

**(1967) 01 MAD CK 0018**

**In the Madras High Court**

**Case No : Writ Petition No's. 1030 etc. of 1964**

Pharm Products Ltd., Thanjavur and Others

APPELLANT

Vs

District Revenue Officer, Thanjavur and Others

RESPONDENT

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**Date of Decision : 24-01-1967**

**Acts Referred:**

Medicinal and Toilet Preparations (Excise Duties) Act, 1955 — Section 2, 3, 3(2), 4, 6(2)

Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 — Rule 11, 12, 2, 60(1), 9

**Citation : AIR 1969 Mad 448**

**Hon'ble Judges : P. Ramakrishnan, J**

**Bench : Single Bench**

**Advocate : T. Chengalvarayan, K. Raj Iyer and K. Narayanaswami Mudaliar, for the Appellant; Govt. Pleader, for the Respondent**

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## **Judgement**

P. Ramakrishnan, J.—These petitions were heard together because common questions of fact and of law arise in them for consideration.

They are filed by certain manufacturers of patent or proprietary medicines under Article 226 of the Constitution for writs in the nature of mandamus

or certiorari, as the case may be. In all these cases the respondents who are the Board of Revenue Authorities of the Commercial Tax Department

and the District Revenue Officer charged with the administration of the Medicinal and Toilet Preparations Excise Duties Act. 1955 (Central Act 16

of 1955) hereinafter called the Act, as amended in 1961 have, after calling for returns of their manufacture of patent and proprietary medicines

since 1st June, 1961, when an amendment to the aforesaid Act was brought about under Act XIX of 1961, issued demands against the petitioners

for payment of excise duty calculated ad valorem at 10 per cent of the value on

the patent or proprietary medicines manufactured by them  
subsequent to 1st June, 1961.

2. The first contention of the petitioners in these cases, for challenging the correctness and validity of the above demand, was that under the Schedule to Act XVI of 1955, in item 1, under which the proposed levy of excise duty had been made, only preparations containing alcohol are liable to excise duty; but in the case of the preparations manufactured by the petitioners, except a single item called "Selviue" (manufactured by the petitioner in W. P. No. 1139 of 1964) alcohol in its free state had not been used; but they had used "spirits," "Chloroform" or other tinctures containing alcohol in small quantities only as preservatives. In such circumstances, bearing in mind the definition of alcohol given in Section 2(a) of the Act and also the general scope of the Act and the Rules the petitioners contend that it is illegal to consider that their preparations contain alcohol, and therefore, liable to pay excise duty.

3. In addition to this main plea which turns on the proper interpretation to be given to the use of the term "containing alcohol", in the Schedule to the Act, the petitioners have also raised pleas that the levy in question is illegal because (1) it involves a double taxation on their products. (2) the levy is discriminatory, (3) the levy is barred by time and finally (4) that in any event, assuming that all the above mentioned points are decided against them, bearing in mind the presumption of law enunciated in Rule 60 (3) of the Rules framed under the Act; the appropriate item of the Schedule under which they should have been assessed to excise duty will be item 2 and not item I. In their counter affidavit, the Department traversed all these points and raised pleas contra. I shall refer to them at the appropriate stage in the course of this judgment.

4. I will take up first for consideration the first plea mentioned above, that the preparations under consideration do not contain alcohol as defined in the Act. The definition of alcohol in Section 2(a) of the Act runs:  
Alcohol means ethyl alcohol of any strength and purity having the chemical composition of C<sub>2</sub>H<sub>5</sub>OH.

5. It is admitted by the petitioners that in most of the products manufactured by them, they have used either spirits, chloroform, or tinctures of other substances, only as preservatives. It was also admitted by them that on the

labels affixed to their preparations, they have given in the formula used for the manufacture, the exact alcoholic content by volume. The words "spirits" and "tinctures" have recognised meanings in the Pharmacopoeias.

