

(1990) 12 GUJ CK 0031

In the Gujarat High Court

Case No : Special Civil Application No. 2438 of 1978

Saurashtra Cement and Chemical Industries Ltd.

APPELLANT

Vs

U.O.I.

RESPONDENT

Date of Decision : 12-12-1990

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 57

Central Excises and Salt Act, 1944 — Section 11A, 12, 3, 37, 37(1)

Citation : (1991) 55 ELT 467

Hon'ble Judges : M.S. Parikh, J; M.B. Shah, J

Bench : Division Bench

Advocate : S.I. Nanavati, for the Appellant; B.B. Naik, for the Respondent

Judgement

Shah, J.—Petitioner, Saurashtra Cement and Chemical Industries Ltd., is engaged in the business of manufacturing portland cement which was controlled commodity at the relevant time. The dispute in the present petition is for the period from 1-10-75 to 22-12-75 with regard to the packing material i.e. gunny bags.

2. It is the contention of the petitioner that u/s 4(4)(d)(i) of the Central Excises and Salt Act, 1944, for determining the value of the excisable goods, the value of the gunny bags which are used as packing material is required to be excluded as the packing material (gunny bags) is of durable nature and is returnable by the buyer to the assessee. Under the Cement Control Order, 1967, the Central Government fixed the price at which the producers were required to sell the cement, including the price of gunny bags.

3. The learned counsel for the petitioner has not disputed the fact that gunny bags were used as primary packing material for cement. However, it is sought to be contended that even though gunny bag is primary packing material, as it is of a durable nature and is returnable by the buyer to the assessee, its cost is required to be excluded while determining the value of excisable goods as provided u/s 4(4)(d)(i) of the Central Excises and Salt Act, 1944, hereinafter

referred to as the "Central Excise Act".

4. In this case, the Superintendent of Central Excise, Porbandar had issued a show cause notice dated 19-1-76 (Annexure H) under Rule 10 of the Central Excise Rules, 1944, hereinafter referred to as the "Rules". By that notice the petitioner was called upon to show cause why it should not be required to pay the amount mentioned in the show cause notice, on the ground that the petitioner has cleared the cement during the period from 1-10-1975 to 29-12-1975 at the rate of Rs. 211.00 P.M.T. (RC) and Rs. 201.00 P.M.T. (RC) excluding packing charges on cement as fixed, by Cement Controller. It has been further stated that price list submitted was incorrect inasmuch as it was not inclusive of packing charges. It was pointed out that the rate of value inclusive of packing charges was Rs. 251.98 P.M.T. (RC) and Rs. 241.93 P.M.T. (RC). The demand was as per the detailed work-sheet which was attached with the show cause notice. The petitioner filed reply to the said show cause notice, stating that packing material used by the cement companies is returned by the buyer and is used again and again. Therefore, it was prayed that the demand of excise duty of Rs. 15,02,721.00 was not justifiable. Thereafter, the Assistant Collector of Central Excise, Bhavnagar, passed an order dated 7-8-76 confirming the demand. That order was set aside by the Appellate Collector, Customs and Central Excise, Bombay in appeal No. II-729/76 vide the order Annexure "L" to the petition. The Appellate Collector directed the Assistant Collector to start de novo proceedings. Thereafter, the Assistant Collector, Central Excise, Bhavnagar, passed an order dated 18-10-1978 under Rule 10 of the Rules and confirmed the demand for recovery of differential duty of excise amounting to Rs. 15,02,721/-.

5. Against that order, the petitioner has preferred this petition. At the time of admission the Court has passed the following interim order on 15-12-1978.

"Interim relief in terms of para 25(e) on condition that the petitioners furnish Bank guarantee to the satisfaction of respondents within one month from today for the sum of Rs. 15,02,721.19 paise with interest at 12 per cent. per annum till the date of payment. Mr. Vakharia for the respondents is informed that in the event of petitioners succeeding in this petition, the Bank guarantee charges paid by the petitioners may have to be paid by respondent.

6. The short question involved in this petition is whether the cost of gunny bags (packing material) is required to be included or excluded while determining the value of the cement bags as required u/s 4(4)(d)(i) of the Central Excise Act. The relevant part of Sections 4(1)(a) and 4(4)(a) & (d)(i) of the Central Excise Act reads as under :

4. Valuation of excisable goods for purposes of charging of duty of excise. - (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section, be deemed to be -

(a) the normal price thereof, that is to say, the price at which such goods are

ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal where the buyer is not a related person and the price is the sole consideration for the sale :

Provided that -

(i) xx xx xx

(ii) Where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum fixed under any such law, then, notwithstanding anything contained in Clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall in relation to the goods so sold, deemed to be the normal price thereof;

(iii) xx xx xx

(b) xx xx xx

(2) xx xx xx

(3) xx xx xx

(4) for the purposes of this section, -

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) xx xx xx

(c) xx xx xx

(d) "value", in relation to say excisable goods,

(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature had is returnable by the buyer to the assessee. Explanation. - In this sub-clause, "packing" means the wrapper, container, bobbin, pirn, spool, reel wrap beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;

