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**(1998) 02 MP CK 0040**

**In the Madhya Pradesh High Court**

**Case No : Writ Petition No's. 2972-2973 of 1997**

Kedia Liquor Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

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**Date of Decision : 17-02-1998**

**Acts Referred:**

Central Excise Rules, 1944 — Rule 7A  
Central Excises and Salt Act, 1944 — Section 3

**Citation : (2004) 164 ELT 399**

**Hon'ble Judges : A.K. Mathur, C.J.; S.K. Kulshrestha, J**

**Bench : Division Bench**

**Advocate : Dushyant Dave and A.M. Mathur, R. Arya and A. Upadhyay, for the Appellant; I.Nair, for the Respondent**

**Final Decision : Dismissed**

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## **Judgement**

A.K. Mathur, C.J.—Both the aforesaid writ petitions involve similar questions of law; therefore, they are disposed of by this common Order.

2. For convenient disposal of both the writ petitions, the facts given in the case of Kedia Liquor Limited and Anr. v. Union of India, (W.P. No. 2972/97), are taken into consideration.

3. The petitioners by this writ petition, have prayed that Rule 7A of the Central Excise Rules framed under the Central Excise Act, 1944, and Rule 2(ixa) of the Central Excise Rules be declared ultra vires.

4. The brief facts giving rise to this petition are that the petitioner No. 1 is a Company registered under the Companies Act, 1956 and has got its registered office at Indore. The petitioner No. 2 is Managing Director of the petitioner-Company. The petitioner-company owns a distillery situated at village Ekalduna, District-Dhar. The petitioner-company manufactures potable alcohol in this distillery from the rectified spirit. For manufacture of rectified spirit, the petitioner-company uses Molasses as a raw material. The molasses is purchased

by the petitioner-company, which is produced both by the Vacuum Pan Sugar Factory (Sugar Mill) as well as from Khandsari Sugar Factory. The petitioner-company purchases the molasses both from the market as well as from the sugar factories. The petitioner company while purchasing the molasses either from the Vacuum Pan Sugar Factory or from Khandsari Sugar Factory pays price and consideration for purchasing the molasses. The molasses was earlier controlled by the Molasses Control Order and was allotted to different States as per the production and the demand of the various States. In the year 1991, the molasses was de-controlled and the States were free to sell their own molasses as per their policies. The excise duty on molasses is paid at the factory gate at the rate of 20% under sub-heading 1730.10 of the Tariff. The molasses produced by the Khandsari Sugar Factory under sub-heading 1703.90 is liable to excise duty.

5. The Central Government amended Rule 7 by adding a new Rule 7A and it applies to Khandsari Sugar Factory. Rule 7 and Rule 7A read as under :

"Rule - 7 : Recovery of duty. - Every person who produces, cures or manufactures any excisable goods, or who stores such goods in a Warehouse, shall pay the duty or duties leviable on such goods, at such time and place and to such person as may be designated, in, or under the authority of these rules, whether the payment of such duty or duties is secured by bond or other wise :

Provided that nothing contained in this rule shall apply to molasses produced in a Khandsari sugar factory.

Rule - 7A : Recovery of duty on molasses produced by a khandsari sugar factory. - Every person who procures molasses produced in a khandsari sugar factory, whether directly from such factory or otherwise, for use in the manufacture of any commodity, whether or not excisable, shall pay the duty or duties leviable on such molasses, as if such molasses has been manufactured by the procurer, at such time and to such persons as may be designated under these rules, whether the payment of such duty or duties be secured by bond or otherwise."

The said Rule 7A is the subject matter of this writ petition and validity thereof, has been challenged. The principal challenge to the Rule is that it is not covered by Entry 84 of List I of 7th Schedule to the Constitution of India and secondly, that it is ultra vires of Section 3 of the Central Excise Act.

