
(2000) 05 RAJ CK 0021
In the Rajasthan High Court
Case No : Civil Writ Petition No. 881 of 2000

Suzuki Processors

APPELLANT

Vs

The Commissioner and Others

RESPONDENT

Date of Decision : 23-05-2000

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 148
Penal Code, 1860 (IPC) — Section 109, 116, 161

Citation : (2000) 2 WLN 526

Hon'ble Judges : S.K. Garg, J; Rajesh Balia, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Rajesh Balia, J.—By this petition, the petitioner challenges show cause notices dated 15.1.1999 (Annex. 2) issued by Commissioner, Central Excise, Jaipur-11, and dated 11.6.1999, 30.9.1999, 23.12.1999 & 16.3.2000 by Assistant Commissioner, Bhilwara (Annex. 4 to 7 respectively of the writ petition) covering different periods for which the liability to pay excise duty under the Central Excise Act is sought to be determined and raised against the petitioner from 3rd June, 1997 onwards excluding the period from 24th February, 1998 to 15th December, 1998.

2. The facts necessary for the present purposes may be noticed. M/s. Suzuki Processors is a unit of M/s. Suzuki Textiles Ltd., a company registered under the Indian Companies Act. M/s. Suzuki Textiles Ltd. had set up a process house and a weaving unit under the name Suzuki Processors in village Guda, Tehsil Mandal, District Bhilwara and finances for the purposes were arranged by securing loans from IDBI. According to the case set up by the petitioner, the processing section of the Suzuki Processors was leased out to another company namely PGO Processors (Pvt.) Ltd. which was incorporated in 1994 and the said lease was duly registered on 3rd June, 1997. As a result of this transaction, M/s. Suzuki

Processors applied for amending its certificate of registration under the Central Excise Rules on 2.6.1997 and PGO Processors (Pvt.) Ltd. applied for grant of registration certificate under the said Rules so that with effect from 3.6.1997, the date of lease the manufacturing activities carried out in the process house become the manufacturing activities of the lessee and the lessee became liable for payment of excise duty under the Central Excise Act. To the extent manufacturing/ processing done at the unit leased out to the PGO Processors the lessor is denuded of its liability to account for and pay excise duty on the manufactures of goods (processing of man-made grey fabrics) carried on by the lessee at the said process house since 3.6.1997. The registration was also granted to PGO Processors (Pvt.) Limited with effect from 3rd June, 1997 and the certificate of registration of the petitioner was amended in consonance with it. As a result of this arrangement, the goods processed at the leased unit since 3.6.1997 neither formed part of the price list furnished by the lessor nor it remained responsible for classification of goods manufactured at the processing house by the lessee. There is no dispute between the parties that as per the arrangements stated above, the lessee was only carrying out the job work for various customers including that of the lessor-petitioner but was not processing its own goods, that is to say the lessee was himself not selling the goods processed at its unit. Accordingly, the basis for determining the excise duty in the hands of the lessee was not on the sale price charged by the lessor-owner of the fabrics but was covered by the principle enunciated by the Supreme Court in Ujagar Prints case as clarified in 1989 ELT 972 (SC). The excise duty was paid by and recovered from PGO Processors (Pvt.) Ltd. on said basis until 23rd Feb., 1998. During this period, the search was conducted on the premises of the petitioner and of the PGO Processors (Pvt.) Ltd. on 19th/20th Jan., 1998 and 19th/20th Feb., 1998. As a consequence of that search, the immediate effect was that with effect from 24th Feb., 1998 the basis for determining the Excise duty on the processed fabric as job work on behalf of the lessor in the hands of PGO Processors (Pvt.) Ltd. was shifted from the principle enunciated in Ujgar Prints case (supra), to the sale price of the commodity, which was processed as job work for petitioner company, at the sale price at which the petitioner company (Suzuki Processors) sold such processed fabrics and the same was paid by PGO Processors (Pvt.) Ltd; for which PGO Processors (Pvt.) Ltd. raised objection and filed refund applications which have been rejected and appeal against such rejection is going to be filed by the said company. In the meantime, there was a Notification No. 36/98 by the Central Govt. on 10.12.1998 which came into operation with effect from 16.12.1998 which provided certain benefits to the independent processors on the processed textile fabric falling under heading Nos. 52.07, 52.08, 52.09, 54.06, 54.07, 55.11, 55.12, 55.13, and 54.14 manufactured or processed by it with the aid of hot air stinter. This required a declaration to be filed by the "independent processors" claiming benefit under the notification. The PGO Processors, the lessee, which was registered under the Central Excise Rules, sought to file declaration as "independent processor" under the Notification No. 36 of 1998 which was refused to be accepted by the

respondent officers, presumably on the basis of pending investigation, as a consequence of the aforesaid search. This action on the part of the respondents of not accepting the declarations by the PGO Processors (Pvt.) Ltd. under Notification No. 36 of 1998 led to filing of writ petition No. 11 of 1999 seeking a writ of mandamus for directing the Deputy Commissioner to entertain the declaration filed by the petitioner and to determine the annual capacity of the production of the process house under the notification and determine the levy of excise duty under the said notification in its favour and it was prayed that the petitioner be allowed to clear the goods availing the benefit of Notification No. 36 of 1998 dated 10.12.1998. The controversy raised before the Division Bench in the said writ petition was whether the respondents could refuse to allow the petitioner (PGO) to clear the goods by not treating the petitioner (PGO) as "independent processor" of fabrics under Notification No. 36 of 1998 dated 10.12.1998 even before deciding finally as to whether they are covered under the Notification or not. In reply to the challenge, it was contended on behalf of the Central Excise Department that the PGO could claim to be covered under Notification No. 36 of 1998 only after its declaration was accepted by the Department and not before that. It was submitted before the Court that the Department of Central Excise had on investigation found out material to support the contention that the said petitioner company was not independent processor and it had virtually no capital assets of its own and it did not own any land, building plant or machinery and all these have been taken on lease from M/s. Suzuki Textiles Limited. It was also alleged that the entire goods processed by the said petitioner company either belong to M/s. Suzuki Textiles Limited (about 97%) or goods of other manufacturers sent for processing to the petitioner company for processing through the present petitioner and the petitioner (PGO) is only an instrumentality of M/s. Suzuki Textiles Limited and it is used only as a facade for avoiding excise duty. In support of their contention, the revenue has also filed joint show cause notice issued after the filing of the petitioner on 15.1.1999 to M/s. Suzuki Textiles Limited as well as to the PGO Processors (Pvt.) Limited and their directors and offices. In the said show cause notices the validity of agreement of M/s. Suzuki company and the PGO company has been doubted. Those notices had not been adjudicated.

