

(2012) 03 GUJ CK 0022
In the Gujarat High Court

Case No : Special Civil Application No's. 1984 of 2002 with 3637 of 2004 and 6779 of 2003

Krishna Processors

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 16-03-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 1, 11A, 11AC, 3, 37
Constitution of India, 1950 — Article 13, 13(2), 14, 141, 19(1)(g)
Finance Act, 2001 — Section 121, 131, 132, 3
General Clauses Act, 1897 — Section 6, 6(1), 6A
Income Tax Act, 1961 — Section 276C

Citation : (2012) 280 ELT 186

Hon'ble Judges : R.M. Chhaya, J; Harsha Devani, J

Bench : Division Bench

Advocate : Paresh M. Dave and Dhaval Shah, for the Appellant; Y.N. Ravani, R.J. Oza and Darshan M. Parikh, for the Respondent

Judgement

Harsha Devani, J.—Since common facts and questions of law are involved in all these petitions the same were taken up for hearing together and are decided by this common judgment. In Special Civil Application No. 1984 of 2002, the petitioners have challenged the constitutional validity of Rule 96ZQ(5)(ii) of the Central Excise Rules, 1944 (hereinafter referred to as "the Rules") prescribing imposition of penalty equal to the amount of duty outstanding from an independent processor of textile fabrics in case such person fails to pay the amount of duty or any part thereof by the specified date, on the ground that the said rule is ultra vires the Constitution of India. The petitioners have also challenged the order-in-original dated 1st January, 2002 passed by the Deputy Commissioner, Central Excise, Di-vision-II, Ahmadabad-I insofar as the same imposes penalty under Rule 96ZQ(5)(ii) of the Rules.

2. In Special Civil Application No. 3637 of 2004, the petitioner has challenged the order-in-original No. 41-45/D/2003 dated 31st December, 2003 passed by the

Deputy Commissioner of Central Excise, confirming total demand of Rs. 12,45,370/- under Rule 96ZP(3) of the Central Excise Rules, 1944 and imposing equal amount of penalty as well as interest at the appropriate rate on the confirmed amount under Rule 96ZP(3) of the Rules.

3. In Special Civil Application No. 6779 of 2003, the petitioners have challenged Order-in-Original No. SRT-VI/Adj-778/2001-0A dated 30th October, 2001 passed by the Deputy Commissioner of Central Excise & Customs insofar as imposition of penalty equal to the amount of duty amounting to Rs. 6,00,000/- (rupees six lakhs) under Rule 96ZQ(5)(ii) read with Rule 173Q(1) of the Rules on the petitioners is concerned.

4. Thus all the three petitions challenge levy of penalty equal to the amount of duty under Rule 96ZQ(5)(ii)/96ZP(3) of the Rules, whereas the petitioners in Special Civil Application No. 1984 of 2002 have also challenged the constitutional validity of Rule 96ZQ(5)(ii) of the Rules.

Facts :

5. Special Civil Application No. 1984 of 2002 :

The petitioner firm is engaged in the activity of processing textile fabrics. The fabrics are covered under the Schedule to the Central Excise Tariff Act, 1985 and are, therefore, exigible to levy of Central Excise. The Central Government enacted Section 3A of the Central Excise Act, 1944 (hereinafter referred to as "the Act") under which power was conferred upon the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. With effect from 6th December, 1998, the textile fabrics produced by the petitioner company were notified for the purpose of Section 3A of the Act and accordingly, the excise duty on such notified textile fabrics became leviable and recoverable on the basis of the production capacity of manufacturers of textile fabrics. The Central Government issued various notifications and framed rules for determination of annual production capacity of the manufacturers of notified goods for implementing the scheme of Section 3A, popularly known as Compounded Levy Scheme. Vide notification dated 10th December, 1998 Part E. XIA which bears the heading "Processed Textile Fabrics" came to be inserted in the Rules. Rule 96ZQ of the Rules which falls under the said part provided for the procedure to be followed by an independent processor of textile fabrics. The production capacity and duty liability of the petitioner's factory came to be determined in accordance with the provisions of the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998 (hereinafter referred to as "the Determination Rules") which came to be communicated by a letter dated 25th September, 2000 (Annexure "B" to the petition).

5.1. Under the provisions of sub-rule (3) of Rule 96ZQ of the Rules, 50% of the amount of duty on the annual capacity of production as determined under the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998 payable for a calendar month under sub-rule (1) thereof was

required to be paid by the 15th of the month and the remaining amount was required to be paid by the end of that month. It appears that the petitioner in respect of the first fortnight of July, 2000 for which the due date specified was 15th July, 2000 made payment of Rs. 5 lakhs on 19th July, 2000, after a delay of about four days. In respect of the second fortnight of September, 2000, for which the due date specified, was 30th September, 2000, duty of Rs. 9 lakhs came to be paid on 3rd October, 2000. A show-cause notice dated 4th October, 2001 came to be issued to the petitioner firm for violation of the provisions of Rule 96ZQ(3) read with Rule 173G of the Rules calling upon the petitioners to show cause as to why penalty of Rs. 14 lakhs should not be imposed upon them under Rule 96ZQ(5)(ii) and interest at the rate of 24% per annum calculated for the outstanding period on the outstanding amount as per Rule 96ZQ(5)(ii) of the Rules should not be recovered. The petitioner firm submitted its reply dated 8th November, 2001 explaining that they were supposed to pay 50% of their excise liability by 15th July, 2000 but by the 13th of that month, there was a heavy downpour of water which lasted for nearly twenty four hours which was well published in the newspapers and known to all. The water caused heavy logging at almost all places and their factory was also flooded as water entered the premises and their machineries and electric motors were under 1.5 feet water. It took four days for them to clear the debris of rainwater and their production also was affected for four days. During the said period, their bankers also did not operate their business due to lack of staff who also suffered due to water-logging. So the operation of the bank started on 18th July, 2000 and they deposited the amount on the same day and challan was passed on 19th July, 2000. It was the case of the petitioners that it was not their intention to make the payment late. In respect of September, 2000, it was the case of the petitioners that they had deposited the amount of Rs. 9 lakhs on 29th September, 2000 and challan was also deposited. But, 30th September was half-year closing and it was closed for public transactions and the next working day was 3rd October, 2000. 1st October was a Sunday and 2nd October was a public holiday on account of Gandhi Jayanti. So the bankers put 3rd October, 2000 on TR-6 challan. The petitioners, accordingly, requested the Deputy Commissioner not to impose any penalty as per Rule 96ZQ(5) of the Rules and interest of 24 per cent as it was not their intention to make the payment late and it was only under unavoidable circumstances.

5.2. By the impugned order dated 9th November, 2001/1st January, 2002, interest of Rs. 1315/- for the period of four days on the outstanding amount of Rs. 5 lakhs and Rs. 1775/- for the period of three days on the outstanding amount of Rs. 9 lakhs as also a penalty of Rs. 9 lakhs in terms of the provisions of Rule 96ZQ(5)(ii) came to be imposed on the petitioners which is subject matter of challenge in the present petition. The petitioners have also challenged the validity of Rule 96ZQ(5)(ii) of the Rules as being ultra vires the provisions of the Constitution and the Act.

5.3 By a judgment and order dated 24th June, 2002, this court observed that in

Special Civil Application No. 164/2002 and cognate matters, the court had held that although the provisions of clause (ii) of sub-rule (5) of Rule 96ZQ of the Rules were not declared as ultra vires, the authority was required to be directed to read the rule in a reasonable manner, i.e. to say, the penalty stipulated therein is only the maximum amount which can be levied and the assessing authority has the discretion to levy lesser amount depending upon the facts and circumstances of each case. The court, accordingly, allowed the petition by quashing and setting aside the impugned order-in-original insofar as the same imposed penalty under Rule 96ZQ(5)(ii) of the Rules and remanded the matter to the authorities. It was further observed that the remaining portions of the impugned order are not interfered with, for the simple reason that the petitioners have preferred appeals for challenging the other portions of the order levying duty and interest. The respondents herein carried the aforesaid judgment and order passed by this court in appeal before the Supreme Court. The Supreme Court in the case of Union of India and Others v. M/s. Krishna Processors and Another [2009 (237) E.L.T. 641 (S.C.)] held that in view of the decision of the Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, , Rule 96ZQ is mandatory. The court held that the consequence of the said judgment in Dharamendra Textile Processors is that the challenge to the vires of Rule 96ZQ(5)(ii) in the original writ petition before the High Courts stands revived. The Supreme Court, accordingly, remitted the entire batch of civil appeals to the respective High Courts for deciding the question of vires of the above sub-rule. The court also granted liberty to the assesseees to amend the writ petitions/appeals, if so advised. Further liberty was granted to both sides to complete their pleadings at the earliest before the High Court(s). This is how the matter stands revived and has come up for hearing before this court.

6. Special Civil Application No. 3637 of 2004 :

6.1. The facts of the case as appearing in the petition are that the petitioner is a partnership firm, inter alia, engaged in the business of manufacturing of steel products like round bars, etc. falling under Chapter 72 of the Schedule to the Central Excise Tariff Act, 1985. Section 3 of the Central Excise Act, 1944 provides for levy and collection of dues of excise on all excisable goods which are produced or manufactured in India. However, with effect from 14th May, 1997, the Union Government framed Section 3A under which the power to charge excise duty on the basis of capacity of production in respect of goods notified under the said Section 3A has been conferred on the Central Government. Section 3A of the Act also confers powers on the Central Government to issue notifications and also the rules for various matters arising u/s 3A so as to charge excise duty on the basis of the capacity of production in respect of the notified goods. The Central Government promulgated Rule 96ZP(3a) of the Central Excise Act, 1944, thereby providing for the procedure to be followed by the manufacturers of steel re-rolling products like the goods manufactured by the petitioners herein. Rule 96ZP and various other Rules including Hot Re-Rolling Steel Mills Annual Capacity Determination Rules, 1997 are framed by the Central

Government in exercise of the powers conferred by it u/s 3A read with Section 37 of the Act.

6.2. The Central Government issued notifications in connection with Steel Rolling Mills u/s 3A of the Act thereby providing for levy and collection of excise duty on the steel rolling mills on the basis of their Annual Production Capacity (APC). It appears that being aggrieved and dissatisfied with the action of the Government, some of the Steel Rolling Mills Owners challenged the validity of Section 3A of the Act as well as those notifications including denial of Modvat benefit before the Delhi High Court which came to be admitted by an order dated 28th December, 1997, whereby the interim relief was also granted in favour of those petitioners. Against the said decision of the Delhi High Court, the Union of India preferred appeal before the Supreme Court. Considering the fact that the matter involved great public importance and affected interest of manufacturers throughout the country, by an order dated 3rd March, 1998, the Supreme Court transferred all the petitions before it. In the said matters, the Supreme Court passed an interim order dated 21st April, 1998 in Civil Appeals No. 52 to 63 of 1998 in the following terms :-

While the matters are pending in this court, the Union Government shall not take any penal or coercive measures under the notification No. 07/98 -Central Excise (N.T.) dated March 10, 1998. It will be open to the manufacturers to submit application on the basis of the actual production and, if any such application is submitted the same shall be duly considered by the competent authority in accordance with the rules.

6.3. During the pendency of the above referred proceedings, the petitioners were also following the procedure prescribed under Rule 96ZP of the Rules because there was no option for the manufacturers like the petitioners but to discharge duty liabilities under the Compounded Levy Scheme. The Annual Production Capacity of the petitioners factory was fixed on the basis of the parameters of factory at 3260 MTs for the period from 1st April, 1998 to 21st July, 1998, and at 2373 MTs for the period from 1st August, 1998 to 31st March, 1999 vide letter dated 27th October, 1998.

6.4. Since the above referred APC was much higher than the annual production of the petitioners' factory, the petitioners were paying duty only on the basis of the actual production and not in accordance with the above APC which was much higher and much in disproportion, to the actual production capacity as well as actual production of the factory. The petitioners, in fact, also closed down the factory with effect from 5th May, 1998, and an intimation in that regard was also submitted by the petitioners on 27th July, 1998. It appears that the Gujarat Electricity Board had also disconnected power supply of the petitioners' unit with effect from 24th June, 1998 because the petitioners failed to pay electricity charges to the GEB. The petitioners also formally informed the Superintendent of Central Excise vide letter dated 1st February, 1999 that the registration was being surrendered as there was no production in the factory from May 1998, the

GEB had disconnected power supply from June 1998 and there was no alternative source of power like DG set with the petitioners using which any production could be made in the factory.

6.5. It appears that the Range Superintendent did not accept the petitioners request for surrendering/cancelling registration on the ground that there were pending show cause notices against the petitioners. A certain correspondence was exchanged between the parties in this regard wherein the Superintendent refused to cancel registration whereas the petitioners were insisting on surrendering and cancelling registration on execution of an undertaking for paying up any duty liability that may arise in future. In view of the above referred facts and undisputed closure of the factory from 5th May, 1998, the petitioners were also not liable to pay any compounded levy amount for the period from May 1998 onwards. According to the petitioners, even for the period prior thereto., the petitioners were not legally obliged to pay any duties on the basis of the APC when the actual production capacity and the actual production were much lower than the APC. It appears that five show cause notices covering the period from 1st September, 1997 to 31st March, 2000 were issued to the petitioners proposing to recover various amounts of compounded levy on the ground that the petitioners had not discharged duty liability in accordance with the APC and duty liability as determined by the Department.

