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**(1986) 03 KAR CK 0064**  
**In the Karnataka High Court**  
**Case No : W.P.No. 19994 of 1981**

Davangere Cotton Mills Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

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**Date of Decision :** 03-03-1986

**Acts Referred:**

**Citation :** (1986) 8 ECC 113 : (1986) 24 ELT 507

**Hon'ble Judges :** Puttaswamy, J;Mahendra, J

**Bench :** Division Bench

**Advocate :** K. Srinivasan and N.S. Prasad, for the Appellant; K. Shivashankar Bhat, Senior Standing Counsel, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Puttaswamy, J.—On a reference made by Venkatachaliah, J. this case was posted before us for disposal.

2. The Davangere Cotton Mills Limited, Davangere Chitradurga District ("DCM") with its registered office at Davangere, a public limited company incorporated under the Companies Act, is the petitioner before us. The petitioner is operating a composite textile mill at its factory situated on Chitradurga Road, Davangere City, inter alia manufacturing different kinds of yarn which is ultimately consumed in its own factory for the manufacture of different kinds of textile or fabrics. For the manufacture of different kinds of yarn and textiles or fabrics the petitioner had obtained separate licences from the competent licensing authority under the Central Excises and Salt Act of 1944 (Central Act No. 1 of 1944) and the Central Excise Rules of 1944 framed there under ("the Act and the Rules"). The different kinds of yarn manufactured at the factory are dutiable to excise duty under tariff item Nos. 18 III, 18A and 18E of the First Schedule to the Act and we are concerned with the levy of duty on such yarn manufactured at its factory.

3. Ever since the Act was extended to the area viz. from 1-4-1950 by the Finance

Act of 1950, the petitioner was paying excise duty on yarn manufactured and consumed in its mill, without demur, till the end of August, 1981. But, like a Rip Van winkle the petitioner inspired by a ruling of the Delhi High Court rendered on 16-10-1980 to which we will make a detailed reference at a later stage woke up in the later part of 1981 and approached this Court on 8-9-1981 under Article 226 of the Constitution for a declaration that the yarn manufactured without removing the same from its factory premises was not dutiable to duty under the Act. The petitioner after obtaining the leave of this Court has also challenged the amendments made to Rules 9 and 49 of the Rules and Section 51 of the Finance Act of 1982 (1982 Act). The challenge to these provisions are based on a large number of grounds which will be noticed and dealt by us in due course.

4. In their return, the respondents have justified the levy, the amendments made to the Rules and the 1982 Act. The respondents have urged that the yarn manufactured under separate and distinct licences within the factory but removed and utilised for the manufacture of end products whether removed from the factory premises or otherwise, was separately dutiable to excise duty under the Act.

5. Sri K. Srinivasan, learned Advocate has appeared for the petitioner. Sri K. Shivashankar Bhat, learned senior standing Counsel for the Central Government has appeared for the respondents, Both sides in their full and elaborate arguments have relied on a large number of rulings and we will refer to them at the appropriate places.

6. Sri Srinivasan has urged that yarn manufactured by the petitioner at its factory, without removing the same from the factory premises but exclusively consumed within the very factory for the manufacture of textiles was not dutiable to excise duty under the Act as rule by the High Court of Delhi in Delhi Cloth and General Mills Company Limited and Anr. v. Joint Secretary, Government of India and Anr. (DCM's case) : 1978 ELT 121 and J. K. Cotton Spinning and Weaving Mills Co. Ltd and Anr. v. Union of India (J. K. case) 1981 ELT 887.

7. Sri Bhat has urged that yarn manufactured and consumed within the factory was separately dutiable to excise duty under the Act as ruled by the High Court of Gujarat in Maneklal Harilal SPG. & MFG. Co. Ltd. Ahmedabad and Ors. v. Union of India and Ors. (Maneklal's case) 1978 ELT 618) and the enunciation made by the High Court of Delhi in the cases relied on by Sri Srinivasan was unsound.

8. In order to ascertain the true scope and ambit of the charging Section, the rules, in particular Rules 9 and 49, it is first useful to notice some of the important rules of construction that bear on them and the nature of the duty or tax levied, which are all now concluded and are no longer in doubt.

9. A machinery provision in a fiscal statute should be so interpreted as to make the charging provision of that statute effective is well settled. In K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, Bhagawati, J. (as His Lordship then was) referring to various passages of Lord Denning and Judge Learned Hand

has explained the principle of progressive rule of construction of statutes in these words :

"The task of interpretation of a statutory enactment is not a mechanical task. It is more than a mere reading of mathematical formulae because few words possess the precision of mathematical symbols. It is an attempt to discover the intent of the legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and as pointed out by Lord Denning, it would be idle to expect every statutory provision to be "drafted with divine prescience and perfect clarity". We can do no better than repeat the famous words of Judge Learned Hand when he said : ".....it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable, source of interpreting the meaning of any writing ; be it a statute, a contract or anything else. But, it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary ; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning". We must not adopt a strictly literal interpretation of Section 52 Sub-section (2) but we must construe its language having regard to the object and purpose which the legislature had in view in enacting that provision and in the context of the setting in which it occurs. We cannot ignore the context and the collocation of the provisions in which Section 52 Sub-section (2) appears, because, as pointed out by Judge Learned Hand in most felicitous language: ".....the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create". Keeping these observations in mind we may now approach the construction of Section 52 Sub-section (2).

