

(1988) 03 GUJ CK 0029
In the Gujarat High Court

Case No : Special Civil Application No's. 6434, 6449 to 6453, 6602, 6631 and 6865 of 1987

Maheshwari Mills Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-03-1988

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 3, 3(1), 3(3)
Central Excise Rules, 1944 — Rule 2, 47, 49, 49A, 52, 52
Central Excise Tariff Act, 1985 — Section 3
Central Excises and Salt Act, 1944 — Section 2, 3, 3(1), 37, 37(2)

Citation : (1989) 22 ECR 110 : (1988) 35 ELT 252

Hon'ble Judges : D.H. Shukla, J;A.H. Ahmadi, J

Bench : Division Bench

Advocate : S.I. Nanavati, for the Appellant; K.A. Mehta and J.D. Ajmera, for the Respondent

Final Decision : Dismissed

Judgement

A.H. Ahmadi, J.

1.We had heard these petitions at length and we had indicated to the learned advocates that we would dispose of these petitions as finally heard. At that time Mrs. Mehta and Mr. J.D. Ahmera had stated that they would waive service of rule on behalf of the respondents and the Court may dispose of the petitions finally. Accordingly we issue rule. Mrs. Mehta and Mr. Ajmera waive service of rule in each petition and we now proceed to dispose of the petitions on merits.

2. In this batch of petitions the petitioner-Companies are engaged in the manufacture and production of cotton and man-made fabrics covered under Chapters -52, 54 and 55 of the Central Excise Tariff Act, 1985 (hereinafter called the Tariff Act). These manufacturing concerns have taken out L-IV licences under the Central Excises and Salt Act, 1944 (hereinafter called "the 1944 Act") read

with the Central Excise Rules, 1944 (hereinafter called "the Rules") framed thereunder. According to the petitioners, even though man-made fabric is an excisable commodity under the Tariff Act, no duty of excise is leviable thereon u/s 3 of the 1944 Act but an additional duty of excise is levied on specified goods under Sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (hereinafter called "the 1957 Act") i.e., inter alia, on goods falling under Chapters 54 and 55 of the Tariff Act. Section 3 of the 1957 Act reads as under :-

"3. Levy and collection of additional duties - (1) There shall be levied and collected in respect of the following goods, namely, sugar, tobacco, cotton fabrics, silk fabrics, man-made fabrics and woollen fabrics produced or manufactured in India and on a!) such goods lying in stock within the precincts of any factory, warehouse or other premises where the said goods were manufactured, stored or produced, or in any premises appurtenant thereto, duties of excise at the rate or rates specified in the First Schedule to this Act.

(2) The duties of excise referred to in Sub-section (1) in respect of the goods specified therein shall be in addition to the duties of excise chargeable on such goods under the Central Excises and Salt Act, 1944, or any other law for the time being in force.

(3) The provisions of the Central Excises and Salt Act, 1944, and the rules made thereunder, including those relating to refunds and exemptions from duty, shall, so far as may be, apply in relation to the levy and collection of the additional duties as they apply in relation to the levy and collection of the duties of excise on the goods specified in Sub-section (1)."

By Notification No. 60/87 dated 1st March 1987 issued in exercise of power conferred by Rule 8(1) of the Rules partial exemption was granted in respect of certain man-made fabrics, namely, goods falling within the Headings 54.09, 54.12, 55.08, 55.11 and 55.12 of Chapters 54 and 55 of the Tariff Act. The petitioners contend that they were paying duty as per this notification (as amended by Notification No. 142/87 dated 12th May 1987 and corrected by Corrigendum dated 7th July 1987) till 24th November 1987.

3. On 25th November 1987, the Central Government issued another Notification No. 254/87, (Annexure "A") superseding the earlier Notification No. 60/87 whereby the basis for grant of exemption underwent a change in respect of the goods covered under the aforestated headings. The petitioners contend that the net effect of this change is an increase in the additional duty of excise on the specified goods. The question then is, whether goods manufactured before the Notification No. 254/87 dated 25th November 1987 came into effect but not removed from the factory premises would be governed by the said notification or the earlier Notification No. 60/87 which was in operation till then. According to the petitioners, the goods manufactured prior to 25th November 1987 and lying in stock of the Company would be entitled to the benefit of the exemption

Notification No. GO/2,7 and would be liable to pay additional duty on the basis thereof. The revenue contends otherwise.