6. In order to appreciate the challenge, it would be relevant to mention first certain provisions of the Central Excise Act and rules framed thereunder. Section 2(d) defines "excisable goods" which reads as under :

"Section 2(d) - "excisable goods" means any goods specified in the Schedule to the Central Excise Tariff Act, 1985 ( 5 of 1986) as being subject to a duty of excise and includes salt."

The molasses is excisable article and it is included in Chapter 17.03, which reads as under:

"17.03 - Molasses, resulting from the extraction or refining of sugar. -

Sub-heading 1703.10-Molasses produced in the manufacture of sugar by the vacuum pan process - Rs. 500 per tonne Sub-heading 1703.90 - other Rs. 500 per tonne."

Therefore, molasses is an excisable articles. Section 2(e) defines "factory", which reads as under :

"Section 2(e) - "factory" means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on."

Section 2(f) defines - "manufacture", which reads as under :

"Section 2(f) - "manufacture" includes any process, - (1) incidental or ancillary to the completion of a manufactured product; and

(2) which is specified in relation to any goods in the Section or Chapter notes of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture, and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account."

Section 2(g) defines "prescribed" which reads under :

"Section 2(g) - "prescribed" means prescribed by rules made under this Act."

Section 3 deals with the duties specified in Schedule to the Central Excise Tariff Act, 1985 to be levied, which reads as under :

"Section 3 - Duties specified in the Schedule to the Central Excise Tariff Act, 1985 to be levied. - (1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985....."

Section 4 deals with valuation of excisable goods for purposes of charging of duty of excise, Section 4(4) which is relevant for our purposes reads as under :-

"Section 4 - Valuation of excisable goods for purposes of charging of duty of excise. -

XXX XXX XXX (4) For the purposes of this Section, (a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent."

Section 6 deals with Registration of certain persons. Section 37 lays down the

power of Central Government to make rules, which reads as under :

"Section 37 - Power of Central Government to make Rules. - (1) The Central Government may make rules to carry into effect the purpose of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may....."

In pursuance of this power, the Central Government has framed rules to carry out into effect the purposes of the said Rules, known as Central Excise Rules, 1944. Rule 2(7) defines "duty" which means duty payable u/s 3 of the Act. Rule 2(12) defines "procurer", which reads as under :

"Section 2(12) - "procurer" means any person who receives molasses manufactured in a Khandsari sugar factory, whether directly from such factory or otherwise, for use in the manufacture of any commodity, whether or not excisable, and is liable for payment of duty assessed on such molasses."

Rule 7 lays down the recovery of duty, which has already been reproduced above. Rule 9 lays down time and manner of payment of duty, which is relevant for our purposes, which reads as under :

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

Provided that such goods may be deposited without payment of duty in a store-room or other place of storage approved by the Commissioner under Rule 27 or Rule 47 or in a Warehouse appointed or registered under Rule 140 or may be exported under bond as provided in Rule 13 :

Provided further that the molasses produced in a Khandsari sugar factory may be removed without payment of duty leviable thereon and the duty of excise leviable on such molasses shall be paid by the procurer, as if such molasses has been manufactured by such procurer, on the date of receipt of such molasses in his factory :

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

Provided also that the Commissioner may, if he thinks fit instead of requiring payment of duty in respect of each separate consignment of goods removed from the place or premises specified in this behalf, or from a store room or warehouse

duly approved, appointed or registered by him, keep with any person dealing in such goods an account-current of the duties payable thereon and such account shall be settled at intervals, not exceeding one month, and the account holder shall periodically make deposit therein sufficient in the opinion of the Commissioner to cover the duty due on the goods intended to be removed the place of production curing, manufacture or storage.

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

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

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

(i) as such or after subjection to any process or processes; or

(ii) for the manufacture of any other commodity;

Whether in a continuous process or otherwise, in such place or any premises appurtenant thereto, specified by the Commissioner under sub-rule (1), shall be deemed to have been removed from such place or premises immediately before such consumption of utilisation."