In *Mc. Dowell and Company Limited v. Commercial Tax Officer*, 59 SIC 277 the Supreme Court reviewing all the earlier cases has expounded that tax measures should not be so interpreted as to provide for evasion of taxes. In *C. Arunachalam Vs. Commissioner of Income Tax, Karnataka, Bangalore*, a Full Bench of this Court reiterating the progressive rule of construction of statutes has expressed thus :

"So far as the fiscal statutes are concerned, we must remember one more principle. The provisions in a fiscal statute are not to be so construed as to furnish a chance of escape and a means of evasion. In case of doubt, the fiscal statute should be continued in favour of and beneficial to the subject".

With this, we pass on to notice the rulings that bear on the nature of the duty or tax under the Act.

10. In *R.C. Jall Vs. Union of India (UOI)*, an unanimous Constitution Bench of the Supreme Court speaking through Subba Rao, J. (as His Lordship then was) referring to the earlier leading cases of the Federal Court and the Privy Council

on the subject and expressing its concurrence with all of them on the nature of duty levied under the Act expressed thus :

"Excise duty is primarily & duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer. That is, its ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that is it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience....."

In Ahmed Hussain Khan Vs. State of Andhra Pradesh, the Court, has followed this enunciation (vide para 12 at pages 480 and 481);

11. On the mode of collection of duty levied under the Act, the Federal Court in The Province of Madras v. Messrs Boddu Paidanna and Sons, AIR 1942 F C33 expressed, thus :

"The duties of excise which the Constitution Act assigns exclusively to the Central Legislature are, according to 1939 FCR 18, duties levied upon the manufacturer or producer in respect of the manufacture or producer in respect of the manufacture or production of the commodity taxed.....The two taxes which he is called on to pay are economically two separate and distinct imposts. There is in theory nothing to prevent the central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold", consumed, destroyed or given away. A taxing authority will not ordinarily impose such a duty, because it is much more convenient administratively to collect the duty (as in the case of most of the Excise Acts) when the commodity leaves the factory for the first time, and also because the duty is intended to be an indirect duty which the manufacturer or producer is to pass on to the ultimate consumer, which he could not if the commodity had, for example, been destroyed in the factory itself. It is the fact of manufacture which attracts the duty, even though it may be collected later ; and we may draw attention to the Sugar Excise Act in which it is specially provided that the duty is payable not only in respect of sugar which is issued from the factory but also in respect of sugar which is consumed within the factory ....."

In Governor General in Council v. Province of Madras AIR 1945 PC 96 the Privy Council concurring with this opinion expressed thus :

"To their Lordships this contention does not appear well-founded. The term "duty of excise" is a somewhat flexible one; it may, no doubt, cover a tax on first and perhaps on other sales : it may in a proper context have an even wider meaning. An exhaustive discussion of this subject, from which their Lordships have obtained valuable assistance, is to be found in the judgment of the Federal Court

in 1939 FCR 18. Consistently with this decision, their Lordships are of opinion that a duty of excise is primarily a duty levied upon a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax upon goods not upon sales or the proceeds of sale of goods. Here again their Lordships find themselves in complete accord with the reasoning and conclusions of the Federal Court in the Boddu Paidanna case (AIR 1942 FC 33), The two taxes, the one levied upon a manufacturer in respect of his goods, the other upon a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But, in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment, when the exciseable article leaves the factory or workshop for the first time upon the occasion of its sale. But, that method of collecting the tax is an accident of administration ; it is not of the essence of the duty of excise which is attracted by the manufacture itself. That this is so is clearly exemplified in those excepted cases in which the Provincial, not the Federal, Legislature has power to impose a duty of excise. In such cases there appear to be no reason why the Provincial Legislature should not impose a duty of excise in respect of the commodity manufactured and then a tax on first or other sales of the same commodity. Whether or not such a course is followed appears to be merely a matter of administrative convenience. So, by parity of reasoning may the Federal Legislature impose a duty of excise upon the manufacture of exciseable goods and the provincial Legislature impose a tax upon the sale of the same goods when manufactured".

In R.C. Jall Vs. Union of India (UOI), the Supreme Court approving the above exposition expressed thus:

"The argument confuses the incidence of taxation with the machinery provided for the collection thereof ?"

With these basic postulates we will ascertain the true scope and ambit of the material provisions.

12. Section 3 of the Act, is the charging Section. Section 3(1) of the Act that is material reads thus :

"3(1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in (India) and a duty on salt manufactured, in or imported by land into, any part of (India) as, and at the rates, set forth in the first Schedule."

This section levies excise duty on exciseable goods which are produced or manufactured in the country at the rates set forth in the first schedule to the Act, The taxable event is the manufacture of exciseable goods and such manufacture attracts duty in accordance with the rates levied thereon in conformity with the tariff items of the Act. The intermediate goods manufactured as intermediate goods in one and the same factory premises whether consumed in the

manufacture of other products or end products or sold at the factory gate or thereafter does not make any difference in the durability of such goods and is separately chargeable to duty trader the Act is now set at rest by the Supreme Court in Union of India (UOI) Vs. Delhi Cloth and General Mills, and South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, . The terms "in such manner as may be prescribed" occurring in Section 3(1) of the Act or "as may be prescribed by the Rules made by Government u/s 37 of the Act" have really no relevance to decide whether the manufactured exciseable goods are dutiable to duty or not. This principle governs all the manufactured exciseable goods whether they are intermediate or end products. The rules made or to be made by Government do not at all make a levy of excise duty on manufactured goods exciseable to duty but only enable the impost or duty levied under the Act to be collected in the manner stipulated by the Rules. The manner and method stipulated by Rules neither impose nor determine the duty imposed by the Act. The liability to duty is created by the Act and not by the Rules. We are of the view that the emphasis laid by Sri Srinivasan on the Rules either before the amendment of Rules 9 and 49 or after their amendment and their retrospectivity and validation by the 1982 Act do not really make any impact and difference to hold that yarn manufactured as intermediate goods but not removed from the factory premises was not dutiable duty under the Act. We are of the view that on this conclusion of the Act which is the only conclusion to be reached on the principles enunciated by the Supreme Court, we cannot uphold the plea of the petitioner.

