

(1986) 08 BOM CK 0011

In the Bombay High Court

Case No : Writ Petition No. 1300 of 1986

GTC Industries Limited and another

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 11-08-1986

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 3(3)
Central Excise Rules, 1944 — Rule 8, 8(1), 8(3)
Central Excises and Salt Act, 1944 — Section 12, 3(1), 3(2), 3(3), 37
Constitution of India, 1950 — Article 226, 32

Citation : (1987) 11 ECC 33 : (1989) 23 ECR 239 : (1986) 25 ELT 925

Hon'ble Judges : R.A. Jahagirdar, J

Bench : Single Bench

Judgement

1. The first petitioner is a company incorporated under the Companies Act, 1956 having its registered office within the jurisdiction of this Court. The second petitioner is the Secretary of the first petitioner company which is engaged in the manufacture and marketing of cigarettes of various kinds and packed in different quantities. The petition states that the petitioners follow a uniform practice and pattern in selling and marketing the cigarettes. This pattern consists of the supply of the cigarettes to the wholesale buyers throughout the country who in turn sell them to the retailers, the latter coming in contact with the ultimate consumers. On the packets containing the cigarettes there is always market a price which is mentioned as the maximum retail price excluding local taxes, if any. The petition describes in some details the distribution system under which the petitioner's products are sold. In paragraph 8 of the petition it has been specifically stated that under the rules made under the Standard of Weights and Measures Act, 1976, the rules being called the Standard of Weights and Measures (Packed Commodities) Rules, 1977, manufacturers who pack goods in package intended for retail sale are required to mention on each package the maximum sale price of the retail packet. In accordance with the requirement of the said Rules, the packets of cigarettes sold by the petitioners also are stamped

with the maximum sale price.

2. Cigarettes are subjected to excise duty. The excise duty is leviable in the cigarettes under the Central Excises and Salt Act, 1944, hereinafter referred to as the "Excise Act". In addition, under the Additional Duties of Excise (Goods of Special Importance) Act, 1957, additional duties of exercise are leviable on such cigarettes. In theory, the excise duty may be either on ad valorem basis, that is, the duty being related to the value of the product, or the duty may be specific in the sense a given excise duty is levied upon the quantity of the product. Section 3(1) of the Excise Act provides for the levy and collection of duties of excise on all excisable goods in such manner as may be prescribed and at the rates set forth in the First Schedule. Subsequently this Schedule has been deleted from the Excise Act of 1944 and has been annexed as Schedule to the Central Excise Tariff Act, 1985. Provision has been made for this change in Section 3 of the Excise Act as amended in the year 1985. For the sake of convenience, the rates of duty formerly mentioned in the First Schedule to the Excise Act of 1944 and now in the schedule to the Central Excise Tariff Act, 1985 can be referred to as the statutory rates. Amendment consequent to the introduction of the Schedule to the Central Excise Tariff Act, 1985 has come into effect from 1st of February 1986.

3. Sub-section (2) of Section 3 of the Excise Act provides that the Central Government may, by notification in the Official Gazette, fix, for the purpose of levying the duties, tariff values of any articles enumerated, either specifically or under general headings, in the Schedule to the Central Excise Tariff Act, 1985 as chargeable with duty ad valorem. In other words, by issuing a notification the Central Government can fix a valuation for the purpose of levying ad valorem duty of items mentioned in the Schedule. The tariff values so fixed by the Government notification may be fixed for different classes or descriptions of the same excisable goods or for excisable goods of the same class or description produced or manufactured by different classes of producers or manufacturers or sold to different classes of buyers. Wide discretion is thus left to the Government for fixing tariff values under sub-section (3) of Section 3 of the Excise Act.

4. There is also an additional provision, namely, Section 4, which defines what would be the value of excisable goods chargeable to duty under the Excise Act. Detailed provision has been made for the manner in which this valuation is made. Reference has been made by me to these provisions only for the purpose of understanding the scheme of the Excise Act though on the facts of the present case the provisions of these Sections are not strictly attracted. Reference, however, will have necessarily to be made to these provisions in the light of the arguments advanced by the parties in support of their respective cases.