6.6. In response to the show cause notices, the petitioners filed reply to the effect that the issue of the validity of Compounded Levy Scheme was pending before the Supreme Court and therefore, adjudication be kept in abeyance. The petitioners also challenged the compounded levy scheme and recovery being proposed thereunder before this Court by way of a writ petition being Special Civil Application No. 11931 of 2000. During the pendency of these show cause notices, the Supreme Court decided the controversy about Section 3A of the Act and the Compounded Levy thereunder in a group of cases between the Union of India and Others Vs. Supreme Steels and General Mills and Others, . In the said decision, the Supreme Court directed that the assessment shall be made for the whole time of one year, namely, the financial year on the basis of actual production according to the compounded levy provision in all matters not yet closed and still pending before the concerned authorities.

6.7. The petition filed by the petitioners before this Court also came up for hearing with a group of similar petitions on 11th December, 2002 and came to be disposed of by a common order on the ground that Section 3A of the Act was deleted and hence, the petitions had become infructuous. The Court, however, granted liberty to all the petitioners, including the petitioners herein, to agitate the contentions if any cause of action pursuant to the proceedings already initiated u/s 3A before its deletion accrued.

6.8. By the impugned order, the Deputy Commissioner confirmed all the five show cause notices and also imposed penalty of equal amount of the compounded levy amounts as demanded by the said show cause notices on the

ground that the petitioners had not paid duties in accordance with the APC fixed by the Government, giving rise to the present petition.

7. Special Civil Application No. 6779 of 2003 :

7.1. The petitioner firm is engaged in the manufacture of manmade fabrics (processed) falling under sub-heading No. 5406 of the Central Excise Tariff Act, 1985. The textile fabrics produced by the petitioner firm were notified for the purpose of Section 3A of the Act, on 16th December, 1998 and accordingly, the Excise duty on such notified textile fabrics became leviable and recoverable on the basis of the production capacity of manufacturers/processors of textile fabrics. The Competent Authority fixed the Annual Production Capacity of the petitioner company at Rs. 1.5 lakhs per chamber per month and accordingly, the petitioner company was duly discharging its duty liability on regular basis. For the month of May, 1999 the petitioner company was required to pay an amount of Rs. 6 lakhs towards compounded levy as per the Annual Production Capacity determined by the competent authority. Therefore, on 13th May, 1999, the petitioner company as usual advised it's Bankers, namely - Prime Bank Limited, Su-rat to divert an amount of Rs. 6 lakhs to the Government Account. The local Bank lodged cheque in the clearing on 15th May, 1999 and the credit was confirmed on 18th May, 1999, since intervening days were holidays for the Bank. Thus, though the instruction was given by the petitioners to Prime Bank Limited on 13th May, 1999 for diverting the funds, cheque was presented for clearance through Bank of Baroda on 15th May, 1999. Since it had come to the knowledge of the petitioners that the amount of Rs. 6 lakhs was credited by Bank of Baroda in the Govt. account only on 18th May, 1999, the petitioners by way of abundant caution also paid interest amount of Rs. 1800/- and intimated the same to the Department.

7.2. Despite this, the Superintendent of Central Excise, Range-I, Division-VI issued a Show Cause Notice bearing F.No. AR-III/SCN-96ZQ/Rita/99 dated 29th November, 1999 calling upon the petitioner company to show cause as to why penalty equal to the duty of Rs. 6,00,000/- should not be imposed under Rule 96ZQ(5)(ii) of the Rules. The petitioners filed a detailed reply on 29th December, 2000 explaining the position and informing the Deputy Commissioner-respondent No. 2 herein that the petitioners have already instructed their Bankers - Prime Co-operative Bank Ltd. on 13th May, 1999 itself for diverting the funds and the cheque was presented for clearance on 15th May, 1999 and that the amount was duly credited by the petitioners bankers in the Government account on 18th May, 1999 because of the intervening holidays. In order to substantiate their case, the petitioners also submitted copy of letter dated 17th December, 1999 received by the petitioners from Bank of Baroda, the contents of which were self-explanatory. The respondent No. 2 however, passed an Order-in-Original No. SRT-VI/ADJ-78/2001-OA dated 30th October, 2001, thereby confirming payment of interest under Rule 96ZQ(5)(i) of the Rules and imposing penalty of Rs. 6,00,000/- under Rule 96ZQ(5)(ii) of the Central Excise Rules, 1944. Being

aggrieved, the petitioner has filed the present petition challenging the aforesaid order passed by the adjudicating authority.

8. During the pendency of Special Civil Applications No. 3637 of 2004 and 6779 of 2003, the petitioners therein had filed applications seeking to amend the memorandum of petitions by inserting paragraph 5A, whereby the petitioners have challenged the impugned orders on the ground that Rules 96ZO, 96ZP and 96ZQ were omitted by Notification No. 6/2001-C.E. (N.T.), dated 1st March, 2001. Vide clause (7) of this notification, these Rules were omitted without any saving clause. Section 3A of the Act was also omitted vide Section 121 of the Finance Act, 2001 which has received the assent of the President on 11th May, 2001 and thus, Section 3A of the Act stands omitted with effect from 11th May, 2001 without any saving clause. All proceedings which were pending as on 1st March, 2001 and/or 11th May, 2001 as regards the Rules 96ZO, 96ZP and 96ZQ would, therefore, automatically lapse in the absence of any saving clause for continuing the proceedings already initiated under these rules framed u/s 3A of the Act and hence, no orders could have been passed against the petitioners under these provisions, if the action against the petitioners were not finally concluded at the time of omission of these provisions.

Submissions :

9. Mr. Paresh Dave, learned advocate for the petitioners invited attention to the provisions of the Act and more particularly to Section 3 thereof to submit that Section 3 is the charging section which provides for levy and collection of duty in the manner specified therein. Section 3A came to be inserted in the Act with effect from 14th May, 1997. The said section provides that notwithstanding anything contained in Section 3, where the Central Government having regard to the nature of the process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such factors as may be relevant, is of the opinion that it is necessary to safeguard the interest of revenue, specify, by notification in the Official Gazette, such goods as notified goods and there shall be levied and collected duty of excise on such goods in accordance with the provisions of this section. In exercise of powers u/s 3A of the Act, the Central Government issued notification notifying the Hot Air Stenter Independent Textile Processor Annual Capacity Determination Rules, 1998. The goods manufactured by the petitioners came to be notified as goods on which duty was to be levied and collected as prescribed u/s 3A of the Act. Thus by a legal fiction, Section 3A became the charging event in respect of goods notified under sub-section (2) of Section 3A of the Act, The Central Government also inserted Rule 96ZQ in the Rules which lays down the procedure to be followed by an independent processor of textile fabrics and which provided for the manner in which duty was to be determined as well as paid as well as the amount of penalty and interest in case of default in payment of duty, etc. Similarly the Central Government had promulgated Rule 96ZP u/s 3A of the Act thereby providing for the procedure to be followed by the

manufacturers of steel re-rolling products like the goods manufactured by the petitioners. Rule 96ZP and various other rules including the Hot Re-Rolling Steel Mills Annual Capacity Determination Rules, 1997 are framed by the Central Government in exercise of powers conferred upon it vide Section 3A read with Section 37 of the said Act.

9.1. It was submitted that Rules 96ZO, 96ZP and 96ZQ were omitted vide clause 7 of Notification No. 6/2001-C.E. (N.T.), dated 1st March, 2001 without any saving clause. Section 3A of the Act was also omitted vide Section 121 of the Finance Act, 2001 which was given assent by the Hon"ble President on 11th May, 2001, and thus Section 3A of the Act also stands omitted with effect from 11th May, 2001 without any saving clause.

9.2. It was submitted that in view of the omission of the aforesaid provisions, all the proceedings which were pending as on 1st March, 2001 and on 11th May, 2001 under Rules 96ZO, 96ZP and 96ZQ would, therefore, automatically lapse in the absence of any saving clause for continuing proceedings already initiated under these rules framed u/s 3A of the Act, and hence, no orders could have been passed against the petitioners under these provisions, if the actions against the petitioners were not finally concluded at the time of omission of these provisions. It was pointed out that in the case of the petitioners in Special Civil Application No. 1984 of 2002, the show cause notice proposing to impose penalty and recover interest was issued on 4th October, 2001, that is, after the relevant provisions were omitted, and therefore, the very initiation of proceedings that culminated into the impugned order dated 9th November, 2001 issued on 1st January, 2002 was a nullity. Insofar as Special Civil Application No. 3637 of 2004 is concerned, the show cause notice came to be issued on 28th October, 1999, however, the impugned order came to be passed on 31st December, 2003 after the aforesaid provisions came to be omitted, and hence continuance of the proceedings after the said provisions came to be omitted was without any authority of law. Similarly in the case of the petitioners in Special Civil Application No. 6779 of 2003, the show cause notice came to be issued on 20th November, 1999, but the impugned order came to be passed on 30th October, 2001 after the aforesaid provisions came to be omitted and as such was without authority of law. In support of his submission, the learned advocate placed reliance upon the decision of this court in the case of Amit Processors Pvt. Ltd. Vs. Union of India and Others, wherein this court while considering as to whether Rule 10 and 10A of the Central Excise Rules which came to be omitted without any saving clause, held that the court was concerned with omission of a rule and not a Central Act or Regulation and, therefore, looking to the decision of the Supreme Court in the case of M/s. Rayala Corporation (P) Ltd. v. Director of Enforcement, AIR 1970 SC 494, it is clear that Section 6 of the General Clauses Act cannot be pressed into service. When Section 6 of the General Clauses Act cannot be pressed into service and when there is no saving clause in the notification by which Rule 10 was omitted, it is clear that no action could have been taken in pursuance of the said notice which was issued under Rule 10 as it

then existed. The court further held that an action under Rule 10 consists of two parts; one is the initiation of proceedings and the second is the conclusion of the proceedings. But before the proceedings came to be concluded, the power to conclude those proceedings disappeared from, the scene. The court, therefore, rejected the argument that once action is initiated, it can be said to be taken under Rule 10. Reliance was also placed upon the decision of this court in the case of *Mehendra Mills Ltd. Vs. Union of India*, for a similar proposition of law.

9.3. It was contended that Section 6 of the General Clauses Act is applicable only when any enactment is repealed. In case of *Rayala Corporation (P) Ltd. and Another v. Director of Enforcement (supra)*, the Supreme Court has held that Section 6 of the General Clauses Act applies to repeals and not to omissions. In case of *Kolhapur Canesugar Works Ltd. and Another Vs. Union of India and Others*, also, the Supreme Court has held that Section 6 of the General Clauses Act was not applicable in case of omission of an enactment and it was applicable only in case of repeal of an enactment.

9.4. It was argued that insofar as Rules 96ZO, 96ZP and 96ZQ of the Rules are concerned, the proceedings initiated thereunder are not saved by virtue of Section 6 of the General Clauses Act or by Section 38A of the Central Excise Act because these provisions regarding continuation of pending proceedings do not apply in case of "omission" of a rule. It was, accordingly, contended that there is no saving clause provided by the legislature while omitting these rules. Similarly, Section 6 of the General Clauses Act or Section 38A of the Act, are not applicable in case of "omission" of Section 3A also, inasmuch as this is a case of "omission" and not that of "repeal". Accordingly, proceedings pending against the petitioners under the above rules and Section 3A of the Act have lapsed and therefore, the orders passed against the petitioners under such provisions, which stood omitted without any saving clause, are wholly illegal.

9.5 It was further submitted that when Section 3A of the Act was omitted on 11th May, 2001 by virtue of Section 121 of the Finance Act, 2001, all the provisions like the rules made thereunder and the action initiated under such rules also stood lapsed. Reference was made to the decision of the Supreme Court in *Air India Vs. Union of India and others*, , wherein it has been held that if subordinate legislation is to survive the repeal of its parent statute, the repealing statute must say so in so many words and by mentioning the title of the subordinate legislation. It was held that that when the parent provision is omitted, all the provisions like rules and regulations made thereunder, would also not survive. The learned counsel pointed out that no such provision for survival or continuation of proceedings initiated under Rules 96ZO, 96ZP and 96ZQ is made while omitting Section 3A of the Act which is the parent provision for these rules. Under the circumstances, no penalty could be imposed and no interest could be charged in case of the petitioners, because the case against the petitioners had not been brought to finality before omission of the above provisions.

9.6. The next contention raised by the learned advocate for the petitioners was that it is a settled legal position that penalty cannot be imposed merely because it is lawful to do so, because liability to pay penalty does not arise merely upon proof of default in compliance with a particular provision. Penalty would not ordinarily be imposed unless the party obliged, either acted deliberately or in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Reliance was placed upon a decision of the Supreme Court in the case of *Hindustan Steel Ltd. v. State of Orissa*, (1970) 25 STC 211 = 1978 (2) E.L.T. (J159) (S.C.) for the proposition that even if a minimum penalty is prescribed, the authority competent to impose penalty would be justified in refusing to impose penalty when there was a technical or venial breach of the provisions of the Act. It was submitted that Rule 96ZQ(5)(ii) of the Rules does not leave any such discretion to the adjudicating authority, and in fact this provision takes away the discretion of the adjudicating authority and makes it obligatory on the part of the adjudicating authority to impose a penalty equal to an amount of duty outstanding from the assessee at the end of a particular month. According to the learned advocate the rule which thus, takes away discretion of an adjudicating authority and makes it obligatory on adjudicating authority to impose penalty even in the absence of any dishonest or contumacious conduct on the part of the assessee, is therefore illegal and in violation of Article 14 of the Constitution of India.