Taking for example Bentley's Text Book on Pharmaceutics, "spirits" are defined as solutions of volatile substances in alcohol, and as such furnishing relatively stable solutions for distilling purposes. The British Pharmacopoeia Codex describes tinctures as alcoholic liquids containing in comparative dilute solution the active principle of vegetable drugs. Both these definitions of the terms "tinctures" and "spirits" would show that they comprise necessarily solutions of other substances in alcohol. The products manufactured by the petitioners are prepared adding spirits or tinctures to other drugs so as to form a mixture in the form of a solution. Therefore, alcohol which has functioned as a solvent in the tinctures and spirits, has gone into state of further solution in the medicines prepared by the petitioners. In other words, alcohol though it might not have been directly added, is present in the medicines in a state of solution. It has not undergone a chemical change into some other substance. It is present in a liquid form and the medicines thus prepared will reveal all the properties of alcohol, whether of smell or taste or capacity to vaporise, dependent of course, upon the quantity present. A solution of sugar in water retains the properties of sugar including taste, a solution of salt in water retains the properties of salt including taste, and a solution containing coloured substance or substances having smell, retains the colour and smell, the going of a substance into the solution will still make it an ingredient present in the solution importing all its characteristics to the solution. Therefore, the fact that alcohol went into solution in these preparations as tinctures or spirits and was not directly added will not make any difference to the resultant position about the presence of alcohol as alcohol in the product. In fact the position of alcohol in relation to the pharmaceutical products of the petitioners, as an Ingredient in a state of solution is an a fortiori case, in the light of the decision of the Supreme Court in *Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool*, where the Supreme Court held that Vanaspathi manufactured out of groundnut oil is still groundnut oil notwithstanding that in the manufacture of Vanaspathi, a chemical change has intervened by effecting an inter-molecular change in the

composition of the oil, by the absorption of hydrogen atoms. I am, therefore, of the opinion that the medicines in this case are preparations which contain alcohol.

6. Before dealing with the other contentions of the petitioners I will briefly refer to the charging section which is Section 3 of the Act, and it reads

thus:

Duties of excise to be levied and collected on certain goods-

1. There shall be levied duties of excise, at the rates specified in the Schedule on all dutiable goods manufactured in India.

2. The duties aforesaid shall be leviable-

(a) where the dutiable goods are manufactured in bond, in the State in which such goods are released from a bonded warehouse for home

consumption whether such State is the State of manufacture or not;

(b) where the dutiable goods are not manufactured in bond, to the State in which such goods are manufactured.

3. Subject to the other provisions contained in the Act, the duties aforesaid shall be collected in such manner as may be prescribed.

Explanation:-- Dutiable goods are said to be manufactured in bond within the meaning of this section if they are allowed to be manufactured

without payment of any duty of excise leviable under any law for the time being in force in respect of alcohol, opium. Indian hemp or other narcotic

drug or narcotic which is to be used as an ingredient in the manufacture of such goods.

7. The actual levy is made in accordance with the Schedule. The Schedule prior to the amendment in 1961 read thus:--

Item No. Description of dutiable goods. Bate of duty.

1 2 3

1. Medicinal and toilet preparations, containing alcohol, which ate Rupees Seventeen and

prepared by distillation or t.o which alcohol Las been added, annaa eight per gallon of

and whinh are of the strength of capable of being consumed the strength of London

as ordinary alcoholic beverages. proof spirit.

2. Medicinal and toilet preparations not otherwise specified containing alcohol: 1½

(i) Ayurvedic preparations containing self-generated Nil alcohol which are not capable of being consumed as ordinary alcoholic beverages.

(ii) Ayurvedic preparations containing self-generated Rupees three per gallon. alcohol which are capable of being consumed as ordinary alcoholic beverages.

(iii) All others... Rupees five per gallon of the strength of London proof spirit.

6. Medicinal and toilet preparations, not containing alcohol, but Nil containing opium, Indian hemp, or other narcotic drug or narcotic.

8. After the amendment in 1961 the Schedule was recast thus:-

Item No. Description of dutiable goods. Rate of duty.

1 2 3

Medicinal preparations :

1. Medicinal preparations, being patent or proprietary medicines, Ten per cent ad valorem.

containing alcohol and which are not capable of being consumed as ordinary alcoholic beverages.

