

(1980) 12 MAD CK 0027

In the Madras High Court

Case No : Writ Appeal No's. 430 and 431 of 1981 and Writ Petition No's. 8845, 6129, 6298, 6341, 6357, 6508, 6509, 6519, 6591, 6592, 6757 to 6764, 6783 to 6788, 6807 to 6812, 6818 to 6832, 6890 to 6894, 6907 to 6912, 6914 to 6923, 6929, 6930, 6933 to 6941, 7041, 7

Devi Match Factory and Others

APPELLANT

Vs

Superintendent of Central Excise, Sattur

RESPONDENT

Date of Decision : 21-12-1980

Acts Referred:

Central Excise Rules, 1944 — Rule 8, 8(1)
Central Excises and Salt Act, 1944 — Section 3

Citation : (1983) 12 ELT 99

Hon'ble Judges : V. Ramaswami, J;R. Sengottuvelan, J

Bench : Division Bench

Judgement

V. Ramaswami, J.—The petitioners in this batch of writ petitioners are small scale match manufacturing units who are not given the benefit of

Notification GSR No. 99 of 1980-Central Excise, dated 19-6-1980. They have prayed for a writ of mandamus or any other Writ or appropriate

direction directing the respondents to give the benefit to them of the said Notification without reference to the first and the second provisos to the

said Notification by reason of which the Petitioners were not able to claim the concession. Section 3 of the Central Excises and Salt Act, 1944

imposes excise duty on manufacture in respect of items mentioned in the first schedule to the Act. Matches are mentioned in item No. 38 of the

schedule and the duty is leviable on the manufactured matches at the rates specified therein. In exercise of the rule-making powers under the Act,

the Central Government have made the Central Excise Rules, 1944. Rule 8 provides that the Central Government may, from time to time, by

notification in the official Gazette, exempt subject to such conditions as may be specified in the notification any excisable goods from the whole or

any part of duty leviable on such goods. In exercise of this power, the Central Government were prescribing from time to time lower rates than

those prescribed under item 38.

2. Prior to 1967, for the purpose of levy of excise duty, match factories were classified on the basis of their production during the financial year

and matches produced in different factories were subjected to varying rates of duty a higher rate being levied on matches produced in factories

having higher output. This classification thus was not on any technological differences but on the basis of output. There were four classes, namely,

"A", "B", "C" and "D" - "A" class comprising factories whose annual output exceeds 4,000 million match sticks, "B" class comprising factories

whose annual output exceeds 500 million match sticks but does not exceed 4,000 million match sticks, "C" class comprising factories whose

annual output exceeds 50 million match sticks but does not exceed 500 million match sticks and "D" class comprising factories whose annual

output does not exceed 50 million match sticks. In 1967, the classification of match factories on the basis of production was abandoned and they

were classified from the point of view of manufacturing technique and accordingly they were grouped into two distinct categories, one mechanised

unit and the other non-mechanised unit. It may be mentioned at this stage that all mechanised units were producing more than 4,000 million match

sticks per year. Accordingly only mechanised units were falling under class "A". All non-mechanised units have to be grouped under the earlier

categorisation on the basis of output coming under "B", "C" and "D" classes. By Notification No. 115 of 1967, dated 8th June 1967, a rate of Rs.

4.60 per gross of boxes of 50 matches each was prescribed for matches manufactured in mechanised units and Rs. 4.30 was fixed per gross of

boxes of 50 matches each produced in non-mechanised units. There was a proviso to this Notification which read as follows :

Matches referred to in category 2 and cleared for home consumption during the financial year from a factory from which the total clearance of

matches during that year is not, as per declaration made by the manufacturer under this notification, estimated to exceed 75 million matches, shall

be allowed to be cleared at the rate of Rs. 3.75 per gross of boxes matches each, upto 75 million matches and the quantity of matches, if any,

cleared in excess, and upto 100 million matches shall be allowed to be cleared at the rate of Rs. 4.30 per gross of boxes of 50 matches each; and

if the clearance in such factory exceeds 100 million matches during the financial year, the manufacturer shall be required to pay at the rate of Rs.

4.30 per gross of boxes of 50 matches each, on the entire quantity cleared during the financial year.....".

The result of this Notification was that "B" and "C" categories of the old system would have to be treated equally. A batch of writ petitions was

filed by manufacturers who belonged to the "C" category contending that clubbing them together with those who produce more than 500 million

matches per year and levying a uniform duty would virtually condemn them to gradual extinction and that it is violative of Article 14 of the

Constitution. In the decision reported in *Murthy Match Works and Others Vs. The Asstt. Collector of Central Excise, and Another*, , the Supreme

Court rejected this contention observing :

There is no doubt, that in the past amount the non-mechanised manufacturers of matches a further classification based on viability had been made.

It is also true that the financial resources, the capacity to command a market on their own without depending on intermediaries, etc. marked off

the "B" category from the "C" category. But then experience gathered subsequently disclosed certain evils which the state took note of and

endeavoured to set right. Ultimately the present notification was issued obliterating the distinction which gave a concessional edge to the "C" group

over the "B" group.

The Supreme Court also held :

Another proposition which is equally settled is that merely because there is room for classification it does not follow that legislation without

classification is always unconstitutional. The Court cannot strike down a law because it has not made the classification which commends to the

court as proper. Nor can the legislative power be said to have been unconstitutionally exercised because within the class a sub-classification was

reasonable but has not been made.