Rule 49 deals with duty chargeable only on removal of the goods from the factory premises or from an approved place of storage, which reads as under :-

"Rule 49 - Duty chargeable only on removal of the goods from the factory premises or from an approved place of storage. - (1) Payment of duty shall not be required in respect of excisable goods made in a factory until they are about to be issued out of the place or premises specified under Rule 9 or are about to be removed from a store-room or other place of storage approved by the Commissioner under Rule 47:

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

Provided further that the proper officer may not demand duty due on any goods claimed by the manufacturer as unfit for consumption or for marketing subject to

such conditions as may be imposed by the Commissioner by order in writing.

(2) Notwithstanding anything contained in Sub-rule (1) , excisable goods made in a factory to which provisions of Chapter VII of these rule"s have been extended by the Central Government by notification in the Official Gazette, may be removed from the factory in which they are made to any warehouse registered under Rule 140 for the storage of such goods and situated outside the registered premises of the factory and subject to such exemptions, limitations and conditions as may, from time to time, be specified in this behalf by the Central Government.

(3) Notwithstanding anything contained in Sub-rule (1), the Government may, under circumstances of exceptional nature, allow, by notification in the Official Gazette, any excisable goods to be removed from the factory in which they are produced without payment of, or only on part payment of duty leviable thereon subject to such conditions and limitations including payment of interest on the balance amount of duty as may, from time to time, be specified by the Central Government. The manufacturer of such excisable goods shall execute a bond in the proper Form with such surety or security as the Commissioner may approve.

(4) xxx xxx xxx Explanation. - For the purposes of this rule, excisable goods made in a factory and consumed or utilised -

(i) as such or after subjection to any process or processes; or

(ii) for the manufacturer of any other commodity,

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

7. In the light of the aforesaid provisions the learned Counsel submitted that the excisable duty is chargeable on excisable articles on its manufacture and therefore, the manufacturer is liable to pay the duty the moment goods are removed from the factory; but by this Rule 7A, the liability has been shifted to purchaser; therefore, this rule is not covered by Entry 84, List I of 7th Schedule to the Constitution of India. Entry 84, List I of 7th Schedule to the Constitution of India reads as under :

"Entry 84 - Duties of excise on tobacco and other goods manufactured or produced in India except --

(a) Alcoholic liquors for human consumption;

(b) Opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

Therefore, the learned Counsel submits that the incidence of taxation has been shifted from manufacturer on the excisable of articles to the consumer i.e. a purchaser and this is more of a sales tax which is covered by Entry 54, List-II of 7th Schedule of the Constitution, which reads as under :

"Entry 54 - Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I."

The learned Counsel submits that the moment the goods leaves the factory premises, then the relations of the manufacturer with the goods is snapped and a purchaser is not liable to pay excise duty. It is also submitted that it is beyond the scope of Section 3 of the Act because it is the duty of manufacturer to pay duty and not purchaser. As against this, the learned Counsel for the Union of India has submitted that Rule 7 is intra vires of the Constitution and is fully covered under Entry 84 of List I of 7th Schedule of the Constitution. Learned Counsel submits that in fact Rule 7A deals with the recovery of duty from a procurer and such procurer has been deemed to be a manufacturer by way of legal fiction. It is pointed out that Rule 7A is not beyond the scope of Section 3 because Section 3 only says that duty shall be levied and collected in the manner prescribed. The manner of collection of duty has been prescribed in Rules. It is also pointed out that Rule 7A is a machinery provision. It only lays down method of collection of duty on excisable articles and the incidence of taxation remains the excisable article and it is not changed.

8. It may be relevant to mention here that in fact this rule seems to have been introduced on account of the fact that large number of Khandsari Factories manufacture the molasses and they are not registered as a factory and sell molasses without payment of duty. Therefore in order to check the evasion of duty by these unregistered Khandsari Factories, who manufacture molasses, Rule 7A was incorporated.

