(1985) 01 DEL CK 0003

In the Delhi High Court

Travancore Rayons Ltd. APPELLANT

Vs

Union of India and others RESPONDENT

Date of Decision : 01-01-1985

Acts Referred:

Citation : (1985) 19 ELT 354

Hon'ble Judges : Gian Chand Jain, J

Bench : Single Bench

Judgement

1. The petitioners, Messrs Travancore Rayons Ltd. (for short `the company'') manufactures, inter alia, moisture proof and heat saleable cellulose film. Starting raw material for the manufacture of cellulose film is Chemical pure `Pulp''. Pulp is converted into viscose. After purification of viscose, it is extruded into acid coagulating both in the forming machine when cellulose is regenerated in continuous sheet form. This regenerated cellulose contains a number of impurities and these are removed by successive treatments in the forming machine. After purification the cellulose film is given a finishing treatment depending on the type of film to be manufactured.

2. To make it moisture proof and heat saleable the cellulose film is given thin coating by applying a `surface coating composition'' prepared for this purpose in the premises of the mills itself. Preparation of this of this coating composition is done in jacketed mixers which have not water circulation for heating and top entry stirrers for agitation. The required volume of solvent is pumped into the mixer through a meter. The hot water in the jacket is opened and the stirrer started. When the requisite temperature is reached, the nitrocellulose is added and stirred till it dissolves. Plasticizers and resins are then added and stirred. To this solution melted paraffin wax and anti-block dispersion are added and the stirring is continued. This is then pumped through a coarse strainer to transfer tanks which are insulated to prevent heat loss and provides with stirrers. These stirrers in the transfer tanks are continuously worked to prevent setting out of anti-block. From the transfer tank it is continuously fed through a float valve to

the intermediate tank near the coating machine. This intermediate tank is also jacked and hot water is circulated through the jacket and temperature of the composition is automatically controlled by instrumentation. From the intermediate tank the composition is continuously pumped to the coating through the machine and the over-flow falls into the same intermediate tank. The coating of film takes place by passing the film to be coated beneath a nape roller in the composition through the machine where constant level of the composition is maintained by continuous circulation from intermediate tank. The film after dipping in the composition ascends up to between a pair of doctor rollers which controls the level of coating and thence through the drier. In the drier the film meets a countercurrent of hot air and the solvent in the composition evaporates to the hot air. The hot air is withdrawn continuously and the solvent in the hot air is recovered by absorption in activated carbon and sent to the recovered solvent tank. The recovered solvent is again used in the preparation of this composition.

3. The Assistant Collector of Central Excise, Trivandrum issued a notice dated August 16, 1963 (Annexure A) to the company stating that it had contravened Rules 174 and 9(1) of the Central Excise Rules, 1944 inasmuch as it had manufactured nitrocellulose lacquer, an excisable commodity included under the First Schedule of the Central Excises and Salt Act, 1944 as per Finance Bill, 1955 falling under Tariff Item No. 14-III(i) of the Central Excise Tariff as amended, without taking out a license and removed the same for the process of moisture proofing of cellophane film during the period October 11, 1955 to September 19, 1962 without payment of the appropriate Central Excise duty. It was further stated that duty livable thereon as per the rates prevalent during the relevant period came to Rs. 4,88,797.34. The company was required to show cause as to why a penalty should not be imposed on them for contravention of Rule 9(1) of the Central Excise Rules, 1944 and why duty at the appropriate rate mentioned above on the quantity of nitrocellulose lacquer manufactured and removed by them during the above-mentioned period without payment of duty should not be recovered from them under Rule 9(2) of the Central Excise Rules, 1944. The Company submitted its reply dated August 27, 1963 (Annexure B). The Assistant Collector, Central Excise, Trivandrum, by order dated October 3, 1963 (Annexure C) held that the company had manufactured and removed nitrocellulose lacquer during the period October 11, 1955 to September 19, 1962 without payment of duty in contravention of the provisions of Rule 9(1) of the Central Excise Rules, 1944, and directed the company to pay the duty thereupon amounting to Rs. 4,88,797.34. He, however, held that there was no fraudulent intention on the part of the company and consequently only a token penalty of Rs. 25/- was imposed for contravention of Rule 9(1). The company preferred an appeal against the said order before the Collector of Central Excise, Cochin. It was, however, dismissed by order dated August 5, 1964 (Annexure D). The revision petition filed by the company was rejected by order dated July 16, 1966 (Annexure E). The company then filed a petition for special leave to appeal under Article 136 of the Constitution of India before the Supreme Court. It was allowed

