

(1984) 12 CAL CK 0033
In the Calcutta High Court
Case No : F.M.A.T. No. 2362 of 1984

State of West Bengal and Others

APPELLANT

Vs

Gwal Dass Mohotta

RESPONDENT

Date of Decision : 21-12-1984

Acts Referred:

Central Sales Tax Act, 1956 — Section 2
Constitution of India, 1950 — Article 14, 141, 226, 286

Citation : (1985) 59 STC 346

Hon'ble Judges : M.N. Roy, J; Amarendra Chandra Sengupta, J

Bench : Division Bench

Advocate : Samarendra Nath Dutt, for the Appellant; Gopal Chandra Chakraborty and Sanjukta Bhattacharya, for the Respondent

Judgement

M.N. Roy, J.—This is an application for stay of operation of an order passed by the learned trial Judge on 22nd June, 1984 by the appellant/petitioners, who were respondents in that proceeding.

2. It would appear that against the imposition of turnover tax by the West Bengal Taxation Laws (Second Amendment) Act, 1979, various applications were moved under Article 226 of the Constitution of India and many of such applications were heard by B. C. Basak, J., and by his judgment and orders dated 18th July, 1980, made in Matter No. 492 of 1980 [Associated Pigment Ltd. v. State of West Bengal 1983 (16) STA 409], the said learned Judge disposed of the applications holding inter alia amongst others that "in the calculation of gross turnover, the non-taxable sales, that is, the sales referred to in Section 27 of the Act and Article 286 of the Constitution are not to be taken into consideration. However, I have held that for that reason the provisions of Section 6B(1)(a) or (b) and 4AAA(1) (a) or (b) cannot be declared to be invalid or beyond legislative competency. For the aforesaid reasons I hold and declare that the impugned Acts, that is Section 6B of the Bengal Finance (Sales Tax) Act, 1941 and Section 4AAA of the West Bengal Sales Tax Act, 1954 which was introduced by 1979 Amendment Act to be

a valid piece of . legislation. However, I hold and direct that in calculation of the gross turnover, the sales referred to in Section 27 of the said Act and Article 286 of the Constitution are not to be taken into consideration. The applications are disposed of accordingly, all interim orders are vacated...". Against such determination and more particularly against inclusion of non-taxable sales in gross turnover, it has been stated that the appellants before us moved a SLP (Civil) before the Supreme Court of India and according to the prayers as made, on 6th August, 1982 the following order :

Stay confirmed on the condition that if the appellants fail in this Court, he will pay the whole amount with interest at the rate of 12% per annum from the date of admission of appeal. Let this case be listed for hearing in 1st week of September, 1982

was made.

3. It has been stated that such order was made after hearing both the parties to that proceeding and the particulars of the proceeding are C. M. P. No. 14916 of 1980 (in S. L. P. No. 10398 of 1980).

4. It was the case of the appellant/petitioners that by the West Bengal Taxation Laws (Second Amendment) Act, 1979, turnover tax was introduced and accordingly Section 6B, dealing with liability to payment of such tax and rates thereof were duly introduced in the Bengal Finance (Sales Tax) Act, 1941 and Section 4AAA was introduced in the West Bengal Sales Tax Act, 1954 with effect from 1st April, 1979. It has been alleged that even in spite of the above the assessee failed, refused and neglected to pay the concerned turnover tax and then, on 22nd June, 1984 moved this Court challenging the validity of the said West Bengal Taxation Laws (Second Amendment) Act, which is mentioned hereinbefore made provisions for imposition of turnover tax on grounds similar to those as disposed of by B. C. Basak, J., in the manner as indicated above. Apart from that, challenge was thrown to the notifications as disclosed in annexure A to this application.

