

(1991) 09 DEL CK 0027

In the Delhi High Court

Case No : Civil Writ Petition No's. 327, 787, 788, 2974 and 3895 of 1990 and 1185 of 1991

Pioneer Silk Mills Pvt. Ltd. and Another, Sanghi Textiles Processors Pvt. Ltd. and Others, Karan Textile Industries Pvt. Ltd. and Others, Dilip Textiles (P) Ltd. and Another, Sri Ram Mills and Another, Hyderabad Silk Mills Pvt. Ltd. and Another and S. Kumars Ltd. and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 30-09-1991

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 3(3)

Citation : (1998) 79 ECR 553 : (1995) 80 ELT 507 : (1992) ILR Delhi 433

Hon'ble Judges : Dalveer Bhandari, J; D.P. Wadhwa, J

Bench : Division Bench

Advocate : R.K. Parasaran, V. Sridharan, R.H. Pancholi, G. Ramaswamy and Madan Lokur, for the Appellant;

Judgement

D.P. Wadhwa, J.

(1) In this batch of seven writ petitions, the petitioners challenge the show cause notices issued to them by the Collector of Central Excise, the second respondent requiring them to show cause as to why their respective plant, machinery, land and building utilised in the manufacture, etc. of the fabrics as mentioned in the show cause notices should not be confiscated to the Government under Rule 173Q(2) of Central Excise Rules, 1944 (for short the Central Excise Rules"), and further that penalties should not be imposed on them under Rules 9(2) and 172Q of the Rules. There is also a challenge to the show cause notices as to why a penalty should not be imposed under rule 209A of the Rules. The petitioners seek setting aside of the show cause notices. It may at once be noticed here itself that contravention of the Rules is regarding levy and collection and additional duties of excise under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (for short "the Additional Duties Act") as applicable by virtue of section

3 of the Additional Duties Act. The notices call also upon the petitioners to show cause as to why additional duties of excise and cess payable on certain quantity of processed man-made fabrics should not be demanded from them under rule 9(2) of the Central Excise Rules read with section 11A of the Central Excises and Salt Act, 1944 (for short "the Central Excises Act"), and further as to why differential additional duties of excise payable on goods of certain value cleared within a certain period as per details given in the notices should not be demanded from them u/s 11A of the Central Excises Act. There is, however, no challenge to this part of the show cause notices. The petitioners say they are engaged in the processing of cotton fabrics and also man-made fabrics. They receive grey fabrics which may either be cotton fabrics, polyester fabrics or fabrics having polysster blend, and that u/s 3 of the Additional Duties Act, additional duty of excise is leviable in respect of these goods as per rates prescribed. The claim of the petitioners, in short, is that invoking of the penal M/s. Sanghi Textiles Processors. Pvt. Ltd. and Ors. (CW 327/90), M/s Karan Textile Industries Pvt. Ltd. & Ors. (CW 787/90), M/s. Dilip Textiles (P) Ltd. & Anr. (CW 2974/90), M/s Sri Ram Mill & Anr. (CW 2975/90), M/s Hyderabad Silk Mills Pvt, Ltd. & Anr. (CW 3895/90). M/s S. Kumars Ltd. and Anr. (CW 1185/91) Vs. Union of India and others provisions of the Central Excise Rules by the respondents under the show cause notices is illegal, void and unconstitutional as u/s 3 of the Additional Duties Act, the only provisions of the Central Excises Act and Rules made there under apply in relation to the levy and collection of additional duty of excise under the Additional Duties Act which pertain to the levy and collection of the duties of excise under the Central Excises Act. They say that any tax statute has to provide for the charge, viz., the taxable event and the quantum of tax and in the absence thereof, there will be no liability for tax, and that if a penalty is levied for infraction of the tax laws, as a deterrent, to ensure against evasion of tax. the taxation statute should expressly provide for charge for penalty. In the absence of such a provision under the Additional Duties Act, the petitioners say, the mere liability to duty alone cannot carry with it a liability to penalty.

(2) To appreciate the argument of the petitioners, it will be appropriate at this stage itself to set out the relevant provisions of the Additional Duties Act. This Act provides for levy and collection of additional duties of excise on certain goods and for the distribution of a part of the net proceeds thereof among the States in pursuance of the principles of distribution formulated and the recommendation made by the Finance Commission from time to time. u/s 2(a), "additional duties" means the duties of excise levied and collected under sub-section (1) of section 3. This section 3 is as follows :-

"1. Levy and collection of additional duties.-(1) There shall be levied and collected in respect of the goods described in column (3) of the First Schedule produced or manufactured in India and on all 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 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 column (4) of the said Schedule.

(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 there under, 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)."

(3) In the show cause notices, the second respondent has alleged contravention of rules 9, 173B, 173D, 173F, 173G, 209 and 226 read with rules 52A and 53 of the Central Excise Rules. These rules and rules 13, 14A and 14B contain penal provisions under the Central Excise Rules and may briefly be referred to.

(4) SUB-RULE (1) of Rule 9 provides for time and manner of payment of duty. Sub-rule of rule 9 provides that if any excisable goods are removed in contravention of sub-rule (1) then the person removing such goods shall be liable to a penalty which may extend to two thousand rupees and such goods shall be liable to confiscation. Rule 13 lays down the procedure for export of excisable goods. Rules 14A and 14B respectively provide for penalty for failure to furnish the proof of export within the prescribed period and for removal of excisable goods, the duty payable on which exceeds the bond amount. Sub-rules (1) to (4) of rule 52A prescribe the procedure for removal and delivery of excisable goods from the factory, and sub-rule (5) of rule 52A prescribes the penalty for failure to comply with the prescribed manner. Rules 173B, 173D, 173F and 173G prescribe the procedure for removal of excisable goods on determination of duty by producers, manufacturers or private warehouse licensees, Rule 209 provides for confiscation of goods and imposition of penalty and is applicable to assessed working under physical control procedure (Physical control procedure is applicable to assessed manufacturing tobacco products, matches, tyre-tubes and flaps, man made filament yarn and man made M/s. Sanghi Textiles Processors Pvt. Ltd. and Ors. (CW 327/90), M/s Karan Textile Industries Pvt. Ltd. & Anr. (LW 787/90), M/s. Dilip Textiles (P) Ltd. & Anr. (CW 2974/90), M/s. Sri Ram Mills & Anr. (CW 2975/90), M/s. Hyderabad Silk Mills Pvt. Ltd. & Anr. (CW 3895/90), M/s. S. Kumars Ltd and Anr. (CW 1185/91) Vs. Union of India and others staple fibres and potassium chloride). Under rule 209A, any person who acquires possession of, or is in any way concerned with transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Central Excises Act or the Rules, is liable to a penalty. Under rule 210 a breach of any of the Central Excise Rules, where no other penalty is provided in the Rules or in the Act, is again punishable with a penalty and with confiscation of goods in respect of which the offence is

committed. Under Rule 210A, the Collector of Central Excise can even accept a certain amount in lieu of confiscation or punishment of breach of any of the provisions of the Act or of the Rules. Under rule 211, anything confiscated under the Rules vests in the Central Government. Rule 226 prescribes as to how books and accounts should be maintained and also prescribes the penalty for failure to maintain books, accounts or registers in the required manner. Section 11 of the Central Excises Act prescribed the procedure how the duty or any other sum of any kind payable under this Act and the Rules could be recovered by the Central Government. These amounts can be recovered as if these were arrears of land revenue. Section 11A deals with recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. Section 11B deals with claim for refund of duty.

(5) The petitioner had also questioned the constitutional validity of the Additional Duties Act and it was stated that the payment of duty of additional excise over and above 4 per cent ad valorem was not countenanced by the Additional Duties Act. These challenges were not pressed. The validity of the Additional Duties Act has already been upheld by this Court in *M/s. Parekh Prints and others v. Union of India* and other 1991(3) D L 99 and SLP filed in the Supreme Court against that judgment had been dismissed.