9.7. It was next submitted that Rule 96ZQ(5)(i) of the Rules provides for recovery of interest on the outstanding amount and thus, in case of default on the part of an assessee, the revenue is duly compensated by virtue of operation of this provision. Interest which is compensatory in character thus, takes care of the interest of the revenue in case an assessee commits default in making payment of the compounded levy amount within the specified period. However, penalty which is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of a particular statute is thus penal in character. However, penalty under Rule 96ZQ(5)(ii) of the Rules would be imposable on the assessee regardless of the facts and circumstances of such a case and thus, penalty which is penal in character is provided under this rule even without any action on the part of the assessee inviting any penal consequences. In view of the provisions of Rule 96ZQ(5)(i) which are compensatory in nature, Rule 96ZQ(5)(ii) becomes onerous and wholly unjustified. It was, accordingly, urged that this provision of Rule 96ZQ(5)(ii) which thus provides for penalty without there being any action on the part of an assessee justifying taking of any action penal in character, is therefore wholly illegal and in violation of Article 14 of the Constitution of India.

9.8. Next it was contended that there is a basic inconsistency in Rule 96ZQ(5)(ii) which shows the unreasonableness and arbitrariness underlying this provision. Rule 96ZQ(3) provides for payment of 50% of the amount by the fifteenth day of the month and the remaining amount by the end of the month. In case there is a default in paying the first installment by the 15th day of the month, no penalty

under Rule 96ZQ(5)(ii) is leviable, and only interest under Rule 96ZQ(5)(i) is recovered as a compensatory measure. However, in case of default in payment of the second installment, not only compensatory measure of interest, but penalty would also be attracted. Even if the default in the payment of the first installment is of a larger period, no penalty would be imposed if the payment of the first installment was made by the end of the month, which would mean the delay of at least two weeks for the payment of the first installment. However, in case of default of even a single day in making payment of the second installment, penalty of equal amount would be imposed under Rule 96ZQ(5)(ii) of the Rules. It is thus clear that the impugned provision works unreasonably and arbitrarily even within itself and is therefore liable to be struck down as unconstitutional and illegal. Further the gross arbitrariness of this provision becomes amply clear by virtue of the fact that not only the circumstances leading to delayed payment, but even the period of delay also becomes irrelevant for imposing penalty under this provision. If there was a delay of one day in making payment of the second installment of compounded levy amount or there was a delay of a substantial period in making payment of the second installment, the amount of penalty would be the same, that is, an amount equal to the duty outstanding. Thus, this rule does not even require consideration about the period of delay or the gravity of default on the part of the concerned assessee and proposes to treat all such assessees equally. It was contended that an assessee paying the second installment after one day of the specified date and an assessee paying such amount after hundred days of the specified date cannot be treated equally, because of the simple fact that the latter case would show deliberate defiance on the part of the concerned assessee. However, the rule treats unequal"s as equals thereby violating Article 14 of the Constitution of India. It was, accordingly, urged that Rule 96ZQ(5)(ii) of the Rules therefore deserves to be struck down as being violative of Article 14 of the Constitution of India.

9.9. Mr. Dave further submitted that Rule 96ZQ(5)(ii) of the Rules is discriminatory in nature and therefore, it fails on the touchstone of Article 14 of the Constitution of India. It was submitted that the provisions of the Act are applicable to all the goods produced or manufactured in India. All the manufacturers of excisable goods are therefore governed by the provisions of the Act, but except the manufacturers of specified textile products, no other manufacturer of any other excisable goods is governed by a provision like Rule 96ZQ(5)(ii) of the Rules. Even the manufacturers of similar textile products, including fabrics, which are not specified u/s 3A of the Act are not governed by Rule 96ZQ(5)(ii) and are therefore, not liable for any like penalty under the Rules. It was submitted that there is no reasonable classification between manufacturers of specified textile products and manufacturers of other excisable goods and therefore, the impugned rule which subjects only the manufacturers like the petitioners to discriminatory treatment is wholly unconstitutional and liable to be struck down. Reliance was placed upon the decision of the Supreme Court in the case of *The State of Kerala Vs. Haji K. Kutty Naha and Others*

etc., , as well as in the case of Special Courts Bill, 1978, In Re: The Special Courts Bill, 1978, , wherein the court had laid down propositions applicable to cases arising under Article 14 of the Constitution. It was, inter alia, laid down that the principle underlying the guarantee of Article 14 is not that the same rules or law should be applicable to all persons within the Indian Territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced should be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another, if as regards the subject matter of the legislation their position is substantially the same.

9.10. The learned advocate further submitted that other manufacturers who were not governed u/s 3A of the Act and were thus, not subjected to Compounded Levy Scheme have been discharging their duty liabilities u/s 3 of the Act, read with the procedure prescribed under Rule 49 of the Rules. Such manufacturers are also given similar facility of payment of duty for the clearances made during the first fortnight of the month by the 20th day of that month and for the clearances made during the second fortnight of the month, by the 5th day of the succeeding month, except in cases of the clearances made during the second fortnight of March of each financial year. Under Rule 49 of the Rules, which provides similar facility to other manufacturers it is also provided that a manufacturer failing to pay the amount of duty by the due date shall be liable for interest at the rate of 24% per annum on the outstanding amount. However, no penalty at all is provided under Rule 49 in case of default in payment by such manufacturers. Thus, manufacturers of goods specified u/s 3A of the Act were subjected to harsh treatment of unreasonable penalty under Rule 96ZQ(5)(ii) compared to the other manufacturers of excisable goods. It was, accordingly, submitted that the provisions of Rule 96ZQ(5)(ii) of the Rules which mete out discriminatory treatment to the manufacturers like the petitioners is wholly unconstitutional and liable to be struck down.

9.11. Mr. Dave further submitted that Rule 96ZQ(5)(ii) is also violative of Article 19(1)(g) of the Constitution of India, as it imposes unreasonable restriction on the fundamental rights of the petitioners in conducting their business because if the petitioners have to pay substantial amount as penalty only because of a very minor delay in making payment of the duty, such a provision violates the petitioners' fundamental right of conducting business without unreasonable restrictions. As has happened in various cases, the manufacturers would be liable for an astronomical amount of penalty only because of a minor delay of three/ four days, which amounts to unreasonable restriction on the petitioners' right to conduct business. The liability of penalty under the impugned rule is undoubtedly onerous and therefore it deserves to be struck down as violative of Article 19(1)(g) of the Constitution of India. In support of his submissions, the learned advocate placed reliance upon the decision of the Punjab & Haryana High Court in the case of Bansal Alloys and Metals Pvt. Ltd. Vs. Union of India (UOI),

wherein the court has struck down Rules 96ZO, 96ZP and 96ZQ to the extent the same permit minimum penalty for delay in payment without any discretion and without having regard to extent and circumstances for delay as ultra vires the Act and the Constitution. It was submitted that the said decision would be squarely applicable to the facts of the present case and that the provision of Rule 5(ii) of Rule 96ZQ of the Rules is required to be struck down as being unconstitutional.

9.12. Reliance was also placed upon a decision of the Karnataka High Court rendered on 2nd January, 2009 in Writ Petitions No. 9689 of 2006 and other cognate matters in the case of Philips Electronics India Ltd. and Others Vs. State of Karnataka and Others, . The decision of the Supreme Court in the case of State of Maharashtra Vs. Mrs. Kamal Sukumar Durgule and Others, , was also relied upon wherein the court held that classification requires division into classes which are marked by common characteristics. Such division has to be founded upon a rational basis and it must be directed at sub-serving the purposes of the statute. Reliance was also placed upon the decision of the Supreme Court in the case of New Manek Chowk Spinning and Weaving Mills Co. Ltd. and Others Vs. Municipal Corporation of The City of Ahmedabad and Others, , and more particularly paragraphs 12 and 13 thereof.

9.13. The decision of the Supreme Court in the case of Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another, , was cited for the proposition that Article 265 imposes a limitation on the taxing power of the State insofar as it provides that the State shall not levy or collect a tax, except by authority of law, i.e. to say, a tax cannot be levied or collected by a mere executive fiat. It has to be done by authority of law, which must mean valid law. In order that the law may be valid, the tax proposed to be levied must be within the legislative competence of the legislature imposing a tax and authorising the collection thereof and secondly, the tax must be subject to the conditions laid down in Article 13 of the Constitution. One of the conditions envisaged by Article 13(2) is that the Legislature shall not make any law which takes away or abridges the equality clause in Article 14. Referring to the provisions of Rule 37 of the Rules, it was submitted that the said rule does not empower the Central Government to levy penalty or interest on late payment of duty. It was submitted that levy of penalty being in the nature of a tax, unless expressly empowered, the Central Government could not have framed the rule levying penalty in exercise of powers u/s 37 of the Act.

9.14. Reliance was placed upon the decision of the Supreme Court in the case of Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra, for the proposition that penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act. Reliance was placed upon the decision of the Supreme Court in the case of Collector of Central Excise, Ahmedabad Vs. Orient Fabrics Pvt. Ltd., , wherein the court

affirmed the decision of the Delhi High Court in the case of Pioneer Silk Mills Ltd. [1995 (80) E.L.T. 507 (Del.) wherein it was held that when penalty is additional tax, constitutional mandate requires a clear authority of law for imposition thereof.

9.15. Referring to Section 38A of the Act, which came to be inserted in the statute book by Section 131 of Act 14 of 2001 with effect from 28th February, 1944, it was submitted that the said section applies only in respect of rules, notifications or orders and does not apply to any section. According to the learned advocate Section 3A is the mother provision under which the other rules came to be framed. Section 3A came to be omitted in 2001 and is not saved by Section 38A of the Act. Moreover, Section 38A speaks of a rule being amended, repealed, superseded and rescinded and does not speak of omission and as such, would not be applicable to the omission of Rule 96ZQ of the Rules. Reliance was placed upon the decision of the Supreme Court in the case of General Finance Co. and Another Vs. Assistant Commissioner of Income Tax, Punjab, , wherein the court held that in the light of its earlier decisions in Rayala Corporation Pvt. Ltd. (supra) and Kolhapur Canesugar Works Ltd. (supra), the principle underlying Section 6 of the General Clauses Act as saving the right to initiate proceedings for liabilities incurred during the currency of the Act will not apply to omission of a provision in an Act but only to repeal, omission being different from repeal as held in the said decisions.

10. On the other hand, Mr. Darshan Parikh, learned Senior Standing Counsel appearing on behalf of the respondents in Special Civil Application No. 3637 of 2004 opposed the petition submitting that while omitting Rules 96ZQ, 96ZP and 96ZO from the Central Excise Rules, 1944, the legislature has introduced Section 38A in the Act with retrospective effect from 28th February, 1944. It was submitted that Section 38A saves all actions under the above referred rules. Initially, the petitioners were liable to pay duty u/s 3 of the Act. Subsequently, in view of the insertion of Section 3A in the Act, the petitioners became liable to pay duty under the said provision. In the circumstances, the petitioners are liable to pay duty either u/s 3 or Section 3A of the Act. Merely because Section 3A is obliterated, their liability to pay duty does not go away. This cannot be the intention of the legislation. It was submitted that even under Rule 96ZQ of the Rules, under sub-rule (4) thereof, the assessee was required to maintain all records and as such it is always possible to assess the petitioners' liability u/s 3 of the Act. It was submitted that there is no provision under the Act under which the assessee can go scot-free without payment of duty. The attention of the court was drawn to the decision of the Supreme Court in the case of Union of India and Others Vs. Supreme Steels and General Mills and Others, , to submit that in the facts of the said case, the vires of Rule 96ZO of the rules had been challenged on the ground that it is inconsistent with the provisions of the Act. The Supreme Court in the facts of the said case observed that the scheme had since been dropped. The court disposed of the bunch of cases comprising of civil appeals, special leave petitions and writ petitions relating to charge of excise

duty on notified goods on the basis of capacity of production, as introduced by Section 3A of the Act, by holding that no dispute thus remained on the point and the excise duty shall accordingly be assessed in respect of matters not yet closed and still pending before the concerned authorities. It was submitted that in the light of the aforesaid decision of the Supreme Court, it is not open for the petitioners to contend that the liability of the petitioners to pay duty stands totally obliterated in view of the omission of Rule 96ZQ of the Rules and Section 3A of the Act. According to the learned counsel, considering the knowledge or the information given to the court regarding the provision which was no more on the statute book, the Supreme Court thought it appropriate to direct the parties to go before the appropriate authority in all pending cases. This would mean that the Supreme Court considered those provisions for removal of the section and rules and was of the opinion that despite that the matters should be decided.

