IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 13134 of 2009
With
SPECIAL CIVIL APPLICATION NO. 10903 of 2009

FOR APPROVAL AND SIGNATURE :

HONOURABLE THE ACTING CHIEF JUSTICE
MR. VIJAY MANOHAR SAHAI Sd/-

and

HONOURABLE MR.JUSTICE R.P.DHOLARIA Sd/-

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1.	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2.	To be referred to the Reporter or not ?	**YES**
3.	Whether their Lordships wish to see the fair copy of the judgment ?	**YES**
4.	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	**NO**

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NIKO RESOURCES LIMITED....Petitioner
Versus
UNION OF INDIA & 1....Respondents

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Appearance :

Special Civil Application No.13134 of 2009
MR S N SOPARKAR, SENIOR COUNSEL ASSISTED BY MR TANVISH BHATT FOR M/S WADIA GHANDY & CO, ADVOCATE for the Petitioner.
MR SHAKEEL A QURESHI, CENTRAL GOVERNMENT STANDING COUNSEL for the Respondent No.1.
MR MIHIR JOSHI, SENIOR COUNSEL ASSISTED BY MR NITIN K MEHTA, ADVOCATE for the Respondent No.2.

Special Civil Application No.10903 of 2009
MR S N SOPARKAR, SENIOR COUNSEL ASSISTED BY MRS. SWATI SOPARKAR AND MR. BANDISH S. SOPARKAR, ADVOCATES for the Petitioner.
MR SHAKEEL A QURESHI, CENTRAL GOVERNMENT STANDING COUNSEL for the Respondent No.1.
MR MIHIR JOSHI, SENIOR COUNSEL ASSISTED BY MR SUDHIR MEHTA, ADVOCATE for the Respondent No.2.

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
MR. VIJAY MANOHAR SAHAI
and
HONOURABLE MR.JUSTICE R.P.DHOLARIA

Date : 26/03/2015
COMMON CAV JUDGMENT
(PER : HONOURABLE THE ACTING CHIEF JUSTICE
MR. VIJAY MANOHAR SAHAI)

1. The Petitioner is a foreign company based in Canada and has set up a project office in India with the permission of Reserve Bank of India. The Petitioner is subject to income tax in India in accordance with the provisions of the Income Tax laws in India. The Petitioner is engaged in exploration, development and production of mineral oil and natural gas. The Petitioner has been awarded the right to explore, develop and produce mineral oil in various blocks. For this purpose, the Petitioner has entered into what is known as "Production Sharing Contract" (for short the PSC) with the Government of India for exploration, development and production of "mineral oil". The PSC specifies the area over which the Petitioner has been given such rights. PSC defines the Contract Area as a Block. One such PSC was entered into on 23rd September, 1994 and another on 17th July, 2001 for the exploration, development and production of mineral oil in the Hazira and Surat block respectively. The Petitioner has been producing crude oil and natural gas from such Blocks.

2. The Petitioner has been claiming benefit of deduction of 100% of the profits and gains from the production of mineral oil

and natural gas under Section 80-IB(9) as it stood prior to an amendment to Section 80-IB(9) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') which was introduced by the Finance (No.2) Act 2009. In these proceedings the constitutional validity of the amendment to sub-Section (9) of Section 80-IB and Explanation added to it under the Act by the Finance (No.2) Act, 2009, has been challenged.

3. The relevant portion of the amendment in the present proceedings read as under:-

> "**37. In Section 80-IB of the Income-tax Act**, -
>
> (a) for sub-Section (9), the following sub-Section shall be substituted and shall be deemed to have been substituted with effect from the 1st day of April, 2000, namely :-
>
> '(9) The amount of deduction to an undertaking shall be hundred per cent, of the profits, for a period of seven consecutive assessment years, including the initial assessment year, if such undertaking fulfills any of the following, namely :-
>
> (i) is located in North-Eastern Region and has begun or begins commercial production of mineral oil before the 1st day of April, 1997;
>
> (ii) is located in any part of India and has begun or begins commercial production of mineral oil on or after the 1st day of April, 1997;
>
> (iii) is engaged in refining of mineral oil and begins such refining on or after the 1st day of October, 1998.

Explanation.— For the purposes of claiming deduction under this sub-Section, all blocks licensed under a single contract, which has been awarded under the New Exploration Licensing Policy announced by the Government of India vide Resolution No.O-19018/22/95-ONG.DO.VL dated 10th February. 1999 or has been awarded in pursuance of any law for the time being in force or has been awarded by Central or a State Government in any other manner, shall be treated as a single "undertaking".':

(a) in sub-Section (9), as so substituted, -
(A) in clause (iii), after the words, figures and letters "the 1st day of October, 1998", the words, figures and letters "but not later than the 31st day of March, 2012" shall be inserted;

(B) after clause (iii), the following clause shall be inserted with effect from the 1st day of April, 2010, namely:—

'(iv) is engaged in commercial production of natural gas in blocks licensed under the VIII Round of bidding for award of exploration contracts (hereafter referred to as "NELP-VIII") under the New Exploration Licensing Policy announced by the Government of India vide Resolution No.0-190l8/22/95-ONG.DO.VL dated 10th February, 1999 and begins commercial production of natural gas on or after the 1st day of April, 2009;
(Emphasis supplied by us)

4. We are concerned with the amendments which have been highlighted above. The relevant amendments in question are in two parts.

5. The first part is the insertion of the Explanation to Section 80-IB(9) with retrospective effect from the 1st day of April, 2000. This Explanation seeks to define the meaning of the term "undertaking". This Section provides for deduction, from the gross total income of any assesses, 100% of the profits and gains of an undertaking engaged in commercial production of "mineral oil". This deduction is available to the assessees for a period of seven consecutive assessment years, including the initial assessment year in which an undertaking commences commercial production, provided the undertaking has commenced commercial production of mineral oil on or after 1st April 1997.

6. The second part of the amendment is the introduction of a new sub clause (iv) to Section 80-IB(9) by which the benefits of the deduction under 80-IB(9) have been conferred to persons engaged in commercial production of ''natural gas" In blocks licensed under the VIIIth Round of bidding under the New Exploration and Licensing Policy (NELP) and who begin commercial production of natural gas on or after 1st day of April 2009. This amendment is effective from 1.4.2010 i.e. for

Assessment Year 2010-11 onwards.

7. We shall now deal with the first part of the amendment namely, insertion of the Explanation to Section 80-IB(9) of the Act by Section 37 of the Finance (No.2) Act, 2009.

8. The benefits given in terms of Section 80-IB to persons like the Petitioner were originally covered by Section 80-IA and later on became part of Section 80-IB. A short legislative history of the benefits as were available from time to time as is relevant for the present proceedings is given in the following paragraphs.

9. Section 80-IA as it stood with effect from 1.4.1999 under which the tax benefits were available is reproduced below:-

> "**80-IA(1)** where the gross total income of an assessee includes any profits and gains derived by on any business of an industrial undertaking or a hotel or commercial production or refining of mineral oil in the North-Eastern Region or any part of India on or after 1st day of April 1997 (such business being hereinafter referred to as the eligible business), to which this Section applies, there shall, in accordance with and subject to the provisions of this Section , be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to the percentage specified in sub-Section (5) and for such number of assessment years as is specified in

sub-Section (6)."

"(4E) : This Section applies to any undertaking which begins commercial production or refining of mineral oil in the North-Eastern Region or in any part of India on or after the 1st day of April, 1997:

Provided that the provisions of this Section shall apply in case of refining of mineral oil where the undertaking begins refining on or after the 1st day of October, 1998"

"(5)(v) The amount referred to in sub-Section (i) shall be in the case of undertaking referred to sub-Section (4E) hundred percent of profits and gains derived from such business for the initial seven assessment years."

10. By an amendment in Finance Act, 2001, when the benefit to commercial producers of mineral oil was shifted from Section 80-IA to Section 80-IB and the said Section 80-IB with effect from 1.4.2002, till its amendment by Finance Act, 2008 reads as under :-

"80-IB(1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-Sections (3) to (11).....(such business being herein after referred to as the eligible business), there shall in accordance with and subject to the provision of this Section, be allowed, in computing the total income of the assesses, a deduction from such profits and

gains of an amount equal to such percentage and for such number of assessment years as specified in this Section."

Sub-clause(9) : The amount of deduction to an undertaking which begins commercial production or refining of mineral oil shall be hundred percent of the profits for a period of seven consecutive assessment years, including the initial assessment year:

Provided that where the undertaking is located in North-Eastern.....and where is located in any part of India, it begins commercial production of mineral oil on or after the 1st day of April 1997"

11. Section 80-IB (9) was amended by Finance Act 2008 but that amendment is not relevant for present proceedings.

12. The Section was further amended by Finance (No.2) Act, 2009 with effect from 1.4.2000, and as amended, the said Section reads as under :-

"Sub-clause (9) : The amount of deduction to an undertaking shall be hundred percent of the profits for a period of seven consecutive assessment years, including the initial assessment year, if such undertaking fulfills any of the following, namely:-

(i) is located in North-Eastern Region and has begun or begins commercial production of mineral oil before the 1st day of April 1997;

(ii) is located in any part of India and has begun or begins commercial production of mineral oil on or after the 1st day of April 1997;

(iii) .....

(iv) .....

(v) .....

Explanation :- For the purposes of claiming deduction under this sub-Section, all blocks licensed under a single contract, which has been awarded under the New Exploration Licensing Policy announced by the Government of India vide Resolution No.O-19018/22/95-ONG.DO.VL dated 10th February, 1999 or has been awarded in pursuance of any law for the time being in force or has been awarded by Central or a State Government in any other manner, shall be treated as a single "undertaking"."

13. Paragraph 102 of the Budget speech of the Finance (No.2) Bill, 2009 reads as under :-

"...Further I also propose to retrospectively amend the provisions of the said Section to provide that "undertaking" for the purpose of Section 80-IB(9) will mean all blocks awarded in any single contract."

14. The Memorandum to the Finance (No.2) Bill, 2009, by which the above amendments were introduced reads as under :-

"The term "undertaking" in sub-Section (9) has not been defined. Therefore, in the context of mineral

> oil, the meaning of the term "undertaking" has been the subject matter of considerable dispute. The tax payers have been holding the view that every well in a block licensed constitutes a single "undertaking" and accordingly the tax holiday is available separately for each such well. However, this view is against the legislative intent. Accordingly, it is proposed to amend sub-Section (9) by inserting an Explanation so as to clarify that for the purposes of claiming deduction under sub-Section (9), all blocks licensed under a single contract, which has been awarded under the New Exploration Licensing Policy announced by the Government of India vide Resolution No.O-19018/22/95-ONG.DO.VL dated 10th February, 1999 or has been awarded in pursuance of any law for the time being in force or has been awarded by Central or a State Government in any other manner, shall be treated as a single "undertaking". This amendment is proposed to take retrospective effect from the 1st April, 2000 and will, accordingly, apply in relation to assessment year 2000-2001 and subsequent years. This definition of "undertaking" will be applicable both in relation to mineral oil and natural gas."

15. Notes on clauses to the Finance (No.2) Bill, 2009 provide as under :-

> "It is further proposed to provide by way of an Explanation that for the purposes of claiming deduction under this sub-Section, all blocks licensed under a single contract which is, awarded

> under the New Exploration Licensing Policy announced by the Government of India vide Resolution No.O-19018/22/95-ONG.DO.VL. dated 10th February 1999 or has been awarded in pursuance of any law for the time being in force or has been awarded by the Central or State Government in any other manner, shall be treated as a single ''undertaking". This amendment will take effect retrospectively from 1st April, 2000 and will, accordingly, apply in relation to the assessment year 2000-2001 and subsequent years."

16. Explanation added to Section 80-IB(9) by the Finance (No.2) Act, 2009 (reproduced above) with retrospective effect from 1.4.2000, reads as under :-

> "Explanation :- For the purposes of claiming deduction under this sub-Section, all blocks licensed under a single contract, which has been awarded under the New Exploration Licensing Policy announced by the Government of India vide Resolution No.O-19018/22/95-ONG.DQ.VL dated 10th February, 1999 or has been awarded in pursuance of any law for the time being in force or has been awarded by Central or a State Government in any other manner, shall be treated as a single "undertaking"."

17. At this stage, it would be useful to briefly set out the history of the Government's policy and the tax holidays in regard to production of mineral oil in the country.

(i) Prior to 1999, the Government had a policy with respect to exploration, development and production of mineral oil in the country, when private participation was permitted for the first time under the extant policy.

(ii) It was under this policy that the Petitioner entered into its first PSC on 23rd September 1994 with the Government of India and the benefit of deductions to an undertaking engaged in commercial production of mineral oil in any part of India on or after the 1st day of April 1997 was first introduced by Finance Act 1998 in Section 80-IA of the Act.

(iii) The Government, in order to attract private investments in the mineral oil sector, formulated the New Exploration and Licensing Policy (NELP) which came to be notified in the official gazette on 10th February, 1999. Among other things, the NELP stated that a seven year tax holiday from the date of commencement of commercial production would be available to the contractors under NELP. The NELP also stated that a separate Petroleum Tax Guide would be in place to facilitate the investors.

18. This Petroleum Tax Guide is a compilation of the laws relating to Income Tax, Custom Duties, Central Excise and other laws, as applicable to activities connected with prospecting for or extraction and production of petroleum in the upstream sector under PSC entered into on or after 1st January 1999. The tax guide also provides that in event of inconsistency between this guide and any enactment or rules, the relevant Act or the Rule shall apply. Paragraph 5 of the guide deals with the Income Tax provisions in relation to PSC participants. Sub paragraph 5 (11) reads as under:-

> "Under Section 80-IA of the Income Tax Act, 1961, PSC Participants who begin Commercial Production of Petroleum in any part of India on or after 1st April 1997 shall be entitled to claim deduction of 100% of their profits and gains derived from such business for initial seven years commencing from the first year of Commercial Production.''
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> The term "Commercial Production" is defined as under in the Petroleum Tax Guide :-
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> "Commercial Production" means production of Petroleum (excluding any production for testing purposes) from a field and delivery of the same at the relevant delivery point under a programme of regular production and sale. The date of commencement of commercial production will be the date when commercial production commences from a field and the date of commencement of

commercial production shall be intimated by the contractor to the Government of India in writing."

19. The word "undertaking" has not been defined in either Section 80-IA or Section 80-IB of the Act and the principles and attributes of what constitutes an "undertaking", for the purposes of these Sections have been laid down in a series of judgments of the Apex Court and other High Courts of the country starting from Textile Machinery Corporation Limited, Calcutta v. the Commissioner of Income Tax, West Bengal Calcutta (1997) 2 SCC 368.

20. The Petitioner has treated each well/cluster of wells as an "undertaking" for the purpose of claiming deductions under Section 80-IB(9) of the Act. In the Hazira block, the Petitioner commenced commercial production of mineral oil in some of the wells before 1.4.1997, but in some of the well/cluster of wells, the commercial production commenced after 1.4.1997. On the basis that a well/ cluster of wells is an ‘undertaking’, the Petitioner has claimed the benefits of deduction of the profits and gains from such 'undertakings' which commenced production after 1.4.1997 under Section 80-IB(9). This claim was disallowed by the Assessing Officer for Assessment Year 2001-02 relating to the Hazira block on the ground that since commercial production from the Hazira block (even though from a different well) commenced before 1.4.1997, it

did not satisfy the requirement of Section 80-IB(9). According to the Assessing Officer it is the date of first commercial production from the block, as a whole, was to be considered to determine the entitlement of the benefit under this Section. On appeal by the Petitioner, the Income Tax Appellate Tribunal (hereinafter referred to as 'ITAT'), by its order dated 29th February 2008, held that each well/cluster of wells constituted a separate undertaking and therefore the Petitioner was entitled to a deduction under Section 80-IB(9) in respect of profits derived from each such well/cluster of wells for a period of seven consecutive years from the commencement of the commercial production, in each such undertaking, consisting of a well/cluster of wells. The ITAT thereafter allowed similar claims for the Assessment Years 2000-01, 2002-03 and 2003-04. The Respondent has gone in appeal against the orders of ITAT before this Court, which is pending.

21. Consequent upon the introduction of the Explanation to Section 80-IB(9) by the Finance (No.2) Act, 2009, defining the term "undertaking" to mean "all blocks licensed under single contract" with retrospective effect from 1.4.2000, by an Order dated 7th September 2009, the claim of the Petitioner for the Assessment Year 2006-07 under Section 80-IB(9) was disallowed by the Assessing Officer.