9. There are no two opinions that molasses is an excisable article which is covered under Entry 84, List I of 7th Schedule of the Constitution of India. Since it is an excisable article as apparent from the Tariff quoted above; therefore, the Central Government is competent to enact the rule so as to check the evasion of the duty. This rule nowhere infringes either Entry 84, List I of 7th Schedule of the Constitution or travels beyond the charging section, i.e. Section 3 of the Central Excise Act. Section 3 which is a charging section only lays down that the duty shall be levied and collected in such manner as may be prescribed on all excisable goods which are produced or manufactured in India, and at the rates set forth in the Schedule to the Central Excise Tariff Act, 1985. Levy and collection has to be regulated by the rules, as prescribed under the Act. "Prescribed" has been defined u/s 2(g) which means prescribed in the rules made under this Act. Rule 7A is framed under this Act. The collection of duty has to be as prescribed by rules. What is to be taxed is excisable goods which are produced or manufactured; therefore, to say that the excisable duty can only be recovered from the person who manufactured is not correct. The collection has to

be prescribed under the rules and the rules have been framed u/s 37 of the Central Excise Rules, 1944. Therefore, the contention of the learned Counsel that the moment manufactured articles are moved out from the factory, then the relation of the manufacturer with manufactured goods is snapped and would acquire the status of a sold commodity in the hands of purchaser and it can only be taxed as a sales tax under Entry 54 of List II of 7th Schedule of the Constitution of India by the State, appears to be misconceived.

10. Section 3 itself very specifically lays down that the levy and collection of excise duty shall be in the manner prescribed on excisable goods which are produced or manufactured in India at the rates set forth in the Central Excise Tariff Act, 1985. There are no two opinions that the molasses is an excisable article produced by Khandsari units or by a factory. Therefore, the mode of collection of duty has to be regulated by the rules and Rule 7A is one of the modes of collection of duty and it cannot be said to be beyond the legislative competence of the Central Government. It is well within the competence of the Central Government to frame the rules in exercise of powers conferred u/s 37 of the Act for collection of excise duty on the excisable articles. Section 4 only lays down the valuation of excisable goods for purposes of charging of excise duty and Section 4(4a) says that the assessee means the person who is liable to pay the duty of excise under this Act and includes his agent. Therefore, those persons who carry excisable articles from the so called Khandsari units, are also agents of the units as a sale of excisable articles is subject to the excise duty and if it is not paid by the person who has produced or manufactured, then it can be recovered from his agent, i.e. a person who has procured it. Rules 7 and 7A say recovery of duty and it means duty payable u/s 3 of the Act. Therefore, whoever procures or receives molasses manufactured by Khandsari Factory, whether directly or from such factory or otherwise or for use in manufacture of any commodity whether or not excisable, is liable to pay duty assessed on such molasses. Therefore, it is only one of the modes of collection of excise duty on articles on which these Khandsari Units manufacture and on which they have not paid the duty. Rule 7A lays down recovery of duty on molasses produced by Khandsari sugar factory and it says that every person who procures molasses produced in a Khandsari sugar factory or stored such goods in their houses, shall pay the duty at such time and place and such persons as may be designated or under the authority under these rules, whether the payment of such duty to be secured by bond or otherwise. Therefore, what is mandate is that the duty can be recovered on molasses produced by these Khandsari units which has not suffered the excise duty. The emphasis of the learned Counsel for the petitioner was that it is only manufacturer who alone can be made liable and the moment excisable articles leave the factory and the purchaser comes into picture, therefore, no excise duty can be levied on purchaser and this can only be a sales tax which is covered under Entry 54 of List II of 7th Schedule of the Constitution. This argument of the learned Counsel is devoid of any merit and is overruled.