13. Rules 9 and 49 of the Rules as they stood prior to their amendments and the 1982 Act read thus:

"9. Time and manner of payment of duty : (1) No excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export or manufacture or any other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these rules or as the Collector may require, and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form ;

Provided that such goods may be deposited without payment of duty in a store room or other place of storage approved by the Collector, under Rule 27 or Rule 47 or in a warehouse appointed or licensed under Rule 140 or may be exported under bond as provided in Rule 13 ;

Provided further that such goods may be removed without payment or on part payment of duty leviable thereon if the Central Government, by notification in the official gazette, allow the goods to be so removed under Rule 49 ;

Provided also that the Collector may, if he thinks fit instead of requiring payment of duty in respect of such separate consignment of goods removed from the

place or premises specified in this behalf, or from a store room or warehouse duly approved, appointed or licenced by him keep with any person dealing in such goods and account-current of the duties payable thereon and such account shall be settled at intervals, not exceeding one month, and the account-holder shall periodically make deposit therein sufficient in the opinion of the Collector to cover the duty due on the goods intended to be removed from the place of production, curing, manufacture or storage.

(1A) Where a person keeping an account current under the third proviso to sub-rule (1) makes an application to the Collector for withdrawing an amount from such account current, the Collector may, for reasons to be recorded in writing, permit such person to withdraw the amount in accordance with such procedure as the Collector may specify in this behalf.

(2) If any excisable goods are, in contravention of sub-rule (1) deposited in, or removed from, any place specified therein, the producer or manufacturer, thereof shall pay the duty leviable on such goods upon written demand made within the period specified in Section 11A of the Act by the proper officer, whether such demand is delivered personally to him, or is left at his dwelling house, and shall also be liable to a penalty which may extend to two thousand rupees, and such goods shall be liable to confiscation,"

"49. Duty chargeable only on removal of the goods from the factory premises or from an approved place of storage :

(1) Payment of duty shall not be required in respect of exciseable goods made in a factory until they are about to be issued out of the place or premises specified under Rule 9 or are about to be removed from a store-room or other place of storage approved by the Collector under Rule 47 ;

Provided that the manufacturer shall on demand pay the duty leviable on any goods which are not accounted for in the manner specifically provided in these rules, or which are not shown to be satisfaction of the proper officer to have been lost or destroyed by natural causes or by unavoidable accident during handling or storage in such store-room or other - approved premises ;

Provided further that the proper officer may not demand duty due on any goods claimed by the manufacturer as unit for consumption or for marketing subject to such conditions as may be imposed by the Collector by order in writing.

(2) Notwithstanding anything contained in sub-rule (1), exciseable goods made in a factory to which provisions of Chapter VII of these Rules have been extended by the Central Government by notification in the Official Gazette, may be removed from the factory in which they are made to any warehouse licensed premises of the factory and subject to such exemptions, limitations and conditions as may, from time to time, specified in this behalf by the Central Government.

(3) Notwithstanding anything contained in sub-rule (1), the Central Government

may, under circumstances of exceptional nature, allow, by notification in the Official Gazette, any exciseable goods to be removed from the factory in which they are produced without payment of, or only on part payment of, duty leviable thereon subject to such conditions and limitations (including payment of interest on the balance amount of duty) as may, from time to time, be specified by the Central Government. The manufacturer of such exciseable goods shall execute a bond in the proper form with such surety or security as the Collector may approve."

Rule 9(1) in very clear terms prohibits the removal of manufactured goods from the place where they are manufactured which necessarily means the very place of manufacture and not the factory or licensed premises, without payment of duty chargeable thereto under the Act. The first part of the rule containing the prohibition which commences with negative words is an imperative provision. The second part of the rule only enables the payment of duty in accordance with the Rules, the removal of goods in the manner prescribed by the Rules or an order made thereto by the Collector in that behalf. Rule 9(1) which carries out the purposes of the Act, in particular, the charging section prohibits the removal of goods from the place of manufacture or the very place of manufacture or outside the factory or for that matter wherever that be without payment of duty chargeable under the Act. Assuming that there is to be removal without payment of any duty, then the same should be in conformity with the Rules or the permission so granted by the Collector under the Act and the Rules are not otherwise.

14. The first proviso to Rule 9(1) permits the manufacturer to deposit the goods in a store room or other place of of storage approved by the Collector or in a warehouse appointed or licensed under Rule 140 or export under bond as provided in Rule 13 of the Rules. The second proviso provides for removal without payment of whole or part of the duty in terms of a notification, if any issued by the Central Government and published in the official gazette. The third proviso to the said rule provides the removal of manufactured goods on account basis under and in terms of that rule. Rule 9(1A) is only supplemental to the last proviso to Rule 9(1) of the Rules. Rule 9(2) regulates the removal of goods in contravention of Rule 9(1) of the Rules.