22. The Petitioner challenges the constitutional validity of

the retrospective amendment to Section 80-IB(9) on the ground of it being arbitrary and unreasonable and thus *ultra vires* Article 14 of the Constitution of India as well as on other grounds.

23. We have heard Mr. S.N. Soparkar, learned Senior Counsel assisted by Mr. Tanvish Bhatt, learned counsel appearing for M/s. Wadia Ghandy and Company for the Petitioner in Special Civil Application No.13134 of 2009 with learned counsel Mrs. Swati Soparkar and Mr. Bandish S. Soparkar appearing for Petitioner in Special Civil Application No.10903 of 2009, Mr. Mihir Joshi, learned Senior Counsel assisted by Mr. Nitin K. Mehta appearing for the respondent No.2 in Special Civil Application No.13134 of 2009 with Mr. Sudhir M. Mehta, learned counsel appearing for respondent No.2 in Special Civil Application No.10903 of 2009 and Mr. Shakeel A. Qureshi, learned Central Government Standing Counsel appearing for respondent No.1 in both the writ petitions.

24. Though we have heard both the petitions together, but for convenience, we have treated Special Civil Application No.13134 of 2009 to be the leading writ petition.

25. Mr. S. N. Soparkar, learned Senior Counsel for the Petitioner has contended that this amendment is not merely clarificatory in nature, but is a substantive retrospective amendment and inasmuchas it takes away vested rights, it is

arbitrary and unreasonable and is liable to be struck down as being *ultra vires* to Article 14.

25.1 The other contentions of the learned Senior Counsel for the Petitioner are set forth below.

25.2 According to learned Senior Counsel, the background facts for introduction of the New Exploration Licensing Policy (NELP) was that the ownership of natural resources embedded in the sea bed and ground vests in the State and the policy for exploitation of the said resources was also formulated by the Central Government. In order that the private sector companies are attracted to participate in the exploration, development and production of hydrocarbons, the NELP was notified by the Central Government and it provided certain assurances to the prospective participants. Under the NELP, the Central Government invited offers for exploration of mineral oil for every block and commenced the process of entering into a PSC with the successful bidders who is nomenclature as the contractor under the PSC.

25.3 The learned Senior Counsel drew the attention of the Court to the Notice Inviting Offers under the NELP, where under the heading "Main Features of the Terms Offered", It was stated that "Income Tax Holiday for 7 years from the start of commercial production" will be available and further that "to facilitate

investors, a Petroleum Tax Guide (PTG) is in place". A gas basin comprises of a huge area and each basin may comprise of a number of blocks with delineated areas. Each block may have one or more gas or oil fields where hydrocarbons had been discovered. Every field may have one or more wells, depending on the extent of the mineral oil reserve driven by technical requirements. Once a discovery is announced and declared to be a "commercial discovery", an elaborate process has been laid down in the PSC not only for approving it as a commercial discovery, but right down to the number of wells which the contractor was to drill. For this purpose a separate development plan for development of each field is prepared by the contractor and is approved by a body known as the Management Committee in which the Government has the veto power. He submitted that each of such wells/cluster of wells is a separate and independent undertaking. Moreover, the notice inviting offers and the PSC envisage an exploration period, followed by development and production period. The exploration period is a maximum of 7 years. He further submitted that while the notice inviting offers envisaged production in a phased manner, it is a contradiction to state that the period of 7 years exemption for the entire block, should commence from the time when the first well started commercial production. The learned Senior Counsel further contented that exploration, development and production, are phase-wise for every block and it would not be right to state that the period of seven years for the entire block would commence

from the date of commercial production in the very first well, when the other areas of the block were still under exploration or development phase as stipulated in the PSC. The term undertaking, therefore, cannot be construed to mean the entire block to reckon the period of seven years of the tax holiday.

25.4 According to the learned Senior Counsel various clauses of Petroleum Tax Guide define "Commercial Production" to mean production of petroleum from a field in commercial quantities. Provisions of Act which have been set forth in the Tax Guide and in particular in view of the statement under Section 80-IA of the Act, PSC participants who begin Commercial Production of Petroleum in any part of India on or after 1st April, 1997 shall be entitled to claim deduction of 100% of their profits and gains derived from such businesses for initial seven years commencing from the first year of Commercial Production, the phrase "commercial production" has to be read and understood in the context of the field in respect of which development plan had been approved and not the entire block.

25.5 Reading of various clauses in the PSC clearly demonstrate that the term "undertaking" was never construed to mean the entire block area. Each well/clusters of wells depending upon the Development Plan, approval is a separate and independent undertaking and commercial production from each

such undertaking is under supervision and scrutiny of the Central Government. In this context, the definitions of "Commercial Production", "Contract Area", "Development Area" were stressed to point out that while the Contract Area means the area of the entire Block, the Development Area is a part of the "Contract Area" which may encompass one or more commercial discoveries. The Development Area in a Block can be more than one and each Development Area may be independent and each such area may be identified and developed in phased manner. The definition of the term "Commercial Production" read with the definition of the same word in the Petroleum Tax Guide clearly shows that Commercial Production has to be read in the context of a Field which can be a Development Area. The definition of the term "Development Operations" and "Development Plan" were stressed to point out that there is a separate plan approved by the Management Committee for development of a Commercial Discovery for a Development Area or a Field. It was pointed out that there can be more than one Development Plan for development of a Block and every Development Area or Field which may consist of one well/cluster of wells is a separate and independent undertaking, as this term has been understood both by the Contractor and the Government. Several other definitions such as "Discovery", "Discovery Area", "Exploration Operations", "Exploration Period", "Exploration Phase", "Field", "Production Cost", "Well" were referred to emphasize this point.

25.6 It was further contended that it has been stipulated in the PSC, that the Central Government would closely scrutinize and approve every stage of exploration, development and production of mineral oil. It was pointed out that the Central Government is not only in majority in the Managing Committee under PSC but also has a veto power. The learned counsel pointed out the fact that in the course of development of the Block and in some cases of the field, Development Plans consisting of either a single well/cluster of wells had been approved. Thus, the Central Government has always been aware that there are more than one undertaking in each Block, has acted on this premise in approving more than one Commercial Discovery in each Development Area of a Block and cannot now introduce by retrospective amendment, the concept that an entire Block would be a single undertaking, and that such an amendment is liable to be struck down as unreasonable and arbitrary.

25.7 The learned Senior Counsel for the Petitioner cited various authorities which are for the purposes of the benefits of the Act defining the term "undertaking'" which, go to show that a Development Area or a Field within a Block with a well/cluster of wells can be considered as a separate undertaking.

25.8 In Textile Machinery Corporation Limited, Calcutta v.

Commissioner of Income Tax, West Bengal, Calcutta (1977) 2 SCC 368, the Apex Court has laid down the principles of what constitutes an "undertaking". Manufacture of production of articles yielding additional profits attributable to new outlay of capital is a separate and distinct unit. The fact that an assessee, by establishment of a new industrial undertaking, expands his existing business which he certainly does, would not on that score deprive him of the benefits under Section 15C of the Act. The true test is not whether the new industrial undertaking connotes expansion of the existing business of assessee but whether it is all the same a new and identifiable undertaking separate and distinct from the existing business. An undertaking is formed out of the existing business if the physical identity of the old unit is preserved. The new activity may produce the same commodities of the old business or it may produce some other distinct marketable commodities.

25.9 The Gujarat High Court in Gujarat Alkalies and Chemicals Ltd v. Commissioner of Income Tax 350 ITR 94 (Guj) held that a new unit, even if it derived help from an existing unit and is dependent on the existing undertaking, will not deprive the new undertaking the status of a separate and distinct identity.

25.10 The learned Senior Counsel contended that the introduction of the Explanation in Section 80-IB(9) by Finance (No.2) Act, 2009 with retrospective effect from 1.4.2000 is a

substantive amendment which takes away a vested right of the Petitioner. It is arbitrary, unreasonable and *ultra vires* to Article 14 of the Constitution of India and is liable to be struck down. He further contended that the Explanation has been introduced solely to supersede various judgments of the tribunals/courts which have rightly interpreted and held that a well/cluster of wells is an "undertaking". He contended that the amendment, retrospectively, deprives persons similarly placed as the Petitioners of their legitimate vested rights. An amendment such as this can never be considered clarificatory but is in the nature of an unreasonable substantive retrospective amendment and is liable to be struck down. The Counsel relied upon the following judgments to canvas the contentions raised by him in this regard, According to the learned counsel :-

(i) When a retrospective amendment is arbitrary and unreasonable and imposes a unforeseen financial burden, it is liable to be struck down as violative of Article 14. Three factors determining whether a retrospective amendment is so unreasonable or confiscatory that it violates Article 14 and 19 of the Constitution are (i) the context in which retrospectlvity was contemplated, (ii) the period of such retrospectivity, and (iii) the degree of any unforeseen or unforeseeable financial burden imposed for the past period. Avani Exports v.

Income Tax (2012) 348 ITR 391.

(ii) Only retrospective amendments which are in the nature of a Validating Acts which seek to validate the earlier Acts declared illegal and unconstitutional by the Courts by removing the defect or lacuna and which are not unreasonable and arbitrary are valid and not violative of Article 14 to the extent that such a retrospective amendment which is in the nature of Validating Act is not reasonable and is liable to be struck down. Cawasji & Co. v. State of Mysore 150 ITR 648); Rai Ramakrishna and others v. State of Bihar 50 ITR 171; National Agricultural Co-operative Marketing Federation of India Ltd v. Union of India (2003) 5 SCC 23.

(iii) An Explanation cannot take away a statutory right given to any person under a statute. S. Sundaram Piliai and others v. V. R. Pattabiraman and others (1985) 1 SCC 591.

(iv) An insertion of an Explanation which is really clariflcatory in nature even though retrospective is valid. Katira Construction Limited v. Union of India and others (2013) 352 ITR 513 (Guj).

(v) There should be reasonably and rationale behind retrospective amendment, otherwise liable to be struck down. An action taken by the State cannot be so irrational and so arbitrary so as to introduce one set of rules for one period and another set of rules for another period by amending the law in such a manner as to withdraw the benefit that has been given earlier resulting in higher burden without any reason. Tata Motors v. State of Maharashtra AIR 2004 SC 3618.

(vi) Taxing statute is not immune from challenge under Article 14, State of Kerala v. Haji K. Kutty AIR 1969 SC 378; Ayurveda Pharmacy v. State of Tamil Nadu (1989) 2 SCC 285.

25.11 It was further contended that although included by the amendment as an explanation, the real purport of the amendment was not to explain any provision but to retrospectively amend the statute in a manner so as to take away the rights vested in the Petitioner and subject the Petitioner to financial liabilities which did not exist at the relevant time retrospectively in an arbitrary and unreasonable manner by an amendment which was of a substantive nature.

25.12 It was further contended by the learned Senior counsel that the benefits of deductions under Section 80-IA were expressly made available with effect from 1.4.1999 by amending the then existing Section 80-IA. Later on Section 80-IB(9) was introduced to provide for such benefits. At all times the benefit had been available to an "undertaking". Neither Section 80-IA, Section 80-IB nor the provisions of PSC provided that the "undertaking" would be construed as a whole Block. The meaning of the word "undertaking" was always clear as laid down by catena of judgments including that of the Apex Court. Thus, the Government as well as the Petitioner clearly understood the meaning of the term "undertaking" as essentially an independent economic unit and it was a vested right conferred by the statute. Thus, the law was unambiguous as to the meaning of the word “undertaking”. The amendment is not clarificatory but substantive, which takes away vested rights retrospectively putting additional financial burden on the Petitioner which was not permissible.

25.13 The learned Senior Counsel for the Petitioner fairly conceded that principles of promissory estoppels, equity and Article 19(l)(g) are not applicable to facts of the case of the Petitioner but in a given case in which provisions of Article 19 can be properly invoked, this would be applicable.

26. On the other hand, Mr. Mihir Joshi, learned Senior

Counsel for the Respondent No.2 contended that any legislation cannot be struck down on the basis of Article 14 alone. In this case, there is no vested right whatsoever in the Petitioner and even if the Petitioner had a vested right, it can be taken away by the legislature and the test before the Court can only be whether it is reasonable or not.

26.1 The other contentions of the learned Senior Counsel for the Respondent are set forth below :-

26.2 The Petitioner's contention that assurances have been provided by the Government in the NELP and the Petroleum Tax Guide would be of no assistance to the Petitioner as this do not vest any rights in the Petitioner. The NELP has stated that a tax holiday will be available for a period of seven years from the date of commencement of commercial production. The NELP does not make reference to commercial production from a well or cluster of wells while referring to the tax holiday. The NELP also states the Tax Guide is only to facilitate the investors and states that in case of any inconsistency between the Tax Guide and the provisions of any legislation, the provisions of the relevant Act would prevail. Clause 3 of the NELP states that a Block will be carved out for offering. The Contract Area as defined in the PSC means the entire area of the block and not one or a cluster of wells. The definition of Commercial Production in the PSC is production of crude oil,

condensate or natural gas from the Contract Area. The term "Field" is defined to mean an oil or gas field or a combination of both as the case may be. Therefore, the term “Commercial Production” relates to a field and the Contract Area and not wells. The PSC also states that the companies shall be eligible for benefit under Section 80-IA of the Act, as applicable from time to time. This clearly indicates that the law can be changed at any time and the deductions as per the law as may be amended from time to time only would be available to the Petitioner. Further, Clause 17.10 of the PSC provides that if, due to any change in law dealing with Income Tax or any other tax, which results in a material change to the expected economic benefits accruing to any of the parties after the date of execution of the Contract, the parties shall promptly consult in good faith to make necessary revisions and adjustments to the Contract in order to maintain the expected economic benefit to such affected parties. There, however, has never been any vested right, as is being claimed by the Petitioner. These are no rights vested by a statute. At the best, these can be considered to be contractual rights under a Contract with the Government which can be taken away, modified or withdrawn. Even assuming that such rights are vested in the Petitioner, these rights have not been available and/or have not arisen as yet. The Respondents have not admitted these rights at any time during the assessment proceedings. A vested right can only accrue by an action of any authority in a positive manner or a right acquired by a final

adjudication by a competent court. The only vested right in this case is the benefit conferred by the Section for seven years which has not been taken away.

26.3 The Explanation, according to the learned Senior Counsel, has been inserted by the legislature to resolve a dispute regarding interpretation of a provision of law. An explanation such as this cannot be considered to be unreasonable or *ultra vires*. The Explanation has not modified any charging provision but is a part of the chapter dealing with deductions from profits and gains and was not susceptible to any challenge. The retrospective amendment provides an Explanation which is clarificatory in nature and does not relate to a levy or make a substantive amendment and therefore, there was no question of it being unreasonable.

26.4 The contention of the Petitioner that the Central Government always controlled the exploration, development and production is not correct. The PSC provided discretion to the Petitioner to deal with discoveries, development and working of the Development Area. Under the PSC, the fact that the Petitioner has the right to retain areas rich in mineral oil after the exploration is over is a pointer to the fact that the total area retained by the contractor is an "undertaking" and each well or cluster of wells do not constitute an "undertaking". The learned Senior Counsel contended that the position of the Petitioner with regard to

"undertaking" is not unambiguous since, interchangeably a well and sometimes a cluster of wells has been treated as an undertaking to suit its convenience. The learned Senior Counsel stated that the judgments relied upon by the Petitioner for the meaning of "undertaking" were in relation to industries which were producing goods and these cannot be equated to the facts and circumstances in cases of mineral oil exploration, development and production.

26.5 The learned Senior Counsel for the Respondent has contended that provisions of Article 19(l)(g) are not available to the Petitioner as no citizen of India is a party to the petition.

26.6 The learned Senior Counsel further contended that Article 14 deals only with discrimination and provides for equality before the law. The contentions of the Petitioner with regard to unreasonableness cannot be sustained under Article 14.

27. The learned Senior Counsel for the Respondent further contended as follows:-

> (i) There are established principles while considering the constitutional validity of a statute said to be violative of Article 14. There is presumption in favour of the constitutionality of the

statute. The burden is upon the person who impugnes the provisions to show that there has been a transgression. Law relating to economic activities should be viewed with greater latitude. R. K. Garg v. Union of India (1981) 4 SCC 675.

(ii) Only palpable arbitrariness can be faulted as discriminatory and violative of Article 14. Shashikant Laxman Kale v. Union of India (1990) 4 SCC 366.

