(1987) 12 CAL CK 0018

Calcutta High Court

Case No: Matter No. 3256 of 1987

I.T.C. Ltd. and Others		APPELLANT
	Vs	
Union of India and Others		RESPONDENT

Date of Decision: Dec. 23, 1987

Acts Referred:

- Constitution of India, 1950 - Article 14
- Customs Act, 1962 - Section 19
- Foreign Exchange Regulation Act, 1973 - Section 12(1), 23, 23A
- Income Tax Act, 1961 - Section 121, 2(b)

Citation: 92 CWN 1035

Hon'ble Judges: Bhagabati Prosad Banerjee, J

Bench: Single Bench

Judgement

Bhagabati Prosad Banerjee, J.

This writ application was moved by the petitioner Company against a show cause notice dated 23rd March, 1987 issued by Shri A.K. Bajpai, Director, Directorate of Anti Evasion (Central Excise) New Delhi, whereby the petitioner company was, inter alia, directed to show cause why Central Excise Duty to the extent of Rs. 803.75 crores which was allegedly short paid by the petitioner Company, should not be demanded under the provisions of section 11A of the Central Excise & Salt Act, 1944 read with Rule 9(2) of the Central Excise Rules. The facts, in short, relevant for the purpose of determination of the question raised in this case are as follows :-

The petitioner company is engaged in manufacturing of cigarettes having its registered office at Calcutta and have five factories situated at Bombay, Bangalore, Saharanpur, Munger and Calcutta respectively. The petitioner company sells cigarette manufactured by it through whole-sellers, secondary wholesellers and retailers. The petitioner Company also had been getting their brands of cigarettes manufactured on job basis from other tobacco Companies which are mentioned in

the show cause notice. Prior to 1st March, 1983 the cigarettes, were liable to excise duty under item 411(2) of the first schedule of the said Act and were liable to excise duty under Chapter 24 of the Central Excise Tariff Act, 1985. The valuation of the'' excisable goods for the purpose of charging the excise duty was made in accordance with the provisions of section of the said Act. The said Tariff Act as prescribed under the said item was as follows :

Date	Basic Duty	Addl. Duty	Spl. Excise Duty
1.3.83	Rs.440/- per Thousand or 300%	Ris. 160/- per Thousand or 100% ad. val plus Rs. 12/- per thousand whichever is higher	Nil
1.3.84	Rs. 440/- per thousand or 300% ad. val. plus Rs. 20/- per thousand whichever is higher	Rs. 260/- per thousand or 175% ad. val. plus Rs. 12/- per thousand whichever is higher	Nil
25.3.85	-do-	-do-	10% of basic
2.9.85	-do-	-do-	Nil

2. Thereafter the Central Government, in exercise of its power under Rule 8 of the Central Excise Rules, issued Notifications from time to time granting exemption and providing for a lower and confessional rate of exercise duty on cigarettes than ordinarily prescribed under the Act. Prior to 1st March, 1983 the amount of duty was required to be determined with reference to the wholesale cash price of the excisable goods determined in accordance with the principles laid down u/s 4 of the said Act. After 1st March, 1983 by a Notification dated 27.2.86 issued under Rule 8 of the Central Excise Rules, the rates of duty for cigarettes were related to various specific slab rates for which different rates of cigarettes were placed depending upon the retail price of package of cigarette, in other words, the rate of excise duty was made specific for different values depending upon the retail price of the cigarettes and that the duty was levied according to the rates prescribed. For the purpose of determination of the amount of excise duty payable under the Notifications issued under Rule 8 of the said Rules, the Central Government from time to time issued Notifications changing the rates. It is not necessary to set out the said rates which were amended from time to time but only for the purpose of this writ application the rate introduced by the Notification dated 2.9.85 is mentioned for the purpose of understanding the case made out in the show cause

notice and the case made by the parties before this Court which is as follows :

Description (1)	Rate (2)
Cigarettes (being cigarettes packed in packages) of which the adjusted sale price per one thousand -	
(i). does not exceed rupees sixty	forty-two rupees per one thousand;
(ii). exceeds rupees sixty but does not exceed rupees one hundred and seventy	One hundred and twenty five rupees per one thousand.
(iii). exceeds rupees one hundred and seventy but does not exceed rupees three hundred	Two hundred and twenty five rupees per one thousand;

3. The said Notification, inter alia, provided certain definitions which are necessary to be set out in this connection :

(a) ''adjusted sale price'', in relation to each cigarette contained in a package of cigarettes, means the unit price arrived at by dividing the sale price of such package by the number of cigarettes in such package;

(b) ''cigarettes packed in packages'', means cigarettes which are packed for retail sale, in packages which -

(a) contain 10 or 20 cigarettes, and

(b) bear a declaration specifying the maximum sale price thereof as the amount specified, in the declaration, plus local taxes only

(c) ''sale price'' in relation to a package of cigarettes means the maximum price (exclusive of local taxes only) at which such packages to be sold in accordance with the declaration made on such package.

4. In the show cause notice it was alleged that the excise duty was short paid by the petitioner company inasmuch as the petitioner deliberately paid duty at a lesser rate on the basis of declaration and printing incorrect prices on the packages of cigarettes, and it is stated that on proper interpretation of the said Notification the petitioner Company was required to declare and state on the package of cigarette the maximum retail price or in other-words, the price at which the said cigarettes, are intended to be sold by the petitioner company. The petitioner company, it is alleged, printed a price as the sale price on packages of cigarettes knowing fully well that the same was not the price at which it is to be sold in the market by the retailer and on the basis of such wilful mis-statement with regard to the sale price printed on the packages of cigarettes the petitioner took the advantage of the lower rate of duty, whereas the petitioner company at the same the time fixed another price as

the ''effective price'' which was circulated through unsigned blind notes, circulars and instructions to the wholesalers and retailers and thereby controlling the price prevailing in the market which was admittedly higher than the ''sale price'' printed on the cigarettes, In the show cause notice the period for which the show cause notice was issued was from 1st March, 1983 to 27th February, 1937 and it was alleged that during this period the petitioner company declared and/or printed a sate price which'' was not the proper price and/or the maximum retail price, but deliberately printed a lower price and paid lesser duty on the basis of such lower price printed on the packages of cigarettes and thereby deliberately evaded Rs. 803.75 crore on account of Excise duty.

5. The show cause notice was issued after the Respondents had seized large number of documents and records on the basis of searches conducted in various offices of the petitioner company situated at different parts of India and on examination of the seized documents and records as well as the statement obtained during such search and seizure, from various persons including top officials of the petitioner company wherein it was admitted that the printed sale price was in some cases below the effective price, viz., the price at which the petitioner company intended the same to be sold in the market. It also transpired from the seized documents and records, particularly from various charts on which reliance was placed by the Respondents in the affidavit-in-opposition, that the sale prices printed in the packages of cigarettes were far below the effective price and that the petitioner company was controlling the margin of profit of the wholesale dealers, secondary wholesale dealers and retailers to suit the convenience and design of the petitioner company. The petitioner company, it is alleged, had chosen to communicate such margin of profit in a clandestine manner drastically reducing the margin available to wholesale dealers, retailers immediately after the budgetary changes made in the year 1983 while increased their sale price and the sale realisation. It also transpired from the seized documents that by this pricing strategy process, the margin left for the retailers was reduced to only 10 Paise per one thousand cigarettes and that it was stated that it was practically impossible on the part of any retailer to sell 1000 sticks of cigarettes at a total margin of profit of 10 Paise only. The "effective price" that was introduced by the petitioner company was the price at which the retailers would sell and as a matter of fact sold the goods at such effective prices in the market. It is stated that the petitioner company fixed one price for the purpose of levy and collection of duty only and fixed another price for the purpose of selling the same in the market and that by this process it is stated that there had been large scale evasion of excise duty to the extent indicated above. From the various exhibits filed before this Court it is clearly selling the goods in the market was higher than the maximum sale price printed on the package of cigarettes in most of the cases. It would be sufficient if only one such example is highlighted which is necessary for the purpose of understanding the main ground for challenge of the show cause notice before this Court. In one case the petitioner

company printed Rs. 1.70 Paise, on the packages of a particular brand of cigarettes as sale price and according to the slab rate of duty prescribed in this behalf the petitioner company paid Rs. 125/- per thousand and that by issuing circulars/blind notes/secret instructions, the petitioner company fixed another price as ''effective price'' for the self same commodity at Rs. 2/-, and if the effective retail price as per the Notification, in that event the petitioner company had to pay excise duty at the slab rate of Rs. 225/-per thousand cigarettes. From this example it will be evident that the difference between the printed price and the effective price had the effect of changing the slab rate altogether and according to the revenue it was the duty cast upon the petitioner to pay excise duty on the basis of the effective price and by not paying the same on that basis, the petitioner had evaded large amount of Central Excise Duty by wilful misstatement. But according to the petitioner the sale price that was printed on the packages of cigarettes was made strictly in accordance with the provisions of the said Notification, inasmuch as, the petitioner had no statutory obligation and/or duty to print a sale price at which the goods must be sold in the market. The petitioner had no manner of control over the retail price and the petitioner company could not be made liable for selling the cigarettes at a price higher than the printed price in the market. It is stated that the revenue did not raise any objection to the pricing method adopted by the petitioner and when the rules were changed requiring the petitioner company to get the price list approved, the revenue also approved the price list as it is, submitted by the petitioner company. These state of affairs contained until the search and seizure was made by the revenue, whereupon certain paper and documents were obtained and on the basis of the examination of the same the impugned show cause notice was issued against the petitioner company on the allegation that the petitioner Company by adopting a pricing strategy, fixing our price for the purpose of payment of Excise and the other for the purpose of sale in the market and the marketing strategy was also fully controlled by the petitioner. This show cause notice by which the petitioner was called upon to pay the deficit excise duty paid by the petitioner during this period to the extent of Rs. 804.75 crores.