5. By the concerned Departmental Circular No. 523 dated 6th April, 1983, the Commissioner, Commercial Taxes, West Bengal, has after narrating the texts of the said determination of B. C. Basak, J., directed the assessing authorities to assess and levy turnover tax from these dealers, who did not obtain any rule and interim order from any competent Court of course keeping in view the observations contained in the judgment in Associated Pigments case 1983 (16) STA 409. Then, by an addendum to the said Departmental Circular No. 623 dated 6th April, 1983 it was directed by the said Commissioner on 3rd September, 1983, that in view of the determinations dated 6th May, 1983 in Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, , the assessing authorities should proceed to assess the dealers as per the provisions of the West Bengal Taxation Laws (Second Amendment), Act, 1979, keeping in view the observations made by the Supreme Court in that matter. It has of course been

directed that the cases of dealers who have obtained specific interim orders/ injunctions restraining the State from making the assessment of turnover tax or from applying the provisions of the said Act, should be guided in terms of the instructions in para 3 of the Departmental Circular No. 523 until the injunctions/ interim orders are vacated by the High Court. The said para 3 lays down that in view of the interim orders in specific cases (the terms of which will have to be ascertained by the assessing officer from the respective dealers or from the Law Section) the assessing officers will have to complete the assessments under the respective Acts, but they cannot assess the turnover tax payable by the concerned dealers. If the appeals before the Division Bench of the High Court or the Supreme Court are eventually decided in favour of the Government, all such assessments have to be reviewed. In order to keep track of all such cases, it is advised that an unofficial register should be maintained in each charge for noting all such cases for future reference. In terms of Departmental Circular No. 413 dated 14th May, 1965 each charge was required to maintain one such register. Any Commercial Tax Officer who completes such assessments will invariably enter in this register names of the dealers, period of assessments, name of the Act under which assessment has been made, the date of order and short particulars of dealers' liability to pay tax u/s 6B not assessed which will have to be reviewed in case the law is decided in our favour. The entry should be initialled by the Commercial Tax Officer making the assessment. Necessarily, details of the amount of tax not considered (i. e., the turnover of the dealer on which assessment of turnover tax could not be made in accordance with Act IV of 1979 and quantum of such taxes) should be clearly noted, so that in case of suo motu revision the revisional authority may not have any difficulty in computing the turnover and tax payable. The entry in this register should be made very carefully and the assessing authority shall be held personally responsible for making such entries. The case of Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, .

6. In Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, , the provisions of the Bihar Finance Act, 1981 were considered and the same, as indicated by Mr. Chakraborty, dealt with the imposition of surcharge, which is a tax on tax, on sales tax and the further considerations in that case, amongst others were how gross turnover has to be computed and if in doing so the turnover representing inter-State sales should be included and on considerations of the provisions of Section 5(1) and (3) of that Act, it has been held that the State Legislature notwithstanding Article 286 of the Constitution while making a law under entry 54 of List II of the Seventh Schedule can, for purposes of the registration of a dealer and submission of returns of sales tax, include the transactions covered by Article 286 of the Constitution. That being so, the constitutional validity of Sub-section (1) of Section 5 of the Act which provides for the classification of dealers whose" gross turnover during a year exceeds Rs. 5 lakhs for the purpose of levy of surcharge, in addition to the tax payable by him, is not assailable. So long as sales in the course of inter-State trade and

commerce or sales outside the State and sales in the course of import into, or export out of the territory of India are not taxed, there is nothing to prevent the State Legislature while making a law for the levy of a surcharge under entry 54 of List II of the Seventh Schedule to take into account the total turnover of the dealer within the State and provide, as has been done by Sub-section (1) of Section 6 of the Act, that if the gross turnover of such dealer exceeds rupees 5 lakhs in a year, he shall, in addition to the tax, also pay a surcharge at such rate not exceeding 10 per centum of the tax as may be provided. The liability to pay a surcharge is not on the gross turnover including the transactions covered by Article 286, but is only on inside sales and the surcharge is sought to be levied on dealers who have a position of economic superiority. The definition of "gross turnover" in Section 2(j) of the Act is adopted not for the purpose of bringing to surcharge inter-State sales or outside sales or sales in the course of import into, or export of goods out of the territory of India, but is only for the purpose of classifying dealers within the State and to identify the class of dealers liable to pay such surcharge. The underlying object is to classify dealers into those who are economically superior and those who are not. That is to say, the imposition of surcharge is on those who have the capacity to bear the burden of additional tax. There is sufficient territorial nexus between the persons sought to be charged and the State seeking to tax them. Sufficiency of territorial nexus involves a consideration of two elements, viz., (a) the connection must be real and not illusory, and (b) the liability sought to be imposed must be pertinent to that territorial connection. The gross turnover of a dealer is taken into account in Sub-section (1) of Section 5 of the Act for the purpose of identifying the class of dealers liable to pay a surcharge not on the gross turnover but on the tax payable by them. Apart from the above, it has been observed, that there is no ground whatever for holding that Sub-section (3) of Section 5 of the Act is arbitrary or irrational or that it treats "unequals as equals" or that it imposes a disproportionate burden on a certain class of dealers. It must be remembered that Sub-section (1) of Section 5 of the Act provides for the levy of a surcharge having a gross turnover of Rs. 5 lakhs or more in a year at a uniform rate of 10 per centum of the tax payable by them, irrespective of whether they are dealers in essential commodities or not. A surcharge in its true nature and character is nothing but a higher rate of tax to raise revenue for general purposes. The levy of surcharge under Sub-section (1) of Section 5 of the Act falls uniformly on a certain class of dealers depending upon their capacity to bear the additional burden and it is not the function of the Court to consider the propriety or justness of the tax, or enter upon the realm of legislative policy. If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied. The equality clause in Article 14 does not take from the State power to classify a class of persons who must bear the heavier burden of tax. The classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequalities and merely because a dealer falling within the class defined

