
(1996) 06 MAD CK 0045

In the Madras High Court

Case No : Writ Petition No's. 11017 and 11018/92

Eternit Everest Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 25-06-1996

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 10, 14, 23, 45, 48
Central Excises and Salt Act, 1944 — Section 11, 11A, 11B, 17, 3
Constitution of India, 1950 — Article 14, 19, 248, 265
Industrial Disputes Act, 1947 — Section 11, 11C, 11D, 12E

Citation : (1996) 56 ECC 24 : (1997) ECR 52 : (1997) 89 ELT 28

Hon'ble Judges : Raju, J;K.A. Swami, J

Bench : Division Bench

Advocate : Shri Soli Sorabjee, for M/s. M. Muthappan and D. Gurumoorthy, for the Appellant; Shri V.T. Gopalan, Sr. Central Government Standing Counsel, for Shri K. Ramakrishnan Reddy and Addl. Central Govt. Standing counsel, for the Respondent

Judgement

D. Raju, J.—The above batch of writ petitions have been filed by the very same writ petitioner, challenging the show cause notices issued as also in one writ petition the constitutional validity of Section 11D of the Central Excises and Salt Act, 1944, hereinafter referred to as "the Act". Several writ petitions relate to the various show cause notices issued for different periods and in other respects, the grounds of challenge are similar and identical. For a proper understanding of the grievance of the petitioner and an appreciation of the points urged on either side, it would be useful to refer to the facts pertaining to W.P. Nos. 11017 and 11018 of 1992. The writ petition, W.P. No. 11017 of 1992 has been filed for the writ of certiorari to call for and quash the show-cause-cum-demand notices issued by the fourth respondent in O.S. No. 1906 dt. 13.7.1992, calling upon the petitioners to show-cause as to why an amount of Rs. 2,47,05,641.22 as detailed in the annexure thereto for the period from 1.2.1992 to 30.6.1992 should not be demanded and recovered u/s 11A read with Section 11D of the Act with a consequent liability for penalty under Rule 210 of the Central Excise Rules, 1944

and giving the petitioners an opportunity to make their submissions in this regard. W.P. No. 11018 of 1992 has been filed with reference to the same show-cause notice, but seeking for a writ of declaration or any other appropriate writ or direction, declaring that Section 11D of the Act is ultra vires and unconstitutional, so far as the other writ petitions are concerned, they relate to similar show-cause notices issued relating to different periods demanding different sums of amount as set out hereunder -

Sl. No.	W.P. No.	Show-cause Notice and date	Amount demanded	Period covered
1.	[1968/93]	O.C. No. 3436/28.12.1992	2,17,46,031/-	7/92 to 10/92
2.	9785/93	O.C. No. 888/23.4.1993	2,46,51,772/-	11/92 to 3/93
3.	19324/93	O.C. No. 2115/22.9.1993	3,17,59,137/-	4/93 to 8/93
4.	4878/94	O.C. No. 425/24.2.1994	2,91,22,288/-	9/93 to 1/94
5.	15337/94	O.C. No. 1258/25.7.1994	2,34,44,368/-	2/94 to 6/94
6.	20938/94	O.C. No. 1897/13.12.1994	1,95,24,466/-	7/94 to 10/94
7.	7294/95	O.C. No. 774/4.5.1995	2,15,08,994/-	11/94 to 2/95
8.	13413/96	O.C. No. 1599/8.9.1995	2,49,83,212/-	3/95 to 7/95

2. The petitioners are a Company registered and incorporated in India and engaged in the manufacture and sale of asbestos cement products which are liable to Central Excise duty under Chapter 68 of the Schedule to the Central Excise Tariff Act, 1985 and are also liable to special excise duty. They are said to be in the business of manufacture and sale of asbestos cement products for the last more than 50 years and carrying on their manufacturing activities at four factories situated at Kymore in Madhya Pradesh, Mulund in Bombay, Podanur in Tamil Nadu and Calcutta in West Bengal. The Central Government is said to have issued a Notfn. No. 60 of 1991-CE, dated 25.7.1991 as amended subsequently by Notfn. No. 26/92-CE, dated 1.3.1992 in exercise of its powers u/s 5A of the Act and in supersession of the earlier notification dated 16.11.1989 exempting all goods falling under Chapter 68 of the Tariff Act, 1985 containing more than 25% by weight of fly ash from the whole of duty of excise leviable thereon which was specified in the said schedule. Consequently, the goods falling within Chapter 68 of the Tariff Act became wholly exempt from the levy of excise duty if it is shown to contain more than 25% by weight of fly ash.

3. Subsequent to the said notification, the petitioner-company claims to have undertaken to upgrade its technology by making upon extensive experimenting and testing and was able to achieve the desired results to manufacture asbestos cement products containing more than 25% by weight of fly ash identifying the said resultant product as the "UT Product" (Upgraded Technology Product). The said product was considered to be fit for sale in the market and the petitioner-company also claims to have commenced commercial production of the UT Products in or about January/February, 1992 and cleared such products without payment of duty from February, 1992, by availing the exemption under the exemption notification dated 25.7.1991. The case of the petitioner is that they were manufacturing the asbestos cement products some of them containing less than 25% by weight of fly ash identified as conventional products and the other

category containing more than 25% by weight of fly ash known as UT Products simultaneously and marketing them. So far as the conventional products are concerned, the petitioners are not entitled to any exemption and the classification list filed and approved appears to make the goods exigible to excise duty. As far as UT Products are concerned, it is stated that the petitioners filed a classification list with the third respondent on 30.12.1991 claiming the benefit granted by the above notification dated 25.6.1991, but the third respondent, by his communication dated 3.2.1992 granted permission to the petitioners to clear the UT Products on the basis of the classification list submitted by them, however subject to the condition that the assessment of the UT Products would be provisional under Rule 9B of the Central Excise Rules, 1944 and the petitioners executing the necessary bonds in this regard. This, it appears, was necessitated for the reasons as found stated in the counter-affidavit filed by the respondents that the fly ash content could not be determined by the test conducted at Madras and Calcutta and the test results from the Central Revenue Control Laboratory at New Delhi was awaited. There is no controversy over the position, that subsequently in or about November, 1992 final approval has been accorded to enable the petitioners to avail of the exemption in respect of the UT Products from the payment of excise duty. The petitioners would further claim that thereafter they have discontinued the manufacture of conventional products and confined their production and manufacturing activities only to UT Products.

4. While matters stood thus, the petitioners were served with show-cause notices as referred to supra on the basis that the petitioners, though were found manufacturing UT Products and clearing them without payment of duty, availing of the exemption under the notification dated 27.7.1991, they were found to have collected excise duty from their customers even in respect of such UT Products cleared availing of the exemption notification and, therefore, the petitioners are bound to pay to the Central Government as enjoined in Section 11D of the Act the amount collected by the petitioners as excise duty in respect of UT Products without passing on the benefit of exemption to their customers. The annexure to the show-cause notices contained details of the reasons on which the prima facie conclusion about such collection of excise duty from their customers in respect of the sale of UT Products. To refer to a few of them, it may be stated that according to the respondents, the petitioners were found to have charged the same price for what are called as conventional products as well as UT Products and though the UT Products were cleared without paying the excise duty availing of the exemption notification, the petitioners have collected excise duty from their customers without passing on the benefit of exemption notification to the customers and that in the Depot Challans, it was found mentioned as "Excise duty pre-paid at the factory" and in some Depot Challans as "Excise duty is paid as per the provisions at the factory". It is unnecessary to delve in great details in this regard since the petitioners have approached this Court at the stage of show-cause notices-cum-demand and it is not for this Court within the scope of these writ petitions to undertake an enquiry or adjudication

into the correctness of conflicting factual claims of the petitioners or the respondents.