6. Mr. Nariman, the learned Advocate appearing on behalf of the petitioner made the following submissions support of the writ application:

(a) That the respondents have acted illegally and without jurisdiction in issuing the impugned show cause notice dated 27th March, 1987, inasmuch as, there was no short levy and/or short payment of excise duty on the part of the petitioner company and in any event there was no misstatement and/or misrepresentation made by the petitioner company in the matter of printing the sale price on the packages of cigarette for the purposes of payment of excise duty.

(b) That on the basis of rules of interpretation contemporanea expositio (contemporary exposition) the respondents had no jurisdiction to attribute a different meaning to the definition of the words ''sale price'' after a lapse of so many

years and so claim that the prices were not correctly declared and that for not correctly declaring the sale price there had been evasion of excise duty.

(c) On a true interpretation of the provision of section 11A read with the provisions of sections 35A, and 35EE of the said Act the impugned notice is liable to be set aside inasmuch as, the power u/s 11A of the said Act could not be invoked in a case where payments have already been made on the basis of the price list and the matter was finally concluded and that the provisions of section 11A of the said Act would only be invoked as a machinery provisions in aid of the powers conferred on the appellate and revisional jurisdiction under sections 35A and 35EE of the said Act.

(d) That the Notification No. 215/86 - Central Excise, New Delhi dated 27.3.86 was ultra vires, the provision of the Act and did not and could not confer any power upon the respondent No. 3 - Sri N.K. Bajpayee to exercise the powers of the collector under- proviso to sub-section (1) of section 11Aof the said Act and as such the impugned show cause notice issued by Sri N.K. Bajpayee, respondent No. 3 is, on the face of it, was illegal and without jurisdiction.

(e) That the respondent No. 3 had disqualified himself to act as an adjudicator in the matter, inasmuch as, after the'' search and seizure he had made certain prejudicial statements in the press and that under there ward rules the respondent No. 3 and the officers working under him were entitled to reward thereby created an interest in favour of the respondent No. 3 and his department and further the entire search and seizure throughout the country was made under the supervision and control of the respondent No. 3 who had occasion to know the affairs of the petitioner company not only from the materials recovered from the search and seizure but also from other sources including the Intelligence Report and as such on the ground of bias and ''personal interest'' the respondent No. 3 should not be allowed to act as an adjudicator in the mater.

7. A preliminary objection was taken on behalf of the Revenue as to the maintainability of the writ application against the show cause notice and that such a preliminary objection has to be disposed of before I can proceed on to the merits of the case. Ordinarily, a writ petition is not maintainable against a show cause notice inasmuch as, when a show cause notice is issued, the party gets an opportunity to place his case before the authority concerned and there are elaborate procedure by way of an appeal and/or revision against such order passed in such proceedings. But when a case is made out that the show cause notice was issued without jurisdiction and without the authority of law or that the show cause notice on the basis of the admitted facts is not maintainable in law, the writ petition would be maintainable and the writ Court can undertake a limited scrutiny on the points raised in the petition to find out whether there was any jurisdictional error and/or any legal infirmity in the proceeding. In the instant case it is alleged that the show cause notice was issued on the basis of an erroneous interpretation of the provisions of the Notification in question which was issued under Rule 8 of the said

Rules and in law there had been no mis-statement or mis-representation regarding the sale price and there had been no evasion of excise duty. It was alleged that on the basis of the admitted facts, this point could be decided. In the writ petition it was alleged that the respondent No. 3 had no jurisdiction to act as a Collector on the strength of the notification No. 213/86 dated 27.3.86 and also alleged bias against the respondent No. 3, who had issued the show cause notice and who would be acting as an adjudicator in the mater. These questions raised in the petition, in my view, could be appropriately decided in the present writ application. Of course, the question whether there had been evasion of duty in the facts and circumstances of the case is a mixed question of law and fact and at this stage writ Court cannot go into the questions of fact far less disputed questions of tact. But if the writ Court can decide the question on the basis of the admitted facts, in that-event, the writ petition could be held to be maintainable. If it appears to the writ Cou(sic)t at the proceeding suffers from a legal infirmity which goes into the root of the case and is not curable during the proceeding, in my view, the party cannot be directed to submit to the jurisdiction of the authority concerned and to undergo the proceeding which would ultimately fail. Considering the facts and circumstances of the case, 1 overrule the preliminary objection raised on behalf of the Revenue because of the nature of the allegations and points raised in the writ application, which will be dealt with hereunder:

SUBMISSION ON POINT (a) : In support of the contention that the show cause notice was issued without any authority of law or jurisdiction, Mr. Nariman, the learned Advocate, appearing on behalf of the petitioner made the following submissions;

Under the notification in question which was issued under Rule 8 of the said Rules the only requirement was on the part of the petitioner to print a sale price on each package of cigarette. There was no indication in the definition that it must be the actual sale price or the maximum retail price. Reference was also made to the definition of ''sale price'', under the Weights and Measures (Packaged Commodities) Act, 1976 and the rules framed thereunder (hereinafter referred to as the Packaged Commodities Rules) where certain guidelines are provided for fixing the maximum retail price and that in this particular case it is alleged that the petitioner company had no obligation or duty to print the maximum retail price or the actual market price at which the goods are likely to be sold in the market. The only requirement to print a sale price, was solely for the purpose of payment of excise duty on the basis of such sale price printed thereon. The legislature did not provided any guideline for, fixing of the sale price and/or any machinery for having supervision over such fixation of sale price nor the legislature provides any provision for reviewing and/or revising the sale price so fixed. The petitioner''s case is that whatever price that is printed on the package of cigarette was finally binding and conclusive on the parties which could not be reopened or questioned at a later stage. The petitioner company on coming to know that the cigarettes manufactured by the petitioner company were sold at 10% above the printed price, started making representations before

the revenue drawing their attention to this aspect of the mater, to which the revenue did not take any exception but on the contrary the revenue sought for suggestions from the petitioner company and ultimately with effect from 1.4.87 the duty is being levied on the basis of the length of the cigarettes and not on the basis of the sales price of such cigarettes to avoid this controversy. The petitioner company alleged that the petitioner acted in the matter bonafide and paid duty on the basis of the declared price as per the schedule of rates provided in this behalf. As the revenue did not take any exception in the matter and as according to the petitioner it must be deemed that the revenue who was responsible for administering the law accepted this position. Under the Packaged Commodity Rules there is a provision for prosecution for selling the commodities at prices higher than the printed price. In this case, the petitioner sold the cigarettes at a price between the printed price to the wholeseller and the wholesale dealer and the secondary wnolesellers also sold the cigarettes to the retailers at a price less than the printed price. The petitioner company it was stated was not concerned at what price the retailers would sell the same in the market. It is stated that if the retailer sells the cigarettes at a price higher than the printed price in that event such retailers were liable for, prosecution under the Packaged Commodity Rules Under the Package Commodity Rules there was no obligation upon the petitioner company to print a sale price at which the same was liable to be sold by the retailers.

