(2014) 12 BOM CK 0201

In the Bombay High Court

Case No : Writ Petition No. 9996 of 2014

CEAT Limited APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 23-12-2014

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 3
Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 — Section 3
Central Excises and Salt Act, 1944 — Section 3
Constitution of India, 1950 — Article 14, 226, 256, 257, 258
Customs Tariff Act, 1975 — Section 3
Essential Commodities Act, 1955 — Section 3, 3(3-C)
Finance (No. 2) Act, 2004 — Section 88, 88(1)
Finance Act, 2001 — Section 136
Finance Act, 2003 — Section 157
Finance Act, 2005 — Section 124, 85, 88(5)

Citation : (2016) 332 ELT 481

Hon'ble Judges : S.C. Dharmadhikari, J;A.A. Sayed, J

Bench : Division Bench

Advocate : V. Sridharan, Sr. Counsel, Prakash Shah, Anjali Hirawat and Gajendra Jain i/b PDS Legal, Advocates for the Appellant; Anil C. Singh, Additional Solicitor General, A.S. Rao, Pradeep S. Jetly, Afroz Shah and Suchitra Kamble, Advocates for the Respondent

Judgement

S.C. Dharmadhikari, J.—Rule. Respondents waive service. By consent rule is made returnable forthwith.

2. By this Writ Petition under Article 226 of the Constitution of India the Petitioners seek a declaration that classification made by section 88 of the Finance (No. 2) Act, 2004 disallowing utilization of the credit of Additional Excise Duty (GSI) on goods of special importance paid after 1 April 1996, but prior to 1 April 2000 for payment of duty for First and Second Schedule to Central Excise Tariff Act, 1985, but at the same time allowing utilization of credit of Additional Excise Duty on the same goods paid on or after 1st April 2000 is violative of Article 14 of the Constitution of India and hence invalid.

3. By prayer clause (b), a declaration is sought so as to declare the cut-off date of 1 April 2000 mentioned in the Second Schedule of the said Finance Act read with section 88(1) thereof as violative of Article 14 of the Constitution of India.

4. The Credit of Additional Excise Duty of Rs. 9,64,98,626/-, according to the Petitioners, is available on tyre cord fabrics pertaining to this period namely 1 April 1996 to 31 March 2000, and declaration to that effect also be granted.

5. Though prayer clauses (d) & (e) pertain to an order passed on 12 June 2014 by the second Respondent and on 1 November 2013 by the third Respondent upholding the recovery of credit of Additional Excise Duty (GSI) paid on 5 June 2006, we are not concerned with that aspect of the matter as a substantive Appeal bearing Appeal No. 261 of 2014 is instituted in this Court to challenge the order dated 12 June 2014. Though that is listed for disposal alongwith this Writ Petition, since Mr. Shridharan, learned Senior Counsel appearing for the Petitioners and the Appellants in Appeal No. 261 of 2014, submits that there is an additional point in the Appeal, we adjourn the hearing of that Appeal by clarifying that this order shall govern only the Writ Petition.

6. The Petitioners have summarized the brief facts and leading to filing of the Writ Petition. The Petitioners have pointed out that they are, inter alia, engaged in the manufacture of tyres & clear the same on payment of duties of excise leviable under the First Schedule and Second Schedule to the Central Excise Tariff Act, 1985 read with section 3 of the Central Excise Act, 1944. These duties are termed as Basic Excise Duty and Special Excise Duty.

7. The raw material namely nylon tyre cord fabric comes into manufacture of tyre. The Petitioners purchased that and subjected the same to the process of dipping in a solution to obtain dipped tyre cord fabric, which in turn is used in the manufacture of tyre. This nylon tyre cord fabric purchased by the Petitioners, inter alia, suffers Additional Excise Duty (GSI) under the Additional Duties of Excise (Goods of Special Importance) Act, 1957, that is with effect from 16 March 1995.

8. At the outset, we must set out the abbreviations and which would appear in the judgment hereafter. The Central Excise Act shall be referred to as "the Act". The Central Excise Tariff Act, 1985 shall be referred to as "the Tariff Act". The Basic Excise Duty shall be referred to as "BED" and Special Excise Duty shall be referred to as "SED". Additional Excise Duty shall be referred to as "AED" and Additional Duties of Excise (Goods of Special Importance) Act, 1957 shall be referred to as "AED (GSI)" and the Act in that behalf shall be referred to as "1957 Act".

9. The case of the Petitioners is that they took cenvat credit of AED paid on tyre cord fabrics in terms of Rule 57A of the earlier Central Excise Rules/Modvat Rules and now termed as Cenvat Credit Rules. They applied for this credit and obtained it in terms of a notification issued under the applicable law, as enabling them to obtain credit of AED (GSI) paid on inputs, in payment of said duty leviable on the

final product. The Petitioners pointed out that since AED (GSI) is not leviable on the final product namely tyres, bulk of credit of AED (GSI) paid on tyre cord fabrics remained unutilized.

10. The Petitioners rely on an Explanation to Rule 3(6)(b) of Cenvat Credit Rules, 2002 and which has been brought into effect from 1 March 2003. It is their case that they utilized this accumulated credit on AED (GSI) lying unutilized as on 28 February 2003 for payment of Basic Excise Duty (BED) and Special Excise Duty (SED) on tyre under section 3 of the Act cleared during the period from March 2003 to May 2003. Conflicting Circulars were issued by Central Board of Excise and Customs and according to the Petitioners with regard to the true scope of the explanation. One view was that benefit applied only to AED (GSI) paid after 1 March 2003 and another was that the benefit applied whenever duty was paid on inputs. The Petitioners rely upon section 88 of the Finance (No. 2) Act, 2004 and by which the amendment was made to the Explanation retrospectively. They rely upon this amendment and urged that the Central Excise Authorities took the view that only credit relatable AED (GSI) paid on or after 1 April 2000 is available for utilization. Hence, the credit relatable to period prior to 1 April 2000, but utilized during March to May 2003 cannot be granted was the stand of the Department/Revenue. The matter must be read, according to the Petitioners, in the light of the amendment to section 88(5) of the Finance Act, 2005. The amendment provided for manner of recovery of amount of Cenvat Credit of the above duty, which was utilized for payment of BED and SED, which could not have been utilized in view of the amendment made by section 88 of the Finance Act, 2004. The 2005 Finance Act amendment requires the Assessee to pay back the excess amount of credit in 36 monthly installments together with interest thereon. The Petitioners claimed to have paid Rs. 20.50 crores approximately in 36 equal installments and that is how the alleged excess utilization of credit of duty of prior to 1 April 2000 along with interest is a closed matter according to them. They, therefore, proceeded to restore the credit of AED (GSI) in their books and reflected the same in their ER-1 returns filed for the months of July 2005 to June 2008. The Petitioners submit that an order adjudging liability was passed by the Commissioner on 28 February 2006. Thereunder the duty of Rs. 6.60 crores approximately was confirmed as amount of AED (GSI) on dipped nylon fabrics consumed during the period 16 March 1995 to 1 June 1998. Utilizing the restored credit of AED (GSI), the Petitioners paid Rs. 6.60 crores approximately on 5 June 2006. Since, this constitutes AED (GSI) paid on or before 1 April 2000, the Petitioners relying upon the Explanation to Rule 6(3)(b) as amended retrospectively, claimed credit of the same for utilization of BED on tyres cleared in April 2007. Such utilization of the AED (GSI) for payment of BED on tyres cleared in April 2007 is incorrect according to the Department. It is in these circumstances that the Petitioners have instituted the present Petition contending that the date chosen namely 1 April 2000 in section 88 of the Finance Act (No. 2) of 2004 is arbitrary and violative of the mandate of Article 14 of the Constitution of India. The date ought to be 1 April 1996.