5. The petitioners, in the affidavit filed in support of the writ petitions, contend that the provisions of Section 11D of the Act are ultra vires and in excess of the legislative competence of Parliament under Entry 84 of List I of the VII Schedule to the Constitution since, according to the petitioners, the provision in the Act provides for the deposit of amounts which are collected as "representing" excise duty, though, in fact, it may not be payable as such duty. The further grounds of challenge in the affidavit are that the show-cause notices are totally illegal and arbitrary inasmuch as the petitioners have not charged or collected any amount as excise duty or representing to be the excise duty in respect of UT Products from their customers, and the said move of the respondent is opposed to the price list submitted by the petitioners. The show-cause-cum-demand notices under challenge are also said to be premature in that no such assumption could be made by the authorities before the issue of the final approval of the classification list which were said to be pending as on 13.7.1992 when the first of the notices came to be issued. The further plea on behalf of the petitioners is that Sections 11A and 11D of the Act are mutually exclusive having different schemes and purpose and also situations to be dealt with by them and they cannot be simultaneously invoked as have been done by the respondents by issuing the impugned notices and therefore, there is no scope to proceed against the petitioners u/s 11D read with Section 11A of the Act. On merits, the petitioners contend that the petitioners have not factually collected any excise duty on the U.T. Products from their customers representing any portion of the price to be towards excise duty, that at any rate, the provision of Section 11D does not provide for any issue of notice or taking of action or adjudication of any claim and that Section 11A has no application whatsoever to the case on hand. The impugned demands and show-cause notices are said to be violative of Article 265 of the Constitution of India.

6. The respondents have filed a counter-affidavit contending that the petitioners, in spite of the fact that they have availed of the exemption notification and did not pay any excise duty on their UT Products, have charged identical and same rates of prices (cum-duty) for both conventional and UT Products. This Act taken together with a remark found in some of the Depot invoices as "Excise duty pre-paid at the factory" would go to show that the petitioners have collected from their customers excise duty for the UT Product also as a constituent of the price charged and collected and on account of this prima facie they were found to have violated the provisions contained in Section 11D of the Act inasmuch as the petitioners have failed to remit to the Central Government such excise duty said to have been collected by them when the goods were really exempt and the petitioners have themselves not paid any such duty while clearing such goods. This, according to the respondents, necessitated and justified the issue of the demand-cum-show-cause notices. It is also contended for the respondents that the writ petitions are premature in that it is for the petitioners to make

representations and obtain an adjudication of the issues raised on merits before the authorities. The respondents further contend that only after verification of sale invoices of the petitioners, it was noticed that the petitioners had collected the duty element as part of the price and has not paid to the Government the amounts so collected necessitating the issue of demand-cum-show-cause notices which are said to be quite in accordance with law, just, fair and legal and not unconstitutional as alleged. The respondents also contend that since the petitioners had an effective alternative remedy under the Act the writ petitions are not maintainable. In other respects, the reasons, which according to the respondents, justify their provisional conclusion that the petitioners really charged and collected excise duty even in respect of exempted commodities which are set out in detail in the counter affidavit are correct and the claim of the petitioners, to the contrary, that they have not collected any amount representing excise duty is disputed as a false. It is also the contention of the respondents that the impugned demand-cum-show-cause notices were issued to conform to the principles of natural justice and give an opportunity to the petitioners and the proceedings are quite in accordance with law particularly Sections 11A and 11D of the Act and there is no violation of Article 265 of the constitution of India as alleged by the petitioners. Reliance is also placed on the decision of a Division Bench of the Andhra Pradesh High Court reported in 1988 (23) ELT 351 (AP) (*South India Corporation v. Assistant Collector of Customs*) in support of the stand taken for the respondents that the petitioners are bound to pay the duty collected by them from their customers to the Government.

7. The petitioners have filed a reply affidavit wherein while reiterating the stand taken in the affidavit filed in support of the writ petitions, it is further contended that Section 11D of the Act merely makes a declaration of a liability to make payment to the Government by any person who has collected any amount from the buyer of any goods representing any sum to be the duty of excise and that in the absence of any provision therein for any forum or authority or prescription of any machinery for adjudication of the vital jurisdictional issue viz., whether any amount has really been collected from the buyer of any goods as representing the duty of excise, the impugned show-cause notices are totally without jurisdiction and without the authority of law. While contending that Section 11A has absolutely no application to the case on hand which is not a case of non levy or short levy in the payment of excise duty, it is further contended that recourse to Section 11D of the Act by issuing notices on demand would constitute violation of Article 265 of the Constitution of India. In the absence of any specific stipulation in this regard, enabling the respondents to take action of the nature under challenge, the respondents are said to have no authority to issue the show-cause notice. The respondents also at length have explained and taken great pains to point out the reasons which necessitated them to charge same price rates for both conventional and UT Products when they were manufacturing side by side both products and we also consider it unnecessary to advert to them in great detail in view of our earlier observation that we do not propose to

undertake an enquiry into the conflicting claims as to whether there was such collection of excise duty by the petitioners in respect of the UT Products representing a portion of the price to be towards excise duty though the petitioners have availed of the exemption notification and cleared such goods without paying the excise duty. Suffice it to notice that the excess cost of production incurred in manufacturing the UT Products and principles governing prudence of business are said to be the basis for charging identical price rates for both products. The petitioner-company's invoices and Depot vouchers are also sought to be explained with the statement of the petitioners in the wholesale price list and that particularly the remarks in Column No. 6 that the prices are "inclusive of excise duty as applicable".

8. At the time of hearing of the writ petitions, Sri Soli Sorabjee, learned Senior Counsel appearing for the writ petitioners, projected his challenge mainly based on the constitutional validity of Section 11D of the Act. It was the contention of the learned Senior Counsel that the Parliament lacked legislative competence to enact Section 11D of the Act and that, in any event, the absence of provision for any machinery or actual prescription of the competent authorities to adjudicate on any disputed claims of collection of any amount as representing the excise duty renders the provisions of Section 11D of the Act as it stands unenforceable, not arbitrary and violative of Article 14 of the Constitution of India. The learned Senior Counsel further contended that Section 11A of the Act has no application whatsoever to the case on hand, since it has relevance to a case of recovering a duty not levied or not paid or short levied or short paid or erroneously refunded postulating thereby an earlier assessment of duty as such, unlike the amount contemplated u/s 11D of the Act which was not really excise duty payable, but said to be an amount collected from the buyer of any goods in any manner as representing duty of excise. It is, therefore, contended that a provision like Section 11D of the Act cannot be enacted in exercise of the powers of the Parliament under Entry 84 of List I of the VII Schedule to the Constitution. Argued the learned Senior Counsel further, that since there is no specific provision in the Act constituting or designating any authority to decide the basic jurisdictional issue when a dispute is raised about the charge made against anyone collection of any amount representing the same to be excise duty when no such duty is payable, the impugned notices should not have been issued and the petitioners could not, therefore, be saddled with liability without any provision for assessment and determination of the claim or providing for an appeal to any aggrieved person against any such determination. The lack of such machinery provisions is said to be not only arbitrary and unreasonable, but also violative of Article 14 of the Constitution of India. On that basis, it is submitted that the impugned show-cause notices are totally without jurisdiction and, therefore, are liable to be struck down.

9. Mr. V.T. Gopalan, learned Senior Central Government Standing Counsel for the respondents, contended that the challenge to the constitutional validity of Section 11D of the Act is not well merited and cannot be considered to be of any

substance in the teeth of Article 248 and Entry 97 of List I of the VII Schedule to the Constitution of India. The learned counsel also contended that even in respect of Section 11D of the Act, the procedure contemplated u/s 11A of the Act can be resorted to and the provisions under Sections 11A to 11D of the Act form a compendious scheme to prevent undue and unjust enrichment and that, therefore, the amounts due to the Central Government u/s 11D of the Act can be recovered by the Authorities by having recourse to the machinery u/s 11A of the Act. In view of the above, according to the learned Counsel for the respondents, the alleged violation of Articles 14 and 265 of the Constitution is untenable and liable to be rejected. According to the respondents, the officers empowered to exercise powers u/s 11A are entitled to enforce the recovery of the amount due u/s 11D and the demand-cum-show cause notices issued are, therefore, quite in accordance with law and unassailable and the petitioners may go before the authorities to vindicate their rights and the writ petitions are, therefore, liable to be rejected. The learned Senior Counsel appearing on either side adverted to several judicial pronouncements and reference to them will be made before advertent to a consideration of the issues raised on either side.