8. The petitioner''s case is that the fact that the cigarettes were sold in the market at a rate higher than the printed price was also known to the revenue. It was evident from the fact that before the Public Accounts Committee (1985-86) the Member (Budget) stated in evidence that-

It is leviable on the goods. It is the basis for classification of the goods for determining the duty payable. The formula would depend upon the amount which the Government would like to realise by way of exercise duty. What we are interested is to collect a certain amount of duty from a particular industry. The rate of duty is accordingly fixed, Ad valorem duty is based on the value of the goods. Specific rate is directly related to the produce. So, it was decided that we could adopt a formula linked to printed retail price for classification of the goods for deciding the amount of duty that this particular commodity should bear. Even at that time we were conscious of the fact that there could be an over charging of the prices by the retailers. But according to Packaged Commodities Rules, the retailer were bound to sell the goods at that particular price; and if the prices were more there was a legal provision for taking action against the retailers.

9. Subsequently, the notification was amended which required that, before the sale price, the petitioner had to get the price list approved by the revenue and as a matter of fact such sale price as printed on the package of cigarettes was approved as it is, without taking any exception inspite of the fact that the revenue was all along aware that the cigarettes manufactured by the petitioner company were sold

at a price 10% higher that the printed price. According to the petitioner on a true and proper construction of the term ''sale price'' in the notification in question it must be held that it must not be the maximum price at which the said package may be sold in the market. The words may be" according to Mr. Nariman indicate that it is merely directory and not mandatory. If it was the intention of the legislature that it must be sold and not may be sold, in that event the legislature should have used such expression in the notification in clear words. By any stretch of imagination, the words "may be sold" in accordance with the declaration made on such packets cannot be held to mean that the commodity must be sold on the basis of the declaration so made by the petitioner company. If the intention of the legislature was that the "sale price" must be the price at which the commodity must be sold in the market or capable of being sold in the market, in that event the legislature should have used the expression ''maximum retail price'' or such other terms which might indicate that it must be the actual market price. According to Mr. Nariman the Packaged Commodity Rules provided two different expressions for "sale price", in section 2(s) of the Packaged Commodity Rules, one in clause (i) and another in clause (ii) and that the said two independent definitions disclosed standards and/or guide lines to be followed differently, whereas the impugned notification did not provide any guide line and in the absence of the use of the words ''maximum sale price'' without providing any definition therefor it must be held that the impugned notification only required the printing of a sale price which need not be the retail price or the maximum sale price or the actual sale price at which the goods in question are sold and/or intended to be sold and/or capable of being sold. The definition of the sale price according to Mr. Nariman was nothing but a recommendatory price and not the market price. It is stated that the interpretation sought to be given by the revenue at this stage was nothing but an after thought only for the purposes saddling the petitioner company with some huge liabilities which was unwarranted under the law.

10. It was further contended by Mr. Nariman that Section 11A of the said Act could be ascertained and/or determined on the basis of some mistake committed by the parties on record. But provision of Section 11A could not be invoked alleging that there had been short levy and/or short payment of duty on the basis of some interpretation of the Notification in question given in a manner which is contrary to the long standing practice and understanding which was accepted by the revenue. It was stated that the Revenue was fully conscious and aware of the sale price which was fixed by the Petitioner for the purpose of payment of excise duty and was continuously administering the law on the basis that whatever price that is printed by the petitioner was made upon duty compliance with the law. Section 11A of the said Act did not contemplate a proceeding for recovery on the basis of review of the whole situation and/or mere changing of the opinion after the lapse of so many-years. It is stated that in a fiscal statute unless the words are clear, such a proceeding which is unwarranted in law could not be initiated by exercise of any

inherent power.

11. On the question of interpretation of the fiscal notification Mr, Nariman relied on a case of the Supreme Court in Hansraj Gordhandas Vs. H.H. Dave, Assistant Collector of Central Excise and Customs, Surat and Others, where the Supreme Court observed that it is well established that in a taxing statute there is no rule for any intendment. The entire matter is to be governed wholly by the language of the notification. If the tax payer is entitled to get any benefit on the basis of the plain term of the expression, it could not be denied its benefit by resorting to any supposed intention of the Exempting Authority.

12. Reliance was placed in the decision of this Court in case of Mangla Brothers Vs. Collector of Customs and Others, in which A.K. Sengupta 3 of this Court held that with the change of the officer there could not be any change of the opinion as that will amount to review of the order which the Custom Authority had not been conferred under the Customs Act. In this case goods were cleared u/s 47 of the Customs Act and thereafter the successors-in-office sought to review the same and contended that the goods were not liable to be cleared and in that context it was held that in the absence of power conferred to review and earlier order, the successor-in-office was bound by the earlier view.

13. Reference was also made to several other decisions of several other Tribunals which is not necessary to set out inasmuch as, this principle is well established that a notification has to be construed on the basis of the plain language used and in the absence of express power conferred by law, there is no inherent power of review of a statutory order by the successor-in-office on the basis of the change of opinion and it cannot ignore the decision already taken by the predecessor-in-office.

14. Mr. Naranarayan Gooptu, Advocate General of State of West Bengal, appearing on behalf of the Respondent No. 1, Union of India, submitted that the requirement of the notification was clear, precise and unambiguous. The notification defined the term ''sale price'' which is an independent definition and the meaning is so clear that it does not require exercise of any skill or requires any extraneous aid for its interpretation. It was the statutory duty and/or the obligation on the part of the petitioner company to declare the maximum sale price of the packages of cigarette. Mr. Advocate General submitted that on true and proper construction of the definitions provided in the said notification, it was crystal clear that the petitioner had to declare the ''sale price'' correctly inasmuch as, on the basis of such sale price, duty was leviale and collected but is appeared that the petitioner had committed fraud, wilful mis-statement and suppression of fact by deliberately printing a price at a lower figure than really what was the maximum retail sale price thereof resulting in short levy and short payment of duty and under such circumstances, action could be taken straight way u/s 11A of the said Act against the petitioner Company. It was further stated that under the exemption notification the petitioner had no liberty to declare any price as the sale price for the purpose of payment of

duty. The maximum price thus printed, may be recommendatory nature but such a price must be fixed bonafide and the same must be capable of being sold in the market at that price. But in this case the petitioner deliberately printed a lower price on the packages as the sale price for declaring the same to the excise authority to avail of a lower rate, of excise duty and at the same time fixed another price as the effective price which was the market price and which was higher than the printed price, this according to Mr. Advocate General, amounts to fraud on the revenue and such a case is covered by provision of Section 11A of the said Act. It was further submitted that the over-charging of price by the retailers, if any, over the printed price has nothing to do with the excise law, inasmuch as, it is only concerned with the manufacturer and the manufacturer in the instant case was under the statutory obligation of duty to fix and declare a maximum sale price on the packages. Such an act should be bonafide and should not be allowed to be done with an intention to evade the payment of lawful excise duty.

15. It was further submitted that when the prices are mentioned on the packages of cigarette, in that event, the retailers are bound to sell the same at or below that price, otherwise it would be punishable under the Packaged Commodities Rule. When prices are fixed by a manufacturer, the manufacturer is wholly aware that under the existing law, namely, under the Packaged Commodities Rule, a price has to be fixed in such a manner so that the same may be sold or capable of being sold by the retailer in the ordinary course of trade or business. But in the instant case, the petitioner fixed up a price in such a manner, that only 10 paise margin of profit was left for the retailers for one thousand sticks of cigarettes, which is nothing but an impossibility and no reasonable man with ordinary prudence could think that a retailer could sell one thousand pieces of cigarettes at a profit of 10 paise only. It is further submitted by Mr. Advocate General that the seized records, and documents clearly exhibited that the petitioner company was fixing one price on the packages for the purpose of payment of the excise duty at a lower rate and simultaneously, fixing another price as ''effective price'' at which the retailers could sell the same at the market. From this, it is evident that the petitioner company was maneuvering the whole affair in such a manner that the petitioner company had to pay lesser amount of excise duty and could earn huge amount of profits by squeezing the margin of profits of the wholesellers and retailers and allowing the retailers to sell at a price higher than the printed price by fixing the effective price. Mr. Advocate General submitted that the petitioner company could not be made liable in cases where the retailers sell the goods at a price higher than the printed price of their own and if it can be shown that the petitioner company had no hand in this matter. But in the instant case the petitioner was controlling the retail market price by issuing of circulars/blind notes/secret instructions and that this was done with a malafide motive and it would be evident from the fact that these blind notes, circulars/directions which were issued mostly unsigned and in some, directed to the addressee that such notes should be destroyed after looking into it and this aspect

of the matter became clear after recovery of the documents and papers on seizure. It is stated that this is a case where the petitioner company was conducting this affair in a clandestine manner and whole purpose was to cause loss to the revenue in a cool and calculated manner. Mr. Advocate General also pointed out that from the seized documents and records, it also appeared that the management decided to go on making representations periodically in a ritualistic manner complaining about the sale of the Petitioner''s cigarettes 10% above the printed price by the retailers and this fact, according to Mr. Advocate General, clearly indicated and established beyond doubt that the petitioner company was fully aware that what was done by the petitioner company by way of fixing the effective price over and above the sale price was illegal and unlawful. The petitioner company understood that the ''effective price'' should have been the real sale price and should have been reflected on the package of cigarette for the purpose of payment of excise duty. It is further submitted that the maneuvering tactics was adopted by the petitioner company solely for the purpose of diverting the attention of the revenue, so that the revenue could not suspect that the Petitioner had any role in the matter of selling the cigarettes at a higher price in the market. Mr. Advocate General submitted that this court should not interfere in a case like this, where fraud had been committed by the petitioner on the revenue in a highly sophisticated manner, which is required to be gone into in details by the adjudicating authority where the petitioner company will get every opportunity to place their defence and the adjudicating authority had to take a decision on the basis of the materials, documents and the records and upon hearing the petitioner and further if the decision ultimately goes against the petitioner the petitioner company had the liberty to file an appeal and/or revision and anything done in the matter would be open to further judicial review by the High Court or the Supreme Court.