11. It may be relevant to mention here that the Union of India, in its return has

explained that it was becoming administratively difficult to collect duty because these Khandsari Units manufacture molasses and sell to distilleries without payment of duty. Therefore, it became necessary to frame this rule to check this evasion of duty. The excisable article continued to be excisable article whether it leaves factory or it does not leave factory. The incidence of taxation is on the excisable articles and not on the sale of articles. Section 3 lays that the levy and collection of excisable articles manufactured or produced in India at such rate and in such manner as prescribed by the rules means that any excisable article be within the factory premises or be out of the factory premises if it has not suffered the excise duty then same can be recovered and the Central Government is competent to frame rules u/s 37 which is covered under Entry 84 of List I of 7th Schedule of the Constitution of India. Entry 84 of List I of 7th Schedule says that the duty of excise on tobacco and other goods manufactured or produced in India meaning thereby that the excise duty can be levied on goods manufactured in India and molasses is an excisable article manufactured in India; therefore, it can be subjected to excise duty and mode of collection which is purely a machinery provision prescribed under the rules and the Rule 7A neither infringes Entry 84 of List I of 7th Schedule of the Constitution nor Section 3 of the Act. In this connection, the learned Counsel for the petitioners has invited our attention to various decisions of the Hon. Supreme Court, which will be referred hereinafter. A reference may be made to a decision given in the case of AIR 1939 1 (Federal Court) in which their Lordships of Federal Court of India have observed :

"There can be no reason why an excise duty should not be imposed on the retail sale of an article, if the taxing Act so provides.

Subject always to the legislative competence of the taxing authority, a duty on home produced goods will obviously be imposed at the stage which the authority finds it the most convenient and the most lucrative wherever it may be; but that is a matter of machinery collection and does not affect the essential nature of the tax."

This observation has been further affirmed by their Lordships of Federal Court in the case of Punjab Province v. Daulat Singh (AIR 1942 FC 38) and both these cases have subsequently come up for consideration before the Hon. Supreme Court and the ratio has been affirmed by the Hon. Supreme Court in successive decisions.

12. A reference may be also made to the decision of the Hon<sup>ble</sup> Supreme Court reported in Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another, wherein it was observed :

"In construing the expression "duty of excise" as it occurs in Entry 84 of List I in Schedule 7 of the Constitution of India, the Court is not concerned so much with whether the tax is "direct" or "indirect as upon" the transaction or activity on which it is imposed. In "determining the content of that term no assistance can

be derived from Canadian or American decisions. AIR 1945 98 (Privy Council) and AIR 1939 1 (Federal Court) , Relied on."

It was further observed :

"A duty of excise is a tax-levy on home-produced goods of a specified class or description, the duty being calculated according to the quantity or value of the goods and which is levied because of the mere fact of the goods having been produced or manufactured and unrelated to and not dependent on any commercial transaction in them. The duty levied u/s 7(2) of the Finance Act, 1951, satisfied this test and the fact that it was imposed with retrospective effect did not alter its essential character as such and convert it into direct and personal tax merely because it could not be passed on to others."

It was further observed :

"Even assuming that to be a duty of excise within Entry 84 of the Union List the taxing authority should have expected the tax to be passed on, that condition is satisfied in the case of the levy now impugned, because of the operation Section 64A of the Sale of Goods Act which refers in express terms to "duties of excise" and has, therefore, to be read as part and parcel of every legislation imposing a duty of excise.

The duty of Excise in item 84 should be given the widest construction unless for some reason it is cut down either by the terms of that item itself or by other Parts of the Constitution. List I item 84 deals with taxes on goods manufactured or produced and List II item 60 deals with the carrying on of trade i.e. an activity in the nature of buying and selling and the Act in its pith and substance relates to duty on goods manufactured or produced and has no relationship with item 60 of List II.

Even assuming that the nature and tendency of the duty of Excise is that it can be passed on the consumer, even then the complaint that the tax payer has been deprived of that opportunity is not well founded."

Therefore, this judgment of Chhotabhai (supra) is a charter for interpretation of Entry 84 by a Constitutional Bench and this has been consistently followed in the subsequent decisions of the Lordships of Hon. Supreme Court, which we will refer to hereinafter.