5. Prior to November 1982 the Excise duty levied in respect of cigarettes was on an ad valorem basis, which meant that the rates had to be determined on the percentage of the value as worked out u/s 4 of the Excise Act. In practice, however, all the excisable goods need not be subjected to the duty mentioned in

the Schedule. Section 37(xvii) of the Excise Act empowers the Government to exempt any goods from the whole or any part of the duty imposed by the Act, which means that a rule may be made in exercise of the powers vested in the Central Government u/s 37(xvii) to exempt any excisable goods from the whole or any part of the duty imposed under the Act. Apart from Section 37, there are other provisions like Section 6 and Section 12 in the Excise Act under which the Central Government is required to make rules.

6. In exercise of the powers vested in the Central Government by Sections 6, 12 and 37, the Central Government has made rules which are called the Central Excise Rules, 1944, hereinafter referred to as "the Rules". Rule 8 of these Rules has obviously been made in exercise of the powers vested in the Central Government u/s 37(xvii) of the Excise Act because it is entitled "Power to authorise exemption from duty in special cases". This rule itself does not exempt any goods from excise duty payable under the Excise Act, but it again empowers the Central Government to exempt any excisable goods from the whole or any part of the duty leviable on such goods, subject to such conditions as may be specified in the notification. It would be advantageous to reproduce the rule in so far as it is relevant for the purpose of this petition. It is as follows :-

"8. (1) 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.

* * * * * (3) An exemption under sub-rule (1) or sub-rule (2) in respect of any excisable goods from any part of the duty of excise leviable thereon (the duty of excise leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any excisable goods in the manner provided in this sub-rule shall have effect subject to the condition that the duty of excise chargeable on such goods shall in no case exceed the statutory duty.

Explanation - "Form or method", in relation to a rate of duty of excise, means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty is leviable".

7. On 1st of March 1983 the Central Government issued a notification in exercise of the powers conferred on it by Rule 8(1) of the Rules read with Section 3(3) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957. This notification relates to the exemption to be granted for cigarettes from the duty mentioned in the Schedule. The notification prescribed different slabs and provided exemption on a decreasing scale. The effect was that the excise duty was on an increasing scale. It provided, for example, that cigarettes of which the adjusted sale price per one thousand did not exceed Rs. 50, the excise duty was

Rs. 35 per one thousand. If however, such adjusted sale price exceeded Rs. 50 but did not exceed Rs. 60, the excise duty would be Rs. 35 per one thousand plus Rs. 3.50 paise per one thousand for every increase of Rs. 5 or fraction thereof. A similar increased rate was provided in the third slab, namely, where the adjusted sale price per one thousand cigarettes exceeded Rs. 60. "Adjusted sale price" was explained to mean, for the purpose of this notification, the unit price arrived at by dividing the sale price of such package by the number of cigarettes in such package. In other words, if a packet of cigarettes contained twenty cigarettes and the sale price of such packet was Rs. 2 then the adjusted sale price for the unit would be arrived at by dividing 200 paise by 20 paise. "Sale price" was also explained to mean, in relation to a package of cigarettes, the maximum price (exclusive of local taxes only) "at which such package may be sold in accordance with the declaration made on such package". Reading the notification as a whole including the explanations of the words "adjusted sale price" and "sale price", it could be seen that under the said notification of 1st of March 1983 excise duty was always less than the price which was carried on the packets of the cigarettes.

8. The petition traces to some extent the history of the action taken by the Excise Department of the Government of India in recent times. In particular, it has been mentioned that respondents Nos. 2 and 3 being Collector and Additional Collector respectively of the Central Excise are proceeding to levy excise duty by taking into consideration the price of the cigarettes at which the retailers ultimately sell the same. In order to show that the procedure which is thus followed by the respondents is not only not warranted by law but is also unfair and unjust, the petitioners have given in sufficient details the picture of the distribution system through which cigarettes are ultimately sold. However, the respondents have contended, which contention is naturally contested by the petitioners, that by virtue of the difference between the interest paid on the amount of security deposit placed with the petitioners by the wholesale buyers and the interest paid by the wholesale buyers to the petitioners in respect of the credit facilities availed of by them earned by the petitioners, the petitioners have reduced the assessable value of the cigarettes manufactured by them. It is so stated in paragraph 28 of the petition. From what has been stated in the petition it also appears that the respondents are contending that part of the excess amount recovered by the retailers over and above the price stated on the packages flows back to the petitioners. The respondents, therefore, have proceeded to ignore the concept of the adjusted sale price as mentioned in the notification and taken certain action on the basis that the valuation of the product could be made on the actual retail price at which the cigarettes are sold.