(ii) xx xx xx

7. From the aforesaid section, it is clear that for fixing the value of the excisable goods, normal price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a reached person and the price is the sole consideration for the sale, is to be taken into consideration. The proviso to sub-section (1)(e) of Section 4 carve out certain exceptions with which we are not concerned in this petition. According to proviso (ii) the goods where price is fixed under any law for the time being in force, the price or the maximum price fixed in relation to the goods is deemed to be the normal price thereof. Value in

relation to any excisable goods is defined to include the cost of packing if the goods are delivered in a packed condition. However, the exception provides that the cost of packing which is of a durable nature and is returnable by the buyer to the assessee is not to be included. Admittedly the cement could only be sold in packed condition. Primary packing material is gunny bags and the cement is made marketable for ordinary consumer or in the wholesale market when it is packed in gunny bags. Hence cost of gunny bags is required to be included in the value of the article for the purpose of excise duty.

8. The next question, therefore, would be whether the cost of gunny bags is required to be excluded in view exception to sub-section 4(4)(d)(i). For getting benefit of this sub-section, the assessee must satisfy these conditions, namely, (i) packing material is of durable nature and is returnable; (ii) there is agreement between the assessee and the buyer for the return of such packing material (gunny bags); and (iii) the cost of such packing material is either not included in the price or it is required to be refunded to the buyer on the return of packing material.

9. This sub-section is considered by the Supreme Court in the case of K. Radha Krishnaiah Vs. Inspector of Central Excise and Others, . The Supreme Court held that is required for the purpose of attracting the applicability of the exclusion clause in Section 4(4)(d)(i) is that the packing must be returnable by the buyer to the assessee. The question, which has to be asked in each case is : Is the packing in this case returnable by the buyer to the assessee and obviously it cannot be said that the packing is returnable by the buyer to the assessee there is an arrangement between them that it shall be returned. The relevant observations are as under :

"The only question which arises in this SLP is as to what is true meaning and scope of the word "returnable" in Section 4(4)(d)(i) of the Central Excise and Salt Act, 1944. If the packing is durable and returnable, then its cost is liable to be excluded in computation of the assessable value of the goods for the purpose of excise duty. So far as the question of durability is concerned, there cannot be such controversy about it, but a question has been raised as to what is the meaning and connotation of the word "returnable". Does it mean physically capable of being returned or does it postulate an arrangement under which the packing is returnable. While interpreting this word, we must bear in mind that what Section 4(4)(d)(i) excludes from computation is cost of packing which is of a durable nature and is "returnable by the buyer to the assessee". The packing must be one which is returnable by the buyer to the assessee and obviously that must be under an arrangement between the buyer and the assessee. It is not the physical capability of the packing to be returned which is the determining factor because, in the event, the words "by the buyer to the assessee" need not have found a place in the section, they would be superfluous. What is required for the purpose of attracting the applicability of the exclusion clause in Section 4(4)(d)(i) is that the packing must be returnable by the buyer to the assessee. The

question which has to be asked in each case is : Is the packing in this case returnable by the buyer to the assessee and obviously it cannot be said that the packing is returnable by the buyer to the assessee unless there is no arrangement between them that it shall be returned. Here, in the present case, it is not the contention of the petitioner that there was any such arrangement for return of the packing by the wholesale buyers to the petitioner nor is there any evidence to that effect. The excise authorities were, therefore, right in not excluding the cost of packing the determination of the assessable value of the goods. The SLP will, therefore, stand rejected."

10. In the present case also it is not the contention of the petitioner that there was any such arrangement for return of gunny bags by the wholesale dealers or authorised dealers to the petitioner, nor the petitioner has produced any evidence to that effect before the Assistant Collector. Therefore, the petitioner is not entitled to get the benefit of the exception.

11. Further, it may be noted that u/s 4 of the Central Excise Act, inter alia, where the levy of excise duty upon manufactured goods is ad valorem, assessable value is deemed to be the normal price thereof. We doubt, this is subject to the provisos which are mentioned under sub-section (1)(a) of Section 4. In the present case, it is an admitted fact that the price of cement is fixed by the Government along with the price of gunny bags. That means, the price was the maximum price fixed by the law for the time being in force which included the price of packing material and would be the assessable value for the purposes of determining ad valorem excise duty. It is nobody's case that the cost of the gunny bags which are used for packing the cement is entirely refundable by the manufacturer or the assessee. It is an admitted fact that as per the Cement Control Order the maximum price fixed for sale in the course of wholesale trade is fixed and it includes price of packing material. This would be clear from Annexure B to the petition. There is nothing on the record to the effect that second-hand unserviceable bags were returned to the petitioner and that he had refunded the cost of the said bags and what was the price of the second-hand serviceable bags which were returned. Merely from the fact that the cement bags could be returned by the buyer or that the assessee was required to re-purchase the said gunny bags at some fixed cost, which admittedly was less than the cost of the gunny bags, which was included in the price fixed by the authority, it cannot be said that the entire cost of packing was required to be excluded for determining the value. As there is no material on the record of this case or no material is produced by the petitioner before the Assistant Collector, the contention raised by the learned advocate for the petitioner requires to be rejected.