under Sub-section (1) of Section 5 of the Act is prevented from collecting the surcharge recovered from him, it does not affect the competence of the State Legislature to make a provision like Sub-section (3) of Section 5 of the Act nor does it become a tax on his income. It is no doubt true that a sales tax is, according to the accepted notions intended to be passed on to the buyer, and the provisions authorising and regulating the collection of sales tax by the seller from the purchaser are a usual feature of sales tax legislation. But it is not an essential characteristic of sales tax that the seller must have the right to pass it on to the consumer, nor is the power of the Legislature to impose a tax on sales conditional on its making a provision for sellers to collect the tax from the purchasers. Whether a law should be enacted, imposing a sales tax, or validating the imposition of sales tax, when the seller is not in a position to pass it on to the consumer, is a matter of policy and does not affect the competence of the Legislature.

7. It was claimed by Mr. Dutt that in view of the determinations of the Supreme Court as indicated above, the concerned Departmental Circular No. 523 and the addendum thereto, the appropriate particulars whereof have been mentioned hereinbefore had to be issued and according to him further, that the writ petitioners objected to the said addendum, as by such, they became taxable to turnover tax. In fact, it has been stated that on 22nd June, 1984 the learned trial Judge was pleased to issue a rule in terms of prayers (a), (b) and (c) of the petition and also directed that there will be an interim order of injunction restraining the respondents from including any turnover in respect of sales taking place outside the territorial limits of the State of West Bengal on the basis of Circular No. 523 as amended by Memo No. 12392 dated 8th September, 1983 for determining liability of turnover tax, on the petitioner's undertaking before this Court that the petitioner's will pay 50% of the aforesaid turnover tax in cash to the Commercial Tax Officer and will furnish a bank guarantee for the balance 60% of such tax of a nationalised bank in favour of the Commercial Tax Officer within six weeks from date of demand and on their furnishing the aforesaid bank guarantee and also depositing the turnover tax as stated hereinbefore, the Commercial Tax Officer will issue declaration forms as used to be previously issued to the petitioner according to the volume of their business. This interim order will be till the disposal of the Rule. Mr. Dutt has contended that on the basis of the order as issued above, the writ petitioners, whose sales are mostly of inter-State sales or sales outside India, would not become liable to turnover tax and as such the appeal, in which this application has been filed, was presented on 20th July, 1984. On a reference to the relevant provisions of the said Act as amended and the decision of the Supreme Court in Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, , Mr. Dutt pointed out, as to who are to be assessed to turnover tax on the basis of the present incident of taxability and so also the rates, at which such taxes are to be paid. According to him, in terms of the definition of "turnover" in Section 2(i), turnover should mean and include now, all sales except the amount of refund or amounts

as received or receivable less refund and such imposition of turnover tax is not hit by Section 27 of the said Act, rather such incidents of taxation would be protected by the concerned provisions and the same would also be the position so far Article 286 of the Constitution is concerned and in fact, for classification of dealers under Sections 6A and 6B, there has been no prohibition imposed.

