on a sound appreciation of the facts of the matter and the applicable law and the same would not call for any interference by this Court. It was further contended as under:

- i. That the Amendment and Validation Act of 1997 has validly addressed the deficiencies in various provisions of the Act of 1955 and has therefore removed the basis of the judgment of the Division Bench of the High Court dated 27 March, 1997 in accordance with law. That it is trite that if a law passed by a Legislature is struck down or rendered inoperative by a Court, the competent Legislature can correct the infirmities which formed the basis of the Court's decision to strike down the law and make such amended law effective retrospectively, vide *M/s West Ramnad Electric Distribution Co. vs. State of Madras, A.I.R. 1962 SC 1753; Rai Ramkrishna vs. State of Bihar, A.I.R. 1963 SC 1667; Lohia Machines Ltd. vs. Union of India, (1985) 2 SCC 197; State of Himachal Pradesh vs. Yash Pal Garg, (2003) 9 SCC 92; Baharul Islam vs. Indian Medical Association, 2023 SCC OnLine SC 79*.
- ii. That Section 3 (1A) as incorporated by the Amendment and Validation Act of 1997, provides that notwithstanding anything contained in sub-section (1) of Section 3, when passengers are carried and goods are transported by a motor vehicle and no fare or freight, whether chargeable or not, has been charged or fare or freight has been charged at a concessional rate, the tax at the rates directed by a Notification by the Government under sub-section (1), shall be levied, charged and paid as if the passengers were carried or goods were transported, either on fares or freights fixed by the competent authority, under the MV Act, for different classes of roads and motor vehicles in the State, or on fares and freights specified in Schedule I to the Act for different classes of roads and motor vehicles, whichever is higher. That previously, under the Act of 1955, Explanation to Section 3(1), which provided that when passengers are carried and goods are transported by a motor vehicle and no fare or freight, whether chargeable or not, had been charged, the tax was levied and paid, as if such passengers were carried or goods transported, at the normal rate prevalent on the

route. The ambiguity in the charging provision, i.e., Section 3 (1) of the Act of 1955 arose on account of the fact that the terms ‘normal rate’ and ‘route’ had not been defined under the said Act. Owing to such a defect/lacuna, the charging provision could not be given effect to as noted by the Division Bench of the High Court in the judgment dated 27 March, 1997. That by the Amendment and Validation Act of 1997, Explanation to Section 3(1) has been deleted and Section 3 (1A) has been inserted, prescribing two alternate methods to notionally determine fares or freights, when the same has not been charged, i.e. by taking into account: (a) fares or freights fixed by the competent authority, under the MV Act, or (b) fares and freights specified in Schedule I to the Act for different classes of roads and motor vehicles: the higher of the two fares is to be adopted in every case. Further, the terms ‘fares’, ‘freights’ and ‘roads’ have been defined, thereby removing the defects/deficiencies in the Act of 1955.

- iii. That another reason given by the Division Bench in the judgment dated 27 March, 1997 for holding that employees of the appellants and their children were not covered by the Explanation (now deleted by way of the Amendment and Validation Act of 1997) was in relation to the definition of ‘business’. ‘The term ‘business’ was defined in a narrow manner in the Act of 1955 and meant the business of carriage of passengers and goods. Therefore, when the definitions of the terms ‘motor vehicle’ and ‘business’ were read into the charging provision, the inference was, only those who were not in the business of carrying passengers and goods, would not be covered by the charging provision. This loophole has also been plugged by way of the Amendment and Validation Act of 1997, inasmuch as the definition of ‘business’ has been enlarged and it now includes, besides the business of carrying passengers and goods by motor vehicles, any trade, commerce or manufacture, or any adventure or concern, whether or not the same is carried on with a profit motive; and any transaction in connection with, incidental or ancillary to such trade, commerce or manufacture. That ‘business’ now means just any business, carried on with or without a profit motive, or any ancillary

transactions in connection with such business. The said expression having being widened, a macro meaning and interpretation must be given to the same, was the submission.

- iv. That simply for the reason that notices had been issued to the owners or assessment orders had been passed against the owners of the vehicles, it could not be said that the tax was being levied on the motor vehicles. The tax sought to be imposed was on the passengers and goods carried by road and the operators/owners of the motor vehicles were simply required to facilitate payment of tax by collecting the same from the passengers and depositing it with the Respondent Authorities. That the Act of 1955, as amended by the Amendment and Validation Act of 1997, was enacted on the strength of Entry 56 of List II of the Seventh Schedule of the Constitution of India, which pertains to “taxes on goods and passengers carried by road and inland water ways.”

With the aforesaid submissions, it was prayed that the present appeals be dismissed as being devoid of merit and the impugned orders of the High Court, be affirmed.

***Points for Consideration:***

6. Having heard learned counsel for the respective parties and on perusal of the material on record, the following points would emerge for our consideration:

- i. Whether, by enacting the Amendment and Validation Act of 1997, the Himachal Pradesh State Legislature had validly removed the basis of the judgment of the Division Bench of the High Court dated 27 March, 1997, whereby the Act of 1955 had been held not to include within its scope the activity of the appellants of providing *gratis* transport facilities for their employees and their children?
- ii. Whether the activity of the appellants of providing *gratis* transport facilities for their employees and their children, would now be a taxable activity under Section 3(1-A) of the Amendment and Validation Act of 1997?

- iii. Whether the impugned judgment of the High Court calls for any interference?
- iv. What order?

***Legal Framework:***

7. Before proceeding further, it would be useful to refer to the legal framework relevant to the issues which arise in these appeals. Entry 56 List II of the Seventh Schedule of the Constitution of India reads thus:

**“56.** Taxes on goods and passengers carried by road or on inland waterways.”

7.1. The preamble of the Act of 1955 indicates that it is an Act to provide for levying a tax on passengers and goods carried by road in ‘certain’ motor vehicles. Section 2(e) defined ‘motor vehicle’ as any transport vehicle, including a motor vehicle used for carrying passengers or goods, for hire or reward even in contravention of the provisions of the MV Act. Section 2 (aa) of the Act of 1955 defined ‘business’ to mean the business of carrying passengers and goods by motor vehicles. Section 2 (g) defined ‘passenger’ to mean any person travelling in a motor vehicle, but did not include the driver or conductor or any employee of the owner of the vehicle travelling in bona fide discharge of his duties in connection with the vehicle. The term ‘owner’ was defined under Section 2 (f) to mean the owner of the motor vehicle in respect of which a permit had been granted or countersigned under the provisions of the Motor Vehicles Act, 1939.

7.2. Section 3 (1) which was and still is the charging provision provided that a tax shall be levied and charged by the State Government on all fares and freights in respect of all passengers carried and goods transported by motor vehicles, at such rates not exceeding one-sixth of the value of the fare or freight, as the Government may, by notification, direct. The charging provision contained an Explanation which read as under:

“When passengers are carried and goods are transported by a motor vehicle, and no fare or freight, whether chargeable or not, has been charged the tax shall be leviable and paid as if such passengers were carried or goods were transported at the normal rate prevalent on the route.”