10. In *R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad*, a Constitution Bench of the Supreme Court has considered the constitutional validity of Section 11(2) of the Hyderabad General Sales Tax Act, 1940 which was in pari materia with Section 8B(2) of the Madras General Sales Tax Act, 1939 and it was held therein as follows :-

"The first question therefore that falls for consideration is whether it was open to the State Legislature under its power under Entry 54 of List II to make a provision to the effect that money collected by way of tax, even though it is not due as a tax under the Act, shall be made over to Government. Now it is clear that the sums so collected by way of tax are not in fact tax exigible under the Act. So it cannot be said that the State Legislature was directly legislating for the imposition of sales or purchase tax under Entry 54 of List II when it made such a provision, for on the face of the provision, the amount, though collected by way of tax, was not exigible as tax under the law. The provision, however, is attempted to be justified on the ground that though it may not be open to a State Legislature to make provision for the recovery of an amount which is not a tax under Entry 54 of List II in a law made for that purpose, it would still be open to the Legislature to provide for paying over all the amounts collected by way of tax by persons, even though they really are not exigible as tax, as part of the incidental and ancillary power to make provision for the levy and collection of such tax. Now there is no dispute that the heads of legislation in the various Lists in the Seventh Schedule should be interpreted widely so as to take in all matters which are of a character incidental to the topics mentioned therein. Even so, there is a limit to such incidental or ancillary power flowing from the legislative entries in the various Lists in the Seventh Schedule. These incidental and ancillary powers have to be exercised in aid of the main topic of legislation which in the present case, is a tax on sale or purchase of goods. All powers necessary

for the levy and collection of the tax concerned and for seeing that the tax is not evaded are comprised within the ambit of the Legislative Entry as ancillary or incidental. But where the legislation under the relevant entry proceeds on the basis that the amount concerned is not a tax exigible under the law made under that entry, but even so lays down that though it is not exigible under the law, it shall be paid over to Government, merely because some dealers by mistake or otherwise have collected it as tax, it is difficult to see how such a provision can be ancillary or incidental to the collection of tax legitimately due under a law made under the relevant taxing entry. We do not think that the ambit of ancillary or incidental power goes to the extent of permitting the Legislature to provide that though the amount collected may be wrongly by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to Government, as if it were a tax. The Legislature cannot under Entry 54 of List II make a provision to the effect that even though a certain amount collected is not a tax on the sale or purchase of goods as laid down by the law, it will still be collected as if it was such a tax. This is what Section 11(2) has provided. Such a provision cannot in our opinion be treated as coming within incidental or ancillary powers which the Legislature has got under the relevant taxing entry to ensure that the tax is levied and collected and that its evasion becomes impossible. We are therefore of opinion that the provision contained in Section 11(2) cannot be made under Entry 54 of List II and cannot be justified even as an incidental or ancillary provision permitted under that entry. An attempt was made to justify the provision as providing for a penalty. But as we read Section 11(2) we cannot find anything in it to justify that it is a penalty for breach of any prohibition in the Act. Penalties imposed under taxing statutes are generally with respect to attempts at evasion of taxes or to default in the payment of taxes properly levied (see Sections 28 and 46 of the Indian Income Tax Act, 1922). The Act also provides for penalty, for example, Section 19 and Section 20. The latter section makes certain acts or omissions of an assessee offences punishable by a Magistrate subject to composition u/s 21. Section 11(2) in our opinion has nothing to do with penalties and cannot be justified as a penalty on the dealer. Actually Section 20 makes provision in clause (b) for penalty in case of breach of Section 11(1) and makes the person committing a breach of that provision liable, on conviction by a Magistrate of the First Class, to a fine. We are therefore of opinion that Section 11(2) cannot be justified under Entry 54 of List II either as a provision for levying the tax or as an incidental or ancillary provision relating to the collection of tax. In this connection, we may refer to clause (o) of Section 20, which provides that any person who fails "to pay the amounts specified in sub-section (2) of Section 11 within the prescribed time" shall on a conviction by a Magistrate be liable to fine. It is remarkable that this provision makes the person punishable for his failure to pay the amount which is not authorised as a tax at all under the law, to Government. It does not provide for a penalty for collecting the amount wrongly by way of tax from purchasers which may have been justified as a penalty for the purpose of carrying out the objects of the taxing legislation. If a dealer has collected anything from a purchaser which is not

authorised by the taxing law, that is a matter between him and the purchaser, and the purchaser may be entitled to recover the amount from the dealer. But unless the money so collected is due as a tax, the State cannot by law make it recoverable simply because it has been wrongly collected by the dealer. This cannot be done directly for it is not a tax at all within the meaning of Entry 54 of List II, nor can the State Legislature under the guise of incidental or ancillary power do indirectly what it cannot do directly. We are therefore of opinion that Section 11(2) is not within the competence of the State Legislature under Entry 54 of List II"

11. In *Ashoka Marketing Ltd. Vs. State of Bihar and Another*, a constitution Bench of six learned Judges of the Apex Court considered the constitutional validity of some of the provisions contained in Section 20A of the Bihar Sales Tax Act, 1959. After referring to the decision in *R. Abdul Quader and Company's* case (supra), the provision under challenge in that case was considered to be not in truth one for levy or collection of an amount as tax which the State is not competent to levy or collect but for compelling a Registered dealer to pay over the amount collected on behalf of the State as tax so that it may be available to a person from whom it was unlawfully recovered. Apart from relying upon Entry 54 of List II support was sought to be drawn from Entries 6, 7 and 13 of List III of the VII Schedule to the Constitution also. While observing that State Legislature has no competency to legislate for demanding payment of or retaining amounts recovered by a registered dealer but which are not due as sales tax to the State, the Apex Court held as follows :-

"A provision which enables the dealer to pass on the liability for payment of tax is incidental to legislation for sales-tax. But we are unable to hold that a provision under which a dealer is called upon to pay to the State an amount which has been collected by him on a representation-express or implied--that an equal amount is payable by him under the Bihar Sales Tax Act, is a provision incidental to the power to levy "tax on sale or purchase of goods" within the meaning of Entry 54 List II of the Seventh Schedule. Entry 54 List II, of the Seventh Schedule, comprehends the power to impose tax, to prescribe machinery for collecting the tax, to designate officers by whom the liability may be imposed and to prescribe the authority, obligation and indemnity of the officers. The State Legislature may under Entry 54 List II be competent to enact a law in respect of matters necessarily incidental to "tax on the sale and purchase of goods". But a provision compelling a dealer who has deliberately or erroneously recovered an amount from the purchaser on a representation that he is entitled to recover it to recoup himself for payment of tax, to pay over that amount to the State cannot, in our judgment, be regarded as necessarily incidental to Entry 54 List II. In effect the provision is one for levying an amount as tax which the State is incompetent to levy. A more device cannot be permitted to defeat the provisions of the Constitution by clothing the claim in the form of a demand for depositing the money with the State which the dealer has collected, but which he was not entitled to collect."

"Sub-section (8) of Section 20A, in our judgment, does not alter the true nature of the demand or appropriation which can be made under sub-sections (3), (4) and (5) of Section 20A. The intentions underlying sub-sections (3), (4) and (5) is to enable the State to collect from the dealer tax which the State is not entitled to levy and to appropriate it to itself except in the very rare cases in which the purchaser may approach the State and be able to satisfy that he has a claim, that the claim is in order, and that it is within limitation. Notwithstanding the addition of sub-section (8), in our judgment, the amount received by the State or appropriated by the State continues to have the character of a tax collected which the State is not entitled to collect."

"We fail to appreciate how power to legislate in respect of Entries 6 and 13 would authorise the State Legislature to legislate in respect of recovery from the dealer of an amount which the dealer was in law not entitled to collect, but which he has collected. The power to legislate in respect of sub-sections (3), (4) and (5) of Section 20A does not fall under Entries 6, 7 and 13 of List III expressly, nor can it be said that the power to legislate is necessarily incidental to the power contained in Entries 6, 7 and 13 of List III. As already pointed out, this Court in the judgment in *R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad*, has clearly held that the State has no power to legislate for recovering amount which is collected by the tax-payer in order to recoup himself for payment of tax which under the law he is not bound to pay. Even though the competence of the State to legislate was not sought to be supported under Entries 6, 7 and 13 of List III, the decision of the Court plainly implies that the State has no such power under any Entry in the third List."