2. Medicinal preparations, containing alcohol which are prepared Rupees three and eighty.

by distillation or to which alcohol has been added, and which five annas paise per litre of

are capable of being consumed as ordinary alcoholic the strength of London proof beverages. spirit.

3. Medicinal preparations, not otherwise specified containing alcohol: 1½

(i) Ayurvedic preparations containing self-generated Nil

alcohol which are not capable of being consumed as ordinary alcoholic beverages.

9. Learned Counsel Sri K. Raja Iyer, Sri Chengalvarayan and Sri Narayanaswamy Mudaliar, appearing for the petitioners, referred to the

provisions of the Act and the Rules and in particular, to Section 3(2)(a) and (b) extracted above, (which provide for manufacture in bond or

manufacture outside bond), Rule 20 and the licence in Form L-2 for supporting the argument that the words, "containing alcohol" in item 1 of the

Schedule as amended in 1961, must necessarily refer to the direct use of free alcohol and not alcohol used indirectly in the form of tinctures or

spirits. Their argument is that the provisions of the manufacture in bond and manufacture outside bond, must imply the direct use of alcohol as a

dutiable preparation, but when it is used as a tincture or spirits, there is no question of paying duty on the tinctures as such, or spirits as such and

therefore the charging section will not apply. Rule 20 states that manufacture of medicinal and toilet preparations containing alcohol shall be

permitted in bond without payment of duty as well as outside bond; in the case of manufacture in bond alcohol on which duty has not been paid

shall be used under excise supervision and in the case of manufacture outside bond, only alcohol on which duty has already been paid shall be

used. Clause (3) in Form L-2 licence provided a condition limiting the quantity of spirit in the licensee's possession upto a certain quantity.

According to the learned Counsel, these provisions also would show that the Act contemplated the use of alcohol directly in the course of

manufacture for purposes of bringing the medicinal preparations within the scope of its levy, but it was not intended to levy excise duty on

preparations in whose manufacture alcohol did not directly enter in its pure form but only as tinctures or spirits. Reference was also made in this

connection to the Preamble to the Act which states that it was intended to provide for the levy and collection of excise on medicinal and toilet

preparations containing alcohol, opium etc. It is urged that under the broad scheme of the Act thus expressed in the provision of the Act, the Rules

thereunder as well as in the Preamble, the Act was intended to tax only preparations in whose manufacture alcohol directly was used, and not

alcohol contained in tinctures or in spirits.

10. I am unable to accept this line of reasoning. Section 3(2)(b) of the Act, dealing with manufacture outside bond, is sufficiently general, to include the preparations in the present cases. The provision contained for manufacture outside bond in Rule 20 and also in Clause (3) of L-2 licence are not exhaustive. They deal with safeguards where spirit as such is used, but they are not authority for the conclusion that a preparation containing alcohol comes into existence, only if alcohol in its free condition had been used but not as tincture or spirits. The aforesaid rules are intended to safeguard the case of manufacture outside bond where alcohol in unmixed form is used. But they will have no application where alcohol in tinctures or spirits is used in a preparation; the preparation will come within the category of preparations containing alcohol for the levy of excise duty on which the Act as well as the schedule there under have made provision.

11. I will take up next the argument advanced by the learned Counsel for the petitioners under the heading "double taxation," The argument of the learned Counsel is that tinctures have already suffered excise duty on their alcoholic component, and levy of excise duty on the medicines again will involve double taxation. It appears to me that this is not a very clinching argument. The scope of the Act is obviously to pass on the duty to the customers. Further, the tax on the alcoholic content of the tinctures or spirits was paid by the manufacturers of these tinctures or spirits and not by the petitioners. Therefore there is no question of double taxation so far as the petitioners are concerned. Again, if in a given case the manufacturer used alcohol for manufacture on which he has paid duty, he can claim a rebate on such duty u/s 4 of the Act, I am of opinion that the attack made on the levy from the point of view of double taxation has no substance.