by judgment dated October 28, 1969. The revision order dated July 16, 1966 was set aside on the ground that it was not a speaking order and the case was remanded to the Central Government with the direction that it should be disposed of according to law after giving the petitioner an oral hearing. The matter was thereafter heard by the revision Authority, respondent No. 2. The revision was ultimately rejected by order dated December 16, 1970 (Annexure N).

4. On March 23, 1971 the company filed the present writ petition for quashing the orders of respondents 2, 3 and 4 (Annexures N, D and C) and the demand dated May 13, 1963 raised in respect of the surface coating composition for the period October 11, 1955 to September 9, 1962 and seeking a declaration that no excise duty was payable in respect of the surface coating composition under Tariff Item 14-III and restraining the respondents from recovering any amount by way of excise in respect of the surface coating composition under the said Tariff Item 14-III(i).

5. It was averred that the surface coating composition produced by the petitioner was not nitrocellulose lacquer and was not covered by Item 14-III(i) of the First Schedule. It was not a marketable product, was never marketed and was not known to the market. It was never removed from the premises of the factory of the company and that the demand in question was barred by limitation by virtue of Rule 10 of the Central Excise Rules.

6. This petition was opposed by the respondents. Mrs. Heera Radhakrishnan, Assistant Collector of Central Excise, Ernakulam-I Division, Cochin, in her affidavit filed in opposition denied the allegations made by the petitioner.

7. Excise duty is a tax on production or manufacture of goods. It is clear from the reading of Section 3 of the Central Excises and Salt Act, 1944 (hereinafter referred to as `the Act''). Section 3 provides for levy and collection of duties of excise on all excisable goods other than salt which are produced or manufactured in India. u/s 2(d) of the Act the term "excisable goods" means `goods specified in the First Schedule as being subject to a duty of excise and includes salt''. The First Schedule specifies the goods under nine headings. Item 14, which falls under the heading `Chemicals'' takes in its fold `pigments, colours, paints, enamels, varnishes, blacks and cellulose lacquers''. Item 14 III(i), which according to the respondents, covers this surface coating composition, i.e. the goods in question, reads as under: -

"III. Cellulose lacquers -

(i) Nitrocellulose lacquers, clear and pigmented and nitrocellulose ancillaries in liquid, semi-solid or pastry form."

8. Mr. G. B. Pai, learned counsel for the petitioner, contended that surface coating composition was not a lacquer. It was not clear and pigmented and that these were not goods which could ordinarily come to the market to be bought and sold

and, Therefore, this coating material was not subject to any excise duty.

9. Whether the surface coating composition is a nitrocellulose lacquer within the meaning of Tariff Item 14-III(i)?

10. `Lacquer'' has not been defined under the Act. In the various dictionaries it has been defined as follows: -

(a) According to Chambers''s Twentieth Century Dictionary, revised edition, it means:

"a solution of film-forming substances in a volatile solvent, esp. a varnish of lac and alcohol; the juice of the lacquer-tree (Japan lacquer) or similar product: a covering of one of these: an article, or ware, so coated.

v.t. to cover with lacquer: to varnish."

(b) The Concise Oxford Dictionary defines `lacquer'':

"Gold-color varnish of shellac dissolved in alcohol used esp. as coating for brass; kind of resinous varnish (esp. Japanese...) taking hard polish and used for wood etc., articles so coated."