16. Mr. A.K. Ganguly, the learned Advocate appearing on behalf of the Respondent No. 2 Central Board of Excise & Customs submitted that the notification in question did not create any difficulty and/or ambiguity in the matter for ascertaining what was the duty cast upon the petitioner company in order to avail of the concessional rate of duty under the notification in question. Mr. Ganguly submitted that the definition ''sale price'' should be read along with the definition of the word ''cigarette packed in packages'' and stated that if the said two definitions are read together, it makes abundantly clear, that, in order to avail of the concessional rate of duty, the petitioner had to mention in the packages of cigarette the maximum retail sale price and inasmuch as in the definition of the words ''cigarette packed in packages'', it is provided that for the purpose of the notification, the cigarettes are packed for retail sale and must bear a declaration specifying the maximum sale price and the definition of the word'' sale price'' had to be read in the context of cigarettes packed in packages. Mr. Ganguly submitted that there could not be any other possible interpretation of the word ''sale price''. Mr. Ganguly submitted that is does not require any skill or extra-ordinary knowledge to understand the plain and

the simple meaning of the word ''sale price'' which means that the petitioner had to state the maximum retail sale price, in other words, the maximum price at which the retailer can sell in the market. The expression ''may be sold'' in accordance with the declaration made on such package as appearing in the definition of the ''sale price'', implies that the manufacturer is duty bound to print the retail price of the packages of which every retailer is enjoined under the law to sell the same to the consumers. It was submitted by Mr. Ganguly that no manufacturer under the scheme of the said exemption of notification can be allowed to say that it would be a proper compliance with the notification by merely printing a price which is not the retail sale price. It is further submitted by Mr. Ganguly that it was not open to the petitioner to declare a price which according to the petitioner is not the retail sale price. The exemption of notification prescribed the requirements to be observed in order to avail the benefits thereunder and that in order to get benefit of such notification, the petitioner was required to declare the maximum retail sale price which it is stated admittedly had not been done and on the contrary, it was stated by Mr. Ganguly that the petitioner did not in fact print the maximum retail price but printed a price according to their choice which is not permissible at all. Mr. Ganguly stated that on plain reading of the notification in question if it is clear that the petitioner was under a statutory duty to state the maximum retail sale price, in that event, the petitioner was guilty of wilful mis-statement and suppression of material facts and the petitioner is guilty of not paying payment of proper duty and consequently the petitioner is liable to make good the loss caused to the revenue by such wilful mis-statement contrary to the law. The petitioner it is stated, had no fundamental right to carry on business of intoxication like cigarette. The petitioners are granted only a privilege to do such a business on certain terms and conditions and strict payment of excise duty at the prescribed rate which is one of such conditions which the petitioner must comply. It is further submitted that the law recognised that the actual retail sale price of the Packaged Commodities to be one which every manufacturer is duty bound to print in accordance with Rule 2(s) read with rules 3, 4 and 6 of the Standard of Weights & Measures (Packaged Commodities) Rules 1977. Mr. Ganguly in support of this contention that exemptions of notification are to be construed in a manner which would ensure to the benefit of the revenue unlike the provision relating levy of tax, reference was made to the following case laws :
(a). Commissioner of income tax v. R.V. Naidu (AIR 1957 SC 522 at 525).

(b). H.E.H. Nizam''s Religious Endowment Trust, Hyderabad Vs. Commissioner of Income Tax, Andhra Pradesh, Hyderabad,

(c). Controller of Estate Duty, Kerala Vs. V. Venugopala Varma Rajah,

17. On the question that the statute dealing with evasion of tax should be construed literally as to prevent evasion, reliance was placed by Mr. Ganguly to a passage from Maxwell on Interpretation of Statute 12th Edition at page 137. It was further submitted by Mr. Ganguly that it is a clear case that as a result of such squeezing, of

margin and secret directions issued by the petitioner company to the retailers to sell the cigarettes at an effective price printed on such packages, which is the retail price, the petitioner benefited itself in some form or other, such as compelling the whole sellers to keep in deposit huge money a compulsory deposit and charging interest on the debit balance of such whole sellers. It was further submitted by Mr. Ganguly that Section 11A of the said Act did not provide any condition precedent before exercise of such power. The power can be exercised in the instant case, if it could be established that there had been short payment of excise duty because of wilful mis-statement and/or mis-representation. It was submitted that on true interpretation of the notification it was a duty of the petitioner company to print the price correctly and if it is found that the petitioner had not printed the price correctly and consequently did not pay the proper duty, in that event, there is no other restriction imposed upon the power of the revenue to recover the same. It was further submitted by Mr. Ganguly that on the basis of the materials on records it cannot be said that the Revenue acted without jurisdiction in issuing a show cause notice and that on true interpretation of the notification, it was clear that the petitioner availed of the concessional rate in clandestine manner and as such the petitioner is not entitled to any relief at this stage before this Court.
On Point ''B''

18. Mr. Nariman next contended that the petitioners were encouraged or induced to follow the practice which they were following in the matter of printing sale price by the action and/or the inaction on the part of the revenue. It is stated that it is well established principle that under certain condition silence and/or inaction may constitute their representation in the positive language or conduct and in the instant case when the real state of affairs was known to the revenue, but still then the revenue was continuingly administering the law on the basis that the price that was printed by the petitioner, was printed on due compliance with the law. The statements made on behalf of the revenue before the Public Accounts Committee as well as the statements made by the Hon''ble Finance Minister in the Parliament indicated that the Officers of the Central Government understood the purport of the notification in the same manner as understood by the petitioner and in the facts and circumstances of the case, on the basis of the principle of contemporaneous exposition (contemporances expositio), it must be held that this principle of interpretation should apply in this case and the contemporary official statements, letters and others should be taken to be the meaning of the said notification as understood by the revenue and sought to be implemented by the revenue and the Court should apply that the principles of interpretation and should interpret the notification and hold that there was no statutory requirement on the part of the petitioner to print the maximum retail sale price at which the retailers can sell the same in the market but the only requirement under the notification was to print a sale price which may not be the correct price or the maximum retail sale price.

19. On the question that the meaning of the word "Sale Price" should be interpreted to mean a mere recommendatory price which need not be the actual sale price or the maximum retail price on the basis of the principles of contemporary exposition Mr. Nariman relied upon the following Case Laws :-

(a) K.P. verghese v. Income Tax Officer (AIR 1961 SC 1922)

(b) Desh Bandhu Gupta and Co. and Others Vs. Delhi Stock Exchange Association Ltd.,

(c) Baleswar Begarti v. Bhagarathi Das (reported in 12 Calcutta Weekly Notes Page 657 D.B. where is Sir Ashutosh Mookerjee of the Calcutta High Court observed in the year 1908 that "It is a well settled principle of interpretation that Courts in construing a statute will give much weight to the interpretation put upon it at the time of its enactment and since by those whose duty it has been to construe, execute and supply it" which was noted with approval by the Supreme Court in Desh Bandhu Gupta and Co. and Others Vs. Delhi Stock Exchange Association Ltd.,

(d) Commissioner of Income Tax, Bangalore Vs. J.H. Gotla, Yadagiri,

(e) State of Mysore Vs. M.H. Bellary,

(f) The State of Orissa Vs. Dinabandhu Sahu and Sons, and other case laws

and also relied on a passage from Statutory Interpretation by F.A.R. Bennion, wherein it was observed at paras 252 and 253 that "In the period immediately following its enactment, the history of how an enactment is understood forms part of the contemporanea exposition and may be held to throw light on the legislative intention" and that "Official Statements by the Government department administering an Act, or by any other authority concerned with the Act, may be taken into account as persuasive authority on the meaning of its provisions." Relying on this principle it was contended that as the Revenue was continuously administering the law on the basis that the price printed by the petitioner on the commodity was final and binding and not open to question by the Revenue and that if it was not so, in that event Revenue should have taken exception or step where in fact the goods were being sold in the market at a price which was higher than the market price and that the Revenue had accepted by its conduct and by its expositions expressed by statements made before the Public Accounts Committee.