7.3. Section 2(c) provided an inclusive definition of the term ‘fare’ which would include sums payable for a season ticket or in respect of a contract carriage.

7.4. It was primarily the aforesaid provisions of the Act of 1955 that formed the subject of interpretation by the Division Bench of the High Court in Writ Petition No.1733 of 1995, which was allowed by the judgment dated 27 March, 1997 as per the reasons indicated above.

8. With a view to bring the employees of the appellants and their children, travelling in the buses of the appellants without payment of fare within the tax net under the Act of 1955 and also to validate the collection of tax already made thereunder, the Amendment and Validation Act of 1997 was enacted by the Himachal Pradesh Legislative Assembly. By way of the Amendment and Validation Act of 1997, amendments were brought about to the Preamble and various provisions of the Act of 1955 with retrospective effect, viz. date of enforcement of the Act of 1955. The amendments brought about, which are relevant for the purpose of deciding these appeals are as under:

- i. The preamble, as amended states that it is an Act to provide for levying a tax on passengers and goods carried by road in motor vehicles. The word ‘certain’ which earlier preceded the term ‘motor vehicle’ has been deleted by way of the Amendment and Validation Act of 1997.
- ii. The definition of ‘business’ has been amended and it now includes, besides the business of carrying passengers and goods by motor vehicles, any trade, commerce or manufacture, or any adventure or concern whether or not the same is carried on with a profit motive; and any transaction in connection with, incidental or ancillary to such trade, commerce or manufacture.
- iii. The definition of ‘fare’ was amended to include sums fixed by the competent authority under the MV Act for hire of motor vehicle for carriage of passengers and transport of goods; sums payable for a season ticket; and where no such fare has been paid, includes the sums specified under Schedule I.

- iv. The term ‘owner’ has been defined to mean owner of the motor vehicle used for carrying passengers or transporting goods in or through the territory of the State of Himachal Pradesh.
- v. The following provisions defining the terms ‘private service vehicle’, ‘road’, and ‘transport vehicle’ were introduced by way of the Amendment and Validation Act of 1997:

**“2(gb) “private service vehicle”** means a motor vehicle constructed or adapted to carry more than six persons excluding the driver and ordinarily used by or on behalf of the owner of such vehicle for the purpose of carrying persons for, or in connection with his trade or business;”

**“2(gc) “road”** means a track for travel or transportation to and fro, serving as a means of communication, between two places;”

**“2(ia) “transport vehicle”** means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle;”

- vi. Sub-section (IA) has been added to Section 3 of the Act of 1955 and the Explanation to Section 3 (1) has been deleted. Section 3(1A) provides that notwithstanding anything contained in sub-section (1) of Section 3, when passengers are carried and goods are transported by a motor vehicle and no fare or freight, whether chargeable or not, has been charged or fare or freight has been charged at a concessional rate, the tax at the rates directed by Notification issued by the Government under sub-section (1), shall be levied, charged and paid as if the passengers were carried or goods were transported, either on fares or freights fixed by the competent authority, under the MV Act, for different classes of roads and motor vehicles in the State; or on fares and freights specified in Schedule I to the Act for different classes of roads and motor vehicles, whichever is higher.
- vii. Section 9 has been inserted, which provides for validation of assessments made under the Act of 1955.
- viii. Schedule I has been added to the Act, which stipulates the fares on which tax would be leviable, for different categories of motor vehicles and class of roads.



9. For easy reference, as submitted by Sri Yashraj Singh Deora, learned counsel, a comparative table of the relevant provisions of the Act of 1955 and the amendments introduced to such provisions, by way of the Amendment and Validation Act of 1997, is provided hereinunder:

<b><i>Parameters</i></b>	<b><i>The Himachal Pradesh Passengers and Goods Taxation Act, 1955</i></b>	<b><i>The Himachal Pradesh Passengers and Goods Taxation (Amendment and Validation) Act, 1997</i></b>
<b><i>Preamble</i></b>	An Act to provide for levying a <u>tax on passengers and goods carried by road in certain motor vehicles.</u>	An Act to provide for levying a <u>tax on passengers and goods carried by road in motor vehicles.</u>
<b><i>Definition of the term 'business'</i></b>	<u>2(a) "business" means the business of carrying passengers and goods by motor vehicles.</u>	<u>2[(aa) "business" includes:-</u> <u>i. The business of carrying passengers and goods by motor vehicles;</u> <u>ii. Any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce, or manufacture whether or not such trade, commerce manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern; and</u> <u>iii. Any transaction in connection with, or incidental or ancillary to, such trade, Commerce, manufacture, adventure or concern.</u>

<b><i>Definition of the term 'fare'</i></b>	<b><u>2(c) "fare"</u></b> includes sums payable for a season ticket or in respect of the hire of a contract carriage;	<b><u>2(c) "fare" or "freight includes sums fixed by the competent authority under the Motor Vehicles Act for the hire of motor vehicles for carriage of passengers and the transport of goods therein</u></b> and includes the sum payable for a season ticket, and where no such fare or freight has been fixed, <b><u>also includes such sum as specified in Schedule-1:</u></b>
<b><i>Definition of the term 'motor vehicle'</i></b>	<b><u>2(e) "motor vehicle"</u></b> means a public service vehicle or public carrier, or private carrier or a trailer when attached to any such vehicle;	<b><u>2(d) "motor vehicle" means any transport vehicle, which is mechanically propelled and adapted for use upon roads</u></b> whether the power of propulsion is transmitted thereto from an external or internal source, or a trailer when attached to any such vehicle and includes- (i) A motor vehicle used for carriage of passengers or goods or both for hire or reward in contravention of the provisions of the Motor Vehicles Act; and (ii) A maxi cab, which is constructed or adapted to carry more than six passengers, but not more than twelve passengers;] (ea) Motor Vehicles Act" means the Motor Vehicle Act, 1939 (4 of 1939) and the Motor Vehicles Act, 1988 (59 of 1988), as the case may be:]

<p><b>Definition of the term 'owner'</b></p>	<p><u>2(f) "owner" means the owner of the motor vehicle in respect of which a permit has been granted or countersigned under the provisions of the Motor Vehicles Act, 1939 (4 of 1939) and includes (a) the holder of a permit in respect of such vehicle, (b) any person for the time being in charge of such vehicle, (c) any person responsible for the management of the place of business of such owner, (d) Government or a Corporation constituted under the Road Transport Corporations Act, 1950;</u></p>	<p><u>2(f) "owner means" the owner of the motor vehicle used for carrying passengers or transporting goods in or through the territory of the State of Himachal Pradesh, and includes, -</u> (a) The de-facto and de-jure owners; (b) Any person for the time being incharge of such vehicle; (c) any person responsible for the management of the place of business of such owners; (d) The Government or Corporation constituted under the road Transport Corporation Act, 1950 (64 of 1950):</p>
<p><b>Definition of the term 'Private service vehicle'</b></p>	<p>-</p>	<p>(gb) "Private service vehicle" means a motor vehicle constructed or adopted to carry more than six persons excluding the driver, and ordinarily used by or on behalf of the owner of such vehicle for the purpose of carrying persons for, or in connection with, his trade or business;</p>