13. In this connection, a reference is also made to the decision of Hon"ble Supreme Court reported in R.C. Jall Vs. Union of India (UOI), .

This was a case with regard to cess on coal. In that connection, a similar question arose before their Lordships of Hon. Supreme Court with regard to payment of cess and in that, their Lordships observed :

"When the consignor pays, it is the most convenient stage for the collection of the tax, for it is the first time the coal leaves the possession of the consignor. The fact that the consignee is made to pay, in the contingency contemplated by Rule

3(b) of the Rules cannot affect the essence of the tax, for the consignor, if he had paid the freight, would have passed it on to the consignee and instead the consignee himself pays it. The Central Government was legally competent to evolve a suitable machinery for collection without disturbing the essence of the tax or ignoring the rational connection between the tax and the person on whom it is imposed. The machinery evolved under the Rules for collection of the duty satisfies the said conditions and therefore, the exigibility of the tax at the destination point in the hands of the consignee cannot legitimately be questioned. AIR 1939 1 (Federal Court) & AIR 1945 98 (Privy Council) , Relied on."

In this case, the Constitutional Bench affirmed the collection of cess at the hands of the consignee. Their Lordships held that the collection of duty at the hands of consignee does not detract from the nature of the duty. Therefore, ultimately, the tax in every event has to be born by the consumer at the last destination point and, therefore, the Lordships observed that the tax at the hands of destination point of the consignee cannot be legitimately questioned. This case clinches the whole issue and provides a complete answer to all the contentions which have been raised by the learned Counsel for the petitioners. It was further observed in R.C. Jail's case (supra):

"With great respect, we accept the principles laid down by the said three decisions in the matter of levy of an excise duty and the machinery for collection thereof. Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can levied at a convenient stage so long as the character of the impost, that is, it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience. Whether in a particular case the tax ceases to be in essence an excise duty, and the rational connection between the duty and the person on whom it is imposed ceased to exist, is to be decided on fair construction of the provisions of a particular Act."

That decision was subsequently followed by the Lordships of Hon. Supreme Court in the case of Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc., relying on the decisions of AIR 1939 1 (Federal Court) ] and AIR 1945 98 (Privy Council) . The question in that case was the levy of health cess under Mysore Health Cess Act on shop rent whether it falls within Item 1 of Schedule A of former Act or within Entry 51 of List II of Schedule 7 of the Constitution. The Lordships after examining the matter, came to the conclusion that the State of Mysore have no authority to levy and collect the health cess under the Mysore Health Cess Act on shop rent. But the lordships have approved the principles of law laid down by the Lordships in the case of R.C. Jail (supra).

14. In the case of *In Re : Sea Customs Act* (AIR 1963 SC 1760), a reference was made under Article 41 of the Constitution of India by the President of India the interpretation of Article 289 of the Constitution relating to immunity of property and income of States from Union Taxation. In that case also, it was observed in para 25 as under :

"This will show that the taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. We may in this connection contrast sales-tax which is also imposed with reference to goods sold, where the taxable event is the act of sale. Therefore, though both excise duty and sales tax are levied with reference to goods the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. In neither case therefore can it be said that the excise duty or sales tax is a tax directly on the goods for in that event they will really become the same tax. It would thus appear that duties of excise partake of the nature of indirect taxes as known to standard works on economics and are to be distinguished from direct taxes like taxes on property and income."

By following the earlier decision of the Hon. Supreme Court as well as decisions of AIR 1939 1 (Federal Court) and [1945 PC 98] referred to above, their Lordships distinguished the excise duty and the sales tax that they are two distinct things and they cannot be treated to be the same. Therefore, keeping in mind the distinction between the two, it will be relevant to mention here that what is being taxed is an excise duty on manufacture of an excisable article. Duty to pay excise is not only on manufacturer but on the person who procures it. Therefore, it is not a duty on sale. It is only convenient to recover the duty from a procurer on an excisable article. The duty is essentially, on the goods which are excisable and not on the person; therefore, whoever be it a manufacturer or a person, who procures, is under the duty to pay the excise duty.