11. Mr. Sridharan, learned Senior Counsel appearing on behalf of the Petitioners submits that the BED is levied under the Act and Additional Duty is levied under the Act of 1957. He has tendered a compilation, which contains the relevant provisions of the Act, the Tariff Act, 1957 Act and applicable Notifications. It also contains the gist of the Constitutional provisions.

12. Pointing out as to how the duty is levied under the Act, the Tariff Act and styled as BED and SED, Mr. Sridharan submits that AED (GSI) is levied on selected goods namely textiles, sugar and tobacco in terms of the First Schedule to the 1957 Act. This is also the duty of excise since the taxable event is manufacture. However, since this duty is over and above the duty levied under the Act, it is called Additional Duty of Excise. Inviting our attention to Articles 270 and 272 of the Constitution of India, Mr. Sridharan submits that personal income tax collected by the Centre (other than Agricultural and Corporation Tax) is to be collected by the Government of India, but is distributed between the Union and the States. The distribution is as per the order of the President of India and based on the recommendations of the Finance Commission. Similar is the stipulation on excise duty collected by the Centre. Article 272 of the Constitution of India is pressed into service and to urge that even this duty has to be distributed amongst States, but leaving out duty of excise on medicinal and toilet preparations. This distribution is to be made as per the law. Accordingly, the Union Duties of Excise Distribution Act, 1979 came to be enacted (hereinafter referred to as "the Distribution Act, 1979"). It is periodically amended every five years by an Amending Act after receipt of the report of the Finance Commission. The ratio of distribution of excise duty between Centre and States is recommended by the Finance Commission and in terms of these recommendations the amendments are carried out. The argument is that AED (GSI) collected by the Central Government should be entirely distributed to the States. The understanding between the Union and States is that the States will not levy sales tax on the sale of these commodities covered by AED (GIS) 1957 Act. The portion of AED (GSI) collected which relates to the Union Territories is of course retained by the Central Government. Then, reference is made by Mr. Sridharan to the amendment carried out to the Second Schedule to AED (GSI) Act by a amending Act and based on the report of the Finance Commission. This is also generally done every five years to indicate inter se share of the States from total AED (GSI) distributed to the States.

13. Mr. Sridharan, has then placed reliance upon Article 280 of the Constitution of India, whereunder the Finance Commission has been established, its functions and its reports. He then relies upon the Report of the 10th Finance Commission (November 1994) for the period 1995-2000. He relies upon para 5.21 of this Report. But prior thereto he relies upon Articles 280(3) and 280(4) of the Constitution of India. This is to emphasize the binding nature of the recommendations of the Finance Commission. Thereafter, referring to Report of 10th Finance Commission (para 5.2 specifically) he submits that the recommendation was that the share of the State in the net proceeds of income

tax should be 77.5%. Para 5.28 of the Report recommended share of the State in the net proceeds of Union Excise Duty should be 47.5%. Then, para 6.19 of the Report has been relied upon to urge that AED (GSI) is to be entirely allocated to the States. The Report focuses only on inter se share of the States from the total net proceeds of AED IGSI), which is set out in Table 2 to para 6.19 of the Report. He submits that steps were taken by the Competent Legislature after receipt of Finance Commission Report. An amendment is made to the Distribution Act, 1979 and the Second Schedule to the 1957 Act. The Constitution (Distribution of Revenue) order is issued by the President under Article 270 of the Constitution of India for distribution of the income tax. Then he relies upon the Act 31 of 1995 (to be found in compilation, Volume II-page 276) so as to amend section 2 of the Distribution Act, 1979. That indicates the share of States as 47.5%. The Act 32 was issued amending Second Schedule to AED (GSI) Act, 1957 indicating inter se share of States. The Constitutional Order of 1995 was issued to the effect that the share of States in the subject period of income tax is 77.5%.

14. Mr. Sridharan has heavily relied upon the Report of the 10th Finance Commission and urged that this method of devolution as recommended therein was effective from 1 April 1996. He has taken us extensively through paras of this Report and to urge that an illustration would denote us as to how the method adopted by the Finance Commission would be put in place. The Finance Commission recommended 26% of Rs. 2,100/- in terms of this illustration and which is to be found at page 8 of the written submission. The argument is that the total amount + the amount towards AED should be taken into consideration for 26% recommendation to be implemented. Similarly, 3% of this sum is to be distributed to the States as their share in AED (GSI). Mr. Sridharan has submitted that accepting these recommendations of the 10th Finance Commission, the Constitution (89th Amendment) Bill, 2000 was introduced in the Parliament. Mr. Sridharan has relied upon the Statement of Objects and Reasons accompanying this Bill. He submits that the Constitution (80th Amendment) Act, 2000 was enacted by the Parliament and it is in furtherance of this Bill, the amendment was given assent by the President on 19 June 2000. Article 270 of the Constitution was substituted by section 3 of the Constitution Amendment Act, 2000 retrospectively from 1 April 1996. Mr. Sridharan, therefore, submits that alternate scheme on devolution of revenue was implemented effective from 1 April 1996. By this very amendment Act of 2000 (vide section 4(1)), Article 271 of the Constitution of India was omitted. Sub-section (2) of section 4 of this Act mandates as if the Article 272 is omitted from 1 April 1996. The Petitioners have also relied upon additional affidavit filed on 8 December 2014 including the extracts of finance budget documents. Thus, the emphasis is placed to demonstrate as to how the Constitution (80th Amendment) Act 2004 is implemented and acted upon.

15. Further the argument is that though section 88 of the Finance Act 2004 has been enacted by the Parliament, if that Act fails to consider the relevant factors including retrospective amendment of Article 270 read with Article 272 effective

from 1 April 1996 as also recommendations of 10th Finance Commission, then, it must be held to be irrational and arbitrary. The amendment introduced by the Finance Act 2004 is retrospective from 1 April 2000. Confining of the relevant AED (GSI) paid after 1 April 2000, instead of 1 April 1996, is therefore irrational and arbitrary. Thus, it is not as much a cut-off date, but date on which the Act itself has been brought into effect and retrospectively.

