

**(1989) 03 KL CK 0024**

**In the High Court Of Kerala**

**Case No :** T.R.C. No's. 101 of 1983, 35, 36 and 37 of 1987, W.A. No. 681 of 1986 and O.P. No. 1344 of 1987

Madras Rubber Factory Limited

APPELLANT

Vs

State of Kerala

RESPONDENT

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**Date of Decision :** 29-03-1989

**Acts Referred:**

Constitution of India, 1950 — Article 143  
Kerala High Court Act, 1958 — Section 4  
Rubber Act, 1947 — Section 12, 25

**Citation :** (1990) 1 ILR (Ker) 1 : (1989) 74 STC 56

**Hon'ble Judges :** Kumari M. Fathima Beevi, J;K.S. Paripoornan, J;K. Sreedharan, J

**Bench :** Full Bench

**Advocate :** N.N.D. Pillai, Government Pleader in T.R.C. No. 101 of 1983, for the Appellant; M.A. Thrivikrama Pai in T.R.C. No. 101 of 1983, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

K.S. Paripoornan, J.—These are connected cases. The sole question that arises for consideration in these cases is whether the cess payable and paid by the manufacturers, under the Rubber Act, 1947 and the Rules, will form part of their purchase turnover, under the Kerala General Sales Tax Act. In a common order, dated 20th November, 1986, in T.A. Nos. 601 to 603 and 838 of 1986, which is the subject-matter of T.R.C. Nos. 35, 36 and 37 of 1987, the Appellate Tribunal held that it is so. In an earlier order, in T.A. No. 102 of 1978 dated 6th October, 1982, which is the subject-matter of T.R.C. No. 101 of 1983, the Appellate Tribunal held that it is not so. T.R.C. Nos. 35 to 37 of 1987 are revisions filed by the assessee. Writ Appeal No. 681 of 1986 is filed against the judgment of a learned single Judge, in O.P. No. 5767 of 1986-J dated 11th August, 1986, holding that the cess paid is part of the purchase turnover. In O.P. No. 1344 of 1987, the petitioner-manufacturer assails the notices issued by the assessing authority proposing to include the cess in the purchase turnover of the rubber for

the years 1982-83, 1983-84 and 1984-85, evidenced by exhibits P1 to P3 orders. The O.P. is filed to quash the said notices. Arguments were advanced in the main cases (T.R.C. Nos. 35 to 37 of 1987). It was agreed that the decision in the said cases will govern the other cases also.

1-A. The petitioner in the three revisions (T.R.C. Nos. 35 to 37 of 1987) is a public limited company. It is an assessee under the Kerala General Sales Tax Act. These revisions relate to the assessment years 1972-73, 1976-77 and 1977-78. The sole respondent in these three revisions is the Revenue. In these revisions, filed u/s 41 of the Kerala General Sales Tax Act, the revision petitioner prays to set aside or annul the common order passed by the Kerala Sales Tax Appellate Tribunal, Trivandrum, for the three years 1972-73, 1976-77 and 1977-78, dated 20th November, 1986, in T.A. Nos. 601 to 603 and 838 of 1986.

2. The common revision petitioner-assessee is engaged in the manufacture of rubber products. It purchases rubber from various estates in Kerala. Under entry 71 of the First Schedule to the Kerala General Sales Tax Act, 1963, as it stood during the relevant assessment years, rubber was taxable at the point of last purchase in the State by a dealer who is liable to tax u/s 6 of the Act. u/s 12 of the Rubber Act, 1947 read with the Rubber Rules, the revision petitioner-assessee had paid cess to the Rubber Board. In effecting the assessments, amongst other things, the cess so paid by the assessee (revision petitioner) was included as part of its purchase turnover and brought to tax. It was confirmed in appeal by the Deputy Commissioner (Appeals), on the basis of the decision of this Court in T.R.C. Nos. 96 to 99 of 1983 and connected cases (Deputy Commissioner of Sales Tax v. Bata India Ltd. 1986 KLT 833). In further appeals by the assessee, the Sales Tax Appellate Tribunal affirmed the decision of the authorities below and sustained the addition of cess, paid by the assessee to the Rubber Board, as part of its purchase turnover. Aggrieved by the aforesaid decision of the Sales Tax Appellate Tribunal, so rendered by its common order dated 20th November, 1986, the assessee has come up in revisions. It is common ground that under the Rubber Act, 1947 and the Rules, the cess was payable and paid by the assessee-company direct to the Rubber Board. The question is, whether cess so payable and paid by the assessee will form part of its purchase turnover ? It has been held to be so by a Division Bench of this Court in Deputy Commissioner of Sales Tax v. Bata India Ltd. 1986 KLT 833.

3. When the above three revisions were initially heard by a Division Bench, consisting of their Lordships Dr. T. Kochu Thommen and K.P. Radhakrishna Menon, JJ., the Bench felt that there is an apparent conflict between the decision in Bata India Ltd. case 1986 KLT 833 and the subsequent decision of this Court in Madras Rubber Factory v. Rubber Board 1986 KLT 935. After referring to the rival contentions of the parties and the decisions of the Supreme Court and of this Court and the relevant rules, the Bench felt that there is much force in the submission of the petitioner's counsel, that the decision of this Court in Bata India Ltd. case 1986 KLT 833 requires reconsideration. It was also stated that

there is force in the submission that the conclusion reached by this Court in Bata India Ltd. case 1986 KLT 833 is inconsistent with the view expressed on the point by this Court in the subsequent decision reported in 1986 KLT 935 (Madras Rubber Factory v. Rubber Board). Accordingly, the Bench referred the matter to a Full Bench in terms of Section 4 of the Kerala High Court Act, by its order dated 5th March, 1987. Accordingly, these three revisions have come up before this Full Bench.