8. The determination of B. C. Basak, J., in Associated Pigment's case we are informed, has since been reported in 1983 (16) STA 409. It was Mr. Dutt's further contentions and that too on a reference to the interim order as made by the Supreme Court, the particulars whereof have been mentioned hereinbefore, and so also the determinations in Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, , that the notifications as impeached, were made on fresh application of mind and in fact, he claimed that they had to be issued or made on the change of law. Mr. Dutt stated that Section 6B of the said Act, firstly lays down the class of transactions, which would be deemed to be considered, to find out the turnover and the amount which is required to be paid and secondly, the items which are to be excluded at the time of imposition of the tax. Mr. Dutt's submission on the basis of arriving at the turnover of a dealer in terms of Section 2(j), have been indicated hereinbefore.

9. The question of determination of turnover or the manner and means to determine the same under the Travancore-Cochin General Sales Tax Act, came up for consideration in the case of A.V. Fernandez Vs. The State of Kerala, to which reference was made both by Mr. Dutt and Mr. Chakraborty, the Supreme Court in that case has laid down a broad distinction between the provisions contained in the statute with regard to exemptions from tax on the one hand and non-liability to tax or non-imposition of tax on the other. In the former case, the sales or purchases should be included in the gross turnover of the dealer because they are prima facie liable to tax and only thing that the dealer was entitled to in respect thereof was the deduction from the gross turnover in order to arrive at the taxable turnover in the manner provided. In the latter case, the State Legislature could not enact a law imposing or authorising the imposition of tax on the sales which did not come within the purview of the imposition of tax on the sales which did not come within the purview of the Act at all. The very fact of non-liability to tax was sufficient to exclude the sales from the calculation of the gross turnover. It was Mr. Dutt's further and specific submission that in this case, levy and imposition of tax is not being made and only steps are being taken for determining the tax liability and that too for the purpose of categorisation. It was also claimed by him that A.V. Fernandez Vs. The State of Kerala, is no longer the good law on the subject, in view of the determinations in the case of Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, . It was also claimed and contended by him that in view of the bonafide nature of claim of the Revenue, not only the prima facie case, but also the balance of convenience in this case, should be deemed to be in their favour and against the writ petitioners. Mr. Dutt also claimed that the bank guarantee, in a case like this would not serve the purposes of the Revenue as they, and through them the

Government would require liquid cash, for effective and satisfactory functioning of the same. It was also claimed that without the variation of the order as asked for, the Revenue would be unsecured and for the long time which is expected to be required in having the case disposed of, there would be further and huge accumulation, which again would be very difficult, not only for the writ petitioners to pay, in case the Rule fails, but it would also and equally be difficult for the Revenue to recover after a long time. It was also stated by him that his clients would undertake to the Court, that if the Rule ultimately succeeds, they would refund the entire amount that would be paid by the writ petitioners along with necessary and due interest. In that view of the matter, Mr. Dutt claimed that the balance of convenience, as indicated hereinbefore, would entirely be in favour of making the order as asked for. It should be noted that while making the order the learned trial Judge directed securing the payments @ 50% by way of bank guarantee and 50% by cash.

10. Mr. Chakraborty placed the two notifications/circulars as mentioned hereinbefore and stated that by the first one, the determination as made by B. C. Basak, J., in Associated Pigments Limited's case 1983 (16) STA 409 was directed to be given effect to, but strangely enough that by the subsequent notifications, the authorities have been directed not to follow such law as declared by B. C. Basak, J., but asked the authorities to follow the determination of the Supreme Court in Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, . Since under Article 141 of the Constitution of India, the law as declared by the Supreme Court is a law of the land, so in case the said Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, has an application, then it would be very difficult to hold that the authorities concerned have given any irregular or unauthorised instruction but we also feel that at this interlocutory stage, it is very difficult for this Court to hold that such decision of the Supreme Court would aptly apply in the facts and circumstances of the case or whether the said decision has overruled the case of A.V. Fernandez Vs. The State of Kerala, , on the basis whereof, the concerned decision was made by B.C. Basak, J.