16. Mr. Sridharan submits that there is absolutely no rationale for not allowing AED(GSI) paid on inputs after 1 April 1996 for payment of BED. There could be such rationale for not allowing same prior to 1 April 1996. It is submitted that the restriction in the Cenvet Credit Rules that AED(GSI) taken as credit can be utilized for payment of AED(GSI) only on the final product had some relevance till the time AED(GSI) collected by the Central Government was not part of the Central pool of taxes, but entirely distributed to the States. After 1 April 1996 all the Central taxes including amounts collected as Additional Duty, but save and except exclusion stipulated in the Constitutional Scheme, formed a part of the central pool. The recommendations of the Finance Commission was to share the taxes thus with the States. That is effective from 1 April 1996. Therefore, the restriction that Cenvet Credit of AED(GSI) paid on inputs can be utilized for payment of only AED(GSI) does not have any meaning or relevance after 1 April 1996. Relying upon the affidavit filed in reply to this Writ Petition, it is submitted that separate accounting of AED(GSI) dispensed with effect from 1 April 2000 cannot be a reason to choose the date on which the Amendment Act namely Finance Act No. 2 of 2004 ought to be brought into effect. An accounting procedure and which is required to be followed can never govern the bringing into effect of the Amendment is thus the submission. That is elaborated by relying on the Finance Commission recommendations contained in the Report of the 10th Finance Commission dated 25 November 1994 as also tried to be supported from the Report of the 11th Finance Commission. The classification between utilization of credit on AED(GSI) paid after 1 April 1996 but before 1 April 2000 on one hand and utilization of AED(GSI) paid on or after 1 April 2000 contained in section 88(1) is, therefore, termed as having no nexus whatsoever with the object sought to be achieved. A final attempt is made to support the argument of irrational and arbitrary classification by pointing out that all the recommendations of the 10th Finance Commission particularly to amend the Constitution and particularly Article 270 and deletion of Article 272 are effective from 1 April 1996, and therefore, there is no justification for denying benefit of utilization of credit of AED(GSI) paid on or after 1 April 1996, but before 1 April 2000.

17. We have also on file additional written submissions of the Petitioners. The two written submissions summarize the oral argument. First written submission was tendered on 15 December 2014 and the second on 20 December 2014.

18. The second additional written submission purported to deal with the argument based on the affidavit-in-reply that there is no Presidential order under

Article 270 from 1 April 1996 to 31 March 2000. The Parliament has enacted 80th Constitution Amendment Act, 2000. Reliance is once again placed on method of devolution implemented by the Constitution of India under sections 4(2) & 4(3) of (80th Amendment) Act, 2000. Hence, there could not have been a Presidential order necessary for the past period.

19. Mr. Sridharan has, then, pointed out by relying on the wording of old Article 270 and deletion of Article 272 by the Amendment Act that the Constitution itself envisages distribution of the tax collected on income and other taxes. If distribution of Union duties of excise including Additional Duty of Excise has been brought into effect by the Constitutional Amendment Act and for period 1996-2000, then, the date or the classification under section 88 of Finance (No. 2) Act, 2004 has been assailed by pointing out that AED(GSI) paid on inputs on or after 1 April 1996, but prior to 1 April 2000 should have been made available for utilization in payment of BED. If all taxes in terms of the Parliamentary Statute are part of the Central pool of taxes from which the share has to be allocated to the States and in terms of the recommendations of the Finance Commission, then, all the more the classification, as made, cannot be termed as intelligible. The argument is based on the settled principle that a classification must be reasonable. For it to be termed as reasonable it must be founded on intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group. In addition differentia must have rational relation to the object sought to be achieved by the Statute in question. It is, therefore, submitted that the stand taken in the affidavit-in-reply is contrary to the Constitutional scheme. It is also pointed out that Rule 3(6)(b) of the Cenvat Credit Rules 2004 continues to exist even after 1 March 2003. There is Additional Duty of Excise (Textiles & Textile Articles) paid on inputs under the Additional Duty of Excise (Textiles & Textile Articles) Act, 1978. That can be utilized only for payment of AED of 1978 on final products. Hence, the justification provided in the affidavit-in-reply has been faulted by Mr. Sridharan. The Petitioners have submitted that AED is part of the sharable pool of Central taxes and with effect from 1 March 2003, Rule 3(6)(b) has also been amended. The additional duty of excise is now confined on NCCD and Education Cess.

20. We are not concerned as much in this Writ Petition with the treatment that the Petitioners gave to the credit in their account. That is subject matter of the Appeal. However, that is relied upon only to support the aforenoted argument.

21. It is in these circumstances, that Mr. Sridharan submits that the Constitutional challenge deserves to be upheld. He has placed heavy reliance upon the judgment of the Hon''ble Supreme Court rendered in the case of Clarence Brandenburg Vs. State of Ohio, 395 U.S. 444 (1969) . He also relied upon Union of India v/s. Parmeshwaran Match Works, 1978 (2) ELT J 429. Reliance is also placed on the decision in the case of Clarence Brandenburg Vs. State of Ohio, 395 U.S. 444 (1969) . Finally reliance is placed upon the judgment in the case of Clarence Brandenburg Vs. State of Ohio, 395 U.S. 444 (1969) .

The later decisions which follow Parmeshwaran (supra) are on the selection of the date or on the date chosen for bringing into effect the provisions or a Statute itself. Sitaram Sugar Company Ltd. has been relied upon to urge that the constitutional power and enabling making of a law or effecting any amendment ought to be consistent (see: para 51) and if there is manifest error in exercise of such power or the exercise of the power is manifestly arbitrary, then, there is an intervention permissible under the powers of judicial review conferred in this Court. Similarly, if the power has been exercised on a non-consideration or non application of mind to the relevant factors the exercise of power will be regarded as manifestly erroneous. Thus, both administrative and legislative powers cannot be exercised on the basis of erroneous facts for such exercise of power will stand vitiated.

22. Mr. Sridharan, also submits that it is not proper to contend that such issues are out of purview of judicial review conferred by the Constitution of India in this Court. If the exercise of the power is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable, or no fair minded authority could ever have made it, then, the judicial review is permissible.

23. Mr. Anil Singh, Addl. Solicitor General, appearing on behalf of the Respondents submitted firstly that the Constitutional validity of the provision and which has been brought into effect nearly 14 years back is now put in issue. There is, thus, enormous and unexplained delay. The Petitioners were aware of the Constitutional provision, the Central Excise Act 1944 and the Tariff Act and the amendments brought to the Cenvat Credit Rules, yet they did not choose to challenge them for all these years. Hence, at the instance of such Petitioners, this Court should refrain from examining the Constitutional issue or the issue of Constitutional validity and illegality of the Finance Act No. 2 of 2004.

Apart therefrom, he relies upon the background in which the enactment has been made. He relies upon the facts and circumstances narrated and set out in the affidavit-in-reply.