4. In order to decide the controversy in this case, it will be necessary to advert to Section 12 of the Rubber Act, 1947, as it stood originally and after its amendment by Act 21 of 1960, Rule 33-D of the Rubber Rules and also Section 2(xxvii) of the Kerala General Sales Tax Act defining the expression "turnover".

Section 12 of the Rubber Act, 1947, as it originally stood, is extracted herein below :

Imposition of rubber cess.-(1) With effect from such date as may be notified by the Central Government in this behalf, there shall be levied and collected as a cess for the purposes of this Act a duty of excise on all rubber produced in India at such rate not exceeding one anna per pound of rubber so produced as the Central Government may, by the same or a like notification, from time to time fix.

(2) The said duty of excise shall be payable by the owner of the estate on which the rubber is produced and shall be paid by him to the Board within one month from the date on which he receives a notice of demand therefore from the Board.

(3) The said duty of excise may be recovered as if it were an arrear of land revenue.

(4) For the purpose of enabling the Board to assess the amount of the duty of excise payable by the owner of an estate under this Section,-

(a) the Board shall, by notification in the Gazette of India, fix the period in respect of which assessments shall be made and

(b) without prejudice to the provisions of Section 20, every owner of an estate shall furnish to the Board a return stating the total amount of rubber produced on the estate in each such period, not later than fifteen days after the expiry of the period to which the return relates :

Provided that in respect of an estate situated only partly in India, the owner shall in the said return show separately the amounts of rubber produced within and outside India.

(5) If any owner of an estate fails to furnish in due time the return referred to in Sub-section (4) or furnishes a return which the Board has reason to believe is incorrect or defective, the Board may assess the amount payable by that owner in such manner as may be prescribed.

(6) Any owner of an estate aggrieved by an assessment made under this section

may within three months of the service of the notice under Sub-section (2) apply to the District Judge for the cancellation or modification of the assessment and the District Judge shall, after giving the Board an opportunity of being heard, pass such order (which shall be final) as he thinks proper.

(7) The proceeds of the duty of excise collected by the Board and any of the fees levied under this Act (all of which shall form part of the Consolidated Fund of India) reduced by the cost of collection as determined by the Central Government, shall, if Parliament by appropriation made by law in this behalf so provides, be paid to the Board for being utilised for the purposes of this Act.

Section 12 of the Rubber Act, after its amendment by Act 21 of 1960, is extracted herein below :

Imposition of new rubber cess.-(1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be levied as a cess for the purposes of this Act, a duty of excise on all rubber produced in India at such rate, not exceeding fifty naye paise per kilogram of rubber so produced, as the Central Government may fix.

(2) The duty of excise levied under Sub-section (1) shall be collected by the Board in accordance with rules made in this behalf either from the owner of the estate on which the rubber is produced or from the manufacturer by whom such rubber is used.

(3) The owner or, as the case may be, the manufacturer shall pay to the Board the amount of the duty within one month from the date on which he receives a notice of demand therefore from the Board and, if he fails to do so, the duty may be recovered from the owner or the manufacturer, as the case may be, as an arrear of land revenue.

(4) For the purpose of enabling the Board to assess the amount of the duty of excise levied under this section

(a) the Board shall, by notification in the Official Gazette, fix a period in respect of which assessments shall be made ; and

(b) without prejudice to the provisions of Section 20, every owner and every manufacturer shall furnish to the Board a return not later than fifteen days after the expiry of the period to which the return relates, stating,-

(i) in the case of an owner, the total quantity of rubber produced on the estate in each such period:

Provided that in respect of an estate situated only partly in India, the owner shall in the said return show separately the quantity of rubber produced within and outside India ;

(ii) in the case of a manufacturer, the total quantity of rubber used by him in such period out of the rubber produced in India.

(5) If any owner or manufacturer fails to furnish, within the time prescribed, the return referred to in Sub-section (4) or furnishes, a return which the Board has reason to believe is incorrect or defective, the Board may assess the amount of the duty of excise in such manner as may be prescribed.

(6) Any person aggrieved by an assessment made under this section may, within three months of the service of the notice under Sub-section (3), apply to the District Judge for the cancellation or modification of the assessment and the District Judge shall, after giving the Board an opportunity of being heard, pass such order (which shall be final) as he thinks proper.

(7) The proceeds of the duty of excise collected under this section reduced by the cost of collection as determined by the Central Government shall first be credited to the Consolidated Fund of India and then be paid by the Central Government to the Board for being utilised for the purposes of this Act, if Parliament by appropriation made by law in this behalf so provides.

Rule 33-D of the Rubber Rules, reads thus :

33-D. (1) Every manufacturer shall by demand notice sent through registered post or in such other manner as the Board may direct be intimated of the amount assessed on the quantity of rubber acquired during the periods specified in Rule 33(e). On receipt of such notice, the manufacturer shall pay to the Board the amount specified therein either in cash at the Board's office at Kottayam or by money order or by bank draft or cheque duly crossed and payable at Kottayam to the Secretary of the Board within 30 days from the date of receipt of the said notice.

(2) On such demand being made, if a manufacturer fails to pay the amount within the due date, the Board may take steps to report the fact to the Central Government or the State Government concerned for recovery of the outstanding amount as an arrear of land revenue.

Section 2(xxvii) of the Kerala General Sales Tax Act reads as follows :

"turnover" means the aggregate amount for which goods are either bought or sold, supplied or distributed, by a dealer, either directly or through another, on his own account or on account of others, whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce, grown by himself or grown on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover.