10.1. The attention of the court was drawn to paragraph 3.9 of Special Civil Application No. 3637/2004 wherein the petitioner has submitted that during the pendency of the show-cause notice, the Supreme Court had decided the controversy about Section 3A and the compounded levy thereon in the case of Union of India v. Supreme Steels and General Mills Ltd. It was submitted that it was the case of the petitioner that in view of the directions of the Supreme Court, the concerned authority seized of the adjudication of the show-cause notices issued to the petitioners was also duty bound to assess the duties on actual production, and not on the basis of production capacity determined for the factory. Hence, the above referred averments made in the petition indicate that the petitioner is also very clear as regards the decision in the case of Supreme Steels and General Mills Ltd. and the applicability of the same to the facts of the present case.

10.2. Attention was invited to Section 132 of the Finance Act, 2001 which makes provision for "Validation of certain action taken" to submit that in view of the said provision, everything done under the old provision is saved. Referring to Notification 6/2001- dated 1st March, 2001 whereby Rule 96ZO, Rule 96ZP and Rule 96ZQ came to be omitted, it was submitted that the said notification amends the Central Excise Rules, 1944 and saves all things, actions done prior to the amendment. Strong reliance was placed upon the decision of the Larger Bench of the Tribunal in the case of Surana Metals & Steels (I) Ltd. v. Commissioner of Central Excise, Chennai, 2007 (216) E.L.T. 24 (Tri.- LB) wherein the Tribunal has held that Rule 96ZQ and Rule 96ZP came to be omitted by Rule 7 of the Central Excise (Third Amendment) Rules, 2001 which were notified on 1st March, 2001 by Notification No. 6/2001-C.E. (NX). As stated in the preamble of the notification, these rules were made u/s 37 of the Central Excise Act by the Central Government, "further to amend the Central Excise Rules, 1944, except as respects things done or omitted to be done before such amendment". The Tribunal held that the amendment was done by way of, inter alia, omitting Rules 96ZO and 96ZP while simultaneously providing a saving clause by incorporating the expression "except as respects things done or omitted to be done before

such amendment". The Tribunal further held that there cannot be a greater all pervasive saving clause than Section 38A. When, admittedly, the obligations and liabilities were incurred under Rules 96ZO and 96ZP, during their currency when Section 3A was still in force, amendments by omission, repeal etc. contemplated by Section 38A did not affect such liabilities, and the investigation, legal proceeding or remedies in respect thereof were all saved. The Tribunal further held that the liabilities were admittedly incurred by the appellants under Rules 96ZO and 96ZP while Section 3A was in force. The subsequent omission of Section 3A from 11th May, 2001 did not obliterate the obligations and liabilities which had already arisen under the rules and were saved because of the saving provisions contained in Section 38A of the Act. The obligations and liabilities had arisen under the said rules as contemplated by Section 3A when it was in force and those very obligations and liabilities subsisted by virtue of the saving provision of Section 38A which was simultaneously introduced while omitting Section 3A. The omission of Section 3A was not done with any retrospective effect and therefore liabilities that had already arisen under the said rules could be enforced by virtue of Section 38A of the Act. It was submitted that the view taken by the Tribunal is the correct view and that all obligations and liabilities incurred under Rule 96ZQ, Rule 96ZO and Rule 96ZP are saved by the provisions of Section 38A of the Act.

10.3. In support of his submissions, the learned counsel placed reliance upon the decision of the Supreme Court in the case of Commissioner of Central Excise and Customs Vs. M/s. Venus Castings (P) Ltd., . Reliance was also placed upon the decision of the Punjab & Haryana High Court in the case of Shree Bhagwati Steel Rolling Mills Vs. Commr. of C. Ex., , wherein while deciding a similar controversy, the court held that even by omission of Section 3A, the liability of the assessee thereunder was not wiped out. It was submitted that the said decision of the Punjab & Haryana High Court would be directly applicable to the facts of the present case. In conclusion, it was submitted that the interpretation as put forth by the petitioners would result in a situation whereby though there is a liability to pay duty, the petitioners would go scot-free without payment of any duty which could never be the intention of the Legislature.

10.4. Mr. Parikh further submitted that the use of any particular form of expression is not necessary to bring about a repeal. It is a matter of legislative practice to provide by enacting an amendment that an existing provision shall be omitted; that such omission has the effect of repeal of the existing provision, and that such law may also provide for introduction of a new provision. It was urged that viewed from that angle, there may be no real distinction between "repeal" or "omission"; that what is required is that the words used show an intention to abrogate the Act or provision in question. The Legislature adopts different forms for the same; that the usual form is to use the words "is hereby repealed" and thereafter enumerate the Acts sought to be repealed or put them a schedule; that sometimes the words "shall cease to have effect" are used; that when the object of repeal affects only a part of the Act, the words "shall be omitted" are

used; that omission and repeal have identical effect in operation of statutes. Adverting to the provisions of Section 6A of the General Clauses Act in which it is stated that if any Act repeals any enactment making textual amendment in the Act by express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of such amendment made by an enactment so repealed and in operation at the time of such repeal; that the use of the words "repeals by express omission, insertion or substitution" will cover different aspects of repeal; that this is a further legislative indication that "omission" also amounts to a "repeal" of an enactment. Reliance was placed upon the decision of the Supreme Court in the case of General Finance Co. and Another v. Assistant Commissioner of Income Tax, Punjab, (2002) 7 SCC 1, wherein the court had found force in the aforesaid submissions advanced by the learned counsel for the appellant therein.

11. Mr. Y. N. Ravani, learned Senior Standing Counsel appearing on behalf of the respondents in Special Civil Application No. 1984 of 2002 reiterated the submissions advanced by Mr. Darshan Parikh. It was further submitted that the contention as regards lapsing of the above referred provisions not having been taken at the inception; the petitioners may not be permitted to raise the same. Referring to the reliefs claimed in the petition, it was submitted that the petitioners have challenged the impugned orders only to the extent the same levy penalty; hence, it is now not open to the petitioners to contend that the entire order is bad on the ground of lapsing of the aforesaid provisions. Inviting attention to the earlier order passed by this court disposing of the petition, it was pointed out that the court had interfered only with the penalty part of the order by observing that the remaining portions are not interfered with, for the simple reason that the petitioners have preferred appeals for challenging the other portions of the orders levying duty and interest.

11.1. The learned counsel invited attention to the decision of the Supreme Court in the case of Union of India v. Krishna Processors (*supra*) to submit that the Supreme Court has remitted the matter for deciding the question of vires of clause (ii) of sub-rule (5) of Rule 96ZQ of the Act. It was submitted that the scope of the petition cannot be enlarged beyond what was remitted to the High Court. In the circumstances, the petitioners cannot be permitted to raise the contention regarding lapsing of provisions at this stage. Inviting attention to the relief claimed in the petition, it was pointed out that petitioners have only challenged the impugned order-in-original to the extent penalty is imposed under Rule 96ZQ(5)(ii) of the Rules. Rule 96ZQ is part of the Central Excise Rules. The Central Excise Rules are still in existence and are framed in exercise of powers u/s 37 and not Section 3A of the Act. Accordingly the power of enactment prescribed u/s 37 of the Central Excise Act, has its independent existence irrespective of Section 3A of the Act.

11.2. On the question of validity of Rule 96ZQ of the Rules, Mr. Ravani invited attention to the decision of the Supreme Court in the case of Union of India v.

Dharamendra Textile Processors, 2008 (231) E.L.T. 3 (S.C.), and more particularly to paragraph 25 thereof wherein the Supreme Court has held that wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution u/s 276C of the income tax Act. It was submitted that penalty is a civil liability and as such, penalty can be imposed for loss of revenue and wilful and intentional delay is not necessary. Reliance was also placed upon the decision of the Supreme Court in Commissioner of Income Tax, Delhi Vs. Atul Mohan Bindal, , wherein it has been held that the decision in Dharamendra Textile (supra) must be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the Section, once the Section is applicable in a case the authority concerned would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A.

11.3. It was pointed out that Section 3A of the Act is a special provision and provides for a different procedure than Section 3 of the Act which is the charging provision. u/s 3A of the Act which is intended to charge duty on the basis of annual production capacity, the important aspect is that the same involves pre-determination of duty whereas in other cases, the liability arises on manufacture. It was submitted that u/s 3 of the Act, the assessee does not know what will be the liability in advance whereas in case of Section 3A of the Act, the assessee knows his liability well in advance. Rule 96ZQ has been framed keeping in mind this aspect. According to the learned counsel, Rule 96ZQ applies uniformly to those to whom Section 3A applies, viz., independent textile processors who are a class by themselves. Hence, there is no discrimination on the basis of such classification.

11.4. Mr. Ravani further submitted that the penalty cannot be said to be invalid on the ground of different periods for payment of duty. The defaulter is a class by himself. In the circumstances not providing separate penalties for different defaulters would not make the penalty bad. It was submitted that the contention put forth by the petitioners creates an absurdity because lesser penalty for lesser period would encourage defaulters. Deterrence would have vanished though the prescribed period is known to the assessee. It was submitted that in the decisions relied upon by the petitioners in the context of tax liability, the court found that in the absence of valid classification, the provision is ultra vires. It was submitted that Section 3A of the Act is based upon a valid classification and imposition of penalty cannot be compared to liability to tax as imposition of penalty is different. The object is that the defaulter and the assessee cannot be put in the same class.

11.5. It was further submitted that the compensatory aspect of imposing interest for delayed payment cannot be a ground for non-levy of penalty. Referring to the decision of this High Court in the case of Ambuja Synthetic Mills v. Union of India, 2004 (175) E.L.T. 85 (Guj.), and more particularly paragraph 5 thereof, it

was submitted that this aspect of the matter stands concluded by this court in the said decision wherein it is held that on reading clause (i) of sub-rule (5) of Rule 96ZQ, it appears that 36% interest per annum is imposed as compensatory measure as the Revenue suffered loss on account of non-payment of revenue. At the same time, with a view to see that there is deterrent effect on the tax payers, it is also thought fit to impose penalty so that the amount which the Revenue is entitled to collect is paid by an assessee in time and the Government is not required to face any hardship. If the amount is not paid, it becomes difficult for the Government to run the administration. Therefore, this provision is to be invoked when the revenue is not paid by the assessee in time. The aforesaid two clauses operate in different fields and it is known that compensatory measures as well as measures for deterrent effect can be provided. The court found no difficulty in arriving at the conclusion that it is not possible to provide compensatory measures as well as measures which would deter the assessees. It was submitted that it is settled legal position that while considering the validity of a statutory provision the presumption is always in favour of its constitutionality. It was submitted that Section 3A of the Act was brought on the statute book with an intention to collect tax on production basis and to collect the same within time. The said provision was enacted in the interest of the revenue. It was intended to avoid a situation of evasion of tax and to provide timely collection of duty. Both purposes can be achieved by imposing penalty to create deterrence for committing default and therefore provision for imposition of penalty has a direct nexus with enacting Section 3A of the Act. It was submitted that this court in the case of *Ambuja Synthetic Mills v. Union of India* (supra) has verified the scheme and found it valid. Reliance was also placed upon the decision of the Supreme Court in the case of *Assistant Collector of Central Excise Vs. M/s. Ramakrishnan Kulwant Rai*, .

11.6. In so far as Section 37 of the Act is concerned, each sub-section is required to be applied independently. It was submitted that the sub-section (1) prevails over the subsequent sub-sections. Under sub-section (1) of Section 37 the Central Government is empowered to make rules to carry into effect the purposes of this Act and as such can frame any rule for this purpose. According to the learned counsel the clauses contained in sub-section (2) of Section 37 are enumerative and not exhaustive. It was submitted that sub-section (3) of Section 37 is an enabling provision and does not debar the Central Government from levying higher penalty.

11.7. It was further submitted that the scheme u/s 3A of the Act is itself unique. Reliance was placed upon the decision of the Supreme Court in the case of *Hans Steel Rolling Mill Vs. Commnr. of Central Excise*, , wherein it has been held that the compounded levy scheme for collection of duty for annual capacity of production u/s 3A of the Act and *Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997* is a separate scheme from the normal scheme for collection of central excise duty on goods manufactured in the country. This is a comprehensive scheme in itself and general provisions in the Act and the Rules

are excluded. It was submitted that the scheme is a unique scheme not comparable with the scheme of Section 3 and that the aspect of penalty u/s 3 and Section 3A of the Act cannot be compared. It was argued that, therefore, reliance placed on any aspect of normal recovery and penalty provisions is misconceived in respect of recovery and penalty provisions under the special scheme u/s 3A of the Act. According to the learned counsel, the regular scheme for recovery of tax and imposition of penalty is different from the scheme u/s 3A of the Act and that there are different means for levy of penalty. In the circumstances, the provisions of Rule 96ZQ(5) (ii) of the Act are not violative of Article 14 or of any other provision of the Constitution or the Act and as such, deserve to be sustained.

12. Mr. R. J. Oza, learned Senior Standing Counsel, appearing on behalf of the respondents in Special Civil Application 6779 of 2003 adopted the submissions advanced by Mr. Darshan Parikh.