15. Rule 49 of the Rules is also an enabling rule and must be read in conjunction with Rule 9 of the Rules. Rule 49 does not in any way destroy the effect of Rule 9 of the Rules, Rule 49 (1) only permits the postponement of collection of duty on intermediate or other goods manufactured till they are removed from the factory gate or premises subject to the terms and conditions stipulated in that Rule. But, that postponement of payment of duty does not and cannot mean that the duty already attracted on the manufactured goods at the place of manufacture is obliterated or extinguished.

16. The Rules only facilitate the smooth collection of duty and the time of removal of goods from the factory gate. The enabling rules do not destroy the

incidence of taxation but only facilitate the collection of duty on goods manufactured and delivered taking due note of and providing for the possibility of destruction of manufactured goods for a variety of purposes.

17. The explanation added to Rules 9 and 49 of the Rules apparently with the object of overcoming the effect of the rulings of the Delhi and other High Courts in any event, in our view were introduced *ex abundanti cautela*. Even without those amendments the legal position was that the intermediate goods like yarn manufactured in a factory which are ultimately consumed in the manufacture of end products were dutiable to duty whether removed from such factory premises or otherwise. We are, therefore, of the view that the amendments made to the rules do not make any difference in the chargeability of duty of the yarn manufactured by the petitioner and the fact that the same is not removed from the factory premises but is only consumed in the manufacture of end products do not touch on the chargeability or otherwise to duty under the relevant tariff items of the Act.

18. On 20-2-1982, Government of India introduced an identical explanation with necessary modifications thereto to Rules 9 and 49. The said amendments made to the said Rules read thus :

"Explanation : For the purposes of this rule, exciseable goods produced, cured or manufactured in any place and consumed or utilised --

(i) as such or after subjection to any process or processes ; or (ii) for the manufacture of any other commodity, whether in a continuous process or otherwise, in such place or any premises appurtenant thereto, specified by the Collector under sub-rule (1), shall be deemed to have been removed from such place or premises immediately, before such consumption or utilisation.

(vide: Explanation to Rule 9)

""Explanation : For the purpose of this rule, exciseable goods made in a factory and consumed or utilised...

(i) as such or after subjection to any process or processes; or (ii) for the manufacture of any other commodity.

Whether in a continuous process or otherwise, in such factory or place or premises specified under Rule 9 or store-room or other place of storage approved by the Collector under Rule 47, shall be deemed to have been issued out of, or removed from such factory, place, premises, store-room or other place of storage, as the case may be, immediately before such consumption or utilisation.

(vide : Explanation to Rule 49)

These amendments in our considered view make explicit what is implicit in Section 3(1) and the original Rules 9 and 49. The explanations do not introduce any new concept but only clarify the earlier rules.

19. In DGM's case 1978 ELT (121), a Division Bench of the Delhi High Court consisting of Deshpande, J. (as His Lordship then was) and Anand, J. had occasion to examine whether "calcium carbide, manufactured in the factory of the petitioner consumed in the end product of "acetylene gas" was goods or not and if it was goods whether the former was exigible to excise duty or not. We are not concerned with the question whether "calcium carbide" was goods or not.

20. But, on the other aspect, a contention similar to the contention urged before us was urged before their lordships in that case and the same was accepted by the Court speaking through Deshpande, J. (as His Lordship then was) in these words :

"(4) The expression "factory" is defined in Section 2(e) to mean any premises including the precincts thereof wherein or in any part of which exciseable goods are manufactured. The definition covers the present case because the calcium carbide is manufactured in one part of the factory while the acetylene gas is manufactured in another part thereof. The definition of "factory" makes it clear that the meaning of factory is not restricted to only the part in which the exciseable goods are manufactured. On the other hand, it includes the whole of the premises in a part of which such goods are manufactured. Any rate the case of the petitioner is that the whole of the premises which comprise both the Plants making calcium carbide and acetylene gas are its factory. It is not contended by the Respondents that the calcium carbide plant constitutes a separate factory and the acetylene gas plant constitutes another factory. It cannot be said, therefore, that the so called calcium carbide made by the petitioner is removed from the factory in which it is made. A perusal of Rules 9 and 49 makes it clear that the question of collection of any excise duty cannot arise unless and until the goods are removed from the factory.

8. We may conclude, therefore, that even if it is assumed for the sake of argument that for some reason or the other the calcium carbide made by the petitioner is "goods" and is, therefore assessable to excise duty still the actual collection of the excise duty on these goods cannot be made unless and until these goods are removed from the factory of the petitioner."

With great respect to their Lordships we are of the considered opinion that this enunciation is unsound for more than one reason. First, in reaching their conclusion their Lordships have overlooked the relevant rules of construction, Second, the construction placed does not give full effect to the duty levied in the charging Section and Rules 9 and 49 only effectuate and achieve the same. Lastly the fact that the manufactured goods, at whichever place they are manufactured are exigible to excise duty and the subsidiary rules do not levy duty, has been overlooked by their Lordships. For these and other reasons noticed by us earlier, with great respect so their Lordships we find it difficult to subscribe to the views expressed in DGM's case, 1978 ELT 121.