9. The Excise authorities in Bombay and Baroda have issued two show cause notices, which have been challenged on different grounds by the petitioners in a writ petition in this Court, being writ Petition No. 67 of 1984. It has been stated that the said petition has been admitted and further proceedings pursuant to the show cause notices were stayed. Thereafter the respondents filed an appeal

where the Division Bench dealing with the appeal varied the interim order of stay by permitting the respondents to continue with the hearing of the show cause notices, but restrained them from communicating the orders thereon. A third show cause notice was also issued and in order to include a challenge to the same, Writ Petition No. 67 of 1984 has been amended.

10. By a communication dated 28th of January 1986, a copy of which is annexed to the petition as Exhibit "C", the petitioners were informed that though the adjusted sale price of the cigarettes known by the brand name of "Golden Style Filter Kings" was Rs. 170 per one thousand cigarettes, it was reported that the petitioners were recovering more than Rs. 170 and, therefore pending the enquiry being made the petitioners should pay duty on the same on the basis that the adjusted sale price exceeded Rs. 170. The petitioners filed a petition, being Writ Petition No. 206 of 1986, against the said decision of the respondents. Bharucha J. was not satisfied that there was a case for issuing rule. He was also of the opinion that interference at the stage of provisional assessment was not called for. However, following the order of the Gujarat High Court the respondents were directed to finalise the investigation and issue the show cause notice within eight weeks. This order was passed by Bharucha J. on 7th of February 1986.

11. Against the aforesaid order the petitioners preferred an appeal, being Appeal No. 83 of 1986. The appeal was admitted by the Division Bench of S.K. Desai and Kurdukkar JJ. When, however, motion for interim relief in the appeal was taken up the petitioners agreed to withdraw the appeal since they stated that the respondents had agreed to permit the petitioners to clear the cigarettes at the rate of Rs. 170 provisional basis under Rule 9B of the Rules. The petitioners were, however, permitted to challenge any final order that may be passed as a result of the said investigation. A copy of the order of the Division Bench dated 25th February 1986 has been annexed to this petition as Exhibit "D". The appeal was, therefore, dismissed as not pressed.

12. It is clear, therefore, that in previous proceedings the petitioners have contended that the respondents are not entitled to consider any price other than the adjusted sale price mentioned in the notification as the basis for determining the value of the product manufactured by them for the purpose of levying and calculating excise duty. In the proceedings which ended by the order of the Division Bench on 25th February 1986, liberty was given to the petitioners to challenge any final order that may be passed by the respondents an order that would be based upon the stand of the respondents that excise duty could be levied on the basis of valuation other than the one which is mentioned in the notification. Detailed submissions have been incorporated in this petition on what the petitioners regard as the unjust and illegal approach of the respondents by taking into account a factor which is not strictly provided for in the notification issued under Rule 8. What is mentioned in the notification is the adjusted sale price with reference to which excise duty is to be levied and collected. The

petitioners contend that the respondents are taking into account something more and something different from what is permitted under the notification. Since, however, that question was raised by the petitioners in an earlier proceeding and they were allowed to agitate on the question after a final order is passed, it is not proper for me to go into that question. A further show cause notice dated 4th April 1986 has been issued to the petitioners. Reference to the same has been made by the petitioners in the petition. Submissions have been made that this show cause notice of 4th April 1986 is not authorised by law for the same reason which has been urged by the petitioners in the earlier writ petition. The petition itself in its prayer clause does not challenge the validity of this show cause notice, nor does the petition ask for setting aside the said show cause notice. This is presumably because liberty has been given to the petitioners to challenge the final order that may be passed in those proceedings.