20. Mr. A.K. Ganguly the learned Counsel appearing on behalf of the revenue submitted that the principle of contemporanea expositio in an extraordinary aid to the interpretation of only ancient statute and which has no application to interpretation of modern statute and in support of this contention reliance was placed on behalf of the revenue, on the decision of the Supreme Court of India in (a) The Senior Electric Inspector and Others Vs. Laxmi Narayan Chopra and Others, (b) J.K. Steel Ltd. Vs. Union of India (UOI), and also upon the decision in the case of Governors of the Campbell College Belfast v. Commissioner of Valuation of Northern

Ireland, reported in (1964)2 All England Report 705 at 725 and also relied on certain passages from some other text books corpus juris secomdom. In those cases it was held that the principle of contemporanea exposition applied only to the interpretation of ancient statute and not to the enactment which are comparatively modern. It was further submitted that this principle had no application to the interpretation of an exemption notification since until seizure of documents from various parts of India, it was not known to the revenue that the retail price of cigarette was different from the printed price on the packages. In other words, it was not known to the assessing authority concerned that the petitioner deliberately printed a lower price as retail sale price of the cigarette for the purpose of deliberately paying a lower duty for getting maximum benefit under the exemption notification.

21. ON POINT ''C'' : Mr. Nariman contended that within the scope and ambit of the provision of Section 11A of the said Act, the impugned show cause notice could not be issued inasmuch as, it was contended that the said Section only provides machinery for the purpose of recovery of the duty by the government but the recovery in cases where assessment had been made or deemed to have been made under the law can be made only by the appellate authority u/s 35A or the Revisional Authority u/s 35EE of the said Act. It was further contended that Section 11A of the said Act was not a complete code for recovery of the duty short paid. It is stated that the provision of Section 11A is only restricted to cases where assessment had not been made or completed and those section 35A and 35EE of the Act are applicable to cases of completed assessments. Mr. Nariman pointed out that such a question had not been considered by any court until now about the scope and an of the provision of section 11A of the said Act as sought to be interpreted by Mr. Nariman and it was stated that the Court should give a hermonio(sic) construction considering the scope and ambit of those sections, so the powers conferred by different parts of the statute do not overlap and do not create any ambiguity. According to Mr. Nariman the scope of Section 11A should only be restricted to cases where no assessment had been made and/or completed and that when assessments have been completed, it is found that something was due, in that event, the provision of Section 11A could be invoked for the purpose of recovery of the duty short paid. The question of final payment arises after the assessments had been completed. The question of recovery of any short duty or short levy in respect of completed assessment does not arise unless the appellate and/or revisional authority in exercise of power of appeal and/or revision was of the opinion that there had been short levy and/or short payment of duty and as soon as the assessments, have been made, the assessing authority had no jurisdiction to contend that there had been short levy or short payment on account of some mistakes, unless of course the law has conferred power of review in the statute in question. In this connection Mr. Nariman relied on the decision of the case Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others, .

In this case Supreme Court considered the scope of Section 12(1) read with Section 23 of the Foreign Exchange Regulation Act and Section 19 read with rule 167 of the Customs Act and that before a case can be held within the scope of Section 23A, it must be shown that there had been contravention of the restrictions imposed u/s 12(1) of the said Act and the requirement of Section 12(1) is satisfied if the stipulated declaration is furnished and it is supported by evidence in the prescribed form and that in this case, the contravention, if any, was really the contravention of Section 12(1) and rule 5 and the Customs Authorities are concerned with and all that they have to see is that no goods are exported without furnishing declaration prescribed under rule 12(1) and incidentally they cannot take any action for any minor mistakes in giving full export value in the said declaration. Supreme Court observed that as Section 12(1) being penal provision the court must construe it as it would construe any other instrument that is to say - it must look at all the surrounding circumstances, the mischief intended to be remedied and must above all give effects to the words used in the section. Mr. Nariman also relied on a decision of the CECAT Special bench ''A'' New Delhi in the case of 1987 (13) ECR 1 wherein it was held that is order to enable to get refund u/s 11B, the manufacturer must prefer an appeal against the price list and the question of refund would only arise, if the price list is set aside and order for refund is made by the Appellate and/or Revisional Authority. On behalf of the Revenue it was submitted that provisions of Section 11A and those of Sections 35A and 35EE are independent provisions and could only be exercised by the original, Appellate and Revisional Authorities respectively and it was contended that from the provisions of Sections 35A and 35EE, it was made abundantly clear that Section 35A and Section 35EE did not incorporate the entire provision of Section HA but only it was provided those powers which could not be exercised by the Appellate and/or Revisional Authorities beyond the period of limitation mentioned in Section 11A of the said Act. This according to the learned counsel on behalf of the Revenue, made it abundantly clear that Section 11A is not intended to be used as a mere machinery provision but an independent provision and the powers conferred therein are independent from the powers conferred in other provisions of the act. If it was an intention of the legislature that Section 11A is a machinery provision which could be exercised only in aid of the power conferred u/s 35A or Section 35EE, in that event, the legislature should not have incorporated only the period of limitation in the said two sections from Section 11A. By this it is made abundantly clear that the Section 35A and/or Section 35EE was quite independent of Section 11A, otherwise language used in Section 11A would become meaningless and the legislative intention will be fully defeated. It is stated by counsel on behalf of the Revenue Sections 11A and 11B were introduced solely for the purpose of providing a simple procedure for recovery of the duties not paid or short paid or short levided and at the same time the manufacturers were also provided with an easy provision for obtaining refund in case payment was made in excess. Section 11B(1) of the said Act expressly provided that the claim for refund was not dependent upon an order from appellate and/or revisional authority inasmuch as sub-section(3) clearly

provided the provision where the claim for refund will be made on the basis of an order passed in appeal or revision and sub-section (1) thereof provides an easy provision for getting refund of the duty paid in excess. It is submitted that Section 11A of the said Act did not contemplate re-opening of an assessment but only enable the Excise Authority to recover the duty not levied or not paid, short levied or short paid. The recovery is only confirmed to excise duty which had not been levied or short levied or short paid. It is submitted that rule 2(1)(a) of the Central Excise Rules defines the expression ''assessment'' to include even re-assessment and therefore it is submitted that the recovery proceeding u/s MA may also amount to re-assessment of an assessment already made and it would be perfectly justified to do so the exercise of power u/s 11A of the said Act read with Rule 52. It was contended that it was idle to contend the recovery proceeding u/s 11A could not be initiated save and except questioning the assessment orders itself before the Appellate and/or Revisional Authority. It was further submitted that the expression ''short paid'' should not be given any narrow and/or restricted meaning in case where it is alleged that there had been large scale evasion of duty.

22. SUBMISSION ON POINT (d) : The next submission of Mr. Nariman is that the notification No. 215/86-Central Excise, New Delhi dated 27th March, 1986 by which officers of the Directorate of Anti Evasion (Central Excise) were delegated with the powers of the ranks of the officers of Central Excise. By the said notification the Director of Anti Evasion was invested with the power of a Collector to exercise through out the territory of India. The said notification was issued by the Central Board of Excise & Customs in exercise of the power conferred by clause (b) of the Section 2 of the Central Excise & Salt Act, 1944 read with rule 4 of the Central Excise Rules 1944. Mr. Nariman contended that Section2(b) of Central Excise & Salt Act provides the definition of Central Excise Officers, which means any officers of Central Excise Department or any person invested by the Central Board of Excise & Customs constituted under the Central Board of Revenue Act 1963 with any of the powers of the Central Excise Officers under this Act. It was pointed out that rule 2(h) defines the word ''Collector'' and in the said definition various Collectors have been mentioned on whom jurisdiction was conferred in respect of a part of a State or whole of a State or two or more States together. Mr. Nariman submitted the Section 2(b) of the Act read with Rule 2(ii) of the said Rules clearly indicates that the Collector may be appointed in the manner indicated in the rule only in respect of the part of a state or whole of a state and that there is no provision or scope for appointing a Collector having jurisdiction through out the territory of India. It was submitted that the impugned notification by which the Director of Anti Evasion of Central Excise Department was conferred power through out the territory of India as Collector was ultra vires the provisions of the Act and the rule framed thereunder. According to Mr. Nariman Section 2(b) read with rule 2(ii) of the said Rules makes it quite clear that it may appoint a Central Excise Officer but limited to a state or area. It is stated that there are already as many as five Collectors exercising jurisdiction in five