* * * *

In the present case, a pertinent principle of differentiation, which is visibly linked to productive process, has been adopted in the broad

classification of power users and manual manufacturers. It is irrational to castigate this basis as unreal. Indeed, the soundness of this distinction is

not denied. The challenge is founded on the failure to mini-classify between large and small sections of manual match manufacturers. But ours is not

to reason why, that being a policy decision of Government dependent on pragmatic wisdom plying on imponderable forces at work. Our

Jurisdiction halts where the constitutional touchstone of a rational differentia having a just relation to the legislative and to revenue raising is satisfied.

Gratuitous Judicial advise on the socialistic direction of fiscal policy is do trop.

Thus the two fold classification of mechanised and non-mechanised units was upheld in this judgment.

3. By Notification No. 162 of 1967, dated 21st of July 1967, the earlier Notifications were superseded. Though the differentiation between non-

mechanised units and mechanised units was kept intact, a different rate of levy of excise duty in respect of non-mechanised units was provided.

The proviso and the explanation to this Notification made by differentiation read as follows :

Provided that

(i) matches referred to in category 2 and cleared for home consumption during the financial year from a factory from which the total clearance of

matches during that year is not as per declaration made by the manufacturer under this notification, estimated to exceed 75 million matches, shall be

allowed to be cleared at the rate of Rs. 3.75 per gross of boxes of 50 matches each upto 75 million matches and the quantity of matches if any

cleared in excess, and upto 100 million matches shall be allowed to be cleared at the rate of Rs. 4.30 per gross of boxes of 50 matches each; and

if the clearance in such factory exceeds 100 million matches during the financial year, the manufacturer shall be required to pay duty at the rate of

Rs. 4.30 per gross of boxes of 50 matches each, on the entire quantity cleared during the financial year;

(ii) in the case of matches packed in cardboard boxes the amount of exemption shall be increased by 30 paise per gross of boxes;

(iii) in the case of matches referred to in category 2, the rate of exemption shall

be increased by 50 paise per gross of boxes, if bamboo is used for the splints or for both splints and veneers;

(iv) the rate of duty applicable to matches referred to in category 2, the splints of which are made of bamboo and which are packed in boxes of

40s shall be four-fifths of the rate applicable to matches of identical description produced in the same factory but packed in boxes of 50s, and if

such packing in boxes of 50s is not done, it shall be four-fifths of the notionally determined rate for matches packed in boxes of 50s.

Explanation. - For the purpose of this notification, no process other than the mechanical process employed for dipping of splints in the composition

for match heads or for filling of boxes with matches, or both, shall be deemed to be a process ordinarily carried on with the aid of power.

As may be seen from the proviso, even among the non-mechanised sector units, differential rates were levied with reference to the output. The

explanation defined what is meant by non-mechanised sector. There was an amendment of this notification by Notification No. 205 of 1967, dated

4th September, 1967 of which clause (i)(d) alone is relevant for our purpose and that reads as follows :

Nothing contained in the foregoing clauses shall apply to any factory other than the factories -

* * * *

(d) whose production during any financial year does not exceed or is not estimated to exceed 100 million matches and are recommended by the

Khadi and Village Industries Commission for exemption under this notification as a bona fide cottage unit or which is set up by a co-operative

society registered under any law relating to co-operative societies for the time being in force.

The requirement of a declaration before a particular date that their estimated production may not exceed 100 million matches and the further

requirement of a recommendation by the Khadi and Village Industries Commission, hereinafter referred to as the KVIC, for exemption as a bona

fide cottage unit was held to be reasonable and intended to prevent further fragmentation of bigger units into the smaller ones in order to get

concessional rate of duty intended for the smaller units, in the decision reported in Union of India (UOI) and Another Vs. Parameswaran Match

Works and Others, . The requirement of the recommending certificate as a bona fide cottage unit from the KVIC was again directly questioned in

the case reported is Supdt. of Central Excise and Others Vs. Ayyangar Match Works and Others, . The contention of the match manufacturers

before the Supreme Court was that the KVIC was not competent to make any recommendation as contemplated in the proviso, clause (i)(d) of

the Notification. The Supreme Court observed :

Section 15 of the Khadi and Village Industries Commission Act, 1956 which speaks of the functions of the Commission states in clauses (c), (d),

(f), (g) and (h) that the Commission may take steps to provide for the sale and marketing of Khadi or of products of village industries, to

encourage and promote research in the development of village industries, to undertake, assist or encourage the development of village industries, to

promote and encourage co-operative efforts among manufacturers of khadi and persons engaged in village industries. Section 15(h) specifically

states that the Commission may take steps for ensuring the genuineness of, and for granting certificates to producers or dealers in, khadi or the

products of any village industry. These provisions indicate that the Khadi and Village Industries Commission is competent to grant certificates

recommending village industries for exemption under clause (d) of the notification dated 4th September, 1967.