12. In *Laxmi Starch Limited Vs. Union of India*, A Division Bench of the Andhra Pradesh High Court was concerned with the scope of Entry 84 of List I of the VII Schedule and the validity of Section 11D and it was observed therein as follows :-

"51. The power to levy and collect excise duty is contained in Entry 84 of List I of Seventh Schedule to the Constitution. It has been noticed above that the power to regulate refund of duty is incidental and ancillary to the power under this entry. The duty is imposed on the manufacture or production of the goods. There is a distinction between the levy of excise duty which is at the stage of manufacture or production of goods in India and the collection of duty which may be in accordance with the terms of the statute. If the duty has already been assessed and is sought to be collected from persons as mentioned in Section 11D(1) the position might have been different. But under this sub-section any amount received by any person by way of excise duty from the buyer is directed to be paid to the credit of the Central Government without there being determination of liability of excise duty on manufacture or production of particular goods. Under Entry 84 the taxable event (levy of excise duty) being manufacture or production, if the duty is sought to be collected not with reference to manufacture or production of goods, but with reference to receipt of money by any person as excise duty it would certainly be beyond the legislative

competence of the Parliament to enact such a provision as sub-section (1) of Section 11D.

52. As indicated above, the purport of sub-section (1) of Section 11D of Central Excise Act and sub-section (1) of Section 28B of the Customs Act is not only to collect the amount from the manufacturer or producer with reference to manufacture or production but from every person which means even persons other than the manufacturers or producers from whom excise duty cannot otherwise be collected having regard to the wording of the relevant entries in Seventh Schedule and the charging sections. It has been noticed above that the excise duty and the customs duty being indirect taxes can be passed on to others. From the stage of manufacture or production to the stage of ultimate consumption goods may pass from manufacturers/producers to the agents or dealers and from them to the wholesalers and from them to the retailers before they reach the consumers. Excise duty can properly be levied and collected from the manufacturers/producers but not from all those who happen to sell or purchase the goods till they reach the ultimate consumer for the taxable event is only one and that is manufacture or production of particular goods. Excise duty can be collected only once at the point of collection declared by the statute but not on multiple points. Thus, it is clear that on the ground of persons other than manufacturers or producers or importers receiving the amounts as excise duty, they cannot be made to credit the same to the Central Government. As the ambit and scope of the above-said provisions is beyond the scope of relevant legislative entry and relevant charging sections, they cannot be said to be within incidental and ancillary power of the legislature. In view of the above discussion and applying principle No.(2) aforementioned, sub-section (1) of Section 11D of the Central Excise Act and sub-section (1) of Section 28B of the Customs Act cannot but be held to be beyond the legislative competence. Therefore, the answer to the aforesaid first question will be in the negative.

13. In *K.M. Vijayan and others Vs. Union of India and others*, to which one of us (Raju) was a party, a Full Bench of this Court has considered the principles to be applied in dealing with a challenge to the constitutional validity of a provision enacted by the Parliament and it was held therein applying the ratio of the decisions of the Apex Court in *Union of India v. Harbhajan Singh Dhillon*, (1972) 83 ITR 582 (SC) and *Attorney General for India and Others Vs. Amratlal Prajivandas and Others*, that where the legislative competence of Parliament to enact a particular statute is questioned one must look at the several entries in List II to find out whether the said statute is relatable to any of these entries and if the statute does not relate to any of the entries in List II no further inquiry is necessary and it must be held that Parliament is competent to enact that Statute whether by virtue of the entries in List I and List III or by virtue of Article 248 read with Entry 97 of List I.

14. In *Kasturi and Sons (Private) Ltd. Vs. N. Salivateeswaran and Another*, a Constitution Bench of the Apex Court had an occasion, while dealing with the

provisions contained in the Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955, to consider the impact of absence of sufficient statutory provisions conferring relevant and adequate powers to hold formal enquiry and held as follows :-

"5. It would be necessary and convenient to construe Section 17 of the Act first and determine its true scope and effect. The larger question about the vires of this Act and the validity of the decision of the Wage Board set up by the Central Government u/s 8 of the Act have been considered by us in the several petitions filed by several employers in that behalf before this Court. We have held in those petitions that, with the exception of Section 5(1)(a)(iii) which deals with the payment of gratuity to employees who voluntarily resign from service, the rest of the Act is valid. That is why the question about the vires of Section 17 need not be considered, in the present petition over again. The main point which remains to be considered, however, is : Does Section 17 constitute the State Government or the authority specified by the State Government into a forum for adjudicating upon the merits of the claim made by newspaper employee against his employer under any of the provisions of this Act. Section 17 provides :

"Where any money is due to a newspaper employee from an employer under any of the provisions of this Act, whether by way of compensation, gratuity or wages, the newspaper employee may, without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the money due to him, and if the State Government or such authority as the State Government may specify in this behalf is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector and the Collector shall proceed to recover that amount in the same manner as an arrear of land revenue."

It is clear that the employees claim against his employer which can form the subject-matter of an enquiry u/s 17 must relate to compensation awardable u/s 4 of the Act, gratuity awardable u/s 5 of the Act, or wages claimable under the decision of the Wage Board. If the employee wishes to make any other claim against his employer, that would not be covered by Section 17. As the marginal note shows, the section deals with the recovery of money due from an employer.

7. On the other hand, the case for the petitioner is that the section provides for a procedure to recover the amount due from an employer, not for the determination of the question as to what amount is due. The condition precedent for the application of Section 17 is a prior determination by a competent authority or the Court of the amount due to the employee from his employer. It is only if and after the amount due to the employee has been duly determined that the stage is reached to recover that amount and it is at this stage that the employee is given the additional advantage provided by Section 17 without prejudice to any other mode of recovery available to him. According to this view, the State Government or the authority specified by the State Government has to hold a summary enquiry on a very narrow and limited point : Is the amount which is found due to the employee still due when the employee makes an

application u/s 17, or, has any amount been paid, and, if yes, how much still remains to be paid? It is only a limited enquiry of this type which is contemplated by Section 17. Within the scope of the enquiry permitted by this Section are not included the examination and decision of the merits of the claim made by the employee. When the section refers to the application made by the employee for the recovery of the money due to him, it really contemplates the stage of execution which follows the passing of the decree or the making of an award or order by an appropriate Court or authority. In our opinion, the construction suggested by the petitioner should be accepted because we feel that this construction is more reasonable and more consistent with the scheme of the Act.

8. It is significant that the State Government or the specific authority mentioned in Section 17 has not been clothed with the normal powers of a Court or a Tribunal to hold a formal enquiry. It is true that Section 3 sub-section (1) of the Act provides for the application of the Industrial Disputes Act, 1947 to or in relation to working journalists subject to sub-section (2); but this provision is in substance intended to make working journalists workmen within the meaning of the main Industrial Disputes Act. This Section cannot be read as conferring on the State Government or the specified authority mentioned u/s 17 power to enforce attendance of witnesses, examine them on oath, issue commission or pass orders in respect of discovery and inspection such as can be passed by the Boards, Courts or Tribunals under the Industrial Disputes Act. It is obvious that the relevant provisions of Section 11 of the Industrial Disputes Act, 1947, which confer the said powers on the conciliation officers, Boards, Courts and Tribunals cannot be made applicable to the State Government or the specified authority mentioned u/s 17 merely by virtue of Section 3(1) of the Act.

9. In this connection, it would be relevant to remember that Section 11 of the Act expressly confers the material powers on the Wage Board established u/s 8 of the Act. Whatever may be true nature or character of the Wage Board-whether it is a legislative or an administrative body-the legislature has taken the precaution to enact the enabling provisions of Section 11 in the matter of the said material powers. It is well known that, whenever the legislature wants to confer upon any specified authority powers of a Civil Court in the matter of holding enquiries, specific provision is made in that behalf. If the legislature had intended that the enquiry authorised u/s 17 should include within its compass the examination of the merits of the employee's claim against his employer and a decision on it, the legislature would undoubtedly have made an appropriate provision conferring on the State Government or the specific authority the relevant powers essential for the purpose of effectively holding such an enquiry. The fact that the legislature has enacted Section 11 in regard to the Wage Board but has not made any corresponding provision in regard to the State Government or the specified authority u/s 17 lends strong corroboration to the view that the enquiry contemplated by Section 17 is a summary enquiry of a very limited nature and its scope is confined to the investigation of the narrow point as to what amount is actually due to be paid to the employee under the

decree, award or other valid order obtained by the employee after establishing his claim in that behalf. We are reluctant to accept the view that the legislature intended that the specified authority or the State Government should hold a larger enquiry into the merits of the employee's claim without conferring on the State Government or the specified authority the necessary powers in that behalf. In this connection, it would be relevant to point out that in many cases some complicated questions of fact may arise when working journalists make claims for wages against their employers. It is not unlikely that the status of the working journalist, the nature of the office he holds and the class to which he belongs may themselves be matters of dispute between the parties and the decision of such disputed questions of fact may need thorough examination and a formal enquiry. If that be so, it is not likely that the legislature could have intended that such complicated questions of fact should be dealt with in a summary enquiry indicated by Section 17.