(c) The Shorter Oxford English Dictionary on historical principles defines it:

"a kind of sealing-wax, a Gold-color varnish, chiefly, pale shellac dissolved in alcohol, and tinged with saffron, anatta, etc; used esp. as coating for brass 1673. Any of various kinds of resinous varnish, esp. the `Japanese lacquer'', capable of taking a hard polish , and used for coating articles of wood, etc. Article of wood coated with lacquer; chiefly made in Japan, China, and India."

(d) The Random House Dictionary of the English Language, College Edition, defines `lacquer'' thus:

"protective coating consisting of a fesin, cellulose ester, or both, dissolved in a volatile solvent, sometimes with pigment added, any of various resinous varnishes, esp. a resinous varnish obtained from a Japanese tree, Rhus verniciflus, used to produce a highly polished, lustrous surface on wood or the like. Also called lacquer ware, ware, esp. of wood, coated with such a varnish, and often inlaid.

v.t. to coat with lacquer,............unexplained var."

(e) According to Webster''s Third New International Dictionary of the English language unabridged, volume III, `lacquer'' means:

"a spirit varnish (as shellac) often coloured and used esp. for coating brass and other metals to heighten their luster or prevent tarnishing; any of various tough durable natural varnishes; esp. a varnish obtained by tapping the Japanese varnish tree - called also Chinese lacquer, Japanese lacquer; compare Burmese lacquer; any of various clear or colored synthetic liquid organic coatings that typically dry to form a film by evaporation of a volatile constituent and are used for many industrial purposes; esp. a coating in which a cellulose derivative (as cellulose nitrate) serves to form a film with or without a natural or synthetic resin (as an alkyd) (automotives are sprayed on) - compare enamel, varnish: a highly glazed finish or fabric usu. applied in patterns on a plain ground: a resinous coating applied to flat sheet metal or formed metal cans and usu. dried by baking or lacquer ware: a decorative article made of wood coated with Japanese or other Oriental lacquer and often inlaid with ivory or metal; collectively: such articles or lacquer red: or a variable color average or dark reddish orange that is redder, stronger, and slightly lighter than ochre red and redder, stronger, and slightly lighter than burnt sienna: a dressing (as an alcoholic solution of a gum or resin) for the hair usu. applied by spraying and intended to keep the hair smooth and in place: nail polish to coat with lacquer: varnish: to give smooth finish or appearance to: to make glossy: polish wound up with a virtuosity that...ed over any rough parches that had been laid bare in the White Paper......the phrase as did some of the accusers - Jerome Mel Quist "

11. Mc Graw Hill, Encyclopedia of Science and Technology -= Vol. 7, page 376, defines `lacquer'' as under: -

"A surface coating; the vehicle of which contains a substantial quantity of cellulose derivative. The derivative is most commonly nitrocellulose, but may be a cellulose butyrate, or a cellulose (other, such as ethyl cellulose). The term is sometimes used for other coatings which have properties and uses similar to those of lacquers, particularly clear metallic coatings. Originally, lacquers were coatings produced by the use of juice of a tree of the some family, but these materials often called Oriental or Chinese lacquers, are not widely used today.

Lacquers are made by dissolving nitrocellulose and other modifying materials in a solvent, and pigmenting if desired. They dry by evaporation of the solvent. Because solvents with very high volatility may be used, extremely fast drying times may be obtained, and lacquers are usually applied by spray. The drying time may be extended to allow brushing, but brushing lacquers are not commonly used.

Nitrocellulose is not soluble in conventional paint thinners so that a mixture of solvents, usually containing others (ethyl acetate), aromatic hydrocarbon (toluene), and petroleum thinners are used. Alcohols and other solvents may be present. The solvents must be chosen carefully for the combination of solvency and evaporation rate required.

Nitrocellulose is very hard; its flexibility is modified by the addition of plasticizers. These may be vegetable oils, such as castor or linseed, which have been modified to be compatible with nitrocellulose or Chemical compounds, such as debut phthalate or tracery phosphate. Numerous other materials are also used for this purpose. The adhesion of lacquers can be improved by the addition of other resins and these also may reduce the cost by allowing the use of less expensive solvents, or alternatively allowing the application of heavier films.