(iii) The burden of proving discrimination is more in the case of taxing statutes. Laws relating to economic activities should be viewed with greater latitude than laws touching civil rights. Associated Cement Companies Ltd v. Govt. of AP and another (2006) 1 SCC 597.

(iv) When the assessments have not become final, no right can be said to be vested. Escorts Limited and another v. Union of India (1993) 1 SCC 249.

(v) Clarifications to end a dispute does not give rise to vested interest. WPIL Limited, Ghaziabad v. Commissioner of Central Excise, Meerut, UP (2005)

3 SCC 73.

(vi) Retrospective amendment is possible even in case of pending proceedings. B. P. Krishna Moorthy v. State of Orissa AIR 1964 SC 1581.

(vii) Legislature is empowered to cure the statute and such curative statute is always valid when there is no finality in the judicial procedure. National Agricultural Co-op Marketing Federation of India v. Union of India (2003) 5 SCC 23.

(viii) Even In the case of pending assessment, if the legislature makes explicit what was implicit, then the same is not *ultra vires*. Escorts Limited and another v. Union of India (1993) 1 SCC 249.

(ix) Mere arbitrariness is not sufficient, it requires palpable arbitrariness for the court to intervene. State of Madhya Pradesh v. Rakesh Kohli (2012) 6 SCC 312.

(x) A 'declaratory amendment' in the nature of declaring the meaning of an existing statute does not widen the scope of purview of the existing

provision and therefore is not susceptible to challenge. Commissioner of Income Tax, Bombay v. Podar Cement Pvt. Ltd. and others (1997) 5 SCC 482.

(xi) Retrospectivity is challengeable, only if it is unreasonable i.e confiscatory or extortionate in nature. The Assistant Commissioner of the Urban Land Tax and Others v. The Buckingham and Camatic Co. Ltd. (1969) 2 SCC 55.

(xii) The factors which are generally considered in determining whether a retrospective amendment is so unreasonable or confiscatory that it violates are (i) the context in which retrospectivity is contemplated (ii) the period of such retrospectivity and (iii) the degree of any unforeseen or unforeseeable financial burden imposed for the past period. The period of retrospectivity is irrelevant when the amendment is justified and clarificatory. R.C. Tobacco (P) Ltd. v. Union of India and another (2005) 7 SCC 725.

(xiii) A company does not have fundamental rights. Unreasonableness cannot be challenged

under Article 14 alone. Shree Sidhbaii Steels Limited Vs State of Uttar Pradesh and others (2011) 2 SCC 193.

(xiv) No justification is required to be given by the legislature for enacting a retrospective amendment. Entertainment Tax Officer and another v. Ambae Picture Palace (1994)1 SCC 209.

27.1 It was contended that the amendment is not a colourable exercise of power since the tribunal's judgments are not statutes and the Respondent has preferred appeals in the High Court and the amendment is in the nature of a clarification to a pending dispute.

27.2 He further contended that assuming that the parties agreed to treat each well as an "undertaking'' and the amendment was contrary to the terms of a contract, such as this, even then it would not invalidate the amendment. A contractual vested right cannot be the reason to strike down an amendment to law.

28. On the second issue involved in the petition is whether the term "mineral oil" includes "natural gas", the contention of Mr. S. N. Soparkar, learned Senior Counsel for the Petitioner is that this amendment has the effect of erroneously considering that the

term “mineral oil” does not include natural gas prior to this amendment. This amendment is unreasonable and in any event not in consonance with industry norms and technical realities. The terms "oil and gas" are always used in conjunction. The income Tax Department has interpreted the insertion of sub clause (iv) to Section 80-IB(9) in this manner and has denied the benefit to the Petitioner on this count. If this is the interpretation, this amendment artificially restricts the tax benefit under Section 80-IB(9) of the Act only to commercial production of natural gas in the NELP VIIIth round of bidding as opposed to the position settled by the tribunal in the Petitioner's own case which clarifies that mineral oil as understood always included natural gas. This also creates an anomalous position creating two classes of assessees for the purpose of availing deduction under Section 80-IB(9) i.e., one who is engaged in commercial production of natural gas in Blocks licensed under the VIIIth Round of bidding and begins commercial production of natural gas on or after 1st day of April, 2009 and another who has commenced the commercial production of natural gas in blocks licensed under pre NELP VIII rounds of bidding. Therefore, this amendment is arbitrary and unreasonable and liable to be struck down as being *ultra vires* to Article 14.

29. Mr. Mihir Joshi, learned Senior Counsel appearing for the Respondent No.2, has forcefully submitted that it has been the consistent position of the Revenue that mineral oil does not include

natural gas. He further contended that whenever legislature desired so, it had used the terms mineral oil and natural gas distinct from each other in different provisions in the Act.

30. Learned Central Government Standing counsel for Respondent No.1 Mr. Shakeel A. Qureshi has urged that the impugned amendment made in the Act retrospectively is a valid piece of legislation and does not suffer from any infirmity nor it violates any constitutional provision. The amendment made by Finance (No.2) Act 2009 is liable to be upheld. He further relied on the case laws and arguments of Mr. Mihir Joshi, learned Senior Counsel and has adopted it as part of his argument.

31. We have examined the rival contentions and according to us the following issues fall for consideration in this matter:-

(i) Whether the insertion of the Explanation to Section 80-IB(9) of the Income Tax Act, 1961 by Finance (No.2) Act, 2009 with retrospective effect from 1.4.2000 explaining the meaning of the term "undertaking" is unconstitutional and *ultra vires* to Article 14 of the Constitution of India?

(ii) Whether the insertion of sub clause (iv) in Section 80-IB(9) of the Income Tax Act, 1961, by

Finance (No.2) Act, 2009 conferring the benefit of the deduction under this Section to undertakings engaged in commercial production of natural gas in blocks licensed under VIIIth round of bidding provided such commercial production commenced on or after 1.4.2009 results in denial of the benefit of deduction under 80-IB(9) to undertakings engaged in commercial production of natural gas under contracts entered into prior to NELP VIII on an interpretation thereof that the term "mineral oil" would not include natural gas since the benefit was available only to undertakings engaged in commercial production of "mineral oil" rendered the newly added sub clause (iv) unconstitutional and *ultra vires* Article 14 of the Constitution of India?

(iii) Whether the Petitioner has any accrued or vested right?

Whether the term “mineral oil" would include Gas ?

32. We propose to deal with the second issue first.

33. Before we go into the issue of constitutional validity and vires of the amendments by insertion of sub-clause (iv) to Section 80-IB(9) to the Act, it will be profitable to understand the

meaning and import of the expression "mineral oil". The term “mineral oil" has not been defined under the Act. The Respondent seeks to rely on Explanation to Section 42 which, for the purpose of that Section, explains "mineral oil" as including both, petroleum and natural gas, The Explanation qualifies the applicability only to Section 42 of the Act. It is therefore contended that 'mineral oil" under 80-IB should be so construed so as not to include natural gas and the explanation under Section 42 cannot be looked at in construing the provisions of Section 80-IB.

34. This contention would merit consideration if mineral oil has either been defined under the Act or has acquired a natural, commercial or interpretative meaning so as to exclude natural gas. Section 80-IB(9)(ii) of the Act provides for the same exemption to undertakings located in any part of India which began commercial production of mineral oil on or after 1st April 1997. Apart from use of the term "undertaking", this provision also uses the term "mineral oil". It is necessary to consider the scope and amplitude of these terms in the context of the provisions of Sections 80-IB particularly in view of the fact that while amending the provisions of this Section in the manner aforesaid, Section 80IB(9)(ii) has remained unamended.

35. The question whether natural gas is encompassed in the term “mineral oil" came up for consideration before a

Constitutional Bench of the Apex Court in the case of **Association of Natural Gas and others v. Union of India and others, (2004) 4 SCC 489**. The question arose as to the legislative competence of the State to enact laws on natural gas in terms of Entry 25 of List II of the Seventh Schedule of the Constitution. Union of India contended that the exclusive domain power and competence to legislate on natural gas is available only to the Parliament by virtue of Entry 53 List I of the Seventh Schedule.

35.1 Entry 53 of List I of the Seventh Schedule reads as under:-

> "Regulation and Development of oil fields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable."

35.2 Entry 25 List II reads as follows :-

> "Gas and gas works."

35.3 The State contended that the expression 'gas' in Entry 25 List II takes within its ambit "natural gas", Natural gas is widely used as energy source and State alone would be in a position to exploit the resources and distribute them to the consumer. Natural gas is classified in several broad categories such as wet gas, lean gas, dry gas, sour gas and sweet gas. State also contended that natural gases are not associated with any petroleum products, and

therefore State has the legislative competence to pass legislation in respect of natural gas, as it is not a petroleum gas.

35.4 The Apex Court framed the following question in paragraph 19 of the decision :-

> "The controversy in the instant case could only be resolved by examining the question whether the expression "petroleum and petroleum products", or "mineral oil resources" mentioned in Entry 53 of List I of the Seventh Schedule would take in its compass the natural gas or its derivative forms."

35.5 The relevant portions of this decision is reproduced below:-

> "20. In Kirk-Othomer Encyclopedia of Chemical Technology, (Third Edition), Vol, 11 page 630, 'Natural gas' is defined as a naturally occurring mixture of hydro-carbon and non-hydrocarbon gases found in the porous geologic formations beneath the earth's surface, often in association with petroleum.
>
> 22. Natural gas is found in areas of the earth that are covered with sedimentary rocks. These sediments were first laid down during the Cambrian period, ca 500 million years ago, and this process continued until the end of the Tertiary period ca 100 million years ago. These sediments contain the organic source materials from which natural gas and petroleum were produced. Gas and

petroleum, being less dense than the water present in the rocks, tended to migrate upward until contained under impervious rock barriers.

23. On page 634 of the above Encyclopedia, Natural gas is classified in several broad categories based on the chemical composition, which are; (1) wet gas contains condensable hydrocarbons such as propane, butane, and pentane; (2) lean gas denotes an absence of condensable hydrocarbons; (3) dry gas is a gas whose water content has been reduced by dehydration process; (4) sour gas contains hydrogen sulfide and other sulfur compounds; and (5) sweet gas denotes an absence of hydrogen sulfide and other sulfur compounds. Natural gas sold to the public is described as lean, dry and sweet.

27. In Volume 17 on page 119, it is stated that the term 'petroleum', literally, rock oil, is applied to the deposits of oily material found in the upper strata of the earth's crust. Petroleum was formed by a complex and incompletely understood series of chemical reactions from organic material laid down in previous geological eras. Large deposits have Lean found in widely different parts of the world and their chemical composition varies greatly. Consequently, no single composition of petroleum can be defined. It is not surprising that the composition varies, since the local distribution of plant, animal and marine life is quite varied and, presumably, was similarly varied when the petroleum precursors were formed.

28. As per 'The New Book of Popular Science' Vol. 2, petroleum is an oily, inflammable, liquid made up mostly of hydrocarbons - compounds containing only hydrogen and carbon. The hydrogen content of petroleum ranges from 50 per cent to 98 per cent. The rest is made up chiefly of organic compounds containing oxygen, nitrogen, or sulphur.

29. According to a widely held theory, the remains of countless small marine animals and plants dropped to the ocean bottom and were covered over by mud. Many layers of mud and plant and animal remains accumulated in the course of time. These sediments were subjected to great pressure and heat, and were often squeezed and distorted as the earth's crust moved. Gradually they were converted into layers of sedimentary rock. The plant and animal remains contained within them were transformed into petroleum and natural gas. The details of this transformation are not quite clear.

30. Gas and oil are found in huge subterranean caverns. They both occur in minute pores of such rocks as sandstone and limestone. They are held captive under great pressure by surrounding rock formations that are impervious to seepage. Finally they are released when the shifting of the earth's surface cracks the cap rock."

"31. 'Natural gas' has been defined in the Webster's new 20th Century dictionary, unabridged

second edition, as follows :

"Natural Gas: A mixture of gaseous hydrocarbons, chiefly methane, occurring naturally in the earth in certain place, from which it is piped to cities etc, to be used as a fuel." (p-756).

32. In Ballantine's Law Dictionary, 3rd Edn. 1969, 'Natural Gas' has been defined as "A mineral in the form of a vapor." "A gas characterized by hydrocarbons in mixture, occurring naturally in the crust of the earth, obtained by drilling, and piped to cities and villages, industrial and commercial centers, for use in heating, illumination and other purposes."

"35. All the materials produced before us would only show that the natural gas is a petroleum product. It is also important to note that in various legislations covering the field of petroleum and petroleum products, either the word 'petroleum1 or 'petroleum products' has been defined in an inclusive way, so as to include natural gas. In Encyclopaedia Britannica, 15th Edn. Vol. 19, page 589 (1990), it is stated that "liquid and gaseous hydrocarbons are so intimately associated in nature that it has become customary to shorten the expression 'petroleum and natural gas' to 'petroleum' when referring to both."The word petroleum literally means 'rock oil'. It originated from the Latin term petra-oleum. (petra-means rock or stone and oleum-means oil). Thus, Natural Gas could very well be comprehended within the

expression 'petroleum' or “petroleum product."

"37. A survey of the various legislations on the topic would show that the term 'petroleum' or 'petroleum products' has been given a wide meaning to include natural gas and other similar products.

38. In the Pipelines Act, 1962 of the United Kingdom, 'petroleum' has been defined as follows :-

"Petroleum includes any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in strata, whether or not it has undergone any processing; but does not include coal or bituminous shales or other stratified deposits from which ail can be extracted by destructive distillation."

39. Petroleum has been variously defined in different Acts, noted herein below :-

"Petroleum (Production) Act 1934 (UK) "Petroleum includes any mineral oil or relative hydro-carbon and natural gas existing in its natural condition in strata, but does not include coal or bituminous shales or other shales or other stratified deposits from which oil can be extracted by destructive distillation.

Petroleum Act, 2000 (Sec.4), Australia "Petroleum" means a naturally occurring substance consisting of a hydrocarbon or mixture of hydrocarbons in

gaseous, liquid or solid state but does not include coal or shale unless occurring in circumstances in which the use of techniques for coal seam methane production or in situ gasification would be appropriate."

Liquid Fuel Emergency Act, 1984 (Sec.3) "petroleum" means :-

(a) any naturally occurring hydrocarbon or mixture of hydrocarbons, whether in a gaseous, liquid or solid state; or

(b) any naturally occurring mixture of a hydrocarbon or hydrocarbons and of another substance or other substances, whether in a gaseous, liquid or solid state."

40. The various legislations passed by the Indian Parliament and the relevant rules also would show that 'natural gas' was treated as mineral oil resource or petroleum product.

1. The Oil Fields (Regulation & Development) Act, 1948.

3(c) "Mineral Oils" include natural gas and petroleum.

2. Mines Act, 1952 2 (jj) "minerals" means all substances which can be obtained from the earth by mining, digging, drilling, dredging, hydraulicking, quarrying or by any other operation and includes

mineral oils (which in turn include natural gas and petroleum)."

3. The Mines and Minerals (Development and Regulation) Act, 1957,

3.(b) "minerals oils" includes natural gas and petroleum.”

4. Petroleum and Natural Gas Rules, 1959,

3. (k) "Petroleum" means naturally occurring hydrocarbons in a free state, whether in the form of natural gas or in a liquid viscous or solid form, but does not include helium occurring in association with petroleum, or coal, or shale, or any substance which may be extracted from coal, shale, or other rock by the application of heat or by a chemical process."

3. (n) "petroleum product" means any commodity made from petroleum or natural gas and shall include refined crude oil, processed crude petroleum, residuum from crude petroleum, cracking stock, uncracked fuel oil, fuel oil, treated crude oil residuum, casing head gasoline, natural gas gasoline, naphtha, distillate, gasoline, kerosene, waste oil, blended gasoline, lubricating oil, blends or mixture of oil with one or more liquid products or by-products derived from oil condensate, gas or petroleum hydrocarbons, whether herein enumerated or not."

5. The Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962,

2. (c) "petroleum" has the same meaning as in the Petroleum Act, 1934, and includes natural gas and refinery gas."

6. The Oil Industry (Development) Act, 1974

2. (h). "mineral oil" includes petroleum and natural gas."