4. The charging section extracted earlier empowers the levy and collection of duties of excise at the rate or rates specified in the First Schedule to the Act on goods catalogued therein "produced or manufactured in India and on all such goods "lying in stock.... where the said goods were manufactured, stored or produced, or in any premises appurtenant thereto. The duty imposed under this provision is in addition to the duties imposed under the 1944 Act or any other law for the time being in force. The provisions of the 1944 Act and the Rules made thereunder apply to the levy and collection of additional duty as they apply in relation to the levy and collection of duty under the said statute. Under the said provision the additional duty can be levied and collected on certain fabrics including man-made fabric. The present batch of petitions concerns goods referred to under the Headings 54.09 and 54.12 of Chapter 54 entitled "Man-made Filaments" and Headings 55.08, 55.11 and 55.12 of Chapter 55 entitled "Man-made Staple Fibres" to the Tariff Act. Rule 8(1) of the Rules empowers the Central Government to exempt by notification any excisable goods from the whole or any part of duty leviable on such goods. In exercise of power conferred under the said Rule read with Section 3(3) of the 1957 Act, the Central Government issued the Notification No. 60/87 dated 1st March 1987 granting exemption to goods falling under Headings 54.09, 54.12, 55.08, 55.11 and 55.12 from so much of the duty leviable under the 1957 Act as is in excess of the amount calculated at the rate specified in Column 4 of the table thereto. This notification was in force till it came to be superseded by Notification No. 254/87 dated 25th November 1987 whereby the basis of exemption shifted from the price of the goods under the earlier notification to the width and weight of the concerned fabric. We will hereafter refer to the Notification No. 254/87 dated 25th November 1987 as the "impugned Notification" since its legality and validity is in challenge in this group of petitions. The challenge is founded on the following grounds :-

(1) Under Rule 8(1) of the Rules, the Central Government has power to grant exemption from duty of excise but it has no power to enhance the duty as has been done by the impugned Notification.

(2) Section 3 of the Tariff Act confers emergency powers on the Central Government to increase the duty of excise in certain circumstances by an amendment of the Schedule to the 1944 Act but since the impugned Notification is not issued under the said provision, the Central Government was not empowered to enhance the duty which it had done by the impugned Notification.

(3) It is not permissible to the Central Government to change the mode or basis of exemption which has the effect of increasing the duty having regard to the scope of Clause (xvii) of Section 37(2) of the 1944 Act and Rule 8(1) of the Rules made thereunder; and

(4) Under Entry 84 in List 1 of the Seventh Schedule to the Constitution (as also under the corresponding Entry in the Government of India Act, 1935) Excise duty can be levied and collected on the manufacture and production of goods and hence the taxable event is the date of manufacture of man-made fabrics and not the removal thereof from the manufactory and hence the revenue would be entitled to duty on goods manufactured before 25th November 1987 on the basis of the exemption Notification No.60/87 and not on the basis of the subsequent Notification No.254/87 as that would not be warranted by the charging section as well as Rule 8(1) of the Rules: Rule 9A cannot be read as permitting levy and collection of duty at the rate prevalent on the date of actual removal regardless of the date of manufacture : to do so would be to widen its scope beyond the charging section and render it ultra vires the said provision. It must, therefore, be read down to make it consistent with the charging section.

Note:- By an amendment of the petition the constitutional validity of Rule 9A came to be challenged but Mr.Nanavati stated that he did not press that contention in the present group of petitions. He also made it clear that he did not desire to address this Court on the point that under Rule 8(1) the Central Government has no power to enhance the rate of duty beyond that prescribed by the First Schedule to the 1944 Act.(See orders dated, 24th December 1987 and 15th December 1987 respectively).

5. In the counter filed on behalf of the revenue it is pointed out that the petitioners are manufacturers of man-made fabric falling within Chapters 54 and 55, Headings 54.09, 54.12, 55.08, 55.11 and 55.12, of the Tariff Act. The additional duty of excise for the goods covered under the said Headings is 10 per cent plus Rs. 5 per sq. meter. However, the Central Government granted an exemption to the extent stated in Notification* No.60/87 which later came to be replaced by the impugned Notification. The effective rate under both the Notifications was and is indisputably less than the rate prescribed under the 1957 Act and, therefore, the submission that the impugned Notification enhances the duty is clearly misconceived. As regards the demand for duty at the rate prevailing on the date of removal, reliance is placed on Rule 9A of the Rules. It is contended that the duty is leviable on the date of manufacture but its collection may be on the date of removal of the goods from the manufactory. It is, therefore, contended that the Central Government which has the power to grant exemption must be deemed to have the power to withdraw the exemption or revise, modify or restructure the same as is done by the impugned Notification and in doing so the Central Government was entitled to change the basis of exemption if demand necessary. Such a change in the form or method of exemption cannot invalidate the exemption Notification. It is, therefore, submitted on behalf of the revenue that its demand for additional duty on the basis of the impugned Notification at the rate applicable on the date of removal is justified.

6. Section 3 of the 1944 Act provides that there shall be levied and collected in

such manner as may be prescribed duties of excise on all excisable goods other than which are produced or manufactured in India. The term "manufacture" is defined by Section 2(f) to include any process incidental or ancillary to the completion of a manufactured product and the expression "excisable goods" means goods specified in the Schedule to the Tariff Act as being subject to a duty of excise and includes salt. The duty has to be levied and collected in such manner as may be prescribed, that is, prescribed by rules made under the 1944 Act. Section 37 empowers the Central Government to make rules inter alia to "exempt any goods from the whole or any part of the duty imposed by the Act. In exercise of the power conferred by the said section the Central Government framed the Rules, Rule 8 whereof reads as under:-

"8. Power to authorise exemption from duty in special cases-

(1) The Central Government may, from time to time, by notification in the Official Gazette exempt subject to such conditions as may be specified in the notification any excisable goods from the whole or any part of duty leviable on such goods;

Provided that, unless specifically provided in any notification issued under this Sub-rule, any exemption therein shall not apply to excisable goods produced or manufactured in a free trade zone and brought to any other place in India.