Historically, the development of lacquers came in early 1920''s, when ample supplies of relatively inexpensive Chemical solvents became available after World War I. This coincided with the great increase in the production of automobiles and the demand for a fast-drying, weather-resistant finish which could be used to replace the previously used enamels which required long drying periods. Lacquers still constitute the finish used on about one-half the automobiles produced in the United State and furnish a large portion of the coatings for furniture and other factory finished items.

Lacquers using other cellulose derivatives are much less common. Cellulose acetate, acetate butyrate and butyrate have certain specific uses, particularly for clear coatings where goods weather resistance is required. Ethyl cellulose given firms of extreme flexibility, but such coatings are too soft many uses. (See Cellulose Derivatives); paint; solvent; surface coatings. Biography ;R. Kirk and D. Other (eds.) Encyclopedia of Chemical Technology Vol. 10, 1983."

12. Indian Standard Institution (I.S.I.) glossary terms relating to paints read: "Lacquer is a coating composition which dries up by the solvent evaporation" (as stated by the export of the petitioner in his report).

From the above definitions I am of the opinion that nitrocellulose lacquer is a surface coating composition which dries up rapidly by evaporation of volatile constituents forming a film on the substance on which it was coated and contains a substantial quantity of nitrocellulose. In other words, nitrocellulose lacquer must be (1) a surface coating material: (2) it must dry up rapidly by evaporation of volatile constituents; (3) it must form a film on the substance on which it was coated and (4) it must contain a substantial quantity of nitrocellulose.

13. According to the affidavit filed by Shri P. S. Hariharakrishnan, the composition in question contains the following volatile and non- volatile materials: -

Name Volatile Non-volatile Nitrocellulose 50.0 Kgs. Dutyl alcohol 21.4 Kgs. Acronol 4F 5.0 Kgs. Uresin B 3.0 Kgs. Palatino 17.5 Kgs. Cyclopean phthalate 22.5 Kgs. Resin 3.0 Kgs. Butyl acetate (100 liters) 87.0 Kgs. Ethyl acetate (350 liters) 311.5 Kgs. Toluene (200 liters) 172.0 Kgs. Paraffin wax 2.0 Kgs. ------------ ------------- 591.9 Kgs. 103.0 Kgs. 591.9 x 100 Volatile % by Weight: --------------- = 85.2 (591.9 + 103) 103 x 100 Non-Volatile percentage by wt. = ---------- = 14.8 694.9

14. It is admittedly a surface coating composition and is used for coating cellulose film to make it moisture free and heat proof. If is also not disputed that it dries up quickly and forms a film by evaporation of volatile constituents which make the cellulose film moisture and head proof. It contains 50 Kgs. of nitrocellulose out of 103 Kgs. of non-volatile material. Thus it substantial quantity of nitrocellulose. Therefore, the composition in question was

nitrocellulose lacquer within the meaning of Item 14-III(i).

15. Learned counsel for the petitioner in support of his contention that it was not nitrocellulose lacquer has relied on three circumstances, namely, (1) that it contained paraffin wax, (2) it contained 85.2% volatile matter while volatile material in nitrocellulose lacquer is never more than 70 per cent and (3) it contained only 4.7 per cent to 6.7 per cent nitrocellulose contents while a nitrocellulose lacquer contains more than 25 per cent of the nitrocellulose.

16. In Dunlop India Ltd. v. Union of India and others AIR 1977 S.C. 597 = 1983 E.L.T.1566 (S.C.)], the Supreme Court quoted with approval the following observations of the Exchequer Court dealing with the meaning of term "vegetables" in King v. Planters Nut and Chocolate Company Limited, 1951 C.L.R. 122 (Canada).