24. Mr. Singh submits that the Finance Act (No. 2) of 2004 had section 88. That was because of clause (iv) of Rule 3(1) of the Cenvat Credit Rules, 2002 to enable the manufacturer of dutiable goods to take credit of AED (GSI) Act 1957 on items like sugar, tobacco and textile products. This was allowable since 16 March 1965. That was when the credit of AED payable under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 was allowed for the first time. However, in terms of Rule 3(6)(b) Cenvat Credit Rules, credit of additional duty on excise could be utilized only for the purpose of payment of additional duty of excise on such final products. Mr. Singh submits that aforesaid restrictions were prescribed because prior to 2000 the proceeds of the AED (GSI) were distributed amongst the States as per the recommendations of the Finance Commission and therefore the same required the separate accounting. There were certain cases where the inputs attracted Additional Excise Duty, but there

was no Additional Excise Duty on the final product like in the present case. In these circumstances, because of the restrictions the manufacturer could not utilize the credit which resulted in accumulation thereof. In the year 2000 and subsequent to the Constitution (Distribution of Revenue) No. 5 Order, 2000 issued by the President of India instead of distribution of AED (GSI) amongst the States, an additional 1.5% of the total sharable taxes and duties including AED (GSI) was prescribed for such distribution. The need of separate accounting for AED (GSI) was dispensed with. Therefore, there was no justification for restriction of utilization of additional duty of excise as the credit of AED (GSI) was then onwards available for payment of the Cenvat duties i.e. BED. From 1 March 2003, Rule 3(6)(b) was amended so as to permit the utilization of credit of AED (GSI) paid on inputs towards payment of BED on the finished goods. In other words, the restriction imposed earlier with regard to utilization of AED (GSI) was removed. However, the amendment made in 2003 did not mention any specific date of credit of additional duty of excise which could be utilized for the payment of BED on the finished products. Resultantly all the accumulated credit was utilized by industry. In such circumstances and when doubts were raised that the clarification came to be issued and by which it was found that there was no reason to deny the benefit after 1 April 2000 on the ground that the Constitutional changes were made only in March 2003.

25. It is in these circumstances and when the abovementioned Presidential order was brought into force on 1st April 2000, it was clarified that the Additional Duty of Excise paid on inputs on or after 1 April 2000 would be eligible for utilization towards payment of Central Excise Duty on the finished products. In such circumstances, and after a period of 10 years, that the Petitioners are challenging the Constitutional validity of the provision. Therefore, it would not be proper to grant any relief on the basis of such belated challenge.

26. Further, reliance placed on the recommendations of the 10th Finance Commission is entirely misplaced. There is a basic distinction as between the collection of taxes and by the competent/appropriate authorities under the Parliamentary Statute. Thereafter the total taxes collected either on income or otherwise including Central Excise Duty have to be distributed. The distribution of the taxes already collected has no connection to the stage prior thereto namely the collection or imposition. The element of distribution comes after collection. It is in these circumstances and by relying on clauses (2) & (3) of Article 270 that the Additional Solicitor General contends that there is a definite relation to the Presidential order and the date of its issuance. There cannot be any connection or nexus established and with the date of the amendment to the Constitution. In such circumstances, there is a clear object sought to be achieved. There is no question of any arbitrary or unreasonable date being prescribed. If the underlying date is taken into account, then, the challenge has no merit. For all these reasons, it is submitted that the Writ Petition is devoid of any merit and must be dismissed.

27. Mr. Singh has taken us through further portions of the affidavit-in-reply to submit that the justification as set out in this affidavit would enable this Court to hold that this petition deserves to be dismissed.

28. With the assistance of the learned Senior Counsel appearing for both sides we have perused the Writ Petition and the annexures thereto. The Petitioners claim the relief and particularly the one referred to above, essentially on the ground that the authorities have come to the prima facie conclusion that the Petitioners have incorrectly utilized the credit of Additional Duty of Excise (paid on 5 June 2006) in terms of the order dated 28 February 2006 passed by Respondent No. 3 for payment of BED on the final products cleared in 2007. The second Respondent proceeded on the basis that the credit can be availed of only when the Additional Duty of Excise is paid after 1 April 2000. In other words, it pertains to the Additional Duty of Excise leviable after 1 April 2000 in terms of the Explanation appended to Rule 3(6)(b) of the Cenvat Credit Rules.

29. In that regard, we have seen the earlier Rules namely Rule 57A of the Central Excise Rules, 1944. That was the old regime of Modvat. The duty paid on excisable goods used as inputs was dealt with by the Central Excise Rules, 1944 and particularly Rule 57A thereof. Thereafter the Modvat procedure, Invoicing system and Service Tax underwent some changes and in that regard Notifications issued under Rule 57A, have all been set out in the compilation tendered by the Petitioners. This compilation would denote as to how the Rules proceeded and from 1994 onwards till 31 March 2000. Thereafter, what we have been shown are Rules 3 and 9 of the Cenvat Credit Rules, 2002. Those Rules indicate that the cenvat credit shall be allowed to manufacturer or producer of the final product of the duty of excise specified in the First Schedule to the Tariff Act and leviable under the Act; of the duty of excise specified in the Second Schedule to the Tariff Act leviable under the Act; the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textiles and Textile Article) Act, 1978; the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and it should be availed of with regard to above duties paid on any inputs or capital goods received in the factory on or after the first day of July 2001 including the said duties paid on any inputs used in the manufacture of intermediate products. We have also perused the relevant amendments and which have been brought on 1 March 2003. The Cenvat Credit (Second Amendment) Rules, 2003 and to the extent relevant for us reads as under:-

"(d) In sub rule (6),-

(A) for clause (b), the following shall be substituted, namely:-

"(b) CENVAT credit in respect of-

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textiles and Textiles Articles) Act, 1978 (40 of 1978)''

(ii) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 as amended by clause 161 of the Finance Bill, 2003, which clause has, by virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act, 1931, the force of law, and (iii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i) and (ii) above,"

Shall be utilized only towards payment of duty of excise leviable under the said Additional Duties of Excise (Textiles and Textile Articles) Act, or the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 as amended by clause 161 of the Finance Bill, 2003, which clause has, by virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act, 1931, the force of law, respectively, on any final products manufactured by the manufacturer or for payment of such duty on inputs themselves if such inputs are removed as such or after being partially processed.

Explanation:-For removal of doubts, it is clarified that the credit of the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), may be utilized towards payment of duty of excise leviable under the First Schedule or the Second Schedule of the Central Excise Act, 1944"

30. The position prevailing prior to this amendment was that the Cenvat credit in respect of additional duty of excise leviable under section 3 of the 1957 Act shall be utilized only towards payment of duty of excise leviable under the 1957 Act on any final product manufactured by the manufacturer or for payment of such duty on inputs themselves if such inputs are removed as such or after being partially processed. The Explanation clarified that the credit of the additional duty of excise under section 3 of the 1957 Act may be utilized towards the payment of duty of excise leviable under the First Schedule or the Second Schedule of the Central Excise Act, 1944. The Cenvat Credit Rules of 2004 are also referred by us and at page 63 of Volume-I of the Compilation, Rule 3 sub-rule 6(b) has been reproduced. There, the reference is made to the additional duty of excise leviable under section 157 of the Finance Act 2003 and the additional duty of excise leviable under section 85 of the Finance Act, 2005. The Finance Act, 2005 by section 124 made an amendment to Act 23 of 2004 and in section 88 after sub-section (4), following sub-sections were inserted namely:-