(6) The respondents state that section 3 of the Additional Duties Act makes all the provisions of the Central Excises Act and the Rules made there under, including those relating to refund and exemption from duty applicable, so far as may be, to the Act. They say that the wordings "apply in relation to the levy and collection of additional duties as they apply in relation to the levy and collection of duties of excise on the goods specified" are expressive enough to make all provisions in the Central Excises Act and Rules applicable, if they are "in relation to" the levy and collection of excise duty. They say that confiscation and penalty necessarily flow out of levy and collection of duty and in all cases where there is an evasion of payment of duty, which is intricably related to the levy and collection of duty, the provisions as contained in the Central Excises Act will necessarily become applicable.. The respondents also referred to observations of the Supreme Court in *Ujagar Prints Vs. Union of India (UOI)*, , to contend that all penal and confiscatory provisions in the Central Excise Rules would be applicable respecting the levy and collection of additional duties under the Additional Duties Act. The respondents then say that Chapter II of the Central Excises Act deals with levy and collection of duty and sections 3 to 12 all fall under this Chapter. Sections 9, 9A and 9AA specifically provide for offences and penalties. Therefore, they say that contention of the petitioners that levy and collection of duty cannot comprehend within itself offences and penalties is, on their own showing, ill founded. According to the respondents the contention of the petitioners that the proposal to impose penalties as stated in the show cause notices is without jurisdiction, is totally baseless.

(7) The only question that arises for consideration is if the respondents have

jurisdiction to resort to penalty proceedings or forfeiture of goods provided under the Central Excise Rules for alleged default under the Central Excises Act or the Central Excise Rules in so far these provisions are made applicable by virtue of section 3 of the Additional Duties Act. In short, it would be putting like this, if the term "levy and collection" of additional duty of excise would include levy and collection of penalty and forfeiture of goods and also prosecution provided under the Central Excises Act and the Central Excise Rules. The issue, thus, involved in these writ petitions would appear to be rather simple, but it is not so as great deal of arguments were addressed by Mr. K. Parasaran, former .attorney General of India, and Mr. G. Ramaswamy, the present Attorney General, M/s. Sanghi Textiles Processors Pvt. Ltd. and Ors. (CW 327/90, M/s. Karan Textile Industries pvt Ltd. & Ors. (.CW 787/90) M/s. Dilip Textiles (P) Ltd. & Anr. (CW 2974/90), M/s. Sri Ram Mills & Anr. (CW 2975/90), M/s. Hyderabad Silk Mills Pvt. Ltd. & Anr. (CW 3895/90), M/s. S. Kumars Ltd. and Anr (CW 1185/91) Vs. Union of India and others appearing respectively for the petitioners and the respondents. Mr. Parasaran said that under Article 265 of the Constitution no tax shall be levied or collected except by authority of law. He said that authority has to be specific and explicit and expressly provided. He said the Additional Duties Act created liability for additional duty for excise but created no liability for any penalty. That being so the respondents could not proceed to impose any penalty or confiscate the goods of the petitioners by invoking the provisions of the Central Excise Act and the Rules made there under. He said if the definition of ""additional duties" as contained in clause (a) of section 2 of the Additional Duties Act is substituted for expression "additional duties" as appearing in section 3(3) of the Act, this would read as under:-

""THE provisions of the Central Excises and Salt Act, 1944 (1 of 1944). and the rules made there under, 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 "duties of excise levied and collected under sub-section (1) of section 3" as they apply in relation to the levy and collection of the duties of excise on the goods" specified in sub-section (1)."

(8) He said when so read there was not even a whisper about penalty anywhere in this sub-section and the provision exclusively related to levy and collection of the tax, viz., the additional duty, and Mr. Parasaran further said that the provisions of the Central Excises Act and the Rules there under relating to penalty could not be borrowed for the purpose of the Additional Duties Act. He said if full effect was given to the expressions (1) "including those relating to refunds and exemptions from duty" and (2) "so far as may be" in sub- section (3) of section 3, it was clear that there was no scope for levy of any penalty, and those expressions totally negated any contention that entire provisions of the Central Excises Act and he Rules made there under were incorporated in the Additional Duties Act by pen and ink. Sub-section (1) of section 3 of the Additional Duties Act crested charge of additional duties of excise and sub-section (3) thereof prescribed the procedure for levy and collection thereof by

incorporating the provisions of the Central Excises Act and the Rules made there under. But Mr. Parasaran said the provisions of that Act and the Rules made there under relating to penalty could not be said to have been incorporated in the Additional Duties Act as the Additional Duties Act did not create any charge for levy of any penalty. Penalty, he said, was an additional tax and for imposition thereof there had to be sanction by the Legislature which was lacking in the present case. Mr. Parasaran referred to various other enactments, namely, Produce Cess Act, 1966, Sugar Export Promotion Act, 1958, Marine Products Export Development Authority Act, 1972, Tea Act, 1953, Tobacco Cess Act, 1975, and The Cotton Fabrics (Additional Excise Duty) Act, 1957, wherein there had been provisions similar to sub-section (3) of section 3 of the Additional Duties Act, but separate substantive provisions had been made therein for penalties and offences. In support of his submission Mr. Parasaran referred to a decision of the Constitutional Bench of the Supreme Court in *Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra*, which was followed in *Manganese Ore (India) Ltd. Vs. The Regional Assistant Commissioner of Sales Tax, Jabalpur*, and also to some commentaries on the interpretation of the statutes. He also referred to decision of the Supreme Court in *The South Gujarat Roofing Tiles Manufacturers Association and Another Vs. The State of Gujarat and Another*, and *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others* Air 1987 S.C. 1023.(6) to contend that the word "includes" is generally used as a word of extension, but the meaning of the word or phrase is extended when it is said to include things that would not properly fall within its ordinary connotation, and, thus, where "includes" has an extending force, it adds to the word or phrase a meaning which does not naturally belong to it. But there cannot be any inflexible rule that the word "include" should be read always as a word of extension without reference to the context, and though "include" is generally used in interpretation clauses as a word of enlargement, in some cases the context might suggest a different intention. Mr. Parasaran. Therefore, said that in the present case since the inclusion pattern in sub-section (3) of section 3 of the Additional Duties Act related to refund and exemption, it established that it excluded such like penalties. Mr. Parasaran also said that wherever the Legislature wanted to borrow the provisions of another enact- *M/s. Sanghi Textiles Processors Pvt. Ltd. and Ors. (CW 327/90)*, *M/s Karan Textile Industries Pvt Ltd. & Ors. (CW 787/90)*, *M/s. Dilip Textiles (P) Ltd. & Anr. (CW 2974/90)*, *M/s. Sri Ram Mills & Anr. (CW 2975/90)*, *M/s. Hyderabad Silk Mills, Pvt. Ltd. & Anr. (CW 3895/90)*, *M/s. S. Kumars Ltd. and Anr. (CW 1185/91)* Vs. Union of India and others mentioned in its entirety, it said so explicitly and did not use the terminology "including" and "as far as may be". In this connection he referred to section 3(2) of the Imports and Exports Control Act, 1947 and section 67 of the Foreign Exchange Regulation Act, 1973, whereunder provisions of the Customs Act, 1962, were made applicable and it was mentioned "and all the provisions of the Act shall have effect accordingly". Relying on another decision of the Supreme Court in *Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd.*, Mr. Parasaran said that the term levy was wider in its import than the term

assessment, and levy included both imposition of a tax as well as assessment. The term "imposition" was generally used for a levy of a tax or duty indicating the subject-matter of the tax and the rates at which it had to be taxed and the term "assessment" was generally used for the actual procedure adopted in fixing the liability to pay the tax after determining the amount. The "collection" part seemed to be a term used to a stage subsequent to assessment. Mr, Parasaran, Therefore, said that the collection was equated to recovery of the tax imposed and assessed and there could be collection only when it had been levied, and since admittedly there was no levy of penalty under the provisions of the Additional Duties Act, a mere process of collection could not create penalty.