4. There was a further notification No. 154 of 1975, dated 3rd June, 1975 which came into effect on and from first of July, 1975. This Notification

also maintained the distinction of mechanised and non-mechanised units and among the non-mechanised units further concessional levy with

reference to output, and further increased the concession with reference to some other factors also which are not relevant for our purpose. This

was the situation prevailing before the financial year 1980-81. During the financial year 1980-81, the following two Notifications were issued :

Notification No. 98/80-CE, dated 19th June 1980

In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944 and in supersession of the notification of the

Government of India in the Ministry of Finance (Department of Revenue and Insurance) No. 154/75-CE, dated the 3rd June, 1975, the Central

Government hereby exempts matches of the description specified in column (2)

of the Table below and falling under Item No. 38 of the First

Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), and cleared for home consumption by a manufacturer from so much of the duty

of excise leviable thereon as is in excess of the rate of duty specified in the corresponding entry in column (3) of the said Table.

THE TABLE

Sl. Description of matches Rate of duty

No. (Rs. per gross of
50 matches each)

1 2 3

(1) Matches in or in relation to the
manufacturer of which any process
is ordinarily carried on with the
aid of power. 7.20

(2) Matches in or in relation to the
manufacture of which no process
is ordinarily carried on with
the aid of power. 4.50

Provided that -

(i) in the case of matches packed in boxes in which both the outer slide as well as the inner slide are made of card-board, the amount of exemption

shall be increased by sixty paise per gross of boxes :

(ii) in the case of matches packed in boxes in which the inner slide alone is made of card-board, the amount of exemption shall be increased by

twenty-four paise per gross of boxes;

(iii) in the case of matches referred to in serial No. 2, the amount of exemption shall be increased, or further increased, as the case may be, by 50

paise per gross of boxes if bamboo is used for the splints or for both splints and veneers; and

(iv) the rate of duty applicable to matches referred to in Sl. No. 2, and the splints of which are made of bamboo and which are packed in boxes of

40s shall be four-fifths of the rate applicable to matches of identical description produced in the same factory but packed in boxes of 50's and if

such packing in boxes of 50's is not done, it shall be four-fifths of the notionally determined rate for matches packed in boxes of 50's.

Explanation - For the purposes of this notification, no process other than the mechanical process employed for dipping of splints in the composition

for match heads or for filling of boxes with matches or both, shall be deemed to be a process ordinarily carried on with the aid of power.

Notification No. 99/80-CE, dated 19-6-1980

In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts

matches, in or in relation to the manufacture of which no process is ordinarily carried on with the aid of power falling under Item No. 38 of the First

Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), from so much of the duty of excise leviable thereon as is in excess of Rs. 60 per

gross boxes of 50 matches each :

Provided that the matches are cleared for home consumption by manufacturer from a factory which is recommended by the Khadi and Village

Industries Commission for exemption under this notification as a bona fide cottage unit, or which is a member of a co-operative society (including a

marketing or service industrial co-operative society but excluding a co-operative bank) registered under any law relating to co-operative societies

for the time being in force and assisting exclusively manufacturers of such matches :

Provided further that the matches are sold or marketed through the Khadi and Village Industries Commission or a Co-operative Society (including

a marketing or service industrial co-operative society but excluding a co-operative bank) aforesaid or an agency established by a State

Government :

Provided also that where the matches are produced by a factory recommended by the Khadi and Village Industries Commission as bona fide

Cottage Unit aforesaid the matches shall be cleared only under the labels prescribed by the said Commission and approved by an Officer not

below the rank of an Assistant Collector of Central Excise :

Provided also that :-

(i) in the case of matches packed in boxes in which both the outside as well as inner slide are made of cardboard, the amount of exemption shall

be increased by sixty paise per gross of boxes;

(ii) in the case of matches packed in boxes in which the inner slide alone is made of cardboard, the amount of exemption shall be increased by

twenty-four paise per gross of boxes;

(iii) the amount of exemption shall be increased, or further increased as the case may be, by fifty paise per gross of boxes if bamboo is used for the

splints or for both splints and veneers;

(iv) if the splints of such matches are made of bamboo and the matches are packed in boxes of 40s, the rate of duty shall be four-fifths of the rate

applicable to matches of identical description produced in the same factory but packed in boxes of 50s and if such packing in boxes of 50s is not

done, it shall be four-fifths of the notionally determined rate for matches packed in boxes of 50s.

Explanation. - For the purpose of this notification -

(i) no process other than the mechanical process employed for dipping of splints in the composition for match heads or for filling of boxes with

matches or both, shall be deemed to be a process ordinarily carried on with the aid of power;

(ii) the units recommended by the Khadi and Village Industries Commission for exemption under Notification of the Government of India in the

Ministry of Finance (Department of Revenue and Insurance) No. 162/67-Central Excise, dated 21st July, 1967, or No. 154-75-Central Excise,

dated the 3rd June, 1975, as a bona fide Cottage Unit shall be deemed to be recommended for the purpose of this Notification.

5. As may be seen from these Notifications, though a broad classification of power users and manual manufacturers is kept up, they do not make

any further classification among the non-mechanised sector with reference to the output. We have already seen that the Supreme Court in the

decision reported in *Murthy Match Works and Others Vs. The Asstt. Collector of Central Excise, and Another*, upheld the non-classification of

large and small sections of non-mechanised sector. However, Notification No. 99 of 1980 gives a larger concession if certain further conditions

are satisfied. They are to be found in the first, second and third provisos. The conditions to be satisfied under the first proviso is that either the

manufacture should be in a factory which is recommended by the KVIC for exemption under this Notification as a bona fide Cottage Unit, or the

manufacture unit must be a member of a Co-operative Society referred to therein. The second proviso laid a further condition that the matches

manufactured by these units shall be sold or marketed through the KVIC or a Co-operative Society or a Governmental agency. We are not

concerned with the other conditions because they are not the subject matter of dispute in these cases. Leaving apart the unit being a member of a

Co-operative Society because none of the Petitioners are such member on a literal understanding of the first proviso, we are of the view that the

recommendation required to be produced from the KVIC related only to the question of the Cottage Unit being a bona fide unit and it did not

relate to a question whether it is a cottage unit at all and, herein to decide, or the principles on which it is to be decided whether it is a cottage unit.