2. (m). "petroleum product" means any commodity made from petroleum or natural gas and includes refined crude oil, processed crude petroleum, residuum from crude petroleum, cracking stock, uncracked fuel oil, fuel oil, treated crude oil residuum, casing head gasoline, natural gas, gasoline, naphtha, distillate gasoline, kerosene, bitumen, asphalt and tar, waste oil, blended gasoline, lubricating oil, blends or mixture of oil with one or more liquid products or by products derived from oil or gas and blends or mixtures of two or more liquid products or byproducts derived from oil condensate and gas or petroleum hydrocarbons not specified herein before."

“42. ……..Thus, the legislative history and the definition of 'petroleum', 'petroleum products' and 'mineral oil resources' contained In various legislations and books and the national interest involved in the equitable distribution of natural gas amongst the States - all these factors lead to the

> inescapable conclusion that "natural gas" in raw and liquefied form is petroleum product and part of mineral oil resource, which needs to be regulated by the Union."

35.6 The Constitutional Bench, after considering "natural gas is a mineral in the form of vapor"; "a gas characterized by hydrocarbon in mixtures"; "Natural gas is found in areas of earth covered by sedimentary rocks. Gas and petroleum being less dense than water present in the rocks tends to migrate upwards"; and "Liquid and gaseous hydrocarbon are so intimately associated in nature that it has become customary to shorten the expression petroleum and natural gas to petroleum when referring to both", concluded as follows :-

> "(i) All the materials produced before us would only show that the natural gas is a petroleum product. It is also important to note that in various legislations covering the field of petroleum and petroleum products, either the word 'petroleum' or 'petroleum products' has been defined in an inclusive way, so as to include natural gas, In Encyclopedia Britannica, 15th Edn. Vol. 19, page 589 (1990), it is stated that "liquid and gaseous hydrocarbons are so intimately associated in nature that it has become customary to shorten the expression 'petroleum and natural gas' to 'petroleum' when referring to both. The word

petroleum literally means 'rock oil', it originated from the Latin term petra-oleum. (petra-means rock or stone and oleum-means oil). Thus, Natural Gas could very well be comprehended within the expression 'petroleum' or 'petroleum product'.

(ii) In para 37, it held "a survey of various legislations on the topic would show that the term "petroleum' or "petroleum products" has been given a wide meaning to include natural gas and other similar products.

(iii) In para 41, it held "production of natural gas is not independent of the production of other petroleum products; though from some wells natural gas alone would emanate, other products may emanate from sub terrain chambers of the earth, But all oil fields explored for their potential hydrocarbon."

(iv) In para 42 it held that the legislative history and the definition of 'petroleum', 'petroleum products' and 'mineral oil resources' contained in various legislations and books and the national interest involved in the equitable distribution of natural gas amongst the States - all these factors lead to the inescapable conclusion that "natural

gas" in raw and liquefied form is petroleum product and part of mineral oil resource, which needs to be regulated by the Union of India."

35.7 The Apex Court in unequivocal terms has held that, "natural gas in raw and liquefied form is a petroleum product and part of mineral oil resources." In light of the above judgment, and in absence of any specific definition of mineral oil under Section 80-IB of the Act, any reference to mineral oil in its natural, commercial and technical sense will include petroleum products and natural gas. The decision rendered by the Apex Court in Association of Natural Gas case would squarely apply. In the absence of the definition under Section 80-IB of the Act, if reliance has to be placed on allied enactments passed by Parliament, this would also lead to a clear conclusion that mineral oil includes natural gas.

35.8 It is therefore clear, that the expression "mineral oil" would include and encompass within itself, both, petroleum products and natural gas. When one deals with the provisions of the PSC or any taxing statute, without doubt mineral oil is the genus and contains within its ambit petroleum products and natural gas as its species. The term natural gas may not be sufficient to include petroleum product or mineral oil. On the contrary the expression "mineral oil" is wide enough to encompass

within itself petroleum products and natural gas. The contention of the Respondent that petroleum products and natural gas have been made part of mineral oil only through inclusive provisions contained in Sections 42, 44BB and 293A and its conspicuous absence in section 80-IB has to be inferred that the purpose of Section 80-IB, mineral oil would not include petroleum products and natural gas. This contention of the learned counsel for the Respondent needs to be rejected for the following reasons:-

(I) The judgment of the Apex Court makes it very clear that the expression "mineral oil" encompasses within itself petroleum products and natural gas.

(ii) The Constitutional Bench judgment was delivered on 25.3.2004. The Explanation in Sections 42 and 293A was introduced vide Finance Act 1981 effective from 1.4.1981. Explanation of Section 44BB was again introduced vide Finance Act 1987 with retrospective effect from 1.4.1983.

(iii) The judgment of the Apex Court which is later in time after considering the technical, commercial and legislative meaning have concluded that mineral oil would encompass within itself petroleum products and natural gas.

(iv) In the light of the judgment of the Constitutional Bench of the Apex Court, the Explanation in these Sections have to be read and referred to only as abundant caution.

35.9 If Explanation has to be given preference then it would amount to reading or rewriting the decision of the Apex court that mineral oil in its natural sense would not include natural gas. On the contrary, para 48 of the judgment uses the expression "all these factors lead to the inescapable conclusion" that natural gas in raw and liquefied form is petroleum product and part of mineral oil resources.

35.10 In fact, there is no dispute or contest on facts between the Union and the States as to what would constitute "natural gas" and its broad categories and chemical compositions. The Apex Court referred to technical literature and the advancement in science in the use of liquefied natural gas. The contention of the State that natural gas do not fall within the genre of petroleum products and mineral oil stood rejected by holding that natural gas in raw and liquefied form is petroleum product and part of mineral oil resources.

35.11 Section 80-IB of the Act has not defined mineral oil nor has it excluded petroleum products and natural gas. It is not alien

to tax laws to have scripted definition to suit a particular enactment or introduce deeming provisions. The amendments to Section 80-IB do not define or restrict the meaning of mineral oil or even introduce such deeming provisions. The ratio and findings of Constitution Bench judgment apply squarely to the controversy in this case. The judgment conclusively covers the issue and we have no hesitation in concluding that the term "mineral oil" in the Section 80-IB of the Act, takes within its purview both petroleum products and natural gas.

35.12 Before parting with this issue, we need to examine one more aspect. The Constitutional Bench resolved the conflict as to the domain competence to legislate on natural gas by holding that natural gas is nothing but part of mineral oil and the exclusive competence to regulate is vested only with the Union or Parliament and the power of the State are completely denuded. It is by virtue of its power under Entry 53, Central Government has entered into the Production Sharing Contract (PSC) with parties like the Petitioner granting them rights to explore, develop and produce mineral oil which also encompasses natural gas. The proposition that even though the findings of the Apex Court are unequivocal, for the purpose of Section 80-IB the term “mineral oil” would not encompass within its purview, natural gas only has to be stated to be rejected.

35.13 The judgment of the Apex Court holds the field. The

ratio of this judgment remains unaffected by the subsequent amendments to Section 80-IB(9)(ii). The insertion of sub clause (iv) to Section 80-IB(9) does not militate against meaning attributed to the expression "mineral oil" by the Apex Court, Entry 53 of List I does not refer to Natural Gas separately. The Apex Court has also read it only as part of mineral oil, but for which Parliament would not have had the power and competence to legislate. Various enactments such as the Oil Fields (Regulation and Development) 1948, Mines Act 1952, The Mines and Minerals (Development and Regulation) Act 1957, Petroleum and Natural Gases Rules 1959, The Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act 1962 and The Oil Industry Development Act 1974 have been passed by the Parliament. Since there was no explicit entry "Natural Gas" in Entry 53, all the aforesaid legislations while referring to Mineral Oil had indicated explicitly, what is otherwise implicit that Mineral Oil includes Natural Gas. If Natural Gas is not part of the term Mineral Oil, Parliament could not have legislated in any manner on any issues relating to Natural Gas which position has been made explicit.

35.14 Sub-clause (iv) to Section 80-IB(9) was introduced by the Finance (No.2) Act 2009 with effect from 1.4.2010. Notes on Clauses to the Finance Bill 2008 and 2009, the actual amendments to Section 80-IB(9) made through Finance Bill 2008 and Finance Bill 2009 along with the statements laid on the floor of the Parliament by the Hon'ble Finance Minister while moving the

motion for consideration of Finance Bill 2008 on this subject matter are reproduced below :-

> "**Notes on clauses to Finance Bill 2008** :-
>
> "Clause 15 seeks to amend section 80-IB of the Income-tax Act, which relates to deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings. Sub-section (9) of the said section provides for deduction in respect of profits and gains derived from commercial production or refining of mineral oil. The term "mineral oil" does not include petroleum and natural gas, unlike other sections of the Act. The deduction under this subsection is available to an undertaking for a period of seven consecutive assessment years including the initial assessment year - (i) in which the commercial production under a production sharing contract has first started; or (ii) in which the refining of mineral oil has begun. It is proposed to insert a new proviso in subsection (9) of section 80-IB so as to provide that no deduction under this sub-section shall be allowed to an undertaking engaged in refining of mineral oil if it begins refining on or after 1st April, 2009. This amendment will take effect from 1st April, 2008."
>
> Amendment of Section 80-IB in Finance Act 2008.
> "18. In Section 80-IB of the Income-tax Act,—
>
> (a) In sub-section (9), after the second proviso, the following proviso shall be inserted, namely :-

> Provided also that where such undertaking begins refining of mineral oil on or after the 1st day of April, 2009, no deduction under this section shall be allowed in respect of such undertaking unless such undertaking fulfills ail the following conditions, namely :-
>
> (i) It is wholly owned by a public sector company or any other company in which a public sector company or companies hold at least forty-nine per cent of the voting rights;
>
> (ii) It is notified by the Central Government in this behalf on or before the 31st day of May, 2008; and
>
> (iii) It begins refining not later than the 31st day of March, 2012."

35.15 Statement of the Finance Minister on the floor of the Parliament while moving the motion for the consideration of Finance Bill 2008 :-

> "...Members are aware, this sub-section allows 100 per cent tax exemption in respect of an undertaking which begins commercial production or refining of mineral oil for a period of seven consecutive assessment years.
>
> Now, what is the scope of this Section? It is disputed. The Department has taken a view; the assessees have taken another view. The disputes go

back to assessment year 2001-02. The disputes are under adjudication before different tax authorities. In my view, it is not correct to resolve these disputes by debate in Parliament We should allow the disputes to be resolved in the normal course by the tax tribunals and the courts. Nevertheless, some doubts have arisen because of the notes on clauses attached to the Finance Bill. I wish to clarify these doubts. The statement in the notes on clauses is a mere restatement of the Income Tax Department's known position before the tribunals and the courts which are adjudicating the matter. Nothing new has been stated, it is simply a restatement of Department's position which has already placed before the tribunals and the courts. Besides, it is a well settled proposition of law that notes on clauses have no legal effect and are not binding on the courts. I may assure potential bidders for oil exploration blocks that the benefit of Section 80IB(9), as finally interpreted by the courts, will be applicable to all exploration and production contracts, whether obtained through nomination or bidding..."

35.16 Budget speech of the Finance Minister while introducing Finance (No.2) Bill, 2009 :-

"102. Madam Speaker, in the context of the geo-political environment, it is necessary for us to create our own faculties for energy security. Accordingly, I propose to extend the tax holiday under Section 80IB(9) of the Income Tax Act, which was hitherto available in respect of profits arising

from the commercial production or refining of mineral oil, also to natural gas. This tax benefit will be available to undertakings in respect of profits derived from the commercial production of mineral oil and natural gas from oil and gas blocks which are awarded under the New Exploration Licensing Policy-VIII round of bidding. Further, I also propose to retrospectively amend the provisions of the said Section to provide that "undertaking" for the purposes of Section 80-IB(9) will mean all blocks awarded in any single contract."

35.17 Notes on clauses to Finance (No.2) Bill 2009:

"Clause 37 of the Bill seeks to amend Section 80-IB of the Income Tax Act, which relates to deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings.

Sub-section (9) of the said Section provides for deduction in respect of profits and gains derived from commercial production or refining of mineral oil subject to the conditions stipulated in the said sub-section.

It is proposed to substitute the said sub-section to provide that the amount of deduction to an undertaking shall be hundred per cent, of the profits for a period of seven consecutive assessment years, including the initial assessment year, if such undertaking fulfills any of the following :-

(i) is located in North-Eastern Region and has begun or begins commercial production of mineral oil before the 1st day of April, 1997;

(ii) is located in any part of India and has begun or begins commercial production of mineral oil on or after the 1st day of April, 1997;

(iii) is engaged in refining of mineral oil and begins such refining on or after the 1st day of October, 1998.

It is further proposed to provide by way of an Explanation that for the purposes of claiming deduction under this sub-section, all blocks licensed under a single contract which is, awarded under the New Exploration Licensing Policy announced by the Government of India vide Resolution No.O-19018/22/95-ONG.DO.VL dated 10th February 1999 or has been awarded in pursuance of any law for the time being in force or has been awarded by the Central or State Government in any other manner, shall be treated as a single "undertaking". This amendment will take effect retrospectively from 1st April, 2000 and will, accordingly, apply in relation to the assessment year 2000-2001 and subsequent years. It is further proposed to amend clause (iii) of the said sub-section (9) as so substituted to provide that the benefit of deduction under the said sub-section shall be available if the undertaking is engaged in refining of mineral oil and begins such refining on or after the 1st day of October, 1998 but not later than the 31st day of March, 2012.

This amendment will take effect retrospectively from the 1st April, 2009. It is also proposed to further amend the said sub-section (9) as so substituted and further amended by inserting a new clause (iv) to provide that the benefit of deduction under the said sub-section shall be available if the undertaking is engaged in commercial production of natural gas in blocks licensed under the VIII Round of bidding for award of exploration contracts under the New Exploration Licensing Policy announced by the Government of India vide Resolution No.O-19018/22/95-ONG.DO.VL dated 10th February, 1999 (hereinafter referred to as "NELP-VIII") and begins commercial production of natural gas on or after the 1st day of April, 2009.

This amendment will take effect from 1st April, 2010 and will, accordingly, apply in relation to the assessment year 2010—2011 and subsequent years."

35.18 Amendment to Section 80-IB(9) by Finance (No.2) Act, 2009 :-

"37. In Section 80-IB of the Income-tax Act,—
(a)for sub-section (9), the following sub-section shall be substituted and shall be deemed to have been substituted with effect from the 1st day of April, 2000, namely :-

'(9) The amount of deduction to an undertaking

shall be hundred per cent of the profits for a period of seven consecutive assessment years, including the initial assessment year, if such undertaking fulfills any of the following, namely :-

(i) is located in North-Eastern Region and has begun or begins commercial production of mineral oil before the 1st day of April, 1997;

(ii) is located in any part of India and has begun or begins commercial production of mineral oil on or after the 1st day of April, 1997;

(iii) is engaged in refining of mineral oil and begins such refining on or after the 1st day of October, 1998.

Explanation.- For the purposes of claiming deduction under this sub-section, all blocks licensed under a single contract, which has been awarded under the New Exploration Licensing Policy announced by the Government of India vide Resolution No.O-19018/22/95-ONG.DO.VL dated 10th February, 1999 or has been awarded in pursuance of any law for the time being in force or has been awarded by Central or a State Government in any other manner, shall be treated as a single "undertaking";

(b) In sub-section (9), as so substituted, -

(A) in clause (iii), after the words, figures and letters "the 1st day of October, 1998", the words,

figures and letters "but not later than the 31st day of March, 2012" shall be inserted;

(B) after clause (iii), the following clauses shall be inserted with effect from the 1st day of April, 2010, namely :-

(iv) is engaged in commercial production of natural gas in blocks licensed under the VIIIth Round of bidding for award of exploration contracts (hereafter referred to as "NELP-VIII") under the New Exploration Licensing Policy announced by the Government of India vide Resolution No.O-19018/22/95-NG.DO.VL dated 10th February, 1999 and begins commercial production of natural gas on or after the 1st day of April, 2009.

(v) is engaged in commercial production of natural gas in blocks licensed under the IV Round of bidding for award of exploration contracts for Coal Bed Methane blocks and begins commercial production of natural gas on or after the 1st day of April, 2009."

35.19 These amendments are not in the nature of a Validating Act and they have not been given retrospective effect. In fact, the Notes on Clauses merely set out the stand of the revenue authorities. This exercise is insufficient to construe that the term mineral oil does not include natural gas or that the benefits of Section 80-IB have been extended to natural gas for the first time with effect from 1.4.2009 by virtue of insertion of sub clause (iv) to

Section 80-IB(9). At the best, sub clause (iv) has to be construed to mean that the benefit would also be available for NELP VIII bidders who satisfy the conditions set out in the said sub clause.