12. It is true that, in the present case, the Government of Bombay has specified the authorities under the Payment of Wages Act and the Industrial Disputes Act as specified authorities u/s 17 to deal with applications of newspaper employees whose wages are less than Rs. 200/- per month or more respectively; but there can be no doubt that, when the second respondent entertained the first respondent's application, he was acting as the specified authority u/s 17 and not as an industrial tribunal. It is clear that u/s 17, the State Government would be entitled to specify any person it likes for the purpose of holding an enquiry under the said section. The powers of the authority specified u/s 17 must be found in the provisions of the Act itself and they cannot be inferred from the accidental circumstance that the specified authority otherwise is a member of the industrial tribunal; since there is no provision in the Act which confers on the specified authority the relevant and adequate powers to hold a formal enquiry, it would be difficult to accept the position that various questions which may arise between the working journalists and their employers were intended to be dealt with in a summary and an informal manner without conferring adequate powers on the specified authority in that behalf. The second respondent himself was impressed by this argument but he was inclined to hold that the necessary power could be assumed by him by implication because he thought that, in the absence of such implied power, his jurisdiction u/s 17 could not be effectively exercised. In our opinion, this approach really begs the question. If the legislature did not confer adequate powers on the specified authority u/s 17, a more reasonable inference would be that the nature and scope of the powers u/s 17 is very limited and the legislature knew that, for holding such a limited and narrow enquiry, it was unnecessary to confer powers invariably associated with formal and complicated enquiries of a judicial or quasi-judicial character. We must accordingly hold that the second respondent had no jurisdiction to entertain the first respondent's application at this stage".

15. In *Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another*, , a Constitution Bench of the Apex Court, while dealing with the provisions contained in Travancore-Cochin Land Tax Act, 1955 emphasised the need for the provision of an assessment machinery, in a taxing enactment, in the following terms :-

"The provisions of the Act are unconstitutional viewed from the angle of the provisions of Article 19(1)(f) of the Constitution, also. Apart from the provisions of Sections 4 and 7 discussed above, with reference to the test under Article 14 of the Constitution, we find that Section 5A is also equally objectionable because it imposes unreasonable restrictions on the rights to hold property, safeguarded by Article 19(1)(f) of the Constitution. Section 5A declares that the Government is competent to make a provisional assessment of the basic tax payable by the holder of unsurveyed land. Ordinarily, a taxing statute lays down a regular machinery for making assessment of the tax proposed to be imposed by the statute. It lays down detailed procedure as to notice to the proposed assessee to make a return in respect of property proposed to be taxed, prescribes the authority and the procedure for hearing any objections to the liability for taxation or as to the extent of the tax proposed to be levied, and finally, as to the right to challenge the regularity of assessment made, by recourse to proceedings in a higher Civil Court. The Act merely declares the competence of the Government to make a provisional assessment, and by virtue of Section 3 of the Madras Revenue Recovery Act, 1864, the land-holders may be liable to pay the tax. The Act being silent as to the machinery and procedure to be followed in making the assessment leaves it to the Executive to evolve the requisite machinery and procedure. The whole thing, from beginning to end, is treated as of a purely administrative character, completely ignoring the legal position that the assessment of a tax on person or property is at least of a quasi-judicial character. Again, the Act does not impose an obligation on the Government to undertake survey proceedings within any prescribed or ascertainable period, with the result that a landholder may be subjected to repeated annual provisional assessments on more or less conjectural basis and liable to pay tax thus assessed. Though the Act was passed about five years ago, we were informed at the Bar that survey proceedings had not even commenced. The Act thus proposes to impose a liability on land-holders to pay a tax which is not to be levied on judicial basis, because (1) the procedure to be adopted does not require a notice to be given to the proposed assessee; (2) there is no procedure for rectification of mistakes committed by the Assessing Authority; (3) there is no procedure prescribed for obtaining the opinion of a superior Civil Court on question of law, as is generally found in all taxing statutes; and (4) no duty is cast upon the Assessing Authority to act judicially in the matter of assessment proceedings. Nor is there any right of appeal provided to such assessee as may feel aggrieved by the order of assessment."

In *State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others*, , yet another Constitution Bench of the Apex Court dealt with the importance and necessity for providing a machinery for assessment in a taxing enactment while

dealing with the Andhra Pradesh Land Revenue (Additional Assessment) and Cess Revision Act, 1962 and held as follows :-

"It will be seen that in that case on existing rates based upon scientific data a surcharge was imposed as a temporary measure till a uniform land revenue law was enacted for the whole State. That decision, therefore, does not touch the present case. But in the instant case, as we have pointed out earlier, the whole scheme of ryotwari settlement was given up so far as the minimum rate was concerned and a flat minimum rate was fixed in the case of dry lands without any reference to the quality or fertility of the soil and in the case of wet lands a minimum wet rate was fixed and it was sought to be justified by correlating it to the ayacut. Further, the whole imposition of assessment was left to the arbitrary discretion of the Officers not named in the Act without giving any remedy to the assesseees for questioning the correctness of any of the important stages in the matter of assessment, such as ayacut taram rate or classification or even in regard to the calculation of the figures. Not only the scheme of classification, as pointed out by us earlier, has no reasonable relation to the objects sought to be achieved, viz., fixation and rationalisation of rates but the arbitrary power of assessment conferred under the Act enables the appropriate officers to make unreasonable discrimination between different persons and lands. The Act, therefore, clearly offends Article 14 of the Constitution."

16. In D.B. Godbole Vs. Kunwar Rajnath, , a Division Bench of the Bombay High Court, while dealing with the position and powers of the custodian u/s 48(2) of the Administration of Evacuee Property Act, 1950, held that the custodian had neither the authority to determine the liability of the person whom he had appointed as Manager nor call upon him to pay any amount which he determined as due from him. Chief Justice M.C. Chagla, speaking for the Division Bench, observed as follows :-

"We were also told that if Legislature enacts any provisions of the Law, it does so with some purpose and we must find some cases to which the particular provision of the law would attach, and it is said that if we give to Section 48 the meaning which we suggest is the proper meaning, then it would be difficult to find any cases to which Section 48 would be applicable. It is true that ordinarily the function of the Court should be not to render any legislation futile or infructuous, but it is equally the function of the Court not to alter the language of the Legislature in order to give effect to any piece of legislation. There are innumerable instances of what a learned Law Lord said of Legislature misfiring and often the Legislature by failure to use adequate language fails to achieve its object. We are not at all sure, in the first instance, that the Legislature ever intended to confer upon the Custodian the wide and drastic power of deciding liabilities of third parties, and even assuming we were satisfied that this was the object of the Legislature, we refuse to extend and alter the meaning of the language used by the Legislature merely because we may find that Section 48 would have no application if it was given the strict meaning which the language

bears. As a matter of fact, Mr. Maneckshaw has drawn our attention to two provisions of the Act which were extant when Section 48 was originally enacted. Sections 23 and 45(b) which go to show that there might have been provisions when Section 48 was enacted which would satisfy the language used by the Legislature, viz. sum due under the provisions of the Act. But that is neither here nor there. We cannot throw the burden upon the respondent to show us some provision of the Act to which Section 48 applies. Rather it is for the Custodian to satisfy us that on the language used by the Legislature in Section 48 it applies to the case of third parties. Turning to the authorities, our attention was drawn naturally to a decision of this Court reported in *S. Benjamin v. Ebrahim Aboobaker* - (1954) 37 Bom L.R. 40 . That is a decision directly in point. In that case, we held that Section 10(2)(i) of the Administration of Evacuee Property Act did not confer upon the Custodian the power to recover a debt due to an evacuee by a summary process without having resort to the Civil Courts and that he could only recover that debt by going to a Civil Court, establishing the debt and getting the Court to pass a decree in his favour, and further that the right conferred upon the Custodian, u/s 10(2)(f) to call upon a person to furnish information, returns and accounts did not carry with it the right by the Custodian's own adjudication to determine the liability of any person in respect of any property which was vested in him. What is now sought to be argued is that when this decision was given, Parliament had not enacted Section 48(2), and what is urged upon us is that by reason of the enactment of Section 48(2) this decision is no longer good law and that we would never have come to this conclusion if Section 48(2) had been upon the statute book. In our opinion, the enactment of Section 48(2) does not make the slightest difference to the ratio of this decision. As a matter of fact, in that case the Advocate General relied on Section 48 and we pointed out to him before he could rely on that section he must satisfy us that any sum was due to the Custodian under the provisions of the Act, and inasmuch as the Advocate-General was not in a position to satisfy us, he failed. The position is identical today. The only change in the law that Section 48(2) has brought about is that it has conferred a power upon the Custodian to decide and it has made his decision final. But the law is still the same today, viz. that what he can decide is something due under the provisions of the Act, and unless the Attorney General can satisfy us that this sum claimed by the Custodian from the respondents is due under the provisions of the Act, just as Section 48 was of no help to the Advocate General in that case, Section 48(2) can be of no help to the Attorney General in this case. What was argued in that case was that because a debt was due by a third party to the evacuee or the Custodian, the Custodian had the right to determine the liability of the debtor. We rejected that contention because we found nothing in any provision of the Act which conferred such a power upon the Custodian. We again look in vain through the provisions of the Act to find such a power conferred upon the Custodian, because what the Custodian is purporting to do today is exactly what the Custodian purported to do in that case."