13. In rejoinder, Mr. Paresh Dave, learned advocate for the petitioners submitted that in the case of Union of India v. Supreme Steels and General Mills (supra) the issue of proceedings continuing or not had not been raised, considered or decided by the Supreme Court. It was a direction on consensus. It was submitted that it was a sort of a consent decree and as such, the same is not a decision binding as an authority, In support of his submission, the learned advocate placed reliance upon the decision of the Supreme Court in the case of Kulwant Kaur and Others Vs. Gurdial Singh Mann (dead) by Lrs. and Others etc., , wherein the court held that concession, if made and in the event the court proceeds on the basis of such a concession, the decision cannot by any stretch be termed as a binding precedent. The court in the facts of the said case held that the previous decision did not and cannot have the sanctity and solemnity of a binding precedent. The decision of the Supreme Court in the case of Municipal Corporation of Delhi Vs. Gurnam Kaur, , was cited for the proposition that when a direction or order is made by consent of the parties, the court does not adjudicate upon the rights of the parties nor does it lay down any principle. Quotability as "Taw" applies to the principle of a case, its ratio decidendi. The only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. It was submitted that the decision of the Supreme Court was delivered without argument, without reference to the relevant provisions of the Act and the Rules and as such, the same cannot be treated to be a binding precedent insofar as the transaction involved in the present case is concerned. Reliance was also placed upon the decision of the Supreme Court in the case of Zee Telefilms Ltd. and Another Vs. Union of India (UOI) and Others, , for the proposition that when questions raised were neither canvassed nor was there any necessity therefore in the earlier decision, the same cannot be treated as a binding precedent within the meaning of Article 141 of the Constitution, having been rendered in a completely different situation. The decision of the Supreme Court in the case of

The Divisional Controller, KSRTC Vs. Mahadeva Shetty and Another, , was cited for the proposition that while applying a decision to a later case, the court dealing with it should carefully try to ascertain the principle laid down by the previous decision. The decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. It was submitted that in the circumstances, the decision of the Supreme Court in the case of Union of India v. Supreme Steels and General Mills (supra) cannot be treated as a binding precedent to the issue involved in the present case.

13.1. Next it was submitted that the assessees who are manufacturers of excisable goods are sought to be distinguished on the basis of liability being predetermined, by contending that provision for taxes and penalties under the scheme of Section 3A and Section 3 of the Act would be different. It was contended that pre-determining of liability is not a relevant consideration for imposition of penalty. It was argued that even otherwise, the statement is factually incorrect. Attention was invited to the provisions of Rule 173G of the Rules which lays down the procedure to be followed by the assessee in the normal course. It was submitted that under sub-rule (1) of Rule 96ZQ, goods and rates are specified whereas sub-rule (3) provides for payment of 50% of the duty by 15th and the remaining by the end of the month. Under the normal scheme, Chapter 7A of the Rules provides for removal of excisable goods on determination of duty by producers, manufacturers or private warehouse licensees. Attention was invited to the notification issued in exercise of powers conferred by Rule 173A of the Rules specifying the goods to which the provisions of sub-rule (1) of Chapter 7A of the Rules shall apply. It was pointed out that most of the goods are covered under Chapter 7A and that all goods except cigarettes have been brought under the self-removal procedure. Attention was invited to Rule 173B of the Rules and Rule 173F of the Rules to submit that even under the regular procedure, the duty has to be paid prior to removal of the goods. Referring to Rule 173Q of the Rules which provide for confiscation and penalty, it was submitted that all clauses refer to some deception or wilful action on the part of the assessee. Except for rate of duty which is on actual production u/s 3 of the Act and rate of duty being on annual production capacity u/s 3A of the Act, nothing is different in the procedure to be followed for payment of duty and its charging liability etc. under the Act. Assessee u/s 3 and Section 3A are not a different class except for the limited purpose namely, the manner in which the liability is determined viz. on actual production and on annual production capacity. It was submitted that penalty partakes character of tax or is in the nature of a tax. Reliance was placed upon the decision of the Supreme Court in the case of Collector of Central Excise, Ahmedabad Vs. Orient Fabrics Pvt. Ltd., and more particularly paragraph 17 thereof for the proposition that levy of penalty which is an additional tax has to be under the authority of law which should be clear, specific and explicit. It was submitted that accordingly the principle of reasonable classification of assessee is applicable even in cases of

penalty, and that in any case on mere ipse dixit, penalty cannot be imposed to the extent Government thinks fit. It was argued that the only basis for revenue to levy the penalty is that Section 3A of the Act is a unique scheme. According to the learned advocate not providing for different penalties based on length of delay is absurd and not vice versa. It was submitted that length of delay is a very relevant factor as the same shows the intention of the assessee. It was submitted that there may be genuine reasons for short delay whereas long delay would normally lack bona fide. The aforesaid aspect has been lost sight of by the Government while framing rules. It was submitted that no attempt has been made to show as to why there is no penalty for delay qua the first fortnight and that there is no rationale behind not levying any penalty for any delay that may occur for a period of 15 days from the end of the first fortnight to the end of the month.

13.2. Dealing with the contention that *Ambuja Synthetic Mills v. Union of India* (supra) concludes the issue, it was submitted that in the said case the court never dealt with the aspect of vires of Rule 96ZQ and the rule was read down. It was further submitted that the decision of this court in *Ambuja Synthetic Mills v. Union of India* has been quashed and set aside in the case of *Dharamendra Textile Processors* and as such, no reliance can be placed upon the same by the Revenue. Reliance was placed upon the decision of this High Court in the case of *Satellite Engineering Ltd. Vs. Asstt. Collector of Central Excise*, , for the proposition that once a decision is reversed and set aside, it is immaterial on which point the decision is reversed because on reversion of the decision, it ceases to be a good decision in the eye of law. As regards the decision of the Punjab & Haryana High Court in the case of *Shree Bhagwati Steel Rolling Mills* (supra) it was pointed out that in the said decision the court had observed that the decision of the Supreme Court in *Kolhapur Canesugar* was in respect of a temporary statute which is an incorrect fact, and as such there is a complete misreading of the said decision. It was submitted that the said decision was contrary to the decision of the Supreme Court in *Kolhapur Canesugar* (supra). According to the learned advocate the Central Excise Act, 1944 and the rules framed thereunder are never temporary and that Section 38A has been relied upon incorrectly. In the circumstances, no reliance can be placed upon the said decision. Discussion :

14. In the background of the facts and contentions noted hereinabove, the court is called upon to decide as to :

(i) Whether in view of the omission of Rule 96ZQ of the Rules with effect from 1st March, 2001, the adjudicating authority could thereafter have initiated action for breach thereof by issuance of show cause notice and/or could have continued with the proceedings initiated but not concluded prior thereto?

(ii) Whether any obligation or liability incurred u/s 3A of the Act is saved by Section 6 of the General Clauses Act and whether after the omission of Section 3A of the Act with effect from 11th May, 2001 proceedings initiated under the

Rules 96ZQ, 96ZP and 96ZO of the Rules would survive?

(iii) Whether Section 38A of the Act saves all obligations and liabilities incurred under Rule 96ZQ of the Rules? If yes, whether the said position would prevail even after the omission of Section 3A of the Act?

(iv) Whether in view of Section 132 of the Finance Act, 2001 everything done under the old provision is saved?

(v) Whether Rule 96ZQ(5)(ii) of the Rules which does not provide for any inbuilt discretion in respect of the penalty to be imposed thereunder is ultra vires the provisions of the Constitution and the Act? and

(vi) Whether the decision of the Supreme Court in the case of Union of India v. Supreme Steels and General Mills Ltd. (supra) concludes the controversy involved in the present case?

15. Dealing with the first question, it may be germane to refer to the provisions of Rule 96ZQ of the Rules. Rule 96ZQ makes provision for the procedure to be followed by the independent processor of textile fabrics. Sub-rule (1) thereof requires an independent processor of textile fabrics to debit the amount specified thereunder on the annual capacity of production as determined under the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998. Sub-rule (2) thereof provides for debiting the duty payable under sub-rule (1) in the current account maintained by the independent processor under sub-rule (1) of Rule 173G of the Rules. Sub-rule (3) says that 50% of the amount of duty payable for a calendar month under sub-rule (1) shall be paid by the 15th of the month and the remaining amount shall be paid by the end of that month. Sub-rule (4) makes provision for maintaining records etc. Sub-rule (5) which makes provision for payment of interest and penalty is in two parts. The first part provides for payment of interest at the rate of 24% per annum for the outstanding period on the outstanding amount if an independent processor fails to pay the amount of duty or any part thereof by the date specified in sub-rule (3); whereas the second part provides for payment of penalty equal to the amount of duty or Rs. 5000/-, whichever is greater, in case of default in making payment in terms of sub-rule (3). In Special Civil Application No. 1984 of 2002, the Superintendent of Central Excise issued a show-cause notice on 4th October, 2001, that is, after Rule 96ZQ came to be deleted. In the other two writ petitions the show cause notices came to be issued prior to deletion of Rule 96ZQ but the proceedings were not concluded when the said rule as well as Section 3A came to be omitted. The question that therefore arises is whether after Rule 96ZQ came to be omitted, the adjudicating authority could have initiated and continued with proceedings under sub-rule (5) of Rule 96ZQ of the Rules.

15.1. On behalf of the revenue, twin contentions have been raised. Firstly, that there is a saving clause while deleting Rule 96ZQ inasmuch as the Notification dated 1st March, 2001 has amended the Central Excise Rules except as respects things done or omitted to be done before such amendment. The other contention

is that, even if there is no saving clause in the notification. Section 38A was brought on the statute book with effect from 28th February, 1944 and, therefore, the action could be initiated, continued and concluded even after the omission of Rule 96ZQ as the regular provisions of the Act would continue to apply. In this regard, it may be relevant to notice some facts. Rule 96ZO, 96ZP and 96ZQ came to be omitted by Notification 6/2001-C.E. (N.T.), dated 1st March, 2001. Subsequently, Section 3A of the Act came to be omitted with effect from 11th May, 2001 by Finance Act, 2001. Section 38A, came to be inserted in the Central Excise Act with effect from 28th February, 1944 and reads thus:

38A. Effect of amendments, etc. of rules, notifications or orders. - Where any rule, notification or order made or issued under this Act or any notification or order issued under such rule, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not -

(a) revive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect; or

(b) affect the previous operation of any rule, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule, notification or order so amended, repealed, superseded or rescinded; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under or in violation of any rule, notification or order so amended, repealed, superseded or rescinded; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid.

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the rule, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded.

15.2. At this juncture it may be germane to refer to the decision of the Supreme Court in the case of M/s. Rayala Corporation Pvt. Ltd. v. Director of Enforcement, New Delhi (supra), wherein the court was dealing with a question whether proceedings could be validly continued on the complaint in respect of the charge u/s 132-A(4) of the Defence of India Rules, 1962. By the Defence of India (Amendment) Rules, 1965, Rule 132A came to be deleted in the following terms :-

In the Defence of India Rules, 1962, Rule 132-A (relating to prohibition of dealings in foreign exchange) shall be omitted except as respects things done or

omitted to be done under that rule.

(Emphasis supplied)

The Supreme Court held that the language contained in the said clause can only afford protection to action already taken while the rule was in force, but cannot justify initiation of a new proceeding which will not be a thing done or omitted to be done under the rule but a new act of initiating a proceeding after the rule had ceased to exist. The court observed that the language used in the notification only affords protection to things already done under the rule, so that it cannot permit further application of that rule by instituting a new prosecution in respect of something already done. It was held that consequently after omission of Rule 132-A of the Defence of India Rules, no prosecution could be instituted even in respect of an act which was an offence when that rule was in force. In the facts of the said case, simultaneously with the omission of Rule 132-A of the Defence of India Rules, Section 4(1) of the Act was amended so as to bring the prohibition contained in Rule 132-A(2) u/s 4(1) of the Act. The Supreme Court observed that when Section 4(1) of the Act was amended, the Legislature did not make any provision that an offence previously committed under Rule 132-A of the Defence of India Rules would continue to remain punishable as an offence for contravention of Section 4(1) of the Act, nor was any provision made permitting operation of Rule 132-A itself so as to permit institution of prosecutions in respect of the said offences. On this interpretation, the court held that the complaint made for the offence under Rule 132-A(4) of the Defence of India Rules, after 1st April, 1985, when the rule was omitted, has to be held invalid.

15.2.1. The court made reference to the Privy Council case in *Wicks v. Director of Public Prosecution* wherein the saving clause laid down that the operation of that Act itself was not to be affected by the expiry as respects things previously done or omitted to be done. It was observed that in the said case the prosecution had been started before the Defence of India Act ceased to be in force and, secondly the language introduced in the amended sub-section (4) of Section 1 of the Act had the effect of making applicable the principles laid down in Section 6 of the General Clauses Act, so that a legal proceeding could be instituted even after the repeal of the Act in respect of an offence committed during the time when the Act was in force. The court noted that the notification of the Ministry of Home Affairs omitting Rule 132-A of the Defence of India Rules did not make any such provision similar to that contained in Section 6 of the General Clauses Act. The court observed that consequently, it is clear that, after the omission of Rule 132-A of the Defence of India Rules, no prosecution could be instituted even in respect of an act which was an offence when the rule was in force. The court further observed that when Section 4(1) of the Act was amended, the Legislature did not make any provision that an offence previously committed under Rule 132-A of the Defence of India Rules would continue to remain punishable as an offence of contravention of Section 4(1) of the Act, nor was any provision made permitting operation of Rule 132-A itself so as to permit institution of

prosecutions in respect of such offences. It was held that the consequence is that the complaint was incompetent even in respect of the offence under Rule 132-A(4).