"(5) Notwithstanding anything contained in sub-section (4), the following procedure shall be followed for the recovery of the CENVAT credit of additional duty leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) which has been availed but which would not have been availed if the amendment made by sub-section (1) was in force at all material times (hereinafter referred to in this section as the amount of credit) namely:-

(i) the Central Excise Officer shall, on or before the 25th day of May, 2005, serve notice on the person from whom the recovery is to be made (hereinafter referred to as the assessee), requiring the assessee to declare the amount of credit utilised by him on different dates for payment of duty of excise (hereinafter referred to as the CENVAT duty) leviable under the First Schedule or the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(ii) the assessee shall furnish the declaration as required under clause (I) on or before the 31st day of May, 2005;

(iii) the Central Excise Officer shall, after considering the declaration made by the assessee under clause (ii) determine the amount of credit utilised on different dates for payment of CENVAT duty;

(iv) the Central Excise Officer shall separately determine the amount of interest on the amount of credit (hereinafter referred to as the amount of interest) utilised for paying the CENVAT duty, in accordance with the provisions of clause (v);

(v) The amount of interest on amount of credit utilised for paying the CENVAT duty shall be at a rate of thirteen per cent per annum for the period beginning on and form the day when each time the amount of credit was so utilised and ending on the 10th day of September, 2004;

(vi) the Central Excise Officer shall, on or before the 15th day of June, 2005, inform the assessee, in writing, the amount of credit and the amount of interest so determined under clauses (iii) and (iv);

(vii) the assessee shall pay an amount equal to one-thirty sixth part of each of the amount determined under clauses (iii) and (iv) by the fifth day of every month, commending from the month, following the month of receipt of information of the amount determined by the Central Excise Officer;

(viii) the assessee may make payment on his own towards the amount of credit or, as the case may be, the amount of interest, in excess of the amount required to be paid up to a particular month;

(ix) where the assessee pays the total amount of credit and the amount of interest so determined under clauses (iii) and (iv), respectively, the Central Excise Officer shall issue an order confirming the payment of credit and the amount of interest and discharging the assessee from any recovery of the amount of credit;

(x) for the purposes of this sub-section, it is hereby clarified that the amount of credit has been fully utilised first towards payment of the CENVAT duty before utilising the CENVAT credit of additional duty leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) paid on or after the 1st day of April, 2000 for payment of the CENVAT duty;

(6) Where the assessee fails to furnish the declaration as required under clause (i) or has furnished the declaration but failed to pay the amount by the day as

specified in clause (vii), of sub-section (5), the provisions of sub-section (4) shall apply subject to the modification that the notice, requiring the assessee to show cause why he should not pay the amount specified in the notice, shall be served upon him within three months from the date of his such failure".

31. We are not concerned as much with the additional duty rates and which have been set out in the said compilation.

32. In Volume-II of the compilation, what has been relied upon is the Statement of Objects and Reasons and for the purpose of Constitution (89th Amendment) Bill, 2000. The Statement of Objects and Reasons set out that 10th Finance Commission has submitted its report on 26 November 1994 for the period of five years that from 1995-96 to 1999-2000. The said Report was tabled in the both Houses of Parliament on 14 March 1995. What is important for our purpose is that one of the recommendations of the Commission and which was under consideration of the Government is an alternative scheme of sharing of proceeds of certain Union taxes and duties between the Union and the States. The alternative scheme envisages that twenty-six percent out of the gross proceeds of Union taxes and duties, excluding stamp duty, excise duty on medicinal toilet preparations, Central Sales Tax, Consignment tax, cesses levied for specific purposes and surcharge, is to be assigned to the States in lieu of their existing share in AED in lieu of Sales Tax on tobacco, sugar and cotton may be merged with the Basic Excise Duties. In addition, 3% in gross on duties excluding the above, is to be assigned to the States in lieu of their existing share in Additional Excise Duties in lieu of Sales Tax on Tobacco, Cotton and Sugar. The Commission has proposed that tobacco, cotton and sugar may continue to be exempt from Sales Tax and the Additional Excise Duties in lieu of Sales Tax on these items may be merged with the Basic Excise Duties. The Statement of Objects and Reasons further states that whether the alternative scheme would be more gainful to the Centre or to the States vis-a-vis existing arrangements would entirely depend on the relative growth in the collection of various Central taxes and duties to be paid. After setting out and explaining the benefits of the scheme, the Statement of Objects and Reasons states that the above scheme is in national interest, as it helps to remove a perceived inter-tax in the tax mobilization effort of the Government of India while having sufficient flexibility for meeting Centre''s exclusive needs by keeping Cesses and Surcharges outside the pooling arrangement. Further clauses in the Statement of Objects and Reasons would read thus:

"STATEMENT OF OBJECTS AND REASONS

The Tenth Finance Commission had submitted its report on the 26th November, 1994 for the period of five years, i.e., from 1995-96 to 1999-2000. The said report was laid on the table of both the Houses of Parliament on the 14th March, 1995. One of the recommendations of the Commission that has been under consideration of the Government is an alternative scheme of sharing of the proceeds of certain Union taxes and duties between the Union and the States.

2. The alternative scheme envisages that twenty-six per cent out of the gross proceeds of Union taxes and duties (excluding stamp duty, excise duty on medicinal toilet preparations, Central Sales Tax, Consignment tax, cesses levied for specific purposes under any law made by Parliament and Surcharge) is to be assigned to the States in lieu of their existing share in income-tax, basic excise duties, special excise duties and grants in lieu of tax on railway passenger fares.

3. In addition, three per cent share in the gross proceeds of all Central taxes and duties (excluding stamp duty, excise duty on medicinal/toilet preparations, Central Sales Tax, Consignment tax, cesses levied for specific purpose under any law made by Parliament and Surcharge) is to be assigned to the States in lieu of their existing share in Additional Excise Duties in lieu of Sales Tax on tobacco, cotton and sugar. The commission had proposed that tobacco, cotton and sugar may continue to be exempt from Sales Tax and the Additional Excise Duties in lieu of Sales Tax on these items may be merged with the Basic Excise Duties.

4. Whether the alternative scheme would be more gainful to the Centre or to the States vis-a-vis existing arrangements would entirely depend on the relative growth in the Collection of various Central taxes and duties to be pooled

5. The benefits of the scheme have been listed by the Commission in para 13.2. and 13.3 and 13.18 of their reports. These are as follows:-

(i) with a given share being allotted to the States in the aggregate revenues from Central taxes, the States will be able to share the aggregate buoyancy of Central taxes;

(ii) the Central Government can pursue tax reforms without the need to consider whether a tax is sharable in the states or not;

(iii) the impact of fluctuations in Central tax revenues would be felt alike by the Central and the State Governments;

(iv) Should the taxes mentioned in articles 268 and/or 269 from part of this arrangement, there will be greater likelihood of their being tapped; and

(v) the progress of reforms will be greatly facilitated if the ambit of tax sharing arrangement is enlarged so as to give greater certainty of resource flows to, and increased flexibility in tax reform.