Provided further that, unless specifically provided in any notification issued under this Sub-rule, any exemption therein shall not apply to excisable goods produced or manufactured in a hundred per cent export-oriented undertaking and allowed to be sold in India.

(2) The Central Board of Excise and Customs may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature, any excisable goods.

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

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

Rule 9 says that no excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the

excise duty leviable thereon has been paid at such place and in such manner as is prescribed. That brings us to Rule 9A, the relevant part whereof reads as under:-

"9A. Date for determination of duty and tariff valuation : -

(1) The rate of duty and tariff valuation, if any, applicable to any excisable goods shall be the rate and valuation in force, -

(i) in the case of goods removed from the premises of a curer on payment of duty, on the date on which the duty is assessed; and

(ii) in the case of goods removed from a factory or a warehouse, subject to Sub-rules (2), (3) and (3A), on the date of the actual removal of such goods from such factory or warehouse.

Now in addition to the duty imposed. by the 1944 Act additional duty of excise is levied and collected u/s 3(1) of the 1957 Act on specified goods including man-made fabrics produced or manufactured in India at the rate or rates specified in the First Schedule to the said Act. By virtue of Sub-section (3) of Section 3 of the said Act the provisions of the 1944 Act and the Rules made thereunder, including those relating to exemption from duty, are made applicable in relation to the levy and collection of additional duties as they apply in relation to the specified goods under the 1944 Act. It is by virtue of this provision that the Central Government has been issuing exemption notifications under Rule 8(1) of the Rules, including the notification challenged in the present proceedings. As pointed out earlier, the revenue contends that u/s 3(3) of the 1957 Act read with Rule 9A of the Rules, the revenue is entitled to claim duty on the date of "actual removal" of the goods at the rates prevalent at that date regardless of the date of manufacture of the said goods.

7. In order to decide whether the goods in question are to bear the duty under the old Notification No.60/87 or under the impugned Notification No.254/87, it is necessary to understand the scheme of taxation. Firstly, Section 3 of the 1944 Act provides for the levy and collection of excise duty on all excisable goods manufactured in India at the rates set forth in the First Schedule in such manner as may be prescribed. Section 4 says that where the duty of excise is chargeable on any excisable goods with reference to its value, such value shall be deemed to be the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person, etc. The place of removal means a factory or any other place or premises of production or manufacture of excisable goods or a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where such goods are removed. It is obvious that emphasis here is clearly on the time and place of removal.

8. We now pass on to the rules framed u/s 37 of the 1944 Act. Rule 2 provides

the meanings to the various expressions used in the rules. While the expression "factory" is defined by Section 2(e) of the 1944 Act, the term "warehouse" is defined in Clause 2(xv) of Rule 2. Chapter III which deals with "Levy and refund of and exemption from duty enjoins on every person who produces or cures or manufactures any excisable goods, or who stores such goods in a warehouse, the liability to pay duty or duties leviable on such goods at such time and place and to such person as may be designated, in or under the authority of the Rules (Rule 7). Rule 9 lays down the time and manner of payment of duty. It says that no excisable goods shall be removed from any place where they are produced, cured or manufactured until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed by the rules. This rule clearly prohibits the "removal" of the goods from the factory until the excise duty is paid, unless the goods are deposited in an approved store-room or other place of storage or any warehouse appointed or licensed under Rule 140, or are removed for captive consumption as raw material or component parts for the manufacture of excisable duty. As we are not concerned with cases falling within the said proviso, it is not necessary to elaborate. Rule 49 provides that the payment of duty shall not be required in respect of excisable goods made in factory until they are about to be issued out of the place or premises specified under Rule 9 or are about to be removed from a store-room or other place of storage approved by the Collector under Rule 47, Rule 52 lays down the procedure which a manufacturer who desires to remove the goods on payment of duty must follow before he removes the goods from the factory, store-room or warehouse. Rule 52-A says that no excisable goods shall be delivered from a factory except under a gate-pass signed by the owner of the factory and countersigned by the proper officer. These rules also lay emphasis on removal. Rule 9A extracted above next provides that the rate of duty and tariff valuation, if any, applicable to any excisable goods shall be the rate and valuation in force, in the case of goods removed from the premises of a curer on payment of duty, on the date on which the duty is assessed; and in the case of goods removed from a factory or a warehouse, on the date of actual removal of such goods. On a plain reading of the said rule it becomes obvious that the first part applies to a case where the goods are removed by a curer on payment of duty whereas the second part relates to removal of goods from the factory or warehouse on which duty is yet to be paid. In the case of the former, the critical date is the date on which the duty is assessed whereas in the latter case the critical time is the time of actual removal of the goods from the factory or the warehouse. Mrs. Mehta contends that the cases on hand belong to the latter category. On the other hand, Mr. Nanavati contends that since the taxable event is manufacture or production of excisable goods, the critical date for assessing the duty of excise can only be the date of manufacture regardless of the date of removal. According to him, "manufacture" takes place no sooner there is transformation of a commodity into a new commodity commercially distinct and separate from the earlier one having its own character, use and name, whether it be the result of a single or several processes. He submitted that on the date a new commodity comes into being, if

the same is excisable, the liability to pay duty at the rate prevailing on the date of manufacture arises no matter when the same is removed from the factory or warehouse. In our view, this submission runs counter to the scheme of the relevant taxing statutes and the rules referred to earlier.