"Now the statute affects nearly everyone, the producer or manufacture, the importer, wholesaler and retailer, and finally, the consumer who, in the last analysis, pays the tax. Parliament would not suppose in an Act of this character that manufacturers, producers, importers, consumers, and others who would be affected by the Act, would be botanists. The object of the Excise Tax Act, is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. In my view, Therefore, it is not the botanist''s conception as to what constitutes a `fruit'' or `vegetable'' which must govern the interpretation to be placed on the words, but rather what would ordinarily in matters of commerce in Canada be included therein. Botanically, oranges and lemons are berries, but otherwise no one would consider them as such."

17. After noting various other judgments, it was held that the meaning given to the article in a fiscal statute must be as people in trade and commerce, conversant with the subject, generally treat and understand them in usual course.

18. Traders and consumers generally understand from the term `nitrocellulose lacquer'', a surface coating composition which dries up rapidly and on drying forms a film by evaporation of volatile constituents and contains a substantial quantity of nitrocellulose. (I say so because of the definition of the term `lacquer'' given in various dictionaries noted earlier). They generally do not know the exact materials used in preparing the composition. They are not supposed to know whether volatile matter is 70 per cent or more and whether it contained paraffin wax or not.

19. The percentage of volatile matters depends on the evaporation rate required. If for achieving a particular result more volatile matters are required to prepare a composition it would not cease to be nitrocellulose lacquer if the basic requirements exist. For the same reason presence of paraffin wax for obtaining the particular result, namely, making the cellulose film, on which the composition is to be coated, moisture proof, would not make any difference. Paraffin-wax is only 2 Kgs. out of 103 Kgs. while nitrocellulose is 50 Kgs. out of 103 Kgs. of non-

volatile material.

20. Learned counsel for the petitioner in support of his contention placed reliance on the standards adopted by the Indian Standard Institution for lacquer cellulose clear. According to para 4.1 of the said specifications the material should be clear and transparent and free from foreign matter, sediment and undisclosed water. Para 4.4 says that volatile matter of the material shall be not more than 70 per cent, when tested as prescribed in Appendix B. According to para 4.7, read with Item (vii) of Table I. "Keeping properties" of the material should not be less than one year from the date of manufacture. These specifications adopted by the Indian Standard Institution are for grant of I.S.I. registration. It cannot be accepted that nitrocellulose lacquer which has not been registered by the Indian Standard Institution ceases to be nitrocellulose lacquer.

21. Dr. M. S. Patel, Consulting Industrial Chemist, Chemical Engineer and Economic Geologist, and a well qualified person in his affidavit has stated that nitrocellulose lacquer compositions do not contain paraffin wax. He referred to Chapter 24, Table 24.7, at page 450 of Chemical process Industries, Third Edition, by R. Norris Shreve, and has stated that this table showed that paraffin wax was not an ingredient in the lacquer constituent. This table, in my view, is not exhaustive of all the nitrocellulose lacquers. As observed earlier, it depends on the use to which the lacquer has to be put. If it is required for polishing brass utensils its constituents may be different than the constituents of lacquer which is required for polishing wood. The constituents would definitely be different when it is required to make the cellulose film heat and moistures proof. The meaning to the term `nitrocellulose lacquer'' is not to given by the use to which it is to be put or the object to be achieved by using the same. The meaning has to be given according to the understanding of people in trade. For them, it must be a surface coating composition which on application forms a film and has substantial quantity of cellulose derivatives besides other materials. The fact that paraffin wax was an indispensable component for making the cellulose film moisture and heat proof would not make much difference.

22. It may be mentioned here that Bennetts Chemical formulary gives list of lacquer formulations. This list as admitted by Dr. Patel, includes one lacquer formula which contains wax. The contention that this description of the said formula as lacquer was an error cannot be accepted. No reason has been given in support of this contention.

23. The fact that the formula containing paraffin wax was a new invention or had been patented in the U.S.A. as a surface coating composition for application to cellulose film also does not improve the case of the petitioner. At the most it is a new variety of nitrocellulose lacquer. A new variety of nitrocellulose lacquer would fall within the term nitrocellulose lacquer used in Item 14-III(i).