6. The above scheme recommended by the Commission is in national interest as it helps to remove a perceived inter-tax in the tax mobilisation effort of the Government of India while leaving sufficient flexibility for meeting Centre''s exclusive needs by keeping Cesses and Surcharges outside the pooling arrangement.

7. A Discussion Paper bringing out various aspects of the scheme was laid on the table of both the Houses of Parliament on the 20th December, 1996 with a view to generate an informed debate.

8. On the basis of a consensus reached in the Third Meeting of the inter-State Council held on the 17th July, 1997, the then Government had agreed in principle to accept the scheme recommended by the Tenth Finance Commission subject to certain modifications.

9. The Government had decided to ratify the decision taken by the previous Government according in principle approval for the scheme recommended by the Tenth Finance Commission with some modifications.

10. Firstly, the percentage share of State is to be reviewed by the successive Finance Commissions instead of freezing it for fifteen years as suggested by the Tenth Finance Commission.

11. Secondly, Government had decided to change the sharing of "gross proceeds" as recommended by the Tenth Finance Commission to the sharing of "net proceeds" in order to maintain consistency between articles 270, 279 and 280 of the Constitution. However, this will not result in any consequent loss to the States because the Government has also simultaneously decided to compensate the States by suitably enhancing the percentage share beyond 29%.

12. Thirdly, as intended by the Commission, no amendment is sought to be done in article 271, which authorize the Central Government to levy surcharge on Central taxes and duties for the purpose of the Union.

13. The scheme will be effective from 1st April, 1996. The percentage share of net proceeds during 1996-97 to 1999-2000 will be such that the States'' share is 29% of the gross proceeds. The recommendations of the 11th Finance Commission, which has been mandated to give its final report by 30th June, 2000, will cover the 5 years period w.e.f. 1st April, 2000.

14. In order to implement this decision, this Bill seeks to amend article 269, 270 and 272 of the Constitution so as to bring several Central taxes and duties like Corporation tax and Customs duties at par with personal income-tax as far as their constitutionally mandated sharing with the States is concerned."

33. A bare perusal thereof would indicate as to how the Constitutional Amendments were thought of and made, that is for the purposes of suitably distributing taxes and collection of which has been made for the purpose of the Union. The scheme has been made effective from 1 April 1996. The percentage share of net proceeds during 1996-97 to 1999-2000 will be such that the States'' share is 29% of the gross proceeds. The recommendations of the 11th Finance Commission, which have been amended to give its final report on 30 June 2000, will cover the 5 years period with effect from 1 April 2000. Since these are the recommendations of the 10th Finance Commission and for the period of 5 years from 1995-96 and the later Commission was to submit its final Report by 30 June 2000, to cover further period with effect from 1st April 2000 that the Parliament intended to make the Constitutional Amendments effective from 1 April 1996.

34. We see much substance in the argument of the learned Addl. Solicitor

General that in order to implement the decision of amending Articles 269, 270 and 272 of the Constitution of India and to bring the Central taxes and duties like Corporation tax and Customs duties at par with the personal income-tax as far as their constitutionally mandated sharing with the States is concerned, that the Parliament amended the Articles of the Constitution. By the Constitution (88th Amendment) Act 2000, the effect given to it from 1 April 1996 is to carry forward the Constitutional theme. That was and is to be found in the relevant Articles namely Article 270 onwards. Chapter II of the Constitution contains "Articles on Administrative relations". It sets out the obligation of the State and the Union and control of the Union over States in certain cases in Article 256 and Article 257. Then Article 258 sets out the power of the Union so as to enable it to confer with the consent of the Governor of the State, conditionally or unconditionally, to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends. Then there are provisions with relation to disputes and with which we are not concerned. Part XII deals with Finance, Property, Contracts and Suits. In that, Chapter-I titled as "Finance" contains general provisions. Article 264 defines the term "Finance Commission" and to be one set up and constituted under Article 280. Article 265 sets out prohibition namely that tax not to be imposed save by authority of law. Article 266 is dealing with the consolidated funds and public accounts of India and of the States. Subject to the provisions of Article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by issue of treasury bills etc. and all moneys received by that Government in repayment of loans shall be formed to be one consolidated fund of India. There is then a consolidated fund of the State as well in terms of Article 266(1). Article 267 deals with the contingency fund. Distribution of revenues between the Union and the States is a matter dealt with in Article 268 and by further Articles. Article 268 reads as under:-

268. Duties levied by the Union but collected and appropriated by the States:-(1) Such stamp duties and such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied by the Government of India but shall be collected--

(a) in the case where such duties are leviable within any [Union territory], by the Government of India, and

(b) in other cases, by the States within which such duties are respectively leviable.

(2) The proceeds in any financial year of any such duty leviable within any State shall not form part of the Consolidated Fund of India, but shall be assigned to that State.

35. Clause (1) thereof on perusal would indicate that such stamp duties and such duties of excise on medicinal and toilet preparations as are mentioned in the

Union List shall be levied by the Government of India, but shall be collected in the cases where such duties are leviable within any Union territory by the Government of India and in other cases by the States within which such duties are respectively leviable. Clause (2) clarifies that the proceeds in any financial year of any such duty leviable within any State shall not form part of the Consolidated Fund of India, but shall be assigned to that State. Thus, the theme is that stamp duties and duties of excise on medicinal and toilet preparations which are mentioned in the Union list have to be levied by the Government of India, but they have to be collected by the States within which such duties are respectively leviable. The proceeds in any financial year of any such duty leviable within any State shall not form part of the Consolidated Fund of India, but shall be assigned to that State. Article 268A deals with Service tax levied by Union and collected and appropriated by the Union and the States. Though it has not been brought into force, what is material for our purpose is the fact that there could be and within the Constitution itself an arrangement where the taxes levied and imposed by the Union are collected within the States in which they are also leviable. Once such taxes are leviable and collected, then, the proceeds thereof have to be distributed. Article 270 deals with that part and reads as under:-

11270-Taxes levied and distributed between the Union and the States-(1) All taxes and duties referred to in the Union List, except the duties and taxes referred to in 2(articles 268, 268A and 269), respectively, surcharge on taxes and duties referred to in article 271 and any cess levied for specific purposes under any law made by Parliament shall be levied and collected by the Government of India and shall be distributed between the Union and the States in the manner provided in clause (2).

(2) Such percentage, as may be prescribed, of the net proceeds of any such tax or duty in any financial year shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax or duty is leviable in that year, and shall be distributed among those States in such manner and from such time as may be prescribed in the manner provided in clause (3).

(3) In this article, "prescribed" means,--

(i) until a Finance Commission has been constituted, prescribed by the President by order, and

(ii) after a Finance Commission has been constituted, prescribed by the President by order after considering the recommendations of the Finance Commission.