35.20 In the absence of specific wordings in the Statute, to draw a conclusion that only undertakings engaged in the commercial production of 'mineral oil" other than "natural gas" will be entitled to deductions of profits and gains under the above mentioned sub-section, is wholly incorrect.

35.21 For the aforesaid reasons, we hold that the insertion of sub clause (iv) to Section 80-IB(9) of the Act by the Finance (No.2) Act, 2009 cannot be interpreted to mean that the term "mineral oil" as used in Section 80-IB does not include natural gas and cannot result in denial of the benefit of deduction under Section 80-IB(9) to undertakings engaged in commercial production of natural gas under contracts entered into prior to VIIIth round of bidding. In view of the decision of the Constitutional Bench of the Apex Court, the term "mineral oil" includes and has always included "natural gas".

Whether the Petitioner has any accrued or vested right ?

36. We may now consider the third question as to whether the Petitioner has any accrued or vested right. One of the

fundamental principles of a democratic society inherent in all the provisions of the Constitution is that any interference with the property should be lawful. We are in the era of globalisation. Deprivation of property may also cause serious concern in the area of foreign investment, especially in the context of International Law and international investment agreements. Whenever, a foreign investor operates within the territory of a host country, the investor and its properties are subject to the legislative control of the host country, along with the international treaties or agreements. Even, if the foreign investor has no fundamental right, let them know, that the rule of law prevails in this country. The message should be loud and clear, that rule of law exists in our country.

36.1 Income-tax Act, 1961, do not explicitly or impliedly forbid as to how a company and the Government should enter into agreements or contracts. In absence of contract, there is no vested interest which requires the continuance of a legislative policy however expressed in a system of taxation. A vested right is a legal and enforceable right, enforceable by a legal process. We propose to consider Article 300A of the Constitution of India which reads as under :-

> "Article 300A. Persons not to be deprived of property save by authority of law. No person shall be deprived of his property save by authority of law."

Two words, “person” and “property” in Article 300A are important. We may first consider the meaning of word “person”. The expression “person” includes any entity, not necessarily a human being, to which rights or duties may be attributed. In ordinary, popular and natural sense word “person” means “a specific individual human being”. But in law the word “person” has a slightly different connotation, and refers to any entity, which is recognized by law as having the rights and duties of a human being. Thus the word “person”, in law, unless otherwise intended, refers not only to a natural person (male or female human being), but also any legal person i.e. an entity that is recognized by law as having or capable of having rights and duties. Ramanlal Bhailal Patel v. State of Gujarat, (2008) 5 SCC 449. The word “person” includes a corporation or a company as well as a natural person. Unless there is something to the contrary, it ought to be held to include both.

36.1 The expression “person” has been defined in Section 2 (31) of the Income Tax Act, 1961 as under:-

> (31) “person” includes –
> (i) an individual,
> (ii) a Hindu undivided family,
> (iii) a company,
> (iv) a firm,
> (v) an association of persons or a body of individuals,

whether incorporated or not,

(vi) a local authority, and

(vii) every artificial juridical person, not falling within any of the preceding sub-clauses.

The term "person" is not defined in the Constitution. But Article 367 of the Constitution provides that definitions contained in the Section 3 (42) of General Clauses Act, 1897, apply for the interpretation of the Constitution. The definition of "person" in the General Clauses Act, would not restrict the power of the State Legislature to define a "person" and adopt a meaning different from or in excess of the ordinary acceptation of the world as is defined in the General Clauses Act.

36.2 The provision of the General Clauses Act, 1897 which is applicable for the interpretation of the Constitution as provided for under Article 367 (1) itself restricts the applicability of the Act and makes such an application subject to the context as otherwise may require. Section 3 of the General Clauses Act, 1897 itself says that unless there is anything repugnant in the subject or context the term "person" shall include any company or association or body of individuals, whether incorporated or not. The legislature is not denuded of its competency to define the term "person" differently from the definition of that term in the General Clauses Act, 1897. It is not uncommon practice for Parliament or the State Legislature to define "person" in the Act and create an artificial unit by fiction.

The definition of "person" in Section 3 (42) of the General Clauses Act is undoubtedly illustrative and not exhaustive. The well-known rule of interpretation regarding such inclusive definitions has always been to treat the other entities, which would not otherwise have come strictly within the definition, to be a part thereof, because of illustrative enactment of such definitions. The legislature is competent in its wisdom to define "person" separately for the purposes of each of the enactments and different from the one in the General Clauses Act and create an artificial unit. The definition of "person" in the General Clauses Act would not operate as any fetter or restriction upon the powers of the State Legislature to define "person" and adopt a meaning different from as defined in the General Clauses Act. Karnataka Bank Limited v. State of A.P., (2008) 2 SCC 254.

36.3 The maxim "*reddendo singular singulis*" will apply to the interpretation of the word "person" so that the general meaning of the word "person" in its generic sense with its width would not be cut down by the specific qualification of one species, i.e., natural "person" when it is capable to encompass in its ambit, natural persons, juristic persons and constitutional mechanism of governance in a democratic set up. The State, by Cabinet form of Government, is a person *ficta*, a Corporate sole. Samatha v. State of A.P. and others, AIR 1997 SC 3297.

36.4 The expression “person” includes any entity, not necessarily a human being, to which rights or duties may be attributed. Under the Act, and Article 300A the expression “person” includes a company, an association of persons or a body of individuals, whether incorporated or not and every artificial juridical person. Therefore, the Petitioners would be “person” covered under Article 300A of the Constitution.

36.5 The Apex Court had the occasion to consider as to what is accrued vested right in **J. S. Yadav v. State of U.P and another (2011) 6 SCC 570** in paragraph 20 to 22 which is extracted as under:-

> “20. The word 'vested' is defined in Black's Law Dictionary (6th Edition) at page 1563, as vested; fixed; accrued; settled; absolute; complete. Having the character or given the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent. Rights are 'vested' when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute vested rights. In Webster's Comprehensive Dictionary (International Edition) at page 1397, 'vested' is defined as :-
>
> Law held by a tenure subject to no contingency;

complete; established by law as a permanent right; vested interest....

21. The word "vest" is normally used where an immediate fixed right in present or future enjoyment in respect of a property is created. With the long usage the said word "vest" has also acquired a meaning as "an absolute or indefeasible right". It had a "legitimate" or "settled expectation" to obtain right to enjoy the property etc. Such "settled expectation" can be rendered impossible of fulfillment due to change in law by the Legislature. Besides this, such a "settled expectation" or the so-called "vested right" cannot be countenanced against public interest and convenience which are sought to be served by amendment of the law.....

22. Thus, "vested right" is a right independent of any contingency. Such a right can arise from a contract, statute or by operation of law. A vested right can be taken away only if the law specifically or by necessary implication provide for such a course."

36.6 The word "property" has not been defined either under the Act or Article 300A of the Constitution. According to Salmond's Jurisprudence, word "property" means legal rights of a person of whatever description.

36.7 Property in legal sense means an aggregate of rights which are guaranteed and protected by law. It extends to every

species of valuable right and interest, more particularly, ownership and exclusive right to a thing, the right to dispose of the thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it. The dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects is called property. The exclusive right of possessing, enjoying, and disposing of a thing is property in legal parameters. Therefore, the word 'property' connotes everything which is subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate or status. Property, therefore, within the constitutional protection, denotes group of rights inhering citizen's relation to physical thing, as right to possess, use and dispose of it in accordance with law. In Ramanatha Aiyar's The Law Lexicon, Reprint Ed. 1987 at p.1031, it is stated that the property is the most comprehensive of all terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have. The term "property" has a most extensive signification, and, according to its legal definition, consists in free use, enjoyment, and disposition by a person of all his acquisitions, without any control or diminution, save only by the laws of the land. In Dwarkadas Srinivas case, this Court gave extended meaning to the word property. Mines, minerals and quarries are property attracting Article 300A. Jilubhai Nanbhai Khachar and others v. State of Gujarat and another 1995

Supp (1) SCC 596.

36.8 “Property” is a term of the widest import and subject to any limitation, which the context may require, it signifies every possible interest which a person can clearly hold or enjoy. If the property rights are taken away by the Act, are such that would render the rights illusory and practically valueless, than in effect and substance, the property of the person has been taken away by the Act. Ahmed G. H. Ariff and others v. Commissioner of Wealth Tax, Calcutta (1969) 2 SCC 47.

36.9 We may now examine as to whether the Petitioners have any vested right to property of which he is being deprived. A demand for tax under an invalid law would amount to deprivation of property. Coffee Board Bangalore v. Joint Commercial Tax Officer AIR 1971 SC 870.

36.10 The Apex Court relying on the Constitution Bench decision in Deoki Nandan Prasad v. State of Bihar and others, AIR 1971 SC 1409 held that the benefit of pension which accrued to an employee is in the nature of “property” which cannot be taken away without the due process of law as per the provisions of Article 300A of the Constitution of India. State of Jharkhand and others v. Jitendra Kumar Srivastava and another, AIR 2013 SC 3383.

36.11 Right to receive pension under the Service Rule for service rendered before retirement is ‘property’ and subsequent reduction of pension would be ‘deprivation’ of property within the purview of Article 300A. State of Kerala v. Padmanabhan AIR 1985 SC 356.

36.12 Copyright is a right to property and the same can be acquired only on payment of compensation. Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd. (2008) 13 SCC 30.

36.13 The right to property under Article 300A of the Constitution of India is not a fundamental right but it is a Constitutional right. The Legislature can deprive a person of his property only by authority of law. The Constitution Bench of the Apex Court in **K. T. Plantation (P) Ltd. v. State of Karnataka (2011) 9 SCC 1**, has held in paragraph 168 that Article 300A proclaims that no person can be deprived of his property save by authority of law, meaning thereby that a person cannot be deprived of his property merely by an executive fiat, without any specific legal authority or without the support of law made by a competent legislature. The expression `Property' in Article 300A confined not to land alone, it includes intangibles like copyrights and other intellectual property and embraces every possible interest recognized by law.

36.14 Similarly, valid contracts are property. But the question is as to what extent a persons rights will be protected when they are sought to be illegally deprived of their properties on the strength of a legislation. Accrued right or a vested right is a mature right which is capable of enforcement in law. Deprivation of property within the meaning of Article 300A, must take place for public purpose or public interest. Any law, which deprives a person of his property has to be justified upon the purpose and object of the statute and the policy of legislation otherwise it will be unlawful and unfair and undermines the rule of law and can be subjected to judicial review.

36.15 Requirement of public purpose, for deprivation of a person of his property under Article 300A, is a pre-condition. The legislation providing for deprivation of property under Article 300A must be "just, fair and reasonable" as understood in terms of Articles 14 of the Constitution.

36.16 The Petitioners are carrying on business of mineral oil. When they entered in contract with the Government they were enjoying seven years tax holiday on multiple undertakings in the block. They were entitled to 100% exemption on their profits and gains under the Act. They acquired a vested right on their 100% exemption on their profits and gains which was the property of the

Petitioners. By the Amendment in the Act they are being deprived of vested right of property by amending the Act retrospectively. In our opinion, the right given to the Petitioner for enjoying seven years tax holiday on each well/cluster of wells or on each undertaking in the block was an accrued and a vested right which could not have been taken away expressly or by necessary implication. In view of Section 6 (c) of the General Clauses Act, the accrued and vested right of the Petitioner should have been preserved and could not be destroyed by the impugned amendment by adding Explanation to Section 80-IB(9) with retrospective effect. We do not find any material on record which may demonstrate that the Parliament intended to destroy a right, privilege or benefit enjoyed by the Petitioner under the unamended Section 80-IB(9) of the Act, without authority of a valid law.

36.17 In J. S. Yadav (supra), the Apex Court had held that "vested right" is a right which can arise from a contract, statute or by operation of law. A vested right can be taken away only if the law specifically or by necessary implication provide for such a course. Thus, the State cannot deprive any person, any corporation or company of his property, without following the rule of law, violating Article 300A of the Constitution of India.

Article 14 of the Constitution of India.

37. Now coming back to the first question as to whether the insertion of the Explanation to Section 80-IB(9) of the Act, by Finance (No.2) Act, 2009 with retrospective effect from 1.4.2000 purporting to explain the meaning of the term "undertaking" is unconstitutional and *ultra vires* and offends Article 14 of the Constitution of India. Whether the explanation provide for a fresh levy of tax? In other words, did the Legislature in introducing the impugned explanation materially changed the exemption which existed till such explanation was introduced? If the effect of the explanation is to withdraw the existing deductions retrospectively, the question of the same being unreasonable or arbitrary and offending Article 14 would arise. Article 14 of the Constitution of India is reproduced as under:-

> "Article 14. Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

37.1 The Petitioners are foreign and domestic companies. A company or a corporation, being not a citizen, has no fundamental rights under Article 19 of the Constitution. Nonetheless, the companies would be entitled to claim protection of their rights under Article 14 of the Constitution. It would be relevant to examine whether the respondents have committed breach of Article 14 or any other Constitutional provision which may render the Amendment Act *ultra vires* to Article 14 of the Constitution of

India.

37.2 The power and competence of the Parliament to amend any statutory provision with retrospective effect cannot be doubted. Any retrospective amendment to be valid must however be reasonable and not arbitrary and must not be violative of any of the fundamental rights guaranteed under the Constitution. The mere fact that any statutory provision has been amended with retrospective effect does not by itself make the amendment unreasonable. Unreasonableness or arbitrariness of any such amendment with retrospective effect has necessarily to be judged on the merits of the amendment in the light of the facts and circumstances under which such amendment is made. In considering the question as to whether the legislative power to amend a provision with retrospective operation has been reasonably exercised or not it, becomes relevant to enquire as to how the retrospective effect of the amendment operates.

37.3 Article 14 is part of the basic structure of the Constitution and, therefore, cannot be abrogated. The Apex Court in State of A. P. and others. v. Mcdowell & Co. and others (1996) 3 SCC 709, observed that a law made by the Parliament or the Legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part-III of

the Constitution or of any other constitutional provision. There is no third ground. If an enactment challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein.

37.4 If any law or amendment to the law made by Parliament or legislature overrides or is made in violation of fundamental rights or any other constitutional provision without sufficient objective and justification, the Court are empowered to declare the law arbitrary and violative of Article 14 of the Constitution. Further, from the scrutiny of the law made by the Parliament or legislature, if the Court finds that the law which is under challenge as *ultra vires* infringes the rights or interests of the Petitioner, the Court can strike down the enactment.

37.5 Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognized by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in

relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognized and these are (i) discrimination, based on an impermissible or invalid classification and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders -- if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is.

37.6 The Constitution Bench of the Apex Court in **Subramaian Swamy v. Director, Central Bureau of Investigation and another (2014) 8 SCC 682** after considering catena of decisions on Article 14 has held in paragraphs 38 to 48 as under :-

> "38. …The first part of Article 14, which was adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India. It enshrines a basic

principle of republicanism. The second part, which is a corollary of the first and is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination of favouritism. It is a pledge of the protection of equal laws, that is, laws that operate alike on all persons under like circumstances.

39. Article 14 of the Constitution incorporates concept of equality and equal protection of laws. The provisions of Article 14 have engaged the attention of this Court from time to time. The plethora of cases dealing with Article 14 has culled out principles applicable to aspects which commonly arise under this Article. Among those, may be mentioned, the decisions of this Court in Chiranjit Lal Chowdhuri, F.N. Balsara, Anwar Ali Sarkar, Kathi Raning Rawat, Lachmandas Kewalram Ahuja, Syed Qasim Razvi, Habeeb Mohamed, Kedar Nath Bajoria and innovated to even associate the members of this Court to contribute their V.M. Syed Mohammad & Company. The most of the above decisions were considered in Budhan Choudhry.

40. This Court exposited the ambit and scope of Article 14 in Budhan Choudhry as follows :- (SCC p. 193, para 5)

‘5. …It is now well-established that while article 14

forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well-established by the decisions of this Court that article 14 condemns discrimination not only by a substantive law but also by a law of procedure.'

41. In Ram Krishna Dalmia, the Constitution Bench of five Judges further culled out the following principles enunciated in the above cases – (AIR pp. 547-46, para 11)

'11. ... (a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the

burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.'

42. In Ram Krishna Dalmia, it was emphasized that (AIR p. 548, para 11)

‘11. … the above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of laws.”