17. In *Gem Cables and Conductors Ltd. Vs. Collector of Customs, Hyderabad*, a

Division Bench of this Court to which one of us My Lord (the Hon'ble Chief Justice) was a party had an occasion to deal with a challenge made to a direction by the CEGAT directing a pre-deposit. In dealing with such a challenge, it was noticed that the amount sought to be recovered and with reference to which a direction for pre-deposit has been made was the one representing excess collection of excise duty from the consumers in that case. It was held therein that even de hors Section 11D, it was permissible for the department within the period specified u/s 11A of the Act to recover the sum. It may be pointed out even at this stage that the learned Senior Counsel appearing for the petitioners attempted to point out from the statement of facts contained in paragraph 4 that unlike the case under our consideration, in the case considered by the earlier Division Bench, it was not disputed by the petitioners before this Court that they did collect the excise duty from the purchasers at 25% on the sales below Rs. 75 lakhs also even though they were required to pay excise duty only at 15% up to Rs. 75 lakhs and that the Division Bench which decided the earlier case had no opportunity or need to decide the issues now raised on behalf of the petitioners and which very much loom large for consideration in the teeth of a positive denial by the petitioners of any such collection in excess or collection of excise duty representing it to be so from the customers when it was not really payable.

18. In *Rayalseema Constructions Vs. Deputy Commercial Tax Officer, Mannady Division, Madras 1 and Others*, a Division Bench of this Court had an occasion to construe the scope of Article 265 of the Constitution of India and particularly the ambit of the words "levy" and "collection" used in Article 265 of the Constitution of India in a comprehensive manner so as to include and envelope the entire process of taxation commencing from the taxing statute to the taking away of the money from the pocket of the citizen. It was held therein that what Art. 265 of the Constitution enjoins is that every stage in the entire process must be authorised by the law.

19. The learned Senior Counsel for the Union of India, has adverted in answer to the above, to some of the decisions of the Apex Court laying down the principles of construction of statutes and contingencies when the Courts called upon to construe the provisions supply even the omissions to make the provisions purposeful and effective in the matter of their enforcement. In *Commissioner of Income Tax, Central, Calcutta Vs. National Taj Traders*, , it was held as follows :-

"10. Two principle of construction -One relating to casus omissus and the other in regard to reading the statute as a whole - appear to be well settled. In regard to the former the following statement of law appears in *Maxwell on the Interpretation of Statutes* (12 edn.) at page 33 :

"Omissions not to be inferred.-It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. Lord Mersy said : "It is a strong thing to rend into an Act of Parliament words which are not there, and in the absence of

clear necessity it is a wrong thing to do". "We are not entitled", said Lord Loreburn, L.C. "to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself". A case not provided for in a statute is not to be dealt with merely because there seems no goods reason why it should have been omitted, and the omission appears in consequence to have been unintentional."

As regards aspect (b) we have already dealt with it above. As regards aspect (a), it is well settled that the principle that the fiscal statute should be construed strictly is applicable only to taxing provisions such as a charging provision or a provision imposing penalty and not to those parts of the statute which contain machinery provisions and by no stretch could Section 33 be regarded as a charging provision. As regards aspect (c) we have already pointed out above that a casus omissus has not to be readily inferred and it could not be inferred from the mere fact that both Sections 33B and 34(3) together with the second proviso were inserted simultaneously in the Act by the same Amending Act of 1948, and that in the case of the former a relaxing provision was not made as was made in the case of the latter provision, firstly because the two provisions operated in distinct fields, and secondly, it would be improper to do so without comparing the various stages of amendments through which each set of these provisions had undergone since inception."

In Hameedia Hardware Stores, represented by its partner S. Peer Mohammed Vs. B. Mohan Lal Sowcar, , the Apex Court held as follows :-

"10. The main ground on which the learned Judge who decided Abdul Rahman"s case AIR1984 (Mad.) 281 (supra) held that it was not necessary to establish the bona fide requirement of the landlord when he made an application for eviction u/s 10(3)(a)(iii) of the Act was that, the word "require" was not to be found in Section 10(3)(a)(iii) of the Act. We are of the view that having regard to the pattern in which clause (a) of sub-section (3) of Section 10 of the Act is enacted and also the context, the words "if the landlord required it for his own use or for the use of any member of his family" which are found in sub-clause (ii) of Section 10(3)(a) of the Act have to be read also into sub-clause (iii) of Section 10(3)(a) of the Act. Sub-clauses (ii) and (iii) both deal with the non-residential buildings. They could have been enacted as one sub-clause by adding in conjunction "and" between the said two sub-clauses, in which event the clause would have read thus : "In case it is a non-residential building which is used for the purpose of keeping a vehicle or adapted for such use, if the landlord required it for his own use or for the use of any member of his family and if he or any member of his family is not occupying any such building in the city, town or village concerned which is his own; and in case it is any other non-residential building, if the landlord or any member of his family is not occupying for purposes of a business which he or any member of his family is carrying on a non-residential building in the city, town or village concerned which is his own. If

the two sub-clauses are not so read, it would lead to an absurd result. The non-residential building referred to in sub-clause (ii) is a building which is used for the purpose of keeping a vehicle or adapted for such use and all other non-residential buildings fall under sub-clause (iii). The State Legislature cannot be attributed with the intention that it required a more stringent proof by insisting upon proof of bona fides of his requirement or need also when a landlord is seeking eviction of a tenant from a garage than in the case of a non-residential building which is occupied by large commercial house for carrying on business. The learned counsel for the respondent was not able to explain as to why the State Legislature gave greater protection to tenants occupying premises used for keeping vehicles or adapted for such use than to tenants occupying other types of non-residential buildings. It is no doubt true that the Court while construing a provision should not easily read into it words which have not been expressly enacted but having regard to the context in which a provision appears and the object of the statute in which the said provision is enacted the Court should construe it in a harmonious way to make it meaningful.

11. In *Seaford Court Estates Ltd. v. Aaher*, (1949) 2 ALL ER 155, Lord Denning, L.J. said :

" When a defect appears, a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written word so as to give "force and life" to the intention of the legislature..... A Judge should ask himself the question how, if the makers of the Act had themselves come across this rack in the texture of it, they should have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven but he can and should iron out the creases."

12. This rule of construction is quoted with approval by this Court in *M. Pentiah and Others Vs. Muddala Veeramallappa and Others*, and it is also referred to by Beg. C.J. in *Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others*, . In the present case by insisting on the proof of the bona fides of the requirement of the landlord, the Court is not doing any violence to the statute nor embarking upon any legislative action. The Court is only construing the words of the statute in a reasonable way having regard to the context."