(9) Countering these arguments Mr. Ramaswamy said that penalty had two meanings penalty on tax was an interest on tax or an additional tax and the other meaning was penal consequences of either deprivation of property or exaction of money for violation of a statutory obligation. He said penalty under the Central Excises Act was not an additional tax or an interest on tax for non-payment or delayed payment, but a penal provision for exaction of money for violation of statutory obligations. He said petitioners under the Central Excise Rules even for assessment of additional duties would have to comply with the various provisions of the Central Excise Rules by virtue of sub-section (3) of section 3 of the Additional Duties Act. Once the liability for compliance with the Rules was attracted by referential legislation, the consequence of non-compliance with the rules attracted an independent liability of penalty as a direct consequence and did not owe its potency to sub-section (3) of section 3 of the Additional Duties Act. Mr. Ramaswamy said it was a direct liability under the Central Excise Rules. Then he said the entire purpose of the Central Excises Act and the Rules there under was to levy and collect central excise and that the provisions of the rules were self contained, each part containing certain obligations and providing for a consequence of penalty for non-compliance with those obligations. He said whole set of Rules were part of a scheme of levy and collection and penalty provisions were part of that scheme, and that it was well settled that in tax laws penalty provisions were, part and parcel of assessment and in fact part of the process of levy and collection of tax. He then said that the additional duty of excise and the central excise duty under the Central Excises Act were both on the same goods and when sub-section (3) of section 3 of the Additional Duties Act said that the Central Excises Act and Rules for levy and collection would apply to the levy and collection of additional duty it was as if under the Central Excises Act there was another section as imposing an additional duty. Therefore, the Central Excises Act and the Rules made there under would apply to levy and collection of both the central excise duty and the additional duty of excise, there being no difference in procedure. Mr. Ramaswamy said it was something like charging two duties on the same goods and so the obligations imposed for levy and collection thereof were same. Mr. Ramaswamy said Khernka's case did not apply to the facts of the present case and he referred to two decisions of the Supreme Court in C.A. Abraham, Uppotttil,

Kottayam Vs. The Income Tax Officer, Kottayam and Another, , and Shiv Dutt Rai Fateh Chand and Others Vs. Union of India (UOI) and Another, , Mr. Ramaswamy also referred to the decision of the Supreme Court in Ujagar Prints case and said that the ratio in that case completely covered the point in issue in the present case. He also said the use of the phrase "including refunds and exemptions" used in sub-section (3) of section 3 of the Additional Duties Act was only by way of abundant caution to avoid any ambiguity that may creep in as to whether the words "levy and collection" would include exemption and refunds as well. He said the Parliament used this phrase for extending the meaning and not for restricting the scope of the incorporation of the Central Excise Rules. He also said that the meaning of the word "include" used in a definition section of an Act was different from the word "including" used in sub-section (3) of section 3. Mr. Ramaswamy also said that the phrase "so far as may be" was M/s. Sanghi Textiles Processors Pvt. Ltd. and Ors. (CW 327/90), M/s. Kiran Textile Industries Pvt Ltd. & Ors. (CW 787/90) M/s. Lilip Textiles (P) Ltd. & Anr. (CW 2974/90) M/s. Sri Ram Mills & Anr. (CW 2975/90) M/s. Hyderabad Silk Mills Pvt. Ltd. & Anr. (CW 3895/90) M/s. S. Kumars Ltd. and Anr. (CW 1185/91) Vs. Union of India and others used to mean "so far as may be necessary in order to carry into effect the purposes of the Central Excises Act and the remedies under that Act, Lastly, he said that the Act was in force since 1957 and the expression similar to sub-section (3) of section 3 of the Additional Duties Act had been used in various Finance Acts levying special duties of excise and there had never been any challenge as made in the present petitions.

(10) When these writ petitions were filed on an interim application by the petitioner the admission Bench ordered that the second respondent might carry on with the proceedings and pass the final order as well, if necessary, but that order could not be implemented without further directions of this Court. This was further modified and it was ordered that any order passed by the second respondent in the proceedings before him arising out of the show cause notice in question shall not be communicated to the petitioners.

(11) To repeat, the stand of the petitioners is that the Additional Duties Act must have a substantive provision to warrant imposition of penalty and the forfeiture of goods etc. and that the provisions of the Central Excise Rules regarding penalty and confiscation of goods etc. for default in payment of additional duties or contravention of any of those rules when there was no substantive provision relating to levy of penalty or confiscation of goods etc. in Additional Duties Act, could not be applied. It was submitted that section 3 of the Additional Duties Act was merely procedural in nature and dealt with utilisation of the machinery under the Central Excises Act and the Rules made there under for the purpose of levy and collection of additional duties of excise.

(12) Since both Khernka's case and Shiv Dutt Rai Fateh Chand's case deal with section 9 of the Central Sales Tax Act, 1956 (for short "the Cst Act") imposing penalties with reference to the State laws dealing with imposition of sales tax, it

would be appropriate to set out relevant provisions of this section as a great deal of arguments" had been addressed respecting these two Judgments of the Supreme Court. Section 9(1) states that tax payable by any dealer under the Cst Act on sales of goods effected by him in the course of inter-State trade or commerce, shall be levied by the Central Government and the tax so levied shall be collected by the State Government in accordance with sub-section (2) of section 9 in that very State from which the movement of goods commenced. Section 9(2) is as follows :-

"SUBJECT to the other provisions of this Act and the Rules made there under, the authorities for the time being empowered to assess, re-assess, collect and enforce payment of any tax under the general Sales Tax law of the appropriate State shall, on behalf of the Government of India, assess, re-assess, collect and enforce payment of tax. including any penalty payable by a dealer under this Act as if the tax or penalty payable by such a dealer under this Act is a tax or penalty payable under the general Sales Tax law of the State: and for this purpose they may exercise all or any of the powers they have under the general Sales Tax law of the State; and the provisions of such law, including provisions relating to returns, provisional assessment, advance payment of tax, registration of the transferee of any business, imposition of the tax liability of a person carrying on business on the transferee of, or successor to, such business, transfer of liability of any firm or Hindu undivided family to pay tax in the event of the dissolution of such firm or partition of such family, recovery of tax from third parties, appeals, reviews, revisions, references, refunds, rebates, penalties, compounding of offences and treatment of documents furnished, by a dealer as confidential, shall apply accordingly; Provided that if in any State or part thereof there is no general Sales Tax law in force, the Central Government, may, by rules made in this behalf make necessary provision for all or any of the matters specified in this sub-section."

(13) After the judgment in Khernka's case, sub-section (2) of section 2 was slightly amended but that is not relevant for our purposes, but sub-section (2A) was inserted in section 9 which is as under :- (2A) All the provisions relating to offences and penalties (including provisions relating to penalties in lieu of M/s. Sanghi Textile, Processors Pvt. Ltd. and Ors. (CW 327/907, M/s Karan Textile Industrie Pvt. Ltd & crs. CW/ 787/90) M/s. Dilip Textiles (P) Ltd. & Anr. (CW 2974/90) M/s. Sri Ram Mills & Anr. (CW 2975/90). M/s. Hyderabad Silk Mills Pvt. Ltd. & Anr. (CW 3895/90), M/s. S. Kumars and Anr. (CW 1185/91) Vs. Union of India and others prosecution for an offence or in addition to the penalties or punishment for an offence but excluding the provisions relating to matters provided for in sections 10 and 10A of the general sales tax law of each State shall, with necessary modifications, apply in relation to the assessment, re-assessment, collection and the enforcement of payment of any tax required to be collected under this Act in such State or in relation to any process connected with such assessment, re-assessment, collection or enforcement of payment as it the tax under this Act were tax under such sales tax law."