15. Our attention was also invited to a decision of Hon. Supreme Court in the case of *Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others*, . In that case also, the Lordships followed the case of *R.C. Jall's* (supra) in para 13 and it was observed :

"The observations show that while the nature of an excise is indicated by the fact that it is imposed in respect of the manufacture or production of an article, the point at which it is collected is not determined by the point of time when its manufacture is completed but will rest on considerations of administrative convenience, and that generally it is collected when the article leaves the factory for the first time. In other words, the circumstance that the article becomes the object of assessment when it is sold by the manufacturer does not detract from its true nature, that it is a levy on the fact of manufacture. In a subsequent case, AIR 1945 98 (Privy Council) , the Privy Council referred to both in the *Central Provinces and Berar Sales of Motor Spirit* and AIR 1939 1 (Federal Court) and the *Province of Madras v. Boddu Paidanna and Sons* (AIR 1942 FC 33) (supra), and

affirmed that when excise was levied on a manufacturer at the point of the first sale by him that may be because the taxation authority imposing a duty of excise finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale. But that method of collecting the tax is an accident of administration; it is not of the essence of the duty of excise, which is attracted by the manufacture itself. This Court had occasion to consider a similar question in *R.C. Jall Vs. Union of India (UOI)*, . In that case, the Central Government was authorised by an Ordinance to levy and collect as a cess on coal and coke despatched from collieries in British India a duty of excise at a specified rate. Rule 3 made under the Ordinance empowered the Government to impose a duty of excise on coal and coke when such coal and coke was despatched by rail from the collieries of the coke plants and the duty was to be collected by the Railway Administration by means of a surcharge on freight either from, the consignor or consignee. It was contended by the assessee that the excise duty could not legally be levied on the consignee, who had nothing to do with the manufacture or production of coal. The Court marked :

"The argument confused the incidence of taxation with the machinery provided for the collection thereof."

Similarly, an attempt has been made in the present case to confuse the machinery provision with incidence of taxation. However, in the present case, what is sought to be taxed is the excise duty on molasses. Only the machinery has been provided for collection of duty that if it is not paid by the manufacturer then the same can be recovered from the procurer also. This machinery provision is sought to be confused with incidence of taxation.

16. In this connection, a recent decision of the Lordships of Hon<sup>ble</sup> Supreme Court would put the matter beyond controversy, in the case of *Mohan Breweries and Distilleries Ltd., etc. Vs. Commercial Tax Officer, Madras and others*, , the question before the Lordships was whether the excise duty paid by the purchaser will fall in turnover as defined in Tamil Nadu General Sales Tax Act or not. The appellant-company manufactured Indian-made Foreign Liquor (IMFL). The manufacture, supply and sale of the IMFL was governed by T.N. Prohibition Act, 1937, the T.N. Indian-made Foreign Spirits (Supply by Wholesale) Rules, 1981, and the Tamil Nadu Indian-made Foreign Spirits (Manufacture) Rules, 1981 (hereinafter referred to as the "Wholesale Rules" and the "Manufacture Rules" respectively). u/s 17C of the Act TASMAL, a corporation wholly owned and controlled by the Government of the State of T.N. had at the relevant time the exclusive privilege of supplying by wholesale IMFL for the whole of that State. The question was whether the excise duty on IMFL paid by the purchasers thereof (TASMAL in this case) directly to the Treasury was includible in the taxable turnover of the appellant manufacturer for the purpose of levy of sales tax under the T.N. General Sales Tax Act. The appellant contended that in view of Rule 22 of the Manufacture Rules, the payment of excise duty was the liability of

