

(2012) 12 GUJ CK 0125
In the Gujarat High Court

Case No : Special Civil Application No. 8742 of 1999

Gujarat Narmada Valley Fertilizer Co. Ltd.	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision : 13-12-2012

Acts Referred:

Citation : (2017) 345 ELT 50

Hon'ble Judges : Akil Kureshi and Sonia Gokani, JJ.

Bench : Division Bench

Advocate : Shri Kunal Nanavati for Nanavati, Associates, for the Petitioner; Shri Asim J. Pandya, Gaurang H. Bhatt and Varun K. Patel, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Akil Kureshi, J. (Oral)—The petitioners have challenged the validity of a Notification No. 14/1997-C.E. (N.T.), dated 3-5-1997 (here-in-after referred to as "the said notification dated 3-5-1997") as being arbitrary, unreasonable and ultra vires the Constitution. We may notice that the petitioners have also challenged the vires of Section 87 of the Finance Act. Such challenge however, was not pressed.

2. As a consequential relief to the petitioners main challenge to the said notification dated 3-5-1997, they have also prayed for a declaration that restricting the Modvat credit to 10% of the Excise duty as provided in the said notification dated 3-5-1997, is ultra vires the rule making powers under Sections 37(xvi) and (xvii) of the Central Excise Act, 1944. The petitioners have prayed for a consequential relief directing the respondents to permit the petitioners to avail of and utilise the accrued Modvat credit to the extent of excise duty paid on the inputs used namely, specified petroleum products during the period between 23-7-1996 to 28-2-1999.

3. Such challenge arises in the following factual background :

3.1 The Petitioner No. 1 is a company registered under the Companies Act. The Petitioner No. 2 is its office bearer. Petitioner No. 1 company is engaged in manufacture of fertilizers and chemicals falling under Chapters 27, 28, 29 and 31 of the Schedule to the Central Excise Tariff Act. The petitioner company uses excisable goods including Low Sulphur Heavy Stock ("LSHS" for short) and also furnace oil for manufacture of fertilizers and other products. Such purchases were being made by the petitioners from M/s. Indian Oil Corporation without payment of duty under notifications prevalent at the relevant time.

3.2 Case of the petitioners further is and with and which there is no serious dispute raised by the Department that in order to have the maximum output from the integrated facilities installed, part of the quantity of the said inputs namely, LSHS and furnace oil is also utilised inseparably for manufacture of chemicals. LSHS and furnace oil were exempted from payment of duty only to the extent of use in manufacture of fertilizers. In other words when such inputs were used for manufacture of chemicals, the same were not exempted from payment of duty. The petitioners were therefore, required to pay excise duty periodically every month for that portion of the LSHS and furnace oil which was not used for manufacture of fertilizers but for manufacture of chemicals. On such inputs, the petitioner company was paying excise duty at the rate of 15% ad valorem as provided in the Central Excise Tariff Act. In terms of Rule 57A of the Central Excise Rules, 1944, the petitioner company had also availed of Modvat credit of the Excise duty paid on such inputs at the rate of 15% to the extent such inputs were used in manufacture of chemicals.

3.3 To better explain the entire manufacturing process, the petitioners have in their rejoinder affidavit dated 5-3-2001 stated as under :

"....It is submitted that in so far as the manufacturing pattern at the premises of the petitioner company is concerned, it is not feasible for the petitioner company to bring separately duty paid LSHS/FO for the manufacture of the chemicals and duty free LSHS/FO for the manufacture of fertilizers respectively due to the complex technical nature of the plant and design for manufacture of fertilizers and chemicals.

In order to manufacture fertilizers, the first stage is the manufacture of Ammonia. The LSHS/FO is first partially oxidized in the gassifier of the Ammonia Plant, where synthesis gas is generated which is moved further in the manufacturing process for production of Ammonia. Part quantity of such synthesis gas is also taken to Acetic Acid Plant for manufacture of Acetic Acid, a chemical. Similarly, part quantity of synthesis gas is also used for the production of Methanol, a chemical.