24. Dr. Patel in his affidavit has stated that volatile matter in nitrocellulose lacquer shall not be more than 70 per cent and he relied on the various available

specifications of this product. As seen earlier, volatile matter depends on the evaporation rate required. The basic character of the product would not change by the increase in volatile matter.

25. For all these reasons, in my view, the surface coating composition in dispute was nitrocellulose lacquer.

26. Whether the composition in question is `clear and pigmented'' within the meaning of Tariff Item 14-III(i)?

27. The word `and'' according to Stroud''s Judicial Dictionary, Fourth Edition, "has generally a cumulative sense, requiring the fulfillment of all the conditions that it joins together, and herein it is the antithesis of OR. Sometimes, however, even in such a connection, it is, by force of a context, read as "or"." Item 14-III(i) has used the term `clear and pigmented''. If interpreted generally, it should mean that the articles, namely, the nitrocellulose lacquers should be clear as well as pigmented. However, I am of the considered view that `and'' in the context has to be read as `or''. It is for the reason that lacquers cannot be clear as well as pigmented simultaneously.

28. "Clear'', according to Webster''s Third New International Dictionary, Volume I, inter alia, means "unclouded, transparent, not turbid". `Pigmented'' admittedly means coloured. Goods cannot be colorless and coloured at the same time because the composition which is clear is colorless ,transparent. A composition which is `pigmented'' has a colour. Its characteristic lies in its hiding power, namely, the power of obliterating the surface on which it is spread. These two things, Therefore, cannot co-exist. The word `and'' consequently has to be read `or''. It was not much disputed.

29. Mr. G. B. Rai, learned counsel appearing for the petitioner, however, urged that the composition in dispute was not pigmented inasmuch as no substance has been used for coloring. It was not clear because its appearance was murky as admitted by the revision authority in its order dated December 21, 1970.

30. On behalf of the respondents it was not disputed that the composition was not pigmented. It was, however, contended that it was clear and murky appearance would make no difference.

31. The word `clear'' as seen above means unclouded, transparent, not turbid. The Chemical examiner, Customs House, Cochin, in his letter dated March 28, 1964 has stated that after application to a suitable surface the composition in question gives a clear transparent tack free film on drying. The correctness of these observations has not been disputed.

32. As a matter of fact, Dr. M. B. Patel, an expert of the petitioner, in his affidavit has admitted that this composition after application on the base film after hearting and drying becomes transparent. The composition, Therefore, has the characteristic of being transparent and would be covered by the word `clear'' used in Item 14-III(ii).

33. Murky appearance, as stated by the Chemical Examiner, Customs House, Cochin, is probably due to small amounts of resins present in the composition. In case this murky appearance takes the composition out of the definition of the word `clear'', then it would be covered by the word `pigmented''. Such a composition has to be either clear or pigmented. It is not possible that it is neither clear nor pigmented. The composition in suit is, Therefore, covered by the term `clear and pigmented''.

34. Whether the surface coating composition is `goods''?

35. u/s 3 of the Act the duty is on manufacture of goods. The word `goods'' has not been defined in the Act. In Union of India (UOI) Vs. Delhi Cloth and General Mills, the Supreme Court after examining the meanings of the word `goods'' in Webster''s Dictionary and taking into consideration a passage in the Words and Phrases, Permanent Edition, Vol. 18, held that to become `goods'' an article must be something which can ordinarily come to the market to be bought and sold. Similar view was taken by the Supreme Court in South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, .

36. Learned counsel for the petitioner contended that there was no evidence on the record to show that surface coating composition of the type manufactured by the petitioner even came to the market for being sold or bought. The second contention was that the composition was not capable of being marketed.

37. As held by the Supreme Court in Union of India and another v. Delhi Cloth and General Mills Co. Ltd. (supra), excise duty is on the manufacture of the goods and not on the sales. The fact, Therefore, that the substance produced by the petitioner is not put in the market would not make any difference to the chargeability of the excise duty when it is nitrocellulose lacquer clear and pigmented covered by Item 14-III(i) of the Schedule.