(14) It may also be noted that section 10 of the Cst Act provides for levy of penalties in certain circumstances. u/s 10A of the Cst Act, penalties could also be imposed in lieu of prosecution. Section 6 of the Cst Act provides for liability to tax on inter-State sales. Section 8 provides for rate of tax on sales in the course of inter-State trade or commerce, and section 9, as noted above, provides for levy and collection of tax and penalties. In Khernka's case the question raised was whether the assessed under the Cst Act could be made liable for penalty under the provisions of the State Sales Tax Act (for short "State St Act"). In the case before the Supreme Court penalty had been imposed under the State St Act for default in payment of taxes under Cst Act within the prescribed time. The assessed in that case contended that there was no provision in the Cst Act for imposition of penalty for delay or default in payment of tax and, Therefore, imposition of penalty under the provisions of the State St Act for delay or default in payment of tax was illegal. The stand of the Revenue, however, was that the provision for penalty for default in payment of tax as enacted in the State St Act was applicable to the payment and collection of the tax under the Cst Act and was incidental to and part of the process of such payment and collection. Elaborating this further it was contended by the Revenue that section 9(1) of Cst Act spoke of tax and did not mention penalty, but law would include collection and enforcement of payment. Section 9(2) of this Act was a provision prescribing the procedure for assessing, collecting and enforcing payment of tax. It was contended that the words "collect and enforce payment of tax, including any penalty" in section 9(2) would include not only penalties imposed by the Cst Act but also penalties under the State St Act and that the words "as if the tax or penalty payable by such a dealer under this Act is a tax or penalty payable under the general Sales Tax law of the State" indicated that tax or penalty was imposed by the Cst Act and by incorporating the State St Act as part of the Cst Act, the liability to pay tax was enforced by penalty for delay or default in payment of tax. It was submitted that wordings of section 9(2) further showed that the enforcement provisions in the State St Act for delay or default in payment of tax were adopted by the Cst Act. for working out the provisions relating to assessment, re-assessment, collection and enforcement of tax of penalties and that penalty was a sanction for non-payment. It was stated if the assessed did not pay and if there was no provision for imposition of penalty, there would be no sanction for enforcement of payment. In short, the submission was that just as the penalty was imposed for non-payment of tax under the State Act, that provision was attracted for delay or default in payment of tax under the Cst Act. It was, however, submitted by the assessed that provision of section 9(2) meant that only if tax as well as penalty was payable by dealer under the Cst Act, only then there could be collection and enforcement of tax and penalty in the same manner as provided in any sales tax law of the State, and, secondly, it was contended that the Cst Act must have a substantive provision to warrant imposition of penalty and the provisions of the State St Act regarding penalty for default in payment could not be applied when there was no substantive provision relating to levy or penalty in the Cst Act in respect of the default. Third

contention of the assessed was that section 9(2) was procedural and only dealt with utilisation of existing machinery in State law.

(15) There were three opinions expressed in that case. A. N. Ray, C. J. with whom Khanna J. agreed held that a penalty not being merely a sanction or an adjunct to or consequential to an assessment and not being just a machinery to enforce payment of a tax but in reality was a statutory liability in the absence of any express provision of levy of penalty for delay or default in payment of the tax under the Act. it was not open to the authorities under the State law to levy and recover penalty for delay or default in payment of tax under the Act. Mathew. J. with whom Chandraehud, J. (as his Lordship then was) agreed took a contrary view holding that if for enforcing pay- M/s. Sanghi Textiles Processors Pvt. Ltd. and Ors. (CW) 327/97, M/s Karan Textile Industries Pvt Ltd & oas (CW 787/90), M/s. Dilip Textiles (P) Ltd. & Anr. (CW 2974/90), M/s. Sri Ram Mills & Anr. (CW 2975/90), M/s. Hyderabad Silk Mills Pvt. Ltd. & Anr. (CW 3895/90), M/s. S. Kumars Ltd. and Anr. (CW IIS5/91) Vs. Union of India and others ment of tax due under the general sales tax law of the appropriate State the authorities there under had power to impose penalty, they had the same power of imposing penalty for enforcing payment of tax payable under the Act in accordance with the general sales tax law of the State. While the existence of specific provision for levy of penalty u/s 10 read with section 10-A of the Act was relied on by A. N. Ray, C. J. in support of his view, the said provisions were explained by Mathew, J. by observing that the penalties provided for in section 10 read with section 10-A of the Act were not for the purpose of or in connection with assessment, re-assessment, collection, and enforcement of payment of tax payable by a dealer under the Act. Beg, J. (as his Lordship then was) by his separate judgment concurred with the view of A. N. Ray, C. J. The result was that the penalty levied against the appellant was held to be unsustainable in accordance with the opinion of the majority. Ray, C. J. also held that there was no lack of sanction for payment of tax and any dealer who would not comply with the provisions for payment of tax would be subject to recovery proceedings under the Public Demands Recovery Act. The ratio of the majority judgment is that penalty is a imposition and penalty like imposition of tax cannot be included within the procedural part. There has to be a substantive provision levying penalty. Penalty is within assessment proceedings just as tax is within assessment proceedings when the relevant Act by substantive charging provision levies tax as well as penalty. Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act. Referring to a decision of the Federal Court in *Chatturam v. Commssioner of Income Tax*, 15 Itr 302 : AIR 1947 Fc 32. Ray, C. J., observed that there must be a charging section to create liability, and that there must be first a liability created by the Act, second, the Act must provide for assessment, and third, the Act must provide for enforcement of the taxing provisions. The mere fact that there is machinery for assessment, collection and enforcement of tax and penalty in the State St Act does not mean

that the provision for penalty in the State St Act is treated as penalty under the Cst Act. The meaning of penalty under the Cst Act cannot be enlarged by the provisions of machinery of the State St Ad incorporat- ed for working out the Cst Act. Beg, J. also observed that two views on an interpretation of section 9(2) of the Cst Act were equally well entertainable. He would rather prefer the view adopted by Ray, C. J. on the principle that the assessed must get the benefit of such uncertainty. He, however, at the same time, observed that the reasons for accepting the contentions on behalf of the assessed were quite compelling and decisive, and he also set out the reasons in brief. The learned Judge said as under (Para 37) :-

"ONa consideration of the provisions mentioned above, it seems to me to be clear that whatever may be the objects of levying a penalty, is imposition gives rise to a substantive liability which can be viewed either as an additional tax or as a fine for the infringement of the law. The machinery or procedure for its realization comes into operation after its imposition. In any case it is an imposition of a pecuniary" liability which is comparable to a punishment for the commission of an offence. It is a well settled canon of construction of statutes that neither a pecuniary liability can be imposed nor an offence created by mere implication. It may be debatable whether a particular procedural provision creates a substantive right or liability. But, I do not think that the imposition of pecuniary liability, which takes the form of a penalty or fine for a breach of a legal obligation, can be relegated to the region of mere procedure and machinery for the realization of tax. It is more than that. Such liabilities must be created by clear, unambiguous, and express enactment. The language used should leave no serious doubts about its effect so that the persons who are to be subjected to such a liability for the infringement of law are not left in a state of uncertainty as to what their duties or liabilities are. This is an essential requirement of a good government of laws. It is implied in the constitutional mandate found in Article 265 of our Constitution."

(16) Beg, J., after considering the provisions of the Cst Act as well as the State St Act relating to penalties observed that One was irresistibly driven to the conclusion that provisions relating to penalties were special and specific provisions in each Act and that they were not part of the general Sales Tax law of M/s. Sangivi Textiles Processors Pvt. Ltd. and Ors .(CW 327/967 M/s. Kara Textile Industries Pvt Ltd., & ors. (CW 787/97), M/s. Dilip Textiles (P) Ltd. & Anr. (CW 2974/90), M/s. Sri Ram Mills & Anr. (CW 2975/90) M/s. Hyderabad Silk Mills Pvt Ltd. & Anr. (CW 3895/90), M/s. S. Kumars Ltd. and Anr. (CW 1185/91) Vs. Union of India and others either the State or of the Union. He finally said that for the reasons given in his judgment he concurred with the opinion expressed and the orders proposed by Ray, C. J. As noted above, the consequence of this judgment was that section 9 of Cst Act came to be amended by the Amending Act which was published in the Gazette of India on September 9, 1976 introducing sub-section (2A) in it.

(17) In *Manganese Ore (India) Ltd. Vs. The Regional Assistant Commissioner of Sales Tax, Jabalpur*, one of the arguments raised was that sales tax authorities had no jurisdiction to impose a penalty for delay in filing the return under the Cst Act because there was no provision in that Act making a dealer liable to pay penalty for filing belated return and recourse could not be taken to the provisions of the State Sales Tax Act on the subject. Relying on the decision of the court in *Khemka's* case the imposition of penalty was quashed.