3. Taking into consideration the defence taken by the respondents and the challenge made by the petitioners, the Court ruled in favour of the PGO Processors (Pvt.) Ltd., wanting to secure benefit under Notification No. 36 of 1998, by holding that in the face of registration of the petitioner's unit under Rule 174 of the Central Excise Rules, the contention of revenue cannot be countenanced till the registration is cancelled by following the procedure and principles of natural justice. Referring to the show cause notice dated 15.1.1999, which was issued to M/s. Suzuki Textiles Limited as well as the petitioner then before the Court. M/s. PGO Processors (Pvt.) Ltd., the Court said:

The respondents have issued show cause notice for cancellation of registration certificate granted under Rule 174 of the Central Excise Rules though they have

not issued for revocation/suspension of the registration certificate and have not as yet decided to revoke/suspend the registration certificate. Grounds on which Registration Certificate once granted can be revoked/suspended under Sub-rule (11) of Rule 174 have also not been taken in the show cause notice which has been issued on the premises that the petitioner Company does not own the unit and in fact the unit is owned by M/s. Suzuki Textiles Ltd. They cannot therefore, contend that the petitioner company is not an independent manufacturer or independent processor at this stage and cannot stop the petitioner company from exercising its right to clear goods on payment of excise duty u/s 3-A of the Act and notification issued thereunder.

4. The Court also held as a premise for reaching its conclusion that the registration certificate granted to the company will have to be taken as valid recognition of its status as distinct and separate manufacturer or processors irrespective of the activities of its members or shareholders so long as it is not revoked or suspended under Sub-rule (11) of Rule 174. The Court did not consider it necessary to go into the question of the identity and unity of interest of two companies by piercing through the veil to find out whether in reality one company can be taken to be a part or extension of another company created only for the purpose of evasion of tax or duty. With these findings the action of the officers of the Excise Department in refusing to accept the declaration form given under Notification No. 36 of 1998 was not approved and direction was issued to the respondents to allow clearance of excisable goods on payment of maximum duty under the notifications provisionally on the basis that it is "independent processor" covered by Notifications No. 36 of 1998 and 42 of 1998 dated 10.12.1998 issued in exercise of powers under sub-Section (3) of Section 3-A of the Act till the question is finally decided by the respondents by following due process of law. This order was made by this Court on 22nd April, 1999 and has been placed on record as Annx. 3 of this petition.

5. As noticed above, while the PGO Processors was contending to get benefit of Notification No. 36 of 1998 and has challenged the refusal on the part of the officers of the Central Excise Department to accept the declarations about its status furnished under the said notification, show cause notices have been issued to Suzuki Processors as well as PGO Processors on 15.1.1999 calling upon them to show cause on various matters referred to therein. The show cause notice dated 15.1.1999 was made subject matter of challenge of D.B. Civil Writ Petition No. 1266/99 by the present petitioner. It appears that petition was filed before the decision rendered in D.B. Civil Writ Petition No. 11/99 and during the pendency of that petition subsequent notices dated 11.6.1999, 30.9.1999 and 23.12.1999 had also been issued to the petitioner. In the wake of these developments, the petitioner sought permission to withdraw the petition with liberty to file fresh writ petition which was granted vide order dated 24.3.2000 (Annx. 8 of the petition) Thereafter the present petition has been filed.challenging the aforesaid notices.

6. Before advertng to the contentions, we may also notice one fact which during the course of the arguments has been brought to our notice that the very show cause notice Ex. 2 dated 15.1.1999 as well another show cause notice dated 31.5.1999 issued to PGO Processors (Pvt.) Ltd. were also made subject matter of challenge in D.B. Civil Writ Petition No. 2179/99 filed at the behest of by M/s. PGO Processors (Pvt.) Limited. The common notice dated 15.1.1999 was subject matter of challenge to the petitioner No. 1266/99, 2179/99 as well as the present petition. The said petition No. 2179/99 by PGO was decided with direction to the respondent No. 1, the Commissioner Central Excise, Jaipur, to furnish authenticated copies of the documents relied on in the notices dated 15.1.1999 and 31.5.1999 as enumerated in the petitioner's (PGO's) letter dated 19.6.1999 addressed to the respondent No. 1 and proceed to adjudicate on the show cause notice only after supply of such copies. Substantive relief to quash notice itself was not granted.

7. The principal contention in this petition is that in view of the categorical finding of the Court in its order dated 22.4.1999 in Writ Petition No. 11/99 that until registration of PGO Processors (Pvt.) Ltd. is cancelled in accordance with the provisions of Rule 174(11), the PGO Processors (Pvt.) Ltd. has to be treated as independent processor for the purposes of benefit under Notification No. 36 of 1998 and 42 of 1998 and that the show cause notice does not have necessary ingredients of revocation or suspension of the registration of PGO Processors (Pvt.) Ltd. as required under Rule 174(11) and the notice can only be considered to be a notice of cancellation; the exercise of enquiry into the show cause notice against present petitioner shall remain futile inasmuch as so long as the notice of cancellation of registration u/s 174(11) is not issued to the PGO Processors (Pvt.) Ltd. for revocation of the registration, its existence as independent unit will have to be accepted by the revenue and even if the registration were to be cancelled it can only act prospectively, therefore, for the periods for which the notices in question relate, no liability can be fixed on the petitioner even on revocation/suspension of registration certificate of PGO (P) Ltd. under the pending proceedings.