<b>Definition of the term 'road'</b>	-	(ge) "road" means a track for travel or transportation to and fro, serving as a means of communication, between two places;
<b>Definition of the term 'transport vehicle'</b>	-	(ia) "transport vehicle" means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle;
<b>Charging provision:</b>	<p><b>3. Levy of Tax. – (1)</b> There shall be levied, charged and paid to the State Government a tax on all fares and freights in respect of all passengers carried and goods transported by motor vehicles at such rates not exceeding one sixth of the value of the fare or freight, as the case may be, and as the Government may, by notification, direct, subject to a minimum of five paise in any one case, the amount of tax being calculated to the nearest multiple of five paise by ignoring two paise or less and counting more than two paise as five paise.]</p>	<p><b>3. Levy of Tax.- (1)</b> There shall be levied, charged and paid to the State Government a tax,-</p> <p>(i) On all fares in respect of all passengers carried by motor vehicles at such rates not exceeding fifty percent of the value of freight, and</p> <p>(ii) on all freights in respect of all goods transported by motor vehicles at such rates not exceeding five percent of the value of freight, As the Government may, by notification, direct, subject to a minimum of five paise in any one case, the amount of tax being calculated to the nearest multiple of five paise by ignoring two paise or less and counting more than two paise as five paise.]</p>

	<p><b><u>Explanation:- When passengers are carried and goods are transported by a motor vehicle and no fare or freight, whether chargeable or not has been charged the tax shall be levied and paid as if such passengers were carried or good transported at the normal rate prevalent on the route.</u></b></p> <p>(2) Where any fare or freight charged is a lump sum paid by a person on account of a season ticket or as subscription or contribution for any privilege, right or facility which is combined with the right of such person being carried or his goods transported by a motor vehicle, without any further payment or at a reduced charge, the tax shall be levied on the amount of such lump sum or on such amount as appears to the prescribed authority to be fair and equitable</p>	<p><b><u>(1A) Notwithstanding anything contained in sub-section (1), when passengers are carried and goods are transported by a motor vehicle and-</u></b></p> <p><b><u>i. No fare or freight, whether chargeable or not has been charged, or</u></b></p> <p><b><u>ii. fare or freight has been charged at a concessional rate, The tax at the rates as directed by notification by the Government under sub-section (1), shall be levied, charged and paid as if the passengers were carried or goods were transported either on fares and frights fixed by the competent authority under the Motor Vehicles Act for different classes of roads and motor vehicles in the State or on the fares and freights, for different classes of roads and motor vehicles, specified in Schedule- I to this Act, whichever is higher:</u></b></p> <p><b><u>Provided that the State Government may, by notification, amend Schedule-I, and thereupon the Schedule-1, shall stand amended accordingly:</u></b></p> <p><b><u>Provided further that every notification amending Schedule-1, shall be laid on the Table of the Legislative Assembly.]</u></b></p> <p>(2) Where any fare or fright charged is a lump sum paid by</p>
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	<p>having regard to the fare or freight fixed by a competent authority under the Motor Vehicles Act, 1939.</p> <p>(3) Where passengers are carried or goods transported by a motor vehicle from any place outside the State [or from any place outside the State to any place outside the State but through the State or from any place within the State to any other place within the State but through the intervening territory of another State] to any place within the State, or from any place within the State to any place outside the State the tax shall be payable in respect of the distance covered within the State at the rate laid down in sub-section (1) and shall be calculated on such amount as bears the same proportion to the total fare and freight as the distance covered in the State bears to the</p>	<p>a person on account of a season ticket or as subscription or contribution for any privilege, right or facility which is combined with the right of such person being carried or his goods transported by a motor vehicle, without any further payment or at a reduced charge, the tax shall be levied on the amount of such lump sum or on such amount as appears to the prescribed authority to be fair and equitable having regard to the fare or freight fixed by a competent authority under the Motor Vehicles Act, 4 [1988].</p> <p>(2-A) Where a motor vehicle plies for hire or reward in contravention of the provisions of the Motor Vehicles Act, 1988 the owner of such vehicle shall, without, prejudice to any action which is or may be taken under that Act, be liable to pay tax at the rate specified in sub-section (1) or such amount of fares and freights as may be determined in the prescribed manner by the prescribed authority.]</p> <p>(3) Where passengers are carried or goods transported by a motor vehicle from any place outside the State but through the intervening territory of another State] to any place</p>
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	total distance of the journey.	outside the State the tax shall be payable in respect of the distance covered within the State at the rate laid down in sub-section (1) and shall be calculated on such amount as bears the same proportion to the total fare and freight as the distance covered in the state bears to the total distance of the journey.
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(Underlining by us)

9.1. Apart from the above, the salient Sections to be noticed are Sections 5 to 9 of the Amendment and Validation Act of 1997 which read as under:

“5. In Section 3A, of the Principal Act, for the words “stage/contract carriage”, the words “transport vehicle, excluding a goods vehicle/ carriage”, shall be substituted.

6. In Section 3B and 21A of the Principal Act, the word “Schedule”, wherever it occurs, the word “Schedule-II” shall be substituted.

7. The existing “SCHEDULE” to the Principal Act shall be re-numbered as “SCHEDULE-II and before the “SCHEDULE-II” so re-numbered, the following “SCHEDULE-I” shall be inserted namely:-  
(not typed in the Paperbook)

\*      \*      \*      \*      \*      \*      \*

8. The amendments to the Principal Act, made by Sections 2, 3, 4, 5, 6 and 7 of the Act shall and shall always be deemed to have been made retrospectively from the date of the commencement of the Principal Act.

9. (1) Notwithstanding anything contained in any judgment, decree, or order of any court or other authority to the contrary, any assessment, levy, charge or payment of any tax on passengers and goods carried to have been made or any action taken or anything done under the provisions of the Principal Act at any time on or after

the commencement of the Act, but before the commencement of the Himachal Pradesh Passengers and Goods Taxation (Amendment and Validation) Act, 1997 (hereinafter referred to as this 'Act'), shall be deemed to be a valid action or thing had been made, taken or done under the provisions of the said Act as amended by this Act and accordingly-

i) the aforesaid tax assessed, levied, charged, paid or collected or purporting to have been assessed, levied, charged, paid or collected under the provisions of the said Act, before the commencement of this Act shall be deemed to be and always be deemed to have been validly assessed, levied, charged, paid or collected in accordance with law:

(ii) no suit or other proceeding shall be maintained or continued in any court or before any authority for the refund of, and no enforcement shall be made by any court or authority of any decree or order directing the refund of any such aforesaid tax, which has been collected;

(iii) recoveries, if any, shall be made in accordance with the provision of the said act of all amounts which would have been collected thereunder as such aforesaid tax if this Act had been in force at all material times; and

(iv) anything done or any action taken (including any rule or order made, notification issued or direction given or exemption granted or penalty imposed) under the said Act before the commencement of this Act shall be deemed always to have been validly done or taken in accordance with this Act.