12. However, learned advocate Mr. Nanavati relied upon the decision of Madhya Pradesh High Court in the case of Birla Jute Manufacturing Company Limited Vs. Union of India (UOI) and Others, . The Court has held that price fixation under the Cement Control Order proceeds on the assumption the cement will be packed

in old and new bags in the ratio of 50 : 50 and that the bags will be collected by the cement factories through their bag-collecting agents from the purchasers on payment of price mentioned therein. The authorisation issued by the Cement Controller for sale and purchase of Cement also directs the purchasers to preserve the empty cement bags in serviceable condition and to return them to the factory of its origin or to the collecting agents. The Court has further held that under these directions, the purchasers have the right to return the bags in serviceable condition to the factories directly or through their collecting agents to get refund or adjustment of the packing charges or payment of the value of the packing returned. The Court, therefore, arrived at the conclusion that all that is necessary is to show that the packing is returnable by the buyer to the assessee under the terms of sale. The Court specifically arrived at the conclusion that what was necessary was to show that the packing was returnable by the buyer to the assessee under the terms of sale. This means that if there is an agreement between the assessee and the buyer that buyer was entitled to return the packing material and get refund of the cost of packing material, then that cost is required to be excluded for the purpose of Section 4(4)(d)(i) of the Act. However, the Court has held that the practice of the factories to appoint collecting agents for collection of bags is only a convenient mode of giving effect of the term that packing is returnable. It seems that the Court omitted to consider the material ingredient of Section 4(4)(d)(i) that there must be some agreement between the assessee and the buyer that packing material was returnable by the buyer to the assessee. In any case, in the present case, the petitioner has failed to produce any agreement between it and the wholesale dealers/authorised dealers or buyers.

13. The aforesaid judgment of the Madhya Pradesh High Court is followed by Andhra Pradesh High Court in the case of Kesoram Cements, Basantnagar v. Union of India & Ors., 1982 (9) ELT 214 and by the Karnataka High Court in the case of Mysore Cements Ltd. Vs. Union of India, . The Karnataka High Court has relied upon the material, which was produced on the record, and arrived at a conclusion that cement is a controlled commodity and the sale of cement was fully controlled by various orders and directions issued by the Cement Controller. The Cement Controller has fixed the packing charges separately and a specific provision was made in Annexure "A" to the effect that the manufacturers should purchase empty bags at the rates specified by the Cement Controller. There were further documents on the record to show arrangement that purchaser should return the empty bags to the petitioner. The Court, therefore, held that there was a statutory condition which constituted an arrangement between the seller and the purchaser of portland cement to the effect that the gunny bags were returnable. In the present case, there is no such material on record.

14. However, at this page, after the lapse 12 years, Mr. Nanavati, learned advocate appearing on behalf of the petitioner, has filed an application for allowing him to produce on record the authorisation order issued by the Cement Controller 7-11-75 whereby Project Officer, Holiday Inn, Bombay, was directed to

purchase from the petitioner-factory 200 tons of portland cement. On the reverse of the said order it is mentioned that "please preserve empty cement bags in serviceable condition and return them to the factory of origin or his collecting agent on payment". Considering the fact that no such material was produced before the Assistant Collector, Central Excise, Bhavnagar, we reject this Civil Application No. 1986 of 1990 for permitting the petitioner to amend the petition at this belated stage by adding certain documents.

15. In any set of circumstances from the aforesaid order which is sought to be reproduced on record, it cannot be inferred that the petitioner had agreed to return the cost of gunny bags to the buyer. It is an admitted fact that the price of cement and gunny bags is fixed by statutory order. The said order nowhere provides that cost of gunny bags would be returned to the buyer if the gunny bags are returned by the buyer to the petitioner. Along with the cement its packing material i.e. gunny bags are sold to the buyer and for that price is fixed under the statutory order. Therefore, u/s 4(1)(a) read with second proviso price fixed under law for the time being in force is to be taken into consideration. It would include the cost of packing material as provided u/s 4(4)(d)(i) of the Act. It is not the case of the petitioner that cement could be sold without gunny bags. In our view, exception to Section 4(4)(d)(i) would be applicable only when there has been a sale of packed material and a separate price is charged for the cost of durable and returnable packing and there is an agreement or arrangement between the parties for return of the said packing material and refund of its cost. The purpose of Section 4(4)(d)(i) by which cost of packing material is required to be included in value for determining excise duty, would be otherwise frustrated by a simple device of agreement that packing material as may be returned to the assessee, say by refund of nominal amount or without refunding any amount. While determining the value in relation to any excisable goods the Legislature has provided that cost of packing is required to be included if the goods are delivered at the time of removal in packed condition. By exception the cost of packing would not be included if it is required to be refunded to the buyer if the packing material is of a durable nature and is returnable by the buyer to the assessee.