We have already seen in setting out the history of these Notifications that all along, the non-mechanised sector units were classified as one group of

manufacturers who were referred to as cottage units and the recommendation of KVIC as a bona fide unit related to the question as to whether the

unit is an independent bona fide unit. The principles on which or the criteria to be applied in determining whether a particular unit is a cottage unit or

not were not left to the discretion of the KVIC and there was no need for the same also because all the non-mechanised sector units were treated

as Cottage Units.

6. The Explanation II to Notification No. 99 of 1980 provides that the units recommended by the KVIC under Notification No. 162 of 1967 or

No. 154/75 as bona fide cottage units shall be deemed to be so recommended for the purpose of Notification No. 99 as well, so that only those

units which did not have such certificate issued by the KVIC earlier or those new units who come into existence subsequent to the Notification No.

99 of 1980 that need to produce the bona fide cottage unit certificate. This explanation along with the situation prevailing earlier to the Notification

clearly shows that the first proviso does not need a finding as to whether a unit is a cottage unit nor does it confer any power on the KVIC to

prescribe its own criteria or principle under which it will decide whether the factory is a cottage unit or not. It appears to us that these two

Notifications Nos. 98 and 99 of 1980, treat the non-mechanised units as cottage units as in the past. It is also pertinent to note that the

Notifications referred to cottage "units" and not cottage "industry".

7. We may here also refer to the Budget Speech of the Finance Minister in regard to excise duty on matches. That reads as follows :

I have given considerable thought to the problems thrown up as a result of the changes made in the 1979 Budget in the excise duty structure

applicable to the match industry. While the duty advantage enjoyed by the cottage sector obviously needs to be maintained, the non-mechanised

middle sector should not be allowed to make inroads into the cottage sector. In order to ensure that the benefit of the lower rate of duty accrues

only to the genuine cottage sector units. I propose to confine the duty concession to match boxes bearing approved labels and sold to or marketed

through the KVIC, State Agencies and registered co-operative societies. At the same time, I do not find justification for the continuance

of the existing limits placed on the clearances of matches by the cottage sector at the concessional rate of duty. I, therefore, propose to abolish the

existing limit on production by the cottage sector units. I am confident that this package of measures will result in accelerated growth of the cottage

sector of the match industry.

It will be seen from this extract that the intention of the Government was to abolish the existing limits on production by cottage sector units.

However, in order to ensure that the benefit of the lower rate of duty accrued only to the genuine cottage sector units it was proposed to confine

the duty concession to match boxes bearing approved labels and sold to or marketed through the KVIC, State Agency and registered Co-

operative Societies. In our opinion, the two Notifications clearly give effect to this proposal. As already stated, except the distinction between

mechanised sector and non-mechanised sector, the Notifications do not impose

any limit on production in the non-mechanised sector in order to get the concessional rates. A reading of the two Notifications also shows that the further concessional rate of Rs. 1.60 is allowed to these match boxes bearing approved labels and sold through or marketed through KVIC, State Agency and Registered Co-operative Societies and the rate of Rs. 4.50 would be applicable to all those manufacturers whose match boxes did not bear the approved labels or not sold to or marketed through the KVIC or State Agency or registered Co-operative Societies. Thus the differential rate of Rs. 4.50 and Rs. 1.60 depended on marketing or sale of the product through the KVIC or Stage Agency or whether it was through any other agency or on their own accord directly by the manufacturers.

8. While so, the KVIC required the following conditions to be fulfilled for becoming eligible for recommendation as a bona fide cottage match unit under the appropriate Notification relating to central excise.

1. The annual production of the unit shall not exceed 100 million matches (sticks).

2. In relation to the manufacture of matches no processes of dipping or box filling shall be carried on with the aid of power.

3. The match producing unit shall not purchase finished matches from any other producers.

4. The unit shall furnish a report annually of its production by such date and in such form as may be laid down by the KVIC or its duly authorised

officers from time to time. In addition it shall furnish every month a report in the required proforma within such time as may be laid down by the

State Director of the KVIC stating therein the production in quantity and value and the number of artisans engaged.

5. All relevant books of accounts, including a stock records shall be made available for inspection and check by the officials of the Commission

whenever required. The officials of the KVIC will also have the right to inspect and verify the stocks held and for this purpose to enter the

premises on the unit at all reasonable hours.

6. The directions of the KVIC and its officers in regard to patterns of production, schedule of wages and other operational matters shall be

complied with.

7. To ensure the production of matches of standard quality, the KVIC may require the unit to obtain its supply of raw materials and chemicals from

sources specified by it and may direct that such supply be obtained from the KVICs own godown.