(2) For the removal of doubts, it is hereby declared that-

(a) nothing in sub-section (1) shall be construed in preventing any person-

(i) from questioning, in accordance with the provisions of this Act, the assessment, levy, charge, payment or collection of the aforesaid tax; or

(ii) from claiming refund of the aforesaid tax paid by him in excess of the amount due from him under this act; and



(b) no act or omission on the part of any person, before the commencement of this act, shall be punishable as an offence which would not have been so punishable as if this Act had not come into force.”

***Analysis:***

*“It is when things go wrong that the retroactive validating statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about and pick up the pieces.”*

- Lon Fuller, The Morality of Law (1960).

10. Since these appeals concern, inter-alia, the issue, as to, whether, by enacting the Amendment and Validation Act of 1997, the Himachal Pradesh State Legislature has validly removed the basis of the judgment of the Division Bench of the High Court dated 27 March, 1997, it would be useful to discuss the law on the adoption of the legislative device of abrogation, to remove the basis of a judgment of a Court in a legislation.

10.1. In the following decisions, this Court has laid down the law with regard to the permissible extent and manner of removing the material basis of a judgment, by correcting the anomalies pointed out by a Court in a legislation:

- i. In *M/s. Tirath Ram Rajendra Nath, Lucknow vs. State of Uttar Pradesh, A.I.R. 1973 SC 405*, this Court held that there is a distinction between encroachment on the judicial power and nullification of the effect of a judicial decision by changing the law retrospectively. The former is outside the competence of the legislature but the latter is within its permissible limits. In that case, the U.P. Sales Tax Act (Amendment and Validation) Act, 1970 was upheld by this Court.
- ii. In *Hindustan Gum and Chemicals Ltd. vs. State of Haryana, (1985) 4 SCC 124*, this Court held that it is permissible for a competent legislature to overcome the effect of a decision of a court setting aside the imposition of a tax by passing a suitable Legislation, by amending the relevant provisions of the statute

concerned with retrospective effect, thus taking away the basis on which the decision of the court has been rendered and by enacting an appropriate provision validating the levy and collection of tax made before the decision in question was rendered. In that decision, reliance was placed on *Shri Prithvi Cotton Mills Ltd. vs. Broach Borough Municipality*, A.I.R 1970 SC 192, a Constitution Bench decision of this Court, which has laid down the requirements which a validating law should satisfy in order to validate the levy and collection of a tax which has been declared earlier by a court as illegal. The relevant portion of the said judgment reads as under:

“When a Legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court’s decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which the

tax was collected and by legislative fiat makes the new meaning binding upon courts. The Legislature may follow any one method or all of them and while it does so it may neutralize the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the Legislature and legal and adequate to attain the object of validation. If the Legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a validating law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax.”

- iii. In the case of *Indian Aluminium Company Co. vs. State of Kerala, A.I.R 1996 SC 1431*, the principles regarding the abrogation of a judgment of a court of law by a subsequent legislation were culled out in the following words:

“56. From a resume of the above decisions the following salient principles would emerge:

- (1) The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transaction and require the court to give effect to them;
- (2) The Constitution has delineated delicate balance in the exercise of the sovereign power by the Legislature, Executive and Judiciary;
- (3) In a democracy governed by rule of law, the Legislature exercises the power under Articles 245 and 246 and other companion Articles read with the entries in the respective Lists in the Seventh Schedule to make the law which includes power to amend the law.
- (4) The Court, therefore, need to carefully scan the law to find out:
  - (a) whether the vice pointed out by the Court and invalidity suffered by previous law is cured complying with the legal and constitutional

requirements; (b) whether the Legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution.

(5) The Court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the Legislature. Therefore, they are not the encroachment on judicial power.

(6) In exercising legislative power, the Legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the Court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date.

(7) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the Legislature must have competence to do the same.”

In the aforesaid case, the issue that arose for consideration was as to the *vires* of Section 11 of the Kerala Electricity Surcharge (Levy and Collection) Act, 1989. It was observed that the said provision was valid and not an incursion on judicial power, notwithstanding the fact that the effect of Section 11 was to validate collection of tax made under an invalid law.

- iv. A Constitution Bench of this Court in *State of Tamil Nadu vs. Arooran Sugars Ltd., (1997) 1 SCC 326*, summarised the law on the legislative device of abrogation, to remove the basis of a judicial pronouncement in the following words:

“30. From the aforesaid authorities, it is settled that there is a demarcation between legislative and judicial functions predicated on the theory of separation of powers. The legislature has the power to enact laws including the power to retrospectively amend laws and thereby remove causes of ineffectiveness or invalidity. When a law is enacted with retrospective effect, it is not considered as an encroachment upon judicial power when the legislature does not directly overrule or reverse a judicial dictum. The legislature cannot, by way of an enactment, declare a decision of the court as erroneous or a nullity, but can amend the statute or the provision so as to make it applicable to the past. The legislature has the power to rectify, through an amendment, a defect in law noticed in the enactment and even highlighted in the decision of the court. This plenary power to bring the statute in conformity with the legislative intent and correct the flaw pointed out by the court can have a curative and neutralizing effect. When such a correction is made, the purpose behind the same is not to overrule the decision of the court or encroach upon the judicial turf, but simply enact a fresh law with retrospective effect to alter the foundation and meaning of the legislation and to remove the base on which the judgment is founded. This does not amount to statutory overruling by the legislature. In this manner, the earlier decision of the court becomes non-existent and unenforceable for interpretation of the new legislation. No doubt, the new legislation can be tested and challenged on its own merits and on the question whether the legislature possesses the competence to legislate on the subject matter in question, but not on the ground of over-reach or colourable legislation.”

- v. In *Bakhtawar Trust vs. M.D. Narayan*, (2003) 5 SCC 298, this Court observed as under while laying down a three-pronged test to determine the vires of a validating Act:

“14. The validity of any statute may be assailed on the ground that it is ultra vires the legislative competence of the legislature which enacted it or it is violative of Part III or any other provision of the Constitution. It is well settled that Parliament and State

Legislatures have plenary powers of legislation within the fields assigned to them and subject to some constitutional limitations, can legislate prospectively as well as retrospectively. This power to make retrospective legislation enables the legislature to validate prior executive and legislative Acts retrospectively after curing the defects that led to their invalidation and thus makes ineffective judgments of competent courts declaring the invalidity. It is also well settled that a validating Act may even make ineffective judgments and orders of competent courts provided it, by retrospective legislation, removes the cause of invalidity or the basis that had led to those decisions.

15. The test of judging the validity of the amending and validating Act is, whether the legislature enacting the validating Act has competence over the subject-matter; whether by validation, the said legislature has removed the defect which the court had found in the previous laws; and whether the validating law is consistent with the provisions of Part III of the Constitution.”