12. I will take up next the attack made against the levy on the ground of discrimination- Sri K. Raja Iyer appearing for the petitioners has made a careful analysis of items 1 and 2 in the Schedule which I have already extracted above. He draws my attention to the point that the essential distinction between the two items is what may be called for brevity "'potability as beverage'" the formula used for this purpose in the Schedule is capable of being consumed as ordinary alcoholic beverage.'" According to the learned Counsel's submission, this ground of distinction has been relied on to make certain preparations, which are not potable as beverages and

falling under Item 1, liable to 10 per cent, ad valorem duty, and other preparations, which are potable as beverages are liable to excise duty according to the alcoholic content calculated at Rs. 3.85 per litre.

Learned Counsel also lays stress on the fact that in the Schedule to the old Act before the amendment there was no provision for such a duty

levied ad valorem but only upon the alcoholic content by volume and this would be more in consonance with the purpose of the Act namely, levy

of excise duty on preparations containing alcohol. Learned counsel also urges that the distinction on the basis of potability for levying ad valorem

duty, is a distinction based on caprice without any reasonable basis to the object of the legislation. He referred to the following observation found

at page 596 of Willis Constitutional Law:--

Another classification for taxation frequently used is one according to objects. The Legislature has a wide discretion in this respect. It may levy a

tax on all houses, excluding barns, and on all horses, excluding sheep and cows. However, any such classification must have some basis other than

mere caprice. A tax on white horses would be an illustration of a classification without basis.

He also referred to the amendment of the Schedule in 1963 and a further amendment in 1964 whereby uniformity as against item 1 and item 2, 10

per cent ad valorem or the rate based upon alcoholic content of the preparation whichever is higher, had been introduced. By these amendments.

It was urged, both items 1 and 2 were brought into a state of uniformity but in the amendment of 1961 which governs the present case, that

uniformity had not been attained, and there was discrimination in the method adopted for levying duty between items 1 and 2.

13. As against this argument, the learned Government Pleader submits that under Item 14 (E) of the Schedule to the Central Excise Act, there was

already a provision for levying 10 per cent, ad valorem excise duty on patent or proprietary medicines not containing alcohol, opium etc. At the

same time when the Medicinal and Toilet Preparations Act (16 of 1955) was passed with the old schedule which contained the ""potability"" test as

well as a levy of duty based upon alcoholic content, several medicinal preparations which contained alcohol in small Quantities which did not satisfy

the ""Potability"" test, and which were in all respects similar to patent or

proprietary medicines falling under Item 14 (E) of the Schedule to the Central Excise Act, were escaping levy of excise duty and gaining an unfair advantage by reason of this lacuna in the legislation. It was to get over this anomaly, that the amendment made in 1961 to Act 16 of 1955 introduced item 1 classification in the Schedule imposing 10 per cent ad valorem duty on preparations which contained alcohol as an ingredient but without the medicine being suitable for being used as an alcoholic beverage. This argument appears to me to be a valid one for explaining the circumstances which led to the imposition of 10 per cent, ad valorem duty on preparations containing alcohol and which did not satisfy the "potability" test.

14. This apart, the "potability" test constituting a distinction between items 1 and 2, on a careful analysis, does not appear to be a capricious or absurd test like the distinction between a white horse and black horse, for the purpose of taxation to quote Willis. On the introduction of the Prohibition Acts in various States, it became apparent that many preparations under the name of medicinal preparations were being put on the market but which were medicines only in a nominal sense, they were being bought up and consumed in large quantities by addicts to alcohol, valuing them exclusively for their alcoholic content. Customers of this kind will not care to buy medicines which contain only a trace of alcohol used as a preservative because such preparations would not readily help them to achieve their object of getting inebriated. It was therefore, considered to be a proper method to levy excise duty on preparations which contain alcohol and which are potable in the sense of their being fitted for consumption as ordinary alcoholic beverages on a rate calculated upon the volumetric content of alcohol. This appears to be a perfectly rational basis for drawing a distinction between item 1 and item 2 of the Schedule based upon their suitability or non-suitability for being used as ordinary alcoholic beverages. In item 1, stress is laid not so much on the value of alcoholic content as on the value of the medicines that go into their preparations. In item 2, the value of the medicines that go into the preparations may be little, when compared with the value of the higher alcoholic content that went into the preparation, and that has necessitated the levy on item 2 on the basis of the alcoholic content. From this point of view