8. The Unit shall undertake to use labels prescribed by the KVIC and also agree to sell its entire production of matches to the KVIC at prices that

may be fixed by the KVIC from time to time which shall ensure a fair reasonable margin of profit to the unit and shall be fixed by the KVIC after

obtaining the advice of the Financial Adviser to the KVIC and after consulting a committee (which would include representatives of the Cottage

Match Associations, if any, of the State) regarding the cost on production. Representatives of Institutions may also be included in the Committee.

This Committee shall review the cost of production atleast once in the beginning of each quarter but may review the same more frequently if

circumstances so demand. The KVIC may grade quantity-wise the production of a unit, fix different prices for different grades of quality of

matches and may direct that particular labels be used for particular grades.

9. The KVIC may reject matches which do not conform to the specifications laid down by it or are otherwise found to be sub-standard. Such

rejected matches shall be destroyed by the unit.

10. The certificate to be issued by the KVIC, would ordinarily, be valid for the financial year for which it is issued i.e., from April to March and

may be renewed on the due fulfilment of the terms and conditions laid down by the KVIC but may be cancelled at any time if the unit consistently

fails to produce matches at such rate of production that the annual estimated target rescind would be reached. The KVIC may also suspend,

cancel, and/or withdraw the certificate if the unit fails to abide by all or any of the conditions stipulated herein or any other conditions that may be

laid from time to time. Such suspension, cancellation etc., shall be ordered by the authority which issued the certificate but the unit shall have a right

of appeal to the Deputy Chief Executive Officer (Village Industries) of the KVIC. The decision of this authority shall be final and binding on all

concerned.

It may be seen from the conditions that though the Notification of the Government of India issued under Rule 8(1) of the Central Excise Rules as

such did not prescribe any limit on the production of matches, the conditions prescribed by the KVIC put a limit on production at 100 million

match sticks per year. With reference to condition No. 6 mentioned above, they also gave the following minimum level of wages as a condition

precedent for giving the certificate.

Rate per gross from

1. Frame filling 60 paise

2. Box making : outer 15 paise

inner 30 paise

3. Box filling 35 paise

4. Labelling and banderolling 15 paise

5. Dozen packing & bundle packing 8 paise

6. Factory work 2 persons fixed work 45 paise

208 paise

9. The KVIC in fact had not issued any certificate subsequent to this Notification. It is stated that the non-issue of bona fide certificate was due to

the marketing position of matches. In the counter affidavit filed in W.P. No. 6724 to 6726 of 1981 which are not included in this batch but a copy

of which is annexed to the rejoinder filed on behalf of the writ petitioners, the Director in-charge of Khadi and Village Industries Commission,

Madras has stated : ""The marketing position of matches is not at all encouraging. There is already a heavy loss to the Khadi and Village Industries

Commission in purchasing the matches from the Cottage Match Units. During the last year the bona fide certificates were issued on a specific

condition as stated in the excise notification that the entire produce should be surrendered to Khadi and Village Industries Commission and

consequently the responsibility of the marketing of matches was solely done by the Commission. However, in practice the Commission

experienced marketing difficulties in middle of September because of substandard matches dumped on Commission's godown despite best efforts

taken by the Commission to improve the quality of matches. This has resulted in

heavy loss. Hence, it is decided by the Commission, not to issue bona fide certificate to the new units till such a time, Commission was able to dispose of the heavy stock. But the position as obtained throughout the later part of the last year and the year also is same and therefore Commission did not issue bona fide certificate after 22-9-1980"".

10. The learned counsel for the petitioners contended that the Notification as such does not enable the KVIC to formulate any criteria limiting the

output per year in order to be eligible for obtaining bona fide certificate. If it is construed as enabling the KVIC to formulate such criteria, the

Notification itself would be affected as sub-delegation of legislative power. In so far as, in substance and in effect, the KVIC is enable to lay down

the criteria for getting the exemption. We have already expressed the view on the construction of the Notification that the KVIC is only an agency

to determine the bona fide nature of the unit and it could only prescribe the criteria for determining what in its opinion is a bona fide cottage unit,

and therefore, unless the criteria or principle or condition to be fulfilled related to the determination of the question of bona fide nature of the unit,

the condition would be illegal and not authorised. The condition relating to the limitation on output is clearly not related to the determination of the

bona fides or otherwise of the units. In this connection we may also mention that under the second explanation to notification No. 99, the certificate

issued by the KVIC under Notification Nos. 162 of 1967 and 154 of 1975 can be deemed to be a certificate issued under Notification No. 99 of

1980. At the time when the certificate was issued, there was no condition prescribed relating to production. When such a certificate issue can be

deemed to be one recommended for the purpose of this Notification, we do not see how the KVIC now wants to put a limitation on production in

order to enable a manufacturer to obtain a bona fide certificate. In fact, if we accept the contention of the respondents that the KVIC has the

power to impose such a condition, it would be affected by the vice of discrimination as the person who had obtained a certificate already at a time

without any need for limiting the production, can continue to produce unlimited quantity and got concessional rate as per Notification No. 99 of

1980, whereas a person who had not obtained a certificate, for some reason or other earlier, or a new entrant, will not be permitted to get that

concession. The learned counsel for the revenue contended that Section 15(h) of the Khadi and Village Industries Commission Act, 1956 was

hold to contain a power to grant certificates recommending village industries for exemption in the decision reported in Supdt. of Central Excise and

Others Vs. Ayyangar Match Works and Others, and that would mean that it can prescribe the conditions of the criteria for the grant of such

certificates. It is true that the Supreme Court held in that case which we have noticed earlier that the provisions of Section 15 indicate that the

Khadi and Village Industries Commission is competent to grant certificates recommending village industries for exemption under clause (d) of the

Notification dated 4th September, 1967.