9. Under Entry 84 in List I, Seventh Schedule to the Constitution, duties of excise can be levied on tobacco and other goods manufactured or produced in India. Neither the Constitution nor the 1944 Act defines the expression "duty of excise". It is, however, obvious from the language of Entry 84 that it is a tax on goods manufactured and produced in India and being an inland tax its incidence generally though -not always falls on the consumer. AIR 1939 1 (Federal Court) ., Sulaiman 3.,,pointed out at page 22 as under :-

"The essence of a tax on goods manufactured or produced is that the right to levy it accrues by virtue of their manufacture or production. It is immaterial whether the goods are actually sold or consumed by the owner or even destroyed before they can be used. If a duty is imposed on the goods manufactured or produced when they issue from the manufactory then the duty becomes leviable independently of the purpose for which they leave it and irrespective of what happens to them later."

These observations were quoted with approval in Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another, .

10. In A.B. Abdul Kadir and Others Vs. State of Kerala, it was said that excise duty was a tax on Articles produced or manufactured in the taxing country. Generally speaking, the tax is on the manufacturer or the producer, yet laws are to be found which impose a duty of excise at stages subsequent to the manufacture or production. (See A.B. Abdulkadir and Others Vs. The State of Kerala and Another, . It is evident from the above that the taxable event undoubtedly is the manufacture and production of goods; it is immaterial what happens to the goods thereafter. The duty, if imposed, becomes leviable on the goods leaving the manufactory irrespective of what happens to them thereafter. It is immaterial whether the manufacturer is able to pass on the duty to the consumer although the general tendency is to do so. It will not effect the impost if a manufac turer is unable to recover the same from the consumer as in cases of retrospective application.

11. R.C. Jall Vs. Union of India (UOI), it was held that once the levy is relatable to manufacture or production of excisable goods, the same can be levied at any convenient stage so long as the character of the impost is not changed. Their Lordships pointed out :-

"The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administ rative convenience."

Thus even though the taxable event is the manufacture or production of an excisable Article, the duty can be levied and collected at a later date for

administrative convenience.

12. In *Province of Madras v. Boddu Paiddana and Sons* 1978 E.L.T. (J 272), the Federal Court observed as under :-

"There is in theory nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed or given away. A taxing authority will not ordinarily impose such a duty because it is much more convenient administratively to collect the duty (as in the case of most of the Excise Acts) when the commodity leaves the factory for the first time and also because the duty is intended to be an indirect duty which the manufacturer or producer is to pass on to the ultimate consumer, which he could not do if the commodity had for example been destroyed in the factory itself."

It is obvious from the above observations that the right to impose a duty arises on the manufacture of an excisable Article even though it may not be collected at once i.e. as soon as it comes into existence but may for administrative convenience be collected later at the date of removal. The levy must be related to the manufacture or production of an excisable Article for otherwise it cannot be regarded as a duty of excise. The scheme of the 1944 Act and the Rules framed thereunder, particularly Rule 9A, reveals that while the taxable event is the fact of manufacture or production of an excisable Article, the payment of duty is related to the date of removal of such Article from the manufactory. This is quite consistent with the scheme of taxation so far as excise duty is concerned.

13. Mrs. Mehta, the learned counsel for the revenue, submitted that the main question raised in this batch of petitions is settled by the decision of this Court in the case of *Alembic Chemical Works Co., Ltd. Vs. Union of India (UOI) and Others*, . The question which arose before the Division Bench in that case was whether the stock of excisable goods was liable to excise duty in force at the date of removal of those goods from the manufactory when the exemption was withdrawn even though the same was manufactured before the withdrawal of the exemption. Before we consider this decision it would be proper to refer to an earlier decision of the Supreme Court in the case of *Orient Paper Mills Ltd. Vs. Union of India (UOI)*, . In that case the Company which held a L-4 licence was engaged in the manufacture and sale of wholesale paper and boards. The Company's factory was traversed by railway lines. The Company enjoyed the benefit of a private siding. In 1960 the Company constructed a new railway siding outside the factory premises and raised a platform for loading and unloading of goods. The extension was not included in the factory or its premises or precincts for purposes of the Excise Rules. The exit from the new siding, however, was only through the factory premises as the railway track came to a dead-end on the other side. On 27th February 1961 it loaded 20 wagons of paper after effecting clearance of these goods by payment of the excise duty under Rule 52 of the Rules. On the next day, 28th February 1961, it loaded 13 more wagons and cleared them. These wagons were sealed by the railway

administration and railway receipts were issued in due course. The Company had also obtained the necessary gate passes. The wagons were shunted to the new siding for want of a pilot engine. The Deputy Superintendent of Central Excise wrote to the Company on 1st March 1961 that the wagons loaded on 27/28th February 1961 were found inside the factory premises till 9.45 A.M. on 1st March 1961 and the goods were, therefore, liable to be assessed at the higher rates of excise duty current on that day. The Company contended that the wagons were taken out of the factory premises and were not in the factory when the new rates came into force. Relying on Rule 9A of the Rules, it submitted that duty was payable at the rate in force on the date on which the duty was actually paid. In the alternative it submitted that since the goods had been cleared or removed from the factory premises before midnight of 28th February 1961, they could not be made liable for enhanced duty which came into force from 1st March 1961. The revenue did not accept this position. The relevant part of Rule 9A as it then stood read as under :-

"9A.(1) Alteration of duty or tariff valuation :-

The rate of duty and the tariff valuation (if any) applicable to goods cleared on payment of duty shall be the rate and valuation (if any) in force on the date on which duty is paid, or if the goods are cleared from a factory or a warehouse, on the date of the actual removal of such goods from such factory or warehouse."