5. The cess levied u/s 12 of the Rubber Act, 1947, at all times, is a duty of excise on all rubber produced in India. In order to understand the impact of Section 12 of the Rubber Act and Rule 33-D of the Rubber Rules, as also the scope of the definition of "turnover" in Section 2(xxvii) of the Kerala General Sales Tax Act, it is essential to understand what is meant by a "duty of excise" as laid down by the decisions of the Supreme Court of India and of this Court. Under Schedule

VII, List I, entry 84, Parliament has got the exclusive power to levy duties of excise on tobacco and other goods manufactured or produced in India except on certain items like alcoholic liquors for human consumption, opium, etc. Under Schedule VII, List II, entry 51, the State Legislatures have got the power to enact the law regarding duties of excise on goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India on alcoholic liquors for human consumption, opium, etc. What is a "duty of excise", as specified in the above Constitutional entries, came up for consideration before the Federal Court, the Judicial Committee of the Privy Council and the Supreme Court of India on a number of occasions. The important decisions on this aspect are : AIR 1939 1 (Federal Court) , Province of Madras v. Boddu Paidanna & Sons AIR 1942 FC 33, AIR 1945 98 (Privy Council) , Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another, , R.C. Jall Vs. Union of India (UOI), , In re Sea Customs Act AIR 1963 SC 1760 Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc., , Jullunder Rubber Goods Manufacturers' Association Vs. The Union of India (UOI) and Another, , A.B. Abdul Kadir and Others Vs. State of Kerala, , McDowell and Co. Ltd. Vs. Commercial Tax Officer, and Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others, . Of the above, the decision In re Sea Customs Act case AIR 1963 SC 1760 is a decision rendered by a Special Bench of nine Judges of the Supreme Court of India on a reference made by the President of India under Article 143(1) of the Constitution of India. Broadly stated, "duty of excise" is an impost on articles produced or manufactured and it can be levied at convenient stages, so long as the character of the impost is not lost. Reviewing the decisions on the subject, rendered till 1973 and after pointed reference to the decision of the Supreme Court in In re Sea Customs Act AIR 1963 SC 1760, delivering the judgment of the Bench, Gopalan Nambiyar, J., in Jose v. State 1973 KLT 463 pithily stated the constitutional concept of the levy, as follows :

...duties of excise are levied upon the manufacturer or producer, "in respect of the manufacture or production of the commodity taxed. (Paragraph 9)

...We do not think we would be justified in accepting the extreme proposition stated...that a duty of excise is a duty on the excisable goods, that is, the goods manufactured or produced. In the light of the exposition made in In re Sea Customs Act AIR 1963 SC 1760, we would rather be justified in stating that the duty is in relation to goods. Nor do we appear to be justified in stating that taxable event being manufacture or production the duty cannot be imposed at any stage prior to these. (Paragraph 10)

...From the decisions and authorities which we have surveyed, it is clear that it is enough if the duty is in respect of the manufacture or production of the goods. (Paragraph 14)

The principles laid down by the Bench in the above decision have not been departed or dissented from in subsequent cases.

6. The cess levied under the Rubber Act, 1947 is a duty of excise on all rubber produced in India. Section 12 of the Rubber Act, 1947, as amended read with Rule 33-D of the Rubber Rules, came up for consideration before a Division Bench of this Court in *Madras Rubber Factory Ltd. v. Rubber Board* 1986 KLT 935. This Court held, that as per Section 12 of the Act read along with Rule 33-D, "cess" (excise duty) is charged on the rubber produced in India, that as per the Act and the Rules (as amended since 1960) the duty has to be collected only from the manufacturer and that there is postponement of the payment of that duty till it is used by the manufacturer. It was also held that the demand is now on the lesser number of manufacturers instead of the larger number of growers. It was held that the mere possession of rubber by a manufacturer will amount to a use of that commodity by that manufacturer. The court held that the acquisition of rubber by a manufacturer is presumed to be for its user. In coming to the said conclusion, the Bench followed the earlier decision of this Court in *Ruby Rubber Works v. Rubber Board* 1965 KLT 1159 and also the decision of the Supreme Court in *Jullunder Rubber Goods Manufacturers' Association Vs. The Union of India (UOI)* and Another, The above decision, rendered by the Bench in *Madras Rubber Factory v. Rubber Board* 1986 KLT 935 was sought to be taken in appeal before the Supreme Court by the manufacturer. But, SLP (Civil) No. 12787 of 1986, filed seeking special leave was rejected by the Supreme Court on 29th January, 1987.

7. As stated, the revision petitioner (assessee) who was assessed and was made liable to pay rubber cess under the Rubber Act and the Rules, complained that the rubber cess so paid by them cannot form part of their purchase turnover of rubber. The Appellate Tribunal held that rubber cess paid by the revision petitioner (manufacturer) is part of the purchase turnover, solely relying on the decision of this Court in *Bata India Ltd. case* 1986 KLT 833. In deciding that "rubber cess" assessed and paid by the manufacturers will form part of their purchase turnover under the Kerala General Sales Tax Act, the Division Bench in *Bata India Ltd. case* 1986 KLT 833 explained the position thus :

(1) The purpose of the amendment made in 1960 to Section 12 of the Rubber Act, 1947, as is clear from its objects and reasons, is to facilitate easy collection of the rubber cess due under the Rubber Act.

(2) The incidence of taxation is on the production of rubber as defined in the Act and the amended provisions of Section 12 have made the recovery and collection of the cess easier.

(3) The excise duty is a duty on the production or manufacture of goods and the same can be levied at convenient stages so long as the character of the impost is not lost.

(4) The excise duty charged on the production of goods sold forms part of the sale consideration and should properly be included in the purchase turnover.

(5) The amendment to Section 12 of the Rubber Act by the Amendment Act,

1960 was only for the purpose of facilitating easy collection of the rubber cess due on the production of rubber. In this case, the liability for rubber cess as a duty of excise is on the production of rubber and is principally that of the producer, in spite of the provision in the amended Act for deferred payment by the purchaser.