13. However, in this show cause notice dated 4th April 1986 reference has been made by the authorities to the provisions of Notification No. 201 of 1985 dated 2nd of September 1985 as amended by subsequent notifications on 20th September 1985 and 10th of February 1986. Though a copy of the said notification was not annexed to the petition, it has been made available at the time of the final hearing of this petition in a compilation which includes several other notifications. The format of the exemption to be granted under the provisions of the notification issued under Rule 8 to be found in the earlier notification has been retained but with certain drastic changes which, according to the petitioners, are totally alien to the scheme of the Excise Act and which are also irrational and impracticable. Instead of the three slabs which were to be found in the previous notification, this notification of 2nd September 1985, amended subsequently, provides for five slabs. The objection of the petitioners is not to the number of slabs as such but to what they call the wholly unworkable and impracticable scheme as embodied in this notification.

14. This notification provides that where the adjusted sale price per one thousand cigarettes does not exceed Rs. 60 the effective excise duty would be Rs. 42 per one thousand. Objection has not been, and could not probably be, taken to this particular provision. In the second slab, which relates to the adjusted sale price per one thousand cigarettes being in excess of Rs. 60 but not in excess of Rs. 170, the effective rate of excise duty has been fixed at Rs. 125 per one thousand. In other words, if the adjusted sale price per one thousand cigarettes as understood in the light of the explanation to the notification is above Rs. 60 but upto Rs. 170, then the excise duty that is payable will be Rs. 125 which means where the cigarettes are sold at the rate of Rs. 61 per one thousand, excise duty payable on the same would be Rs. 125. Similar anomaly is to be found in the third slab also where an effective excise duty of Rs. 225 is to be levied on cigarettes the adjusted sale price of which exceeds Rs. 170 per one thousand but does not exceed Rs. 300.

15. Illustrations of what the petitioners call the absurdities that would result from

the application of this notification have been given in paragraph 36 of the petition. It has been contended, and not without justification, that in order to market and sell cigarettes of which the adjusted sale price would, for example, be Rs. 125 per one thousand, the petitioners would have to pay excise duty from thereon pocket and would not, naturally, be able to recover or pass it on to the consumer. An alternative for the petitioners would be to sell the said brand of cigarettes at the maximum price of Rs. 170 per one thousand as prescribed in the second slab. This alternative would result in the price of the same brand of cigarettes being increased from Rs. 90 to Rs. 170 per one thousand. The petitioner's grievance is that if this is the result there would be no commercial market at all for the cigarettes at the prices which will have to be worked out in view of provisions contained in the notification.

16. As already mentioned above, the petitioners have challenged respondents move to equate the actual retail price to the adjusted sale price. Considerable arguments have been advanced during the course of the hearing of this petition that this cannot be done. Several submissions have also been made in the petition contending that the adjusted sale price has been defined in the notification. It is the price which is printed on the cigarette packets. It has been contended that there is no provision in the Excise Act or the Rules or even in the notification to go behind this price for fixing what the department may regard as the correct valuation for the levy and collection of excise duty. It has been urged that manufacturers of cigarettes such as the petitioners have control over the retail price. It may be noted that the prices are marked on the packets of cigarettes as on the packets of several other commodities under the provisions of the Standard of Weights and Measures Act, 1976. It has been argued that if that if the retailers are selling the cigarettes at a price higher than the one which is printed on the packets of cigarettes, the retailers may, if the Government so desires, be prosecuted for contravention of the Weights and Measures Act or of the rules made thereunder. As far the levy and collection of excise duty is concerned, it can be only in the basis of the adjusted sale price as defined in the notification. The authorities are not entitled to proceed, in the absence of a tariff value fixed u/s 3(2) of the Excise Act in the absence of a valuation calculated under the provisions of Section 4 of the said Act, to fix their own valuation as equivalent to the adjusted sale price. The respondents may, if they so think fit, take action against the petitioners, if there is such provision for action, for making a false declaration if it is proved that the marking of the price on the cigarette packets amounts to a false declaration.