The Ammonia produced from LSHS/FO is utilised for the manufacture of Urea, Ammonium Nitrophosphate and Calcium Ammonium Nitrate. All the three are fertilizers. For the manufacture of Ammonium Nitrophosphate (ANP) and Calcium Ammonium Nitrate (CAN), another chemical viz. Weak Nitric Acid is first

manufactured from Ammonia. This Weak Nitric Acid is then used for manufacture of ANP and CAN. However, the Weak Nitric Acid is also used to manufacture concentrated nitric acid, a chemical. The Weak Nitric Acid itself is also being sold as a chemical.

The entire manufacturing facility is so integrated and inter connected that it is not possible to procure and use separate quantities of LSHS/FO for manufacture of fertilizers and chemicals respectively. Thus, it is only at the end of the aforesaid process that the exact quantum of the input viz LSHS/FO is ascertained by the petitioner company and which crystallizes the liabilities of the petitioner company for the payment of the excise duty in respect of the LSHS used for the manufacture of chemicals. Since the said LSHS is used for manufacture of chemicals is not exempt from payment of Central Excise Duty."

3.4 In the budget of 1996, excise duty on certain petroleum products was raised from 10% to 15%. As the price of these products were administered, increase in duty was not passed on to the consumers but was absorbed by the public sector refineries from Oil Pool Account. In the process, the buyers of these products availed credit of Modvat at the rate of 15% though they had actually borne the duty incidence of only 10%. Government of India was of the opinion that this resulted into undue benefit and excess credit was taken. In order to rectify the situation, Government of India issued the said notification dated 3-5-1997 and amended its previous notification dated 1-3-1994.

3.5 We may record that notification dated 1-3-1994 specified the final product described in Column (3) of the table to the notification and in respect of which 95% of various duties specified in the notification including the duties of Central Excises and Salt Act, 1944 paid on the inputs would be allowed as credit when used in or in relation to the manufacture of final products and the credit of the duty so allowed would be utilised for payment of duty leviable on the said final product, or as the case may be, on such inputs if such inputs were permitted to be cleared under the Rules.

3.6 The said notification dated 3-5-1997 however, added a proviso to the notification dated 1-3-1995 in the following terms :

"provided further that, the credit of specified duty paid in respect of inputs, namely, naphtha, furnace oil, low sulphur heavy stock, light diesel oil, bitumen and paraffin wax falling under Chapter 27 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) and used in the manufacture of final products in any place in India shall be restricted;

(i) in the case if input produced or manufactured in India, to the extent of the amount of excise duty calculated at the rate of 10% ad valorem and

(ii) in the case of input imported into India, to the extent of the amount of additional duty calculated by assuming as if the like input produced or manufactured in India chargeable to excise duty at the rate of 10% ad valorem".

3.7 From the above proviso, it can be gathered that credit of the specified duty paid in respect of inputs namely, naptha, furnace oil, LSHS, light diesel oil, etc., used in the manufacture of final products in any place in India was restricted to extent of the amount of excise duty calculated at the rate of 10% ad valorem. Like-wise, in case of such inputs imported into India, same was restricted to amount of additional duty calculated by assuming as if the like input produced or manufactured in India is chargeable to excise duty at the rate of 10% ad valorem. By Section 87 of the Finance Act, 1997, the said notification dated 3-5-1997 was given retrospective effect from 23-7-1996.

3.8 Though the notification itself does not give the indication why such Modvat credit availment was restricted to 10% from the trade notice issued by the department clarifying the position in this regard, it clearly emerges that to avoid unintentional excess benefit availed by several manufactures in the manner noted above, such amending notification was issued. We may reproduce trade notice dated 21-5-1997 :

"In the budget 1996 excise duty on certain petroleum products was raised from 10 to 15%. As the prices of these goods were administered prices, the increase in duty could not be passed on the consumers and had to be absorbed by the public sector refineries from the oil pool account. The buyers of these goods took credit of the duty paid under the modvat scheme at the rate of the 15% though they had borne duty incidence of only 10% which resulted in undue benefit. Credit taken in excess in terms of the above provision shall be paid by the manufacturers within a period of 90 days, failing which interest shall also be payable at the rate of eighteen percent per annum. Accordingly, all such assesseees who have availed credit of duty at the rate of 15% are advised to approach their Range Officers/Assistant Commissioners and pay back/debit the excess credit taken by them within a period of 90 days."