We have already noticed that sub-clause (d) of the Notification No. 205, dated 4th September, 1967 only related to the bona fide nature of a unit

and not for prescribing other conditions which have no relevance for the determination of the question of bona fide nature.

11. The learned counsel for the revenue then referred to the Report of the Working Group on Khadi and Village Industries. The terms of reference

to the Working Group included the following subjects among other :

To define clearly and terms -

(i) Cottage Industry,

(ii) Village household sector"".

Chapter 7 of this report dealt with the definition of cottage household and village industry. After examining the pros and cons of the various

definitions and terms and taking into account the various factors, the Working Group recommended the following definition for cottage industries :

Cottage industry can be defined as one which is carried on wholly or partly with the help of members of the family either as a full time or part time

occupation mainly in rural areas irrespective of the use of motive power. The employment of outside labour is not, however, entirely ruled out. The

household workers participate in activities when convenient and do not observe any regular working hours or working days. The earnings in

cottage/household industries are residual in character and the earnings cover both the return on capital and management as well as reward for the

labour. The element of personal skill having individualistic character exists.

The learned counsel, after referring to the above passage then stated that it is in these circumstances the Government of India have said that they would leave the question of cottage industry to be determined by the KVIC and the application to be determined by the KVIC and the application to such authority is valid. In fact, according to the learned counsel there was no sub-delegation of legislative power, but there is only an entrustment of administrative function of identifying a cottage industry. In this connection we were also referred to a decision of the Gujarat High Court reported in *Sourashtra Khandasri Manufacturers Association v. Sales Tax Officer, Veraval & others* (16, Gujarat Law Reports 610). That case related to a question arising under the Gujarat Sales Tax Act. The Notification exempting a turnover relating to purchases of sugar cane from purchase tax u/s 18 of that Act was the subject matter in that decision. The Notification stated that purchasers by (1) The Gujarat Rajya Khadi and Gramodyog Board established under the Bombay Khadi and Village Industries Act, 1960, or (2) the Khadi and Village Industries Commission constituted under the Khadi and Village Industries Act, 1956 or (3) any other person who under sub-section (2) of Section 18 of the Gujarat Sales Tax Act is deemed to be a registered dealer of sugar cane for use by such Board, Commission, or as the case may be, dealer, in the manufacture of Khandasari in a village industry established by such Board or Commission or in any industry owned by such dealer and certified as a village industry by such Board or Commission are exempt from the whole of purchase tax u/s 18 of that Act. An inbuilt definition of Khandasari sugar is described in Section 18(2) as meaning sugar in the manufacture of which neither a vacuum pan nor vacuum evaporator is employed. The condition relating to certification as village industry by the Board or Commission in order to be eligible for exemption by a manufacture of Khandasari sugar was questioned in that case. The Gujarat High Court held that there was sub-delegation of legislative power and it amounted only to an entrustment of an administrative function. It was also held that the power delegated is not an unguided power, because it had to be exercised consistent with the object of the disputed notification which proposed to give exemption to the village industry in Khandasari sugar. The Gujarat High Court was further of the opinion that the disputed Notification revealed sufficient guidelines in as much as it contemplates exemptions to be given only to a

genuine village industry which purchases sugar cane for its own use in the manufacture of Khandsari sugar. The Board and the Commission are expected to function within the boundaries of those guidelines while considering whether a particular dealer is entitled to the requisite certificate or not. The Bench also held that the Board and the Commission may adopt any relevant principle but they are not at liberty to take a policy decision which would frustrate the very object of the Notification. In that view, when the Commission refused to issue a certificate on the ground that they have decided to issue such certificates only to Co-operative functionaries and Societies, the Court held that they have no power to refuse to give a certificate to any body who is a bona fide manufacturer of Khandsari on any ground other than the bona fide nature of a unit. Far from helping the revenue, this decision clearly shows that the KVIC could not have formulated any principle or criteria by which they themselves could usurp the jurisdiction to decide whether they would give the benefit of a certificate only to a unit which restricts its production. We are unable to agree with the learned counsel for the revenue that one of the conditions of identifying a cottage unit is output. The Notification itself has dispensed with the condition relating to sale through a Government agency or a Co-operative society or the KVIC was made as a condition for getting additional concessional benefit under Notification No. 99 of 1980. In these circumstances, therefore, the condition relating to the output prescribed by the KVIC is ultra vires the powers and could not be enforced. We have also noticed that the KVIC refused to grant the certificate on the ground that they have incurred heavy loss in purchasing and selling of matches, that they are not able to ensure the quality of stock and that they are also not able to dispose of the heavy stocks. In the circumstances, the petitioners contended that they are unable to obtain the bona fide certificates from the KVIC nor are they able to sell the goods to KVIC because they are not willing to purchase, and for no fault of theirs, they are unable to get the benefit of Notification No. 99 and accordingly they want the mandamus to be issued to give the benefit of the notification without reference to the first and second proviso in that Notification.