17. These are very interesting and, I would regard, very serious and weighty arguments but, as already mentioned above, that challenge has to be taken by the petitioners pursuant to the liberty given to them in the earlier proceedings against any final order that may be passed. Again, as mentioned above, the show cause notice dated 4th of April, 1986 has not been specifically challenged. No relief has been claimed in the prayer clause against the said show cause notice. This is again, for the obvious reason that the petitioners were allowed to

challenge any final order that may be passed in proceedings which includes the issuance of the show cause notice dated 4th of April 1986. It would not be, therefore, correct to consider these various arguments which have been advanced against the action of the respondents which, according to the petitioners, takes into account the retail prices for the purpose of levying and collecting excise duty.

18. However, the challenge to the notification dated 2nd of September 1985, as subsequently amended, remains to be considered. The petitioners have prayed for an appropriate writ, order or declaration declaring the notification dated 1st of March 1983 at Exhibit "A" to the petition or any one or more of the notification mentioned in clause (iii) of prayer (b) to be ultra-vires, null and void. The notification dated 2nd of September 1985 is mentioned in sub-clause (iii) of prayer (b) Accordingly arguments have been advanced challenging the validity of the said notification dated 2nd September 1985 though, as mentioned above, originally a copy of the said notification was not annexed to the petition. It has also been prayed in the alternative that the phrase "adjusted sale price" means and must be read to mean the value as defined by Section 4 of the Excise Act. Similarly it has also been prayed that it be declared that the respondents are not entitled to levy excise duty on the cigarettes manufactured by the petitioners on the basis of the actual retail price thereof and that the excise duty can only be levied on the basis of the price printed on the cigarettes packets. For reasons which I have already mentioned above I will not consider the challenge to the action of the respondents in taking into consideration the actual price for the purpose of valuation of the product for the purpose of levy and collection of excise duty because that is the subject matter of different proceedings. After going through the prayer clauses it is seen that after deleting the challenge made to the action of the respondents of considering the retail prices for the valuation of the product for the purpose of levy and collection of excise duty, the challenge that remains is only to the validity of the notification dated 2nd of September 1985 as amended from time to time.

19. The challenge is made on several grounds by Mr. Setalwad, the learned Advocate who appears in support of the petition. In the first place it has been stated that if the action of the respondents is upheld it is difficult for the manufacturers to know in advance what would be the excise duty payable by them. This necessarily would result in the petitioners losing large amounts of money which they would be paying as excise duty without being able to pass on the same to the consumer. In so far as this argument is based upon the fact that the respondents are taking into account the actual retail price, the same cannot be considered in this petition. If it is the contention of the petitioners that even if the adjusted sale price is taken into consideration the petitioners will not be in a position to know in advance what excise duty they would have to pay, the said contention is not sustainable. As Mr. Dhanuka, the learned Advocate appearing for the respondents, has rightly pointed out the manufacturers are told in advance what could be the excise duty payable by them for the cigarettes falling

within a particular price range. If this is so it is not correct to say that the manufacturers do not know in advance what excise duty they would be called upon to pay.

20. It has next been urged that the action of the respondents in relating the value of the product for the purpose of levy and collection of excise duty to the price mentioned on the cigarettes packets compels the petitioners to fix the retail price. In other words, by an action which is apparently taken under the provisions of the Excise Act the petitioners are being compelled to fix prices of their products which is, according to the petitioners, not permissible. It is impossible to accept this contention of the petitioners. The basis of levy and collection of excise duty mentioned in the notification does not, in my opinion, compel the petitioners to fix any price. The prices are already fixed and with reference to the same the excise duty has to be calculated, levied and collected. In any case, every levy of excise duty must necessarily compel the manufacturer of a product to fix a price which price has to take into account not only the manufacturing cost and the profit margin of the manufacturer but also the excise duty that is payable under the Excise Act. If the excise duty is valid and legal, the manufacturers cannot make a grievance that they are compelled to fix the prices of their products as a result of the imposition of excise duty.