43. Having culled out the above principles, the Constitution Bench in Ram Krishna Dalmia, further observed that statute which may come up for consideration on the question of its validity under Article 14 of the Constitution may be placed in one or other of the following five classes : (AIR pp. 548-49, para 12)

‘12. … (i) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the court. In determining the validity or otherwise of such a statute the court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain

class of persons or things. Where the court finds that the classification satisfies the tests, the court will uphold the validity of the law.

(ii) A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the court will strike down the law as an instance of naked discrimination. …

(iii) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and

uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the court will strike down both the law as well as the executive action taken under such law. ...

(iv) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification. ...

(v) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle ... then in such a case the executive action but not the statute should be condemned as unconstitutional.'

44. In Vithal Rao, the five-Judge Constitution

Bench had an occasion to consider the test of reasonableness under Article 14 of the Constitution. It noted that : (SCC p. 506, para 26)

'26. … the State can make a reasonable classification for the purpose of legislation and that the classification in order to be reasonable must satisfy two tests: (i) the classification must be founded on intelligible differentia and (ii) the differentia must have a rational relation with the object sought to be achieved by the legislation in question.' The Court emphasized that in this regard object itself should be lawful and it cannot be discriminatory. If the object is to discriminate against one section of the minority, the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved.

45. The constitutionality of the Special Courts Bill, 1978 came up for consideration in *Special Courts Bill, 1978*, *In re* as the President of India made a reference to this Court under Article 143(1) of the Constitution for consideration of the question whether the "Special Courts Bill" or any of its provisions, if enacted would be constitutionally invalid. The seven Judge Constitution Bench dealt with the scope of Article 14 of the Constitution. Noticing the earlier decisions of this Court in Budhan Choudhry, Ram Krishna Dalmia, C.I. Emden, Kangsari Haldar, Jyoti Pershad and Shri Ambica Mills Ltd., in the majority judgment the

then Chief Justice Y.V. Chandrachud, inter alia, exposited the following propositions relating to Article 14 : (*Special Courts Bill, 1978*, *In re*, SCC pp.424-26, para 72)

'(1) * * * *

(2) The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

(3) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

(4) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons

similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(5) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well- defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

(6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be

found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.

(8) The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense above mentioned.

(9) If the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation. In such cases, the power given to the executive body would import a duty on it to classify the subject- matter of

legislation in accordance with the objective indicated in the statute. If the administrative body proceeds to classify persons or things on a basis which has no rational relation to the objective of the Legislature, its action can be annulled as offending against the equal protection clause. On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory, irrespective of the way in which it is applied.

(10) Whether a law conferring discretionary powers on an administrative authority is constitutionally valid or not should not be determined on the assumption that such authority will act in an arbitrary manner in exercising the discretion committed to it. Abuse of power given by law does occur; but the validity of the law cannot be contested because of such an apprehension. Discretionary power is not necessarily a discriminatory power.

(11) Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of

constitutionality.

(12) Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Article 14 must be determined in each case as it arises, for, no general rule applicable to all cases can safely be laid down. A practical assessment of the operation of the law in the particular circumstances is necessary.

(13) A rule of procedure laid down by law comes as much within the purview of Article 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination.'

46. In Nergesh Meerza, the three-Judge Bench of this Court while dealing with constitutional validity of Regulation 46(i)(c) of Air India Employees' Service Regulations (referred to as "the A.I. Regulations") held that certain conditions mentioned in the Regulations may not be violative of Article 14 on the ground of discrimination but if it is proved that the conditions laid down are entirely unreasonable and absolutely arbitrary, then the provisions will have to be struck down. With regard to due process clause in the American Constitution and Article 14 of our Constitution, this Court referred to Anwar Ali Sarkar, and observed that the due process clause in the American

Constitution could not apply to our Constitution. The Court also referred to A.S. Krishna wherein Venkatarama Ayyar,J. observed (AIR p.303, para 13)

'The law would thus appear to be based on the due process clause, and it is extremely doubtful whether it can have application under our Constitution.'

47. In D.S. Nakara, the Constitution Bench of this Court had an occasion to consider the scope, content and meaning of Article 14. The Court referred to earlier decisions of this Court and in para 15, the Court observed: (SCC pp.317-18)

'15. Thus the fundamental principle is that Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin tests of classification being founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question.'

48. In E.P. Royappa, it has been held by this Court that the basic principle which informs both Articles 14 and 16 are equality and inhibition against discrimination. This Court observed in para 85 as under: (SCC p.38)

'85. ...From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and

> arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.'

37.7. The Apex Court in **Shimnit Utsch India Pvt. Ltd. v. West Bengal Transport Infrastructure Development Corporation Ltd., (2010) 6 SCC 303** held in paragraph 52 that the government has a discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective. Choice in the balancing of the pros and cons relevant to the change in policy lies with the authority. But like any discretion exercisable by the government or public authority, change in policy must be in conformity with Wednesbury reasonableness and free from arbitrariness, irrationality, bias and malice.

37.8 In a democratic set up, it is for the legislature to decide what economic or social policy it should pursue or what administrative consideration it should bear in mind. It is well recognized that Parliament or the legislature has to be granted

greater latitude in framing a taxing statute. The primary purpose of the levy of all taxes is to raise funds for public good. Which person should be taxed, what transaction should be taxed or what goods should be taxed, depends upon social, economic and administrative considerations. The power of taxation can be used not merely for raising revenue but also to regulate the economy, to encourage the social objectives of the State. The Court should examine the reasonableness of such provision particularly when the same is brought into operation with retrospective effect. Section 80-IB(9) provides for deduction under certain circumstances. If such deductions are withdrawn with retrospective effect, surely there would be a case of providing for a tax which was till then not known.

37.9 When a tax law or amendment made therein is impugned under Article 14, the Court is to decide whether the amendment in tax law is palpably so arbitrary or unreasonable that it must be struck down. The word ‘arbitrary’ is used in the sense of being discriminatory. An act which is discriminatory is liable to be labeled as arbitrary.

37.10 If from a bare reading of the provisions of the Act or the amended Act by which Explanation has been added to Section 80-IB(9), it is clear that new tax is being levied with retrospective effect confers arbitrary, uncancalised, unbridled, unrestricted

power without recording any reasons and without adhering to the principles of equality as envisaged in Article 14 of the Constitution,

38. Before coming to the main question, we deem it necessary to state that India has already begun its process of globalization by opening up world trade. We may call it liberalization, privatization and globalization policy to ensure that India is in the process of restructuring her economy, with expressions of elevating and speeding up her economic development, in which the foreign direct investment is playing a major role in rapid economic growth and we are on the fast track to prosperity. For successful working of the democracy and national economy, it is essential that the public revenue be generated.

39. In **Reliance Natural Resources Ltd. v. Reliance Industries Ltd. (2010) 7 SCC 1**, the Apex Court observed that in a constitutional democracy like ours, the national assets belong to the people. The Government holds such natural resources in trust. The constitutional mandate is that the natural resources belong to the people of this country. The Government owns such assets for the purposes of developing them in the interests of the people. The natural resources are vested with the Government as a matter of trust in the name of the people of India. Thus, it is the solemn duty of the State to protect the national interest.

39.1 The Constitution envisages exploration, extraction and supply of mineral oil and gas to be within the domain of governmental functions. It is the duty of the Union to make sure that these resources are used for the benefit of the citizens of this country. Due to shortage of funds and technical know-how, the Government has privatized such activities through the mechanism provided under the Production Sharing Contract (PSC).

40. Power to impose tax is essentially a legislative function under Article 265 of the Constitution of India. Article 265 states that no tax shall be levied except by authority of law. In a taxing statute one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

41. Income-tax Act, 1961 do not explicitly or impliedly forbid as to how a company and the Government should enter into agreements or contracts. In absence of contract, there is no vested interest which requires the continuance of a legislative policy however expressed in a system of taxation. A vested right is a legal and enforceable right, enforceable by a legal process.

42. Liberal tax incentives for undertaking specific activities such a exploration of mineral oil and gases could be granted by the

Government. The Parliament or the Legislature had taken adequate measure in framing a genuine policy for exploring mineral oil and gases for purely commercial purpose in national interest by inviting parties internationally to make investments by offering tax-holiday. The genuine intention of the Parliament or the Legislature inviting investments has to be recognized and honored. The tax planning was legitimate and the petroleum policy and the provisions of the Income-tax Act, 1961, were within the framework of law.

43. The Government invited foreign company to India including domestic companies by issuing global tender by opening up foreign direct investment, in the field of exploration of mineral oil and gases, under the PSC, where the Petitioner was to carry on the exploration, development and production of mineral oil and natural gas. The Petitioner is subject to Income Tax law in India. He has been awarded the right to explore, develop and produce mineral oil in various blocks. For this purpose, the Petitioner has entered into Production Sharing Contract (PSC) with the Government of India for exploration, development and production of "mineral oil". The PSC specifies the area over which the Petitioner has been given such rights. PSC defines the Contract Area as a Block. He has been producing crude oil and natural gas from Hazira and Surat Blocks. He has been producing crude oil and natural gas from such Blocks. He has been claiming benefit of deduction of 100% of the profits and gains from the production of

mineral oil and natural gas under Section 80-IB(9) as it stood prior to an amendment to Section 80-IB(9) of the Act, which was introduced by the Finance (No.2) Act, 2009. In these proceedings, the constitutional validity of the amendment to sub-Section (9) of Section 80-IB of the Act by the Finance (No.2) Act, 2009, has been challenged.

44. After the foreign investors entered India and apart from other sectors, they also participated in exploration, discovery and commercial production of mineral oil and gases, the Finance Minister in his speech under the pretext of clarification, added an Explanation by laying down an absolutely new proposition that all blocks under a single contract would be treated as a single undertaking. The effect, it appears is devastating on the investors. They have carried out commercial production of mineral oil under a bonafide belief that each well/cluster of wells is an undertaking and he enjoys the benefit of 100% tax deduction for a period of seven years on each well/cluster of wells which is an undertaking and qualifies for tax deduction. The amendment in Section 80-IB(9) and addition of Explanation was made by the legislature by Finance (No.2) Act, 2009 which was given retrospective operation with effect from 1.4.2000, after the Petitioner had started commercial production and were entitled for 100% tax deduction on profits and gains.

45. The ownership of natural resources embedded in the sea bed and ground vests in the State and the policy for

exploitation of the said resources was also as formulated by the Central Government. In order that the private sector companies are attracted to participate in the exploration, development and production of hydrocarbons, the NELP was notified by the Central Government and it provided certain assurances to the prospective participants. Under the NELP, the Central Government invited offers for exploration of mineral oil for every block and commenced the process of entering into a PSC with the successful bidders who is nomenclature as the contractor under the PSC.

46. Notice Inviting Offers under the NELP, where under the heading "Main Features of the Terms Offered", it was stated that "Income Tax Holiday” for seven years from the start of commercial production" will be available and further that "To facilitate investors, a Petroleum Tax Guide (PTG) is in place". A gas basin comprises of a huge area and each basin may comprise of a number of blocks with delineated areas. Each block may have one or more gas or oil fields where hydrocarbons had been discovered. Every field may have one or more wells, depending on the extent of the mineral oil reserve driven by technical requirements. Once a discovery is announced and declared to be a "commercial discovery", an elaborate process has been laid down in the PSC not only for approving it as a commercial discovery, but right down to the number of wells which the contractor was to drill. For this purpose, a separate development plan for development of each

field is prepared by the contractor and is approved by a body known as the Management Committee in which the Government has the veto power. Each of such wells/cluster of wells is a separate and independent undertaking. Moreover, the notice inviting offers and the PSC envisage an exploration period, followed by development and production period. The exploration period is a maximum of seven years. While the notice inviting offers envisaged production in a phased manner, it is a contradiction to state that the period of seven years exemption for the entire block, should commence from the time when the first well started commercial production. The exploration, development and production, are phase-wise for every block and it would not be right to state that the period of seven years for the entire block would commence from the date of commercial production in the very first well, when the other areas of the block were still under exploration or development stage as stipulated in the PSC. The term undertaking, therefore, cannot be construed to mean the entire block to reckon the period of seven years of the tax holiday.

47. The benefits of deductions under Section 80-IA were expressly made available with effect from 1.4.1999 by amending the then existing Section 80-IA. Later on Section 80-IB(9) was introduced to provide for such benefits. At all times the benefit had been available to an "undertaking". Neither Section 80-IA, Section 80-IB nor the provisions of PSC provided that the "undertaking"

would be construed as a whole Block.

48. The Central Government would closely scrutinize and approve every stage of exploration, development and production of mineral oil. It was pointed out that the Central Government is not only in majority in the Managing Committee under PSC but also has a veto power. In the course of development of the Block and in some cases of the field, Development Plans consisting of either a single well/cluster of wells had been approved. Thus, the Central Government has always been aware that there are more than one undertaking in each Block, has acted on this premise in approving more than one Commercial Discovery in each Development Area of a Block and cannot now introduce by retrospective amendment, the concept that an entire Block would be a single undertaking, and that such an amendment is liable to be struck down as unreasonable and arbitrary.

Meaning of the word "undertaking" before the insertion of the Explanation to Section 80-IB(9)

49. Before we advert to the newly introduced Explanation to Section 80-IB(9), it would be relevant to find out the width and ambit of sub-clause (ii) to Section 80-IB(9) before the insertion of the Explanation, which reads as under :-

> "Section 80-IB(9)(ii). The amount of deduction to an undertaking shall be hundred percent of the profits for a period of seven consecutive assessment

> years, including the initial assessment year if such undertaking fulfills any of the following namely,...is located in any part of India and has begun or begins commercial production of mineral all on or after 1st day of April 1997".

49.1 Three conditions need to be satisfied cumulatively to derive benefit under Section 80-IB(9). Firstly, the undertaking should be located in any part of India. Secondly, it has begun or begins commercial production of mineral oil and thirdly on or after 1st day of April 1997.

49.2 In other words, one hundred percent of profits of an undertaking on its commercial production of mineral oil would secure deduction of the profits and gains for seven consecutive years from the year of commencement of commercial production. Consequently, an undertaking for the purpose of Section 80-IB(9) has to be understood as one engaged in commercial production of mineral oil, Neither of the expressions, namely, "undertaking" or "commercial production" have been defined under Section 80-IB of the Act. The Apex Court had defined and laid down the test as to what would constitute an "undertaking" in the case of Textile Machinery Corporation Ltd. (supra). This was the case relating a claim by the assessee under Section 15C of the Income Tax Act, 1922 and vide paragraph 2, two questions were referred before the High Court as follows:-

(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the Steel Foundry Division was an industrial undertaking to which Section 15C of the Indian Income-tax Act, 1922 was applied?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the Jute Mill Division set up by the assessee-company was an industrial undertaking to which Section 15C of the Indian Income-tax Act, 1922, applied?

49.3 It was the contention of the revenue that setting up of a separate unit to do something in the course of pre-existing manufacturing process to aid the production of the same article as was been produced by the pre-existing industrial undertaking would not amount to starting of new industrial undertaking. It was contended that the production of articles in the steel foundry and in the jute mill division is only ancillary activity to the main business of the assessee and since the articles produced in these two supplemental undertakings help in producing identical articles which has been the end product of the assessee main business and the provision cannot come to the aid of the assessee.

49.4 The Apex Court laid out a set of criteria as to what qualifies as an undertaking. There must be a substantial investment of fresh capital in order to enable earning of profits attributable to

that new capital. It should yield additional profits attributable to the new outlay of capital in a distinct unit and this is the heart of the matter.

49.5 Expansion of an existing business would not deprive the benefit since every new creation in business is some kind of expansion or advancement. The true test is not whether a new industrial undertaking connotes expansion of the existing business of the assessee, but whether it is a new and identifiable undertaking separate and distinct from the existing business. The new undertaking must exist on its own as a viable unit. A new undertaking can exist even after cessation of the principal business of the assessee and *vice versa*. It does not matter whether the new activity produces the same commodity of the old business or distinct marketable commodity or even commodities which may feed the old business. What is relevant is that the new undertaking must be an integrated unit by itself capable of its own production. It would be a new undertaking if there is no transfer of any asset from the old business. If the results achieved are commercially tangible and undertakings can be carried out separately without losing its identity in the old business, it would constitute a new undertaking. Maintenance of separate books of accounts and discernible profits would also aid the conclusion.

49.6 In short, an undertaking is one which on a standalone basis is an economically independent unit. As long as this test is

satisfied, it is immaterial whether the undertaking carries out the same business or different business. Economically independent units doing the same business would constitute separate undertakings.