12. We may now notice the orders issued by the Government of Tamil Nadu in regard to admission of members into Co-operative Societies. The

relevant Government Order containing the policy of the Government is C.O.Ms. No. 1466, Industries Department, dated 15-10-1980 and that

reads as follows :

According to the excise duty concessions for match factories announced by the Government of India with effect from 1-3-1979, Cottage Match

Units in the hand made sector both Working under Match Service Industrial co-operatives and enrolled with the KVIC were allowed a

concessional duty of Rs. 1.60 per gross. This concession was subject to a production ceiling of 75 million sticks per year, and was in force till 18-

6-1980. In the Central Budget for 1980-81, the production ceiling of 75 million sticks per year for cottage match units has been removed and the

excise duty concession is extended to all factories who market their products through :-

1. Khadi & Village Industries Commission,
2. Service Co-operatives,
3. Co-operative Marketing Societies, and
4. Government Agencies.

Consequently, several representations have been received by the Government for the formation of Match Co-operative Marketing Societies with a

view to await the benefit of the excise duty concession. There have also been representations against the formation of such co-operative marketing

societies, as it will affect the working of the Industrial Co-operative Match Societies.

2. The Director of Industries and Commerce was consulted in the matter. He has expressed the opinion that if Co-operative Marketing Societies

are allowed to be organised, they will produce unlimited quantity of matches. By virtue of their long standing of the cottage type of match factories.

The Director of Industries and Commerce has accordingly requested the Government to take a policy decision in the matter, with a view to

achieving the twin objectives, viz. (i) encouraging and consolidating the Cottage Match Units i.e., the really small among the units who manufacture

hand-made matches and (ii) preventing the encroachment of the larger units into the Industrial Cooperative, filed in order to enjoy the concessions

meant for the small sector. He has accordingly made the following suggestions for the approval of the Government -

(i) There need not be any ceiling on the number of Industrial Co-operative Service Societies to be registered for Cottage Match Units but

Government may prescribe the number of Societies where share capital assistance will be given.

(ii) The Member Units of the Societies may be subjected to a ceiling on their production, which may be fixed at 120 million sticks per annum.

(iii) Factories which were paying excise duty at Rs. 4.50 per gross by 18-6-1980 need not be admitted as members in the Service Societies.

(iv) KVIC certificate holders may be admitted as members of Industrial Co-operative Match Service Societies after they surrender the certificates

granted by the KVIC and after verification of their standing.

(v) The Societies will continue to adopt the practice of enrolling only one member per family.

(vi) The Traditional areas, new factories which have obtained licences after 18-6-1980 may not be included as members in Service Societies.

(vii) In non-traditional areas, societies may be formed for enrolling even new factories who are eligible without reference to out off dated 18-6-1980.

(viii) No marketing Society will be registered by the Department.

(ix) For registering any Cooperative Society in the field of Matches, the Director of Industries and Commerce alone will be the functional registrar.

3. The Government have carefully examined the several representations received by them and also the suggestions of the Director of Industries and

Commerce. They have decided to accept the suggestions of the Director of Industries and Commerce subject to the modification that in traditional

areas, now factories which have applied for membership as on 18-6-1980 will also be considered for membership in Industrial Cooperative

Service Societies and they accordingly pass the following orders :-

(i) There is no need to form Match Cooperative Marketing Societies in the State.

(ii) There will be no ceiling on the number of Industrial Cooperative Service Societies to be registered for Cottage Match Units, without financial

assistance from the Government.

(iii) The ceiling on the production of member units of the societies will be fixed at 120 million sticks per annum.

(iv) Factories which are paying excise duty of Rs. 4.50 per gross upto 18-6-80 shall not be admitted a member in the service Societies.

(v) KVIC certificate holders shall be admitted as members in the service after they surrender their certificates with KVIC and after verification of their standing.

(vi) The Society shall continue to adopt the practice of enrolling only one member per family.

(vii) In traditional areas new factories which have applied for licences as on 18-6-80 should also be considered for Membership in Service Societies.

(viii) In non-traditional areas, there will be no bar in the enrolment of new factories as members in Service Societies.

(ix) For registering any cooperative society in the field of matches, the Director of Industries and Commerce alone shall be the functional Registrar.

4. The Director of Industries and Commerce is directed to take action accordingly.

It may be seen from this order that though the Government have observed that during the financial year 1980-81, the production ceiling of 75

million stocks per year for cottage match units has been removed and the excise duty concession may be extended to all parties who market their

products through KVIC or Cooperative Societies or Governmental agencies, purporting to act on the twin objectives, viz.,

(i) encouraging and consolidating the Cottage Match Units i.e., the really small among the units who manufacture hand-made matches, and

(ii) preventing the encroachment of the larger units into the Industrial co-operative field in order to enjoy the concessions meant for the small sector.

they have imposed a ceiling on production and certain other conditions in order to be eligible to become members of Co-operative Societies. Thus,

while the KVIC refused to issue the bona fide certificates, and in certain cases, directed them to become members of Co-operative Societies, the

State Government have issued instructions which are contrary to the Notification granting the exemption itself. Therefore,, persons like the

petitioners were neither able to become members of Service Co-operative Societies nor to be eligible to claim the concessional rate of levy. In

such circumstances, therefore, the learned counsel for the petitioners contended

that the petitioners should be given the benefit of the Notification

No. 99 without reference to the compliance with the provisions of the first and the second provisos to the Notification.