(6) In spite of a provision for deferred payment and/or for payment by the purchaser, there is no alteration of the essential character of the levy and it remains as a duty of excise on the production of the goods.

8. We heard Mr. F.S. Nariman, senior counsel, who appeared for the petitioner, as also the learned Advocate-General, who appeared for the Revenue. The main thrust of the arguments, by the petitioner's counsel, was that the decision in Bata India Ltd. case 1986 KLT 833 requires reconsideration especially in the light of the later decision of this Court in Madras Rubber Factory v. Rubber Board 1986 KLT 935. The petitioner's counsel contended that in Bata's case 1986 KLT 833, the concept of excise duty was not properly understood, that by the amendment to Section 12(2) of the Rubber Act, 1947 what was originally the sole liability of the owner of the estate was departed from and after the amendment, the statute has fixed the liability in the alternative, that it has been enjoined by the statute that the duty shall be collected either from the owner or from the manufacturer, that it is not a case of the transfer of the burden, that Section 12(1) and 12(2) should be read together and not in isolation, that after the amendment to Section 12(2) of the Act, the rules made by the Board for the collection is part of Section 12(2) of the Act and so Section 12(2) should be read along with Rule 33-D in order to understand the incidence of levy and also the person on whom the liability is cast to pay the cess under the Act. It was argued that as per Section 12(2) of the Act, as amended in 1960, read along with Rule 33-D, the primary liability is on the manufacturer and not on the grower. Section 12(1) of the Act is silent on whom the liability is cast. Section 12(1) and 12(2) of the Act should be read along with Rule 33-D. Though Section 12(1) of the Act is silent on whom the liability is cast, Section 12(2) of the Act, read along with the rules, to be prescribed by the Board, predicates that either the producer or the manufacturer can be made liable. The levy is in the alternative. The incidence of the levy as also the person on whom the liability should be cast, depended on the rules framed by the Board. In this view, reading Section. 12(1) and 12(2) of the Act, along with Rule 33-D, the liability is only on the manufacturer and not on the producer and so the excise duty paid by the manufacturer (on his own) can never form part of the turnover under the Kerala General Sales Tax Act. The producer was not liable for the cess at all. The payment of excise duty was by the manufacturer, on his own and under an independent Act. Consideration for the goods sold by the producer or owner of the estate is exclusive of the cess. This is not a case where the burden of the producer was transferred to the manufacturer, but it is a case where the producer was not at all made liable and the burden was cast on the manufacturer alone. It was submitted that the Division Bench decision in Bata's case 1986 KLT 833 proceeded on a

misunderstanding of the scope and impact of the relevant statutory provisions in the changed form [Section 12(1), Section 12(2) and Rule 33-D]. Section 12(1), Section 12(2) and the rules should have been construed together and not in isolation, in the light of Jullunder Rubber Goods Manufacturers' Association Vs. The Union of India (UOI) and Another, The Statement of Objects and Reasons for the amendment to Section 12(2) of the Act, as explained by the Supreme Court in Jullunder Rubber Goods Manufacturers' Association Vs. The Union of India (UOI) and Another, will show that the Board shall levy and collect the duty in accordance with the rules and the Board has so levied and collected the duty of excise from the manufacturer. It is not a case where the levy is made on the producer or grower, but collection alone is shifted to be had from the manufacturer. The Statement of Objects and Reasons for the amendment to Section 12(2) made it clear that the Board found it difficult to levy and collect the duty from the owners of the rubber estates. Section 12(1) and 12(2) of the Act should be read along with Rule 33-D. The Division Bench in Bata's case 1986 KLT 833 viewed Section 12(1) and 12(2) of the Act and Rule 33-D in isolation and distinctively which resulted in the wrong approach and conclusion of the Bench in deciding the Bata's case 1986 KLT 833.

9. On the other hand, the learned Advocate-General reiterated that excise duty is on the production of goods and u/s 12(1) of the Act, it is the producer or the manufacturer who is liable and what has been altered by the amendment, in Section 12(2) of the Act in 1960, is to make the collection, easy and convenient. Excise duty is charged on the production of goods sold and so it forms part of the sale consideration.

10. On hearing the rival pleas put forward before us, with respect, we are of the view that the Division Bench, in deciding Bata's case 1986 KLT 833, did not view the concept of excise duty in the correct perspective and as laid down by the decisions of the Supreme Court and as explained by the earlier Division Bench of this Court in Jose v. State 1973 KLT 463. It should also be stated that the scope and effect of the amendment to Section 12(2) of the Rubber Act and the Rules and the construction to be placed on the statutory provisions [Section 12(1), Section 12(2) and Rule 33-D] have not been done in conformity with the decision of the Supreme Court in Jullunder Rubber Goods Manufacturers' Association Vs. The Union of India (UOI) and Another, or from a proper angle or focus. We shall explain these aspects in the following paragraphs.

11. We have already stated that the excise duty is a levy in relation to goods. It is a duty in respect of manufacture or production of goods. It is not strictly or necessarily a duty on the production or manufacture of goods. We have adverted to this aspect in para 5 supra [see AIR 1963 SC 1760 (Sea Customs Act (1878), Section 20(2), In re) and 1973 KLT 463 (Jose v. State)). Before the amendment of the Rubber Act in 1960, as per Section 12(2), as it originally stood, the excise duty was levied and collected from the owner. After the amendment, Section 12(1) is silent on whom the liability is cast. Section 12(2) of the Rubber Act