15.3. Examining the facts of the present cases in the light of the aforesaid decision, vide Notification No. 6/2001-C.E. (N.T.), dated 1st March, 2001, the Central Government in exercise of powers conferred by Section 37 of the Act inter alia made the Central Excise (Third Amendment) Rules, 2001 further to amend the Central Excise Rules, 1944 except as respects things done or omitted to be done by such amendment. Vide clause 7 of the said notification, Rule 57AI, Rule 96ZO, Rule 96ZP and Rule 96ZQ came to be omitted from the Central Excise Rules, 1944. A perusal of the notification dated 1st March, 2001 issued by the Central Government omitting Rules 96ZQ, 96ZO and 96ZP shows that the same does not make any provision similar to that contained in Section 6 of the General Clauses Act nor does the same make any provision that liability under Rule 96ZQ would continue under the regular provisions after its omission. In *M/s. Rayala Corporation (supra)*, the notification afforded protection to things already done under the rule; so also in the present case, the notification affords protection to things already done under the rules. When Section 38A came to be inserted, the Legislature did not make any provision permitting operation of Rule 96ZQ so as to permit initiation of proceedings under the said Rules. In *M/s. Rayala Corporation (supra)*, it was held by the Supreme Court that Section 6 of the General Clauses Act cannot obviously apply on omission of Rule 132-A of the Defence of India Rules for two obvious reasons: (i) Section 6 applies only to repeals and not to omissions and (ii) Section 6 applies when the repeal is of a Central Act or Regulation and not of a rule. In the facts of the present case, Section 6 of the General Clauses Act would not be applicable to Rule 96ZQ of the Rules as the said section applies only in case of repeal of a Central Act and Regulation and not of a rule. In the circumstances, Rule 96ZQ can be saved provided there is some other saving clause expressly provided in the Act or in the Rules.

15.4 In *Kolhapur Canesugar Works Ltd. v. Union of India (supra)* the question that arose for determination before the Supreme Court was whether after omission of old Rules 10 and 10A of the Central Excise Rules, 1944 and its substitution by the new Rule 10 by the Notification No. 267/77 dated 6th August, 1977 the proceedings initiated by the notice dated 27th April, 1977 could be continued in law. The court was of the considered view that in such a case the court is to look to the provisions in the rule which has been introduced after the omission of the previous rule to determine whether a pending proceeding will continue or lapse. If there is a provision therein that pending proceedings will continue and be disposed of under the old rule, as if the rule has not been deleted or omitted, then such proceeding will continue. If the case is covered by Section 6 of the General Clauses Act or there is a *pari materia* provision in the statute under which the rule has been framed, in that case also, the pending proceedings will not be affected by omission of the rule. In the absence of any

such provision in the statute or in the rule, the pending proceedings would lapse on the rule under which the notice was issued or proceedings were initiated being deleted/omitted. The court held that the position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as law that never existed. To this rule, an exception is engrafted by the provisions of Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus, the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted, and in its place, another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings, then it can be reasonably inferred that the intention of the Legislature is that the pending proceedings shall not continue but fresh proceedings for the same purpose may be initiated under the new provision. Adverting to the facts of the present case, in view of the language contained in the notification dated 1st March, 2001, the same can only afford protection to action already taken while Rule 96ZQ was in force, but cannot justify initiation of a new proceeding which will not be a thing done or omitted to be done under the rule but a new act of initiating a proceeding after the rule had ceased to exist. In the circumstances, in the present case, upon omission of Rule 96ZQ of the Rules, in view of the language contained in the Notification dated 1st March, 2001, action already taken while the rule was in force would be protected. However, no new proceeding could be initiated after the rule had ceased to exist.

16. However, the aforesaid observations would be subject to what is held in respect of the second question viz., whether after the omission of Section 3A of the Act with effect from 11th May, 2001 proceedings initiated under Rules 96ZQ, 96ZP and 96ZO of the Rules would survive?

16.1. Dealing with the second question, Section 3A of the Act enables the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. This clause came to be inserted in the Act by the Finance Act, 1997. The reason behind introducing this provision appears to be that in certain sectors like induction furnaces, steel re-rolling mills, etc. evasion of excise duty on goods is substantial and the production is not disclosed accurately and collection of excise on their production capacity is thought of as appropriate. Under the scheme evolved in this provision the annual production capacity of mills and furnaces is determined by the Commissioner of Central Excise in terms of the rules to be framed u/s 3A(2) of the Act by the Central Government. Thereafter, the assessee would be liable to pay duty based on such determination.

16.2. Rule 96ZQ of the Rules which provides for procedure to be followed by independent processors of textile fabrics, comes into play after the Commissioner of Central Excise determines the annual capacity of production on processed textile fabrics u/s 3A of the Act read with the Hot Air Stenter independent Textile Processors Annual Capacity Determination Rules, 1998.

Rule 96ZQ proceeds to lay down the manner of payment of duty, payment of interest/penalty and such other incidental matters. Section 3A has been omitted by the Finance Act, 2001 with effect from 11th May, 2001 without any saving clause. On behalf of the Revenue, reliance had been placed upon the decision of the Supreme Court in the case of *General Finance Company v. Assistant Commissioner of Income Tax* (supra) to contend that omission also amounts to a repeal of an enactment and as such, the provisions of Section 6A of the General Clauses Act would be applicable and all proceedings and liabilities incurred under the omitted provisions would be saved. A Constitution Bench of the Supreme Court in the case of *M/s. Rayala Corporation* (supra) held that Section 6 of the General Clauses Act would not apply to the omission of a provision in an Act but only to repeal, omission being different from repeal. The aforesaid view has been reiterated by another Constitution Bench of the Supreme Court in the case of *Kolhapur Canesugar Works Ltd. v. Union of India* (supra) wherein the court agreed that the earlier view taken in *M/s. Rayala Corporation* (supra) that Section 6 of the General Clauses Act only applies to repeals and not to omission and applies when the repeal is of a Central Act or regulation and not of the rule. Insofar as Section 3A of the Act is concerned, the second part would not be applicable since the present case relates to omission of a section. However, the first part namely that Section 6 of the General Clauses Act only applies to repeals and not to omissions would be squarely applicable to the facts of the present case. Reliance placed by the Revenue on the decision of the Supreme Court in the case of *General Finance Company* (supra) is misconceived inasmuch as in the said case the Supreme Court after finding force in the submissions advanced by the learned counsel, observed that it was constrained to follow the two decisions of the Constitution Benches of the Supreme Court in the case of *M/s. Rayala Corporation Pvt. Ltd.* and *Kolhapur Cane-sugar Works Ltd.* The court, accordingly held that the view taken by the High Court was not consistent with what was stated by the Supreme Court in the decisions aforesaid and the principle underlying Section 6 of the General Clauses Act as saving the right to initiate proceedings for liabilities incurred during the currency of the Act will not apply to omission of a provision in an Act but only to repeal, omission being different from repeal as held in the said decisions.

16.3. Thus, even in *General Finance Company Ltd.* (supra), the Supreme Court has not taken a different view and has followed the aforesaid two decisions. Section 6 of the General Clauses Act, therefore, has no application in the present case. The decision of the Supreme Court in *General Finance Company Ltd.* (supra), therefore, does not carry the case of the Revenue any further.

16.4. Thus, any obligation or liability etc. acquired, accrued or incurred u/s 3A of the Act would not be saved by Section 6 of the General Clauses Act. The next question that arises for consideration is as to whether after the omission of Section 3A of the Act with effect from 11th May, 2001 proceedings initiated under Rules 96ZQ, 96ZP and 96ZO of the Rules would survive, or in other words what would be the position of obligations or liabilities incurred under Rules 96ZQ, 96ZP and 96ZO of the Rules after the omission of Section 3A. As noticed earlier, Rule 96ZQ of the Rules only lays down the procedure to be followed by the independent processor of textile fabrics, the manner of payment of duty and the consequences of non-payment of duty within the prescribed period, etc. Likewise, is the case with Rules 96ZP and 96ZO of the Rules. Rules 96ZQ, 96ZP and 96ZO are not the charging provisions. The charging provision is Section 3A of the Act and Rules 96ZQ etc. are merely machinery provisions.

Thus, any liability which accrues is u/s 3A of the Act. Accordingly, when the charging Section itself is deleted without any saving clause, no recovery under the said Section can be made by resorting to Rule 96ZQ of the Rules. Action, if any, can be taken only under the regular provisions of the Act.

17. The next question that arises for consideration is whether Section 38A of the Act saves the obligations and liabilities incurred under Rule 96ZQ of the Rules, and whether the said position would prevail even after the omission of Section 3A of the Act.

17.1. On a plain reading of Section 38A of the Act, it is manifest that the same operates only in respect of amendment repeal, supersession or rescinding of any rule, notification or order. In the present case, Rule 96ZQ has not been amended, repealed, superseded or rescinded, but has been omitted. As held by the Supreme Court in the case of M/s. Rayala Corporation (supra), omission and repeal are different things and omission does not amount to repeal. Similarly, considering the dictionary meaning of rescind and amend, the same are not synonymous with the word "omit". Under the circumstances, Section 38A of the Act would not save any obligation, liability etc. acquired, accrued or incurred under any rule, order or notification which has been omitted. As a necessary corollary, it follows that Rules 96ZQ, 96ZP and 96ZO of the Rules having been omitted vide the notification dated 1st March, 2001, any liability or obligation acquired, accrued or incurred thereunder would not be saved u/s 38A of the Act.

17.2. If one were to assume that any liability, obligation etc. acquired, accrued or incurred under Rules 96ZQ, 96ZP and 96ZO of the Rules is saved by Section 38A of the Act, the next question that would arise for consideration is as to whether the said position will prevail even after omission of Section 3A of the Act. In this regard, it may be noted that Section 38A came to be inserted in the Central Excise Act, 1944 vide Section 131 of the Finance Act, 2001 whereas Section 3A came to be omitted vide Section 121 of the said Act. Section 38A of the Act, inter alia protects any right, privilege, obligation, liability acquired, accrued or incurred; or any investigation, legal proceeding or remedy as if the rule,

notification or order, as the case may be, had not been amended, repealed, superseded or rescinded. Section 38 does not speak of giving protection to any right, privilege, obligation, liability acquired, accrued or incurred under any rule, notification or order; or any investigation, legal proceeding or remedy etc., in case the rule has been omitted. Thus, Section 38A would not protect any right, privilege, obligation or liability acquired, accrued or incurred, or any investigation, legal proceeding, remedy in respect of such right, privilege, obligation, liability etc. u/s 3A for two reasons, viz., (a) Section 38A only protects any right, liability etc., acquired, accrued or incurred under any rule, notification or order and not under any section; and (b) Section 38A governs only repeal, amendment etc. and not omission. Thus, Section 38A of the Act would in no manner save obligations or liabilities incurred u/s 3A of the Act.

17.3. In the light of the aforesaid discussion, this court is of the view that upon the omission of Rules 96ZQ, 96ZP and 96ZO from the statute book on 1st March, 2001, no action could thereafter have been initiated thereunder. However, in view of the fact that the notification dated 1st March, 2001 amends the Central Excise Rules except as respects things done or omitted to be done by such amendment, the pending proceedings already initiated under Rules 96ZQ, 96ZO and 96ZP could continue. Whereas after the omission of Section 3A of the Act, no action whatsoever could be initiated, continued or taken under the said provision or the rules framed thereunder or framed in respect thereof. In the circumstances, the contention raised on behalf of the petitioners that as vide clause 7 of notification dated 1st March, 2001, Rules 96ZO, 96ZP and 96ZQ were omitted without any saving clause and Section 3A was also omitted vide Section 121 of the Finance Act, 2001 on 11th May, 2001 without any saving clause, all proceedings which were pending as on 11th May, 2001 as regards Rules 96ZO, 96ZP and 96ZQ would thereafter automatically lapse, merits acceptance. Consequently, no orders could have been passed against the petitioners under the said provisions if the actions against the petitioners were not concluded at the time of omission of Section 3A of the Act.

18. As regards the fourth question, viz., whether in view of Section 132 of the Finance Act, 2001 everything done under the old provision is saved, on behalf of the Revenue, reliance has been placed upon Section 132 of the Finance Act, 2001 to contend that the same validates all actions taken or anything done or omitted to be done or purported to have been taken or done or omitted to be done under any rule, notification or order made or issued under the Central Excise Act and that all such actions shall be deemed to be and to always have been, for all purposes, as validly and effectively taken or done or omitted to be done as if the amendment made by Section 131 of the Finance Act, 2001 had been in force at all material times. In this regard, it may be pertinent to note that what Section 132 validates is all actions covered u/s 131 of the Finance Act, 2001, that is, Section 38A of the Act as if the same had been in force at all material times. In the present case, apart from the fact that Section 38 of the Act, does not save the provisions which have been omitted, even if it is assumed

that omissions are covered thereunder, the same would be applicable only for the period prior to 11th May, 2001, till Section 3A came to be omitted. Section 38A saves actions taken or rights and liabilities accrued under any rule, notification or order made or issued under the Act. The same does not save any action taken or rights and liabilities accrued under any provision of the Act. Thus, Section 3A stands unconditionally omitted from the statute book without any saving clause in favour of pending proceedings. All actions thereunder must, therefore, stop at the stage where they were when the provision came to be omitted, and if the proceedings had not been concluded before the omission came into effect, the same cannot be concluded thereafter.