different areas who are the appropriate Collector in so far as the petitioner is concerned. It was submitted that under the scheme of the Act and the rules framed thereunder, there is no scope for appointment of one single Collector over and above the Collector already appointed which would create a good-deal of confusion and there will be overlapping of jurisdiction of two different offices. It was submitted that the Act and rules framed thereunder do not provide any provision for conferring of concurrent jurisdiction, one with the local collector and another with the collector having jurisdiction all over India. Mr. Nariman submitted that Under rule 5 of the said Rules it is provided that unless the Central Government in any case otherwise directs, the collector may authorise any officer subordinate to him to exercise throughout his jurisdiction or in any specified area therein all or any powers of a collector under this rule. Reference was also made to rule 6 which provided that the collector may perform all or any of the duties or exercise all or any of the powers assigned to an officer under the said rule. Relying on these rules it was submitted that Central Government may appoint and/or delegate power upon any collector to exercise jurisdiction in respect of any particular area but the Central Board of Excise & Customs had no such authority and/or jurisdiction to confer and/or to delegate the power to any of its officer to act and/or to discharge the powers and functions of a collector through out the territory of India. It was pointed out that rule 4 of the said Rules which provides that the Central Board of Excise & Customs may appoint such persons as it thinks fit to be the Central Excise Officers or to exercise all or any of the powers conferred this rule on such officers. Mr. Nariman strenuously argued that rule 4 did not provide any such power upon the Board to make such delegation of power and as such the notification in question is ultra vires the provision of the Act and the rules framed thereunder. In this connection, it may be mentioned that the validity and/or legality of the notification in question was also the subject matter of challenge before the Madras High Court, wherein the Madras High Court in case. M/s. Asia Tobacco Company (unreported) upheld the validity of the notification No. 215/86-Central Excise, dated 27.3.86, firstly by a Single Judge of the Madras High Court, which was subsequently affirmed by the Division Bench of the Madras High Court. Mr. Nariman submitted that the Madras High Court did not consider some of the points which were relevant for the purpose. It was contended by Mr. Nariman that the judgments of the Madras High Court did not consider that under the provisions of the said Act, there was no scope for conferring any concurrent jurisdiction and in this case relied on some of the provisions of the Income Tax Act, particularly Sections 116 to 128 of the Income Tax Act 1961, where it was provided that the Director of Inspection can perform such function of any other Income Tax Authorities as may be assigned to them by the Board. It was pointed out that similarly Section 121 of the Income Tax Act provides that Commissioners can perform their functions in respect of such areas or of such persons of class of persons as the Board may direct, but in the instant case under the provisions of Central Excise & Salt Act and the rules framed thereunder, the Central Board of Excise & Customs had not been conferred with any such powers

which was specifically conferred under the Income Tax Act for conferring powers and functions to discharge in respect of any area or areas as a Collector. It was pointed out that in the absence of any specific provision in the Act or the rules framed thereunder, the notification has been issued illegally and that on the strength of the said notification, no lawful power could be conferred upon the Respondent No. 3 to discharge the powers and functions of the Collectors and consequently the show cause notice which was issued by the respondent no. 3 was void and illegal. In this connection, Mr. Nariman relied on a decision of the Andhra Pradesh High Court in the case of Sri Balaji Rice Company v. Commercial Tax Officer reported in 55 Sales Tax case at page 292 wherein the Division Bench of Andhra High Court held that under the relevant provisions of the Andhra Pradesh Sales Tax Act, concurrent jurisdiction could not be conferred on two different authorities in respect of the same area. In that case it was found that without any guideline given in the Act, concurrent jurisdiction could not be conferred. Under the said scheme of the Act, an officer should be given power with regard to a local limit and the local limit is related to a particular locality and the term ''local limit'' does not mean limit through out the state. All the areas in the State cannot be said to be a local limit and no such power could be conferred on any particular authority throughout the state on the strength of conferring jurisdiction over a local limit. Under the Scheme of the Act, the jurisdiction was sought to be localised and in that context, Andhra Pradesh High Court struck down the notification by which concurrent jurisdiction was conferred. It was contended on behalf of the Revenue that u/s 2(b) of the said Act read with rule 4 of the said rules, it is abundantly clear that any officer of the Central Excise Department may be conferred with any of the powers of the Central Excise Officers by the Board and the decision of the Andhra Pradesh High Court in the case of Sri Balaji Rice Company had no application in this case. It was further argued by Mr. Nariman that in respect of the Collectors having territorial jurisdiction exercising power u/s 11A there is a provision for appeal but there is no provision for appeal from an order, if passed, by the Respondent No: 3 in this case. It was further pointed out that the notification in question had brought about a situation which would lead to the possibility of conflict of jurisdiction, and the notification would also be arbitrary and discriminatory and violative of the provision of Article 14 of the Constitution of India. Relying upon the decision of the Andhra High Court in the case of Shree Balaji Rice Flour Mills v. State of Andhra Pradesh reported in 85 Sales Tax Case 292, it was submitted there is a basic and grave infirmity in the notification. Accordingly it was submitted that the authority empowered to issue a show cause notice u/s 11A of the said Act had not issued the Show cause notice and the Respondent No. 3 had no jurisdiction to act as a Collector on the strength of the notification No. 215/86 and as such the Show cause. Notice was on the face of it void.

23. The learned Advocate General as well as Mr. A.K. Ganguly, appearing on behalf of the respondents No. 1 and 2 submitted that u/s 2(b) of the said Act and Rule 4 of

the said Rules could not be given a limited and/or a narrow meaning as sought to be given by Mr. Nariman and it was contended that under those provisions, the Board had been conferred with the jurisdiction to invest power on any of the officers of the Central Excise Department with the powers of Central Excise Officers under this Act. Rule 4 of the said Rules specifically conferred power on the power on the Central Board of Excise & Customs to appoint such person as they think fit to be Central Excise Officers or to exercise all or any of the powers conferred by this rule on such officers. On proper construction of rule 4 of the said Rules it is clear that Central Board may appoint any such person with any of the powers of Central Excise Officers and to exercise all or any of the powers conferred by the rules. It may be mentioned that Section 2 provides that the definition given thereunder will prevail unless there is anything repugnant in the subject or context. In other words, the definition provided thereunder is not final and conclusive. In the instant case the question is whether the respondent No. 3 was authorised by the notification in question to invoke the power u/s 11A of the said Act. In construing power of the Central Board of Revenue to issue such notification within the scope and ambit under this Act and rules framed thereunder, it Avas submitted that the Court will not declare an act ultra vires, merely because it does not fall within the wording used in the strict sense of the term. In other words, the question is whether in order to find out whether the Board had acted outside the power (ultra vires), the Court will take into consideration the object for which such power was conferred and the Court should not be bound by the exact words used in the empowering Act, in as much as, whatever may fairly be regarded as incidental to or consequent upon those things that has to be taken into consideration. It was submitted that the Madras High Court correctly decided that the Notification in question was correctly issued and validly conferred jurisdiction upon the Respondent No. 3 to as the collector.

24. SUBMISSION ON POINT (e) : Mr. Nariman next submitted that Shri N.K. Bajpai, the Director of Anti Evasion (Central Excise) the Respondent No. 3 herein was thoroughly biased and prejudiced against the petitioner company, inasmuch as :

(a). He was personally involved in this matter as the said Shri Bajpai had occasion to know the petitioner company while he was pointed at Calcutta as Collector of Central Excise for some time and had occasion to know the problems of the petitioner company in the matter of selling of the cigarettes at a price higher than the printed price and had occasion to deal with certain representations filed by the petitioner company.