Hidayatullah J., speaking for the Supreme Court observed that Rules 9 and 9A applied to both manufactured and unmanufactured goods because Rule 9 speaks in terms of both and Rule 9A mentions in one place goods without adverting to the source (it then did not speak of removal from the premises of the curer) and in the other the factory or warehouse. In the case of manufactured goods, the learned Judge points out that the payment of duty and the clearance of goods may be synchronous or the payment may be postponed although the goods may be removed (provisos to Rule 9). His Lordship then proceeded to observe as under :-

"The critical time thus becomes the removal from the factory or warehouse but if the payment of duty is made before the removal then the critical time is the payment of duty."

These observations clearly show that if the duty is paid before the date of actual removal, the critical time is the time of payment of duty but if the payment of duty is postponed to the date of actual removal of the excisable goods from the factory or warehouse, the critical time is the time of removal. In the cases on hand it is an admitted fact that no duty was paid on the goods lying in stock on 25th November 1987 and hence the revenue desired to collect tax at the rate prevailing on the date of actual removal of the goods as permitted by Rule 9A.

14. We may now turn to the decision of this Court in *Alembic Chemical Works* (supra) where the question at issue was identical to the question arising for our determination. The assessee Company was manufacturing "Protinules". These

goods became excisable when the relevant Tariff Item IB was introduced in the Schedule on 1st March 1969. No excise duty was, however, payable on these goods because of exemption notification which was issued under Rule 8(1) read with Section 37(2)(x)(vii) of the 1944 Act. The exemption notification was withdrawn by a subsequent notification with effect from 1st March 1970. The assessee Company had a stock of "Protinules" manufactured before 1st March 1970. The revenue sought to tax the said stock under Rule 9A as and when the same was sought to be removed from the factory premises. The question which arose before the Court was whether the Company was liable to pay excise duty in force at the date of removal of "Protinules" manufactured before 1st March 1970. After referring to the decision of the Supreme Court in Orient Paper Mills Ltd., (supra) and the scheme of the 1944 Act and the relevant rules, this Court observed as under :-

"...when the concession flows from the rules, the effect of the withdrawal of that concession would have to be judged by the relevant rules themselves, which provide a crucial date for this purpose in the relevant Rule 9A that the rate of duty shall be the duty in force at the time of removal of these goods. The petitioner having got concession only under the relevant rules could never contend for a moment that the tax became unconstitutional."

In our view, this decision based on the decision of the Supreme Court in Orient Paper Mills Ltd., (supra) is a direct answer to the main contention | raised in this batch of petitions.

15. Mr. Nanavati, however, submitted that the above decision of this Court is no longer good law in view of the subsequent decision in the case of Arvodaya Spg. and Wvg. Co. Ltd. v. Union of India 1981 E.L.T. 274 (Guj.). In that case the petitioner Company, a composite Mill, was engaged in the manufacture of cellulosic spun yarn, cotton yarn and cotton fabrics, all excisable commodities. Cellulosic spun yarn was liable to excise duty under Tariff Item No. 18, cotton yarn was liable to excise duty under Tariff Item No. 18A and cotton fabrics were liable to excise duty under Tariff Item No. 19 in the Schedule to the 1944 Act. Under Rule 8 of the Rules, the Central Government had issued Notification No. 131 of 1977 on 18th June 1977 granting partial exemption to cotton yarn from payment of excise duty. Composite mills were, however, excluded from the operation of the said notification. On the same day another Notification No. 132 of 1977 was issued whereby cellulosic spun yarn falling under Tariff Item No. 18-III(i) and cotton yarn falling under Tariff Item No. 18-A(i) were exempt wholly from excise duty leviable thereon when these yarns were used for weaving cotton fabrics in composite mills. Simultaneously with these two notifications, a third Notification No. 135 of 1977 was issued granting partial exemption to cotton fabrics falling under Tariff Item No. 19(i) of the Schedule. As a result of these notifications duty on cellulosic spun yarn and cotton yarn was wholly exempt while duty on cotton fabrics was partially exempt to the extent mentioned by Notification No. 135 of 1977. Thereafter on 15th July 1977 three