there appears to be a valid basis of distinction between items 1 and 2. Again, when by the amendments in 1963 and 1964 ad valorem duty as an alternative to the duty based on the value of the alcoholic content was used for taxing both items 1 and 2 preparations, apparently a certain uniformity was introduced where such uniformity did not exist before, but still the provision even after such amendment, for the levy of the higher duty out of two alternative rates might have helped to lay stress in the case of item 2, on alcoholic content, and in the case of item 1 on the value of the medicines. Further, it is not possible to say by merely looking at the Schedule that item 1 will operate more oppressively than item 2. It may happen that a particular manufacturer may be able to sell large quantities of preparations which are being put into the market not so much for their medicinal content as for their alcoholic content; and seeing that the rate for item 2 is quite high, namely, Rs. 3.85 per litre of alcohol, the actual duty in such cases may work out of more than 10 per cent, ad valorem if calculated on the value of the medicinal content alone. I am, therefore, of the opinion that the argument based on discrimination is without substance.

15. I will next deal with the argument on the question of limitation. The relevant rules in this connection are Rules 6, 9, 11 and 12 of the Rules

framed under the Act, which read thus:

6. Recovery of duty:-- Every person who manufactures any dutiable goods, or who stores such goods in a warehouse, shall pay the duty or duties

leviable on such goods under the Act, at such time and place and to such person as may be designated in, or under the authority of these Rules,

whether the payment of such duty or duties is secured by bond or otherwise.

9. Time and manner of payment of duty:--

(1) No dutiable goods shall be removed from, any place where they are manufactured or any premises appurtenant thereto, which may be

specified by the Excise Commissioner in this behalf whether for consumption, export or manufacture of any other commodity in or outside such

place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the Excise

Commissioner may require.

Provided that such goods may be deposited without payment of duty in a warehouse or may be exported out of India under bond as provided in

Rule 97:

Provided further that the Excise Commissioner may, if he thinks fit, instead of requiring payment of duty in respect of each separate consignment of

goods removed from the place or premises specified in this behalf or from a warehouse keep with any person dealing in such goods an account-

current of the duties payable thereon and such account shall be settled at intervals not exceeding three months, and the account-holder shall

periodically deposit a sum therein sufficient in the opinion of the Excise Commissioner to cover the duty on the goods intended to be removed from

the place of manufacture or storage.

(2) If any dutiable goods are, in contravention of Sub-rule (1) deposited in, or removed from, any place specified therein the manufacturer thereof

shall pay the duty leviable on such goods upon written demand made by the proper officer, whether such demand is delivered personally to him or

is left at the manufactory or his dwelling house, and he shall also be liable to a penalty to be determined by the Excise Commissioner which may

extend to two thousand rupees, and such goods shall also be liable to confiscation,

11. Recovery of duties or charges short-levied or erroneously refunded:-- When duties or charges have been shortlevied through inadvertence,

error, collusion or misconstruction on the part of an Excise Officer, or through misstatement as to the quantity or description of such goods on the

part of the owner, or when any such duty or charge, after having been levied, has been, owing to any such cause, erroneously refunded the person

chargeable with the duty or charge, so short-levied, or to whom such refund has been erroneously made, shall pay the deficiency or repeat the

amount paid to him in excess, as the case may be, on written demand by the proper officer being made within six months from the date on which

the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund.

12. Residuary powers for recovery of sums due to Government:-- Where these rules do not make any specific provision for the collection of any

duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the collecting

Government under the Act or these Rules, such duty, deficiency in duty or sum

shall, on written demand made by the proper officer, be paid to such person and at such time, and place, as the proper officer may specify.

These rules have to be read also with the Rules for the manufacture of preparations outside bond, contained in Section B of the Rules, namely, Rules 46 to 58, as well as Section 6(1) of the Act and the licence in Form L-2. u/s 6(1) of the Act, no person shall engage in the production or manufacture of any dutiable goods or of any specified component parts or ingredients of such goods except under the authority and in accordance with the terms and conditions of a licence granted under the Act. Section 6(2) says that every licence under Sub-section (1) shall be granted for such area and for such period, subject to such restrictions and conditions, and in such form and containing such particulars as may be prescribed.