21. The third challenge of the petitioners is somewhat legitimate. As already mentioned above, under some of the slabs which have been prescribed by the notification dated 2nd of September 1985 as amended from time to time, the excise duty that is payable is higher than the price of the product itself. The petitioners naturally have a legitimate grievance that if their products are of a particular price range then they will have to pay excise duty out of their own pocket without being able to recover any money for their manufacturing cost, let alone for their profits. In the petition it has been stated, and it has been urged with justifiable persistence, that such a formula is unworkable, absurd and in fact discloses non-application of mind on the part of the authority issuing the notification. Those notifications issued in exercise of the powers conferred by Rule 8, which rule itself has been framed u/s 37(xvii) of the Act, can be struck down as being absurd and as a result of non-application of mind. It is not necessary for me to proceed to give other examples of the unworkable nature of the formula which has been incorporated in the impugned notification. In fact when I asked Mr. Dhanuka to give an illustration as to how the respondents would work out the excise duty in the first parts of the Second and Third slabs he was frankly unable to say anything on the subject. The only reply which Mr. Dhanuka was able to give was that the notification has been issued in valid exercise of a power validly conferred upon the Government and merely because certain parts of the said notification are found to be unworkable or impracticable the Court cannot set aside the said notification. Moreover, says Mr. Dhanuka, the manufacturers know in advance what excise duty is payable and if according to them products falling within a particular price range would not be manufactured or their products cannot be said to be within a particular price range, they are at

liberty to arrange their affairs and manufacture their products in such a manner as to go within a particular price range where they may make legitimate profits.

22. If the notification were the exercise of an executive action or an order made in exercise of an executive power it would have been possible for me to examine the contention in this regard in greater details and, probably, the action which apparently creates an absurd situation could have been struck down on the ground that it discloses a non-application of mind. The formula incorporated in the impugned notification undoubtedly creates incongruous situations. If it were the result of an executive action or the result of an order passed in exercise of an executive power it could have been said that it is not a legitimate or a proper exercise of executive power. But in the instant case the notification in question is legislative in character though it is the result of delegated legislation. The notification has been issued in exercise of the power conferred upon the Central Government under Rule 8 which rule also has been framed by the Central Government in exercise of the powers conferred upon it by Section 37(xvii) of the Excise Act. A legislation cannot be struck down on the basis that it discloses non-application of mind or that it creates an absurd situation. The criteria on the basis of which the validity of the executive actions can be judged cannot be applied while judging the validity of a legislation.

23. The validity of a legislation can be questioned on the ground that it is in contravention of the parent statute which provides for such legislation. For example, the validity of an Act passed by the Parliament can be questioned on the ground that it is outside the legislative competence of the Parliament or it violates the fundamental rights guaranteed by the Constitution. Similarly a rule made under a statute can be challenged on the ground that it is ultra vires the powers conferred upon the rule making authority. Proceeding further, a notification which is issued under a rule can be challenged on the ground that it is not authorised by the rule which is valid. It could conceivably be challenged also on the ground it violates the fundamental rights given by the Constitution. In my opinion, a notification which is legislative in character cannot be struck down on the basis that it is unworkable or it results in certain absurd situations in which situations persons such as the petitioners are not necessarily compelled to go in. I, therefore, reject the contention of the petitioners that the notification must be struck down on the ground that it is unworkable, absurd and discloses non-application of mind.

24. The next plank of attack on the validity of the notification is the contention that the adjusted sale price with reference to which excise duty is to be calculated is a measure which is not permitted by Rule 8 under which the notification has been issued. It has been contended that it is only when a duty is levied on ad valorem basis that it is based or linked up to the value of the commodity in question. According to the petitioners, under the Excise Act when the duty is levied with reference to the value, the value is either the value determined u/s 4 of the said Act or the Tariff value. If the notification is

interpreted in a manner so as to make the duty of excise leviable on the retail price specified on the cigarettes packets, then the same would be ultra vires the Excise Act. It has been so mentioned in paragraph 39 of the petition. The contention has been elaborately enlarged by Mr. Setalwad during the course of his arguments.