- vi. In *Cheviti Venkanna Yadav vs. State of Telangana*, (2017) 1 SCC 283, this Court considered a question relating to the validity of an amendment with retrospective effect after a provision of the Act was struck down by the Court- When does it not amount to the statutory overruling of a judgment by the legislature? This Court held that the legislature has the power to legislate including the power to retrospectively amend laws, thereby removing causes of ineffectiveness or invalidity of laws. Further, when such correction is made, the purpose behind the same is not to overrule the decision of the court or encroach upon the judicial turf, but simply enact a fresh law with retrospective effect to alter the foundation and meaning of the legislation and to remove the base on which the judgment is founded. The order of the High Court, inter alia, holding that the amended provisions did not usurp the judicial power was upheld.
- vii. In *Madras Bar Association vs. Union of India*, (2022) 12 SCC 455, L. Nageswara Rao J., speaking for the majority (2:1) laid down the following principles, as regards the permissibility of abrogation, to remove the basis of a judgment:

“43. The permissibility of a legislative override in this country should be in accordance with the principles laid down by this Court in the aforementioned as well as other judgments, which have been culled out as under:

a) The effect of the judgments of the Court can be nullified by a legislative act removing the basis of the judgment. Such law can be retrospective. Retrospective amendment should be reasonable and not arbitrary and must not be violative of the fundamental rights guaranteed under the Constitution. (*Lohia Machines Ltd. and Anr. v. Union of India and Ors.*, (1985) 2 SCC 1987).

b) The test for determining the validity of a validating legislation is that the judgment pointing out the defect would not have been passed, if the altered position as sought to be brought in by the validating statute existed before the Court at the time of rendering its judgment. In other words, the defect pointed out should have been cured such that the basis of the judgment pointing out the defect is removed.

c) Nullification of mandamus by an enactment would be impermissible legislative exercise (See: *S.R. Bhagwat and Ors. v. State of Mysore*, (1995) 6 SCC 16). Even interim directions cannot be reversed by a legislative veto (See: *Cauvery Water Disputes Tribunal, 1993 Supp (1) SCC 96 and Medical Council of India v. State of Kerala and Ors.*, (2019) 13 SCC 185).

d) Transgression of constitutional limitations and intrusion into the judicial power by the legislature is violative of the principle of separation of powers, the Rule of law and of Article 14 of the Constitution of India.”

viii. In a recent judgment of this Court in the case of ***Dr. Jaya Thakur vs. Union of India***, 2023 SCC OnLine SC 813, this Court held that a writ of mandamus could not be nullified by a subsequent legislation made by the legislator. That a binding judicial pronouncement between the parties cannot be made ineffective with the aid of any legislative power by enacting a provision which in substance simply overrules a judgment unless the foundation of the judgment is removed. Referring to

several judgments of this court on the Doctrine of Abrogation, the following principles as to the manner in which the device of abrogation could be employed, were identified as under:

“It could, thus, clearly be seen that this Court has held that the effect of the judgments of this Court can nullified by a legislative act removing the basis of the judgment. It has further been held that such law can be retrospective. It has, however, been held that retrospective amendment should be reasonable and not arbitrary and must not be violative of the fundamental rights guaranteed under the Constitution. It has been held that the defect pointed out should have been cured such that the basis of the judgment pointing out the defect is removed. This Court has, however, clearly held that nullification of mandamus by an enactment would be impermissible legislative exercise. This Court has further held that transgression of constitutional limitations and intrusion into the judicial power by the legislature is violative of the principle of separation of powers, the rule of law and of Article 14 of the Constitution of India.”

11. What follows from the aforesaid judicial precedent is, a legislature cannot directly set aside a judicial decision. However, when a competent legislature retrospectively removes the substratum or foundation of a judgment to make the decision ineffective, the same is a valid legislative exercise provided it does not transgress on any other constitutional limitation. Such a legislative device which removes the vice in the previous legislation which has been declared unconstitutional is not considered to be an encroachment on judicial power but an instance of abrogation recognised under the Constitution of India. The decisions referred to above, manifestly show that it is open to the legislature to alter the law retrospectively, provided the alteration is made in such a manner that it would no more be possible for the Court to arrive at the same verdict. In other words, the very premise of the earlier judgment should be removed, thereby resulting in a fundamental change of the circumstances upon which it was founded.

12. The power of a legislature to legislate within its field, both prospectively and to a permissible extent, retrospectively, cannot be interfered with by Courts provided it is in accordance with the Constitution.



It would be permissible for the legislature to remove a defect in an earlier legislation, as pointed out by a constitutional court in exercise of its powers by way of judicial review. This defect can be removed both prospectively and retrospectively by a legislative process and previous actions can also be validated. However, where a legislature merely seeks to validate the acts carried out under a previous legislation which has been struck down or rendered inoperative by a Court, by a subsequent legislation without curing the defects in such legislation, the subsequent legislation would also be *ultra-vires*. Such instances would amount to an attempt to ‘legislatively overrule’ a Court’s judgment by a legislative fiat, and would therefore be illegal and a colourable legislation.

13. At this juncture, we must highlight that separation of powers, as crystallised under the Indian Constitution, is characterised by division of power and functions between the legislature, executive and the judiciary, which are the three co-equal organs of the State. The doctrine also necessarily postulates that each institution has some power to regulate the functions of the others; this is in the form of the ancillary principle of “checks and balances.” The role of the judiciary in galvanising our constitutional machinery characterised by institutional checks and balances, lies in recognising that while due deference must be shown to the powers and actions of the other two branches of the government, the power of judicial review may be exercised to restrain unconstitutional and arbitrary exercise of power by the legislature and executive organs. The power of judicial review is a part of the basic feature of our Constitution which is premised on the rule of law. Unless a judgment has been set aside by a competent court in an appropriate proceeding, finality and binding nature of a judgment are essential facets of the rule of law informing the power of judicial review. In that context, we observe that while it may be open to the legislature to alter the law retrospectively, so as to remove the basis of a judgment declaring such law to be invalid, it is essential that the alteration is made only so as to bring the law in line with the decision of the Court. The defects in the legislation, as it stood before the Amendment and Validation Act of 1997 was enacted, must be cured by way of the amendments introduced retrospectively. Simply setting at naught a decision of a court without removing the defects pointed out in the said decision, would sound the death knell for the rule of law. The rule of law would cease to have any meaning if the legislature

is at liberty to defy a judgment of a court by simply passing a validating legislation, without removing the defects forming the substratum of the judgment by use of a *non-obstante* clause as a technique to do so.

14. The legislative device of abrogation by enacting retrospective amendments to a legislation, as a means to remove the basis of a judgment and validate the legislation set aside or declared inoperative by a Court, must be employed only with a view to bring the law in line with the judicial pronouncement. Abrogation is not a device to circumvent any and all unfavourable judicial decisions. If enacted solely with the intention to defy judicial pronouncement, such an amendment Act may be declared to be *ultra-vires* and as a piece of ‘colourable legislation.’ The device of abrogation, by way of introducing retrospective amendments to remove the basis of a judgment, may be employed when a legislature is under the *bonafide* belief that a defect that crept into the legislation as it initially stood, may be remedied by abrogation. An act of abrogation is permissible only in the interests of justice, effectiveness and good governance, and not to serve the oblique agenda of defying a court’s order, or stripping it of its binding nature.