The licence in Form L-2 requires the manufacturer to describe the premises where the Goods are to be manufactured. Rules 46 to 58 in Section B provide for the conditions and safeguards under which the manufacture takes place outside bond. It is against the background of the requirements of Rules 46 to 58 that one has got to view the provision in Rule 9, extracted above that duty under the Act has to be ordinarily paid at the time of their removal from the place where they are manufactured or other premises as may be specified by the Excise Commissioner, for consumption, export etc. Rule 9 (2) provides for levy of duty where there is removal of the goods, in contravention of Rule 9 (1), from the place where they are deposited, with a penalty for such illegal removal. In the present case, the petitioners, though they had manufactured dutiable goods containing alcohol as found above, never cared to take a licence as required u/s 6(1) of the Act, with the consequence that all the restrictions and safeguards regarding manufacture of the products contained in Rules 46 to 58 had been avoided by them in this case. There was, therefore, no scope for levy of the duty either as provided under Rule 9 or under Rule 9 (2). Rule 11 which I have extracted above, deals with a limited set of contingencies as mentioned therein. The first contingency is where there has been a short-levy because of inadvertence, error, collusion or misconstruction on the part of the Excise Officer; the second contingency arises where there is a misstatement on the part of the owner as to the quantity or description of such goods. There is a third contingency under Rule 11, of erroneous refund: but

we are not concerned with this. Obviously in the present case there is no question of shortlevy due to any of the acts or omissions attributed to the Excise Officer under the first contingency; nor is there a question of short-levy due to misstatement as to the quantity or description by the owner under the second contingency. What has happened, in fact is a failure on the part of the manufacturer to pay duty due to his default in complying with the requirement of the Act after obtaining a licence u/s 6(1) and after ensuring the manufacture of the goods within the safeguards contained in Rules 46 to 58 with the result that the manufactured goods have not been assessed to duty as they should have been in the normal manner under Rule 9 of the Rules. In my opinion, it is Rule 12 which one will have to look to for finding the appropriate provision for levy of duty in this case. Rule 12, which I have also extracted above, deals with cases where the rules do not make any specific provision for the collection of any duty or of any other sum of any kind payable to the collecting Government under the Act. The rules other than Rule 12 do not contain any specific provision for a case where the manufacturer, due to his own default, fails to take a licence and fails to ensure the proper safeguards for the manufacture under Rules 46 to 58. Had he done so, it would have ensured the levy of duty at the proper time and proper place. But that does not mean that the goods which are dutiable under the Act should escape from duty due to the default of the manufacturer. It is for such cases that Rule 12 provides the appropriate power for levy, it being in the nature of a residuary power, as the heading itself states. For the application of Rule 12, there is no period of limitation. A limitation of six months is provided only for rule 11 and I have already referred to the reasons which make me hold that it is not a case where the question relates to the recovery of a duty or charge short-levied or erroneously refunded.

16. Learned Counsel for the petitioners referred to Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another, . Mewar Textile

Mills Ltd. v. Union of India. AIR 1955 Raj 114, and the decision of Srinivasan, J., in A. Peria Nachimuthu Gowndar v. Assistant Collector of

Central Excise, Coimbatore, W. p. Nos. 125 and 126 of 1961 (Mad). Each one of these cases deals with a particular situation where it was not