Even from the affidavit in reply filed by the respondents this aspect clearly emerges. It is stated :

"3.1 In the budget for 1996-97, excise duty on certain petroleum products was increased from 10% to 15% ad-valorem. However the Government had decided not to increase administered prices of petroleum products. Thus, while oil companies paid excise duty at 15% ad valorem, the duty incidence of only 10% ad-valorem was passed on to the customer. The balance excise duty incidence of 5% ad valorem was borne by the oil pool account. It was reported that though the prices to the customers included excise duty to the extent of 10% ad valorem only, some customers availed of Modvat credit of duty to the extent of 15% ad valorem. This resulted in unintended benefit to such consumers. The consumers although bore duty burden of only 10% ad valorem but enjoyed credit of full 15% ad valorem i.e. the total duty paid on such goods. In other words the consumer got an additional credit equivalent to 5% ad valorem duty without having borne the burden of this amount. It was, therefore, decided to restrict the availability of modvat credit to the extent of 10% in respect of petroleum

products which are used as modvatable inputs and on respect of which duty was increased from 10% to 15% on 23-7-96. Notification No. 14/97-C.E. (N.T.) (GSR No. 240(E), dated 3-5-1997 was issued restricting Modvat credit in respect of naphtha furnace oil, low sulphur heavy stock, light diesel oil, bitumen and paraffin falling under Chapter 27 of the First Schedule to the Central Excise Tariff Act, 1975 and used in the manufacture of final products. The credit was restricted in case of inputs produced/manufactured in India, to the extent of the amount of excise duty calculated @ 10% ad valorem and in case of imported inputs to the extent of the amount of additional duty calculated by assuming that like inputs manufactured in India are chargeable to 10% ad valorem excise duty."

3.9 What thus emerges is that for the period between 23-7-1996 to 3-5-1997, certain manufactures of final products in India used inputs such as LSHS and furnace oil suffering excise duty at the rate of 10% though the prevailing rate of duty of excise was 15%. 5% of the duty was absorbed through the Oil Pool Account. Despite such excise duty incidence of only 10% having been borne by the manufacturers, ultimately, they availed of Modvat credit on the entire 15% of the duty. It was realized that this resulted into wholly unintentional and excess benefit to the manufacturers. To rectify this, amendment was made in the notification dated 1-3-1994 by the said notification dated 3-5-1997. Such amending notification was also given retrospective effect by Section 87 of the Finance Act, 1997.

3.10 Case of the petitioner however, is that the petitioner all throughout during the period in question had paid full duty of excise at the rate of 15% on its final products other than fertilizers and was therefore, entitled to availment of Modvat credit on such basis. It is in this background that the petitioners have challenged the said notification dated 3-5-1997.

4. Learned counsel Shri Kunal Nanavaty appearing for the petitioners submitted that the notification dated 3-5-1997 is arbitrary and discriminatory and therefore, violative of Article 14 of the Constitution of India. He submitted that by virtue of provisions made in such notification unequals are treated as equals. He pointed out that entire purpose of the proviso to original notification dated 1-3-1994 was to ensure that unintended Modvat credit does not accrue to the manufacturers who had paid excise duty at a lower rate of 10% but were availing Modvat credit at the rate of 15%. He submitted that the petitioner company insofar as it used the said inputs for manufacture of non-fertilizer items paid full excise duty at the rate of 15%, their Modvat entitlement cannot be curtailed which in any case was not the purpose of issuing notification dated 3-5-1997.

4.1 Counsel heavily relied on decision of Division Bench of this Court in case of Gujarat Paraffins Pvt. Ltd. v. Joint Secretary to the Government of India reported in 2004(1) GLH 750 (sic). It was a case wherein the Division Bench of this Court struck down such notification dated 3-5-1997 insofar as it restricted the Modvat credit in case of such inputs being imported into India. We may recall that notification dated 3-5-1997 restricted availment of Modvat credit to 10% not only

while such inputs were produced or manufactured in India but also when the same were imported into India. Division Bench found that the importers had paid full duty at the rate of 15% by way of additional customs duty or counter veil duty as is popularly referred to. It was in this background held that notification was violative of Article 14 of the Constitution of India.

