

(1977) 09 AP CK 0013

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 1400 to 1403 of 1976

Coramandal Fertilisers Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 24-09-1977

Acts Referred:

Central Excise Rules, 1944 — Rule 8, 8(1)
Central Excises and Salt Act, 1944 — Section 3, 4
Sea Customs Act, 1878 — Section 30
Tariff Act, 1934 — Section 2(A)

Citation : (1979) CENCUS 456 : (1979) 4 ELT 501

Hon'ble Judges : Sambasiva Rao, J;Punnayya, J

Bench : Division Bench

Judgement

Sambasiva Rao, J.—These four writ petitions are concerned with levy of excise duty on certain chemicals fertilisers. The petitioners in all the four petitions is the same, it being the Coromandal Fertilisers Limited. It is a company incorporated under the Companies Act, 1956. As common and related questions are raised all the four petitions are placed before us in a batch. We will do well in disposing them of under a common order.

2. The petitioners carry business inter alia as manufacturers of diverse kinds of fertilisers at their factory situated at Vishakhapatnam one of the fertilisers thus manufactured is Gromor NPK 14 : 35 : 14 under the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Act") excise duty was being imposed on fertilisers manufactured in India with effect from 1.3.1969. The petitioners will have to file, according to the rules, price lists of the fertilisers, which they manufacture showing therein inter alia the assessable value of the goods manufactured by them. Their fertilisers are sold throughout India. Since the demand is all over the country, the manufactured fertilisers will have to be transported from the factory site at Vishakhapatnam to all the places where there is demand. Though prior to March 1969 fertilisers were sold within the State of Andhra Pradesh at a particular price, which inter alia included the cost of

freight the fertilisers were sold out side the State at the same price, they were collecting in addition a certain amount representing the higher transportation costs involve in sending the fertilisers to different places of India. This policy was however, changed from 1-3-1969. The new method was that for the purpose of recovering expenses of freight from diverse independent purchasers throughout India, the petitioners divided the country into several regions and recovered different amounts towards freight and related charges from buyers depending upon the region in which such customers were situated. The amount thus recovered from the customers, was related to the expenditure actually incurred by the petitioners for freight and related charges. This system was in vogue until 1.4.1970. Another policy came into force with effect from 1-4-1970, since the petitioners thought it more equitable and satisfactory to recover uniform and equal freight and related charges from all the customers and related charges from all the customers through out India wherever situated. This policy was in accordance with the practice followed by the Government of India in distributing imported fertilisers through the fertiliser pool. In the invoices submitted by the petitioners the freight charges have always been shown separately.

3. Further, the petitioners thought that it would be more economical and satisfactory if, instead of the petitioners themselves appointing dealers and organising sales of the fertilisers, such, work was entrusted to a reputable organisation with experience and skill in the sales of fertilisers. In pursuance of this policy the petitioners appointed M/s F.I.D. Parry Ltd., and M/s Rallies India Limited as their selling agents. The selling agents undertook under the agreements the task of selling the fertilisers in consideration of receiving a commission of 3 1/2 per cent calculated on the net realisable value i.e. upon the gross sales realisation less excise duty and sales tax, freight expenses and discount and rebate. This commission is remuneration paid by the petitioners to the selling agents for carrying out the work of selling the fertilisers which work the petitioners themselves would have been obliged to carry on.

4. By a Notification dated 1-3-1970 bearing No. 25/70 the Central Government exempted mixed fertilisers from duty of Excise duty, provided that the same had been manufactured with the aid of power from 2 or 3 fertilisers on which excise duty or countervailing duty has been paid. The notification contains an Explanation giving the meaning of the term "mixed fertilisers" as "mixtures of fertilisers containing more than one nutrient (nitrogen phosphate or potash) and does not include single nutrient fertilisers like super phosphate manufactured from rock phosphate". This Notification was issued by the Government of India in exercise of the powers conferred on it by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 (hereinafter referred to as the Excise Rules"). The exemption is limited to mixed fertilisers falling under item No. 14 H.H. of the First Schedule to the Act.