possible to levy the appropriate duty on certain goods in the manner provided by

the earlier provisions in the Rules, like Rules 9, 11 and so on and it was held that a levy under Rule 12 (or Rule 10-A which is the corresponding provision under the Central Excise Act) could be levied. Thus in the Supreme Court decision in Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another, an additional duty was leviable under a later enactment which was directed to have retrospective effect and therefore, the levy could not be made under Rule 9 or the other provisions of the Rules and the residuary provision under Rule 10-A under the Central Excise Act was held to be applicable. Before Srinivasan, J., in W, P. Nos. 125 & 126 of 1961 (Mad), it was discovered as a result of a subsequent finding arrived at by the department, that the two mills, though they were normally in the names of different persons, really belonged to single manufacturer and this required a further payment of excise duty for which a demand was made under the residual provision in Rule 10-A of the Central Excise Act. The learned Judge held that Rule 10-A would cover such a case. In AIR 1955 Raj 114, by reason of the retrospective operation of an Act, additional duty was found payable in respect of goods which had been already cleared without payment of duty in the ordinary way at the time of clearance, it was held that the residual provision in Rule 10-A would apply. Learned Counsel for the petitioners argued that these decisions would show that the proper situation to apply the residual provision, will be where a subsequent amendment of the laws in force at the time of the actual removal of the goods, and therefore, the residual provision cannot apply to a case like the present where liability to pay a duty under a later enactment is not relied upon, but only a failure on the part of the department to collect the legitimate duty from the manufacturers at the time when the goods were removed from the place of manufacture the law in force having continued to be the same at all material times. I am of opinion that the decisions do not provide an exhaustive list of all the cases or situations where the residual provisions can be applied. They should be considered only as illustrative of certain situations. What we have in this case is a situation, where owing to the default of the manufacturer, he failed to take a licence and failed to pay the duty at the appropriate time and place. Later on, the department found out The omission on the part of the manufacturer to comply with the Rules and called

upon him to pay the required duty. It appears to me that such a demand will fall under the residuary power in rule 12, and therefore the provision

about limitation contained in Rule 9 will not apply.

17. I will now consider a final argument of the petitioner's learned Counsel which appears to have a great deal of substance, and which is based

upon the presumption in Rule 60 (3) of the Rules as amended on 18th June, 1960:--

60. Maintenance of restricted list of preparations:-- (1) A list of medicinal and toilet preparations which are considered as capable of being

misused as ordinary alcoholic beverages, hereinafter referred to as restricted preparations, is given in the Schedule. All other medicinal

preparations being manufactured from a date prior to 1st April, 1957 shall be considered to be not capable of being misused as ordinary alcoholic

beverages (hereinafter referred to as unrestricted preparations),

(2) If, however, a preparation falling in the unrestricted category is found to be widely used as ordinary alcoholic beverage, the Central

Government may on the request of a State Government or suo motu refer the matter to the Standing Committee referred to in Rule 68. The Central

Government shall declare the preparation as a restricted preparation, if so advised by the said Committee and thereupon include the said

preparation in the Schedule.

(3) Medicinal preparations other than official allopathic preparations and toilet preparations which are manufactured in India for the first time on

and subsequent to 1st April, 1957 shall be presumed to be restricted preparations unless declared to the contrary by the Central Government on

the advice of the Standing Committee. Any manufacturer intending to produce a new alcoholic preparation other than an official allopathic

preparation, shall submit two samples of such preparation with the recipe to the State Government. The State Government shall forward such

request with recipe to the Central Government for a decision. The Central Government shall refer the matter to the Standing Committee and in

accordance with the advice tendered by it declare the category in which the preparation should be placed. The decision of the Central Government

shall be communicated to all State Governments. In case the preparation is declared to be a restricted preparation it shall be included in the

Schedule.

The advice of the Standing Committee shall be communicated within a reasonable time and in no case, later than six months from the date of submission of sample to the Committee.

A majority of the preparations in the present cases were manufactured after 1st April, 1957. In their cases, a presumption will arise under Rule 60

(3) that they are restricted preparations. Rule 2 (xix) defines "restricted preparation" as:

"restricted preparation" means every medicinal and toilet preparation specified in the Schedule and includes every preparation declared by the Central Government as restricted preparation under these Rules.

This definition read with Rule 60 (1) would show that a restricted preparation is one which the Government have considered after adopting the prescribed procedure and after taking the advice of the Standing Committee, to be capable of being misused as ordinary alcoholic beverages. In

the present case also the petitioners want to rely on the presumption contained in Rule 60 (3) that since their preparations have not been declared

to be unrestricted by the Central Government on the advice of the Standing Committee, such of their preparations manufactured after 1st April,

1957 shall be presumed to be restricted and therefore, capable of being misused as ordinary alcoholic beverages. It is urged by them that they

could take advantage of this presumption, and claim that such preparations fall under Item 2 of the Schedule already mentioned, for the purpose of

being assessed to excise duty on the basis of the alcoholic content. They also referred to an opinion given by a former Member of the Board of