16. At the time of hearing of this matter, the learned advocate for the petitioner has also filed Civil Application No. 1883 of 1990 for amending the petition by adding the ground that as Rule 10 of the Central Excise Rules, 1944 was amended with effect from 6-8-1977 and as there is no saving clause, the proceedings initiated under the old Rule 10 would come to an end. For this submission reliance is placed on the judgments rendered by this Court in the case of Mehendra Mills Ltd. Vs. Union of India, , and in the case of Amit Processors Pvt. Ltd. Vs. Union of India and Others, . As this Civil Application is based only to add the ground of law, we grant this Civil Application.

17. With regard to this contention, learned advocate Mr. Naik appearing on behalf of the respondents, vehemently submitted that the decisions rendered by this

Court in the case of Mahendra Mills (supra) and in the case of Amit Processors Pvt. Ltd. (supra) are not followed by this Court in the case of Torrent Laboratories Pvt. Ltd. Vs. Union of India, .

18. In the case of Amit Processors Pvt. Ltd. (supra) show cause notice under Rule 10 of the Central Excise Rules was issued on 1-8-1979. No action was taken as per the said notice upto June 1984. Rule 10 was omitted with effect from 17-11-1980. Thereafter, Assistant Collector, Central Excise passed an order on 29-6-1984. The question was whether the Assistant Collector could have taken action in pursuance of the show cause notice dated 1-8-1978 when no enabling provision was made, saving actions already initiated under Rule 10. The Court relied upon the decision of the Supreme Court in the case of M/s. Rayala Corporation (P.) Ltd. v. The Director of Enforcement, AIR 1970 S.C. 494, and arrived at a conclusion that as there was no saving clause, proceedings could not be completed; nor it could be continued u/s 11A of the Act, which was substantially same as Rule 10. The Court further held that there was omission of Rule 10 and as it is not a provision of Central Act or Regulation, Section 6 of the General Clauses Act cannot be pressed into service. The Court, therefore, set aside the order dated 29-6-1984 passed by the Assistant Collector by holding that it was without any authority of law.

19. The aforesaid judgment is followed in the case of Mahendra Mills (supra). In that case also the Division Bench of this Court held that show cause notices issued under Rule 10 or 10A could not have been legally processed further and could not have validly resulted in adjudication after 17-11-1980, as by that date, new Rule 10 itself was omitted from the rules, even though with effect from that date, Section 11A was added in the Act. The Court held that because there was no saving clause, the proceedings pending on 17-11-1980 under omitted Rule 10 automatically lapsed. The Court relied upon the decision in the case of Amit Processors Pvt. Ltd. and the decision in the case of M/s. Rayala Corporation (P.) Ltd. and held that Section 6 of the General Clauses Act cannot apply to cases of omissions of Rules. The Court further arrived at the conclusion that Rules 10 and 10A which were existing prior to 6-8-1977 were omitted and new Rule 10 was substituted and as there was no saving clause of Rule 10 or 10A, the authorities were not competent to adjudicate upon the show cause notice issued under Rule 10 prior to 6-8-1977. The Court arrived at the conclusion that the decision of the Delhi High Court in the case of Kolhapur Cane Sugar Works Ltd. and another Vs. Union of India and others, , ran counter to the ratio of the decision of the Division Bench of this Court in the case of Amit Processors Pvt. Ltd. (supra). It further held that even otherwise the view taken by the Delhi High Court on the applicability of Section 6 of the General Clauses Act ran counter to the view taken by the Constitution Bench of the Supreme Court in the case of M/s. Rayala Corporation (P.) Ltd. v. The Director of Enforcement, AIR 1970 S.C. 494.

20. In the case of Torrent Laboratories Pvt. Ltd. Vs. Union of India, , the Division Bench of this Court considered the decisions in the case of Amit Processors Pvt.

Ltd. (supra) and the decision in the case of Mahendra Mills (supra) and observed as under :

"These two decisions are of no help to the petitioners for the following reasons :

(1) Both the aforesaid decisions, in the case of Mahendra Mills Ltd., and Amit Processors Pvt. Ltd., rendered by two different Division Benches of this High Court, have followed the decision of the Supreme Court in the case of Royala Corporation Pvt. Ltd., (supra). For the reasons stated hereinabove the decision of the Supreme Court in the case of Royala Corporation (supra) is not applicable to the facts and circumstances of the cases on hand. For the same reasons, these two decisions of this High Court are also not relevant and not applicable to the facts and circumstances of the cases on hand. These decisions cannot be treated as precedent for deciding the question as to what is the effect of partial amendment of Rule 57-I of the Rules.

(2) In the instant case, the Court is concerned with the amendment of the Rules and not with the repeal of the Rules. These two Rules (Rules 10 and 10A) were repealed entirely with effect from November 16, 1980 and it was not the case of amendment of part of a rule.

(3) The Court is not to consider the effect of repeal of Rules 10 and 10A of the Rules. The Court is concerned with the effect of amendment of part of Rule 57-I brought in operation from October 6, 1988. Thus the provision which came up for consideration before two different Division Benches of this High Court was altogether different.