5. In W.P. No. 1400/76 the fertilisers in question is Gromor NPK 14: 35 : 14. The petitioners state in paragraph 8 of the Writ Petition that it is manufactured by

mixing with the aid of power from two imported fertilisers viz., rock phosphate and muriate of potash on which the petitioners have paid countervailing duty under the provisions of Section 2 A of the Indian Tariff Act, 1934. The manufacturing process of the said fertiliser consists of treating rock phosphate with sulphuric acid which produces phosphoric acid. When such phosphoric acid is treated with Ammonia, Mono and Di-Ammonium phosphate in slurry form comes into existence. With the said slurry, Muriate of Potash is added. Thereafter the said mixed fertiliser comes into existence. During the said process, a small quantity of Ammonium Sulphate is formed but it as it is mixed with the other ingredients. According to the petitioners, Mono and Di-Ammonium Phosphate in slurry form can not be used as a fertiliser for the reason that they are highly concentrated and in slurry form. The petitioners claim in that since Gromor NPK 14 : 35 : 14 is manufactured with aid of power from two fertilisers, it comes within the exemption given under Notification No. 25/70.

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14. The dispute between the parties is under three heads. The first point in dispute is whether Gromor NPK 14 : 35 : 14 is within the ambit of exemption given under Notification No. 25/70. One has to go by the plain language of the Notification in order to find out its ambit. Taxing statutes, rules and notifications issued thereunder will have to be understood strictly and with the aid of the language employed therein. There is no scope for any element of intention or any element of speculation about intention while interpreting taxing statutory provisions and notifications. Learned counsel further submitted that it was not competent for the Central Board of Revenue to issue any tariff advice or direction amending the statutory notification made by the Government of India. A subordinate agency cannot have the power to amend or add to a statutory notification. Therefore, so the learned counsel urged, the Central Board of Revenue and the Collector of Central Excise, Guntur, acted without jurisdiction in issuing Tariff Advice of November, 1974 and Trade Notice of 20th November, 1974 respectively, purporting to give new dimensions of the meaning of the Notification No. 25/70. While construing taxation provisions extraneous and irrelevant facts cannot be taken into consideration. Since the claim of the company their decisions will have to be quashed and the notification must be given its natural meaning.

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17. The first point to be considered, which would immediately arise is about the true and natural meaning of the notification gathered from the language used herein. We have fully extracted the notification above. The exemption

is given to "mixed fertilisers" which fall under item No. 14 HH of the First Schedule to the Act. The Explanation gives the meaning of the term "mixed fertilisers" as "mixture of fertilisers" containing more than one nutrient (nitrogen Phosphate or Potash) and does not include single nutrient fertilisers like super

phosphate manufactured from Rock Phosphate". Therefore, by the expression "mixed fertilisers" the Government of India meant "mixtures of fertilisers containing more than one nutrient". These mixtures of fertilisers should be manufactured with the aid of power from two or more fertilisers. If appropriate amount of excise duty has already been paid on all the fertilisers used in the manufacture, then alone the end manufactured product will be exempt from the whole of the duty of excise leviable thereon. Why the Government of India granted this exemption is easily discernible. What is sought to be exempted is a mixed fertilisers manufactured from two or more fertilisers on all of which duty has already been paid. If excise duty is imposed on the end-product also, then it would be double taxation. That is why the Government of India desired to avoid double taxation and gave the exemption.

18. What is exempted is "mixed fertilisers" falling under Item No. 14 HH of the First Schedule to the Act. Item 14 HH refers to "Fertilisers, all sorts, but excluding natural, animal, or vegetable fertilisers when not chemically treated". It is, therefore, manifest that the notification is concerned with only "fertilisers" and not with any other commodity. This idea is further demonstrated from the words "Manufactured ... from two or more fertilisers". So it follows that a mixed fertiliser, in order to win the exemption from duty, should be one which has been manufactured from two or more fertilisers. When the notification once again uses the word "fertilisers" its intention to emphasise that the exemption would be available only to mixtures of fertilisers becomes patent. This meaning is further made clearer by the Explanation which gives the meaning of the term "mixed fertilisers" as "mixtures" or "fertilisers". Therefore, there cannot be any hesitation to understand the meaning of the notification as purporting to grant exemption only to mixed fertilisers manufactured from two or more fertilisers. It is not its purpose to grant exemption to mixtures of fertilisers and other commodities as well.