15. The Constitution of India precludes any interference by the legislature with the administration of justice and judicial determination of the validity of a legislation. The power of abrogation is to be exercised in the light of the said Constitutional mandate. The legislative device of abrogation must be in accordance with the following principles which are not exhaustive:

- i. There is no legal impediment to enacting a law to validate a legislation which has been held by a court to be invalid, provided, such a law removes the basis of the judgment of the court, by curing the defects of the legislation as it stood before the amendment.
- ii. The validating legislation may be retrospective. It must have the effect that the judgment pointing out the defect would not have been passed, if the altered position as sought to be brought in by the validating statute existed before the court at the time of rendering its judgment.

- iii. Retrospective amendment should be reasonable and not arbitrary and must not be violative of any Constitutional limitations.
- iv. Setting at naught a decision of a court without removing the defect pointed out in the said decision is opposed to the rule of law and the scheme of separation of powers under the Constitution of India.
- v. Abrogation is not a device to circumvent an unfavourable judicial decision. If enacted solely with the intention to defy a judicial pronouncement, an Amendment and Validation Act of 1997 may be declared as *ultra-vires*.

***Validity of the Act of 1955 as amended by the Amendment and Validation Act of 1997:***

16. We shall now proceed to consider the issue as to validity of the Act of 1955 as amended by the Amendment and Validation Act of 1997, in light of the principles and case law discussed hereinabove. For the purpose of carrying out such an exercise, it is necessary to first, identify the defects pointed out by the High Court in its judgment dated 27 March, 1997, whereby the Act of 1955 had been held not to include within its scope the activity of the appellants of providing transport facilities for their employees and their children, as the charging provision contained therein, i.e., Section 3 (1) and the Explanation thereto was couched in ambiguous terms.

16.1. The defects identified by the High Court in its judgment dated 27 March, 1997 are as under:

- i. The High Court observed that the levy of tax on passengers was only on certain motor vehicles and the provisions of the Act were not applicable to entities, such as, appellants herein. This was on a reading of a definition of ‘motor vehicle’ and ‘owner’ as found in the Act of 1955. Further, the definitions of ‘motor vehicle’ as well as the definition of ‘passenger’ were restricted as a result, the buses owned by the appellants used for carriage of the appellant’s employees and their children gratis were not covered within the charging section. Also, the definition of ‘transport vehicle’ was restricted.

- ii. Explanation to Section 3 (1) of the Act of 1955 introduced a legal fiction requiring assessments to be made on the assumption that even passengers who did not pay a fare, were being carried at the ‘normal rate’ chargeable on the concerned route. There was no definition of ‘route’ for the purposes of the Act and the definition of ‘route’ under the MV Act could not be referred to as the routes on which the appellant’s buses plied were not ‘routes’ in the sense defined under the MV Act. Hence, ‘route’ could not be equated to any ‘road’ so as to hold the appellant-assessee liable to pay tax under the Act of 1955. That for charging tax, by invoking the Explanation to Section 3(1), routes were required to be prescribed, but since no routes had been prescribed, the Explanation could not come to the rescue of the respondent Authorities.
- iii. In the absence of any prescription as to what the ‘normal rate’ would be, the Respondent Authorities could not have levied tax on the appellant based on artificial assumptions. There was no basis to warrant the Authorities from taking into account the fare payable in the adjoining areas, in calculating the ‘normal rate.’
- iv. The charging provision could not be given effect to unless the terms ‘route’ and ‘normal rate’ had been expressly and unambiguously defined.
- v. The term ‘business’ was defined in a narrow manner in the Act of 1955 and meant the business of carriage of passengers and goods. Therefore, when the definition of the term ‘business’ was read into the charging provision, the inference was that those who were not in the business of carrying passengers and goods, would not be covered by the charging provision.
- vi. Intention of the legislature was to make the Act of 1955 applicable only to persons who carried on the business of transport. The definition of ‘owner’ would fortify such finding, as ‘owner’ was defined to be a person holding a permit under the Motor Vehicles Act.

16.2. Having identified the basis for the finding of the Division Bench of the High Court that the Act of 1955 was inapplicable to the

appellants herein, we shall now proceed to determine whether such basis has been removed by curing the defects listed hereinabove, by introducing the Amendment and Validation Act of 1997. For this purpose, a tabular representation of the defects pointed out by the High Court and details of the corresponding provision(s) enacted/amendment introduced to remove the defects, is as hereinunder:

<i><b>Sl. No.</b></i>	<i><b>Defects identified in the Act of 1955 by the Division Bench of the High Court in the judgment dated 27 March, 1997.</b></i>	<i><b>Details of the corresponding provision(s) enacted/amendment introduced by the Amendment and Validation Act to remove the defects.</b></i>
1.	The term ' <i>business</i> ' was defined in a narrow manner in the Act of 1955 and meant the business of carriage of passengers and goods.	The definition of ' <i>business</i> ' has been enlarged by way of the Amendment and Validation Act and it now includes, besides the business of carrying passengers and goods by motor vehicles, any trade, commerce or manufacture, or any adventure or concern whether or not the same is carried on with a profit motive; and any transaction in connection with, incidental or ancillary to such trade, commerce or manufacture.
2.	The expression ' <i>fare</i> ' included sums payable for a season ticket in respect of the hire of contract carriage. It did not include a case where no fare or freight was charged from a passenger.	In Section 2(c) of the Amendment and Validation Act, fare or freight has been defined to include sums fixed by the competent authority under the Motor Vehicles Act for the hirer of motor vehicles for carriage of passengers and the transport of goods therein and includes sum payable for a season ticket and where no such fare or freight has been fixed, also includes such sum as specified in Schedule I.

3.	The meaning of the word “Motor Vehicle” meant a public service vehicle or public carrier, or private carrier or a trailer when attached to any such vehicle;	The scope of the expression “Motor Vehicle” has been extended to mean any transport vehicle, which is mechanically propelled and adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source, or a trailer when attached to any such vehicle and includes a motor vehicle used for carriage of passengers or goods or both for hire or reward in contravention of the provisions of the Motor Vehicles Act.
4.	The meaning of ‘owner’ was restricted to those persons holding a permit under the Motor Vehicles Act.	The scope of term ‘owner’ has been enlarged to mean the owner of the motor vehicle used for carrying passengers or transporting goods in or through the territory of the State of Himachal Pradesh.
5.	As per the Explanation to Section 3(1) of the Act of 1955, where no fare or freight had been charged, tax was to be levied on the ‘normal rate’ chargeable on a given ‘route.’ However, there was lack of clarity as to the meaning of the terms ‘normal rate’ and ‘route’, as appearing in the charging provision, i.e. Section 3(1) and the Explanation thereto, in the absence of	<p>i. Explanation to Section 3(1) has been deleted and Section 3 (1A) has been inserted, prescribing two alternate methods to notionally determine fares or freights, when the same has not been charged, i.e. by taking into account: (a) fares or freights fixed by the competent authority, under the MV Act, or (b) fares and freights specified in Schedule I to the Act for different classes of roads and motor vehicles. The higher of the two fares is to be adopted in every case.</p> <p>ii. Schedule I to the Amendment and Validation Act prescribes the fare</p>

	definitions in the Act of 1955.	and freight for different categories of motor vehicles, for different roads. iii. Section (2gc) defining the term 'road' has been introduced.
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16.3. It is evident from the table presented hereinabove that the defects identified by the Division Bench of the High Court in the judgment dated 27 March, 1997, forming the basis for its decision to the effect that the provisions of the Act would not be applicable to the assessee-appellants herein, have been cured by the Amendment and Validation Act of 1997. The manner in which the defects have been cured, may be explained as follows:

- i. The High Court had observed that for charging tax, by invoking the Explanation to Section 3(1) of the Act of 1955, the 'normal rate' and 'routes' were required to be prescribed, but since no normal rate or routes had been prescribed, the Explanation could not come to the rescue of the respondent Authorities. This defect has been cured by introducing Section 3(1A) by way of the Amendment and Validation Act of 1997 and omitting the Explanation to Section 3(1). Section 3(1A) seeks to bring non-fare paying passengers at par with fare paying passengers, by prescribing two alternate methods to notionally determine fares or freights, when the same has not been charged, i.e. by taking into account: (a) fares or freights fixed by the competent authority, under the MV Act, or (b) fares and freights specified in Schedule I to the Act for different classes of roads and motor vehicles, the higher of the two fares has to be taken into account in every case. Further, Schedule I introduced by way of the Amendment and Validation Act of 1997 stipulates the freights and fares which would be applicable for different classes of roads and motor vehicles. Section (2gc) defining the term 'road' has also been introduced. Therefore, the vacuum identified by the High Court, which was making the charging provision inoperative qua the appellants, has been removed.
- ii. Another reason given by the Division Bench in the judgment dated 27 March, 1997 for holding that employees of the appellants and

their children were not covered by the Explanation (now deleted by way of the Amendment and Validation Act of 1997) was in relation to the definition of 'business'. 'The term 'business' was defined in a narrow manner in the Act of 1955 and meant the business of carriage of passengers and goods. Therefore, when the definitions of the terms 'motor vehicle' and 'business' were read into the charging provision, the inference would be that those who were not in the business of carrying passengers and goods, would not be covered by the charging provision. This loophole has also been plugged by way of the Amendment and Validation Act of 1997, inasmuch as the definition of 'business' has been enlarged and it now includes, besides the business of carrying passengers and goods by motor vehicles, any trade, commerce or manufacture, or any adventure or concern whether or not the same is carried on with a profit motive; and any transaction in connection with, incidental or ancillary to such trade, commerce or manufacture. 'Business' now means any business, carried on with or without a profit motive, or any ancillary transactions in connection with such business.

- iii. The High Court had further held that the intention of the State legislature was to make the Act of 1955 applicable only to persons who carried on the business of transport. That the definition of 'owner' would fortify such finding, as 'owner' was defined to be a person holding a permit under the Motor Vehicles Act. However, the scope of term 'owner' has been enlarged by way of the Amendment and Validation Act of 1997, to mean the owner of the motor vehicle used for carrying passengers or transporting goods in or through the territory of the State of Himachal Pradesh. Therefore, this defect has also been cured.

16.4. In light of the aforesaid discussion, we hold that by enacting the Amendment and Validation Act of 1997, the Himachal Pradesh State Legislature has validly removed the basis of the judgment of the Division Bench of the High Court dated 27 March, 1997.

17. Sri Yashraj Singh Deora, learned counsel for the appellants in Civil Appeal Nos. 4738-4743 of 2009 and Civil Appeal No. 6931 of 2009



submitted that in order to fall within the meaning of the term 'business' as defined under Section 2 (aa) of the Amendment and Validation Act of 1997, the trade, commerce, or manufacture of the assessee, or, the transactions connected therewith or incidental thereto must have some connection with the business of carrying passengers and goods by road. The main activity of the assessee would not amount to carrying on business, as the same does not relate to the activity of carrying passengers and goods by road. In a case where the main activity does not amount to 'business', then the connected, incidental or ancillary activities would also not amount to 'business' unless an independent intention to conduct business in these connected, incidental or ancillary activities is established by the revenue. In the present case, there is no material to establish that the ancillary activity of providing transport facilities to the employees and the children of the assessee-appellants herein is conducted with an independent intention to conduct business through such activity. Therefore, in the present case, neither the main activity of the appellants, nor the ancillary activity of providing transport facilities to their employees and their children, would amount to 'business' as defined under the Amendment and Validation Act of 1997.

18. We do not find the said argument is acceptable. As observed hereinabove, the amended definition of the term 'business' includes within the scope of the term, not only the business of carrying passengers and goods, but also any other trade, commerce, manufacture or concern, whether or not the same is carried on with a motive to earn profit. Further activities incidental and ancillary to such trade, commerce, manufacture or concern are also included within the ambit of 'business'. As per the amended definition, it is not necessary for either the primary business, trade or manufacture, or the ancillary activity to be related to the business of carrying passengers and goods. That is the very purpose of the amendment. The definition of 'business' as amended has the widest amplitude and includes any trade, commerce, manufacture, adventure or concern.

19. Learned counsel for the appellants have contended that definitions of 'passenger', 'business', 'fare' and 'road' are artificial and unnatural, as also contrary to the purpose and object of the Act and hence, *ultra-vires*. However, no reasons have been cited to demonstrate how the said definitions are artificial. Therefore, we find no merit in the said contention.

20. It is also submitted, with respect to the term ‘passenger’ that fundamentally, ‘passenger’ means a person who travels by paying a fare to the owner or operator of the vehicle, vide *M/s Tata Engineering and Locomotive Co. (supra)*. Therefore, a non-fare paying employee of the operator, or a school going child of such employee, is not a passenger. The said submission would also not come to the aid of the appellants. The meaning of the term ‘passenger’ would have to be gathered in every case, having regard to the definition of the said term in the relevant statute. The decision of this Court in *M/s Tata Engineering and Locomotive Co. (supra)* would be of no assistance to the appellants in this regard, as the said judgment turns on its own facts. In the said case, this Court while referring to the charging provision contained in the Bombay Motor Vehicles (Taxation of Passengers) Act, held that non-fare paying passengers would not fall within the purview of the said Act. The said decision would not be relevant in the facts of the present case, as an interpretation of the charging provision in the Act of 1955 as amended, would not give rise to a conclusion that a non-fare paying employee of the operator, or a school going child of such employee, is not a passenger. The term ‘passenger’, in the present case, has been defined under Section 2(g) of the Act in a broad sense to mean any person travelling in a motor vehicle, but shall not include the driver, conductor, or any employee of the owner of the vehicle travelling in the bonafide discharge of his duties in connection with the vehicle. The only three categories of persons who are excluded from the definition of ‘passenger’ are: (a) driver of the motor vehicle; (b) conductor; and (c) any employee of the owner of the vehicle travelling in the bonafide discharge of his duties in connection with the vehicle. The non-fare paying employees of the appellants and their children, would not fall under any of the said exceptions. Although, some of them are employees of the appellants, they are not travelling in the motor vehicle in discharge of duties “in connection with the vehicle”, their duties may be in connection with various affairs of the appellants, but not “in connection with the vehicle” of the appellants. Hence, ‘passengers’ in this case would include non-fare paying employees of the appellant, or school going children of such employees.