The decision in 1991 Supp. (1) SCC 600 (*Delhi Transport Corporation v. DTC Mazdoor Congress and Others*), particularly the observations in paras 119 to 125, relating to the method of construction or interpretation of legislation or rule provisions, that Courts must seek to discover and translate the intention of the legislature or the rule making authority have been also relied upon. The observations are from the judgment of the minority opinion and cannot be relied upon as such, as an authoritative proposition or declaration of law. In *Surjit Singh Kalra Vs. Union of India (UOI)* and *Another*, the Apex Court observed that Court can at times supply words which have been accidentally omitted having regard to the context and object and construe harmoniously the provisions to

advance the remedy intended by the Statute by adopting a purposeful construction. It was held therein as follows :-

"The tenant cannot be allowed to take up defence u/s 14(1)(e) as against an application u/s 14B. There cannot be any defence unconnected with or unrelated to the claim or right of the plaintiff or applicant. That would be against our jurisprudence. It is unlikely that the legislature intended the result for which the counsel for the tenant contended. It will be a mechanical interpretation of the enactment defeating its purpose. Such an interpretation has never found favour with the Courts which have always adopted a purposive approach to the interpretation of statutes. Section 14B and other allied provisions ought to receive a purposeful construction and sub-section (5) of Section 25B should be so construed as to implement the object and purpose of Sections 14B to 14D. It is the duty of the Court to give effect to the intention of the legislature as expressed in Sections 14B to 14D".

"19. True it is not permissible to read words in a statute which are not there, but "where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meaning, it is permissible to supply the words" (Craies Statute Law, 7th edn., p.109). Similar are the observations in *Hameedia Hardware Stores, represented by its partner S. Peer Mohammed Vs. B. Mohan Lal Sowcar*, where it was observed that the Court construing a provision should not easily read into it words which have not been expressly enacted but having regard to the context in which a provision appears and the object of the statute in which the said provision is enacted the Court should construe it in a harmonious way to make it meaningful. An attempt must always be made so to reconcile the relevant provisions as to advance the remedy intended by the statute. (See : *Sirajul Haq Khan v. Sunni Central Board of Waqf*) 1959 SCR 1257."

20. We have carefully considered the submissions of the learned counsel appearing on either side. So far as the challenge made on the ground of lack of legislative competence in the Parliament to enact Section 11B of the Act is concerned, we are of the view that the submission is not well merited and deserves to be rejected. The decisions in *R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad*, and AIR 1972 SC 946 (*Ashoka Marketing Ltd. v. State of Bihar and Another*), turned purely on the scope or powers of the State Legislature under Entry 54 of List II of the VII Schedule to the Constitution of India and not in the context of a consideration of the legislative powers of the Parliament under the Constitution.

21. In *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, , a Constitution Bench of seven learned Judges of the Supreme Court had an occasion to deal with a challenge made on the ground of want of legislative competence to Section 37(1) and Section 46(2) of the Bombay Sales Tax Act, 1959 as applicable to Gujarat State which provided for penalty as also

forfeiture of the amounts collected in contravention of Sections 15A and 46 of the said Act. The Apex Court repelled the challenge upholding the legislative competence of the State Legislature to enact such a provision in exercise of its powers under Entry 54 of List II of VII Schedule to the Constitution. V.R. Krishna Iyer, J. while speaking for the majority view, observed as hereunder :-

"24. In a developing country, with the case of the people illiterate and below the poverty line, and most of the commodities concerned constitute their daily requirements, we see sufficient nexus between the power to tax and the incidental power to protect purchasers from being subjected to an unlawful burden. Social Justice clauses, integrally connected with the taxing provisions, cannot be viewed as a mere device or wanting in incidentality. Nor are we impressed with the contention turning on the dealer being an agent (or not) of the State vis-a-vis sales tax; and why should the State suspect when it obligates itself to return the monies to the purchasers? We do not think it is more feasible for ordinary buyers to recover from the common run of dealers small sums than from government. We expect a sensitive government not to bluff but to hand back. So, we largely disagree with Ashoka Ashoka Marketing Ltd. Vs. State of Bihar and Another, while we generally agree with R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, . We must mention that the question as to whether an amount which is illegally collected as sales tax can be forfeited did not arise for consideration in Ashoka."

22. Even that apart, the conferment of residuary powers upon Parliament with the exclusive authority to make any law with respect to any matter in the concurrent list or Union list inclusive of the power of making any law imposing a tax not mentioned in either of those lists as also the powers under Entry 97 of List I was not the subject matter of consideration in those decisions which dealt with indisputably a challenge to State Legislations. It is not the stand of the petitioners that a provision of the nature envisaged u/s 11D of the Act falls within the purview of any matter enumerated in the concurrent list or state list and that being the position, it is but inevitable and necessary for us to hold that the Parliament had the necessary legislative competence to enact Section 11D in the Act and the challenge made in this regard is nothing but a sheer exercise in futility. It is by now well settled that a legislative measure need not necessarily be confined to any one topic of legislation or enumerated entries and it can encompass powers conferred under more than one entries. Consequently, it cannot be successfully contended for the petitioners that a law relating to Central Excises and Salt Act in question must be only referable to and have its source and origin in Entry 84 only and not any other entries or the powers inclusive of the undisputed residuary powers of Parliament under Article 248 of the Constitution read with Entry 97 of List I of the Constitution. In view of the above conclusion of ours, we are unable to subscribe to the view taken by the Division Bench of the Andhra Pradesh High Court in Luxmi Starch Limited case (supra) that Section 11D of the Act requires to be read down to sustain its constitutionality. In our view, the challenge to Section 11D of the Act on the

ground of lack of legislative competence has to fail and shall stand rejected.

23. It becomes necessary now to consider the further submission on behalf of the petitioners that the absence of any machinery or the notification specifically of the authorities to deal with, determine and adjudicate upon any claim or objection as to whether or not a manufacturer has collected any amount from the buyer of any goods in any manner as representing duty of excise when really no such excise duty was payable to cast an obligation on him to forthwith pay the amount so collected to the credit of the Central Government renders the impugned exercise undertaken by the respondents by the issue of the demand-cum-show cause notices totally without jurisdiction and that the very demand-cum-show cause notice is not only arbitrary and unreasonable but also renders the same unconstitutional and liable to be set aside as being violative of Article 14 of the Constitution of India. Section 11D of the Act inserted by Central Act 40/1991 with effect from 20.9.1991 reads as follows :-

"11D. Duties of excise collected from the buyer to be deposited with the Central Government :-(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, every person who has collected any amount from the buyer of any goods in any manner as representing duty of excise, shall forthwith pay the amount as collected to the credit of the Central Government.

(2) The amount paid to the credit of the Central Government under sub-section (1) shall be adjusted against the duty of excise payable by the person on finalisation of assessment and where any surplus is left after such adjustment, the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of Section 11B and the relevant date for making an application under that section in such cases shall be the date of the public notice to be issued by the Assistant Collector of Central Excise."

A perusal and analysis of Section 11D would go to show that an obligation or liability is caused, no doubt, upon every person who has collected any amount from the buyer of any goods in any manner as representing duty of excise to forthwith pay the amount so collected to the credit of the Central Government. But in case where the person concerned or the manufacturer who is alleged to have so collected any amount as representing duty of excise does not admit such collection or as a matter of fact disputes any such collection there should inevitably be some machinery provisions or notified authorities which could entertain such claim or on its own initiate any action to deal with and determine such disputes before saddling with any person accused of having so collected a sum as representing excise duty a liability to pay to the credit of the Central Government such amount or to render such person liable on his failure to do so in spite of such determination to be proceeded against to recover the same under the provisions of the Act. Section 12E and particularly some of the

provisions incorporated in Chapter III of the Act deal with the powers and duties of Central Excise Officers who are enabled to exercise the powers and discharge their duties conferred or imposed under the Act or on any other Central Excise Officer who is Subordinate to him. In exercise of such powers so conferred, any Central Excise Officer duly empowered by the Central Government is enabled to summon persons to give evidence and produce documents in inquiries under the Act. Section 11 of the Act provides for recovery of any duty and any other sums of any kind payable to the Central Government by availing of the procedure deeming the said amount as if it were an arrear of land revenue. In spite of all the above provisions, we find and notice a conspicuous omission in Section 11D of the Act any provision whatsoever to initiate any proceedings or entertain and adjudicate upon any dispute with reference to the liability to pay any amount said to have been collected by a person who was said to have so collected the amount from the buyer of any goods in any manner as representing the duty of excise but who seriously disputes or denies of having so collected. Neither any such provision is specifically made in Section 11D of the Act itself nor the statutory provision at last leaves it to the rule making authority to make rules to provide for such machinery by engrafting any suitable enabling provision therefor, nor does any rule as such appear to have been made also to give effect to the purposes of the Act by providing any such machinery.