(b). There had been a reward rules under which it was alleged that the said Shri Bajpai would be eligible to get reward for unearthing the evasion of excise duty and certain other officers working under Mr. Bajpai were also entitled to get reward in case the evasion is established. It is alleged that the principle of departmental bias apart from the personal bias disqualified the said Shri Bajpai to act a an adjudicating authority in the matter. It is alleged that Mr. Bajpai after the search and seizure, had

made certain Press Statement to the effect that it was too early to ascertain the extent of evasion and incriminating documents which had been seized were being looked into. Such statements made by Mr. Bajpai allegedly indicated that the said Shri Bajpai had made up his mind to the extent that evasion is already there but only the quantification of the evasion was left and thereby he had committed himself to a view prejudicially against the petitioner in advance of an enquiry and justice would not be seem to have been done if the adjudicating proceeding was allowed to be conducted by Shri Bajpai. It was further alleged that Shri Bajpai would be acting as a witness, a prosecutor and a judge which would be contrary to the principle of natural justice, inasmuch as, it is alleged that Shri Bajpai had personal knowledge about this affairs of the Petitioner Company and secondly, being the Head of the Anti Evasion Department it is his duty to unearth evasion and that he passed orders for search and seizure of documents on the basis of the intelligence report and he had made statement prejudicially against the petitioner company and as such Mr. Bajpai could not act as a judge with an open mind. It is a firmly established principle that the decisions of the administrative authorities are liable to be set aside if it could be established that there was real likelihood of bias or reasonable suspicion of bias. It was further alleged than an affidavit was affirmed before the Madras High Court in M/s. Asian Tobacco''s case, wherein it was stated that the Petitioner Company had evaded duty which indicated a closed mind of the Respondent No. 3 in the matter. The said affidavit was not affirmed by the Respondent No. 3 but by the Deputy Director of Anti Evasion Directorate.

25. FINDINGS : ON POINT (a) : In order to appreciate the true scope and ambit of the notification in question with regard to the meaning of ''sale price'', the definition of ''adjusted sale price'', ''cigarettes packed in packages'' and ''sale price'' has to be looked into. It appears to me that from the said definition the ''cigarettes packed in packages'' must be cigarettes which are packed for retail sale only and which must bear the maximum ''sale price plus local taxes extra and that the definition of ''sale price'' also states that the same is ''in relation to a package of cigarettes.'' Of course the word ''may'' is there and that on the question of the word ''may'' in the definition of ''sale price'', the Court have to ascertain the meaning of a word, particularly general words. The same cannot be read in isolation, their colour and content are depriced from their context. It is the duty of the Court to examine every word of a statute in its context and in its widest sense. According to the petitioner it means, not must, and as such it must be held that the price that may be fixed and declared in the packages need not be the price at which the same should be sold by the retailer or capable of being sold by such retailers. On the contrary according to the revenue the word ''may'' means, it must be capable of being sold, otherwise, it will be contrary to the very spirit of the notification. In this connection, it is pertinent to mention that here the Court has been called upon to decide the liability of a party arising out of a notification for exemption and the principles of interpretation as are applicable in cases of ordinary taxing statute are wholly in-applicable in cases of

interpretation of a statute granting exemption or connection. In cases of interpretation of a notification regarding exemption, the cardinal principle is just the opposite to that of principle of interpretation as is applicable to a taxing statute. Here the petitioner is given certain benefits by way of exemption and that in my view, if a party intends to get, the benefit of exemption notification, that party * has to strictly follow the requirements of the notification and the benefit of doubt in cases of any ambiguity or doubt does not and cannot benefit the party inasmuch as, here is a case, I find that the petitioner was enjoying a concession on the basis of the notification in question, otherwise the petitioner was liable to pay duty on the basis of the ordinary rate which is admittedly higher than the concession rate. On the basis of the notification in question, I am of the view that the sale price must means the maximum retail sale price and at which the same may be sold, which means it is capable of being sold not possible to be sold and not impossible to be sold. So, it appears that the primary duty of the petitioner was to state the maximum retail sale price. Of course, the Court is called upon to decide this question at a point of time when a show cause notice has only been issued and this Court is fully aware that any determination made at this stage is bound to cause prejudice to the parties, but when a petitioner has challenged the validity of the show cause notice mainly on the ground that it was not the duty of the petitioner to state the maximum sale price or the retail sale price of the commodity or in other words, it was at all the requirement of the notification that the petitioner was required to print the maximum retail price at which the same may be sold by the retailer. In this particular case the petitioner submitted that the respondents also were fully aware that the commodities could be sold at a price higher than the printed price by the retailer and that the Respondents had acquiesced in it, and subsequently the petitioner could not be made liable for the same. But in the instant case that on the basis of the documents and papers seized, it transpired that while the petitioner was declaring a price which is lower than the retail-market price, the petitioner was also fixing a higher price in some cases which is stated to be ''effective price'', and that the petitioner has also, it appears, issue blind notes and secret circulars and directions to the whole-sellers and retailers regarding this effective price at which the same would be sold in the market. The respondents are able to find out certain papers and documents during search and seizure that the petitioner was fixing two prices at a time one for the purpose of payment of excise duty and another for the purpose of selling the same at the market as the effective price. It is a matter of common knowledge that sometimes the goods may be sold at a price higher than printed price, but when the petitioner was fully aware that the printed price was not the price at which it was intended to be sold in the market, can it be said that the petitioner can fix any price as the sale price. It is also an admitted position from the documents seized during such search and seizure that if the retailers had to sell the same in the market on the basis of the printed price, only margin of profit that the retailers could get is 10 np. per one thousand pieces of cigarettes which is nothing but a sheer impossibility. In this case, in my view, it

would not be appropriate for this Court to make the final adjudication on this point, inasmuch as, that would prejudice the cause of the parties before the respondent No. 3 before whom the adjudicating proceeding is pending and no final determination has yet been made by the adjudicating authority regarding the effect of the effective price, but prima facie it appears that the respondent No. 3 had not proceeded in the matter illegally. In this case, if it is established that the petitioner had fixed up the effective price and that the effective price was only intended to be the market price and the sale price that was printed on the packages was nothing but a price fixed solely for the purpose of payment of exercise duty at a lower rate" in my view, the revenue may be right in holding that the petitioner is guilty of short payment of excise duty. In any event, at this stage, the petitioner had not submitted any reply'' to the show cause notice and the adjudicating authority had no scope for application of mind. In my view, this Court should refrain from making any final adjudication in question, but it appears to me that the case made out by the respondent No. 3 in the show cause notice requires full adjudication inasmuch as, it prima facie appears to me that the petitioner cannot escape its liability if it is established that the petitioner deliberately made mis-statements in the package of cigarettes regarding the sale price solely for the purpose of avoiding payment of proper duty. The purpose of the exemption notification was to adopt a simple procedure by which the party who intends to get the benefit of the concessional rate of duty is to declare and indicate on the packages a retail sale price and to pay excise duty on that basis. This was done to avoid the legal complications regarding the determination of the wholesale cash price u/s 4 of the said Act and to give scope of the said notification the petitioner was not at liberty to fix any price as the sale price for the purpose of payment of excise duty.

26. If the contention of Mr. Nariman is accepted, that the petitioner company had no obligation to state the maximum retail price, in my view, it will be contrary to the well established principle of interpretation of statute that it is a case of notification for exemption, it has to be interpreted in a manner which fulfilled the object of such notification and further a statute has to be interpreted in such a manner, so as to prevent any evasion for the revenue and the notification, so as to prevent any evasion of the revenue and the notification could not be given any narrow meaning. In my view, the Court has to interpret a statute of this nature having regard to the purpose and object of such statute and the Court has to keep in mind that the court''s duty is not to make a destructive-analysis of a statute so as to frustrate the purpose of'' the statute and to allow persons to take advantage of such interpretation and thereby indulge in evasion of duty payable by him under the law. In my view, it is not a function of the court to rescue individuals from any hardship which may result from such notification when the enactment is clear and in my view, the Court should not go beyond the immediate purpose of the legislation and should not give a meaning broadly which may encourage evasion of duty; on the contrary court''s role is not destructive but should be creative.

27. In this connection it has been submitted by Mr. Nariman that if the petitioner company had to pay such huge amount of excise duty on the basis of such interpretation given by the Revenue that would result in creating a condition in which the petitioner company cannot survive. Court has to interpret a law on the basis of the languages used in the statute keeping in mind the object of such statute. It may result in hardship, but hardship is no ground to limit and/or to narrow down the interpretation of a particular provision, so as to protect the individual. The Court has to interpret law and is not concerned about the result of or effect of such interpretation either on the revenue or on the petitioner. Accordingly, in my view, on true interpretation of the relevant provisions of the notification in question, that it was the duty of the petitioner to state the maximum retail price of the commodity in question which should have been printed on the packages and on that basis the duty should have been paid. Accordingly I hold that the requirement of the said notification is to state a price which should be the maximum retail price at which the petitioner company bonafide intended to sell the same through the retailers, keeping in view the provisions of the Packages Commodities Rules. If the requirement of the notification was to state the maximum retail price, in that event I do not find any thing illegal on the part of the Revenue to issue the show cause Notice on that basis at this stage.