21. We shall now proceed to consider and determine the next aspect argued by learned counsel, i.e., with respect to legislative competence of the Himachal Pradesh Legislative Assembly to enact the Act of 1955 and

the Amendment and Validation Act of 1997, which are stated to be enacted on the strength of Article 246, read with Entry 56 of List II of the Seventh Schedule of the Constitution of India. This argument appears to be a formal one as the High Court did not have an occasion to consider the aspect of legislative competence *vis-à-vis* the impugned Act.

22. The import of the Act of 1955, as amended by the Amendment and Validation Act of 1997, could be gathered from the Preamble which provides that it has been enacted to provide for levying a tax on passengers and goods carried by road in motor vehicles. It is therefore clear that tax is sought to be imposed on passengers and goods, carried by road in motor vehicles. It is a no brainer that such a tax falls within the legislative field governed by Entry 56 of List II of the Seventh Schedule of the Constitution, which pertains to “taxes on goods and passengers carried by road and inland water ways.” Simply for the reason that notices have been issued to the owners or assessment orders have been passed against the owners of the vehicles, it cannot be said that the tax is levied on the motor vehicles. If the persons carried happen to be employees of the owners of the buses, such employees should pay the tax. When the employer, i.e., the owner of the vehicle, does not collect the tax from such employees, he should himself pay it, in discharge of the employer’s statutory duty as an agent of the State to collect tax on the basis of the amended provision. Whether to collect the tax payable from the passengers (the employees and their children) or discharge the liability itself is the prerogative of the appellants. The incidence of the tax continues to be on the passengers who travel in the buses or other vehicles of the appellants irrespective of whether they travel *gratis* or are paying any fare. The impact or burden of the tax however, has been assumed by the appellants-employers owing to the fact that they wish to provide free transportation to the employees and their children as a welfare measure. Therefore, we do not find any substance in the contention of the appellants that the tax was sought to be imposed on ‘motor vehicles’ and therefore, the same is outside the legislative competence of the State Legislature for Himachal Pradesh. It is clarified that the tax is on passengers and goods and the same has to be paid by the owners of the motor vehicles whose responsibility it is to pay. Therefore, there is no substance in the argument concerning legislative competence of the State Legislature in enacting the Act of 1955 or the Amendment and Validation Act of 1997.

***Summary of conclusions:***

23. In the result we arrive at the following conclusions:

- i. The Act of 1955, as amended by the Amendment and Validation Act of 1997, is valid. The said Act seeks to impose tax on passengers and goods carried by road in motor vehicles and the Himachal Pradesh Legislative Assembly possessed the legislative competence under Article 246, read with Entry 56 of List II of the Seventh Schedule of the Constitution of India, to enact the Act of 1955 and the Amendment and Validation Act of 1997.
- ii. By enacting the Amendment and Validation Act of 1997, the Himachal Pradesh State Legislature has validly removed the basis of the judgment of the Division Bench of the High Court dated 27 March, 1997, *inter-alia*, by amending the definition of the term ‘business’; defining the terms ‘fare’, ‘freight’ and ‘road’; deleting the Explanation to Section 3(1); and inserting Section 3 (1A) which brought non-fare paying passengers at par with fare-paying passengers for the purpose of levying tax under the Act. Thus, the Amendment and Validation Act of 1997 is a valid piece of Legislation.
- iii. The activity of the appellant in providing gratis transportation to its employees, and their children, would be a taxable activity under Section 3(1-A) of the Amendment and Validation Act of 1997.

24. The next question is with regard to the liability of the appellants to pay the tax under the Act of 1955 as amended by the Amendment and Validation Act of 1997. The Act of 1955 was assailed in W.P.(C)No.1733 of 1995 by the appellants herein. The High Court of Himachal Pradesh by judgment dated 27.03.1997 struck down certain provisions of the Act and held that the Act did not apply to the appellants herein. The Special Leave Petition filed against the said judgment was also dismissed by this Court on 28th July, 1997. Thereafter, the Amendment and Validation Act of 1997 was enacted by the legislature of the State of Himachal Pradesh. The amendments were unsuccessfully challenged by the appellants herein by filing writ petitions before the High Court. The impugned orders of the High Court of Himachal Pradesh were passed in December 2008 and July,

2009. The Special Leave Petitions filed before this Court were converted to Civil Appeals as leave was granted in them. This Court has now upheld the Amendments made to the Act of 1955 by virtue of the Amendment and Validation Act of 1997 and affirmed the judgment of the High Court of Himachal Pradesh. Therefore, the question is from when the appellants herein would have to pay the tax as prior to 1997 they were successful in assailing the Act of 1955 and it was only thereafter that the Amendment and Validation Act of 1997 was passed by the legislature of the State of Himachal Pradesh. That was also challenged by the appellants herein and the controversy has now finally been set at rest. Therefore, the question is, whether, the appellants herein would be liable to pay the tax from the date when the Amendment and Validation Act of 1997 was passed or from any future date?

25. We have considered this question in the light of the fact that the appellants are public sector organisations (and not private operators) who are engaged in transporting their employees and their children to the work sites and to the school and back *gratis* as a facility being provided to them having regard to the location of the work sites in remote hilly terrain and to ensure the safety of the children of the employees of the appellant organisations.

26. As there has been a long passage of time since the enactment of the Amendment and Validation Act of 1997, that is about twenty-six years till date and by now there would have been replacement of the motor vehicles or buses by the appellants and their liability to pay the said taxes, being at large, and now set at rest, we think that, in exercise of our powers under Article 142 of the Constitution, the appellants should be made liable to pay the tax w.e.f. 01.04.2023, the current financial year onwards and not for the period prior thereto. One of the reasons for directing so is by bearing in mind that the affected appellants herein are not private bus operators or stage carriage operators but are public sector units engaged in hydro-power projects and irrigation projects and as a convenience or facility, owning buses for transporting their employees and children of the employees to the work sites and to schools and return to their homes as a facility being provided to them for the reasons narrated above. That apart, we have now held that by enacting the Amendment and Validation Act of 1997, the lacunae pointed out by the High Court vide the judgment and order dated

27 March, 1997 have been removed. Therefore, saddling the appellants with any anterior demand would not be just and proper. We order accordingly. Therefore, while moulding the relief to be given to the appellants herein, only with regard to the period from which the liability to pay tax under the Act of 1955 as amended by the Amendment and Validation Act of 1997, the appeals stand dismissed.

27. In the result, these appeals are dismissed and the final Orders of the Division Bench of the High Court of Himachal Pradesh, dated 11 December, 2008 and 06 May, 2009 whereby the vires of the Act of 1955 as amended from time to time, particularly by the Amendment and Validation Act of 1997 has been upheld and the writ petitions filed by the appellants herein, i.e., Civil Writ Petition Nos. 725 of 1998, 422 of 1998, 401 of 2001, 464-467 of 2001 and 79 of 2007, have been dismissed, are hereby affirmed, subject to what has been clarified in Paragraph 26 above.

Parties to bear their respective costs.

Pending applications, if any, stand disposed of in the aforesaid terms.

Headnotes prepared by:  
Ankit Gyan

Appeals dismissed.