(4) There is difference between amendment of rule and repeal of rule or for that matter amendment of any provision of statute and repeal of statute. The contention that there is no difference between amendment and repeal cannot be accepted. The decision of the Supreme Court in the case of Bhagat Ram Sharma Vs. Union of India (UOI) and Others, does not lay down the principle that there is no difference between amendment and repeal. Head Note "C of the report, if read in isolation and out of context, is misleading. But reading the entire decision and particularly paragraphs 17, 18 and 19 of the report it becomes clear that howsoever fine the distinction may be, but there is distinction between amendment of a statute and repeal of a statute. As observed by the Supreme Court itself in Bhagat Ram's case (supra), the amendment is a wider term and includes abrogation or deletion of provision in an existing statute. Amendment of a statute may be by way of addition alone and there may not be deletion of a single letter of the provision in question. In such cases amendment and repeal can never be the same.

(5) As indicated hereinabove, the goal of inquiry is to find out the intention of the legislature in bringing about the change in the law. The goal of the inquiry is not to find out as to whether a particular provision of General Clauses Act, 1897 would be applicable or not. The course we are adopting is in conformity with the principles laid down in the decision of the Supreme Court in the case of State of

Punjab Vs. Mohar Singh, , and reiterated in the case of State of Orissa Vs. M.A. Tulloch and Co., , and again in the case of M.S. Shivananda Vs. Karnataka State Road Transport Corporation and Others, .

For the aforesaid reasons, the decisions rendered by this High Court in the case of Mahendra Mills (supra) and Amit Processors (supra) are of no help to the petitioners and they are not required to be gone into in further details. In fairness to the learned Counsels appearing for the petitioners it must be stated that during the course of dictation of the judgment Mr. Paresh M. Dave who was present on behalf of Mr. Kamal P. Trivedi for M/s. Trivedi, Gupta & Dave fairly stated that we need not go into the correctness or otherwise of the decisions of this High Court in the case of Mahendra Mills (supra) and in the case of Amit Processors (supra). In view of this concession we do not elaborate our reasons for not following the aforesaid two decisions. However, we may make it clear that we have reservations about the correctness of these two decisions, and we prima facie feel that the relevant decisions of the Supreme Court on the point were not brought to the notice of this Court."

In view of the aforesaid observations made by the Division Bench of this Court, it is apparent that the Court has not followed the aforesaid two decisions but as there was concession from the learned counsel appearing for the petitioners, the point was not pursued further.

21. With great respect, it is difficult for us also to agree with the view taken in the aforesaid two decisions, namely, Amit Processors and Mahendra Mills for the following reasons in short :

(1) The aforesaid two cases are decided on the basis of the Supreme Court judgment in the case of Royala Corporation Pvt. Ltd. (supra) where in the Supreme Court was only required to deal with the effect of repeal of statute i.e. the Defence of India Rules, 1962 which were in force for temporary period. That decision would have no bearing because -

(a) Rules 10 and 10A or substituted Rule 10 for the aforesaid two rules after 6-8-1977 are of permanent nature. It cannot be said by any stretch of imagination that they are part of temporary statute.

(b) There is no question of repeal because Rules 10, 10A and 11 were substituted by Notification dated 6-8-1977 by Rule 10. Clause 4 of the said Notification, specifically states that for Rules 10, 10A and 11 of the said rules, the following rule shall be substituted - namely Rule 10. Thereafter Rule 10 is omitted because of the introduction of Section 11A in the Central Excise Act with effect from 17-11-1980 by Notification dated 12-11-1980.

(c) Even in the case of Rayala Corporation Pvt. Ltd. (supra) it is not held that the proceedings which are initiated would come to an end as soon as rules are repealed. This would be clear from the following observations :

"The argument of Mr. Sen was that, even if there was a contravention of Rule

132A(2) by the accused when that Rule was in force, the act of contravention cannot be held to be a "thing done or omitted to be done under that rule", so that, after that rule has been omitted, no prosecution in respect of that contravention can be instituted. He conceded the possibility that, if a prosecution had already been started while Rule 132A was in force, that prosecution might have been competently continued. Once the Rule was omitted altogether, no new proceeding by way of prosecution could be initiated even though it might be in respect of an offence committed earlier during the period that the rule was in force. We are inclined to agree with the submission of Mr. Sen that the language contained in Clause 2 of the Defence of India (Amendment) Rules, 1965 can only afford protection to action already taken while the rule was in force, but cannot justify initiation of a new proceeding which will not be a thing done or omitted to be done under the rule but a new act of initiating a proceeding after the rule had ceased to exist."

(d) Even with regard to the temporary statute, rights and liabilities created under the repealed statute are not ipso facto terminated. The accrued rights and liabilities are saved unless they are expressly extinguished or the Amending Act specifically provides to that effect. Liability to pay duty of excise arises immediately when excisable goods are removed.

(2) Rules 10 and 10A or substituted Rule 10 were statutory rules and were for all the purposes law or part and parcel of the statute.