21. The enunciation made in DGM's case 1978 ELT (121) which is the very first

case, on the point has been consistently followed by that Court in the Collector of Central Excise v. J. K. Synthetics Limited, L.P.A. 21 of 1971 Devidayal Electronics and Wires v. Union of India, C.W. 219 of 1978 and in J. K. case which was a case of a composite textile mill as in the present case before us. We do not find any additional reasons in J. K. case, which is the fulcrum of the petitioner's case. For the very reasons on which we have dissented with DGM's case, with great respect to their Lordships that decided the other cases, we regret our inability to subscribe to their views.

22. In Maneklal's case, a Division Bench of the Gujarat High Court consisting of Diwan, CJ. and D. P. Desai had occasion to examine the very question and also notice the ruling of the Delhi High Court in DGM's case, . In rejecting the very contention, the Court speaking through Divan, CJ. expressed thus :

"13. Under Rule 9, it is clear that excise duty must be paid before the goods are removed from the place where they are produced or manufactured and in the light of Rule 175 and the provision as to licences, it is clear that in the case of each excisable article, a separate licence has to be taken specifying the particular place where the excisable goods in question are to be manufactured. Unless the place is specified in the licence, it is not open to the manufacturer of any excisable goods to carry on manufacturing activity, and for the purposes of Rule 9, it is the place specified in the licence concerned that is the place where the goods are produced or manufactured and it is the removal from the place thus specified in the licence in question that is the place referred to in Rule 9. Once this position, is clearly appreciated in the light of the licensing procedure and it is borne in mind that each licence has to specify under the rules the place where excisable goods are to be manufactured, it is obvious that it is removal from the place mentioned in the licence which is material and not removal from the larger compound of the factory where excisable goods are consumed for production of further articles which may or may not be excisable goods. In the case before us, the end product, namely cotton fabrics and polyester carbonized fabrics, are both liable to excise duty as such. But, the question that we have to ask ourselves is whether removal which is spoken of in Rule 9 is removal from the spinning sections which are licenced premises as shown in the affidavits before us, or whether yarn an excisable article, is produced or manufactured and in respect of which licence to produce yarn, either cotton or polyester, is issued to each of the petitioners, or whether it is only removal of cotton fabrics from the factory as such is the event which will attract collection of excise duty.

14. In our opinion, it is obvious from the scheme of the rules and particularly in the light of the language of Rule 9 read in the context of licensing procedure and rules relating to licences issued to manufacturers of excisable goods, that excise duty has to be collected and paid by the manufacturer concerned, at the time, so far as yarn is concerned, when yarn is removed from the spinning department to the weaving department. This conclusion gets support from the language of proviso to Rule 52A(2). It is possible that for the sake of convenience of

collection, particularly in the light of self removal procedure, under Chapter VII-A of the Rules, the excise authorities are treating production of yarn and weaving as continuous processes and giving facilities to the petitioners on the footing that proviso (i) to Section 173G applies, but it is obvious from what the petitioners themselves have stated that the process is not continuous. Merely because a certain facility is given, it does not mean that excise duty is not liable to be collected from the petitioners when yarn is removed from the spinning department to the weaving department.

In para 15, the Court referred to the passage in DGM's case 1978 ELT (121) and expressed thus :

"15. The Learned Advocate General appearing on behalf of the petitioners in each of these petitions has relied on the decision of the Delhi High Court in *Delhi Cloth and General Mills Co. Ltd. v. Joint Secretary, Government of India* and anr. 1978 E.L.T. (121). In that case, the question before the Delhi High Court was whether excise duty was leviable on calcium carbide produced by the Delhi Cloth and General Mills which was consumed in the manufacture of acetylene gas. It was found as a fact that calcium carbide manufactured by the company was not known to the market as calcium carbide, and one of the contentions which was also urged before the Delhi High Court was that calcium carbide was not removed from the factory of the petitioner and the passage of calcium carbide from the plant where calcium carbide was manufactured to the plant where acetylene gas was manufactured, both plants being located in the same factory, was not tantamount to removal from the factory to any other place. It is obvious from what we have stated in connection with the two cases of the Supreme Court referred to above that since calcium carbide which was produced by the manufacturer before the Delhi High Court did not amount to a marketable commodity known to the market as such, excise duty was not payable on the intermediate product in that particular case. However, while dealing with the question of removal from the factory, it is to be noted that the provisions of Section 4 were sought to be invoked. Now, as we have stated in the course of this judgment, Section 4 applies in those cases where excise duty "is leviable ad valorem and the provisions of Section 4 provide how value has to be determined for the purpose of levying and collection of ad valorem duty. In the case before us where excise duty has to be paid on the basis of weight of yarn, the question of invoking Section 4 does not arise, and whatever has been said by the Delhi High Court in the context of the provisions of Section 4 will, therefore, not apply in the instant case. However, the Learned Advocate-General relied very strongly on the decision of the Delhi High Court on point 4 at page J-126 of the report. He relied on the following passage :

"The expression "factory" is defined in Section 2(c) to mean any premises including the precincts thereof wherein or in any part of which excisable goods are manufactured. The definition covers the present case because the calcium carbide is manufactured in one part of the factory while the acetylene gas is

manufactured in another part thereof. The definition of "factory" makes it clear that the meaning of factory is not restricted to only the part in which the excisable goods are manufactured. On the other hand, it includes the whole of the premises in a part of which such goods are manufactured. At any rate the case of the petitioner is that the whole of the premises which comprise both the plants making calcium carbide and acetylene gas are its factory. It is not contended by the Respondents that the calcium carbide plant constitutes a separate factory and the acetylene gas plant constitutes another factory. It cannot be said, therefore, that the so called calcium carbide made by the petitioner is removed from the factory in which it is made. A perusal of Rules 9 and 49 makes it clear the question of collection of any excise duty cannot arise unless and until the goods are removed from the factory".