18.1. In the facts of the present case, as noticed earlier, in Special Civil Application No. 1984 of 2002, the show-cause notice itself has been issued on 4th October, 2001, that is, after the omission of Rules 96ZQ, 96ZO and 96ZP of the Rules whereas in the other two writ petitions the show cause notice had been issued prior to omission of said rules, however, the proceedings had not been concluded prior to the omission of Section 3A of the Act. Insofar as initiation of proceedings after omission of the Rule 96ZQ, 96ZP and 96ZO is concerned, as held hereinabove, the same is not saved by the notification dated 1st March, 2001 whereby the said rules came to be omitted. Insofar as continuance of proceedings under the said rules after the omission of the said rules is concerned, as held hereinabove, after omission of Section 3A of the Act without any saving clause, the power to conclude those proceedings disappeared from the scene. Therefore, even in case of proceedings initiated prior to the omission of Rule 96ZQ, 96ZP and 96ZO of the Rules, if the same were not concluded prior to the omission of Section 3A of the Act, there was no power to proceed further and conclude the same, Under the circumstances, any action taken under Rules 96ZQ, 96ZO and 96ZP of the Rules after Section 3A of the Act came to be omitted from the statute book without any saving clause, would be without authority of law and as such any orders passed in respect thereof after the omission of Section 3A of the Act would be non est. As a result of the aforesaid discussion, the orders impugned in the present petitions are required to be quashed and set aside as being without authority of law.

19. Dealing with the question as regards the vires of Rule 96ZQ(5)(ii) of the Rules which arises only in Special Civil Application No. 1984 of 2002, it may be necessary to refer to the provisions of Rule 96ZQ of the Rules.

19.1. Rule 96ZQ of the Rules insofar as the same is relevant for the present purpose reads thus:-

96ZQ. Procedure to be followed by an independent processor of textile fabrics. -
(1) An independent processor of textile fabrics falling under Heading Nos. 52.07, 52.08, 52.09, 54.06, 54.07, 55.11, 55.12, 55.13 or 55.14, or processed textile fabrics of cotton or man-made fibres, falling under Heading Nos. or sub-heading Nos. 58.01, 58.02, 5806.10, 5806.40, 6001.12, 6001.22, 6001.92, 6002.20, 6002.30, 6002.43 or 6002.93, of the First Schedule to Central Excise Tariff Act,

1985 (5 of 1986), shall debit an amount of duty of Rs. 2.0 lakhs per chamber per month, Rs. 2.5 lakhs per chamber per month, Rs. 3.0 lakhs per chamber per month or Rs. 3.5 lakhs per chamber per month, as the case may be, on the annual capacity of production as determined under the Hot-air Stenter Independent Textile Processors Annual Capacity Determination Rules, 2000.

(2) The amount of duty payable under sub-rule (1) shall be debited by the independent processor in the account current maintained by him sub-rule (1) of Rule 173G of the Central Excise Rules, 1944.

(3) Fifty per cent of the amount of duty payable for a calendar month under sub-rule (1) shall be paid by the 15th of the month and the remaining amount shall be paid by the end of that month.

(4) The independent processor shall continue to maintain records, and file returns, pertaining to production, clearance, manufacturing, storage, delivery or disposal of goods, including the materials received for or consumed in, the manufacture of excisable goods or other goods, the goods and materials in stock with him and the duty paid by him, as prescribed under the Central Excise Rules, 1944 and the notifications issued thereunder.

(5) If an independent processor fails to pay the amount of duty or any part thereof by the date specified in sub-rule (3), he shall be liable to, -

(i) pay the outstanding amount of duty along with interest at the rate of twenty-four per cent, per annum calculated for the outstanding period on the outstanding amount; and

(ii) a penalty equal to an amount of duty outstanding from him at the end of such month or rupees five thousand, whichever is greater.

19.2. Sub-rule (1) of Rule 96ZQ lays down the manner in which duty is required to be paid on the annual capacity of production as determined under the Determination Rules. Sub-rule (3) thereof provides that fifty per cent of the amount of duty payable for a calendar month under sub-rule (1) shall be paid by the 15th of the month and the remaining amount shall be paid by the end of that month. Thus, the amount payable under sub-rules (1) and (2) is required to be paid in two installments one before the 15th of the month and the remaining before the end of that month. Sub-rule (5) lays down that if an independent processor fails to pay the amount of duty or any part thereof by the date specified in sub-rule (1), he shall be liable firstly to pay the outstanding amount of duty alongwith interest at the rate of twenty four per cent per annum calculated for the outstanding period on the outstanding amount. Clause (ii) of sub-rule (5) which is impugned in the present case makes provision for imposition of penalty equal to an amount of duty outstanding from such independent processor at the end of such month or Rs. 5,000/-, whichever is greater. As noted earlier, the petitioners had paid the first installment after a delay of four days on 19th July, 2000 and the second installment after a delay of

three days on 3rd October, 2000. However, insofar as the delay of four days in payment of the first installment is concerned, the petitioners were liable to pay only the interest at the rate of twenty four per cent on the outstanding amount for the period during which the amount was outstanding, whereas in respect of the second installment, apart from payment of interest at the rate of twenty four per cent on the amount outstanding for the period it was outstanding, the petitioners were also liable to pay penalty of an amount equal to the amount of duty outstanding from them at the end of the month.

19.3. Thus, clause (ii) of sub-rule (5) of Rule 96ZQ imposes penalty equal to the amount of duty outstanding only in respect of the amount which is outstanding at the end of the month. Though there may be delay of fifteen days in the payment of the first installment all that is leviable under the rule is interest at the rate of twenty four per cent. However, even if there is even one day's delay in paying the amount after the end of the month, the assessee becomes liable to pay penalty equal to the amount of duty outstanding from him.

19.4. Thus, in case an independent processor fails to pay the amount of duty outstanding from him at the end of any month, he is ipso facto liable to penalty equal to an amount of duty outstanding or Rs. 5,000/-, whichever is greater. The delay in payment may be of one day or a hundred days. Notwithstanding the extent of delay, the assessee would be liable to pay an equal amount of duty outstanding from him at the end of the month. Thus, the rule does not leave any discretion to the adjudicating authority as regards imposition or non-imposition of penalty as also regarding the amount of penalty to be imposed. In fact, the provision makes it obligatory on the part of the adjudicating authority to impose a penalty equal to an amount of duty outstanding from the assessee at the end of a particular month. Moreover, the penalty is required to be imposed merely in case of default in payment of the outstanding amount before the end of the month, even in absence of any dishonest or contumacious conduct on the part of the assessee.

19.5. In this regard, it may be pertinent to note that Rule 96ZQ has been framed in exercise of the power conferred by Section 37 of the Act. Sub-section (1) of Section 37 of the Act empowers the Central Government to frame rules to carry into effect the purposes of the Act. Sub-section (2) enumerates in particular as to what the rules may provide, which is without prejudice to the generality of the foregoing power. A perusal of the categories enumerated under sub-section (2) thereof indicates making provision for imposition of penalty in respect of any delay in payment of duty does not find place therein. However, sub-section (3) of Section 37 provides that in making rules under the said section, the Central Government may provide that any person committing a breach of any rule shall, where no other penalty is provided by the Act, be liable to a penalty not exceeding five thousand rupees. Thus, by virtue of sub-section (3) of Section 37, in case no other penalty is provided by the Act, the Central Government is empowered to make provision for imposition of penalty not exceeding five

thousand rupees for committing a breach of any rule. Rule 96ZQ has been framed in exercise of powers u/s 37 of the Act. Hence, by virtue of sub-section (3) of Section 37, the Central Government is expressly empowered to provide for a penalty not exceeding five thousand rupees in case of breach of the said rule. However, clause (ii) of sub-rule (5) of Rule 96ZQ of the Rules provides for imposing penalty equal to the amount of duty or rupees five thousand whichever is greater on the amount of duty outstanding from an independent processor at the end of the month. The question that therefore arises for consideration is whether the Central Government has the power to make provision for imposition of penalty greater than five thousand rupees.

19.6. On behalf of the petitioners, it has been contended that penalty is in the nature of a tax and that Article 265 imposes a limitation on the taxing power of the State insofar as it provides that the State shall not levy or collect a tax except by authority of law, that is to say, a tax cannot be levied or collected by a mere executive fiat. It must be done by an authority of law, which must mean valid law. In the case of *Collector of Central Excise, Ahmadabad v. Orient Fabrics (P) Ltd.* (supra), the Supreme Court has affirmed the view taken by the Delhi High Court that penalty is additional tax and as such, the constitutional mandate requires a clear authority for imposition thereof. The levy of penalty which is an additional tax has to be under authority of law which should be clear, specific and explicit. Adverting to the facts of the present case, Rule 96ZQ has been framed u/s 37 of the Act. Section 37 of the Act does not expressly authorise the Central Government to levy penalty which is an additional tax, greater than five thousand rupees. Sub-section (3) of Section 37 of the Act makes it explicit that in case no other penalty is provided under the Act, the Central Government may provide that any person committing a breach of any rule shall be liable to penalty not exceeding five thousand rupees. Thus, the power to levy penalty conferred on the Central Government u/s 37 of the Act is limited to an amount not exceeding rupees five thousand. The learned advocate for the petitioner, therefore, appears to be justified in contending that the imposition of penalty equal to the amount of duty is without authority of law.

19.7. The Supreme Court in the case of *K.T. Moopil Nair v. State of Kerala* (supra) has held thus :-

7. The most important question that arises for consideration in these cases, in view of the stand taken by the State of Kerala, is whether Article 265 of the Constitution is a complete answer to the attack against the constitutionality of the Act. It is, therefore, necessary to consider the scope and effect of that Article. Article 265 imposes a limitation on the taxing power of the state insofar as it provides that the State shall not levy or collect a tax, except by authority of law, that is to say, a tax cannot be levied or collected by a mere executive fiat. It has to be done by authority of law, which must mean valid law. In order that the law may be valid, the tax proposed to be levied must be within the legislative competence of the legislature imposing a tax and authorising the collection

thereof and, secondly, the tax must be subject to the conditions laid down in Article 13 of the Constitution. One of such conditions envisaged by Article 13(2) is that the legislature shall not make any law which takes away or abridges the equality clause in Article 14, which enjoins the State not to deny to any person equality before the law or the equal protection of the laws of the country. It cannot be disputed that if the Act infringes the provisions of Article 14 of the Constitution, it must be struck down as unconstitutional. For the purpose of these cases, we shall assume that the State Legislature had the necessary competence to enact the law, though the petitioners have seriously challenged such a competence. The guarantee of equal protection of the laws must extend even to taxing statutes. It has not been contended otherwise. It does not mean that every person should be taxed equally. But it does mean that if property of the same character has to be taxed, the taxation must be by the same standard, so that the burden of taxation may fall equally on all persons holding that kind and extent of property. If the taxation, generally speaking, imposes a similar burden on everyone with reference to that particular kind and extent of property, on the same basis of taxation, the law shall not be open to attack on the ground of inequality, even though the result of the taxation may be that the total burden on different persons may be unequal. Hence, if the legislature has classified persons or properties into different categories, which are subjected to different rates of taxation with reference to income or property, such a classification would not be open to the attack of inequality on the ground that the total burden resulting from such a classification is unequal. Similarly, different kinds of property may be subjected to different rates of taxation, but so long as there is a rational basis for the classification, Article 14 will not be in the way of such a classification resulting in unequal burdens on different classes of properties. But if the same class of property similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property. It must, therefore, be held that a taxing statute is not wholly immune from attack on the ground that it infringes the equality clause in Article 14, though the courts are not concerned with the policy underlying a taxing statute or whether a particular tax could not have been imposed in a different way or in a way that the Court might think more just and equitable. The Act has, therefore, to be examined with reference to the attack based on Article 14 of the Constitution.

19.8. In *Special Courts Bill, 1978*, *In Re: The Special Courts Bill, 1978*, , the Supreme Court stated various propositions which emerge from its judgments in relation to cases arising under Article 14 of the Constitution. The relevant propositions may be referred to :

(4) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws

would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(7) The classification must not be arbitrary and must be rational, that is to say, it must not only be based on some qualities or characteristics which are found to be in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentiation, which distinguishes those that are grouped together from others and (2) that the differentia must have a rational relation to the object sought to be achieved by the Act.

(8) The differentia which is the basis of the classification and the object of the Act are different things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring penalties or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the penalties sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation provided such classification is not arbitrary in the sense above mentioned.

19.9 The validity of Rule 96ZQ(5)(ii) of the Rules may be examined in the light of the aforesaid legal position. As noted hereinabove, Rule 96ZQ(5)(ii) is mandatory in nature and even in case of a delay of one day, penalty equal to the amount of outstanding duty would be leviable. The rule does not require consideration as regards the period of delay or the gravity of default on the part of the concerned assessee and proposes to treat all assessees equally. An assessee paying the second installment after one day of the specified date and an assessee paying such amount after a hundred days of the specified date are treated equally, despite the fact that in the later case, the same would show deliberate default on the part of the concerned assessee. Thus, it is apparent that the rule treats unequal as equals, thereby violating Article 14 of the Constitution.