49.7 Applying the above law laid down by the Apex Court, the sole test is if a unit is able to conduct or perform commercial production of mineral oil that unit would become an undertaking irrespective of the fact it is engaged in production of the very same product, namely, mineral oil.

49.8 It is important to highlight that the expression "undertaking" should not be equated or read as an assessee. This is the essential principle evolved by Courts over a period of time. An assessee is entitled to have more than one undertaking and it can even carry on the same business or distinct business. The test is, the undertaking economically independent and commercially carrying out the activities as a self sustainable unit.

49.9 PSC is a sovereign contract entered into on behalf of the President of India under Article 299 of the Constitution of India. The Petitioner in paragraph 13 of the affidavit has brought on record the methodology for development of oil and gas fields. A perusal of the same indicates that there are detailed activities for exploration and development of every oil field. First, a seismic analysis is done, then exploratory wells are drilled following which

appraisal wells are drilled. Once the contractor believes that oil or natural gas has been struck, he shall give a detailed commerciality plan to the Management Committee. Once this is approved, a Development Plan is prepared for the field which contains detailed proposals for constructions, establishment and operations for all the facilities and services or incidental to the recovery, storage and transportation of mineral oil from the proposed Development Area. Thereafter, on the basis of the approved plan, either one or multiple wells are drilled for exploiting the reservoir. It is pertinent to note that there is a Development Plan approved by the Management Committee for every Development Area/Field.

49.10 We now refer to the PSC dated 17th July 2001 entered into between the Petitioner and the Government of India. Commercial Production of mineral oil is possible only when the Management Committee comprising of the Petitioner and the Government is able to declare a Commercial Discovery. Article 1.19 defines Commercial Discovery to mean discovery of petroleum reserves which has been declared as Commercial Discovery in accordance with the provisions of Article 10 and Article 21. Article 1.20 defines Commercial Production means production of crude oil or condensate or natural gas or any combination of these from the Contract Area (excluding production for testing purposes) and delivery of the same at the relevant delivery point under a programme of regular production and sale.

49.11 Contract Area is the whole area under the PSC. A Commercial Discovery when made from any part of the Contract Area would qualify to become a Development Area. Article 1.31 of the PSC defines Development Area means "part of the Contract Area which encompasses one or more Commercial Discoveries and any additional area that may be required for the proper development of such Commercial Discoveries and established as such in accordance with the provisions of the Contract. Article 1.34 defines Development Plan means "submitted by the Contractor for the development of a Commercial Discovery, which has been approved by the Management Committee or the Government pursuant to Article 10 or Article 21.

49.12 Article 1.37 defines Discovery means the finding during petroleum operations of a deposit of petroleum not previously known to have existed which can be recovered at the surface in a flow measurable by conventional petroleum industry testing methods. Article 1.38 defines Discovery Area means that part of the Contract Area about which based on Discovery under results obtained from a well or wells drilled in such part, the Contractor is of the opinion that petroleum exists and is likely to be produced in commercial quantities.

49.13 Article 1.51 defines Gas Field means within the Contract Area, a natural gas reservoir or a group of natural gas reservoirs within a common geological structure or feature. Article

1.66 defines an Oil Field means within the Contract Area an oil reservoir or group of oil reservoirs within a common geological structure. Article 1.88 defines Well means a bore hole, made by drilling in the course of petroleum operations but does not include a seismic shot hole.

49.14 An analysis of the above definitions along with Article 10 and Article 21 would make the following things clear:-

(i) There can be more than one Discovery within the Contract Area,

(ii) There can be more than one Discovery Area within the Contract Area which as defined will include a well or wells drilled in such part of the Area.

(iii) There can be more than one Commercial Discovery within the Contract Area.

(iv) Every Area in which there is a Commercial Discovery which has one or more reservoir is called as Oil or Gas fields or in other words Development Area.

(v) There can be more than one Development Area or Field within the Contract Area.

(vi) For every Development Area/Field there has to be a Development plant which is approved by the Management Committee comprising the Petitioner

and the Government.

(vii) Every Development Area will have either one well or cluster of wells.

49.15 From the above, it is clear that Commercial Production involves a step by step process identified to every Development Area comprising a well or cluster of wells. The PSC further obligates that the investment, costs, work programme, budget and expenditure is separately identified for each such Development Area. Revenue streams are identifiable from mineral oil produced from each of the Development Area/Field.

49.16 Therefore, it is clear that Commercial Production in terms of Section 80-IB(9)(ii) would arise when a Contractor proceeds to commercially produce mineral oil from each and every Development Area/Field with standalone, independent, identified investment, costs, budgets and revenues. The activities of commercial production of every Development Area/Field qualifies as an undertaking being standalone and economically independent unit in terms of the principles laid out by the Apex Court in Textile Machinery Corporation Ltd. Case, followed without deviation by various courts subsequently. Accordingly, a Block or a Contract Area can have more than one undertaking since it involves more than one Commercial Discovery, Development Area, Development Plan and execution of the commercial production on an independent standalone basis.

49.17 The Explanation inserted by the Finance (No.2) Act 2009 in 80-IB(9) is reproduced below:-

> "Explanation.— For the purposes of claiming deduction under this sub-section, all blocks licensed under a single contract, which has been awarded under the New Exploration Licensing Policy announced by the Government of India vide Resolution No.O-19018/22/95-ONG. DO. VL dated 10th February, 1999 or has been awarded in pursuance of any law for the time being in force or has been awarded by Central or a State Government in any other manner, shall be treated as a single "undertaking"."

The expressions "shall be treated as a “single” undertaking in the Act by inserting Explanation would evidently bring to light the fact that prior to the insertion of the Explanation, even Government was of the view that each Block can have more than one undertaking in view of the various articles in the PSC as set out above. The usage of the expression "single" in the Explanation would automatically give rise to the legal inference of existence of multiple undertakings for the same assessee within the same Contract Area or Block. The Explanation proceeds to deem multiple undertakings as a single undertaking with reference to the Block licensed. This is the plain and simple meaning and interpretation one can extend to the Explanation.

49.18 Section 80-IB(9)(ii) before the insertion of the Explanation had created a substantive vested right in the Petitioner in deriving profits and seeking deductions for every undertaking comprised in each Development Area within the Contract Area or Block. No ambiguity or doubt could be imputed to Section 80-IB(9)(ii) of the Act.

49.19 In this backdrop, one has to now consider whether insertion of Explanation by Finance (No.2) Act, 2009 with retrospective application from 1.4.2000 would be valid and sustainable in law. The above analysis would indicate that though the expression "Undertaking" has not been defined under the Act, it has acquired a well defined meaning through consistent judicial decisions commencing from Textile Machinery case. The expression 'Undertaking' is used in various provisions of the Act, while conferring the benefits under different schemes. It is clear that commercial production of mineral oil happens from every Development Area/Field consisting of a well or cluster of wells with a Development Plan being approved for every Development Area/Field thereby making every Development Area/Field as an independent economic unit. Every Development Area/Field is thus an "Undertaking". The Petitioner placed on record the decision of the ITAT rendered in their own case for the Assessment Year 2001-02. The Respondent contended that this matter is under challenge

in appeals before the High Court which are pending. This decision, however, has not been stayed.

49.20 Looking at the whole conspectus, it is clear that the term “Undertaking" has acquired a consistent statutory meaning. It is true that legislature is entitled to depart from this meaning and can define it the way it chooses to do so. While doing so, it has to resort to the process known to and approved by law. The explanation introduced by Finance Act (No.2) of 2009 is a departure from the settled interpretative meaning given by Courts to the expression 'Undertaking". Any departure, therefore, has to be through the process of validation which has to be notwithstanding any law or decision. The Explanation is not a *non-obstante* clause, notwithstanding any law or decision, it proceeds under the presumption that an existing ambiguity is sought to be clarified when, in reality, there is none. In fact, the usage of the expression "single" before the term 'undertaking' in the explanation evidences the legal understanding that the undertaking is not synonymous to assessee and an assessee can have more than one undertaking doing the same or distinct business as long as they are independent stand alone units. When, clearly there can be separate commercial discoveries for every Development Area/Field which may consists of one well or cluster of wells which makes each Development Area an "Undertaking" and this is as per the Production Sharing Contract (PSC) entered into between the

Petitioner and the Central Government, there does not exist any ambiguity under the Act.

49.21 There is no ambiguity or doubt which needed to be explained by this Explanation, if uniform settled interpretation and meaning needs to be departed, the amendments sought to be carried out, can only be through the process of validation and not through insertion of an Explanation which is not in the nature of validation.

Legislative intent for adding by Amendment Explanation to Section 80-IB(9).

50. For the purpose of finding out the legislative intent, it is necessary to examine the reason for enacting Section 80-IB(9) of the Act and what was the provision earlier. For gathering the legislative intent to give retrospectively to the Explanation added by amendment to Section 80-IB(9) its apposite to find out the reasons and whether they are reasonable and for this purpose, it will be necessary to take into account the history of legislation or the averment introduces a tax which is substantive in nature under the garb of adding a definition which is clarificatory, declaratory, curative or makes “small repair” in the Act.

50.1 In **Apollo Tyres Ltd. v. Commissioner of Income**

Tax, Kochi, (2002) 9 SCC 1, the Apex Court examined the object of introducing Section 115-J in the Act. The Court relied on the budget speech of the then Hon'ble Finance Minister of India made in the Parliament while introducing the said Section.

50.2 In **Union of India and others v. Martin Lottery Agencies Ltd. (2002) 9 SCC 209**, the Apex Court in paragraph 36 to 39, 45, 50 to 52 held as under:-

> "36. ... The speech of the Hon'ble the Finance Minister would have been relevant for the purpose of opining as to whether the court independently would have arrived at a conclusion that organizing lottery would amount to rendition of service but not otherwise.
>
> 37. As it is not possible for us to arrive at the said conclusion, we have no other option but to hold that by inserting the explanation appended to clause (19) of Section 65 of the Act, a new concept of imposition of tax has been brought in. The Parliament may be entitled to do so. It would be entitled to raise a legal fiction, but when a new type of tax is introduced or a new concept of tax is introduced so as to widen the net, it, in our opinion, should not be construed to have a retrospective operation on the premise that it is clarificatory or declaratory in nature.
>
> 38. There cannot be any doubt whatsoever that speech of the Hon'ble Finance Minister in the

House of the Parliament may be taken to be a valid tool for interpretation of a statute. It was so held in K.P. Varghese v. Commissioner of Income-tax, Ernakulam and another [(1981) 4 SCC 173 at 184], in the following terms:-

"8. … Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible.
[See also Commissioner of Wealth Tax, Punjab, J & K, Chandigarh, Patiala v. Yuvraj Amrinder Singh and Ors. (1985) 4 SCC 608]

39. It is, however, also well settled that the statute must be interpreted keeping in view the words used in it. We must notice that in Virtual Soft Systems Ltd. v. Commissioner of Income Tax, Delhi-I [(2007) 9 SCC 665], a Bench of this Court has held:-

"24. Section 271 of the Act is a penal provision and

there are well-established principles for the interpretation of such a penal provision. Such a provision has to be construed strictly and narrowly and not widely or with the object and intention of the legislature."

45. We are also not unmindful of the fact that the said decision has been overruled in Commissioner of Income Tax-I, Ahmedabad v. Gold Coin Health Foods Pvt. Ltd. (2008) 9 SCC 622. A bare perusal of the said decision would, however, show that a Three Judge Bench of this Court noticed that the Act intended to make the position explicit which otherwise was implicit. The Bench went back to the provisions of the Original Act to hold that the clarification issued by the Parliament was in tune with the actual interpretation of the original provision.

50. It is, therefore, evident that by reason of an explanation, a substantive law may also be introduced. If a substantive law is introduced, it will have no retrospective effect. The notice issued to the assessee by the appellant has, thus, rightly been held to be liable to be set aside.

51. Subject to the constitutionality of the Act, in view of the explanation appended to this [*sic* Section 65(19)(ii) of the Finance Act, 1994] we are of the opinion that the service tax, if any, would be payable only with effect from May, 2008 and not with retrospective effect. In a case of this nature, the Court must be satisfied that the Parliament did

not intend to introduce a substantive change in the law.

52. As stated herein before, for the aforementioned purpose, the expressions like for the removal of doubts are not conclusive. The said expressions appear to have been used under assumption that organizing games of chance would be rendition of service. We are herein not concerned as to whether it was constitutionally permissible for the Parliament to do so as we are not called upon to determine the said question but for our purpose, it would be suffice to hold that the explanation is not clarificatory or declaratory in nature."

50.3 The briefly set out the history of the Government's policy and the tax holidays in regard to production of mineral oil in the country.

(i) Prior to 1999, the Government had a policy with respect to exploration, development and production of mineral oil in the country. When private participation was permitted for the first time under the extant policy.

(ii) It was under this policy that the Petitioner entered into its first PSC on 23rd September 1994 with the Government of India and the benefit of deductions to an undertaking engaged in

commercial production of mineral oil in any part of India on or after the 1st day of April 1997 was first introduced by Finance Act 1998 in Section 80-IA of the Income Tax Act, 1961.

(iii) The Government, in order to attract private investments in the mineral oil sector, formulated the New Exploration and Licensing Policy (NELP) which came to be notified in the official gazette on 10th February, 1999. Among other things, the NELP stated that a seven years tax holiday from the date of commencement of commercial production would be available to the contractors under NELP. The NELP also stated that a separate Petroleum Tax Guide would be in place to facilitate the investors.

50.4 Statement of the Finance Minister on the floor of the Parliament while moving the motion for the consideration of Finance Bill 2008 :-

"...Members are aware, this sub-section allows 100 per cent tax exemption in respect of an undertaking which begins commercial production or refining of mineral oil for a period of seven consecutive assessment years.

Now, what is the scope of this Section? It is

> disputed. The Department has taken a view; the assessees have taken another view. The disputes go back to assessment year 2001-02. The disputes are under adjudication before different tax authorities. In my view, it is not correct to resolve these disputes by debate in Parliament We should allow the disputes to be resolved in the normal course by the tax tribunals and the courts. Nevertheless, some doubts have arisen because of the notes on clauses attached to the Finance Bill. I wish to clarify these doubts. The statement in the notes on clauses is a mere restatement of the Income Tax Department's known position before the tribunals and the courts which are adjudicating the matter. Nothing new has been stated, it is simply a restatement of Department's position which has already placed before the tribunals and the courts. Besides, it is a well settled proposition of law that notes on clauses have no legal effect and are not binding on the courts. I may assure potential bidders for oil exploration blocks that the benefit of Section 80IB(9), as finally interpreted by the courts, will be applicable to all exploration and production contracts, whether obtained through nomination or bidding..."

50.5 The Finance Minister on the floor of the Parliament while moving the motion for the consideration of Finance Bill 2008 stated that the sub-section allows 100 per cent tax exemption in respect of an undertaking which begins commercial production or refining of mineral oil for a period of seven consecutive assessment

years and he assured the potential bidders for mineral oil exploration blocks that the benefit of Section 80IB(9), as finally interpreted by the courts, will be applicable to all exploration and production contracts, whether obtained through nomination or bidding.

50.6 After the Income Tax Appellate Tribunal held the each well is a separate undertaking entitled for seven years tax holiday on each well from the date when commercial production begins and the assessee was entitled to 100% tax deduction on profits and gains the law was amended by the Parliament with retrospective effect, though the Revenue had challenged the judgment of ITAT before High Court in appeals which are still pending. Budget speech of the Finance Minister while introducing Finance (No.2) Bill, 2009:-

> "102. Madam Speaker, in the context of the geo-political environment, it is necessary for us to create our own faculties for energy security. Accordingly, I propose to extend the tax holiday under section 80IB(9) of the Income Tax Act, which was hitherto available in respect of profits arising from the commercial production or refining of mineral oil, also to natural gas. This tax benefit will be available to undertakings in respect of profits derived from the commercial production of mineral oil and natural gas from oil and gas blocks which are awarded under the New Exploration Licensing Policy-VIII round of bidding. Further, I also propose

> to retrospectively amend the provisions of the said section to provide that "undertaking" for the purposes of section 80-IB(9) will mean all blocks awarded in any single contract."