(18) In *C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another*, the appellant was a partner with one Thomas carrying on business in foodgrains in the name and style of M. P. the Thomas & Company. Thomas died on October 11, 1949 and for the accounting years August 1947-July 1948, August 1948-July 1949 and August 1949-July 1950 the appellant submitted return of the income of the firm as an unregistered firm. In the course of the assessment proceedings it was discovered that the firm had carried on transactions in different commodities in fictitious names and had failed to disclose substantial income earned therein. The Income Tax Officer assessed the suppressed income of the firm for the assessment years 1949-50 and 1950-51 and also issued notices u/s 28 of the Income Tax Act for these two years requiring the firm to show cause why penalty should not be imposed. These notices were served upon the appellant. After considering the Explanation of the appellant the Income Tax Officer imposed various amounts of penalties. Appeals against that order were dismissed by the Appellate Assistant Commissioner of Income Tax. The appellant then moved the High Court of Judicature at Kerala praying for a writ of certiorari quashing the orders of assessment and imposition of penalty. It was claimed that after the dissolution of the firm by the death of Thomas in October 1949, no order imposing a penalty could be passed against the firm. The High Court rejected the writ petition. The appellant thereupon appealed to the Supreme Court on the certificate granted by the High Court. The Court observed that in interpreting a fiscal statute the court could not proceed to make good deficiencies if there be any and that the court must interpret the statute as it stood and in case of doubt in a manner favorable to the taxpayer. But at the same time where by the use of words capable of comprehensive import, provision was made for imposing liability for penalty upon tax-payers guilty of fraud, gross negligence or contumacious conduct, an assumption that the words were used in a restricted sense so as to defeat the avowed object of the Legislature qua a certain class would not be lightly made. In this case though the condition prescribed by section 28(1)(c) of the Income Tax Act for imposing penalty were fulfilled, it was contended by the appellant that the assessed firm had ceased to exist on the death of Thomas and in the absence of a provision in the Act whereby liability to pay penalty might be imposed after dissolution against the firm u/s 28(1)(c) of the Act, the order imposing penalty was illegal. Section 44 of the Income Tax Act at the material time had stood as follows :-

"WHERE any business carried on by a firm has been discontinued every person who was at the time of such discontinuance a partner of such

firm shall in respect of the income, profits and gain of the firm be jointly and severally liable to assessment under Chapter Iv for the amount of tax payable and all the provisions of Chapter Iv shall, so far as may be, apply to any such assessment."

(19) It was urged that a proceeding for imposition of penalty and a proceeding for assessment of Income Tax were matters distinct, and section 44 might be resorted to for assessing tax due and payable by a firm business whereof had been discontinued, but an order imposing penalty u/s 28 of the Act could not by virtue of section 44 be passed. This contention was negated by the court and it was observed that it was implicit in the contention of the appellant that it was open to the partners of a firm guilty of conduct exposing them to penalty u/s 28 to evade penalty by the simple expedient of discontinuing the firm. Examining various sections in Chapter Iv, the court held as under :- M/S.Sanghi Textiles Processors Pvt. Ltd. and Ors. (CW 327/967, M/s Karan Textile Industries pvt Ltd & ors (CW 787/90), M/s. Dilip Textiles (P) Ltd. & Anr. (CW 2974/90), M/s. Sri Ram Mills & Anr. (CW. 2975/90). M/s. Hyderabad Silk Mills Pvt. Ltd. & Anr. (CW 3895/90), M/s. S. Kumsars Ltd. and Anr. Cw 1195/91) Vs. Union of India and others "The expression "assessment" used in these sections is not used merely in the sense of computation of income and there is in our judgment no ground for holding that when by section 44, it is declared that the partners or members of the association shall be jointly and severally liable to assessment, it is only intended to declare the liability to computation of income u/s 23 and not to the application of the procedure for declaration and imposition of tax liability and the machinery for enforcement thereof. Nor has the expression, "all the provisions of Chapter Iv shall so far as may be apply to such assessment" a restricted content; in terms it says that all the provisions of Chapter Iv shall apply so far as may be to assessment of firms which have discontinued their business. By section 28, the liability to pay additional tax which is designated penalty is imposed in view of the dishonest contumacious conduct of the assessed."

(20) This judgment of the Supreme Court in Abraham's case has been distinguished in Khernknis case. This is how Chief Justice Ray in the course of his judgment in that case dealt with C. A. Abraham's case :-

"The ratio of the decision not support the submission. In Abraham's case (supra) the assessed was subjected to tax for suppressed income and penalties for concealing the income. The question was whether Section 44 of the Income Tax Act would attract liability to pay. Section 44 of the Act stated that the assessed would be liable to assessment under Chapter Iv for the amount of tax payable and all the provisions of that Chapter would apply. This Court said that the word "assessment" had been used in its widest connotation in Chapter Iv of the Act. It was contended that an order imposing penalty u/s 28 of the Act could not by virtue of Section 44 be imposed. This Court held that Section 44 of the Act expressly enacted that the provisions of Chapter Iv would apply to the assessment of a business carried on by a firm even after discontinuance of its

business. Section 28 is one of the Section in Chapter IV. Section 28 imposed a penalty for the concealment of income or the improper distribution of profits. The defaults made in furnishing a return of the total income in complying with a notice and in concealing the particulars of income were treated as penalties u/s 28. Section 28 was held by this Court to be a provision enacted for facilitating the proper assessment of taxable income and to apply to an assessment under Chapter IV. The decision of this Court in Abraham's case (supra) is non-sequiter in regard to the contentions advanced on behalf of the Revenue in the present case. The reason is that in Abraham's case (supra) assessment and imposition of penalty is under the same Chapter in the Act. The assessment is under Chapter IV. Penalty is provided in a section under Chapter IV. Penalty is arising in course of assessment under the same Act."

The Chief Justice further observed as under :-

"The income tax Act 1961 imposes penalty under Sections 270 and 271. These Sections in the Income- tax Act provide for imposition of penalty on contumacious or fraudulent assesseds. Penalty is in addition to Income Tax, if any, determined as payable by the assessed. Tax and penalty like tax and interest are distinct and different concepts under the Indian Income Tax Act. The word "assessment" could cover penalty proceedings if it is used to denote the whole procedure for imposing liability on the tax payer as happened in Abraham's case."

(21) After sub-section (2A) was inserted in section 9 of the Cst Act, it was yet contended in Shiv Dutt's case that sub-section (2A) still did not help the revenue. The court referred to the various provisions of the Cst Act and considered the history of section 9 as amended from time to time. It observed that before introduction of sub-section (2A) there was no express provision in the Cst Act itself authorising the levy of any penalty for delay or default in payment of tax due under that Act or other breaches of the general Sales Tax laws of the States in so far as they were adopted by section 9(2) of the Cst Act as part of the machinery under that Act. M/s. Sanghi Textiles Processors Pvt. Ltd. and Ors. (CW 328/907), M/s Karan Textile Industries Pvt Ltd Ors,(CW 787 90), M/s. Dilip Te tiles (P) Ltd. & Anr.(CW 2974/90), M/s. Sri Ram Mills & Anr (CW 2975/90), M/s. Hyderabad Silk Mills Pvt. Ltd. & Anr. (CW 3895/90), M/s. S. Kumars Ltd. and Arn. (CW 1185/91) Vs. Union of India and fliers

(22) One of the conventions raised in Shiv Dutt's case as noted above, was that the introduction of sub-section (2A) in section 9 of the Cst Act did not have the effect of making the provisions relating to penalties livable under the general sales tax laws of the State applicable to the proceedings under the Cst Act. It was submitted by the petitioners that the Supreme Court in Khemka's Case had pointed out that there was no specific provision levying penalties In the Cst Act as it stood before its amendment in 1976 and this lacuna remained unfilled up and, Therefore, no penalties could be recovered by utilising the provisions of the general sales tax laws of the respective States. It was submitted the words "All

the provisions relating to offences and penalties of the General Sales Tax law of each State shall with necessary modifications apply in relation to the assessment, reassessment, collection and the enforcement of payment of any tax required to be collected under this Act " in sub-section (2A) of section 9 were insufficient to make the provisions relating to penalties in the State laws applicable to the assesseds under the Cst Act. as the word penalties was not found along with the words "assessment, reassessment, collection and the enforcement of payment of any tax". The Court held that this argument was misconceived and observed that the principal object of the Cst Act was not the levying of penalties and the assessed incurred the liability to pay penalties on account of certain acts or omissions committed by him at the various stages specified above, namely, assessment, reassessment, collection and the enforcement of payment of tax, and that the inclusion of the words penalties along with those four stages would have, Therefore, been redundant apart from being inappropriate. The Court held that by inserting sub-section (2A) the deficiency pointed in Khernka's case was removed. It held that sub-section (2A) of section 9 expressly made all the provisions relating to offences and penalties which were committed or incurred, as the case might be, under the general sales tax of respective States, applicable to persons who committed corresponding acts and omissions in the four abovementioned stages under the Cst Act. Respondents, in our view, cannot derive any help from the decisions in Abraham's and Shiv Dutt's cases.