19. Sri Setalvad for the petitioner company strongly urged that if two or more fertilisers are used in the manufacture of mixed fertilisers, such mixed fertilisers would be entitled to exemption despite the use of other commodities like sulphuric acid and Ammonia. According to him, what all the notification required is the use of two or more fertilisers in the manufacturing of mixed fertilisers and it does not matter if in addition to two or more fertilisers, some other commodities are also used. He also pointed out that had the Government of India wanted to limit the exemption in the manner in which the learned Government Pleader construed, then it would have used "the word 'only' before 'two or more fertilisers'". Since that word does not occur, the exemption would be available even if other commodities are used with fertilisers. If that were the intention of the notification, then it could have easily said manufactured from two or more fertilisers or other substances. Not only it omitted to say that but on the other hand the notification throughout emphasises on the use of fertilisers and fertilisers alone. The absence of the word "only" before "two or more fertilisers" does not stand in the way of understanding the real intention of the Government

of India. To our mind, consequently, the true and natural exemption is available to mixed fertilisers alone. If other commodities are also used in manufacturing the mixed fertilisers, then the said mixed fertilisers walks out of the exemption.

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21. Undoubtedly, sulphuric acid is an acid. That can be seen not only from the very name it has, but also from the list of acids given in Item No. 14 G of the First Schedule under the head "Acids" Ammonia, as can be seen from Item 14 HH which is under the heading "gases" is a gas. Sulphuric acid and Ammonia are independent commodities which are by themselves excisable to excise duty. In contract, when we come to Item 14 HH in the First Schedule, it deals only with "fertilisers". It purports to deal with fertilisers of all sorts excluding natural, animal or vegetable fertilisers when not chemically treated. It gives a number of commodities which are treated, under law as fertilisers. Entry 3 of Item 14 HH contains the words which the notification used. It deals with mixed fertilisers manufactured with the aid of power from two or more fertilisers. When the Act itself makes this distinction between fertilisers, including mixed fertilisers, on one hand and acid like Sulphuric acids gases like Ammonia as pointed out and maintained, it is futile to argue that Notification No. 25/70 grants exemption to mixed fertilisers which are manufactured from two or more fertilisers and acids and gases. To say that is only to introduce something which is not in the notification. We are, therefore, of the view that Gromor NPK 14 : 35 : 14 is not within the exemption given under the notification.

22. The same conclusion is arrived at from another perspective of the notifications. The exemption is available only if the mixed fertilisers is manufactured with the aid of power from two or more fertilisers. The Explanation makes it clear that mixtures of fertilisers containing more than one nutrient is mixed fertilisers for the purpose of the notification. So, what the notification contemplates is a simple mixture of fertilisers with the aid of power. It does not purport to postulate manufacture of mixed fertilisers through chemical transformation of so many commodities. In order to meet this argument, Sri Setalvad placed before us the meaning of the word "mix" given in Webster's Third International Dictionary at Page 1448. The meaning is given as "... to stir, shake or otherwise bring together (different substances) with a loss of separateness or identity. Syn : mingle, commingle blend merge-coalesce, amalgamate fuse ; mix, mingle and commingle use, describe, activities with little or no specific direction, often arising from chance or spontaneous suggest inclination, whereas merge and coallsce frequently suggest the working of time or natural force, and blend, amalgamate and fuse often imply a conscious endeavour toward unity, mix is the most general term". Relying on this meaning of the word "mix", Sri Setalvad took the stand that chemical transformation of all the several ingredients used in the process of manufacture remains within the realm of "mixture" as used in the Explanation. We are unable to accept this argument. The word "mix" even going by the Webster's Dictionary meaning is to

stir, shake or otherwise bring together different substances with a loss of separateness or identity. In other words, the process of mixture contains bringing together different substances, in other words, different substances are mingled or blend or merged or coalsced or amalgamated or fused together, It is also important to note that mix, mingle and commingle are used to describe the activities with little or no specific direction, often arising from chance OF spontaneous inclination. Blend, amalgamate and fuse imply a conscious endeavour towards unity. When such is the meaning of the word "Mix" it is difficult to accept that it makes within its meaning the entire process of manufacture of NPK 14 : 35 : 14 as described in paragraph 8 of the writ petition. The elaborate process of manufacture as described in paragraph 8 cannot be called "mixtures of fertilisers" as stated by the Explanation. The process or manufacture of NPK 14: 35 : 14, bringing into existence several others substances, and once again utilising them in the process, feating one substance with the other, cannot be said to be "mixture of fertilisers" as postulated by the notification. So, it will have to be held that NPK 14 : 35 : 14 is not entitled to exemption under Notification No. 25/70.