provides for the collection of duty by the Board in accordance with the rules either from the owner of the estate on which the rubber is produced or from the manufacturer by whom such rubber is used. The language used in Section 12(2) of the Act is clear. The obligation is cast in the alternative. It is either on the producer or on the manufacturer. But, it is for the Board to specify the said incidence by the rules. That has been done by Rule 33-D. The liability is cast on the manufacturer alone. In *Jullunder Rubber Goods Manufacturers' Association Vs. The Union of India (UOI) and Another*, , the Supreme Court considered the scope and ambit of Section 12(2) of the Rubber Act, 1947 after the amendment. The validity and legality of the levy of the cess by way of excise duty on the rubber used by the manufacturers of chappals under the provisions of the Rubber Act, 1947 was challenged. Two main arguments were advanced : (1) the duty sought to be imposed u/s 12 of the Rubber Act, as amended, was stated to be outside the ambit of List I, entry 84 of the Constitution and so beyond the legislative competence of the Parliament and (2) Section 12(2) of the Act was also attacked as suffering from the vice of excessive delegation. The Supreme Court adverted to the history of the law as also the amendment of the Act in 1960 and the Rules. It adverted to the plea of the manufacturer that Section 12(1) of the Act is the charging Section and Section 12(2) only provides for the machinery for levy and collection of tax and the further plea that Section 12(2) of the Act cannot alter the substantive provision in the charging section, Section 12(1) of the Act. It was argued that the incidence of tax was shifted to the users of the goods and so it would cease to be one which will fall within List I, entry 84. In rejecting the argument, the Supreme Court, after adverting to the earlier decisions in AIR 1939 1 (Federal Court) , *R.C. Jall Vs. Union of India (UOI)*, , etc., disapproved the emphasis placed on Section 12(1) of the Act as the charging section and observed:

We find it difficult to endorse the reading of Sub-section (1) and Sub-section (2) of Section 12 in isolation. (Para. 6)

It was stated that the section should be read as a whole and together. It was further held, in para 8 of the judgment, as follows :

In Section 12(2) the Parliament has made it quite clear that the Board can levy and collect the duty of excise either from the owner of a rubber estate on which the rubber is produced or from the manufacturer by whom such rubber is used.

\* \* \* The policy of the Act has been enunciated with sufficient clarity and the guidance has been furnished by the provisions to which reference has been made as to how the Board should exercise its powers in the matter of levy and collection of tax.

Proceeding further, in paragraph 9 of the judgment, the court observed:

The provision in Section 12(2) that the Board shall "levy and collect" the duty in accordance with the Rules is another important safeguard against the Board acting arbitrarily in the matter of collection of duty from the owners of the rubber

estates or the manufacturers.

Referring to the Statement of Objects and Reasons, the court held, in paragraph 11 of the judgment, as follows :

It is quite clear from the data given that the Rubber Board was finding it difficult to levy and collect the duty from the owners of rubber estates and it was considered that it would be much easier to collect the same from the manufacturers.

After advertng to Rule 33-D, the court held, in paragraph 13, as follows:

...it would be reasonable to conclude that under the rules it is only the manufacturers who are liable to pay the amount of duty.

The decision of the Supreme Court in Jullunder Rubber Goods Manufacturers" Association Vs. The Union of India (UOI) and Another, clearly points out in paragraph 6 of the judgment, that Sections 12(1) and 12(2) of the Act should be read together and not in isolation, that by Section 12(2) the Parliament has made it clear that the Board can levy and collect the duty of excise either from the owner of a rubber estate on which the rubber is produced or from the manufacturer by whom such rubber is used, the rules make it clear how the Board should exercise its powers in the matter of levy and collection of tax, that Section 12(2) of the Act as also the Statement of Objects and Reasons point out that the Rubber Board was finding it difficult to levy and collect the duty from the owners of rubber estates and so after the amendment by Section 12(2), the Board can levy and collect the duty in accordance with the rules and as per Rule 33-D it is only the manufacturers who are liable to pay the amount of duty. If we understand the excise duty, as a duty in relation to manufacture or production or in connection with manufacture or production and if Section 12(1) and 12(2) of the Act should be read along with Rule 33-D and not in isolation, it cannot be said that after the amendment, as per Section 12 of the Act read with Rule 33-D, the cess is charged "on the production of goods sold and it forms part of the sale consideration" as held in Bata's case 1986 KLT 833. The levy of cess (excise duty) as per Section 12(1) and 12(2) of the Act (after the amendment) read along with Rule 33-D has made a vital departure. The incidence of the levy is not on the producer or owner of the estate. The liability is cast on the manufacturer alone. In this view of the matter, we are of the view, that after the amendment of the Act in 1960, the scheme of the Act is to levy the duty on the manufacturer (alone) and collection is also made from him (alone). The levy cannot be said to be "charged" on the production of goods sold. It cannot form part of the sale consideration of the producer or the grower of rubber.

12. We should state, that since the "levy of cess" after the amendment of the Act and the rules is on the manufacturer, the total amount charged as consideration by the owner of the estate or the producer, for the sale of rubber to the manufacturer, did not and could not include the "cess" (payable and paid by the manufacturer) as part of the consideration for the sale of rubber. Payment of

"cess" was not a "burden" on the producer at all. It is a levy or burden on the manufacturer of rubber alone, by the Rubber Act and the Rules. The impost is legally permissible and competent as an "excise duty" in the light of the decisions in *In re Sea Customs Act* AIR 1963 SC 1760 and *fose's case* 1973 KLT 463. In the light of the above discussion, with great respect, we are not persuaded to agree with the conclusion reached by this Court in *Bata's case* [1986] 62 STC 436 that the "rubber cess" collected from manufacturers forms part of purchase turnover exigible to sales tax under the relevant entry of the First Schedule to the Kerala General Sales Tax Act 1963. The basic premises on which the said conclusion was rested in *Bata's case* 1986 KLT 833 is not in accord with the decisions of the Supreme Court, of this Court and the interpretation placed on the relevant provisions of the Rubber Act (as amended) and the Rules, by the Supreme Court and this Court. We are of the view that the decision of the Supreme Court in *second McDowell's case* [1985] 59 STC 277 on which reliance was placed is distinguishable and will not apply to the facts of this case. There, the legal liability to pay the duty was on the seller and he transferred such liability by an agreement to the purchaser. Levy or burden was on the seller. He alone had to bear the same. The responsibility was only on the seller to pay the duty. The relevant statutory provisions and the nature of the transaction in *McDowell and Co. Ltd. Vs. Commercial Tax Officer*, were in the opposite direction casting the burden or liability on the seller of the goods, unlike in this case, where the levy or burden is on the purchaser alone-as his own.