(23) We also do not find the decision of the Supreme Court in Ujagar Prints case to be of any help to us in deciding the controversies in the present petition before us. The contentions raised in Ujagar Prints case have been set out in para 16 of the judgment delivered by Venkatachaliah, J. and these are as under :-

(A)(i) Whether the processes of Bleaching, Dyeing, Printing, Sizing, Shrink-proofing etc. carried on in respect of cotton or man-made "Grey-fabric" amount to "manufacture" for purposes and within the meaning of Section 2(f) of the Central Excises and Salt Act, 1944 prior to the Amendment of the said Section 2(f) by section 2 of the Amending Act VI of 1980. (ii) Whether the decision in Empire Industries Limited and Others Vs. Union of India and Others, holding that these operations amount to a manufacture is wrongly decided and requires reconsideration.

(B) Whether the amendment brought about by the Amending Act of 1980 of section 2(f) and to tariff- items 19 and 22 of the Central Excise Act is ultra vires Entry 84 List I and, Therefore, beyond the competence of the Union Parliament. Whether, at all events, ev

(C) Whether, at all events, even if the amendments to Central Excise Act are valid, the levy under the Additional Duties Act is unsupportable and without the authority of law as there is no corresponding enlargement of the definition of manufacture under the Additional Duties Act.

(D)Whether the retrospective operation of the Amending Act is an unreasonable restriction on the fundamental right of the "processors" under Article 190(g) of the Constitution.

(E)Whether, even if the levy is justified, at all events, the computation of the assessable value of the purposed Grey-fabric on the basis of the whole-sale cash selling-price declared under classification 1st M/s. Sanghi Textiles, Processors Pvt. Ltd. and Ors. (CW 3 7/907, M/s Karan Textile Industries Pvt Ltd. & ors.)C.W 787/90), M/s. Dilip Textiles (P) Ltd. & Anr. (CW 2974/90), M/s. Sri Ram Mills & Anr. (CW. 2975/90), M/s. Hyderabad Silk Mills Pvt. Ltd. & Anr. (CW 3895/90), M/s. S. Kumars Ltd. and Anr. (CW 1195/91) Vs. Union of India and others under Rule 173(b) is unjustified and illegal in respect of the assessable value of the processed Greyfabric done on job-work basis.

(24) Arguments were, however, raised by the revenue on the basis of the concluding paragraph of the judgment, but nevertheless concurring, by Ranganathan, J., in Ujagar Prints case. This concluding paragraph 52 is as under :-

"INthe circumstances, I agree that we should give fall and literal effect to the language of S. 3(3) and hold that it has the effect not only of attracting the procedural provisions of the 1944 Act but also all its other provisions, including those containing the definition."

(25) On this basis it was submlited that this Court has no option but to hold that the Additional Duties Act adopted all the provisions of the Central Excises Act and the Rules made there under including levy of penalty, etc. It is difficult to accept this proposition.

(26) The question before is was never in consideration in the Supreme Court in Ujagar Prints case. No doubt the Additional Duties Act makes the provision of Central Excises Act apply in relation to lew and collection of additional duties, but the question in Ujagar Prints case was whether this provision was sufficient to attract section 2(f) of the Central Excises Act which defines "manufacture". This in turn depended upon what the expression "levy" connotes and carries with it. The teim "levy", it is held, is an expression of wide import. It includes both impopition of a tax as well as its Quantification and assessment. In Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., , the court held as under : -----

"THEterm "levy" appeprs to us to be wider in its import than the term "assessment". It may include both of a tax as well as assessment. The term "imposition" is generally used for the levy of a tax or duty by legislative provision indicating the subject matter of the tax and the rates at which it has to be taxed...."

(27) Ranganathan, J. (in Ujagar Prints case) agreed with Venkatachaliah, J., but said he would like to add a few words on two of the points urged before the

Court. First point was decision of this Court in Hindustan Milkfood Manufacturers Ltd. v. Union of India 1980 (11) ELT 487 (to which Ranganathan, J. was a party) and he clarified this decision. The second point was in regard to the contention on behalf of the petitioners that the definition of the term "manufacture" enacted in the Central Excises Act as enlarged by the Amendment Act 6 of 1980 could not be read into the provisions of the Additional Duties Act. In the course of discussion on this point the learned Judge observed that the words "levy and collection" in sub-section (3) of section 3 of the Additional Duties Act could not be construed differently from the words "levied and collected" used in sub-section (1) of section 3 of that Act. Section 3(3), therefore, also covered the entire gamut of section 3(1) and could not be construed as becoming operative at a somewhat later stage. Its operation could not be excluded in determining the scope of the charge. The learned Judge distinguished the decision of the Supreme Court in Associated Cement Companies Ltd. Vs. Director of Inspection, Customs and Central Excise, New Delhi, where the subject-matter was interpretation of section 80 of the Finance Act, 1965, which used identical language to that in section 3(3) of the Additional Duties Act. Section 80 of the Finance Act, 1965, was as follows :-

"(1) When goods of the description mentioned in this section chargeable with a duty of excise under the Central Excises Act, are assessed to duty, there shall be levied and collected- (a) as respects (certain) goods... a special duty of excise equal to 10 per cent of the total amount so chargeable on such goods; (b) as respects (certain other) goods... a special duty of excise equal to 20 per cent...; and (c) as respects (certain other) goods..... a special duty of excise equal to 33-213 per cent. .

(2) *** ** M/s. Sanghi Textiles Processors Pvt. Ltd. and Ors. (CW 327/907, M/s. Karan Textile Industries Pvt. Ltd. & Ors. (CW 78790), M/s. Dilip Textiles (P) Ltd. & Anr. (CW 2974/90), M/s. Sri Ram Mills & Anr. (CW 2975/90), M/s. Hyderabad Silk Mills Pvt. Ltd. & Anr. (CW 3895/90), M/s. S. Kuman Ltd. and Anr. (CW 1185/91) Vs. Union of India and others.

(3) The duties of excise referred to in sub-section (1) shall be in addition to the duties of excise chargeable on such goods under the Central Excise Act or any other law for the time being in force..

(4) The provisions of the Central Excise Act and the rules there under, including those relating to refunds and exemption from duty, shall, so far as may be, apply in relation to the levy and collection of the duty of excise leviable under this section in respect of any goods as they apply in relation to the levy and collection of the duties of excise on such goods under that Act or rules."

(28) The Supreme Court in that case held that sub-clauses (3) and (4) of section 80 of the Finance Act, 1965, referred to the procedural aspect such as the quantification and collection of the special duty and simply because quantification and collection of the special duty under the Finance Act was to be done in

accordance with the provisions of the Central Excises Act, such duty did not become leviable, that is to say chargeable, under the Central Excises Act. Ranganathan J. however, said that though the wording of section 80(4) of the 1965 Finance Act was identical with that of section 3(3) of the Additional Duties Act and had been interpreted as attracting only the procedural aspect of the Central Excises Act, but in his opinion, while that might have been principle of section 80(4) of the Finance Act, 1965, it would not be correct to draw the same conclusion about the Additional Duties Act. He said section 80(1) of the Finance Act, 1965, fully exhausted the aspect of charge of the special duty and it specified the goods to be taxed and also laid down that special duty was to be a percentage of the normal excise duty chargeable on those goods. He said nothing else remained except the quantification and the collection, but that was not the position before him. He said having regard to the nature and content of the levy indicated in section 3(1) it was obvious that section 3(3) had to have the effect of attracting not only the purely procedural and machinery provisions of the Central Excises Act but also some of its charging provisions. The learned Judge reasoned that the Additional Duties Act could not be worked at least in respect of goods where an ad valorem rate was prescribed unless section 3(1) was read with section 3(3) and the definition of "assessable value" in section 4 of the Central Excises Act was read with the Additional Duties Act. Ranganathan, J. was, Therefore, of the view that the Finance Acts which levied special or regular or additional excise duties contained in themselves all the elements of charge of duty. The goods were mentioned and the duty as to be levied either at a percentage of the normal excise duty payable under the Central Excises Act or at a percentage of the value of the assessable goods as determined under that Act. All that was further needed was the applicability of the procedural provisions of the Central Excises Act. He said "however, the 1957 Act (Additional Duties Act) is incomplete as to the basis of the charge and its provisions would become totally unworkable unless the concepts of "manufacture and "assessable value" as determined under the 1944 Act (Central Excises Act) are carried into it." It was, Therefore, in this context that the learned Judge made observations mentioned in the concluding paragraph of the judgment and quoted above. This, however, does not advance the case of the revenue any further that charge of penalty is spelled out u/s 3(1) or even u/s 3(3) of the Additional Duties Act. We may also notice that Venkatachaliah, J. who delivered the main judgment in the case (M/s. Ujagar Prints) did not say anything on the judgment of the Court in Associated Cement Companies Ltd. Vs. Director of Inspection, Customs and Central Excise, New Delhi, .