5. On the other hand, learned Counsel Shri Gaurang Bhatt for the department opposed the petition contending that notification is issued in exercise of legislative powers. There was no discrimination. It is not a case where persons unequally situated have been treated equally. In short, he prayed that the petition be dismissed.

6. Having thus heard learned Counsel for the parties, we may notice few undisputed facts. The petitioners insofar as they utilised LSHS and furnace oil for manufacturing non fertilizer item for the entire period in question, they had paid full excise duty at the rate of 15% ad valorem. Such aspect is not even disputed by the department. In fact in the affidavit dated 22-9-2000 filed on behalf of the respondents, it has been stated that :

"10. With reference to para. 5 of the special civil application, I say and submit that the notification no. 14/97, dated 3-5-1997 was issued with a view to undo the damage that had been on account of buyers taking modvat credit at the rate of 15% though the duty incidence borne by them was only to the extent of 10% ad valorem. However, since the petitioner company had paid excise duty to the extent of 15% ad valorem they are rightly entitled at the rate of 15% ad valorem."

7. This was in contrast to the number of other manufactures who had purchased such similar products but borne only a part of the excise duty incidence at the rate of 10% as against the full rate of duty of 15% prescribed under the law. The rest 5% was absorbed through the Oil Pool Account. We had therefore, during our previous hearing wondered why in contrast to other manufacturers of various other products but using the same inputs, the petitioners had paid full excise duty.

8. Learned Counsel for the petitioners therefore, filed additional affidavit dated 11-12-2012. In said affidavit, it was explained as under :

"3. I state that the company was directly paying to the Excise Department, therefore the petitioner company was bound to pay @ tariff rate, i.e. 15% during that period. As far as others were concerned, they were paying to Oil Companies @ 10%. The Oil Companies would pay @ 15% to the Department, but recover 5% from Oil Pool Account, to the best of my knowledge.

4. I further state that the petitioner company was making the payment of excise duty directly to the Excise Department.

5. I further state that the company would make payment at the end of the month after ascertaining the quantity of LSHS used in manufacture of chemicals.

6. I further state that the petitioner company suffered a loss of Rs. 2,30,61,792/- during the period from 23-7-1996 to 28-2-1999 as the petitioner company paid excise duty @ 15% and availed MODVAT credit @ 10% only, because of the impugned Notification."

9. Counsel for the petitioners further elaborated that the petitioners were purchasing such inputs like LSHS and furnace oil from refineries initially without payment of duty. This was so because the petitioners utilised such inputs for manufacture of fertilizers as well as chemicals other than fertilizers. To the extent such inputs were used for manufacture of fertilizers, inputs were duty free. To the extent such inputs were utilised for manufacture of chemicals, there was a duty liability. Since the entire manufacturing process was integrated, at the time of purchase, no duty was paid but the petitioners were making payment of excise duty directly to the Government to the extent the inputs were utilised for chemicals (non fertilizer items). It was because of this reason the petitioners did not enjoy the benefit of reduced excise duty.

10. From the above, it clearly emerges that the petitioners had all through out paid full duty of excise at the rate of 15% directly to the Government on inputs such as LSHS and furnace oil utilised by them for manufacture of chemicals. It was not a case where the manufacturer had paid the duty at a lower rate and the difference was absorbed by the refinery from the Oil Pool Account. The entire purpose of issuing notification dated 3-5-1997 as already noted was to neutralize this event of a manufacturer paying excise duty at the rate of 10% but availing Modvat credit on such inputs at the rate of 15%. So much is amply clear from the contemporaneous materials which is produced before us. The trade notice issued by the Government of India on 21-5-1997 makes this position amply clear. Affidavit in reply filed by the respondents also makes this position sufficiently clear.