23. In this view, it is not necessary to consider or express any opinion on the other contentions raised by the learned standing counsel for the Central Government as to why this particular fertiliser is not entitled to exemption. Likewise it is also unnecessary to consider the contentions of Sri Setalvad that it is not competent to the Central Board of Revenue or to the Superintendent of Excise to issue tariff advice or to issue trade Notice and that no extraneous considerations should be taken into account. We agree with him when he said that the notification, beingfa part of the Act and statute, must be given its natural meaning as it emerges from the language used in it. That we have endeavoured to do and according to our understanding of the notification. NPK 14 : 35 : 14 is not within the amit of the exemption. For these reasons, we held the first contention against the petitioner company.

24. Now we come to the question of freight charges. The question is whether the freight charges collected by the petitioner company can be included in the assessable value of the fertiliser for the purpose of imposing duty. It is well-known that excise duty is a duty levied on something which is produced or manufactured. In fact Section 3 of the Act, which is the charging section, says this clearly. According to it, a duty can be levied and collected as specified in the First Schedule on all excisable goods which are produced or manufactured in India. Section 4 refers to determination of value for the purpose of duty. We will do well in extracting that section in its entirety :

"4. Determination of value for the purpose of duty -- Where under this Act, any article is chargeable with duty at a rate dependent on the value of the article, such value be deemed to be --

(a) the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article

chargeable with duty from the factory or any other premises of manufacture or production for delivery at the place of manufacture or production, or if a wholesale market does not exist for such article at such place, at the nearest place where such market exists, or

(b) Where such price is not ascertainable, the price at which an article of the like kind and quality sold or is capable of being sold by the manufacturer or producer or his agent, at the time of removal of the article chargeable with duty from such factory or other premises for delivery at the place of manufacture or production or if such article is not sold out or is not capable of being sold at such place, at another place nearest thereto.

Explanation ; -- In determining the price of any article under this section abatement or reduction shall be allowed except in respect of trade discount and amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid".

According to the section, the duty will have to be levied on the value of the article. Such value, according to Clause (a), is deemed to be the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture or production. However, if a wholesale market does not exist for, the article, the wholesale cash price of the article at the nearest place where such market exists will have to be taken into account. The question now is whether freight charges, which are admittedly collected by the petitioner company at its factory gate, are part of the wholesale cash price of the fertilisers.

28. In *A.K. Roy and Another Vs. Voltas Limited*, the Supreme Court explained the meaning of the term "wholesale cash price". Mathew, J speaking for the court observed at page 230 after referring to AIR 1932 168 (Privy Council) : --

"The essence of the idea is that the purchase must be a wholesale purchase and not a retail one. In other words, the sale must be wholesale and not a retail one in order that the price realised may be termed the "wholesale cash price".

The Privy Council in the case referred to in the above decision examining the scope of Section 30, Clauses (a) and (b) of the Sea Customs Act, 1878, whose provisions are analogous to Section 4 of the Excise Act. The learned Judge referred to the following passage in the Privy Council's decision with approval: --