TASMAC and not that of the appellant and that, consequently, the appellant could not recover the excise duty from TASMAC. That the element of the excise duty having not entered into the turnover of the manufacturer, no sales tax was payable on that element. The appellant sought to draw support from Explanation (1A) to Section 2(r) of the T.N. General Sales Tax Act. The appellant further contended that Rule 22 itself was a representation to the manufacturer and an equitable estoppel arose against the respondent State which prevented it from recovering sales tax from the manufacturer on the element of excise duty. The Lordships rejected this contention and held that "excise duty is levied upon goods manufactured or produced (Entry 84 of List I and Entry 51 of List II of the 7th Schedule to the Constitution) its incidence falls, therefore, on the manufacturer or producer of the goods. The collection of excise duty may be deferred to such later stage as is, administratively or otherwise, most convenient". Their Lordships relying on the same earlier decisions of the Hon. Federal Court in the case of [1939 FC 1] and [AIR 1942 FC 33], negated the contention of the petitioner. Therefore, simply because the collection of excise duty is deferred from manufacturer to the procurer it does not mean that the incidence of taxation is changed. Essentially it continues to be an excise duty covered under Entry 84 of List I of 7th Schedule of the Constitution. It is absolutely wrong to say that this machinery provision is nothing but a charging section. The incidence of taxation continues to be on molasses and Rule 7A is only a method of collection of the duty and it is absolutely misconceived to say that it rather becomes a charging section.

17. The learned Counsel for the petitioner has submitted that a subordinate legislation cannot over ride the statutory provisions. In this connection, the learned Counsel has invited our attention to Union of India (UOI) Vs. Delhi Cloth and General Mills, ; Navnitlal C. Javeri Vs. K.K. Sen, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay, and R.R. Engineering Co. Vs. Zila Parishad, Bareilly and Another, . There cannot be two opinions on the matter that the subordinate legislation cannot override the main statutory provision. If main Act does not provide the tax then the same cannot be levied by the Rules. The scope of subordinate legislation is only limited i.e. to implement the provisions of the Act. This is not a case here as we have already detailed above that the incidence of tax is not changed to article which is not excisable but it continues to be on excisable article i.e. molasses which is covered by Section 3 of the Act and Rule 7A only provides a procedure for collection of tax and it is totally misconceived to confuse Rule 7A as a charging section. It is only a machinery provision for collecting the tax and not a provision for imposing the tax. The charging section continues to be Section 3 and the molasses being an excisable article, it has to be taxed on manufacture and production. Therefore, the rule prescribes for collection of tax and Rule 7A is only a machinery provision and it is not that the subordinate legislation has gone beyond the provision of the statute i.e. Central Excise Act, 1944. Hence, this contention of the learned Counsel is also misconceived. It is also contended that Rule 7A is not covered by

Sub-section (2) of Section 37. Suffice it to say that Sub-section (1) of Section 37 is wide enough to cover it because it says that Rules can be framed to effectuate the purpose of this Act. Therefore, this contention of the learned Counsel is also devoid of any merit.

18. Shri A.M. Mathur, learned Counsel for the petitioners, in addition to above submission, also read out to us exhaustively AIR 1939 1 (Federal Court) and AIR 1945 98 (Privy Council) . But we need not to comment on an exhaustive reading because suffice it to say that all the cases were exhaustively examined by the Lordships of Hon. Supreme Court as mentioned above. The learned Counsel has submitted that it is a colourable exercise of power. We do not agree with the submission of the learned Counsel. It is only a machinery provision provided to cover the mischief of evasion of tax. Learned Counsel has submitted that it is nothing but an indirect duty of alcohol which is not contemplated in the Act. It is not duty on alcohol but it is duty on molasses which is used for manufacture of alcohol. The submission of the learned Counsel that what cannot be done directly is sought to be done indirectly, is therefore without any basis.

19. As a result of above discussion, we are of the opinion that there is no merit in both the aforesaid writ petitions and both the writ petitions (W.P. No. 2972/97 and W.P. No. 2973/97) are dismissed with cost of Rs. 5,000/- each.