With great respect to Learned Judges of the Delhi High Court who constitutes the Division Bench, we are unable to agree with the final sentence in the passage quoted above. Rule 9 applies to place where excisable goods are manufactured and not a factory and if the question of intermediate product, which is by itself an excisable article, arises for consideration, it is always a part of the larger factory where intermediate product will be manufactured if it is manufactured in the same larger premises of the factory. But, in view of the licensing procedure and in view of Rule 9, it is the place where a particular excisable article is manufactured that is material so far as collection at the stage of removal is concerned and not the larger factory. Reading in the wording of Rule 9 a factory as equivalent to the place where goods are manufactured is, with great respect to learned Judges of the Delhi High Court, not permissible and with great respect we differ from them."

In para 13 the Court has referred to the removal of goods from the licensed place. We are of the view that this expression has been used by their Lordships only to rebut the contention urged before them but not to hold that the manufacture of goods by a non-licensee does not attract levy of excise duty on excisable goods. We are also of the view that the other expressions used do not militate and take a different view than what we have expressed on the true construction of Section 3(1) and Rules 9 and 49 of the Rules. When so read, with respect, we are in complete agreement with the views expressed by their Lordships of the Gujarat High Court in Maneklal's case 1978 ELT (618).

23. What emerges from our above discussion is that Rules 9 and 49 of the Rules as they stood without their amendment in 1982 or the 1982 Act do not lend support to the contention urged for the petitioner. On this view it is not very necessary for us to examine the effect and the validity of the explanations and the 1982 Act. But, as our order is subject to appeal and the matter has been fully argued, we consider it proper to examine them and decide which we now proceed to do in their order.

24. We have earlier reproduced Rules 9 and 49 before their amendment and the explanations added to those Rules on 20-2-1982. The explanations added to

Rules 9 and 49 declare that when intermediate goods manufactured within a factory are removed and consumed for the manufacture of end products or for captive consumption, they are removed from out of the factory for consumption or utilisation. These explanations are effective from 20-2-1982 and onwards is not and cannot also be disputed.

25. But, Sri Srinivasan had urged that the amendments made had not really achieved the object of legislation in that they do not provide that the removal of the manufactured goods for captive consumption from the licensed place of the premises tantamount to removal from the factory or licensed premises for consumption and utilisation, the defect and the infirmity noticed by the Delhi High Court in DGM's case 1978 ELT (121) and other cases continues to govern the legal position.

26. When there is removal from a place of manufacture within the factory premises for captive consumption, it necessarily comprehends removal from the licensed place or premises and cannot be anything other than that. Whatever be the position prior to 20-2-1982, the position from 20-2-1982 is that removal of intermediate goods for captive consumption attracts excise duty under the Act. We are of the view that the distinction sought to be maintained by Sri Srinivasan is without a difference and has no merit

27. Section 51 of the Finance Act of 1982 which is seriously challenged by the petitioner reads thus :

"51. Retrospective effect for certain amendments to Central Excise Rules and validation :

(1) The amendments made in Rules 9 and 49 of the Central Excise Rules, 1944 by the Notification of the Government of India in the Ministry of Finance (Department of Revenue) No. G.S.R. 74(E), dated the 20th day of February, 1982, shall be deemed to have, and to have always had effect on and from the date on which the Central Excise Rules, 1944 came into force.

(2) Any action or thing taken or done or purporting to have been taken or done before the 20th day of February, 1982 under the Central Excises Act and the Central Excise Rules, 1944 shall be deemed to be, and to have always been, for all purposes, as validly and effectively taken or done as if the amendments referred to in Sub-section (1) had been in force to all material times and, accordingly, notwithstanding anything contained in any judgment, decree or order of any Court, tribunal or other authority :

(a) all duties of excise levied, assessed or collected or purporting to have been levied, assessed or collected before the 20th day of February, 1982 on any excisable goods under the Central Excises Act, shall be deemed to

be, and shall be deemed to have always been, as validly levied, assessed or collected as if the amendments referred to in Sub-section (1) had been in force at all material times :

(b) no suit or other proceeding shall be maintained or Continued in any Court for the refund of, and no enforcement shall be made by any Court of any decree or order directing the refund of, any such duties of excise which have been collected and which would have been validly collected if the amendments referred to in sub-section(1) had been in force at all material times ;

(c) refund shall be made of all such duties of excise which have been collected but which would not have been so collected if the amendments referred to in Sub-section (1) had been in force at all material times ;

(d) recovery shall be made of all such duties of excise which have not been collected or, as the case may be, which have been refunded but which would have been collected or, as the case may be, would not have been refunded, if the amendments referred to in Sub-section (1) had been in force at all material times.

Explanation : For the removal of doubts it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force."

The rule making power conferred on Government by Sections 37 and 38 of the Act, does not empower it to make rules with retrospective effect. These Sections empower Government to make rules prospectively only.

28. But, Section 51 of the Act gives retrospective effect to the Rules made on 20-2-1982 from the very day the Act and the Rules came into force viz., from 28-2-1944. The Section also validates all actions taken and requires all actions including levies, recoveries and refunds to be regulated as if the explanation added to Rules 9 and 49 were part of those Rules from their very inception. The explanation to this Section however, declares that no act or omission on the part of any person shall be punishable when they were not in force. In other words, criminal prosecutions for acts or omissions if any are barred under this Section.