11. It was then contended by Mr. Chakraborty, on a reference to Section 6B of the said Act and so also Section 2(j) of the Central Sales Tax Act, that sale would mean sale within the State and not outside. While making such submissions, Mr. Chakraborty also referred to the definition of "dealer" in Section 2(c) of the said Act and on the basis thereof, he also claimed that since sales would mean sale by a dealer in West Bengal and the term "every dealer" in Section 6B would mean dealer in West Bengal, so transactions outside West Bengal cannot be included, as claimed by Mr. Dutt, for the purpose of computing the turnover under the said Act. He further submitted that in terms of Section 2(j) as mentioned above, inter-State sales cannot form the basis in West Bengal or under the said Act, as necessary prerequisite for arriving at the turnover, as claimed by Mr. Dutt. Mr. Chakraborty further submitted that the case of Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, being a case of surcharge, which is tax on

tax as mentioned above, the same would not be applicable in the case of turnover tax. He stated that the Calcutta decision as indicated above, still holds good on the question of turnover tax and the more so when the same was made at on the basis of the determinations in A. V. Fernandez's case [1957] 8 STC 661 (SC), which according to him, has not at all been upset by the Supreme Court in the latter decision in Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, . It was contended by him that since u/s 2(j) of the Bihar Act, the concerned definition is inclusive of gross turnover, which is not the case under the said Act so also the submission on the distinguishability of the Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, , should succeed and it must be held that by such determination, the Supreme Court has not overruled A.V. Fernandez Vs. The State of Kerala, .

12. It was then contended by Mr. Chakraborty that the present application is not bonafide, as the respondents in the Rule who are the appellants herein, have not applied for setting aside or challenging the orders dated 15th October, 1982, 8th December, 1982, 24th February, 1984 and 5th September, 1984 as made by this Court in other proceedings on the same facts. In fact, he claimed that on the basis of those orders which have been disclosed along with his client's affidavit-in-opposition, the order for securing 50% by cash and 50% by bank guarantee should be deemed to be due, proper, justified and legal. It was then submitted by Mr. Chakraborty that in A.V. Fernandez Vs. The State of Kerala, , which has also been interpreted in Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, , three stages have been indicated and those stages, in fact, have not been disagreed by the Supreme Court in their later decision. In any event, for the reasons as indicated hereinbefore and since the determination in Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, : AIR 1983 SC 1019 was on surcharge, but not on turnover tax. Mr. Chakraborty restated that the said determinations will have no application in the instant case. Then he referred to the case of The State of Bihar Vs. Rai Bahadur Hurdut Roy Moti Lall Jute Mills and Another, , wherein it has been observed that the transactions attracting the provisions were in substance outside the scope of the Act and in a case where amongst others one of the considerations was whether a dealer is liable to pay tax as collected to the Government. In fact, it has been observed in that case that a claim for the exclusion of a part of a dealer's turnover on the strength of Section 33(1)(a)(i) of the Bihar Act cannot be said to be an allowable deduction under the proviso to Rule 19 of the Bihar Sales Tax Rules. In that case, it has also been observed that that transactions which attract the provisions of Section 33 are in substance outside the scope of the Act on which no tax can be imposed and a claim by a registered dealer in respect of such transactions cannot in law be regarded as a claim for allowable deduction or exemption properly so called. It would be straining the language of the second part of the proviso to Rule 19 to hold that such transactions fall within its purview. Mr. Dutt of course claimed that the issue in the abovementioned case was different and the same not being with regard to turnover tax, the

determinations as made by that judgment would not hold good in the facts and circumstances of the present case.

13. Thereafter, Mr. Chakraborty submitted that it was appropriately held by B. C. Basak, J., in his determination as mentioned above, that the issue of the concerned circulars by the executive authorities were unauthorised. While on this point, reference was made by him to the case of Dinesh Chandra Bhattacharyya and Others Vs. Member Board of Revenue and Others, , wherein it has been observed that an administrative tribunal cannot ignore the law declared by the highest Court in the State and initiate proceedings in direct violation of the law so declared. Where at the time of the passing of the assessment order under Rule 2(2) of the Bengal Sales Tax Rules against the assessee for the period 22nd November, 1954 to 10th April, 1956 the Commercial Tax Officer knew that the Calcutta High Court had already declared Rule 2(2) as illegal and ultra vires the Constitution, he should not have passed the assessment order under that rule. He took the extraordinary alternative of passing a palpably illegal order with full knowledge and realisation that this was an illegal order. If administrative tribunals could ignore the law declared by the highest Court in the State in such deliberate and nonchalant manner, that would be the severest possible blow to the administration of law and justice in the country. In such a case, writ petition cannot be dismissed summarily and rule nisi must be issued, and then Mr. Chakraborty referred to another determination in the case of Mahadayal Premchandra Vs. Commercial Tax Officer, Calcutta and Another, . On the basis of the determinations as indicated above, it was Mr. Chakraborty's specific submissions that administrative authorities would not be authorised to direct the quasi-judicial authorities, by issue of any circular as in this case, to modify and nullify the effect of the determination as made by this Court and such direction, according to him, would clearly be mala fide. On the submission as above and so also on the basis of the determinations as indicated hereinbefore, Mr. Chakraborty claimed that the issue of the notifications/circulars were improper, illegal, mala fide and void and he also stated that in the facts and circumstances of the case, the determination in Hoechst Pharmaceuticals Limited's case [1984] 65 STC 1 (SC) would not be applicable, as every basis for determination in that case, was different.