"The price is to be a price for goods, as they are both at the "time" and "place" of importation. It is to be a "cash price" that is to say a price free from any augmentation for credit or other advantage allowed to a buyer, it is to be a net price, that is to say it is a "price" less trade discount". Then Mathew, J proceeded to observe further that their Lordships of the Privy Council therefore held that the words "wholesale price" were used in the section i.e, Section 30 of the Sea Customs Act in contradistinction to a retail price, and that not only on the ground

that such is a well recognised meaning of the words but because their association with the words "trade discount" indicates that sales to the trade are those in contemplation, and also because only by attaching that meaning to the work is the "wholesale price relieved of the loading representing post-importation expenses which, as a matter of business, must always be charged to the consumer and which are eliminated. Then the learned Judge proceeded to observe in paragraph 21 that excise is a tax on the production and manufacture of goods. Section 4 of the Act, therefore provides that the real value should be found after deducting the selling cost and selling profits and that the real value can include only the manufacturing cost and the manufacturing profit. The section makes it clear that excise is levied only on the amount representing the manufacturing cost plus the manufacturing profit and excludes post-manufacturing cost and the profit arising from that post-manufacturing operation, namely selling profit. The section postulates that the wholesale price should be taken on the basis of cash payment thus eliminating the interest involved in wholesale price which gives credit to the wholesale buyer for a period of time and that the price has to be fixed for delivery at the factory gate thereby eliminating freight, octopi and other charges involved in the transport of the articles- This ruling throws considerable light on the problem on hand. It clearly lays down that the real value of a, commodity includes only the manufacturing cost and the manufacturing profit, and that excise is levied only on the amount representing the manufacturing cost plus the manufacturing profit and excludes post-manufacturing cost and the profit arising from post-manufacturing operation, viz., selling profit. The decision also makes it clear that the wholesale price has to be fixed for delivery at the factory gate thereby eliminating freight, octopi and other charges involved in the transport of the articles. This enunciation of the law by the Supreme Court is a clear answer to the question as to the inclusion of freight charges in estimating the wholesale prices. Freight charges are obviously a post-manufacturing cost incurred by the manufacturer in supplying the goods to the purchaser. By no stretch of imagination could it be said that it is part, of the manufacturing cost and the manufacturing profit. Freight charges has nothing to do with the manufacturing or producing cost and profit. It is clearly and definitely a post-manufacturing expenditure and is wholly outside the manufacturing cost and the manufacturing profit.

29. What was stated by Mathew, J in VOLTAS CASE has been reiterated by Bhagwati, J speaking for the Supreme Court in Atic Industries v. Asst. Collector of Central Excise 1978 E.L.T. (J444). Amplifying the view of Mathew, J in Voltas case Bhagwati, J stated thus in paragraph 12: --

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30. It is true that in this case the Supreme Court was dealing with the question whether it is the first sale or second sale that should be taken as the criterion for fixing the wholesale price and that the court held that it is the first sale that should form the basis for reckoning the wholesale price. But the principle of

working out the wholesale cash price as adumbrated in Section 4 and the levy of excise duty on that basis was clearly brought out in this decision.

31. Shri Subrahmanya Reddy sought to distinguish the Volta's case -- supra and Atic Industrial's case -- supra on the ground that they were not dealing with the question of exclusion of export charges in the assessable value and that the observations of the Supreme Court are only incidental. No doubt in neither of the two cases the question of inclusion or exclusion of freight charges, arose. But certainly the question of the import of excise duty and the nature of wholesale cash price arose in the two cases. The law on the point has been made clear by the highest Court of the land which is binding on all the courts in India. From what we have extracted from the decisions of the Supreme Court there cannot be any possible doubt that freight charges cannot be included in estimating the wholesale cash price since they are not part of the manufacturing and producing cost but are only post-manufacturing expenses.

32. Similar view has been expressed by several High Courts, the Andhra Pradesh High Court in W.P. Nos. 1748/75 and batch, the Bombay High Court in Miscellaneous Petition No. 293/74, the Madras High Court in W.P. Nos. 2180/72 and 2742/75, W.P. Nos. 2182 and 2183 of 75 and the Karnataka High Court in W.A. No. 8/75.