22. For the proposition that Rules 10 & 10A or the substituted Rule 10 were statutory rules which were for all the purposes law or part and parcel of the statute, it would be proper to refer to the decision of the Supreme Court in the case of T.B. Ibrahim Vs. Regional Transport Authority, Tanjore, . In that case the Court was required to consider the provisions of Rule 268 of the Motor Vehicles Rules 1940 which were framed u/s 68 of the Motor Vehicles Act, 1939. The Supreme Court has held that bye-laws and the rules made under a rule-making power conferred by a statute do not stand on the same footing. As such, rules are part and parcel of statute itself.

23. Similarly, in the case of The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya, , the Supreme Court has held that rules made under the statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act and are to be judicially noticed for all purposes of construction or obligation. For this proposition, reliance was placed upon Maxwell "On the Interpretation of Statutes", 10th edn., pp. 50-51. After discussion of a number of judgments, the Court held that the decisions which were referred could not be understood to mark a radical departure from the fundamental principle of construction that rules made under a statute must be treated as exactly as if they were in the Act and are of the same effect as if contained in the Act.

24. The Central Excise Rules, 1944 are framed in exercise of powers conferred by

Sections 6, 12 and 37 of the Central Excise Act. Section 3 provides that duties of excise shall be levied and collected in such a manner as may be prescribed. Section 37(1) of the Act empowers the Central Government to make rules to carry into effect the purposes of the Act. Sub-section (2) inter alia provides for making rules for ascertaining equivalent of normal price, for providing for assessment and collection of duties of excise or remission of duty of excise, for transit of excisable goods or for removal of excisable goods or for regulating the production or manufacturing, or any process of the production or manufacture, the possession, storage and sale of salt and such other things. Sub-section (3) of Section 37 of the Act also empowers the rule-making authority to provide for penalty in cases where no other penalty is provided under the Act. Sub-section (5) of Section 37 of the Act also provides for making rules for imposing penalty as stated in the said sub-section. u/s 38 all rules made and notifications issued under the Act are required to be published in the Official Gazette. Every rule made under the Act is required to be laid before each House of Parliament. For carrying out the aforesaid purposes rules are framed. The rules inter alia provide for assessment and collection of duties of excise and the manner of collection of duties of excise, its refund, procedure for removal of excisable goods, licence and the powers of the concerned officers. These rules are part and parcel of the statutes. Further, the Central Excise Act and Rules are of permanent nature.

25. In the case of R.C. Jall Vs. Union of India (UOI), , a similar contention was dealt with by the Supreme Court. In that case, under Ordinance No. 39 of 1944 the Central Government was authorized to levy and collect as a cess on all coal and coke dispatched from collieries in British India a duty of excise at such rate, not exceeding Rs. 1-4-0 per ton. In exercise of the power conferred on the Central Government u/s 5 of the Ordinance, the Government made rules. Rule 3 provides that the duty of excise imposed under the Ordinance on coal and coke shall, when such coal and coke is dispatched by rail from collieries or coke plants, be collected by the Railway Administration by means of a surcharge on freight. The first defendant of that case duty paid the freight and took the delivery of the coal. But by some mistake the cess payable as surcharge on the three consignments was not recovered from the first defendant at the time of delivery of the goods. Thereafter, on 15th April, 1953, the Union of India filed Civil Suit No. 126 of 1953 for recovery of the said cess. Ordinance 39 of 1944 was repealed with effect from 1st May, 1947. It provided in express terms that provisions of Section 6 of the General Clauses Act, 1897 shall apply in respect of the repeal. The Court dealt with the effect of the repeal and held that without the said express provision, Section 6 read with Section 30 of the General Clauses Act might have achieved the said result, but ex-abundanti cautela and to place the matter beyond any controversy, Section 6 of the General Clauses Act was expressly made applicable to the repeal. The Court further held that u/s 6 of the General Clauses Act, so far it is material to the present case, the repeal did not affect the right of the railway to recover the freight or the liability of the

defendants to pay the same, and the remedy in respect of the said right and liability. The Court further held that the result was that Ordinance 39 of 1944 and the rules made thereunder must be held to continue to be in force in respect of the said right and liability, accrued or incurred before the said Ordinance was repealed, and the remedies available thereunder. The relevant discussion runs as under :