36. This Article deals with those taxes and duties referred to in Union List, except the duties and taxes referred to in Articles 268, 268A and 269 respectively, surcharge on taxes and duties referred to in Article 271 and any cess levied for specific purposes under any law made by the Parliament, that shall be levied and collected by the Government of India, but shall be distributed between Union and the States in the manner provided in clause(2). Clause (2) provides for a percentage of the net proceeds of any such tax or duty in any financial year shall

not form part of the Consolidated Fund of India, but to be assigned to the States within which that tax and duty is leviable in that year and shall also be distributed among the States in such manner and from such time as may be prescribed in the manner provided in clause (3). Therefore, it is the percentage being prescribed of the net proceeds of the tax and duty in any financial year and which shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax and duty is leviable in that year and distribution amongst those States in such manner and such time as may be prescribed. The term "prescribed" means until the Finance Commission is constituted, prescribed by the President. Thereafter, by the President upon considering the recommendations of the Finance Commission. Thus, if the Finance Commission has yet to be constituted, the matters which are prescribed by clause (2) of Article 270 have to be prescribed by the Presidential order and the position does not undergo a change, save and except the President will issue an order after considering the recommendations of the Finance Commission, that is upon its constitution in terms of the Constitutional provisions. Article 271 deals with surcharge on certain duties and taxes for purposes of the Union and that enables the Parliament to increase any duties or taxes referred to in Articles 269 and 270 by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India. Article 272 came to be deleted by the Constitution (80th Amendment) Act, 2000. A grant from the Union to the States is a matter dealt with by Article 275 and what we are then concerned with is Article 280, which establishes the Finance Commission. That Article reads as under:-

280. Finance Commission.-(1) The President shall, within two years from the commencement of this Constitution and thereafter at the expiration of every fifth year or at such earlier time as the President considers necessary, by order constitute a Finance Commission which shall consist of a Chairman and four other members to be appointed by the President.

(2) Parliament may by law determine the qualifications which shall be requisite for appointment as members of the Commission and the manner in which they shall be selected.

(3) It shall be the duty of the Commission to make recommendations to the President as to--

(a) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds;

(b) the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India;

3 [(bb) the measures needed to augment the Fund of a State to supplement the resources of the Panchayats in the State on the basis of the recommendations made by the Finance Commission of the State;]

4 [(c) the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Municipalities in the State on the basis of the recommendations made by the Finance Commission of the State;]

5 [(d)] any other matter referred to the Commission by the President in the interests of sound finance.

(4) The Commission shall determine their procedure and shall have such powers in the performance of their functions as Parliament may by law confer on them.

37. Perusal of Article 280 in its entirety would reveal that the Finance Commission has to be constituted. It should consist of a Chairman and four other members to be appointed by the President. Their qualifications have to be determined by law by the Parliament and the Commission''s duty is to make recommendations to the President firstly with regard to distribution between the Union and the States of the net proceeds of taxes which are to be or may be divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds. The principle which should govern the grant-in-aid of the revenues of the States out of the Consolidated Fund of India, the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Panchayats in the State on the basis of the recommendations made by the Finance Commission of the State, the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Municipalities and any other matter referred to the Commission by the President in the interests of sound finance. That recommendation of the Finance Commission has to be laid before each House of the Parliament is a matter dealt in Article 281.

38. We, therefore, do not see how the Constitutional Amendments and pertaining to the matters of distribution and allocation of the proceeds of taxes levied and collected can have any relation or bearing with the matter and which is dealt with Cenvat Credit. The matter which is dealt with in terms of the Cenvat Credit Rules is pertaining to credit on inputs and which can be utilized for payment of BED on the finished product. In relation to that we find is that a stipulation has been made. That provision has been given a limited retrospective effect and operation. That its retrospectivity should be extended to 1 April 1996 is pressed before us on the footing that the Constitutional Amendments in the above Articles have been brought into effect from 1 April 1996. The Explanation below the Rule and which has been referred by us namely Explanation to Rule 3(6)(b) of the Cenvat Credit Rules clarifies that if there are any doubts, then it is declared that the credit of the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and paid on or after the 1st day of April 2000 may be utilized towards payment of duty of excise leviable under the First Schedule or the Second Schedule to the Central Excise Tariff Act, 1985. The availment of credit is a matter dealt with by Cenvat Credit Rules. That as, we have already explained above, deals with a situation which is distinct and in relation to the availment of the credit of the Additional duty of

Excise leviable under the 1957 Act towards payment of duty of Excise leviable under the Tariff act, 1985. Thus, the question of taking credit by the Assessee of payment of excise duty is dealt with exclusively by these Rules. The Respondents have rightly pointed out in the affidavit-in-reply that a matter of distribution of the net proceeds of the Central taxes and sharing thereof with the States could not be connected and with the Act namely the Additional Duty of Excise Act under which the excise duty is imposed, levied and collected. There is no linking of this aspect possible with the date on which a Constitutional amendment is brought into effect. For the availment of credit in terms of the Cenvat Rules, which is a distinct-entitlement, another date could be prescribed.

39. It is not as much a matter of issuance of Presidential order or the date thereof, but the underlying distinction. Though the Petitioners have in the additional affidavit pointed out that the basis and foundation of the Respondents'' version is the separate accounting of AED(GSI) being dispensed with, we do not find that the said issue needs to be gone into, once the difference in the Constitutional scheme and the Act under which the duty was imposed, levied, assessed and collected, is noted. In the affidavit-in-reply, it has been pointed out as to how the original Rule 3(6)(b) of the Cenvat Credit Rules read. The Petitioners have been availing of Cenvat Credit of Basic Excise Duty, namely Cenvat Duty payable under section 3 of the Act as well the AED (GSI) payable under the 1957 Act paid on their inputs received on or after 16 March 1995. Availment of and utilization of Cenvat credit as in force at the material time from 16 March 1995 to 28 February 2003 enabled the credit of AED being utilized for payment of AED on the finished goods. The said credit was not allowed to be utilized for payment of any other duties, including the Excise duty under section 3 of the Act. The Rule was amended namely Rule 3(6)(b) with effect from 1 March 2003 and thereby the utilization of AED for payment of cenvat duty on the finished goods was allowed. The amended Rule with effect from 1 March 2003 has permitted utilization of the cenvat credit in respect of Act of 1957 for payment of duty of excise leviable under the First or the Second Schedule of the Tariff Act, 1985. Thus, as per the amended Rule, credit of Additional Excise Duty leviable under section 3 of the 1957 Act may be utilized towards the payment of duty of excise leviable under the First or Second Schedule of the Tariff Act. There is substance in the contention of the Respondents that in the Amendment Act no date was prescribed for availing and utilization of the Cenvat credit of the additional duty of excise paid. With the result that number of manufacturers had utilized cenvat credit lying with them as on 1 March 2003, for payment of cenvat credit duty payable on finished products/goods under section 3 of the 1957 Act. On realizing this, the Government amended the provision of the Cenvat Credit Rules 2000 retrospectively with section 88 of the Finance Act allowing utilization of Cenvat Credit of AED paid on or after 1 April 2000. That is how the explanation was substituted. We do not see how we can uphold the argument of the Petitioners that the restrictions placed by the Explanation should be interfered with any other stipulation as desired by them so as to make the

provision operational from 1 April 1996. We have amply clarified as to how the issue of Cenvat Credit has been dealt with and in terms of the law made by the Parliament and which enables the availment. We find that the explanation which is set out in the affidavit of the Respondents and from para 12 onwards justifies giving retrospective effect to the Rules from 1 April 2000. Apart therefrom, we find that the Petitioners have raised the issue of Constitutional validity only after they were served with the demand and which eventually was adjudicated, but being still under consideration in the pending Appeal. The issue of legality and validity of the demand and the order in relation thereto can be gone into in the Appeal. The contentions based on that and the merits of the said order challenged in the Appeal is not required to be gone into in this Writ Petition. The matter is still before the Tribunal and equally against the order of the Tribunal it is pending in this Court. The reliance may be placed in the affidavit-in-reply on the Presidential order, but what we find and relevant for the present purpose is that the Constitutional Amendments were made on account of the events narrated in the Statement of Objects and Reasons to the Constitutional Amendment Bill. It was decided that the distribution and allocation of taxes for the States must meet the recommendations. Hence, the further justification that has been provided in the affidavit and particularly para 36 onwards, would justify as to why there is no substance in the challenge and based on the cut-off date.