29. The object with which Section 51 was enacted has been set out in the budget speech of the Hon"ble Minister for Finance and Notes on clauses of Clause No. 51 of Finance Bill, 1982, which later became Section 51 of the Act in these words :

"It has been the long standing practice to charge excise duty on goods used for captive consumption within the factory where they are produced. Some doubt had, however, been cast on this position, as a result of judgments of some High Courts, which interpreted certain provisions of the Central Excise Rules to hold that duty could not be collected on such goods as they had not been "removed" from the factory. A number of manufacturers have also obtained stay orders from Courts based on the same grounds. The matter has been taken up in appeal. Nevertheless, in order to place the position beyond doubt, the relevant Central Excise Rules have been suitably amended. A provision has also been included in the Finance Bill so that these amendments will have retrospective effect and the collections of duty made in accordance with the existing practice will also be

validated".

(vide : Budget Speech of Finance Minister 1982-83).

Clause 51 seeks to give retrospective effect to amendments made on the 20th February, 1982, to Rules 9 and 49 of the Central Excise Rules, 1944, relating to charging of duty of excise on excisable goods used for captive consumption within the factory of production and to validate the collection of duty made prior to these amendments."

(vide : Finance Bill, 1982 : NOTES ON CLAUSES)

We need hardly say that Section 51 enacted achieves these objects. With this analysis, we now pass on to examine the many pronged attack to its validity.

30. Sri Srinivasan has urged that notwithstanding the enactment of Section 51 of the 1982 Act, the character of the Rules amended from 20-2-1982 are not at all altered and that without amending Sections 37 and 38 of the Act, the Rules which had been given retrospective effect, would be ultra vires of the Act and that Section 51 of the 1982 Act does not aid in sustaining their validity or even Section 51 of the 1982 Act.

31. We have earlier noticed that Sections 37 and 38 which empower Government to make Rules under the Act, empower it to make rules prospectively and not retrospectively.

32. Section 38(1) of the Act provides for the publication of the Rules in the Official Gazette. Section 38(2) of the Act provides for laying of the Rules before Parliament and its power to approve or modify them and their effect. The Rules made have the force of law.

33. When Parliament declared that the Explanations to the Rules shall have effect from the very day the Rules were made by Government, it was really legislating them in exercise of its plenary legislative powers. We cannot treat that exercise in any other way. The novelty and necessity does not touch on the character, potency and efficacy of the legislation made by the Parliament at all. When the parliament was legislating in exercise of its plenary legislative powers ; the failure if any, to amend Section 37 and 38 of the Act does not in any way affect its legislative character and validity at all. In reality and substance, it was a case of full and complete legislation by the plenary legislature and it was not a case of subordinate legislation by the delegated authority. If that is so, then the arguments built on the premise of subordinate or delegated legislation must fall to the ground.

34. At the first blush the exercise made by Government and the Parliament may look some what novel and even odd. But, the novelty and oddity, if any, on which also we do not propose to say anything, cannot by itself be a ground to hold that the Parliament was not competent to legislate either in the manner it did and giving it retrospectivity from the very inception of the Rules. We are of the view

that Article 246(1) and Entry No. 84 and in any event residuary Entry No. 97 of the Union List empowered Parliament to legislate in the manner it did. When once it is held that Parliament was competent to legislate Section 51, it follows from the same that it was competent to legislate retrospectively. We cannot on principle or authority hold that the Parliament was not competent to legislate in the manner it did to meet or over come an extraordinary situation created by the rulings of the Delhi and other High Courts.

35. In *The Cannanore Spinning and Weaving Mills Ltd. Vs. Collector of Customs and Central Excise Cochin and Others*, the Supreme Court was only dealing with the validity of an amendment to a rule made under the Act and not of the Parliament legislating as in the present case. In *Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd.*, the Court was only dealing with the effect of laying subordinate legislation before the competent legislature and not of a similar situation as in the present case. Hence, the ratio in these cases relied on by Sri Srinivasan do not bear on the point.

36. In *J. K. Cotton Spinning and Weaving Mills and Anr. v. Union of India and ors.* 1983 ELT 239 (Delhi) the Delhi High Court had also upheld the very amendment. In *Tata Export Ltd. Vs. Union of India (UOI) and Others*, and *Katihar Jute Mills Limited v. The Inspector of Central Excise and Ors.*, (1986) 7 Ecc 43(FB) (Patna) the High Courts of Madhya Pradesh and Patna respectively had also upheld the amendment. We are in respectful agreement with the conclusions reached by their Lordships in these cases.

37. On the foregoing discussion, we hold that there is no merit in this contention Urged by Sri Srinivasan and we reject the same.

38. Sri Srinivasan has urged that the retrospectivity given to Rules 9 and 49 makes the petitioner liable for payment of excise duty though it was not so liable from the very commencement of the Rules and the same was opposed to all canons of retrospectivity of legislation, unconscionable, arbitrary and violative of Article 14 of the Constitution.

39. While analysing the scope of amended Rules 9 and 49, we have expressed that they do not fasten liability and the same is only fastened by the charging Section. The mode of payment or the machinery for collection cannot be confused with the chargeability to duty created by the charging Section and other related provisions of the Act.