50.7 The legislative intent is clearly reflected in the action of the legislature in adding Explanation to Section 80-IB(9) by Finance (No.2) Act, 2009 by way of amendment with retrospective effect. It is easily discernible, that the legislature wanted to overcome the decision of the Income Tax Appellate Tribunal wherein it had been held the each well is a separate undertaking entitled for seven years tax holiday on each well. The adding of Explanation to Section 80-IB(9) with retrospection effect by amendment to was aimed to charge income tax from mineral oil contractors who were benefited by 100% tax holiday for seven years.

50.8 To attain welfare state is our constitutional goal as well, enshrined as one of its basic feature, which runs through our Constitution. It is for this reason, specific provisions are made in the Constitution, empowering the legislature to make laws for levy of taxes, including the income-tax. The rationale behind collection of taxes is that revenue generated therefrom shall be spent by the governments on various developmental and welfare schemes, among others.

Explanation to Section 80-IB(9) by Finance (No.2) Act, 2009

by way of amendment with retrospective effect is clarificatory, declaratory, curative or makes "small repair" or a substantive provision

51. The Constitutional Bench of the Apex Court in **Commissioner of Income Tax (Central)–I, New Delhi v. Vatika Township Private Limited, (2015) 1 SCC 1** has held that though an Act consists of words printed on paper, it amounts to verbal communication by legislation. The technique required to understand legislation is governed by various principles of interpretation of statutes. In paragraph 27, the Court observed of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit*: law looks forward not backward. As was observed in Phillips v. Eyre [(1870) LR 6 QB 1], a retrospective legislation is contrary to the general principle that

legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

51.1 We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India and others v. Indian Tobacco Association (2005) 7 SCC 396, the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra and others (2006) 6 SCC 286. It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are not confronted with any such situation here.

51.2 In such cases, retrospectively is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the proviso added to Section 113 of the Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by out weighing factors.

51.3 Let us sharpen the discussion a little more. We may note that under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such statutory provisions are labeled as “declaratory statutes”. The circumstances under which a provision can be termed as “declaratory statutes” is explained by Justice G.P. Singh [Principles of Statutory Interpretation, 13th Edition 2012 published by LexisNexis Butterworths Wadhwa, Nagpur] in the following manner: “Declaratory statutes. The presumption against retrospective

operation is not applicable to declaratory statutes. As stated in CRAIES and approved by the Supreme Court : “For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word 'declared' as well as the word 'enacted'. But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduced new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An

amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law." The above summing up is factually based on the judgments of this Court as well as English decisions.

51.4 A Constitution Bench of this Court in Keshavlal Jethalal Shah v. Mohanlal Bhagwandas & Anr. [(1968) 3 SCR 623], while considering the nature of amendment to Section 29 (2) of the Bombay Rents, Hotel and Lodging House Rates Control Act as amended by Gujarat Act 18 of 1965, observed as follows :-

> "The amending clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional jurisdiction was before the amendment derived from s. 115, Code of Civil Procedure, and the legislature has by the amending Act attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act."

51.5 We would also like to reproduce hereunder the following observations made by this Court in the case of Govind

Das v. Income-tax Officer (1976) 1 SCC 906, while holding Section 171 (6) of the Income- Tax Act to be prospective and inapplicable for any assessment year prior to 1st April, 1962, the date on which the Act came into force :

> "11. Now it is a well settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospectively and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

51.6 In the case of C.I.T., Bombay v. Scindia Steam Navigation Co. Ltd. [1962 (1) SCR 788], this Court held that as the

liability to pay tax is computed according to the law in force at the beginning of the assessment year, i.e., the first day of April, any change in law affecting tax liability after that date though made during the currency of the assessment year, unless specifically made retrospective, does not apply to the assessment for that year.

51.7 At the same time, it is also mandated that there cannot be imposition of any tax without the authority of law. Such a law has to be unambiguous and should prescribe the liability to pay taxes in clear terms. If the concerned provision of the taxing statute is ambiguous and vague and is susceptible to two interpretations, the interpretation which favours the subjects, as against there the revenue, has to be preferred. This is a well established principle of statutory interpretation, to help finding out as to whether particular category of assessee are to pay a particular tax or not. No doubt, with the application of this principle, Courts make endeavour to find out the intention of the legislature. At the same time, this very principle is based on "fairness" doctrine as it lays down that if it is not very clear from the provisions of the Act as to whether the particular tax is to be levied to a particular class of persons or not, the subject should not be fastened with any liability to pay tax. This principle also acts as a balancing factor between the two jurisprudential theories of justice – Libertarian theory on the one hand and Kantian theory along with Egalitarian theory propounded by John Rawls on the

other hand.

51.8 Tax laws are clearly in derogation of personal rights and property interests and are, therefore, subject to strict construction, and any ambiguity must be resolved against imposition of the tax. In Billings v. U.S.[232 U.S. 261, at p.265, 34 S.Ct. 421 (1914)], the Supreme Court clearly acknowledged this basic and long- standing rule of statutory construction:

> "Tax Statutes . . . should be strictly construed, and, if any ambiguity be found to exist, it must be resolved in favor of the citizen. Eidman v. Martinez, 184 U.S. 578, 583; United States v. Wigglesworth, 2 Story, 369, 374; Mutual Benefit Life Ins. Co. v. Herold, 198 F. 199, 201, affd 201 F. 918; Parkview Bldg. Assn. v. Herold, 203 F. 876, 880; Mutual Trust Co. v. Miller, 177 N.Y. 51, 57."

51.9 Again, in United States v. Merriam [263 U.S. 179, 44 S.Ct. 69 (1923)], the Supreme Court clearly stated at pp. 187-88-:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language

used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. Gould v. Gould, 245 U.S. 151, 153"

51.10 As Lord Cairns said many years ago in Partington v. Attorney- General [(1869) LR 4 HL 100]: "As I understand the principle of all fiscal legislation it is this : If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

51.11 "Notes on Clauses" appended to Finance Bill, 2002 while proposing insertion of proviso categorically states that "this amendment will take effect from 1st June, 2002". These become epigraphic words, when seen in contradistinction to other amendments specifically stating those to be clarificatory or retrospectively depicting clear intention of the legislature. It can be seen from the same notes that few other amendments in the Act were made by the same Finance Act specifically making those amendments retrospectively. For example, clause 40 seeks to amend S.92F. Clause iii (a) of S.92F is amended "so as to clarify that the activities mentioned in the said clause include the carrying out of any work in pursuance of a contract." This amendment takes

effect retrospectively from 01.04.2002. Various other amendments also take place retrospectively. The Notes on Clauses show that the legislature is fully aware of 3 concepts :-

> (i) prospective amendment with effect from a fixed date;
>
> (ii) retrospective amendment with effect from a fixed anterior date; and
>
> (iii) clarificatory amendments which are retrospective in nature.

51.12 Thus, it was a conscious decision of the legislature, even when the legislature knew the implication thereof and took note of the reasons which led to the insertion of the proviso that the amendment is to operate prospectively. Learned counsel appearing for the assessees sagaciously contrasted the aforesaid stipulation while effecting amendment in Section 113 of the Act, with various other provisions not only in the same Finance Act but Finance Acts pertaining to other years where the legislature specifically provided such amendment to be either retrospective or clarificatory. In so far as amendment to Section 113 is concerned, there is no such language used and on the contrary, specific stipulation is added making the provision effective from 1st June, 2002.

51.13 Furthermore, an amendment made to a taxing statute

can be said to be intended to remove 'hardships' only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from 1.6.2002.

52. The Apex Court in **Commissioner of Income Tax-I, Ahmedabad v. Gold Coin Health Food Pvt. Ltd. (2008) 9 SCC 622**, in paragraph 6 held that penalty provision were already in existence and penalty was not imposed for the first time. The amendment by the Finance Act as specifically noted in the Notes on Clauses makes the position clear that the amendment was clarificatory in nature and would apply to all assessments even prior to assessment year 2003-04. The Apex Court further held in paragraph 8 that even if the statute does contain a statement to the effect that the amendment is clarificatory or declaratory, that is not the end of the matter. The Court has to analyse the nature of the amendment to come to a conclusion whether it is in reality a clarificatory or declaratory provision. Therefore, the date from which the amendment is made operative does not conclusively decide the question. The Court has to examine the scheme of the statute prior to the amendment and subsequent to the amendment to determine whether amendment is clarificatory or substantive. The Apex Court in paragraph 20 relied on the decision in Zile Singh v. State of Haryana and others (2004) 8 SCC 1 with approval that it

is a cardinal principle of construction that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only — "*nova constitutio futuris formam imponere debet non praeteritis*" — a new law ought to regulate what is to follow, not the past.

53. The Apex Court in Martin Lottery Agencies Ltd. (supra), in paragraph 19 and 36 held as under:-

> "19. When the Explanation seeks to give an artificial meaning earned in India and bring about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively.
>
> 36. It is, therefore, evident that by reason of an explanation, a substantive law may also be introduced. If a substantive law is introduced, it will have no retrospective effect."

54. The Petitioner has been claiming a well or a cluster of wells each as a separate undertaking and according to him, in a

block, there may be various fields and various undertakings and each undertaking had been granted benefit of deductions under the benefits of deductions under Section 80-IA were expressly made available with effect from 1.4.1999 by amending the then existing Section 80-IA. Later on Section 80-IB(9) was introduced to provide for such benefits.

55. The argument of learned counsel for the respondent, if accepted, would be contrary to the legislative intent as the seven years tax holiday was provided by inviting public private participation contract as huge expenditure was involved in exploration, discovery and commercial production of mineral oil. The benefit of 100% deduction on profits and gains was granted by the legislature under the Act to invite investment and encourage mineral oil exploration, discovery and commercial production. The legislature gave a clear message to foreign and domestic investors that the State is encouraging mineral oil and gases exploration and commercial production by granting seven years tax holiday to an undertaking.

56. We propose to test the argument of learned counsel for the respondent. It is not disputed that the benefit of seven years tax holiday was available to the Petitioner and is still available to the Petitioner. The question is as to whether the benefits of tax holiday of seven years was available on each undertaking which has now been taken away by the amendment made in Section 80-

IB(9) by adding an Explanation that provides that all blocks licensed under a single contract shall be treated as a single undertaking. The PSC provides a period of four years for exploration of mineral oil etc. The argument of learned counsel for the respondent is that the moment the first well starts commercial production of mineral oil, the clock of seven year tax holiday starts ticking and even if the other wells may have been explored or discovered or started commercial production after two, three or about the end of four years period, the Petitioner would be entitled only to a limited part of tax holiday which may be three or four years which may be available when the commercial production starts in a well, as the period of seven years tax holiday has to be counted from the date the first well started commercial production.

57. The argument of learned counsel for the respondent cannot be accepted. If we take an example that a block consists of 200 square Kms., wherein exploration, discovery and commercial production has to be commenced by the Petitioner within a period of four years. If he discovers a well, wherein commercial production can be commenced within a period of three months or six months from the date he started exploration, then whether he should wait and continue to make investment on exploration and discovery of mineral oil in the entire stretch of 200 square Kms., and start commercial production of all the wells together so that all the well/cluster of wells start commercial production on the same day so that he may avail the tax holiday of seven years on all the

wells/cluster of wells by making huge investments in machines manpower etc.. But this was not mentioned either in the PSC or in the petroleum tax guide.

58. The object of the amendment, as it appears from the statements of the Finance Minister while moving the Finance (No.2) Bill 2009, was to define the term “undertaking” in the context of mineral oil which was subject matter of considerable dispute. The assessees who are claiming every well in a block licensed constitutes a single undertaking entitled for tax holiday separately for each well. According to the Finance Minister, the view taken by the assessee were against the legislative intent. What was the legislative intent when 100% tax deduction on profits and gains was granted by the legislature was neither stated nor explained by the Finance Minister. The expression “legislative intent” was used by the Finance Minister in the Bill to impose Income Tax on the Petitioner by withdrawing tax holiday which was vested in the Petitioner from an earlier point of time. Under the garb of clarification or defining the term “undertaking”, the Finance Minister by amendment almost withdrew the benefit of tax deduction substantially.

59. The statement of the Finance Minister further stated that the term “undertaking” has been a subject matter of considerable dispute. The Finance Minister had clearly expressed the legislative intent while presenting the Finance Bill 2008 in the

Parliament. “The legislative intent is clear from the speech of the Finance Minister on the floor of the Parliament while moving the motion for the consideration of Finance Bill 2008, he clearly stated that sub-section allows 100 per cent tax exemption in respect of an undertaking which begins commercial production or refining of mineral oil for a period of seven consecutive assessment years” “…….In my view, it is not correct to resolve these disputes by debate in Parliament. We should allow the disputes to be resolved in the normal course by the tax tribunals and the courts.” “……..I may assure potential bidders for oil exploration blocks that the benefit of Section 80-IB(9), as finally interpreted by the courts, will be applicable to all exploration and production contracts, whether obtained through nomination or bidding.” From the facts of the case in hand, it is clear that the judgment of ITAT was against the revenue as the ITAT had found that each well/cluster of wells was a separate undertaking entitled to seven years tax holiday. The Revenue had challenged the decision of the ITAT before the High Court and thereafter, they have a remedy before the Apex Court. But, arbitrarily, the 100% tax deduction benefit could not be withdrawn by the Finance Minister or the legislature by amending Section 80-IB(9) of the Act retrospectively from an anterior date. The amendment in such cases where already benefit had accrued and vested in the assessee could not be taken away by giving retrospective amendment to Section 80-IB(9) which is nothing but a substantive provision inserted by amendment and it can only operate prospectively and not retrospectively.

60. The Constitutional Bench of the Apex Court in Vatika Township Private Limited (supra) has held in paragraph 34 that it would also be pertinent to mention that assessment creates a vested right and an assessee cannot be subjected to reassessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective. (See Controller of Estate Duty Gujarat-I v. M.A. Merchant [1989 Supp (1) SCC 499].

61. The Apex Court in Gold Coin Health Food Pvt. Ltd. (supra), held in paragraph 8 that even if the statute does contain a statement to the effect that the amendment is clarificatory or declaratory, that is not the end of the matter. The Court has to analyse the nature of the amendment to come to a conclusion whether it is in reality a clarificatory or declaratory provision. Therefore, the date from which the amendment is made operative does not conclusively decide the question. The Court has to examine the scheme of the statute prior to the amendment and subsequent to the amendment to determine whether amendment is clarificatory or substantive. Same principle would apply where the legislature had made a statement in the statute that it would apply retrospectively. We have examined the history of enactment for mineral oil, the old and the amended provisions. We are satisfied that the Explanation added to Section 80-IB(9) has levied income

tax on all wells/cluster of wells and all undertakings, except the first one which commences commercial production for which still seven years tax holiday is available. The legislature or the Parliament had by inserting the Explanation had widened the main Section 80-IB(9) and imposed an altogether new tax by widening the tax net which would be applicable for different periods depending upon the date of starting commercial production would be substantive change in the law with different tax liability. Such substantive provision could only be construed prospective in operation.

62. For the reasons given above, we are of the considered opinion that the amendment made in Section 80-IB(9) by adding an Explanation was not clarificatory, declaratory, curative or made "small repair" in the Act, but on the contrary takes away the accrued and vested right of the Petitioner which had matured after the judgments of ITAT, therefore, the Explanation added by Finance (No.2) 2009 was a substantive law. We have no hesitation to hold that the Explanation added to Section 80-IB(9) by Finance Act (No.2) of 2009 is clearly unconstitutional, violative of Article 14 of the Constitution of India and is liable to be struck down.

63. Therefore, for the reasons given above, we are of the considered opinion that the Explanation added to Section 80-IB(9) by amendment is substantive law and could not apply

retrospectively. The Explanation added to Section 80-IB(9) breaches the rule of law and is arbitrary being violative of Article 14 of the Constitution of India is struck down.

64. In the result, both the writ petitions succeed and are allowed. The Explanation to Section 80-IB(9) of the Act is held to be *ultra vires* to Article 14 of the Constitution of India. Rule is made absolute. Parties to bear their own costs.

(V.M.SAHAI, ACJ.)

(R.P.DHOLARIA, J.)

After this judgment was pronounced, Mr. Mihir Joshi, learned Senior Counsel assisted by Mr. Nitin Mehta and Mr. Sudhir Mehta, learned counsel appearing for respondent No.2 as well as Mr. Shakeel A. Qureshi have prayed that the operation of this judgment be stayed for a period of one month. We do not find any justification to stay our judgment. The oral request made by learned counsel for the respondents is rejected.

(V.M.SAHAI, ACJ.)

(R.P.DHOLARIA, J.)

Savariya