(29) In Jain Bros. and Others Vs. The Union of India (UOI) and Others, , the Supreme Court said that penalty was not a continuation of assessment proceedings and penalty partook all the character of the additional tax.

(30) Considering the ratio of the decisions aforesaid we are of the opinion that "there is no provision in the Additional Duties Act which creates a charge in the nature of penalty". We further find that the term levy and collection" in section

3(3) of the Additional Duties Act has a restricted meaning in view of the use of the words "including those relating to refund and exemptions from duty". Otherwise these words were rather unnecessary. In *Orissa Cement Ltd. Vs. State of Orissa and Another*, , the question before the Supreme Court was whether rebate provided in section 13 of the Orissa Sales Tax Act was available to dealers if they paid the tax under the Cst Act before due date of payment. The court said that rebate for payment of tax within the prescribed time under the State Act was *M/s. Sanghi Textiles Processors Pvt. Ltd. and Ors. (CW 327/907, M/s. Karan Textile industries., Pvt Ltd & ors (C.W 787/90), M/s. Dilip Textiles (P) Ltd. & Anr. (CW 2974/90), M/s. Sri Ram Mills & Anr. (CW 2975/.U), M/s. Hyderabad Silk Mills Pvt. Ltd. & Anr. (CW 3895/90), M/s. S. Kumars Ltd. and Anr. (CW 11 85/91) Vs. Union of India and others* available to dealers for payment of tax under the Cst Act on the reasoning that the power to collect the tax assessed in the same manner as the tax on the sale and purchase of goods under the general sales tax law of the State would include within itself all concessions given under the State Act for payment within the prescribed period. The Supreme Court in *Khemka's* case observed respecting this case that the reason why rebate was allowed and penalty was disallowed was that rebate was a concession whereas penalty was an imposition. The concession did not impose liability but penalty did. It, Therefore, stood to reason that rebate was included within the procedural part of collection and enforcement of payment, and penalty like imposition of tax could not be included within the procedural part.

(31) A distinction was sought to be created by the revenue that though there was no charge for penalty for non-payment, late payment or short deposit of the additional duty, but there could be a penalty without there being any sanction for charge thereof if there was contravention of the rules regarding maintenance of records, etc. This distinction, to our mind, does not appear to be based on any sound reasoning. The object of maintenance of records and for doing other acts as per rules is only to collect proper amount of tax and within the prescribed period and the object for levying of penalty for non-payment or late payment, etc., is also the same. Confiscation or forfeiture of property is also a form of penalty. To appropriate the property of the assessed of the value equal to an amount of taxes due from him is one thing but to confiscate his property for contravening certain provision of the Rules is another and partakes the form of penalty. It is not that there are no teeth for levy and collection additional duty of excise under the Additional Duties Act inasmuch as u/s 11 of the Central Excises Act the officer authorised to levy excise duty may "deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate,

shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue." Provisions of Chapter X of Indian Penal Code, especially sections 176 and 177 (Omission to give notice or information to public servant by person legally bound to give it and furnishing false information) falling therein, can also be made use of by the Revenue.

(32) We also do not find any substance in the argument of the revenue that Chapter II of the Central Excises Act deals with levy and collection of duty and all sections under that Chapter would be applicable. This Chapter contains provisions for offences and penalties and all the sections can hardly be said to be related to levy and collection of duty of excise.

(33) Sections 3 to 12 fall under Chapter II. Section 3 deals with the duties to be levied, section 4 valuation of excisable goods for the purposes of charging the duties, section 5 remission of duty on goods found deficient in quantity, section 6 details certain operations which would be subject to license, section 7 deals with form and conditions of license, and section 8 specifies restriction on possession of goods specified in the Second Schedule of the Act. Then section 9 defines various offences and punishment provided. Therefore a bunch of sections 9-A to 9-E provide that the offences would be non-cognisable, how the offences committed by the companies are to be dealt with, power of the court to publish name, place of business, etc., of the persons convicted for offences under the Act, presumption of culpable mental state, relevancy of statements under certain circumstances, and non-application of the provisions of section 562 of the Code of Criminal Procedure and of the provisions of the Probation of Offenders Act, 1958. Then section 10 empowers the court to order forfeiture of certain articles which have been used in the commission of the offence under the Act. Section 11 deals with recovery of sums due to Government. Section 11-A deals with recovery of duties not levied or not paid or short-levied or short-paid or erroneously "refunded, while section 11-B deals with claim for refund of duty, and section 11-C deals with power of the Central Government not to recover duty of excise not levied or short-levied as a result of general practice. Lastly, section 12 authorises the *M/s. Sanghi Textiles Processors Pvt. Ltd. and Ors.* (CW 327/906, *M/s Kanan Textile Industries pvt Ltd & ors.* (CW 787/90, *M/s. Dilip Textiles (P) Ltd. & Anr.* (CW 2974/90), *M/s. Sri Ram Mills & Anr.* (CW 2975/90), *M/s. Hyderabad Silk Mills Pvt. Ltd. & Anr.* (CW 3395/90), *M/s. S. Kumars Ltd. and Anr.* (CW 1185/91) Vs. Union of India and others Central Government to make applicable certain provisions of the Sea Customs Act, 1878 (now the Customs Act, 1962). It is difficult to appreciate how the provisions regarding offences u/s 9 can be said "to form part" of Chapter II dealing with levy and collection of duty. If this argument of the revenue is correct, then there was no occasion for inserting the words "including those relating to refunds and exemptions from duty" in section 3(3) of the Additional Duties Act inasmuch as Chapter II provided for refund of duty. The argument of the revenue now was that these words had been introduced to avoid any misgiving that refund and exemption from duty may not be covered by the expression "levy and collection of duty". If we see the

provisions of the Income- tax Act, 1961, separate chapters, among others, deal with (1) basis of charge, (2) computation of income, (3) collection and recovery of tax, (4) penalties, and (5) offences and prosecution. Chapter II itself does not provide for levy of any penalty which is under Chapter VII (section 37) of the Central Excises Act under the rule making power of the Central Government. When section 9 of the Act talks of offences and penalties, the reference to penalties is the punishment provided when the offence is committed. It is not to civil penalties which consist generally of fine. Moreover, we do not think that "heading of Chapter II itself is the guiding factor and that all sections falling under this Chapter would pertain to levy and collection of additional duty of excise." It has been said that headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections, and that they cannot control the plain words of the statute but they may explain ambiguous words, a rule which, whatever the assistance which it may render in construction, cannot stand logically with the exclusion of marginal notes, for headings like marginal notes are "not voted on or passed by Parliament, but are inserted after the Bill has become law." (see Maxwell on Interpretation of Statutes). But the same general rule which regulates the effect of the preamble, applies also to these headings namely, that they are not to be taken into consideration if the language of the enactment is clear (see Craies on Statute Law). G. P. Singh in his book Principles of Statutory Interpretation noted that the view is now settled that the Headings or Titles prefixed to sections or group of sections can be referred to in construing an Act of the Legislature, but there are conflicting opinions on the question as to what weight should be attached to the heading's. He said one view is that heading is to be regarded as giving the key to the interpretation of the clauses ranged under it, unless the wording is inconsistent with such interpretation; and so the headings might be treated "as preambles to the provisions following them", but the other view is that resort to the heading can only be taken when the enacting words are ambiguous. In Commissioner of Income Tax, Bombay Vs. Ahmedbhai Umarbhai and Co., Bombay, , the court observed that marginal notes cannot be referred to for the purpose of construing the statute and nor can the title of a chapter be legitimately used to restrict the plain terms of an enactment. In Director of Public Prosecutions v. Schildkamp, (1969) 3 All U.R. 1640 , the respondent was prosecuted for an offence u/s 332(3) of the English Companies Act, 1948, falling in Chapter entitled "Offences antecedent to or in the course of Winding Up". The question was whether before a prosecution could be initiated under this section, the company must be in liquidation. By majority judgment the House of Lords held this to be so. A great deal of importance was attached to the heading in the English Companies Act, 1948, though the uncertainty concerned the scope rather than the meaning of the statutory words. It will be interesting to record the reasoning of various Lords on the use of cross-headings: Per Lord Reid :

"So if the authorities are equivocal and one is free to deal with the whole matter I would not object to taking all these matters into account provided that we realise

that they cannot have equal weight with the words of the Act. Punctuation can be of some assistance in construction. A cross-heading ought to indicate the scope of the sections which follow it but there is always a possibility that the scope of one of these sections may have beenby amendment. But a sidenote is a poor guide to the scope of a section for it can do no more than indicate the main subject with which the section deals."