11. The question is can such a notification be also implemented against the petitioners who had not taken any such unintended benefit of Modvat credit at the rate higher than the actual payment of excise duty In this context, we may refer to the decision of Division Bench in case of Gujarat Paraffins Pvt. Ltd. (supra). It was a case wherein portion of the said notification dated 3-5-1997 came to be challenged by which even when inputs were imported into India, Modvat credit thereon was restricted to 10%. Division Bench noted that importers had paid additional duty of customs equal to excise duty at the rate of 15% ad valorem. In that background, the said portion of the notification dated 3-5-1997 came to be declared illegal and violative of Article 14 of the Constitution of India. The Bench made following observations :

"34. In the present case, we have no hesitation in holding that unequals are treated equally because persons like the petitioners who imported petroleum products as inputs on payment of duty at the full rate of 15% are treated at par with the persons purchasing the petroleum products as inputs from the public sector refineries in India on payment of actual excise duty of only 10%.

35. We have noticed from the affidavit-in-reply filed by the Revenue, more particularly, from paragraph 2.2 that Oil Pool Account was created for discharging the Government obligations to compensate oil companies for difference between their revenue from domestic sales and the cost of procuring oil from international market and it is also clear from paragraph 3 of the reply that APM (i.e. Administered Price Mechanism) was made applicable only to public sector refineries importing crude oil for manufacturing petroleum products, and the private importers like the petitioners were not covered within APM. It is also clear from paragraph 5 of the reply that the object of creating APM was to compensate the oil companies for difference between their revenue from domestic sales and cost of procuring crude oil from international market. From the averments in the reply, it is abundantly clear that the respondents have accepted that the petitioner being a private importer was not covered under APM regime and that the petitioner belong to a different class of the importer than the public sector refineries covered under APM. For this reason, we do not find any merit in the contention of Ms. Mandavia that there is nothing like APM products and non-APM products.

36. We are of the view that the fact that Modvat credit of full 15% is allowed for inputs imported directly by manufacturer for his own use from November 27, 1997 by making appropriate amendment under the main Notification No. 5/1994 issued under Rule 57A is suggestive of the fact that the Government took cognizance of the error of restricting Modvat credit to 10% ad valorem in cases of imported inputs. When the amendment for restricting Modvat credit was made effective retrospectively upon realizing that few manufacturers purchasing inputs in the nature of petroleum products from local refineries were taking undue advantage of 5% excess Modvat credit, then in that case, the Central Government ought to have rectified the error of restricting Modvat credit in case of imported inputs with retrospective effect. We are not at all enamoured by the submission of Ms. Mandavia that the validity of the impugned restriction unreasonably and arbitrarily imposed for imported inputs be upheld on the ground that the Government has taken corrective measures at the earliest and that the restriction would operate only for a limited period of about 16 months i.e. from July 3, 1996 to November 27, 1997.

38. The only objective sought to be achieved by restricting Modvat credit to the extent of 10% for inputs in the nature of petroleum products was to allow manufacturers purchasing such petroleum products from public sector refineries the credit of that amount which was actually paid by them as excise duty. Since duty only to the extent of 10% was recovered from such manufacturers by refineries whereas 5% was paid to the refineries from Oil Pool Account from July 23, 1996, the restriction under the Notification No. 14/1997 was made for allowing Modvat credit to the extent of only 10% and this Notification issued on May 3, 1997 was given retrospective effect from July 23, 1996 onwards. By virtue of the clarifications made vide various Trade Notices, the objective of restricting Modvat credit to only 10% right from July 23, 1996 in case of APM

products i.e. petroleum products purchased from public sector refineries was clarified by the Government itself. The objective of the amendments so made vide Notification No. 14/1997 and Section 87 of the Finance Act, 1997 was to restrict Modvat credit to 10% for inputs produced and manufactured in India is thus an undisputable position. By clubbing non-APM products, i.e. inputs imported on payment of full duty at the rate of 15%, the objective was not achieved and the amendments had no rational relation with imports of petroleum products at full rate of duty."