"On August 26, 1944, the Governor-General of India, in exercise of the powers vested in him u/s 72 of the Ninth Schedule to the Government of India Act, 1935, read with India & Burma (Emergency Provisions) Act, 1940, promulgated the Coal Production Fund Ordinance 1944 (39 of 1944) to constitute a fund for the financing of activities for the improvement of production, marketing and distribution of coal and coke. This Court in *Hansraj Moolji Vs. The State of Bombay*, held that the decision of the words for the space of not more than six months from its promulgation from Section 72 of the 9th Schedule of the Government of India Act, 1935, by Section 1(3) of the India and Burma (Emergency Provisions) Act, 1940 had the effect of equating Ordinance which were promulgated between June 27, 1940, and April 1, 1946 with Acts passed by the Indian Legislature without any limitation of time as regards their duration and therefore continuing in force until they were repealed. It follows from this decision that the Ordinance promulgated on August 26, 1944, was a permanent one and would continue to be in force till it was repealed. The second Ordinance, that is, the repealing Ordinance, was promulgated on April 26, 1947, and the repeal took effect from May 1, 1947. But in express terms it declared that the provisions of S. 6 of the General Clauses Act, 1897 (X of 1897) shall apply in respect of the repeal. Without the said express provision, Section 6 read with Section 30 of the General Clauses Act, might have achieved the said result, but *ex abundanti cautela* and to place the matter beyond any controversy, S. 6 of the General Clauses Act was expressly made applicable to the repeal. Under S. 6 of the General Clauses Act, so far it is material to the present case, the repeal did not affect the right of the railway to recover the freight or the liability of the defendants to pay the same, and the remedy in respect of the said right and liability. The result was that Ordinance 39 of 1944 and the rules made thereunder must be held to continue to be in force in respect of the said right and liability, accrued or incurred before the said Ordinance was repealed and the remedies available thereunder. But the life of the repealing Ordinance had expired on November 1, 1947. What was the effect of the expiry of the repealing Ordinance on the said liability continued after repeal in respect of past transactions ? The repealing Ordinance, being a temporary one, expired after it fulfilled its purpose. As it had continued the life of the original Ordinance, which was a permanent one, in respect of past transactions, the expiry of its life could not have any effect on that law to the extent saved. The decisions relating to the repeal of a temporary Ordinance with a saving clause have no bearing in the present context, for in that case the repealed Ordinance in so far as it was kept alive, could not have a larger lease of life than the repealed and the repealing

Ordinances possessed. If so, it follows that the repealed Ordinance, to the extent saved, continued to have force under Art. 372 of the Constitution until it was altered, repealed or amended by competent Legislature. It cannot therefore, be said that the coal cess was levied or collected without the authority of law."

The court has also observed therein that :

"Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the import, that is, it is a duty on the manufacture of production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience..."

26. With regard to interpretation of Section 6 of the General Clauses Act, it has been laid down that in cases where there is a repeal of enactment followed by a fresh legislation, the line of inquiry would be not whether the new Act expressly keeps alive old rights and liabilities, but whether it manifests an intention to destroy them. Section 6 would be applicable in such cases also, unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from consideration of all the relevant provisions of the new law. In the case of *Jayantilal Amrathlal Vs. The Union of India (UOI)*, , the Supreme Court has observed as under;

"In order to see whether the rights and liabilities under the repealed law have been put an end to by the new enactment, the proper approach is not to enquire if the new enactment has by its new provisions kept alive the rights and liabilities under the repealed law but whether it has taken away those rights and liabilities. The absence of a saving clause in a new enactment preserving the rights and liabilities under the repealed law is neither material nor decisive of the question - see *State of Punjab Vs. Mohar Singh*, , and *T.S. Baliah Vs. T.S. Rengachari*, ".

Reference also can be made to the decision of the Supreme Court in the case of *V.O. Vakkan and Others Vs. The State of Madras*, .

27. In the case of *Joint Secretary to the Government of India and Others Vs. Khillu Ram and Another*, , the Supreme Court dealt with Rule 30 (since deleted in 1963) of the Displaced persons (Compensation and Rehabilitation) Rules, 1955. The Court approved the decision of the Full Bench of the Punjab and Haryana High Court in *Dev Raj v. Union of India* AIR 1975 P& H 65, wherein it was held that -

"a displaced person has a right to the determination of his claim for compensation and its satisfaction in the prescribed manner and this is a

substantive right", that so far as Rule 30 is concerned the right which a displaced person claims under this rule.... cannot be adversely affected or taken away unless it is expressly stated in the sending provision, or the language of the Act unmistakably and unequivocally indicates an intention to that effect."

28. Further, in the case of *M.S. Shivananda Vs. Karnataka State Road Transport Corporation and Others*, , the Supreme Court has held that if the right created by the statute is of an enduring character and has vested in the person, that right cannot be taken away because the statute by which it was created has expired. What is unaffected by repeal of the statute is a right acquired or accrued under it and not a mere hope or expectation of, or liberty to apply for acquiring a right. The relevant discussion in paragraph 12 is as under :

"12. In considering the effect of an expiration of a temporary Act, it would be unsafe to lay down any inflexible rule. It certainly requires very clear and unmistakable language in a subsequent Act of the legislature to revive or re-create an expired right. If, however, the right created by the statute is of an enduring character and has vested in the person, that right cannot be taken away because the statute by which it was created has expired. In order to ascertain whether the rights and liabilities under the repealed Ordinance have been put an end to by the Act, "the line of enquiry would be not whether", in the words of Mukherjee J. in *State of Punjab Vs. Mohar Singh*, , "the new Act expressly keeps alive old rights and liabilities under the repealed Ordinance but whether it manifests an intention to destroy them". Another line of approach may be to see as to how far the new Act is retrospective in operation."