13. Petitioner's counsel also brought to our notice the decision of the Madras High Court in *State of Tamil Nadu v. Sri Venkateswara Mills Ltd.* [1986] 63 STC 141 and contended that the impost made in this case under the Rubber Act and the Rules is a separate one and has nothing to do with the imposition of sales tax and does not form part of the purchase turnover of the manufacturer (the revision petitioner). We perused through the said decision. We are of the view, that the reasoning contained in the said decision will also be appropriate and relevant to hold that the "cess" in the form of "excise duty" levied on the manufacturer under the Rubber Act and the Rules is a separate and independent impost and it can never form part of the purchase turnover of the revision petitioner.

14. In the light of our above discussion, with great respect, we hold that the *Bata's case* 1986 KLT 833 was wrongly decided. The cess payable and paid under the Rubber Act and the Rules by the revision petitioner-assessee/company (manufacturer) will not form part of its purchase turnover. The reasoning and conclusion to the contrary by the Sales Tax Appellate Tribunal, in its common order dated 20th November, 1986 in T.A. Nos. 601 to 603 and 838 of 1986, that the payment of cess to the Rubber Board constituted part of purchase turnover of the revision petitioner, is clearly erroneous in law. We set aside the aforesaid common order of the Appellate Tribunal to the above extent. The Tax Revision Cases Nos. 35 to 37 of 1987 are allowed.

15. In the light of our decision in T.R.C. Nos. 35 to 37 of 1987, we should uphold the order of the Tribunal dated 5th October, 1982 in T.A. No. 102 of 1978 and dismiss T.R.C. No. 101 of 1983. We hereby do so.

16. Similarly, we set aside the judgment of the learned single Judge rendered in O.P. No. 5767 of 1986-J and allow Writ Appeal No. 681 of 1986 to the extent of holding that the cess paid by the appellant under the Rubber Act, 1947 and the Rules will not form part of its purchase turnover. For the same reasoning, exhibits P1 to P3 notices, issued by the assessing authority, in O.P. No. 1344 of 1987, proposing to include the cess as part of the purchase turnover of the petitioner-manufacturer are clearly unauthorised. Exhibits P1 to P3 are quashed. The O.P. is allowed.

17. The tax revision cases, the writ appeal and the original petition are disposed of as above.

M. Fathima Beevi, J.—I have had the advantage of perusing the judgment of my learned brother Paripoornan, J. I feel compelled respectfully to differ from my learned brother.

2. The tax revision cases have been referred to the Full Bench as it was felt that there is an apparent conflict between the Division Bench decisions in Deputy Commissioner of Sales Tax v. Bata India Ltd. 1986 KLT 833 and the later decision in Madras Rubber Factory Ltd. v. Rubber Board 1986 KLT 935 and that the decision in Bata India Limited case 1986 KLT 935 requires reconsideration. In my view, Bata India Limited 1986 KLT 935 has been correctly decided and these cases are covered by that decision.

3. Being a party to that judgment I proceed to state the reasons in support of the view I have expressed. The detailed facts of the cases before us and the material parts of the statutory provisions have been stated in the judgment of my learned brother.

4. Purchase turnover of rubber is exigible to sales tax under entry 38 of the First Schedule to the Kerala General Sales Tax Act, at the last purchase point. Manufacturers of rubber products who use the rubber purchased are thus taxed on the purchase turnover of rubber used for manufacture. Rubber cess is levied u/s 12 of the Rubber Act, 1947 as amended by Act 21 of 1960. A duty of excise on all rubber produced in India at rate fixed is levied as a cess. The duty of excise levied is collected by the Rubber Board in accordance with the rules made either from the owner of the estate on which the rubber is produced, or from the manufacturer by whom such rubber is used. The amount of duty of excise levied is assessed by the Board. Every owner and every manufacturer is required to furnish the return stating the total quantity of rubber produced in the estate or used in the manufacture as the case may be. The owner or the manufacturer is to pay to the Board the amount of the duty on receiving the notice of demand. This is the scheme of Section 12 of the Rubber Act.

5. Rules are framed in pursuance of the power conferred u/s 25 of the Act. Under Rule 33(e) all manufacturers have to submit half-yearly returns showing total quantity of rubber produced or otherwise acquired and consumed or used in the process of manufacture. The Board can, after making enquiry, assess the amount of duty payable. Under Rule 33-D on notice of demand the manufacturer has to pay the amount assessed on the quantity of rubber acquired. On his failure to make such payment, the Board can take steps for recovery of the amount as arrears of land revenue. Under the rules, the demand notice is to be sent only to the manufacturers and the amount of duty is to be realised from them alone.

6. The substantive of provisions Sub-sections (4), (5) and (6) of Section 12 contemplate assessments being made with regard to the return to be furnished by owners and manufacturers. The rules make a definite provision with regard to the category of persons from whom the collection of the duty is to be made, namely, the manufacturers. There is no provision either in the Act or the Rules for a demand to be made on the owner of the estate.