12. In light of the above observations of the Division Bench of this Court, we need to examine the petitioners' challenge to the impugned notification. It is true that the situation in both the cases is not identical. The same is however, substantially similar. In case of Gujarat Paraffins Pvt. Ltd. (supra), the petitioner was an importer of the inputs who had paid the full additional duty of customs at the rate of 15% on the products in question. The impugned notification denied full Modvat credit to such importers also. The Court formed an opinion that the notification is discriminatory and violative of Article 14 of the Constitution of India since the same clubbed together two categories of persons dissimilar to each other.

13. It is stated number of times that Article 14 prohibits class legislation but permits reasonable classification. For such classification to pass the test of reasonableness, two conditions are required to be satisfied namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those left out of the group and (ii) that the differentia must have a rational relation to the object sought to be achieved. Way back in the year 1955 in case of Budhan Choudhry and Others v. State of Bihar reported in AIR 1955 SC 191, the Supreme Court referring to earlier decisions, observed as under :

"It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

14. In the present case, if we examine the facts more closely it would become clear that the impugned notification does not satisfy above twin conditions. The petitioner as noted had paid full excise duty on its purchase of inputs such as

LSHS and furnace oil. Since the petitioner was directly paying such duty to the Government, it was not covered under the regime where the manufacturers who paid the excise duty to the refineries and in whose cases 5% increase in the excise duty was absorbed from the Oil Pool Account. In such cases, understandably the Government of India formed an opinion that such manufacturers cannot be allowed to avail Modvat at the full rate of 15% of excise duty when the duty borne by such manufacturers on such inputs was at the rate of 10%. It would give unintended benefit. In case of the petitioner who all along paid the excise duty at the full rate of 15%, not permitting availment of Modvat credit on such basis, would amount to grouping two unequals for equal treatment. In the same class, notification groups those manufacturers who had paid only 10% of the excise duty on purchase of the inputs but had taken Modvat credit at the higher rate of 15% and the petitioner and other similarly situated manufacturers who had actually paid the full amount of 15% and had therefore, availed the Modvat credit on such basis. We are conscious that the notification is a piece of legislation. We are also conscious that there is presumption of constitutionality applied in such cases. However, being a specie of delegated legislation, the immunity from challenge to its vires which is enjoyed by enactments of the Parliament or the State Legislature would not be available in such cases. In other words, the grounds on which a subordinate legislation can be challenged are wider than those on which legislation of the Union or the State Legislature can be challenged. These aspects of the matter were examined by the Division Bench of this Court in case of *Aditya Birla Nuvo Limited Unit Indian Rayon v. Municipal Corporation of the City of Surat* vide order dated 3-8-2012 in Special Civil Application No. 2834/1997 and connected matters. Following observations are relevant for our purpose :

"14. With this background, we need to examine the validity of the amended rule 2(20) of the Octroi Rules. We are conscious that in the present petition, we are examining validity of statutory provision. We are also conscious that burden lies on the person who challenges a statutory provision to establish that the same is ultra vires.

In this respect we may refer to the decision of the Apex Court in case of *Public Services Tribunal Bar Association v. State of U.P.* and another reported in AIR 2003 Supreme Court 1115. It was observed that it is imperative upon the Courts while examining the scope of legislative action to be conscious to start with the presumption regarding the constitutional validity of the legislation. It was observed that the burden of proof is upon the shoulders of the incumbent who challenges a statutory provision. In case of *Mohd. Hanif Quareshi and others v. State of Bihar* reported in AIR 1958 Supreme Court 731, the Constitution Bench of the Supreme Court observed that the presumption of constitutionality attaching to all enactments is founded on the recognition by the Court of the fact that the legislature correctly appreciates the needs of its own people. We are not oblivious to the fact that this decision was overruled in the case of *State of Gujarat v. Mirzapur Moti Kureshi Kasab Jamat and others* reported in AIR 2006

Supreme Court 212 but on another issue. In case of the State of Jammu & Kashmir v. Triloki Nath Khosa and others reported in AIR 1974 Supreme Court 1, yet another Constitution Bench of the Supreme Court referring to and relying on the decision in case of Mohd. Hanif Quareshi and others (supra), reiterated this principle. In para. 24 of the judgement, it was observed that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principle. In a recent decision in case of State of Madhya Pradesh v. Rakesh Kohli and another reported in (2012) 6 Supreme Court Cases 312, this well settled principle of presumption of constitutionality of statutory provision enacted by State or Central Legislature was reiterated.