33. Another argument addressed by Shri K. Subrahmanya Reddy in this connection will have to be considered. His point is that the petitioner company has been including freight and associate charges in the invoice, thus making those charges part and parcel of the cost of the fertiliser sold by it. It was further pointed out that irrespective of the place of consumer, a uniform rate of freight charges is being included in the invoice. If the purchaser takes delivery of the fertilisers right at the factory gate of the petitioner company at Visakhapatnam even then freight charges are being collected. That means according to the learned counsel, without incurring any expenditure in this behalf the petitioner company is collecting freight charges and are not shown and treated as part of the cost price of the fertilisers but are indicated as a charge for freight and other incidental expenses. It is common ground that a uniform rate for freight and associate charges is being charged by the petitioner company, whether the consumer is in Visakhapatnam itself or in the Punjab, Haryana, or Assam we have already given a brief resume of the writ petition that from 1970 a uniform rate of freight and associate charges are being collected separately whatever be the place of destination of fertiliser. If the consumer is at Visakhapatnam the actual freight that will be incurred by the petitioner company would be lost. But if it is far way in Bombay, the Punjab, Haryana or Assam it will be much more. In order to avoid complication, the petitioner company has introduced a uniform rate of freight and associate charges. That does not and cannot mean that it forms part of the wholesale cash price of the fertiliser. We are, therefore of the view that freight and associate charges collected by the petitioner company cannot be included in the assessable value of the fertilisers they sell.

34. Then survives the claim relating to commission paid to the selling agents. The petitioner company's claim is that this is a commission which they pay to their selling agents and is, therefore, liable to be deducted from the assessable value. We are not, however, persuaded to accept this contention. We have already referred to the principles laid down by the Supreme Court in ascertaining the wholesale price of an excisable commodity. What the petitioner company is paying to its selling agents is 3 1/2% commission on the price as remuneration to them for the service rendered. Thus a part of the wholesale cash price is paid to them as remuneration. But this amount cannot be abated or deducted from the wholesale cash price, unless it is by way of trade discount or an amount of duty payable at the time of the removal of the article chargeable with duty from the factory or any other premises of manufacture as laid down in explanation to Section 4. The commission of 3 1/2% paid to the selling agents is not a trade discount given either to the wholesale buyer or to the retail buyer. It is not given to the consumer or to the trader. Therefore, it is not trade discount within the meaning of explanation to Section 4. By no stretch of imagination could it be said that it represents duty payable at the time of the removal of the article chargeable with duty from the factory. Therefore, the percentage paid to the selling agents out of the total sale price cannot be abated or deducted from the assessable amount. Consequently, this claim of the petitioner company must be rejected.

35. The result of the foregoing conclusion is that Gromor NPK 14 : 35 : 14 is not exempt from excise duty under notification No 25/70. At the same time, the freight and associate charges incurred by the petitioner company cannot be included in the assessable value. However, the commission paid to the selling agents by the company cannot be deducted from the assessable value. The four writ petitions are allowed only to the extent of freight and associate charges and dismissed in other respect. Since the parties have succeeded in part and failed in part, we direct them to bear their own cost. Advocate's fee Rs. 100 lumpsum.

36. After this court pronounced the judgment this day Sri Anjaneyulu, the Advocate for the petitioner and Sri Subrahmanyam Reddy, Central Government Standing Counsel on behalf of the respondents orally requested this court to grant a certificate for leave to appeal to the Supreme Court of India against this judgment and Sri Anjaneyulu Counsel for the Petitioner sought stay of the operation of this judgment in respect of the excise duty payable on the Gromor NPK 14 : 35 : 14 and to selling Agents Commission on the fertilisers sold by the petitioner company, the court made the following orders.

Immediately after delivery of judgment Sri Anjaneyulu for the petitioner and Sri Subrahmanyam Reddy for the respondents sought leave for appeal to the Supreme Court. We did not entertain any doubt on any one of the points we have decided. To us the construction of the notification No. 25 of 1970 is simple and unambiguous. Our decision about the freight charges and the sale commission is based on Supreme Court decision and the criteria laid down by that court for

levying excise duty. We, therefore, see no justification for granting certificate either to the petitioners or to the respondents. The leave is consequently-refused.

Sri Anjaneyuly counsel for the petitioners seeks stay of the operation of our judgment in respect of the excise duty payable on the "Gromor NPK 14 : 35 :14" and the selling agent's commission on the fertilisers sold by the petitioner company. We grant stay in these two respects for two months from today on condition that the petitioner company furnishes bank guarantee for these amounts within one month from today to the satisfaction of the Assistant Collector, Central Excise, Visakhapatnam.