8. Mr. Lodha, learned Counsel, who appears for Union of India, urged that the respondents have been served only with show cause notices to afford opportunity of taking defence to the proposed action against the petitioner company for determining its liability to pay excise duty in respect of fabrics processed apparently by PGO Processors (Pvt.) Limited as a job work for the petitioner which in fact are believed to be processed by the petitioner itself which would alter the basis of determining the duty payable on such goods at the time of clearance. No conclusion for holding petitioner so liable has yet been reached. All the objections, the petitioner is raising now, it is entitled to raise before the Competent Authority and will be adjudicated in the course of determination by the respondents, no present cause of injury arises in as much as no demand as such has yet been raised against the petitioner in respect of the goods cleared in the name of PGO Processors for the periods governed by the show cause notices

which could be recovered by coercive process against the petitioner. That can only be done after show cause notices have been adjudicated and the conclusion is reached against the petitioners. Once, determination of show cause notice is made, and if it is against the petitioner, the petitioner has its remedy to proceed against such adjudication under the provisions of Central Excise Act and Rules, which provide complete code of levy and collection of Excise Duty payable thereunder. No question as to vires of any provision or and inherent lack of Jurisdiction to initiate such proceedings u/s 11-A of the Central Excise Act has been made out. Therefore, no ground is made for examining the merits of the show cause notices at this stage by this Court in exercise of its extraordinary jurisdiction". The petition deserves to be dismissed.

9. There cannot be any dispute about the settled principle that extraordinary jurisdiction is not ordinarily to be exercised to interfere with the show cause notices where the question as to the final outcome of the show cause notice can be adjudicated by the authority itself except where it is shown that the authority issuing show cause notice has no jurisdiction to invoke his authority either on account of non-fulfillment of any condition precedent, existence of which is required before assuming jurisdiction as in the case of issuing notices u/s 148 of the Income Tax Act or for re-assessments under various other taxing statutes, or the authority inherently lacks jurisdiction on the subject matter which it intends to deal with under the guise of show cause notice. So also if a case is made out that on the undisputed and admitted facts the continuance of the enquiry in exercise of jurisdiction by the statutory authority would be futile exercise, the jurisdiction of this Court to examine the issue and entertain the petition under Article 226 is not totally prohibited. The ordinary rule of exercising judicial restraints at the pre-decisional stage by the Court cannot be raised to the height of denuding the Court of its jurisdiction to entertain the petition at all in any appropriate case, merely by showing that it is a show cause notice. While we agree with the learned Counsel for the respondents that ordinarily the jurisdiction of this Court under Article 226 is not invoked against mere show cause notices subject to certain exceptions, since the contention has been raised by the learned Counsel for the petitioner that in view of the earlier decision of this Court which has become final and binding on the respondent, they cannot proceed with the enquiry and reach to any other different conclusion to hold the petitioner liable for the excise duty for the periods in question until the registration of PGO Processors (Pvt.) Ltd. under the Central Excise Act is revoked in accordance with the provisions of Rule 174(11) and as the Court has already reached, the finding that the show cause notice in that regard does not contain the grounds of sustaining action under Rule 174(11), subjecting the petitioner to further enquiry under the show cause notices would be futile exercise, we deem it proper to examine the contentions raised by the petitioner on merit, on such aspects of the matter, which are urged before us to bring the case under exception to the rule.

10. We have already noticed above in the resume of facts of the earlier petition

filed before this Court by PGO Processors (Pvt.) Ltd. (the first petition No. 11/99 decided on 22.4.1999) before issuing any of the impugned show cause notices in this petition. Therefrom one thing can be said at the outset that the ambit and scope of notices in question before us and their validity was not before the Court in the said petition referred to above. Therefore, the finding reached in that petition will have to be examined and understood in the context of controversy that was before the Court.

11. From 3.6.1997 to 23.2.1998 the PGO Processors had been subjected to Excise duty in respect of fabrics processed at the process house owned by Suzuki as lessee under the lease agreement. However, since 24.2.1998, such processed fabrics, as were owned by Suzuki were subjected to excise duty on the basis of sale price of such processed fabric charged by present petitioner Suzuki Processors. The same was being paid by the PGO Processors (Pvt.) Ltd. for which refund applications were made by the said company. The proceedings in pursuance of search in the months of January and February 1998 were pending investigation. Until issuance of Notifications No. 36 of 1998 and 42 of 1998, the revenue was recovering the duty as if it was payable by a manufacturer processing his own goods for sale and no question of payment of less duty whether by Suzuki or by PGO really arose so far as levy of duty on the excisable event viz. the manufacture (processing) was concerned since 24.2.1998. On 10.12.1998 Notification in exercise of powers under Sub-section (3) of Section 3-A of the Central Excise Act was issued where under the "independent processors" of fabric under various tariff items referred to above in the facts narration could be subjected to levy of duty as per the determination of the annual capacity of the production. It contemplated determination of annual capacity of processing textile on the number of chambers of hot air stenter and the average value of the processed textile fabric were to be determined under the "Hot Air stenter independent of Textile Processors Annual Capacity Determination Rules, 1998" issued vide Notification No. 42 of 1998. The provisions of the two notifications namely Sub-clause 6(b) of the Notification No. 36 of 1998 and Explanation III of Notification No. 42 Of 1998 defining "independent processors" for the purposes of notification, made it clear that a composite mill i.e. a manufacturer or processor who is engaged in the processing of the fabrics with the aid of power along with the spinning of yarn fro fibers and weaving or knitting or crocheting of fabrics within the same factory or in one or more factories-owned by the same public limited company was not extended the benefit of these notification. Since PGO Processors (Pvt.) Ltd. professed to be engaged only in the activity of processing fabric and was not engaged in the activity of spinning and weaving, either at the same factory or at different factory owned by it, it has claimed its annual production to be determined under the Notification No. 36/98 and be subjected to the duty payable under it as an "independent processor" for which it has filed requisite declaration before the concerned authority who had refused to accept the same on the ground that question of its independent status as fabric processor was under investigation. It is this action of denying the benefit of the

notification as per existing state of affairs appearing on the record that the earlier writ petition No. 11 of 1999 had been preferred by the PGO in which the Court posed for it the following question which it was required to determine:

The short point involved in the case is as to whether the respondents could refuse to allow the petitioner to clear the goods treating the petitioner as "independent processor" of fabrics under Notification No. 36/98 dated 10.12.1998 even before deciding finally as to whether they are covered under the notification or not.