15. Such principle of presumption of constitutionality also applies to a piece of delegated legislation. In case of St. Johns Teachers Training Institute v. Regional Director, National Council for Teacher Education and another reported in (2003) 3 Supreme Court Cases 321, it was observed that "It is also well settled that in considering the vires of subordinate legislation one should start with the presumption that it is intra vires and if it is open to two constructions, one of which would make it valid and other invalid, the Courts must adopt that construction which makes it valid..."

16. We must however, recall that under challenge before us is not a legislation of the parliament or State Legislature but a rule enacted by the State in its delegated powers of legislation. We highlight this because it is well recognised that delegated legislation does not enjoy the same immunity as the legislation of the Parliament or the State Legislature. Parameters for examining the validity of the legislation either of the Centre or the State Legislation are somewhat different from the parameters on which the statutory provisions enacted under delegated legislation can be judged. The grounds on which a statutory provision enacted by the State or Central Legislature can be struck down are lack of legislative competence or being in conflict with any of the provisions contained in fundamental rights or other articles of the Constitution. In case of State of Madhya Pradesh v. Rakesh Kohli and another reported in (2012) 6 Supreme Court Cases 312, the Apex Court observed that :

"This Court has repeatedly stated that legislative enactment can be struck down by a Court only on two grounds, namely (i) that the appropriate legislature does not have the competence to make the law, and (ii) that it does not take away or abridge any of the fundamental rights enumerated in part-III of the Constitution or any other constitutional provisions."

17. It is often suggested that a law enacted by the parliament or the State Legislature can be struck down only on one ground namely that of legislative competence. In such expression, both the above-noted parameters are included. If the State or the Central Legislation does not have competence to enact a law as per the list contained in Schedule VII, such a case would fall squarely within the expression of lacking in legislative competence. Equally if such statutory

provision is opposed to any of the fundamental rights contained in Part III of the Constitution or is in conflict with other provisions contained in the Constitution, it would be impermissible to the parliament or to the State to enact such a provision and could thus also be stated to be without legislative competence. Besides these categories sometimes, the statutory provision being irrational, arbitrary, come up for discussion. However, such ground also has to be examined within above two parameters. The Apex Court in case of *State of A.P. and others v. Mc. Dowell & Co. and others* reported in (1996) 3 Supreme Court Cases 709, observed that :

"In India, the position is similar to the United States of America. The power of the Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by the Parliament or the Legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part-III of the Constitution or of any other constitutional provision. There is no third ground."

The Apex Court thereafter explaining the previous decision in case of *State of Tamil Nadu and others v. Ananthi Ammal and Others* reported in (1995) 1 Supreme Court Cases 519 observed that :

"The use of the word "arbitrary" in Para-7 was used in the sense of being discriminatory, as the reading of the very paragraph in its entirety discloses. The provisions of the Tamil Nadu Act were contrasted with the provision of the Land Acquisition Act and ultimately it was found that Section 11 insofar as it provided for payment of compensation in instalments was invalid. The ground of invalidation is clearly one of discrimination. It must be remembered that an Act which is discriminatory is liable to be labelled as arbitrary. It is in this sense that the expression "arbitrary" was used in Para-7."

18. While examining the vires of a rule enacted under the powers of delegated legislation, however the scope of challenge is wider. In addition to above two well recognised grounds on which legislation of parliament or of State can be challenged, a rule framed under delegated legislation can also be called in question on the ground that it is ultra vires the Act or that it is wholly arbitrary or irrational.

In this regard we may refer to some of the decisions of the Apex Court.