40. We have also noticed earlier that the petitioner was paying duty on intermediate goods without demur at any rate till it approached this Court in 1981. In these circumstances, the claim of the petitioner that it is exposed to payment of duty by the amendment made to the Rules and its retrospectivity and validation by Section 51 of the 1982 Act has no basis and is really a cry in the wilderness. We see no merit in this contention of Sri Srinivasan either.

41. Even otherwise the power of the Indian Legislature to make laws

prospectively or retrospectively is well settled vide : Rai Ramkrishna and Others Vs. The State of Bihar, If the Parliament is competent to make laws retrospectively, then its wisdom to make a law from such date it so chooses, cannot be characterised as unconscionable, or arbitrary and violative of Article 14 of the Constitution.

42. Sri Srinivasan has urged that the amendment exposes the petitioner and its officers to personal penalties and confiscation of goods from the very inception of the Rules and was violative of Article 14 of the Constitution.

43. What we have said earlier for rejecting the challenge to retrospectivity based on Article 14 of the Constitution equally applies to this contention of the petitioner Even otherwise, the explanation to Section 51 of the 1982 Act far from exposing the petitioner and its officers to personal penalties, expressly provides to the contrary. We see no merit in this contention of Sri Srinivasan and reject the same.

44. The petitioner has urged that Section 51 of the Act making omissions and commissions of Rules 9 and 49 of the Rules an offence, though that was not so, prior to their incorporation in the Rules was violative of the protection guaranteed to it and its employees by Article 20 of the Constitution. Sri Srinivasan, in our opinion, did not rightly pursue and urge this ground at the hearing.

45. We have earlier set out the explanation added to Section 51 of the Act and analysed its scope and ambit also. The Parliament naturally conscious of the requirements of Article 20 of the Constitution viz., Criminal offences must be adjudicated with reference to the law that was then in force and there cannot be retrospectivity on such matters, has ex abundanti cautela incorporated the explanation. We are, therefore, of the view that this contention of the petitioner is based on a misapprehension and is not sound.

46. On the foregoing discussion, it follows that all the challenges of the petitioner are liable to be rejected which necessarily means that it will be liable to pay excise duty on yarn manufactured but consumed for manufacture of textiles or fabrics within its own factory at the rates prevailing from time to time and the respondents are entitled to determine the excise duty payable thereon and recover the same in accordance with law.

47. But, in its Writ Petition, the petitioner sought for an injunction restraining the respondents from levying and collecting excise duty on different types of yarn manufactured and used in the manufacture of fabrics within the factory and that interim prayer granted by this Court on 18-9-1981 has continued ever since then without any modification. With the dismissal of this Writ Petition, the interim order will stand terminated and the respondents are entitled to adjudicate and recover the amounts that may be found due for the said period also. The petitioner who had the benefit of the aforesaid interim order, cannot obviously plead the bar of limitation, if any, for such levy and collection of duty. In this

view, it is undoubtedly open to the respondents to recover all the amounts from 18-9-1981 ignoring the bar of limitation if any under the Act and the Rules. In order to enable them to determine the taxes and collect the same it is undoubtedly open to the respondents to call upon the petitioner to produce all such books of accounts and other documents that are necessary for such determination. But, in recovering the huge arrears that now become due, it would be proper for the respondents to permit the petitioner to pay the same in reasonable instalments on such conditions as may be imposed by them. We have no doubt that the respondents will do so.

48. As all the contentions urged for the petitioner fail this Writ Petition is liable to be dismissed. We, therefore, dismiss this Writ Petition and discharge the rule issued in this case. But, in the circumstances of the case, we direct the parties to bear their own costs.

ORDERS ON THE ORAL APPLICATION MADE BY THE PETITIONER FOR GRANT OF A CERTIFICATE OF FITNESS TO APPEAL TO THE SUPREME COURT UNDER ARTICLES 133 AND 134-A OF THE CONSTITUTION OF INDIA AND FOR STAY.

Immediately after we pronounced our order dismissing the Writ Petition, Sri Srinivasan makes an oral application for grant of a certificate of fitness to appeal to the Supreme Court under Articles 133 and 134-A of the Constitution on the ground that the questions decided by us are substantial questions of law of general importance and they need to be decided by the Supreme Court and for stay of the operation of our order for a period of two months from this day.

2. Sri Shivashankar Bhat opposes the oral application made by Sri Srinivasan.

3. On one of the principal questions that arises for determination in this case. viz., the construction of Rules 9 and 49 of the Central Excise Rules. 1944, as they stood prior to their amendment on 20-2-1982 and the consequent liability over intermediate goods manufactured and consumed within its factory premises, we have differed from the rulings of the Delhi High Court noticed in our order. Even otherwise, on the aforesaid question and other questions, viz., the validity of Section 51 of the Finance Act of 1982, with many novel features, there is no authoritative ruling of the Supreme Court. We are of the view that the questions decided by us are substantial questions of law of general importance and they need to be decided by the Supreme Court and merits the grant of a certificate of fitness to appeal to the Supreme Court under Article 133 of the Constitution.

4. When this Writ Petition was pending before this Court, the petitioner had the benefit of an unconditional interim order. We are of the view that it is proper to stay operation of our order and continue the earlier interim order for a period of two months from this day.

5. In the result, we make the following orders and directions --

(i) We allow the oral application made by the petitioner under Articles 133 and 134-A of the Constitution of India, grant a certificate of fitness to appeal from

our decision and direct the Registrar to issue the necessary certificate to the petitioner.

(ii) We stay the operation of our order for a period of two months from this day and direct the continuance of the interim order issued in this case on the same terms for the said period.