12. It is to this question posed by the Court for its consideration that the Court has searched for an answer on the basis of material that was before it. We may recall here that when the writ petition was filed though a search had been conducted on the premises of the present petitioner as well as on the PGO Processors way back in January and February, 1998, no proceedings in pursuance thereof had been initiated against any of the company and the matter was pending only at the stage of investigation of the material found during the course of that search and collected thereafter. During the pendency of the petition, show cause notices dated 15.1.1999 had been issued to both Suzuki Processors as well as to PGO Processors which is also the subject matter of the present writ petition by the present petitioner. The said show cause notice had been filed before the Court in Writ Petition No. 11 of 1999 as a defence to that action. The show cause notice is a joint show cause notice to both the petitioners Suzuki Processors as well as PGO Processors (Pvt.) Limited. The part of the notice requiring PGO to show cause reads as under:

Para 49. M/s. PGO Processors (Pvt.) Ltd., Bhilwara are also required to show cause to the Commissioner of Central Excise, Jaipur-11, New Central Revenue Building, C-Scheme, Statue Circle, Jaipur as to why the registration certification granted to them under Rule 174 of the Central Excise Rules, 1944 should not be revoked as per provisions of Rule 194(ii) as they do not appear to be the manufacturer within the meaning of Section 2(f) of the Central Excise Act, 1944.

Thus, the fact situation noticed by the Court was that the PGO Processors was registered under the Central Excise Act and such registration was continuing to exist. The Court also considered that PGO was denied the benefit of Notification No. 36 of 1998 notwithstanding that as on the date the notification had come into force no notice for revocation or cancellation of the registration already granted to PGO Processors (Pvt.) Ltd. under Rule 174 had been issued and that final determination whether such registration is required to be revoked or cancelled has not been reached even until the decision of the writ petition by the Court on 22.4.1999. It is also worthwhile to notice here that notice dated 31.5.1999 to which we have referred earlier in the narration of facts and which was issued to the PGO Processors alone for showing cause against it being treated as "independent processor" for the purpose of Notification No. 36/98 had also not even been issued until the decision of the said writ petition. Therefore, in our opinion the enquiry whether notice dated 15.1.1999 could at all could be

proceeded against either of the parties or whether an enquiry into the question that who is really responsible for carrying on manufacturing at the process house in question for determining correct excise duty leviable in respect of the goods in question on finding the real state of affair through the proceedings under show cause notice by the revenue was never the subject matter of the said writ petition, nor any expression of opinion find place in the order dated 22.4.1999. It was in the light of the controversy that was before the Court, the Court found as under:

In the present case, the ultimate question is as to whether the claim of the petitioner to be an independent processor is correct or not and whether the petitioner is entitled to clear the goods on payment of duty u/s 3-A of the Act without the decision of the authorities on the question or not?

13. We may here refer to the definition of independent processors given in Notification No. 42 of 1998 laying rules for determination of annual capacity of production for the purposes of Notification No. 36 of 1998 in Explanation II which is as under:

Explanation III, For the purposes of this notification, an "independent processor" means a manufacturer who is engaged exclusively in the processing of fabrics with the aid of power and who also has the facility in, his factory (including plant and equipment) for carrying out heat-setting with the aid of power of steam in a hot-air stenter, and who has no proprietary interest in any factory engaged in the spinning of yarn or weaving of fabrics.

14. With these premises, namely (i) registration under the Central Excise Act of the PGO Processors was subsisting, (ii) whether PGO Processors was an independent processor or not was yet to be determined and that (iii) lack of allegation in the show cause notice either that the PGO Processors (Pvt.) has any proprietary interest in any factory engaged in the spinning of yarn on weaving of fabrics, the status of PGO Processors (Pvt.) Ltd. could be denied at this stage status of "independent processor", the Court observed:

The question whether the petitioner is an independent processor or not will have to be answered on the basis of the definition of "independent processor" given in the two notifications. When the petitioner "s unit has been independently registered and there is no allegation as yet that the petitioner Company has any proprietary interest in any factory engaged in the spinning of yarn or weaving of fabrics, the processing of declaration given by the petitioner Company under Clause 3 of Notification No. 42/98 cannot be stopped or stalled on the excuse that the respondents doubt the status of the petitioner company as an "independent processor.

15. It is not even now the case of the respondents that PGO Processors, if it is the real processors of the grey fabrics, owns any other factory engaged in spinning and weaving of the fabrics so as to fall in the character of a composite unit, therefore, the question of PGO Processors" entitlement to claim benefit

under Notification No. 36 of 1998 u/s 3-A as an "independent processor" on the facts existing as on the date the notification came into force and on the date when the petition was decided had nothing to do with legality of enquiry into the question whether Suzuki Processors can be held to be real manufacturer because the lease agreement between the Suzuki Processors and PGO Processors (Pvt.) Ltd. is a sham and bogus transaction and not a real transaction. If the answer to this question is in affirmative, it would affect the liability of Suzuki Processors so far as they levy of excise duty is concerned because in that event the PGO Processors goes out of picture as a person responsible for paying excise duty as a manufacturer. In such event, its role only becomes as participant to hide real facts for the benefit of Suzuki, and its responsibility is to be fixed on that basis. We, therefore, do not see any connection between the enquiry in Writ Petition No. 11 of 1999 concerning the claim of PGO Processors (Pvt.) Ltd. to claim benefit of the said Notification as an independent processor engaged in the processing of the fabrics as a registered licensee under Rule 174, and the question that has been raised before us about the ambit and scope of the enquiry that can be gone into by the respondent under the show cause notice to find out the true nature of the real agreement of lease dt. 3.6.1997 under which the PGO Processors was running the process house owned by Suzuki Textiles Limited. The observation in the judgment dated 22.4.1999 on which the bedrock of the contention was founded is reproduced hereinbelow:

The respondents have issued show cause notice for cancellation of registration certificate granted under Rule 174 of the Central Excise Rules though they have not issued it for revocation/suspension of the Registration Certificate and have not as yet decided to revoke/suspend the Registration Certificate. Grounds on which Registration Certificate once granted can be revoked/suspended under Sub-rule (11) of Rule 174 have also not been taken in the show cause notice which has been used on the premises that the petitioner company does not own the unit and in fact the unit is owned by M/s. Suzuki Textiles Ltd. They cannot therefore, contend that the petitioner company is not an independent manufacturer of independent Processor at this stage and cannot stop the petitioner company from exercising its right to clear goods on payment of excise duty u/s 3A of the Act and notifications issued thereunder.