7. The contention raised on behalf of the manufacturers is that when the cess is paid by the manufacturer on demand after assessment, the payment is in discharge of a statutory liability of the manufacturer himself and not on behalf of the owner who produced the rubber. The cess so paid, it is maintained, cannot form part of the sale consideration for being included in the purchase turnover. It is urged that the imposition of the cess is on the manufacturer and the payment is not a deferred payment on behalf of the producer of rubber. The Division Bench in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. Bata India Ltd. and Others, held :

Rubber cess is a duty of excise on rubber produced within the country and the taxable event is the production of rubber as defined in the Rubber Act, 1947 and the amended provisions of Section 12 have made the recovery and collection of the cess easier. Both owner and the manufacturer are made liable to pay the cess. Provision for deferred payment and/or for payment by the purchaser has not altered the essential character of levy and it remains as a duty of excise on the production of the goods.

8. While the levy of duty is on the production of rubber, Section 12 of the Act as amended in 1960 enables the Board to collect the cess either from the owner or the manufacturer who ultimately consumes the rubber produced in the estate.

9. The incidence of taxation on the production of rubber is passed on to the manufacturer who consumes the rubber by providing a machinery for collection of the cess from the manufacturer. The incidence of duty of excise is directly related to the production only. The collection is deferred to a later stage as a measure of convenience or expediency. The character of the impost is not thereby lost. It remains as the duty of excise on production. It is not an impost on use of rubber. The liability of the manufacturer who consumes the rubber arises only on account of the purchase of the goods in respect of which, there is

a levy of excise duty. The ultimate incidence of an excise duty must always be on the consumer who pays as he consumes. The taxable event is the production and the levy is only at the stage of production. The collection at the stage of consumption does not affect the essence of the duty as one on production. The tax being an indirect one to be borne ultimately by the consumer, the fact that the manufacturer is made to pay does not affect the essence of the tax as a duty of excise on production. Section 12(2) is only a suitable machinery for collection without disturbing the essence of the tax or ignoring the rational connection between the tax and the person on whom it is imposed.

10. The levy of cess is under Sub-section (1) of Section 12 of the Act. The impost is on production. The duty of excise thus levied is to be collected as provided in Sub-section (2) either from the owner or the manufacturer. Sub-section (3) fastens liability to pay the duty both on the owner as well as the manufacturer. Sub-section (4) prescribes the procedure for assessment. The term "levy" is wider in its import than the term "assessment". Levy may include both imposition of a tax as well as the assessment. However, levy does not extend to collection. The term "imposition" is generally used for levy of a tax or duty. "Assessment" is generally the actual procedure adopted in fixing the liability to pay tax. What is contemplated Under Sub-sections (3) and (4) of Section 12 is the quantification of the amount of the cess payable on the rubber produced for the purpose of collection from the manufacturer who has used the same. The cess paid by the manufacturer on such assessment being the excise duty levied on production of the rubber is only deferred consideration for the sale, passing from the purchaser to the owner who produced the rubber. "Turnover" means the aggregate amount for which the goods are either bought or sold whether for cash or for deferred payment. Therefore, the rubber cess paid by the manufacturer being deferred consideration for sale, forms part of the purchase turnover.

11. The Supreme Court in *R.C. Jall Vs. Union of India* (UOI), has held:

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

In *Sea Customs Act (1878)*, In re AIR 1963 SC 1760, the Supreme Court in considering the question of the nature of duty of excise stated in para 25 at page

1776:

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

On the principle that duty of excise is in essence trading tax and not tax on property, the contention that levy of excise on goods under item 84 of List I of the Seventh Schedule to the Constitution is a tax on property and therefore, no excise can be levied on goods belonging to States and manufactured by them was negatived by the Supreme Court. The statement of law in this decision followed in *E.R. Jose v. State* 1973 KLT 463 in no way supports the contention that the rubber cess is a levy on the manufacturer who uses the rubber. It is an impost on the act of production.

12. The validity of the amendment of Section 12 by Act 21 of 1960 was challenged in *Jullunder Rubber Goods Manufacturers' Association Vs. The Union of India (UOI) and Another*, The validity and legality of levy of cess by way of excise duty on the rubber used by manufacturers of chappals under the provisions of the Rubber Act, 1947 as amended was assailed in that case. The contentions raised were that the duty sought to be imposed u/s 12 as amended being outside the ambit of entry 84 of List I in the Seventh Schedule of the Constitution is beyond the legislative competence of the Parliament and Section 12(2) suffers from the vice of excessive delegation in that it confers uncontrolled and unrestricted discretion upon the Rubber Board to levy upon and collect duty of excise from either the owners of the rubber producing estates or the users or the manufacturers without specifying the circumstances under which it would be imposed upon the one or the other, nor has any guiding policy or principle been laid down in the Act for making a choice. It was also contended there that the rules which have been framed do not specify the provisions of Section 12(2) of the Act and do not indicate with sufficient clarity and precision on whom the duty is to be collected as between the owners of the estate and the manufacturers. The first two contentions were negatived and the court held that, the incidence certainly falls directly on the production and the method of collection will not affect the essence of the duty and Sub-section (2) of Section 12 provides for the method of collection as the excise duty can be collected either from the producers or from the manufacturers as defined by the Act. The court also held

that the Board is vitally interested in the collection of duty and it has to see that such duty is collected without undue delay and proper expedition. It has also to look to the best possible method of realisation and in the light of this scheme as embodied in the Act it is difficult to sustain the challenge on the ground of excessive delegation. It was also pointed out that the levy and collection in accordance with the rules is an important safeguard against the Board acting arbitrarily in the matter of collection of duty from the owners of the rubber estates or the manufacturers. When the court referred to levy and collection in the discussion, the emphasis is on the assessment and collection and not on the impost. It is nowhere stated that the impost is on the manufacturer. In dealing with the last contention that there is no sufficient clarity and precision on whom the levy is to be made, the court has, after analysing Rule 33-D and the substantive provisions of Section 12 declared that the rules make a definite provision with regard to the category of person from whom the collection of the duty is to be made, namely, the manufacturers. The statement of law by the Supreme Court in this decision does not in any way advance the case that the impost is on the manufacturer and the payment of cess by the manufacturer is in discharge of the statutory liability on account of such impost. On the other hand, it is clearly laid down that Sub-section (2) is an enabling provision for making the assessment and collection in accordance with the rules for administrative convenience.