14. It was further claimed by Mr. Chakraborty that since there are under the provision of the said Act ample provisions, not only for getting interest for nonpayment of tax, to impose fine or penalty for such non-payment and even to initiate prosecution for the same, so the interest of Revenue is not at all jeopardised, but the same is properly protected and because of such protection, the submissions of Mr. Dutt, that if the interim order is not vacated or modified, the interest of the Revenue would be prejudiced, would not hold good. Thereafter, on a reference to the observations in the case of The Commissioner of Income Tax, Bombay Vs. The Jalgaon Electricity Supply Co., Ltd., wherein it has been observed that if the law fails and the taxpayer cannot be brought within its letter, no question of unjustness arises, Mr. Chakraborty stated this Court

would not be justified in making the orders as asked for in this application as under the provisions of the said Act, the dealer cannot be asked to pay turnover tax or to file any return on the basis thereof. It was also submitted by Mr. Chakraborty that since the Revenue in the instant case is amply protected, the dealer was never in default, the business of the dealer is continuing and the dealer has paid and is regularly paying the sales tax, so also, no decision of this Court, agreeing with the submissions of Mr. Dutt, regarding the prejudice of the Revenue, should be made. It was finally claimed by Mr. Chakraborty that since the dealer in the instant case cannot be brought under or roped within the mischief of the Turnover Tax Act, no order, as asked for, should be made.

15. In reply, Mr. Dutt stated that the definition of the "turnover" in the case of Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, has not been looked into and as such, the same will have no application in the instant case. It was submitted by him that Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, has in effect overruled the determination in A.V. Fernandez Vs. The State of Kerala, and u/s 6B of the said Act turnover includes all sales...so it must be held and observed that the present case is fully covered by Section 6B as mentioned above and the determinations in Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, .

16. The points as put forward by the learned Advocates for the respective parties are not substantial and we feel that at this interlocutory stage, we shall not be justified in making a final determination of them. Thus we are left with the consideration of prima facie case and balance of convenience. So far prima facie case is concerned, we cannot at this stage hold or observe that there has been no prima facie case for a rule and as such the said point is answered in favour of the writ petitioners. Then, comes the question of balance of convenience, which according to us, should receive our utmost consideration, on the basis of a determination of the Supreme Court dated 30th November, 1984, in the case of Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. (Civil Appeals Nos. 4742-43 of 1984) [since reported in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others,] arising out of Special Leave Petitions (Civil) Nos. 12312-13 of 1984.

17. In that Dunlop's case [since reported in Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others,], by a notification issued under or in terms of Rule 8(1) of the Central Excise Rules, 1944 tyres falling under item No. 16 of the First Schedule to the Central Excises and Salt Act were exempt from a certain percentage of excise duty to the extent that the manufacturers had not availed themselves of the exemption granted under certain other earlier notifications. The Department was of the view that the company was not entitled to the exemption as it had cleared goods earlier without paying Central excise duty, but on furnishing bank guarantees under various interim orders of Courts.