These observations at best can be that so long as the registration certificate under the Central Excise is continuing in favour of PGO Processors (Pvt.) Ltd. and not cancelled or revoked in accordance with law, the registration which has been granted by treating the PGO Processors as an "independent person" claiming his rights as lessee continues to operate in favour of licensee, such licensee cannot be denied the benefit flowing from that registration including status as of "independent processors" within the meaning of Notification No. 36 of the 1998 read with Notification No. 42 of 1998. Any claim for determination of annual production capacity under those rules by the licensee PGO, unless the enquiry is finally concluded and his licence is revoked, the revenue is bound to act on the facts as they exists apparently and cannot act on the doubts entertained during

the course of investigation which is yet to reach finality. The Division Bench in its entire judgment time and again has emphasized the fact about pendency of the enquiry and non-adjudication of the status of the PGO Processors until then, clearly goes to show that what the Court has conveyed through the judgment was nothing more than that until the registration of PGO is revoked or cancelled in accordance with law, it shall continue to be treated as Independent entity under the Central Excise Act and the PGO Processors (Pvt.) Ltd. cannot be denied any claim to status flowing therefrom on the basis of any other pending enquiry in which no final conclusion has been reached. It is too much to read into aforesaid judgment that the conclusions reached in Petition No. 11/99 in any way expresses an opinion or draws any curtain of finality about the conclusions that are to be reached on a proper adjudication by the respondents in respect of the allegations made against the present petitioner in the show cause notice about the real nature of transaction of lease and consequence flowing therefrom. Such was not the subject matter of enquiry on which the Court was called upon to decide, obviously because validity of notice dated 15.1.1999 was not the subject matter of challenge in the said petition.

16. It would be here worthwhile to take notice of the scope of enquiry proposed under the show cause notice against the present petitioner under Ex. 2 dated 15.1.1999 and subsequent notices we may not refer to the contents of the other impugned notices in detail issued by Assistant Commissioner inasmuch as the other impugned notices Ex. 4 to 7 have all been issued subsequent thereto for different periods but are founded only on facts alleged in show cause notice dated 15.1.1999 (Ex. 2). After details of factual matrix, the Ex. 2 significantly levels the allegations against M/s Suzuki Processors, Bhilwara and M/s. PGO Processors (Pvt.) Ltd., Bhilwara concerning the lease agreement dated 3.6.1997 under which Suzuki Processors claims to have divested itself of the status of processor of the fabrics in question by transferring the process house under a lease agreement to M/s. PGO Processors (Pvt.) Ltd., to be operated by the lessee. The relevant excerpts are reproduced below:

Para 36 It appears that M/s. Suzuki Processors, Bhilwara and M/s. PGO Processors (Pvt.) Ltd., Bhilwara have suppressed material facts, made wilful mis-declaration and contravened various provision of Central Excise Act and Rules with Intent to evade payment of duty of excise in the manner discussed in foregoing paras as:

- (i) They have suppressed material facts relating to the control, supervision and management of the Process-house during the period of lease/rent.
- (ii) That they have wilfully contravened the provisions of Central Excise Act and Rules relevant to registration under Rule 174, determination of value u/s 4, and payment of duty with intent to evade duty of excise.

Para 39 M/s Suzuki Processors, Bhilwara, being the manufacturer, who appear to have evaded duty of excise by creation of bogus lease/rent arrangements, are

liable for penal action u/s 11 AC of the Central Excise Act, 1944.

Para 47 M/s. Suzuki Processors (a unit of Suzuki Textiles Ltd.) Bhilwara are hereby required to show cause to the Commissioner of Central Excise, Jaipur-II, New Central Revenue Building, Statue Circle, C-Scheme, Jaipur within 30 days of receipt of this notice as to why:

(i) Central excise duty amounting to Rs. 2,25,37,010/- (Rupees Two crores Twenty Five lac Thirty Seven thousands Ten only) should not be demanded from them u/s 11A (1) of the Central Excise Act read with Rule 9(2) of the Central Excise Rules.

(ii) Penalty should not be imposed on them under Rule 173. and 226 ibid for the contravention of the provisions of Section 6 of the Central Excise Act, 1944 & Rules 9(1), 173B, 173C, 173G & 174 of the Central Excise Rules.

(iii) Penalty equal to the amount that may be determined u/s 11A(2) of the Central Excise Act, 1944, should not be imposed on them u/s 11AC of the Act.

(iv) Interest at specified rate on the duty determined u/s 11A(2) of the Central Excise Act, 1944 should not be recovered in accordance with the provisions of Section 11AB of the Act.

(v) Land, building, plant and machinery and other belongings used in connection with the manufacturing, storage, production, removals or disposal of the excisable goods should not be confiscated, under the provisions of Sub-rule (2) of Rule 173 Q of Central Excise Rules, 1944.

