

## Bombay HC upholds retro amendment to VAT law

The Bombay high court has upheld the constitutional validity of a retrospective amendment to the Maharashtra Value Added Tax Laws, which restricts the VAT incentives available to eligible industrial units, based on prescribed proportionality formula. With this favourable order on Monday, the state may benefit to the tune of several hundred crores.

The Maharashtra VAT (Levy, Amendment and Validation) Act, 2009, sought to enforce tax benefits under the Package Incentive Scheme based on a prescribed proportionality ratio with retrospective effect from April 1, 2005 (the date when the principal legislation came into force). While the Bombay high court has upheld such retrospective amendment, at the same time it has struck down the retrospective application of penalty, holding it to be harsh and arbitrary.

Sunil Gabhawalla, **chartered accountant** specializing in indirect tax, says: "This judgment brings an element of finality to a long-drawn dispute. Further, the decision of the Bombay high court that penalty cannot be imposed retrospectively is fair and judicious."

The Maharashtra State government from time to time introduces Package Scheme of Incentives to attract industries to underdeveloped and developing regions. Such incentives are available to fresh units and in cases of substantial expansion by an existing industrial unit.

The Maharashtra Value Added Tax Act, 2002 (Mah VAT Act), which came into force from April 1, 2005, also provided for such a scheme.

In their petition to the high court, as many as eight companies, including Jindal Poly Films, Bajaj Auto, [Mirc Electronics](#), challenged the constitutional validity of a retrospective amendment to the Mah Vat Act. Through the concept of proportionality, mandated via this amendment, the benefits to an eligible existing unit were proportionally restricted to the turnover attributable to the expansion.

It was petitioned that over the years, the decision to exclude proportionality was reiterated by the legislature. Further, when the **Sales Tax** Department by way of an administrative decision had sought to impose a norm of proportionality, the same had been struck down by the divisional bench of Bombay high court. As the petitioners had taken the benefit of the exemption available under the Package Scheme of Incentives and passed on the benefit, a retrospective amendment which now sought to collect a tax was unreasonable.

However, the high court, in its exhaustive 41-page order, held that the legislative intent to grant proportionate incentives was clear under the restrictive provisions of section 93(1) of the Mah Vat Act, even prior to the retrospective amendment. Referring to one of the points raised by the petitioners, justices D Y Chandrachud and A A Sayed in their order pointed out that earlier, the divisional bench of the high court had held that the principle of proportionality could not be enforced because of the absence of rules. This lacuna was cured by the amending provisions of Section 93(1), with retrospective effect. By doing so, proportionality has been mandated and a formula for computation of proportionate incentives introduced from the date of the original legislation. Upholding the retrospective amendment, the high court observed, "A validating legislation can be enacted to cure the deficiency and do what was always intended."

However, the judges struck down application of penalty with retrospective effect from April 1, 2005, holding it to be a harsh proposition. "A penalty cannot be imposed merely because it is lawful to do so. The imposition of a penalty for the period prior to the amendment of section 93 with retrospective effect would be arbitrary," they held.

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