25. I have already reproduced the relevant provision of Rule 8 under which the impugned notification has been issued. Sub-rule (3) states that the exemption under sub-rule (1) may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable. According to Mr. Setalwad, the explanation to sub-rule (3) of Rule 8 restricts the meaning of "form or method" to "the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty is leviable". The respondents must now justify the fixation of the basis of exemption by reference to the adjusted sale price which is not to be found at all in the form or method permitted by rule 8. I am not impressed by this argument because the word "valuation" mentioned in the explanation as a form or method permitted by sub-rule (3) can rationally include the adjusted sale price, which is provided for in the notification. The valuation may be made not only on the basis of the manufacturing and other costs but also on the basis of the price fixed by the manufacturers themselves. Mr. Setalwad does not agree. He says that the valuation can only be the one permitted by the provisions such as Section 3(2) or Section 4 of the Excise Act. This contention of Mr. Setalwad cannot be accepted.

26. Sub-section (2) of Section 3 of the Excise Act no doubt provides for the fixation of tariff values of any articles mentioned in the Schedule. Similarly Section 4 provides for valuation of excisable goods for the purpose of charging excise duty. These two methods are undoubtedly provided under the Act. But Mr. Setalwad overlooks the phraseology contained in sub-rule (3) of Rule 8. The said provision specifically permits the grant of an exemption by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable". The provisions of sub-rule (3) of Rule 8, in my opinion, permit the provision of a basis other than the one which is to be found for the levy of statutory duty. The method of relating the valuation to the price marked on the cigarettes packets is wholly permissible under sub-rule (3) of Rule 8. The valuation is easily ascertainable, it has got certainty and it is known in advance to the manufacturers. Even otherwise I do not see why the marked price on the cigarettes packets could not be covered by "other measure" with reference to which the excise duty is leviable as per the explanation to Rule 8(3) of the Rules. The contention that the impugned notification is not in accordance with the provisions of Rule 8 cannot, therefore, be accepted.

27. Before concluding I should mention that Mr. Dhanuka had taken certain preliminary objections. In the first place he had contented that the petitioners

are not persons aggrieved by the notification inasmuch as no action taken pursuant to the said notification has been impugned in the petition. He also contended that a declaration as the one which this Court has proceeded to consider could not be given under Article 226 of the Constitution. Thirdly he said that if the petitioners succeed in their challenge the effective rate of duty will be the one as provided in the Schedule, a situation which Mr. Dhanuka thought would not be welcomed by the petitioners.

28. I have overruled all these preliminary objections. It cannot be contended that the petitioners are not persons aggrieved by the impugned notification. They are manufacturers of cigarettes. Excise duty is to be levied on the products manufactured by them and is to be collected from them, According to them, the law pursuant to which the respondents are to levy and collect the duty is an invalid law. The petitioners are, therefore, directly concerned with the legality and validity of the impugned notification. It cannot, therefore, be said that they are not aggrieved by the said notification. It is not necessary for them, in my opinion, to wait till an action is taken pursuant to the notification which the petitioners say is void ab initio.

29. For the same reason I am also of the opinion that a declaration can be given in a case of this type that the notification is invalid. That is why I proceeded to consider the challenge to the notification. A declaration can be made under Article 226 of the Constitution to get rid of the threat of an illegal action. As early as in *Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and Others*, , the Supreme Court held that a declaration can be given even under Article 32 of the Constitution without any further relief. I do not see why this cannot be done under Article 226 of the Constitution, the scope of which, in some respects, is wider than Article 32. There is a present threat, say the petitioners, from the impugned notification which they say is illegal and void.

30. The next contention that the possible effect of declaring the notification as void would be detrimental to the interests of the petitioners themselves is easily disposed of by pointing out that what is at issue is not what be the effect of the setting aside of the notification. Courts have to consider the legality or the validity of any legislation or executive action without regard to what the consequences of declaring the same as invalid would be, though, of course, the possible consequences may be one of the factors while considering the validity of a legislation. If as a result of the notification being declared as invalid the petitioners are forced to pay additional excise duty it will at worse result in the prices of the cigarettes going up. That itself is no reason which should deter this court from considering the validity of the notification.

31. In the result, this petition fails. Rule is accordingly discharged with no order as to costs.