17. Here, it is also apposite to notice the substance of the dispute which is at the centre of the controversy as to the show cause notice of short levy/non-levy against Suzuki. The question has been raised some time in past whether the processors of bleaching, dyeing, printing, mercerising dyeing, mercerising carried out by process in respect of a grey cotton fabric and man-made fabric belonging to the customer and entrusted by him for processing amount to manufacture at all within the meaning of the Central Excise Act. In corollary to this, another question has also been drawing attention of the Court as to what is the excise duty leviable in terms of Section 4 of the Central Excise Act on the processed fabric where the processing is done by the processor as job work and the fabric does not belong to him. That is to say while the duty is leviable ad-valorem on the price at which the manufactured article is sold by the manufacturers, in the case of a job work there is no sale price of the manufacturer inasmuch as he being not owner of the commodity manufacture, he does not sell the commodity at all. In other words, where the processor processes his own fabric and sells the processed fabric, there is sale price of the manufactured commodity at the factory gate of such processor and therefore, excise duty is leviable on such sale price. However, on the other hand, if same fabric if it is processed at a process house owned by other person as job work, such other person who is engaged in manufacturing does not make any sales and the question that posed for an

answer was what should be the sale price or value of such manufactured article for the purposes of determination of levy ad-valorem? The process houses were contending that processing is not a "manufacturing" hence does not give rise to a taxable event and if at all it is considered "manufacturing", the excise duty is leviable only on the job charges received by the processor and not on the value of the fabric at the factory gate because fabric is not owned and sold by the processor. In *Ujagar Prints Vs. Union of India (UOI)*, Bhagwati, CJI opined that process of bleaching, dyeing, printing, mercerising etc. carried on by a processor on a job work basis in respect of grey cotton fabric and man-made fabric belonging to the customer and entrusted by him for processing amounted to manufacturing within the meaning of the Act. The other question viz. what is the value of the processed fabric liable to be assessed was also answered through an example that where the value of the grey cloth in the hands of the processors was Rs. 20, the value of the Job work was Rs. 5, traders selling price including of is selling profit was Rs. 30, the Court observed, assessable value of the processed fabric must obviously be taken to be the wholesale cash price at the factory gate i.e. when the processed fabric leaves the factory of the processor and it cannot possible include the selling profit of the trader who subsequently sells the processed fabrics. It was emphasised that it is at the point when the processed fabric leaves the factory of the processor that its assessable value has to be determined and that assessable value cannot include the selling profit of the trader, who trades in it at a later stage.

18. The matter again came up before the Court in *Ujagar Prints Vs. Union of India (UOI)*, the Court reaffirmed the view taken by the Court earlier in *Ujagar Print's case* 1987 SC 874 and *Empire Industries v. Union of India* AIR 1987 SC 281 that if processes carried out in respect of grey cotton fabrics and man-made fabrics belonging to customer and entrusted by him for processing amount to manufacture within the meaning of the Act. It also approved the principle enunciated by the Supreme Court in case of *Atic Industries Ltd. Vs. H.H. Dewa, Asstt. Collector of Central Excise and Others*, that the value of the goods for the purposes of excise duty must take into account only the manufacturing cost and the manufacturing profit and it must not be loaded with post manufacturing costs or profits arising from post manufacturing operations.

19. While dealing with this question, the Court said:

The nature of the goods and the conditions of the trade, excise is not concerned with what happens subsequently to the goods. It is the first immediate contact between the manufacturer and the trade that is made decisive for determining the wholesale cash price which is to be the measure of the value of the goods for the purpose of excise. The second or subsequent price, even though on wholesale basis, is not material. If excise were levied on the basis of second or subsequent wholesale price, it would load the price with a post manufacturing element, namely, selling cost and selling profit of the wholesale dealer. That would be plainly contrary to the true nature of excise as explained in *Voltas case*.

Secondly, this would also violate the concept of the factory gate sale which is the basis of determination of the goods for the purpose of excise.

20. The concept of value of the goods on which excise duty is to be determined in the case of processors engaged in job works was clarified by the Supreme Court in Misc. application arising out of Ujagar Prints case 1989 SC 972 The Court explained;

In respect of the civil miscellaneous petition for clarification of this Court's judgment dated 4th November, 1988 (reported in Ujagar Prints Vs. Union of India (UOI)), it is made clear that the assessable value of the processed fabric would be the value of the grey-cloth in the hands of the processor plus the value of the job work done, plus manufacturing profit and manufacturing expenses whatever these may be, which will either be included in the price at the factory gate or deemed to be the price at the factory gate for the processed fabric. The factory gate here means the "deemed" factory gate as if the processed fabric was sold by the processor. In order to explain the position it is made clear by the following illustration: if the value of the grey-cloth in the hands of the processor is Rs. 20/- and the value of the job-work done is Rs. 5/- and the manufacturing profit and expenses for the processing be Rs. 5/-, then expenses for the processing be Rs. 5/-, the in such a case the value would be Rs. 30, being the value of the grey-cloth plus the value of the job-work done, plus manufacturing profit and expenses. That would be the correct assessable value.

If the trader, who entrusts cotton or man-made fabric to the processor for processing on job-work basis, would give a declaration to the processor as to what would be the price at which he would be selling the processed goods in the market, that would be taken by the Excise authorities, as the assessable-value of the processed fabric and excise duty would be charged to the processor on that basis provided that the declaration as to the price at which he would be selling the processed goods in the market, would include only the price or deemed price at which the processed fabric would leave the processor's factory plus his profit. Rule 174 of the Central Excise Rules, 1944 enjoins that when goods owned by one person are manufactured by another the information is required relating to the price at which the said manufacturer is selling the said goods and the person so authorised agrees to discharge all the liabilities under the said Act and the rules made thereunder. The price at which he is selling the goods must be the value of the grey-cloth or fabric plus the value of the job-work done plus the manufacturing profit and the manufacturing expenses but not any other subsequent profit or expenses. It is necessary to include the processor's expenses, costs and charges plus profit but is not necessary to include the trader's profits who gets the fabrics processed, because those would be post-manufacturing profits.