(1) In case of *Indian Express Newspapers (Bombay) Private Ltd. and others v. Union of India and Others* reported in (1985) 1 Supreme Court Cases 641, the Apex Court observed that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. It was held and observed as under :

"75. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which

plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the Judges would say "Parliament never intended authority to make such rules. They are unreasonable and ultra vires". The present position of law bearing on the above point is stated by Diplock. L.J. In *Mixnam's Properties Ltd. v. Chertsey Urban District Council* thus :

The various special grounds on which subordinate legislation has sometimes been said to be void...can, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation, to be valid, must be shown to be within the powers conferred by the statute. Thus, the kind of unreasonableness which invalidates a bye-law is not the antonym of "unreasonableness" in the sense in which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say: "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires", ... if the courts can declare subordinate legislation to be invalid for "uncertainty" as distinct from unenforceable ... this must be because Parliament is to be presumed not to have intended to authorise the subordinate legislative authority to make changes in the existing law which are uncertain."

77. In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned, to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution"

(2) In case of *Supreme Court Employees' Welfare Association v. Union of India* and another reported in (1989) 4 Supreme Court Cases 187, the Apex Court in para 62 observed that delegated legislation or a subordinate legislation must conform exactly to the power granted.

(3) In case of *J.K. Industries Limited and another v. Union of India and Others* reported in (2007) 13 Supreme Court Cases 673, the Apex Court referring to and relying on decision in case of *Indian Express Newspapers (Bombay) Private Ltd. and others* (supra) observed as under :

"63. At the outset, we may state that on account of globalization and socio-economic problems (including income disparities in our economy) the power of Delegation has become a constituent element of legislative power as a whole. However, as held in the case of *Indian Express Newspaper v. Union of India* reported in (1985) 1 SCC 641 at page 689, subordinate legislation does not carry

the same degree of immunity which is enjoyed by a statute passed by a competent Legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition, it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is inconsistent with the provisions of the Act or that it is contrary to some other statute applicable on the same subject matter. Therefore, it has to yield to plenary legislation. It can also be questioned on the ground that it is manifestly arbitrary and unjust. That, any inquiry into its vires must be confined to the grounds on which plenary legislation may be questioned, to the grounds that it is contrary to the statute under which it is made, to the grounds that it is contrary to other statutory provisions or on the ground that it is so patently arbitrary that it cannot be said to be in conformity with the statute. It can also be challenged on the ground that it violates Article 14 of the Constitution."

15. Reverting back to the case on hand, we are clearly of the opinion that the impugned notification is violative of Article 14 of the Constitution of India. We are conscious that in taxing matters, the Government has wide latitude. We are also conscious that under Rule 57A of the Modvat Rules, there is no direct correlation between the excise on duty paid on inputs and availability of Modvat credit on such inputs and it is open for the Government to provide the terms on which such Modvat can be availed by issuing notification on that behalf. Had therefore, the notification been issued limiting the availment of Modvat credit only to a portion of the duty paid in all cases, perhaps the respondents could have convinced us not to interfere. In the present case however, the reason for issuance of such notification is manifest from the trade notice issued by the Government of India, shortly after issuance of the notification as also from the affidavits filed before us. The sole reason therefore, was to withdraw the unintended benefits claimed by the manufacturers who had though paid excise duty only at the rate of 10%, enjoyed Modvat credit on full 15% of the excise duty. The language used in the notification if given its ordinary grammatical meaning, permits of no other interpretation and whatever be the intention behind promulgation of such a notification, its effect is that even in cases as that of the petitioner, availment of Modvat credit would be curtailed. This is clearly a case of grouping together two wholly dissimilar class of persons for the purpose of treating them similarly. There is thus no nexus between the classification and the object sought to be achieved. The classification is that all consumer of the specified inputs are grouped together. The object of denying part of the Modvat credit was to withdraw the unintended benefit. When the petitioner and others who never enjoyed such unintended benefit having paid full duty, they could not have been classified along with others who had received such benefits.

16. In the result the impugned notification dated 3-5-1997 insofar as it limits the Modvat credit to the extent of amount of excise duty calculated at the rate of 10% ad valorem in cases where full excise duty at the rate of 15% was paid, is declared illegal and therefore, quashed. In other words, the application of clause

(i) to the proviso shall be confined to only those cases where the manufacturers had purchased the inputs by paying the excise duty only at the rate of 10% during the relevant period. The petitioner shall be entitled to consequential benefits of refund of duty with statutory interest. We are informed that the petitioner had paid duty under protest at the relevant time.

17. Petition is disposed of accordingly.