further notifications came to be issued under Rule 8 of the Rules. By Notification No. 224 of 1977, Clause (vii) of the proviso and Explanation (ii) of Notification No. 131 of 1977 came to be omitted, by Notification No. 225 of 1977, Notification No. 132 of 1977 was rescinded and by Notification No. 226 of 1977, Notification No. 135 of 1977 was superseded and a new set of partial exemptions in the case of cotton fabrics were prescribed. As a result of these three notifications, the complete exemption granted to cellulosic spun yarn and cotton yarn used by composite mills in the manufacture of cotton fabrics was taken away. By deletion of Clause (vii) of the proviso to Notification No. 131 of 1977 excise duty on cellulosic spun yarn and cotton yarn even if used in the manufacture of cotton fabrics by composite mills became liable to duty at the rates mentioned in Notification No. 131 of 1977. So far as cotton fabrics were concerned, by Notification No. 226 of 1977 a different table was prescribed for levying excise duty thereon. In regard to cotton fabrics which were manufactured after June 18, 1977 by composite mills from cellulosic spun yarn and cotton yarn and which were lying uncleared in stock, a special provision was made in the second proviso to Notification No. 226 of 1977 in the following terms :-

"Provided further that in case where cotton fabrics have been produced in a composite mill or are produced therein and in the production of such cotton fabrics cellulosic spun yarn falling under sub-item III(i) of Item No. 18 of the said First Schedule or cotton yarn falling under item No. 18A(i) of the said First Schedule or both, on which no duty of excise was paid prior to the 15th day of July, 1977, was or is used, then duty payable on such fabrics shall be-

- (a) at the appropriate rate of duty as specified in this notification plus
- (b) the duty payable on such cellulosic spun yarn or cotton yarn or both, as the case may be, under the notification of the Government of India in the Department of Revenue and Banking No. 131/77-Central Excises, dated the 18th July, 1977."

Clause (b) of the aforesaid proviso was challenged on the ground that it was violative of Article 14 of the Constitution and was also ultra vires Rule 8 of the Rules. There was no challenge to the prospective operation of the said notification. This Court after referring to the relevant provisions of the Act and the Rules and on a review of the case law came to the conclusion that while recovering duty on cotton fabrics produced between 18th June 1977 and 15th July 1977 from cellulosic spun yarn or cotton yarn at the date of removal, it was not permissible to add the duty on cellulosic spun yarn and/or cotton yarn levied under the notification issued on July 15, 1977. We do not think that this decision runs counter to the view expressed by this Court in the case of *Alembic Chemical Works* (supra). In the first place it may be mentioned that a specific reference was made to this decision in paragraph 19 of the judgment and if it were to run counter to the view taken by the Division Bench in the case relied on by Mr. Nanavati, the Division Bench would have referred the matter to a larger bench. It did not do so because its decision turned on the special facts of the case and did

not actually run counter to the earlier decision. This becomes clear from the fact that the latter decision turned on the interpretation of Rule 96W replaced by Rule 59A of the Rules. The relevant observations in this behalf found in paragraph 11 of the judgment bear reproduction :-

"So far as composite mills are concerned, under Rule 49A which came into effect from the end of November 1977 and the old Rule 96W which was in force prior to the end of November, 1977, a special provision was made in the case of composite mills by which they could pay excise duty on yarn, not at the time when the yarn was manufactured but when the cloth made out of the yarn left the premises of the composite mill. It is to be noted that under Rule 49A provision has been made for the payment of interest by the composite mill on the amount of excise duty payable on yarn. Such interest is to be paid for the period between manufacture of the yarn and the removal of the cotton fabrics made out of that yarn from the premises of the composite mill. Thus it is clear that so far as excise duty payable by a composite mill is concerned, the duty both on yarn as on cotton fabrics is collected at the time when the cotton fabrics are removed from the warehouse or godown of the composite mill. But it must be borne in mind that in the case of yarn, whether cellulosic spun yarn or cotton yarn, duty is leviable at what is known as spindle stage, namely, at the stage when the yarn comes into existence and a distinct and separate commodity comes into existence."

(Emphasis supplied)

It is manifest from the above statement that the duty on cellulosic spun yarn or cotton yarn became payable at the spindle stage, that is, when the yarn came into existence as a distinct and separate commodity and since the actual payment was postponed till the removal of the cotton fabrics from the manufactory, provision for payment of interest on the duty payable on the yarn for the period between the date of manufacture of the yarn and the date of removal of cotton fabrics from the factory premises as the liability to pay duty on yarn in law was taken to have come into existence on the date of actual manufacture of the yarn. It is in view of this special provision that the Court came to the conclusion that since the duty payable by composite mills on the yarn used in the manufacture of cotton fabrics was relatable to the date of manufacture of the yarn and not the date of removal of the cotton fabrics from the manufactory, it was not permissible to add the duty on yarn at the rate prevailing on the date of actual removal of the cotton fabric in calculating the total duty payable on the cotton fabric at the date of its removal from the factory premises. That being so, it is obvious that the subsequent notification could not apply to yarn manufactured between 18th June 1977 and 15th July 1977. It seems clear to us, therefore, that the decision turned on the special facts of the case and does not run counter to the decision of this Court in *Alembic Chemical Works* (supra) which is binding on us.