21. From the aforesaid background it becomes clear that where a processor of fabric is engaged in the processing on job work basis for processing of the grey fabric owned by customers, he is not engaged in selling activity, and therefore, a

notional sale price has to be determined on the basis of a notional sale at factory gate of the processor, which would include the value of the grey cloth in the hands of the processor plus value of the job work done plus manufacturing profit and manufacturing expenses which will either be included in the price at the factory gate or deemed to be the price at factory gate for the processed goods. Obviously, such price would not be the price at par with the price at which the person owning the fabric would be selling at the factory gate of the process house run by such owner of goods himself as manufacturer. In the latter event the factory gate price which is actual selling price of the finished article by the manufacturer would ordinarily be much higher than the factory gate price determined at the factory gate where the grey fabric has been proceeded on job work basis inasmuch as it will not include the profit of the owner of fabric, who sells the goods after obtaining delivery of finished goods at factory gate. Determination of excise duty on the processed fabric may be much higher in the former case, where manufacturer also owns the grey fabric and himself sells the finished product than the latter case where processor-manufacturer is not the owner of grey, fabric and is not the seller of finished product and duty is determined on a notional price excluding the selling profit of owner of the goods. If the lease is held to be a sham transaction right from the beginning, it would be considered that the fabric owner by Suzuki Processors and processed at the process house in question was also manufactured by Suzuki and not by PGO. In that event, the sale price at which the Suzuki Processors has sold the goods processed at the processing house would be the basis for determining levy whereas if the lease agreement is held to be genuine and lessee PGO is found to be really doing the processing of grey fabric on job work basis, which are owned by Suzuki Processors and other customers, the excise duty is to be determined on the basis of deemed selling price at the deemed factory gate of the process house run by PGO in its own right. Thus, the enquiry sought to be held under show cause notice has direct nexus with question of short levy or non-levy of excise duty on processing of grey fabrics owned by Suzuki Processors at the process house, in question.

22. We are here not called upon to decide this issue as it is the subject matter of the show cause notice. We have only clarified the contours of the controversy which is required to be determined under the show cause notices impugned in the present writ petition. The contours of controversy against PGO prima facie is confined to cancellation of registration certificate and also processing against him for furnishing incorrect particulars about lease agreement now alleged to be sham and bogus and if such finding is reached it will face consequences thereof.

23. A great deal of arguments have been raised on the basis of opinion expressed by the Division Bench in Writ Petition No. 11 of 1999 in its judgment dated 22.4.1999 concerning Rule 174(11). Rule 174(11) read as under:

174(11) Any registration certificate granted under this rule may be revoked or suspended by the proper officer, if the holder or any person in his employ, is

found to have committed a breach of any conditions of the Act or these rules or has been convicted of an offence u/s 161, read with Section 109 or with Section 116 of the Indian Penal Code.

24. Prima facie, revocation envisaged under Rule 174(11) refers to prospective revocation and suspension of an existing registration certificate on finding some breach of conditions of the licenses or other conditions of the Act. Apparently, a registration certificate unless it is revoked for breaches referred to u/s 174 remains in force. We are of the opinion that Rule 174(11) if it is taken in restrictive format as has been contended by learned Counsel for the petitioner then it must be held that so far as controversy whether a lease agreement is a real or unreal document at all form part of the enquiry required for revocation u/s 174(11) but is independent of it. If an order is obtained by misrepresenting facts knowingly, the registration would be invalid from its very inception without conferring any rights under it. In this connection, ambit and scope of enquiry would be quite different.

25. It cannot now be doubted that where any such device has been adopted by the assessee which can be termed as a colourable transaction solely for the purpose of avoiding or evading tax and the purpose of the entering into transaction is not real, no advantage can be taken under such colourable devices by the assessee.

26. Section 11-A (i) of the Central Excise Act, under which impugned notices have been issued, reads as under:

11-A. Recovery of Duties not Levied or not Paid or Short Levied or Short-Paid or Erroneously Refunded.-(1) When any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short levied or short-paid or to whom the refund has erroneously made, requiring him to show cause why he should not pay the amount specified in the notices:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this Sub-section shall have effect, as if for the words "six months", the words five years were substituted.

Explanation.-Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.

27. While Section 11-A authorities initiation of proceedings for recovery of any duty of excise which has not been levied or paid or short paid erroneously within

a period of 6 months from the relevant date i.e. to say the date on which it became payable, the proviso to Sub-section (1) in clear term envisages where any duty of excise has not been levied or paid or which has been short levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of the Act or the rules made thereunder with intent to evade payment of duty by such person or his agent, the case falls u/s 11-A with longer period of limitation within which action can be initiated in respect of past periods. The period within which the proceedings u/s 11-A can be initiated in such cases is five years. We have referred to the proviso which make it clear that where a levy has been short levied or has not been levied because of any wilful misstatement or suppression of fact with intent to evade payment of tax by any person or his agent, the proceedings of bringing such levy or non-levy is permissible under law u/s 11-A of the Act.

28. So far as permissible devices to reduce the tax burden and to choose the course of conducting a business by any person so as to minimise his tax liability also cannot be doubted.

29. In the oft quoted words of Lord Tomlin in IRC v. Duke of Westminster (19 Tax Cases 490):

Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be

30. The aforesaid statement has long been accepted subject to the limitation that every man is entitled to order his affairs so as to minimise his tax burden provided it is within the legitimate framework of law and is not a colourable device.

31. Lord Scarman in *Farniss v. Dawson* 1984 (1) All E R 530 said:

Every man is entitled, if he can to order his affairs so as to diminish the burden of tax. The limit within which this principle is to operate remains to be probed and determined judicially.

32. Lord Diplock observed in *IRC v. Burmah Oil Company Ltd.* 1982 STC 30:

It would be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax-avoidance schemes to assume, that *Ramsay's* case 1982 AC 300, did not mark as significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transactions (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax, which in the absence of those particular steps would have been payable. The difference is in approach. It does not necessitate the overruling of any earlier decision of this House; but it does involve recognising that Lord Tomlin's oft-quoted dictum in *IRC v. Duke of Westminster* 1936 AC 1 at Page (1936) 19 All E R. 259 at page 267, "Every man is entitled if he can to order his

affairs so that the tax attaching under the appropriate method of ordering one's affairs will be recognised by the courts as effective to lessen the tax that would attach to them if business transactions were conducted in a straight forward way.

33. Gujarat High Court in Commissioner of Income Tax Vs. Sakarlal Balabhai, observed:

Tax avoidance postulates that the assessee is in receipt of an amount which is really and in truth his income liable to tax but on which he avoids payment of tax by some artifice or device. Such artifice or device may apparently show the income as occurring to another person, at the same time making it available for use and enjoyment to the assessee... But there must be some artifice or device enabling the assessee to avoid payment of tax on what is really and in truth his income.