Revenue, Sri S. K. Chettur, which is marked as Exhibit B in W. P. No. 1139 of 1964, and also a reply given by another former Member of the

Board of Revenue, Sri C. A. Ramakrishnan in answer to a memorandum from the Honorary Secretary, Pharmaceutical, Chemical and Allied

Manufacturers Association, on 6th October, 1964. These communications indicate that in the view of these authorities of the Revenue Department

where particular manufacturers do not obtain a declaration to the contrary by the Central Government in respect of preparations manufactured

after 1st April, 1957, there shall be a presumption about their being restricted, and with the consequent liability to pay excise duty under item 2. As

against this, the learned Government Pleader contends that what the aforesaid Rule 60 (3) lays down is only a presumption, that such presumption can be rebutted by contra evidence, and that if the petitioners want to take advantage of the presumption thus claimed, the department also should be given an opportunity to afford contra evidence to rebut the presumption and also to establish that the preparations in question are not really capable of being consumed as ordinary alcoholic beverages. But no decision can be given by this Court on these rival contentions while dealing with the matter in a proceeding for the Issue of a writ under Article 226 of the Constitution, because such decision requires an analysis of data and also taking evidence, if necessary. These necessary steps before a decision can be arrived at should necessarily be delegated to the authorities who are charged with the duty of considering the representations by the manufacturers and passing appropriate orders on those representations in the light of the law. It is also mentioned by the learned Government Pleader that against the decisions of the assessing authorities, appeals are provided under the Act and the Rules, to higher tribunals or departmental authorities and the petitioners can obtain adequate relief by resort to these provisions. On the other hand, what the petitioners really feel aggrieved about in the present case is due to a two-fold cause. One is, that even though the amendment to the Act came into force in 1961 and they had submitted returns promptly when the department called for such returns, they were given no opportunity to put forward the proper representations as against the proposed levy at any time, and that they were suddenly faced with the demand by the authorities for payment of the duties calculated ad valorem on the nature of the medicines as if they were products containing alcohol, to be assessed under item 1 of the Schedule. They had no opportunity of meeting this demand by adducing adequate data both regarding the presumption above mentioned as well as the dates of the manufacture of the goods. The second cause of grievance is stated to be that by the time these demands were made, they had sold their products, and that if they are now asked to pay duty with retrospective effect, it would make a deep cut into their profits, especially if the 10 per cent, ad valorem duty is to be made payable. It appears to me that both these representations one from the point of view of want of proper opportunity and the other from the point of view of the undue hardship which may be

caused to the petitioner by making a demand retrospectively long after the Amending Act was passed, are matters which should be properly considered by the appropriate authorities. Necessary relief has to be given to them under Rules in regard to the first contention about the benefits they would be entitled to get under the presumption in Rule 60 (3). The second contention is a matter which the administrative authorities will have to consider in their discretion and decide whether there should be any waiver of duty in these cases, because of the long delay in making the demand and also because the petitioners had long ago sold out their goods without adding the burden of the duty to the prices charged to the customers, and also bearing in mind the fact that the higher authorities of the Department had at one time taken a view which would imply that the products were to be treated as restricted preparations with a liability to pay duty under item 2 of the Schedule at Rs. 3.85 on the volumetric content of alcohol. In view of the above considerations I allow the Writ Petitions (other than W. P. Nos. 1093, 1095, 1098 and 1153 of 1964) and quash the orders making demands for the payment of the duty. It will be open to the authorities to call upon the petitioners to show cause against the levy of the duty, and proceed to make the proper levy after hearing their representations contra and in the light of the observations above-mentioned in this judgment.

18. The excepted writ petitions, W. P. Nos. 1093, 1095, 1098 and 1156 of 1964, are directed against the demand of the authorities against the petitioners asking them to take out L-2 licences on the ground that the preparations manufactured by them contain alcohol and therefore, licences are necessary u/s 6(2) of the Act. In view of my above decision that the preparations do contain alcohol the writ petitions filed against the demand for taking out L-2 licences, have to be dismissed and they are hereby dismissed. There will be no order as to costs.