16. The Bombay High Court in *The Union of India v. The Elphinstone Spinning &*

Weaving Mills Co. Ltd. 1978 E.L.T. (J 680) has taken the same view while construing Section 3 of the 1944 Act and Rules 7, 8, 9 and 9A of the Rules framed thereunder. The Court held that there is no warrant to take the view that it is only the stage of manufacture or production of goods which attracts excise duty. If at the date when the goods are moved from the place of manufacture, they are specified in Schedule I, they cannot be removed unless duty is paid on them, even though such goods may have been manufactured when there was no excise duty on them. According to the Court the combined effect of Section 3 and Rules 7, 9 and 9A is, that the point of time at which the goods were liable to duty would be the actual removal of the goods from the factory or warehouse and not the date of manufacture or production of the goods in the factory.

17. Mr. Nanavati, however, placed strong reliance on the decision of the Madhya Pradesh High Court in the case of Kirloskar Brothers Ltd. v. Union of India 1978 E.L.T. (333) wherein it is held that goods manufactured during the exempted period cannot be taxed even if removed after the exemption is withdrawn. In that case the assessee had manufactured an excisable commodity - power driven pumps - during the exemption period from 1st March 1969 to 16th March 1972. By a notification dated 17th March 1972 the earlier notification dated 23rd April 1969 was modified and excise duty was made payable at 10 per cent ad valorem on the price of the goods and duty in excess thereof continued to be exempted. The question which arose for consideration was whether goods manufactured during the exemption period could be subjected to tax when removed from the manufactory after 16th. March 1972. The Court took the view that since excise duty is a tax on the manufacture or production of goods, those goods manufactured or produced during the exemption period would be outside the tax not regardless of the date of actual removal. It will be seen from Union of India v. Kirloskar Brothers Ltd. 1978 E.L.T. (J 690) that the Court refused to grant a certificate of fitness for appeal to the Supreme Court. With respect, we cannot accept this view firstly because it runs counter to the view expressed by this Court in the case of Alembic Chemical Works Co. (supra) and secondly because it ignores the scheme of the 1944 Act and the Rules made thereunder. As [jointed out earlier, the imposition of excise duty u/s 3 is on the goods manufactured and produced in India. The levy and collection of duty has to be in such manner as may be prescribed i.e., prescribed by rules. Section 4 provides for the determination of the value of the goods for the purpose of duty. Rule 8 enables the Government to exempt certain goods in special circumstances partially or wholly from the levy of duty. Rule 9 lays down the time and mode of payment of duty and Rule 9A indicates the date of determination of duty and its tariff valuation. From the scheme of the aforesaid provisions it is manifest that while the taxable event is the manufacture or production of excisable goods, the levy of duty may be related to a subsequent date e.g., the date of removal of the goods from the manufactory and its value on that date. In taking the view it has taken, the High Court has, with respect, over-looked the scheme of the taxing statute as revealed by the aforesaid provisions. True it is that excise duty is a

tax on the manufacture and production of excisable goods in India but that does not mean that the legislature imposing the tax cannot prescribe the manner for the levy and collection thereof. When it is said that excise duty is a tax on the production and manufacture of excisable goods, all that is meant is that the legislature is now competent to levy and collect a tax thereon but it may be so done at a stage subsequent to manufacture and production e.g., at the stage of removal of the goods and at the rate and valuation prevailing on that date. We must not confuse the right to levy excise duty with the prescription of the rate and the time of its collection; the former arises no sooner an excisable commodity is manufactured or produced, the latter may depend on administrative convenience. With respect, the High Court thinks that the moment there comes into existence an excisable Article, the point of time for levy and collection of duty gets fixed to the date of manufacture, a view which ignores the provision in Rule 9A of the Rules. In a subsequent decision in M.P. No. 338/79 dated 16th January 1982 that High Court differed with its earlier decision and held on the basis of Rule 9A "that the excise authorities were right in applying the rates prevailing on the date of removal, and thereby agreed with the conclusion of this Court in Alembic Chemical Works case (supra) See paragraph 17 of Sirpur Paper Mills case (ibid).

18. Reliance was next placed on the decision of the High Court of Andhra Pradesh in Sirpur Paper Mills Ltd. Vs. Union of India and Others, . In that case the assessee was manufacturing paper. It enlarged its production capacity by installing new machines which went into production from April 1967 or thereabouts. By Notification No. 163/65 dated 1st October, 1965, the Government extended concessional rates in respect of paper which was attributed to the enlarged production capacity of the Company and cleared after 1st March 1966. Later, the said notification was rescinded by Notification No. 87/73 dated 1st March 1973. The assessee claims the benefit of the concessional rates of duty in respect of the paper produced during the period related to the enlarged production capacity but removed after 1st March 1973. The revenue rejected the claim on the basis of Rule 9A. The argument in the main was that since excise duty is a tax on the manufacture or production of excisable goods, no tax can be levied on paper produced during the period prior to 1st March 1973. This argument found favour with the learned Judges as will be apparent from the observations made in paragraph 19 of the judgment to the following effect :-

"On a conspectus of the cases cited by the respondents, what we find is that much emphasis is laid on Rule 9A. True, what Rule 9A stipulates is that the rate of duty shall be the one which is in vogue on the date when the duty is assessed. But, nevertheless it should not make any difference, as there cannot be any quarrel, that the provisions postulated by the said rule lays down mere the mode and manner of assessment. It does not answer the question posed herein. The question is, what is that attracts the tax and not when, how and to what, extent it attracts. In our undoubted view, as we observed earlier, the attraction of tax is

at the very threshold when excisable commodity is manufactured or produced, notwithstanding the point of its removal, consumption or being caused the disappearance of."