29. In the case of *Commissioner of Income Tax Vs. Shah Sadiq and Sons*, , the Supreme Court dealt with the provisions of Section 34(2) of the Income Tax Act, 1922 and held that rights accrued could have been taken away expressly or by necessary implication by the new Act. Under that provision, the assessee was entitled to carry forward to be set off such losses against the profits made from that business in future. It also held that the rights which are not saved by the savings provision are not extinguished or ipso facto terminated by the mere fact that a new statute repealing the old statute is enacted. Rights which have accrued are saved, unless they are taken away expressly. The relevant discussion is as under :

"15. In this case the "savings" provision in the repealing statute is not exhaustive of the rights which are saved or which survive the repeal of the statute under which such rights had accrued. In other words whatever rights are expressly saved by the "savings" provision stand saved. But that does not mean that rights which are not saved by the "savings" provision are extinguished or stand ipso facto terminated by the mere fact that a new statute repealing the old statute is enacted. Rights which have accrued are saved unless they are taken away expressly. This is the principle behind S. 6(C), General Clauses Act, 1897. The right to carry forward losses which had accrued under the repealed Income Tax Act of 1922 is not saved expressly by S. 297, Income Tax, Act, 1961. But it

is not necessary to save a right expressly in order to keep it alive after the repeal of the old Act of 1922. Section 6(C) saves accrued rights unless they are taken away by the repealing statute. We do not find any such taking away of the rights by S. 297 either expressly or by implication".

30. The aforesaid judgment is followed by the Supreme Court in the case of *Bansidhar and Others Vs. State of Rajasthan and Others*, . In that case the Court has held that when there is a repeal of a statute accompanied by re-enactment of a law on the same subject, the provision of the new enactment would have to be looked into not for the purpose of ascertaining whether the consequences envisaged by Section 6 of the General Clauses Act ensued or not - Section 6 would indeed be attracted unless the new legislation manifests a contrary intention - but only for the purpose of determining whether the provisions in the new statute indicate a different intention. Mere absence of saving power is by itself not material. In paragraph 17 the Court has approved the observation by Lord Morris in *Director of Public Works v. Ho Po, Sang* (1961) 2 All ER 721, which runs as under :-

"It may be, therefore, that under some repealed enactment, a right has been given, but that, in respect of it, some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation which is to decide whether some right should be or should not be given. On a repeal the former is preserved by the Interpretation Act. The latter is not."

31. As stated above, it cannot be said that the rules framed under the Central Excise Act are temporary. Rules 10 and 10A were substituted by Rule 10 by amendment dated 6-8-1977. Rule 10 was repealed with effect from 17-11-1980 and on the same day Section 11A having similar wording was introduced in the Central Excise Act. No provision is made while substituting Rules 10 and 10A by Rule 10 or by substituting Rule 10 by Section 11A to the effect that pending proceedings would come to an end or accrued liability to pay excise duty would not remain in force. Nor is there any indication or intention of the Legislature that accrued right to recover excise duty is wiped out or that the pending investigation would be required to be dropped.

32. In the case of *Gwalior Rayon Mfg. (Wvg.) Co. Vs. Union of India (UOI) and Others*, , the Madhya Pradesh High Court has taken the view that even though Rule 10 was omitted from 17-11-1980, Section 11A having similar wording came into force simultaneously maintaining its continuity. Therefore, there was neither any repeal nor omission of an enactment but continuance of the same provision as part of the Act, the only difference being that prior to 17-11-1980, it was in one part of the Act and subsequent to that, it was in another part of the same Act. Similar view is taken by the Delhi High Court in the case of *Kolhapur Cane Sugar Works Ltd. and another Vs. Union of India and others*, .

33. For the aforesaid reasons it is difficult for us to agree with the view taken by the Division Bench of this Court in the case of Amit Processors Pvt. Ltd. Vs. Union of India and Others, , and in the case of Mehendra Mills Ltd. Vs. Union of India, . In our view, the show cause notices issued or actions taken under substituted Rules 10 and 10A or omitted Rule 10 of the Central Excise Rules, 1944 would not come to an end as soon as rules are substituted. Hence we refer the matter to a Larger Bench. The question that requires consideration by a Larger Bench is :

"Whether the notices issued or action taken under substituted Rules 10 and 10A or omitted Rule 10 of the Central Excise Rules, 1944 would stand discharged or terminated upon "substitution" or "omission" as the case may be ?"

34. It is clarified that because the learned advocate for the petitioner had raised the contention that show cause notice issued under Rule 10 would not survive in view of substitution of Rules 10 and 10A by Rule on 6-8-1977, we have not passed the final order in the matter even though we have arrived at the conclusion that the order Annexure M passed by the Assistant Collector confirming the demand for recovery of differential duty amounting to Rs. 15,02,721.19 P. is just and legal. The final order would be passed after the reference is decided.

35. We direct the office to place this matter before the learned Chief Justice for passing appropriate orders for placing it before a Larger Bench.