Though when Section 11B was introduced by Act 25/1978 with effect from 17.11.1980 by a subsequent Central Act 40/91 with effect from 20.9.1991, a provision was enacted in Section 37 enabling the Central Government to prescribe the form in which the application for refund u/s 11B could be made in addition to stipulating the manner in which such claims have to be considered and disposed of having been specifically provided in Section 11B itself, the provisions contained in sub-section (2) of Section 11D also have relevance to cases of claims of refund only and do not deal with a situation like the one before us, wherein a dispute in respect of a basic jurisdictional issue is seriously raised. The submission of the learned Senior Counsel on behalf of the petitioners assumes great significance and importance in this context particularly having regard to the fact that Sections 11A, 11B and 11C deal with only recovery, refund, etc. of duties and not any sum collected representing it to be the duty but not really duty. Section 11A of the Act is attracted only when any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded and in respect of cases where there is no imposition of a charge or duty under the Act and the recovery or erroneous refund of such is not involved for consideration. The submission of the learned Senior Counsel for the petitioners that unlike the situation contemplated u/s 11A of the Act, Section 11D does not deal with a claim in respect of a duty as such, but an amount said to have been collected as representing duty when no such duty was actually exigible under the Act and, that, therefore, Section 11D of the Act cannot be considered to deal with a case of recovery of a duty exigible under the Act so as to attract automatically the procedure that may be available to a Central Excise

Officer u/s 11A of the Act, cannot be lightly brushed aside as of no significance or merit. On a careful consideration of the scope of Section 11A, we are of the view that the machinery or procedure contemplated u/s 11A can be said to be available only when any of the contingencies visualised under the said provision arise or exist viz., when any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded. The provisions of Section 11A, in our view, definitely postulate and designed to deal with a case of duty otherwise exigible under law as duty leviable under the Act which happen due to some mistake or error to be not levied or paid or has been short levied or short paid or erroneously refunded. The words "short paid" or "not paid" cannot be said to have relevance or by any means claimed to refer to even cases of any other payment or sum payable which is not really payment of duty leviable or exigible under the Act. Short levy, or short payment or erroneous refund equally postulates a pre-existing order of assessment or adjudication of duty liability by a competent authority under the provisions of the Act observing the procedure prescribed therefore or on compliance with the principles of natural justice and cannot by itself enable an Excise Officer to have resource to the procedure visualised u/s 11A of the Act to a case arising u/s 11D which really do not deal with a case of non-levy of duty or short levy or short payment of duty or erroneous refund of any such duty. On the other hand, having regard to the fact that Section 11D deals with a case where there was no liability to duty as such under the Act, but yet a person or a manufacturer has chosen to collect any amount from the buyer of goods as representing duty of excise but not really in law an excise duty, there is no scope or justification to deal with a case arising u/s 11D invoking the machinery u/s 11A in the absence of any independent provision as such either u/s 11A of the Act enabling application of such machinery to cases u/s 11D or otherwise permitting the attraction or applicability of such procedure u/s 11A by deeming a sum due u/s 11D as the duty liable under the Act or any other provisions of the Act providing for entertaining a claim or determining or adjudication of such a claim or a dispute in this regard in respect of the factum of actual collection of any amount as representing the duty of excise though no such duty under the Act is leviable or exigible under the provisions of the Act. No doubt, the power to legislate with respect to a tax comprehends the power to impose the tax, to prescribe the machinery for collecting the tax, to designate the officers by whom the liability may be enforced and to prescribe the authority, the obligation and indemnity of those officers. All claims or nature of transactions visualised and encompassed by Section 11A alone shall fall under the governance of the computation provisions contemplated therefore and a claim or transaction to which those provisions cannot be applied must be regarded as never intended by Section 11A of the Act to be the subject matter of the said provision. Consequently, a claim or liability visualised u/s 11D which does not really deal with any such situation or nature of claim as visualised or really and only falling u/s 11A cannot, therefore, be dove-tailed or read into Section 11A so as to attract or avail of the machinery or procedure contemplated or prescribed in Section 11A to deal with even a claim not really falling within

Section 11A but only arising u/s 11D of the Act. The nature of liability and charge or claim dealt with u/s 11A on the one hand and Section 11D on the other being distinct and different in character and etymologically too there is no scope for clubbing the same together so as to treat them on par or as one and the some de hors their heterogeneity even for purposes of computation and adjudication of the claims in the absence of a specific provision enabling the respondents to do so. It is by now, no doubt, well settled that the provisions in a taxing statute dealing with the machinery provisions have to be construed by the ordinary rules of construction, that is to say, in accordance with clear intention of the legislature which is to make a charge levied effective. The interpretation of a taxing provision has been held to necessarily involve the application of the well settled rule that construction should be preferred which makes the machinery workable, "ut res valeat potius qua pereat." In Whitney's case (1926) A.C. (37), Lord Dunedin made the following observations :-

"My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the Statute should not go on to make that liability effective. A Statute is designed to be workable and the interpretation thereof by a Court should be to secure that object unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax : there is the declaration of liability, that is the part of the Statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend upon assessment. That ex-hypothesis has already been fixed. But, assessment particularises the exact sum which a person liable has to pay. Lastly, come the method of recovery, if the person taxed does not voluntarily pay."

This classic statement of law has often been quoted with approval by the Apex Court as well as this Court in number of cases.

24. We have endeavoured to consider the stand taken for the Union of India by the learned Senior Counsel appearing for the respondents with all and required care and caution, but yet, we are unable to accept the stand for the respondents for the obvious reason that the case before us is not one of dealing with a defective provision in a taxing statute dealing with the machinery for assessment and the need for construction thereof as ordained, in a manner, preferably to carry out the clear intention of the legislation and to make a charge levied effective; on the other hand, in our view, we are faced to deal with a case of total absence of any provision or lack of any machinery provision for assessment or adjudication of any claim of the nature visualised u/s 11D of the Act which is a distinct claim not like the other claims under Sections 11A to 11C of the provisions of the Act, which is striking contrast to Section 11D deal with only a claim relating duty exigible under the Act.

In view of the above, we are of the view that the impugned proceedings issued in the nature of demand-cum-show cause notices are totally without jurisdiction and, therefore, liable to be and are hereby quashed. By doing so, we are not to

be understood to have wiped of the liability created u/s 11D or exonerated the petitioners from liability to pay to the credit of the Central Government any amount by the petitioners, if they have really been found to have collected from the buyer of any goods as representing duty of excise when there was no liability at all in respect of such goods under the Act. On the other hand, we categorically declare that the statutory liability and obligation case upon the petitioners if they have really been found to have collected any amount from the buyer of any goods in any manner as representing the duty of excise to pay the amount so collected to the credit of the Central Government preserved, protected and kept intact and is not in any manner interfered with or undermined by this order. On and from the date on which the respondent-Union of India take steps and provide for the required machinery, it shall be open to the respondent-Union of India or designated authority as the case may be to work out or quantify and determine the liability in the manner so prescribed or provided for in any liability thereof and recover the same in accordance with law. The consequence of our quashing the impugned proceedings is only to declare the position that the authority which has chosen to issue the impugned proceedings is neither the competent authority, nor the provisions sought to be relied upon by the said authority are the proper or legal procedure to be followed or observed or powers which could be legislatively invoked in undertaking an adjudication of a liability visualised u/s 11D of the Act when disputed and not only we declare such liability to be preserved for being vindicated and enforced but only in accordance with law but we grant such liberty to so determine and adjudicate the liability of the petitioners in accordance with law relating to the machinery provision that may be enacted. It is also well settled that the absence of a machinery provision does not per se is destructive of the liability otherwise created as a charge which would always subsist till the same is properly quantified, notified and enforced in accordance with law or till such time as the claim becomes time barred or unenforceable due to operation of law.

25. For all the reasons stated above, we declare Section 11D of the Act is valid piece of legislation; but we allow the writ petitions on the only ground of lack of authority in the respondents 2 to 4, particularly the 4th respondent to issue the notices impugned in these writ petitions, at the same time preserving the liability created u/s 11D to be intact to be vindicated, adjudicated and enforced in accordance with law that may be made providing for the adjudication and determination as well as quantification of such liability. The writ petitions are allowed to the above limited extent with the liberties as indicated. No costs.

26. In view of the final orders passed in the writ petitions, no further orders are necessary in the W.M.Ps.