After referring to the observations of Gwyer, C.J. in the case of *Boddu Paidana & Sons* (Supra), the learned Judges said :-

"We apprehend, with great respect, the learned Judges misconceived the effect and impact of the observations of Gwyer C.J. as well as the provisions enacted in Rule 9A. Merely because the mode and method adopted is to collect duty at a later stage, viz., at the time of clearance or removal of goods because of administrative convenience, the point of impost which is sine qua non in adjudicating as to when the commodity attracts duty, cannot be postponed."

With respect, we find it difficult to agree for the very same reasons we could not persuade ourselves to the view of the M.P. High Court in the case of *Kirloskar Brothers* (supra). We are aware that in that case the Court had failed to notice the scheme of Rules 8, 9 and 9A of the Rules but we cannot say the same here. However, we think the Court here has failed to appreciate the real scheme of taxation and the purport of these rules, particularly Rule 9A which does not merely speak of the mode and method of collection of tax but further provides that the rate of duty and tariff valuation in the case of goods removed from a factory or warehouse shall be the rate and valuation in force on the date of actual removal of goods. We have already emphasised earlier that although the right or competence to levy a duty of excise is relatable to the manufacture of excisable goods or Articles, the time for levy may be postponed to a subsequent date and the rate of tax may be the one prevailing on the date of removal. Any other view may truncate Rule 9A. We are, therefore, of the view that it is too simplistic to hold that merely because the taxable event is manufacture of excisable goods, the rate of levy must be the one prevailing on the date of manufacture regardless of Rule 9A. With respect, such a view would run counter to the plain language of Rule 9A which fixes not only the critical date but also relates the rate of duty to that date. We, therefore, think that view expressed by this Court in *Alembic Chemical Works* case (supra) states the law correctly. That apart, it is binding on us and we must respectfully follow the same. It may incidentally be mentioned that the fact that the notification was issued as an incentive to expansive production weighed with the Court as it thought that the withdrawal of concession after the assessee had produced in compliance thereof would destroy the very purpose of the concession which could never have been the authority's intention.

19. The above discussion shows that the view expressed by the Madhya Pradesh High Court in the case of *Kirloskar Brothers* (supra) has been dis-approved by that very High Court in the subsequent decision, M.P. No. 338/79 dated 16th January 1987. In the *Sirpur Paper Mills* case (supra) the High Court of Andhra Pradesh has specifically referred to the decisions of the Bombay High Court and this Court in paragraphs 14 and 15 of the judgment and has differed from the

same. Mrs. Mehta pointed out that the decisions in Kirloskar Brothers and Sirpur Paper Mills are cases of "no duty" and not a change in the rate of exemption as in the present case but we do not propose to rest our conclusion on such a fine distinction. As far as we are concerned, for reasons stated above, we are of the view that the point is squarely covered by this Court's decision in Alembic Chemical Works which is binding on us and which is consistent with the provisions of the relevant statutes and the Rules, particularly Rule 9A. We must respectfully follow the ratio of that decision.

20. We do not think Rule 9A is in any manner inconsistent with Section 3(1) of the 1944 Act or Section 3(1) of the 1957 Act. It is quite consistent with the taxation policy relating to excise duty and the concept thereof. It is, therefore, not necessary to read it down to save it from being rendered ultra vires the charging sections of the said two statutes or any one of them.

21. In view of the above discussion we find no merit in the principal contention. The rate of duty is fixed in the First Schedule to the 1944 Act. It prescribes the outer limit or the maxima. Under Rule 8 the Government is empowered to exempt any goods from the whole or any part of the duty imposed by the 1944 Act. On man-made fabrics only additional duty of excise is levied u/s 3(1) of the 1957 Act. Under Rule 8(1) partial exemption was granted in respect of certain man-made fabrics by Notification No. 80/87 dated 1st March 1987. This was altered by the impugned notification dated 25th November 1987. This alteration may have resulted in a slight increase in duty in certain cases but admittedly the same does not exceed the basic duty prescribed u/s 3(1). So long as the duty payable under the impugned notification is less than the basic duty there is still some exemption and hence such a notification could validly issue under Rule 8(1). The Government which has the power to exempt can vary the exemption so long as the duty falls short of the basic duty. The impugned notification is, therefore, intra vires Rule 8(1) of the Rules. Similarly, it is open to the Government to change the basis of exemption so long as the duty does not exceed the basic duty. This is clearly permissible under Rule 8(3) read with the explanation thereto. Since there is no increase in the basic additional duty levied u/s 3(1) of the 1957 Act by the impugned notification, we see no merit in the contention based on Section 3 of the Tariff Act.

22. For the above reasons we see no merit in the contentions urged on behalf of the petitioners and dismiss these petitions and discharge the rule with costs. As the petitions fail, we vacate the interim order but grant eight weeks' time to the petitioners to arrange to pay the difference in duty in respect whereof they have furnished bank guarantees failing which it will be open to the revenue to recover the duty by enforcing the bank guarantee in the case of the defaulting assessee.