The aforesaid decision of the Gujarat High Court was affirmed by the Supreme Court in Commissioner of Income Tax, Gujarat Vs. Vadilal Lallubhai, etc. etc.,

34. Justice R.N. Misra, delivering leading judgment in McDowell and Co. Ltd. Vs. Commercial Tax Officer, examining the question about the jurisdiction of the tax authorities to lift the veil of any transaction and to obliterate method of tax evasion and avoidance of tax through tax planning said:

Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of the tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is obligation of every citizen to pay the taxes honestly without resorting to subterfuges.

35. Justice O. Chinnappa Reddy in his concurring judgment said:

In our view the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be constructed literally or liberally, nor prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it.

Therefore, it must now be taken to be settled that methodology of tax avoidance through tax planning by resorting to colourable and dubious methods can in any appropriate cases open to be probed and veil may be lifted to find out whether the transaction is real to serve legitimate commercial end, or unreal solely for the purposes of avoidance of tax, and are inserted steps, in the words of Diplock, J., that have no commercial purpose apart from the avoidance of liability to tax, which in the absence of such steps would have been payable.

36. We are not here to examine what shall be the contours of enquiry to establish the transaction under challenge in any particular case so as to treat it as a colourable device as it may vary from case to case. Suffice it to state, to use the expression "colourable in Black's Law Dictionary means "that which is in

appearance only and not in reality what it purports to be, hence counterfeit, feigned, having the appearance of truth." The expression "colourable" is usually used as the reverse of bonafide. "Device" is referred to in Blacks Law Dictionary as contrivance; a scheme, trick. Shorter Oxford English Dictionary uses the expression "subterfuge" as that to which one refers for escape or concealment. In other words, what has been deprecated as tax planning for avoidance of tax are acts which have doubtful or questionable character as to their bonafide and righteousness.

37. However, before any act can be treated as questionable or dubious designed to tax avoidance alone an enquiry has to be conducted in the facts and circumstances of each case when any apparent transaction is sought to be indicted as colourable. That can precisely be done, and is purport of proceedings that follow a notice to show cause against such proposal to treat any act as a colourable device of tax avoidance or evasion. Outcome depends on conclusions reached as a result of such enquiry.

38. We are here not called upon to decide whether petitioner Suzuki Processors infact has entered into an unreal transaction or the transaction of lease is a bonafide genuine transaction to serve legitimate commercial end, as that is the subject matter of enquiry under the show cause notice. Undoubtedly, u/s 11-A when any competent authority under the Central Excise Act believes on the basis of any relevant material that burden of excise duty has been reduced by misrepresenting facts or by devising a colourable transaction to conceal the real nature of transaction, the necessary jurisdiction to initiate proceedings for recovery such short levy or nonlevy whether from the person who has altogether escaped from the levy or from the person who has been subjected to short levy, cannot be doubted. The show cause notices directly impinge on the real nature of the transaction of lease between petitioner and the P.G.O. Processors (Pvt.) Ltd. In the background of principles enunciated in Ujagar Print's case and other cases referred to above the enquiry have direct nexus with the correct determination of levy of excise duty which in turn depends on the basis to be adopted for determination of the excise duty depending upon the conclusion that may be reached, namely whether the fabrics belonging to Suzuki Processors can be said to be processed really by PGO Processors as job work by running the process house on lease in its legitimate commercial pursuit and the manufacturing process is completed at the leased premises and the subsequent transaction of sale is effected by the Suzuki Processors; or in reality the lease being not real, the processing done at the process house in question though apparently carried on by PGO Processors was in fact carried on by the Suzuki Processors. In the latter case, the excise duty leviable on such processed fabric and sold by Suzuki Processors would be far more than in the former case. On such facts being established, it would certainly be a case of short levy or non levy in the hands of Suzuki Processors as a result of concealment of material facts of mis-statement of facts about the lease. However such facts are yet to be established. Determination of such question does not fall within the domain of this petition at

this stage to be decided by us. We, therefore, express no opinion on the merit of this issue except to say that the question about real nature of transaction of lease of process house, which is the real thrust of the show cause notices issued against Suzuki Processors, being not the subject matter of the earlier writ petition No. 11/99 filed by the PGO Processors and no opinion having been expressed on it, any finding recorded or observations made in those proceedings between the PGO Processors and the respondents therein, in the context of non-acceptance of declaration made by the PGO processors under Notification No. 36 of 1998 dated 10.12.1998, has no bearing on the controversy raised between the present petitioner and the revenue under the show cause notices under challenge.

39. It may also be noticed that notwithstanding the judgment dated 22.4.1999 having already come into existence, the PGO Processors had challenged the very same notice dated 15.1.1999 issued jointly against it with the present petitioner, for quashing the same with an alternative prayer for supply of authenticated copies of the documents relied on in the show cause notices. Ultimately, it appears that Court did not find it right to grant relief against the continuance of the proceedings in pursuance of the notice dated 15.1.1999 even in the case of PGO Processors in whose case findings and observations, relied on by learned Counsel for the petitioner in this case, were made yet the only relief granted was about the supply of the authenticated copies of the documents relied on by the revenue, and demanded by the assessee, is also a factor which goes against the present petitioner in seeking relief of restraining the respondents from continuing with the proceedings in pursuance of the very same show cause notices at this stage.

40. We, therefore, do not find any ground to interfere with the continuance of the proceedings in pursuance of the impugned show cause notices at this stage.

41. Before parting with the case, we record the stand taken on behalf of the respondents that until the show cause notices are adjudicated after affording adequate opportunity of hearing to the petitioner and amount of duty, if any, found leviable, is determined, no recovery of the proposed levy of excise duty is going to be enforced against the petitioner in respect of the periods in question, without prejudice to the rights of the petitioner concerning goods already cleared from the process house to seek remedies against adjudication if it goes against it. The respondents shall adhere to it.

42. The petition is, therefore, dismissed. No orders as to costs.