40. We are of the opinion that this is not as much a matter of cut-off date but of the distinction noted above. Even in the matters of cut-off date the Hon''ble Supreme Court has held that for any provision or any prescription to be brought into effect a date has to be chosen. The choice of a date can be termed as arbitrary, particularly because the fixation has to be by the authority or the agency which is making the rule, prescription or legal provision. It is that authority alone which is empowered to select the date. In that matter and choice thereof the argument of it being arbitrary has been noted particularly in cases where beneficial provisions like pensionary benefits etc. were admissible. There, the argument that the cases falling within and those left out being identical the exclusion of similarly placed persons must have a definite nexus with the object sought to be achieved. In such matters to benefit a class of retired persons or those who would suffer hardship post-retirement some date or time period is chosen. The choice of the date or the cut off date is interfered with when it is established that Equals have been treated Unequally. Those retiring before or after the date are pensioners. They are entitled to same benefits and under a single scheme. Hence, the distinction between them is artificial and irrational. However, even in these matters, the judgments of the Supreme Court after Clarence Brandenburg Vs. State of Ohio, 395 U.S. 444 (1969) clarify the position. A scheme or a prescription or a rule, which is operational or made operative for the first time cannot be equated with the existing one. If it is a new or fresh scheme, then, even if it is beneficial it is not intended to cover those employees who have retired earlier. Hence, the Supreme Court has clarified that in such matter as well those retiring prior to new pension scheme being

promulgated and brought into force, would not derive any benefits. In Clarence Brandenburg Vs. State of Ohio, 395 U.S. 444 (1969) all this has been amply clarified and commented upon extensively.

41. In the present case, once the co-relation could not be established, then the Petitioners derive no benefit of the Constitutional provisions and selection of the date, namely, 1st April 1996 for they being brought into effect. We have noted as to how the argument based on this is misconceived and untenable.

42. In such circumstances, we need not refer to and extensively the judgments which have been relied upon by Mr. Sridharan, learned Senior Counsel for the Petitioners. They narrate the settled principles and reiterate them. Suffice it to note that in the judgment rendered by the Hon''ble Supreme Court and relied upon by the learned Clarence Brandenburg Vs. State of Ohio, 395 U.S. 444 (1969) , the Hon''ble Supreme Court has reiterated the principles as to how in matters of this nature and particularly taxing statutes, the tests adopted to determine whether a classification is reasonable or not are, that the classification must be founded on an intelligible differentia which distinguishes person or things that are grouped together from others left out of the group and that the differentia must have a rational relation to the object sought to be achieved by the Statute in question (see: para 30). It is the same principle which has been relied upon by Mr. Sridharan. Therefore, in taxing provisions or in matters where a stipulation pertaining to payment or availment of credit under the Rules/Special Legislation under taxing Statute is involved, the Court will have to find out whether there is indeed any group or class. In terms of the Constitutional provisions dealing with powers to distribute the net tax proceeds the beneficiaries cannot be equated. Taxing Statutes deal with levy and collection of Revenue. For the purposes of collecting the tax, the law must authorize imposition and levy thereof. After the imposition/levy, there is a mechanism in place for assessment and collection thereof and these provisions are termed as machinery provisions. Thus, there is a charging section, there is a machinery provision and thereafter the provisions as to how Taxes are collected and recovered. The Parliamentary stipulation and as contained in the Constitutional Amendment Act is dealing with the distribution of the net collected taxes for and on behalf of the Union between the Union and the States. It is in such circumstances that we do not find any substance in the arguments canvassed before us.

43. We are also of the opinion that the principle which is being pressed into service by relying upon the decision in the case of Sitaram Sugar Company Ltd. (supra) will not assist the Petitioners in this case. In the case of Sitaram Sugar Company Ltd., the Hon''ble Supreme Court was concerned with a challenge and which was laid to the zonewise fixation of price of levy sugar. That was in terms of an order issued under section 3 of the Essential Commodities Act, 1955. The Hon''ble Supreme Court was concerned in this case with the owners of the sugar mills operating in the State of Uttar Pradesh in areas classified for the purpose of

determining the price of levy sugar as West and East zones. They challenged the validity of notifications issued by the Central Government in exercise of its power under sub-section 3-C of section 3 of the Essential Commodities Act, This provision enables issuance of notification and exercise of powers. The Central Government fixed the price of levy sugar for 1974-75 production. The country was divided into 16 zones and the prices fixed for various grades of sugar in terms of section 3(3-C) of the Act vary from zone to zone. The Petitioners contended in that case that these orders are ultra vires the Act and violative of their fundamental rights as the prices of levy sugar have been determined arbitrarily with reference to average cost profiles of factories grouped together in zones without regard to their individual capacity and cost characteristics. Such prices do not reflect the actual manufacturing cost of sugar incurred by producers like the Petitioners or secure to them reasonable returns on the capital employed by them. On such and other grounds, the entire price fixation was put in issue. In dealing with that challenge and to the powers of the Government to issue such notifications, the Supreme Court referred to the settled principles and whether the exercise of power is legislative or administrative, that would be set side if the exercise of power is manifestly arbitrary or it has been exercised on non-consideration or non-application of mind to relevant factors. Thus, manifestly arbitrary exercise of power or manifestly erroneous exercise of power is something which can be interfered with in judicial review. We do not find that any assistance can be derived from the judgment in Sitaram (supra) and for the purpose of the present case.

44. As a result of the above discussion, we find no merit in the Writ Petition. It is dismissed. Rule is discharged. There will be no order as to costs.

1 Sub. By the Constitution (Eightieth Amendment) Act, 2000 w.e.f. 1-4-1996 2 Subs. By the Constitution (Eighty-eighth Amendment) Act, 2003 3 Ins. by the Constitution (Seventy-third Amendment) Act, 1992 w.e.f. 24-4-1993 4 Ins. By the Constitution (Seventy-fourth Amendment) Act, 1992 w.e.f. 1-6-1993 5 Sub-clause (c) relettered as sub-clause (d) by the Constitution (Seventy-fourth Amendment) Act, 1992 w.e.f. 1-6-1993