13. The learned counsel for the Revenue seriously contended that provisos 1, 2 and 3 act convergently and they are condition precedents for

claiming the beneficial concessional rate of duty and that therefore whatever may be the reason, if the petitioners did not produce the bona fide

certificates or show that they have sold the matches to the KVIC or a Co-operative Society or a Government Agency, they are not eligible for the

concessional rates. The learned counsel also contended that if we consider that the provisos are incapable of compliance or, if for any reason

illegal, the entire Notification may be set aside, in which case Notification No. 98 of 1980 will govern and the petitioners will be liable to pay at the

rate of Rs. 30 unless they come under the proviso therein. The learned counsel for the petitioners on the other hand, contended that since the

agency referred to in the proviso is not willing to issue the bona fide certificate and imposed illegal conditions and since they also refused to

purchase the material from them on the ground that they have enough stock in their hands, the petitioners shall be deemed to have complied with

the provisions of the first and the second provisos during the relevant period. Alternatively the learned counsel for the petitioners also contended

that under Explanation II to the Notification No. 99 of 1980, the persons who are holding the bona fide certificates issued under Notification Nos.

162 of 1967 and 154 of 1975, though situated in the same position as that of the petitioners, are able to claim the benefit of Notification No. 90,

the petitioners also shall be given similar benefits. It may be mentioned that in respect of the persons who come under the second explanation, it

was not necessary for them to prove further that they are selling the products to KVIC or a Co-operative Society or a Governmental Agency,

because, one of the conditions on which the KVIC certificate was issued was that the entire produce of the individual who is given the certificate

shall sell his products through the KVIC. If there was any breach of that condition, on that ground the certificate itself will be withdrawn and on

such withdrawal, the concessional rates also will cease. Therefore, in effect if a bona fide certificate is produced, that will satisfy both the first and

the second provisos. Accordingly the learned counsel for the petitioners in the circumstances, contended that we must ignore the non-production of

the certificate by the petitioners and give the benefit of concessional rate of levy. The learned counsel, in this connection referred to the decisions in

Sunday Lake Iron Co. v. Wakefield (62Law.Ed.247U.S.1154), Cumberland Coal Co. v. Board of Revision (76Law.Ed.284U.S.146) and

Vishundas Hundumal and Others Vs. State of Madhya Pradesh and Others, . In Cumberland Coal Co. v. Board of Revision (76Law

Ed.284U.S.146 a discrimination in assessment of coal lands was pleaded on the ground that there was under-valuation of other owners"

properties. The Supreme Court of the United States held that the right of the taxpayer whose property alone is taxed at 100 per cent of its true

value is to have his assessment reduced to the percentage of that value at which others are taxes ""even though this is a departure from the

requirement of the statute."" The court further held that the petitioners pleading discrimination are entitled to a readjustment of the assessments of

their coal so as to put the assessments upon a basis of equality with due regard to differences in actual value, with other assessments of the coal of

the same class within the tax district. Similar view was also expressed in Sunday Lake Iron Co. v. Wakefield (62Law. Ed.247U.S.1154). The

decision in Vishundas Hundumal and Others Vs. State of Madhya Pradesh and Others, related to a scheme of nationalisation of routes under the

Motor Vehicles Act. Certain existing operators were allowed to operate on overlapping portions of notified routes while the petitioners therein

were denied such facility. The Supreme Court observed :

Conceding that this was discrimination unconsciously indulged into by inadvertence or over sight on the part of a governmental agency, by this

order we only propose to rectify the same and not reject the whole scheme. Such an approach would be destructive of a wholesome effort

towards nationalisation of bus transport which is generally undertaken in public interest, when discrimination is glaring the State cannot take

recourse to inadvertence in its action resulting in discrimination. The approach is, what is the impact of State action on the fundamental rights of

citizen. In this case denial of equal protection is complained of. And this denial of equal protection flows from State action and has a direct impact

on the fundamental rights of the petitioners. We, therefore, propose to take a constructive approach by removing the discrimination by putting the

present petitioner in the same class as those who have enjoyed favourable treatment by inadvertence on the part of the Regional Transport

Authority.

14. It may be seen from these cases that when two classes are brought into existence but they are differently taxed, the class which is discriminated

against is entitled to get the same concession and the discriminatory provision need not be set aside. The principle is applicable even to a case

where the lower rate of taxation in favour of one class is contrary to the statute. In our case, there is no question of the concession given to those

manufacturers who come under Explanation II being illegal. Therefore, this is an *afortiori* case where the concession extended to the manufacturers

coming under Explanation II should be extended to the petitioners also. Therefore these writ appeals and the writ petitions have to be allowed.

15. There will be a writ of mandamus directing the respondents to give the benefit of Notification No. 99 of 1980 without reference to the first and

the second provisos to the Notification. However, it is made clear that this order will be applicable only to those petitioners who have filed the writ

petitions. This order also is subject to the further conditions that the Government is at liberty to reject the concession in cases where the

respondents to these writ petitions come to the conclusion on materials that such and such a petitioner is not a bona fide unit, in the sense, that it

was either non-existent or fictitious unit, or that it is a subsidiary of the mechanised sector unit. There will be an order accordingly in these writ

petitions. In form the writ appeals are also allowed. There will be no order as to costs.