19.10 Another aspect of the matter is that except for the manufacturers of specified textile products and other manufacturers governed by Section 3A of the Act, no other manufacturer of any other excisable goods is governed by the provisions of Rule 96ZQ(5)(ii) of the Rules or similar provisions under Rule 96ZP. In case of any other manufacturer, the regular provisions of the Act would be applicable.

19.11. By way of illustration, the facts of the present case may be taken into consideration. The impugned order has been passed against the petitioners imposing penalty equal to the amount of duty on account of delay of three days in depositing the outstanding amount of duty before the end of the month. The petitioners in reply to the show-cause notice have explained the reason. It is the

case of the petitioners that the petitioners had deposited the amount on 29th September, 2000 and challan was also deposited. 30th September, 2000 was half-year closing and it was closed for public transaction and the next working day was 3rd October, 2000, 1st October being a Sunday and 2nd October being a public holiday on account of Gandhi Jayanti. So the bank put 3rd October, 2000 in the TR-6 challan. Thus, it is apparent that though the petitioners had deposited the entire amount on 29th September, 2000, for the reasons mentioned in its reply, the bank had put the date 3rd October, 2000 in the TR-6 challan. However, in view of the mandatory nature of clause (ii) of sub-rule (5) of Rule 96ZQ, the respondents even in such circumstances, were left with no option but to impose penalty equal to the amount of duty. Thus, it is apparent that clause (ii) of sub-rule (5) of Rule 96ZQ operates very harshly on an assessee despite there being no fault on his part in making deposit of the amount within the prescribed time limit.

19.12. At this juncture, it may be pertinent to refer to Section 11AC of the Act which provides for levy of penalty for short-levy or non-levy of duty in case where such short-levy or non-levy is by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of the provisions of the Act or rules made thereunder with an intent to evade payment of duty. The said section provides that in such case, the person shall be liable to pay penalty equal to the amount of duty as determined under sub-section (2) of Section 11A of the Act. However, despite the fact that Section 11AC operates where there is fraud, collusion or wilful mis-statement or suppression of facts or contravention with the intention of evading payment of duty, the proviso thereto provides for payment of only 25 per cent of the penalty in case where the amount is paid within 30 days from the date of communication of the order of the Central Excise officer determining such duty. Thus, even in serious cases of fraud and collusion, wilful mis-statement, etc., the parent Act provides for levy of only 25 per cent of the penalty where the amount is paid within a period of 30 days. Whereas under Rule 96ZQ(5)(ii), merely by dint of the fact that the amount has been paid after a delay may be of even only one day, the assessee is liable to pay penalty equal to the amount of outstanding duty. There is no discretion vested in the adjudicating authority to reduce the amount of penalty. Thus, the provisions under Rule 96ZQ(5)(ii) of the Rules evidently are more onerous than the provisions of Section 11AC of the Act which make provision for levy of penalty in case of fraud, collusion, mis-statement etc. Thus, it is apparent that the rule operates to the prejudice of the assessee covered under the said rule namely, independent processors of textile fabrics. In the circumstances, clause (ii) of sub-rule (5) of Rule 96ZQ is clearly violative of Article 14 of the Constitution of India inasmuch as the same discriminates between two classes of persons namely, independent processors of textile fabrics and other manufacturers who are not covered by Rule 96ZQ.

19.13. On behalf of the petitioners, it has further been pointed out that in case of manufacturers who are not covered u/s 3A of the Act and have been discharging

their duty liabilities u/s 3 of the Act read with the procedure prescribed under Rule 49 of the Rules, similar facility of payment of duty for clearance made during the first fortnight of the month by the 20th of that month and clearances made during the second fortnight of the month by the 5th day of the succeeding month has been provided. In case of default in payment of amount of duty by due date, Rule 49 makes the manufacturer liable for interest at the rate of 24% per annum on the outstanding amount, however, no penalty at all is provided under Rule 49 in case of default in payment by such manufacturers. Thus, manufacturers of goods specified u/s 3A of the Act are evidently subjected to harsh treatment of unreasonable penalty under Rule 96ZQ(5)(ii) compared to manufacturers of other excisable goods. Moreover, considering the nature of the penalty prescribed even for one day's delay, it is apparent that the said provision would amount to imposition of an unreasonable restriction on the petitioners right to conduct business thereby rendering the said provision as violative of Article 19(1)(g) of the Constitution.

19.14 In the light of the above discussion, this court is of the view that clause (ii) of sub-rule (5) of Rule 96ZQ of the Rules is ultra vires Articles 14 and 19(1)(g) of the Constitution of India as well as Section 37 of the Central Excise Act and is beyond the authority of the rule making power of the Central Government and as such, is required to be struck down.

19.15 The above view taken by this court finds support in the decision of the Punjab & Haryana High Court in the case of Bansal Alloys and Metals Pvt. Ltd. v. Union of India (supra) wherein the court has held that the provision for minimum mandatory penalty equal to the amount of duty even for slightest bona fide delay without any element of discretion is beyond the purpose of legislation. The object of the rule is to safeguard the revenue against loss, if any. The penalty has been provided in addition to interest. Mere fact that without mens rea, an assessee can be punished or a penalty could be imposed is not a blanket power without providing for any justification. The court, accordingly, held the provisions of Rules 96ZO, ZP and ZQ permitting penalty for delay in payment, without any discretion and without having regard to the extent and circumstances for delay to be ultra vires the Act and the Constitution.

20. The next question that arises for consideration is as to whether the decision of the Supreme Court in the case of Union of India v. Supreme Steels (supra) concludes the issue involved in the present case. A perusal of the aforesaid decision of the Supreme Court indicates that in the said batch of cases, vires of Rule 96ZO of the Central Excise Rules had been challenged on the ground that it is inconsistent with the provisions of the Act. Before the Supreme Court, the counsel for the parties had informed that the matter remained confined to a period of three years only as the scheme so introduced has since been dropped. The learned counsel appearing on behalf of the manufacturers stated that they do not challenge the validity of Section 3A of the Act. It was submitted that the excise duty may be charged according to the said provision, on the basis of

actual production but for the period of whole year. On behalf of the Union of India, the learned counsel had submitted that there is no dispute with the offer made and also that the assessment shall be made for the whole period of one year namely, the financial year. The court observed that no dispute thus remained on the point and the excise duty shall accordingly be assessed in respect of matters not yet closed and still pending before the concerned authorities. Thus, the subject matter of challenge before the Supreme Court was to the vires of Rule 96ZO and Section 3A of the Act. However, the said challenge was not prosecuted in view of the consensus arrived at between the parties. Before the Supreme Court, no contention was raised to the effect that in view of Rules 96ZQ, 96ZP and 96ZO of the Rules being omitted with effect from 1st March, 2001 or that Section 3A of the Act being omitted with effect from 11th May, 2001, any proceedings taken under the said provisions would be without authority of law. A perusal of the second part of the judgment indicates that it was contended on behalf of the manufacturers that the part of sub-rule (3) which provides that in case excise duty is paid according to the said sub-rule, in that event, the manufacturer shall not avail the benefit available under sub-section (4) of Section 3A of the Central Excise Act, 1944 is bad. In relation to the said contention, the Supreme Court placed reliance upon its earlier decision in the case of Commissioner of Central Excise & Customs v. M/s. Venus Casting (P) Ltd. (supra) wherein it has been held that two procedures namely one as provided under sub-section (4) of Section 3A of the Central Excise Act and the other as provided under sub-rule (3) of Rule 96ZO of the Central Excise Rules are alternative procedures and the assessee has to opt for one. Once having done so, he cannot claim the benefit of the other.

20.1. Another contention raised on behalf of the Revenue was that the petitioners having not raised the contention with regard to lack of jurisdiction before the appellate authority, they cannot be permitted to challenge the show-cause notice at a belated stage. It was contended that the petitioners after participating in the adjudication proceedings and challenging the same on merits, are not entitled to challenge the show-cause notice on the ground that the same involves a pure question of law. It was submitted that the petitioners are estopped from raising such issue as the petitioners have not only given it up but have also not deliberately canvassed the same. It was further pointed out that the petitioners in the petitions have placed reliance upon the decision of the Supreme Court in Union of India v. Supreme Steels (supra) and have acquiesced with the fact that the concerned authorities could decide the matters which are pending before them. It was submitted that in the circumstances, it is not permissible for the petitioners to now raise the contention regarding lack of jurisdiction on the part of the adjudicating authority once having taken shelter of the said decision of the Supreme Court.

20.2. In this regard, a perusal of the averments made in the petition indicates that the petitioners have sought to raise a new plea as regards lack of jurisdiction on the part of the adjudicating authority to adjudicate upon the show-

cause notice on the ground that at the time when the impugned orders were actually passed, the provisions of Rules 96ZO, 96ZP and 96ZQ of the Rules and Section 3A of the Act stood deleted and as such, no orders could have been passed against the petitioners under the said provisions. In this regard it may be apposite to refer to the decision of the Supreme Court in the case of Union of India (UOI) Vs. Sube Ram and Others, , wherein it has been held that in case the court has no jurisdiction, the decision of the court would be a nullity and the same can be raised at any stage. In Balvant N. Viswamitra and Others Vs. Yadav Sadashiv Mule (dead) through Lrs. and Others, , the Supreme Court held that a defect of jurisdiction of the court goes to the root of the matter and strikes on the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is a nullity. Validity of such decree or order can be challenged at any stage even in execution or collateral proceedings. Again in Chiranjilal Shrilal Goenka (Deceased) through Lrs. Vs. Jasjit Singh and Others, , the Supreme Court held that a decree passed by a court without jurisdiction on the subject matter or on the grounds on which the decree is made goes to the root of its jurisdiction or lacks inherent jurisdiction is a coram non judice. A decree passed by such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the very authority of the court to pass decree and cannot be cured by consent or waiver of the party. In the case of Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others, , the Supreme Court held that generally, a point not raised before the Tribunal or administrative authorities may not be allowed to be raised for the first time in the writ proceeding, more so when the interference in the writ jurisdiction which is equitable and discretionary is not a must as indicated by the Supreme Court in A.M. Allison Vs. B.L. Sen, , particularly when the plea sought to be raised for the first time in a writ proceeding requires investigation of facts. But if the plea though not specifically raised before the subordinate Tribunals or the administrative and quasi-judicial bodies, is raised before the High Court in the writ proceeding for the first time and the plea goes to the root of the question and is based on admitted and uncontroverted facts and does not require any further investigation into a question of fact the High Court is not only justified in entertaining the plea but in the anxiety to do justice which is the paramount consideration of the court, it is only desirable that a litigant should not be shut out from raising such plea which goes to the root of the lis involved.

20.3. In the light of the principles enunciated in the above referred decisions of the Supreme Court, it is apparent that the plea sought to be raised by the petitioners is a jurisdictional issue and goes to the root of the case. In the circumstances, this court is of the view that it is permissible for the petitioners to challenge the validity of the impugned orders on the ground of lack of jurisdiction

even at this stage, though the same had not been raised before the adjudicating authority. The contention that the petitioners had not only given up their challenge but had also not deliberately canvassed the same and as such, are estopped from raising such plea at this stage, does not merit acceptance inasmuch as the Supreme Court in the case of Chiranjilal Goenka (supra) has held that the defect of jurisdiction strikes at the very authority of the court to pass decree which cannot be cured by consent or waiver of the party. In the circumstances, the court is of the view that the decision of the Supreme Court in the case of Union of India v. Supreme Steels (supra), does not conclude the controversy involved in the present case nor are the petitioners precluded from raising the controversy as regards jurisdiction for the first time in this writ proceeding.

21. For the foregoing reasons, the petitions succeed and are accordingly allowed. Rule 96ZQ(5)(ii) of the Central Excise Rules, 1944 is held to be ultra vires Articles 14, 19(1)(g) and 265 of the Constitution of India. It is further held that after the omission of Rules 96ZQ, 96ZP and 96ZO of the Rules with effect from 1st March, 2001 no proceedings could have been initiated thereunder and after the omission of Section 3A of the Act with effect from 11th May, 2001, without any saving clause, no pending proceeding under the said rules which had not been concluded before the omission came into effect, could be concluded thereafter. The proceedings culminating into the impugned orders having been initiated/concluded after the omission of Rules 96ZQ, 96ZP and 96ZO of the Rules and Section 3A of the Act are, therefore, without any authority of law and as such, cannot be sustained. The impugned orders dated 9th November, 2001/1st January, 2002 (Special Civil Application No. 1984 of 2002), dated 31st December, 2003 (Special Civil Application No. 3637 of 2004) and dated 30th October, 2001 (Special Civil Application No. 6779 of 2003) are hereby quashed and set aside. Rule is made absolute accordingly in each of the petitions with no order as to costs.

22. Registry to keep a copy of this order in each of the petitions. [Judgment]. At this stage, Mr. Darshan Parikh, learned senior standing counsel has requested that the judgment be stayed for a period of twelve weeks from today. In the facts and circumstances of the case, the request is declined.