Per Lord Hudson:

"I have mentioned these matters, although there are no cross-headings in the Act of 1928 whereas the M/s. Sanghi Textiles Processors. Pvt. Ltd. and Ors (CW 327/907), M/s Karan Textile Industries Pvt Ltd & ors - (CW 787/90), M/s. Dilip Textiles (P) Ltd. & Anr. (CW 2974/90), M/s. Sri Ram Mills & Anr. (CW 2975/90), M/s. Hyderabad Silk Mills Pvt. Ltd. & Anr. (CW 3895/90), M/s. S. Kumars Ltd. and Anr. (CW 1185/91) Vs. Union of India and others corresponding section of the Act of 1948, s. 332, appears under the cross-heading "Offences antecedent to or in the course of Winding Up". The construction of the relevant section ought not to be governed ultimately by considerations of cross- headings, even though some attention may be paid to them."

"I have not entered more fully into the subject of cross-headings on which various conflicting opinions have been expressed from time to time since the question does not arise for consideration on this appeal. I am impressed by the consideration that they are not part of the enacted words in a piece of legislation but are added by the officers of the House of Parliament before they reach the form embodied in the King's Printer's copy. I would not Therefore give them a controlling effect."

Per Viscount Dilhorne :

"SIMILARLY,in my view, the title given to a Part of an Act and the cross-heading to a modern Act. which are inserted by the draftsman and riot "subject to amendment by the members of either House, are no more than guides to the contents of the part or of the sections which follow. They are not meant to control the operation of the enacting words and it would be wrong to permit them to do so."

Per Lord Upjohn :

"MYLords, in this somewhat fluctuating state of the authorities what role do cross-headings play to the construction of the Act? In my opinion, it is wrong to confine their role to the resolution of ambiguities in the body of the Act When the court construing the Act is reading it through to understand it, it must read the cross-headings at well as the body of the Act and that will always be a useful pointer as to the intention of Parliament in enacting the immediately following sections. Whether the cross-heading is no more than a pointer or label or is helpful in assisting to construe or even in some cases to control the meaning or ambit of those sections must necessarily depend , on the circumstances of each case, and

I do not think it is possible to lay down any rules."

(34) We are, thus, of the opinion that "the argument that various sections falling in Chapter II of the Central Excises Act which has the heading "Levy and collection" would all be construed as provisions for levy and collection of additional duty as well, is of no avail to the revenue and we reject this argument. In fact, as noted above, Chapter II contains no provision for levy of penalty.

(35) When penalty is additional tax, constitutional mandate requires a clear authority of law for imposition thereof. If long drawn arguments are needed to explain the Act by referential legislation, or legislation by incorporation levies penalty or not, it is better for the court to lean in favor of the tax payer. There is no room for presumption in such a case. The mere fact that all these years the Additional Duty Act has not been challenged on this ground is of no consequence if authority of law as mandated by the Constitution is lacking. We may also note in the passing that it was submitted before us that penalty so realised earlier has never been distributed among the States as part of act proceeds of the collection of the additional duties of excise under the Additional Duties Act. This statement, made at the Bar was not challenged. Since, however, this point was not raised in the writ petition and the revenue had no opportunity to reply in its counter-affidavit, we leave the matter at that, Levy of penalty which is an additional tax has to be under the authority of law which should be clear, specific and explicit.

(36) In *Dr Partap Singh and Another Vs. Director of Enforcement, Foreign Exchange Regulation Act and Others*, , with reference to (the expression "so far as may be", the Supreme Court said that the expression had always been construed to mean that those provisions may be generally followed to the extent possible and it is not that those provisions have been incorporated by pen and ink (like in section 3(3) of the Additional Duties Act). This expression. Therefore, negatives any plea that the whole of the provisions of *M/s. Sanghi Textiles Processors Pvt. Ltd. and Ors.* (CW 327/907), *Karan Eextile Industries Pvt. Ltd. & ors.* (CW, 787/90), *M/s. Dilip Textile. (P) Ltd. & Anr.* (CW 2074/90) *M/s. Sri Ram Mills & Anr.* (CW 2975/90), *M/s. Hyderabad Silk Mills Pvt. Ltd. & Anr.* (CW 3895/90), *M/s. S. Kumars Ltd. and Anr.* (CW 1185(91) *Vs. Union of India and others* the Central Excises Act have been incorporated by virtue of section 3(3) of the Additional Duties Act. We have already held that the term "levy and collect on has restricted meaning and inclusive provisions have been made only in relation to the refunds and exemptions, it cannot be interpreted to cover penalty and offences as well. In *Statutory Interpretation* by F A. R. Bennion (1984 Edition), it is said "where it is doubtful whether a stated term does or does not include a certain class. and words of extension are added which cover some only of the members of the class, it is implied that the remaining members of the class are excluded" (*Expressio unius principle: words of extension*). Again we have also referred to certain enactments wherein provisions of another enactment has been specifically borrowed in their entirety, and also the enactments where though the terminology used is the same as used in section

3(3) of the Additional Duties Act, yet separate provisions have been made for levy of penalties. The Supreme Court has construed the expression "levy" and "collection" in National Tobacco Company's case which would show that levy refers to imposition of tax as well as assessment and that the term "imposition" is generally used for levy of a tax or duty by the legislative provision, and further collection is equated to the recovery of the tax or duty imposed and assessed. Collection is stage subsequent to levy. In the absence of any provision for levy of tax or duty, the process of collection itself cannot create a levy and more so penalties. A statute must be regarded as penal for purposes of construction if it imposes a fine, penalty or forfeiture other than a penalty in the nature of liquidated damages, or other penalties which are in the nature of civil remedies (para 909, Halsbury Laws of England, Vol. 44, 4th Edition). As a general rule penalty enactments are to be construed strictly. That stage, however, does not arise in the present case. But a penal liability cannot be created by implication or intendment. We have already observed that provision levying penalty must be explicit.

(37) We have given our considerable thought to various arguments raised by the parties. We find there is no mandate in the Additional Duties Act for levy of penalty and the Central Excises Act and the Rules made there under cannot be imported in the Additional Duties Act for the purpose of levy of penalty. We have spent anxious moments as the interpretation we have put has grave consequences for the revenue as similar terminology as used in section 3(3) of the Additional Duties Act has been used in various Finance Acts and other enactments, but then Article 265 of the Constitution mandates that no tax shall be levied and collected except by authority of law. There being no such authority of law to levy penalty, we have to hold 80.

(38) Accordingly, these petitions are allowed to the extent that show cause notices calling upon the petitioners to show cause as to why (a) the plant, machinery, land and building utilised in the manufacture, etc. of the fabrics" as aforesaid should not be confiscated to Government under Rule 1730(2) of Central Excise Rules, 1944, and (b) penalties should not be imposed on them under Rules 9(2) and 1730 of the Central Excise Rules, 1944, are set aside. A writ of prohibition is issued to the respondents restraining them from proceeding under the show cause notices for the purpose of confiscation and penalties as aforesaid. To this extent rule is made absolute. Parties shall bear their own costs.