38. In support of his second contention, learned counsel for the petitioner pointed out that the composition in question was required to be continuously put in a state of agitation to avoid the interlocking agent contained in it from settling. In case the interlocking parties were allowed to settle down and agglomerate the same cannot be registered either by reheating or by stirring the same. For these reasons the composition in question could not come to the market for being sold.

39. Shri T. R. S. Krishnan, Chemical Examiner, Customs House, Cochin, on the basis of the joint inspection made his report dated October 7, 1970 (Annexure L). His report shows that the composition did not indicate the deterioration during storage for a week. After storage it could be used by raising its temperature to 70 degree C to 72 degree C and by mechanically stirring and bringing down the temperature to 40 degree C to 42 degree C. This opinion was accepted by the Rivisional Authority and I see no reason to differ. His report does show that the coating after storage would not bring the same result as the coating in the premises of the petitioner itself. That, however, would not make much difference. At the most it would make the composition goods of inferior

quality. The composition would, however, in my view, remain `goods''.

40. Lastly , it was contended that for the goods produced during the period October 11, 1955 to September 19, 1962 demand draft was issued by the department for the first time or May 13, 1963 which was followed by a show cause notice dates August 16, 1963 and in the circumstances the duty levied was barred by time by virtue of the provisions contained in Rule 10(1) of the Central Excise Rules, 1944 (for short `the Rules''). On the other hand, learned counsel for the respondents contended that the present levy was governed by Rule 9(2) read with Rule 9(1) of the Rules and Rule 10(1) had no application.

41. Relevant portion of Rule 9(1), 9(2) and Rule 10(1) of the Rules, as in force prior to August 6, 1977, reads as under:-

"Rule 9. Time and manner of payment of duty. - (1) No excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty livable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the Collector may required and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form:

* * * * * Rule 9(2): "If any excisable goods are, in contravention of sub-rule (1) deposited in or removed from any place specified therein, the producer or manufacturer thereof shall pay the duty livable on such goods upon written demand made within the period specified in Rule 10 by the proper officer, whether such demand is delivered personally to him, or is left at his dwelling house, and shall also be liable to a penalty which may extend to thousand rupees, and such goods shall be liable to confiscation."

Rule 10(1):

"10. Recovery of duties or charges short-levied, or erroneously refunded.

(1) When duties or charges have been short-levied through inadvertence, error, collusion or misconstruction on the part of an officer, or through mis-statement as to the quantity, description or value of such goods on the part of the owner, or when they such duty or charge, after having been levied, has been owing to any such cause, erroneously refunded, the proper officer may, within three months from the date on which the duty or charge was paid or adjusted in the owner''s account-current, if any, or from the date of making the refund, serve a notice on the person from whom such deficiency in duty or charges is or are recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice.

42. Rule 9 prohibits the removal of any excisable goods whether for consumption, export or manufacture of any other commodity in or outside such place until the excise duty livable thereon has been paid. If this rule is

contravened then under Rule 9(2) the producer or manufacturer of these goods will be liable upon the demand made by the proper officer to pay the excise duty besides the penalty. Rule 9(2) did not at the relevant time provided any time-limit for the demand or payment of the excise duty. The limitation was provided, for the first time, by the Central Excise (Nineteenth Amendment) Rules, 1977 which came into effect from August 6, 1977. It provided that such a demand has to be made within the period specified in Rule 10. Rule 10, after the amendment, prescribed a period of six months for this purpose. Thus it is clear that prior to August 6, 1977 no limitation was prescribed.

43. Rule 10(1), as it stood prior to the amendment had no application for the simple reason that it covered a case where duty or charges had been short-levied. It would not cover a case where duty or charge had not at all been levied. It is clear from the fact that under Rule 10(1) three months period would start to run from the date on which the duty or charge was paid or adjusted in the owner''s account-current or from the date of making the refund. None of these three contingencies would arise in a case where no duty has been levied at all.

44. In conclusion, I find no merit in this petition and dismiss the same. The parties are, however, left to bear their own costs.