18. The company in that case claimed the benefit of exemption to the tune of Rs.

6.05 crores and filed a writ petition in this Court and asked for an interim order restraining the Central excise authorities from the levy and collection of such duty. On holding that a prima facie case has been established, a learned single Judge, by an interim order allowed the benefit of exemption to the company to the tune of Rs. 2,93,85,000, for which amount the company was directed to furnish bank guarantee and the goods were directed to be released on such bank guarantee. On appeal, such order of the learned single Judge was affirmed by the learned Division Bench, with the modification that the Collector of Central Excise would be entitled to encash 30% of the bank guarantee. On further appeal to the Supreme Court, both the determinations as above were disapproved and it has also been observed that such orders were not wholly unsustainable, but they should not have been made, as the balance of convenience was entirely in favour of the Government of India. The Supreme Court, while making such determination, has not expressed any firm opinion on the question of prima facie case, but have stated that the same was not even a sufficient justification for granting the interim orders, as was done by the High Court, on their findings, that there was no question of any balance of convenience in favour of the company, but the position was just the otherwise.

19. The determination as referred to above has not as yet been published*, but since we had the opportunity to look into a copy of the same, we have referred to the said determination, with notice to the learned Advocate for the parties and in fact, the determination which we are making is on the basis of the norms as laid therein. We further feel that we should make the order as indicated hereafter, as by granting interim relief, no Court should in fact give the final relief as claimed in the petition and that too without considering, amongst others, the question of balance of convenience and public interest. While making the present determination, we are also taking into consideration the observations of the Supreme Court in cases of collection of public revenue or that the same should not be jeopardised or put to a precarious position, by the issue of an interim order and the fact that the Government requires liquid cash for the country smoothly and efficiently. We further feel that no incurable harm should be caused to such revenue by the interim orders of the Court and the Courts, in ordinary circumstances, should be slow to issue such interim orders, the effect whereof would be of great dimensions or cause administrative inconvenience or such orders should not also be passed, which would prevent collection of revenue. Mr. Chakraborty wanted to distinguish the determinations and observations in the abovementioned unreported The case has since been reported as Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, case on facts. But we feel that such determinations on bank guarantee or the norms as laid down therein for the grant of the same, can be applied in this case.

20. Testing this case on the basis of the principles as indicated above, we feel that the balance of convenience was certainly in favour of the Government, as Governments are not run on mere bank guarantee and more particularly when

no governmental business or for that matter, no business of any kind, as observed by the Supreme Court, can be run on mere bank guarantees, apart from their holdings, that where matters of public revenue are concerned, it is of utmost importance to realise that interim orders ought not to be granted merely because of prima facie case and furthermore, there should not be the slightest indication of a likelihood of prejudice to the public interest.

21. Such and above being the position, we modify the interim order as made by the learned trial Judge, by directing that instead of petitioner's securing 50% of the turnover tax by paying in cash and balance 50% by bank guarantee in favour of the Commercial Tax Officer concerned, they should deposit 50% of turnover tax in cash and secure 50% by bank guarantee within six weeks from the date of demand, on the basis of their return, which they should now file without prejudice to their rights in the pending Civil Rule and subject to the results of the same, after taking into account, their turnover in respect of sales taking place outside the territorial limits of the State of West Bengal and also in terms of Circular No. 523 as amended by Memo No. 12392 dated 8th September, 1983. The direction of securing 50% by bank guarantee has been made on the concessions of Mr. Dutt and as asked for by him. In fact, we could have secured, on the basis of Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, , the whole of the tax, but we are refraining from doing so, in view of the concession made by Mr. Dutt.

22. The application is thus allowed to the extent as indicated above, on modification of the order dated 22nd June, 1984. It should be noted that in terms of the concession as made by Mr. Dutt, we further have it on record that the respondents concerned should refund all amounts as would be deposited by the petitioners, in addition to or over and above the payments which would be due from them, with necessary legal interest, within eight weeks from the date when the Rule will succeed.

23. There will be no order as to costs in this application.

24. Applications in F.M. A. T. Nos. 3185 of 1984, 3714 of 1984 and 2363 of 1984.

25. The points involved in the above applications being similar to those as in F. M. A. T. No. 2362 of 1984, we make the same order as proposed in that case. As such, these applications are also disposed of without any order as to costs.

26. Let the hearing of the above appeals be expedited.

27. Paper books cyclostyled or typewritten incorporating all papers in the Court below and so also in this Court be filed by four weeks after the Christmas Holidays. It should be noted that this is the last chance given to the appellants. Filing of index is dispensed with. Service of notice of appeal is waived.

Amarendra Chandra Sengupta, J.

I agree.