13. There is, therefore, no force in the contention that the Division Bench proceeded to decide the question without examining the concept of excise duty or applying the principles laid down in *Jullunder Rubber Goods Manufacturers' Association Vs. The Union of India (UOI) and Another*, There is no controversy that the rubber cess is a duty of excise on production. It was nowhere contended that the charge is on use of rubber. Under the provisions of the statute, such a contention cannot hold good. It is not correct to say that the cess is not charged on the production of rubber or that the incidence of levy is not on the producer or owner of the estate and that the levy is on the manufacturer from whom the cess is collected. It is not an independent impost on the manufacturer. Prior to the amendment made by Act 21 of 1960 the duty of excise was payable u/s 12(2) by the owners of the estate on which rubber was produced. By Act 21 of 1960 the important change made is that the duty levied on production of rubber u/s 12(1) could be collected by the Board either from the owners of estates or from the manufacturers by whom the rubber is used. As held in *Ruby Rubber Works v. Rubber Board* ILR (1966) Ker 60 the duty imposed u/s 12 is a duty of excise on the rubber produced in this country. The collection of the said duty from manufacturers of rubber goods does not make it any the less an excise duty on the production of rubber or disrupt the necessary connection between the duty and the person on whom it is imposed. Under Sub-section (2) of Section 12 the duty can be collected by the Board either from the owner of the estate on which the rubber is produced or from the manufacturer by whom such rubber is used. The option has to be exercised by the rule framed u/s 25(2)(xxa) which

states that the Central Government may by notification make rules to carry out the purposes of the Act in particular, may provide for cases and the circumstances in which the duty of excise u/s 12 shall be payable by the owner and the manufacturers respectively, the manner in which the duty may be assessed, paid or collected, the regulation of the production, manufacture, transport or sale for the proper levy, payment or collection of duty. Rule 33-D clearly indicates that the option has to be exercised and that the duty is to be collected from the manufacturer. Collection of the duty from the manufacturer does not alter the character of the impost as a duty on production nor change the taxable event being the production of rubber. By making this provision for convenient collection of the cess at the stage of consumption of goods produced, the character of the levy as a duty of excise on rubber produced or its incidence are not altered.

14. M.S. Menon, C.J., in *Ruby Rubber Works v. Rubber Board* ILR (1966) Ker 60 upholding the validity of Section 12 of the Act pointed out:

Prior to the Rubber (Amendment) Act, 1960 the appellant paid the duty to the producer and he paid it to the Board. Now the appellant does not pay it to the producer but pays it directly to the Board. That and that alone is the change that has been effected.

15. The liability of the manufacturer of rubber to pay the cess to the owner who produced the rubber for being remitted to the Board is statutorily converted as the liability to pay directly to the Board. In other words, the owner who produces the rubber is relieved of the obligation of collection from the manufacturers while passing on the incidence of the duty to the latter deferring payment of part of the consideration for the sale. The manufacturer who thus suffers the incidence of duty is only paying for the goods and the payment so made indirectly enters the purchase price.

16. The collection from the manufacturer does not therefore entitle the manufacturer to claim that the payment is not a component part of the sale consideration for the purpose of being included in the purchase turnover which is exigible to sales tax Under entry 38.

17. I am, therefore, unable to agree with the view that the cess in the form of excise duty levied on all rubber produced in India under the Rubber Act and the Rules is a separate and independent impost on the manufacturer who consumes the same and it can never form part of the purchase turnover of the petitioners. I am clearly of the view that *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. Bata India Ltd. and Others*, has been correctly decided. In *Madras Rubber Factory Limited v. Rubber Board* 1986 KLT 935 the question did not arise directly. There the only question was whether the acquisition of rubber as a necessary raw material in manufacture will amount to a use of that commodity for the purpose of Rule 33-D. There is apparently no conflict in these decisions.

I would therefore dismiss these tax revision cases.

In the view I have taken above, I allow T.R.C. No. 101 of 1983 and dismiss W.A. No. 681 of 1986 and O.P. No. 1344 of 1987.

By Court

In view of the opinion of the majority, we hereby :

(1) set aside the common order dated 20th November, 1986 in T.A. Nos. 601 to 603 and 838 of 1986 passed by the Kerala Sales Tax Appellate Tribunal and allow T.R.C. Nos. 35, 36 and 37 of 1987, filed by the assessee.

(2) uphold the order of the Tribunal dated 5th October, 1982 in T.A. No. 102 of 1978 and dismiss T.R.C. No. 101 of 1983, filed by the Revenue.

(3) set aside the judgment of the learned single Judge rendered in O.P. No. 5767 of 1986-J and allow W.A. No. 681 of 1986.

(4) quash exhibits P1 to P3 notices and allow O.P. No. 1344 of 1987. There shall be no order as to costs in all the cases.

Immediately after the judgment was pronounced, the learned Advocate-General prayed for a certificate to appeal to the Supreme Court of India. We are satisfied that the cases involve a substantial question of law of general importance and in our opinion the question involved needs to be decided by the Supreme Court. We, accordingly, certify that these are fit cases for being heard and disposed of by the Supreme Court. Certificate granted, accordingly, in all these cases.

Order on C.M.P. No. 4278 of 1987 in O.P. No. 1344 of 1987.