28. The decision of the Supreme Court in case of Hansraj Gordhandas Vs. H.H. Dave, Assistant Collector of Central Excise and Customs, Surat and Others, regarding the rules of interpretation in the taxing statute referred to by Mr. Nariman is not applicable in the facts and circumstances of the case. The other case law referred to by Mr. Nariman in the case of Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others, is also not applicable in the facts and circumstances of this case, inasmuch as, in that case the Supreme Court considered the scope of Section 12(1) of the Foreign Exchange Regulation Act regarding the requirements of the declaration and whether the Customs Authority can go behind the said declaration u/s 12(1) of the said Act at the time of importation and that such is not the situation in the case before me where the petitioner has to declare a price in view of the terms and conditions of the notification and that in the instant case it was alleged that such declaration was incorrectly made for paying lesser amount of duty which had resulted in short payment of excise duty to the extent of about Rs. 803.75 Crores.

29. Other case law referred to by Mr. Nariman is also not applicable in the facts and circumstances of the case. This case stands on quite different footing. Accordingly, I hold that the show cause notice cannot be said to have been issued without the authority of law and/or bad in law on any ground as alleged.

Other case law referred to by Mr. Nariman is also not applicable.

30. FINDING ON POINT (b) : The best exposition of statute or any other document is that which it has received from Contemporary Authority and where this has been

given to an enactment by judicial decision then of course it is to be accepted as conclusive. The principle is that the language of statute must be understood in the sense in which it was understood when it was passed and those who lived at or near the time when it was passed may reasonably be supposed to be better acquainted than their defendants with the circumstances to which it had relation, as well as with the sense they attached to legislative expressions. It was observed in the Maxwel''s interpretation of statute which was followed by the Supreme Court in case of Polestar Electronic (Pvt.) Ltd. Vs. Additional Commissioner, Sales Tax and Another, that long acquiescence of the legislature in the interpretation put upon its enactment by notorious practice, may perhaps be regarded as some sanction and approval of it. "The principle of contemporaneous exposition may arise in two different ways, first way, a text was interpreted by courts, legal writers and other in the period following its enactment. This shows how this statute was understood by themselves to whom it was addressed, secondly the statement of statutory instruments issued by the Government contemporaneously with the Act. This shows how the act was understood by those responsible for its enactment.

31. Now the question is whether in the facts and circumstances of the case the principle of contemporaneous exposition is applicable. Admittedly, in the instant case the said notification was not interpreted by any court or other authorities since 1983 and admittedly, no statement or statutory instrument had been issued by the Government contemporaneously with the issue of the said notification. All concerned including the Government and the petitioner and others understood the meaning of the said notification namely, that in order to avail the concessional rate of excise duty under the notification the petitioner had to declare and print the maximum retail price and on the basis of the price so printed, excise duty should be payable at the rate fixed in the notification in question. The admitted position is that the respondents, Central Excise Authorities did not question the fixation of the sale price declared by the petitioner. It is also admitted that the notification in question did not provide any provision for having a check on the question of fixation of the sale price and that the notification in question did not provide for any approval of the price list which was introduced at a later stage and thereafter, admittedly the respondents approved the price list as it was submitted without questioning the bonafides of the petitioners in the matter of fixation and declaration of the sale price. According to Mr. Nariman these facts shall be construed that the Revenue who had issued notification in question approved the action of the petitioner and as such the respondents had no jurisdiction to re-open the issue at a later stage. Mr. Nariman further contended that if the Excise Authorities had pointed out in time that the petitioner was not fixing the price properly, in that event, the petitioner would have taken care of it and that the petitioner would not have fixed a sale price in such a manner which would ultimately cause a disastrous effect upon the petitioner company. It was further submitted that the respondents in the facts and circumstances of the case had no authority or jurisdiction to make any demand for

payment of any excess excise duty which could not be demanded from the petitioner. The case of the respondents in short as made out in the show cause notice and from the affidavit-in-opposition, is that on the basis of the search and seizure conducted by the Excise Authorities, it revealed to the Excise Authorities that the petitioner company drastically reduced the margin available to the wholesale dealers/secondary dealers/retailers immediately after the budgetary change of 1983 while it increased the sale price and sale realisation and the margin of profit it allowed to the retailer was clandestinely reduced to 10 np. per thousand cigarettes and at the same time the petitioner company unofficially fixed the ''effective price'' for their various brands of cigarettes and communicated the same down the line in a clandestine manner. It was alleged that the petitioner company knowingly printed lower price as the maximum retail sale price on their package and by such mis-declaration the petitioner company paid excise duty at a lower rate than at the rate payable. As per example a cigarette of a particular brand was fixed at Rs. 1.70 whereas the effective price thereof was fixed at Rs. 2/-. The rate of duty for one thousand cigarettes if exceeds Rs. 60/- but does not exceed Rs. 170/-, the rate of duty is Rs. 125/- per one thousand whereas if the rate exceeds Rs. 170/- but does not excess Rs. 300/- the rate of duty would be Rs. 225/-. According to the revenue if the effective price which was the real price, is taken to be the sale price of cigarettes, in that event, the petitioner by printing Rs. 1.70 np. paid excise duty at the rate of Rs. 125/- per one thousand and if the sale price exceeds Rs. 1.70/- than the rate would be Rs. 285/-per thousand cigarettes. The claim of the revenue is that the petitioner was under an obligation and/or duty under the notification concerned to state the price correctly namely the price at which it could be sold by the retailers, in that event, the duty is to be paid on that rate namely on the effective price rate and by adoption of this principle, it is alleged that the petitioner company had deliberately and with ulterior motive paid duty at a lower rate than that payable under the notification. The case of the Revenue as it appears is that the Revenue bonafide believed the action of the petitioner company in the matter of fixation of the price but when on the basis of the search and seizure documents had come into the possession of the revenue which clearly indicated that the petitioner company was practicing a fraud upon the revenue in a machinations manner. It was stated on behalf of the Revenue that the whole thing was maneuvered in such a manner that the Revenue was mis-led from the very beginning and that in order to mis-led the Revenue on the strength of the policy decision, the petitioner company periodically went on making representation about the selling of cigarettes at a rate higher than the printed rate and that in the said representation the petitioners expressed their helplessness. From such representations it also indicates that the petitioner company was fully aware and understood that the requirements of the said notification was to declare a sale price in which it must be sold in the market by the retailers otherwise there was no point for making such representation complaining about selling of the said cigarettes at 10% above the printed sale price. In the facts and circumstances of this case the principles of Contemporary Exposition is not

applicable at all and it cannot protect a party against whom serious allegations regarding large scale evasion of excise duty of the nature before me had been made.

ON POINT (c) :

32. With regard to the next contention of Mr. Nariman about the scope and ambit to provisions of Section 11A of the Central Excise &: Salt Act 1944 it appears to me that Section 11A of the said Act provides provision for recovery on duties not levied or not paid or short levied or short paid or erroneously refunded. It is evident that whenever the excise duty has not been levied or not paid or has been short levied or short paid, the power u/s 11A could be invoked, but before an order is passed, a show cause notice has to be issued, in other words, it is the requirement of law that only after giving a notice and hearing, a party who has not paid proper excise duty, can be made liable to pay the said duty. In this context, reference be made to the provision of Section 11B of the said Act. Which provides claim for refund of duty and on plain reading of Section 11B of the said Act it appears that any person claiming refund of any duty of excise may make an application for refund of such duty before the expiry of six months. This power u/s 11B of the said Act is independent of the case when such refund is allowable as a result of an order passed in appeal or revision under the Act. Mr. Nariman referred to the proviso to sub-section (3) of Section 35A of the said Act, wherein it was provided that where the Collector (Appeals) is of the opinion any duty of excise has not been levied or has been short levied or short paid etc., no order requiring the appellant to pay any duty not levied or not paid, short levied or about paid etc. shall be passed unless the appellant is given a notice within the time limit specified in Section 11A to show cause against the proposed order. This proviso to Sub-section (3) of Section 35A of the said Act clearly indicates that it is independent of the provisions of Section 11A of the said Act and on plain reading of Sections 11A and proviso to Section 35E(3) of the said Act, it is clear that the submission of. Mr. Nariman that section 11A is a mere machinery section and cannot be exercised independently but can be exercised in connection with an appeal or revision a provided in section 35A or Section 35EE of the said Act is without any substance. Sections 35A and 35EE of the said Act merely adopted the period of limitation prescribed u/s 11A of the said Act for the purpose of initiating a proceeding for realisation of duties not levied or short paid in connection with an appeal or revision. Accordingly, in my view, on plain reading of Section 11A of the said Act, no other interpretation could be given. In this connection reference may be made to the observation of Lord Esher N.R. in the case of R. v. City of London Court Judge reported in 1842 (9 M&W) 378 at 398 may be quoted, wherein it was observed that "if the words of an act are clear, you must follow them, even though they lead to manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity. In my opinion, the rule has always been this if the words of an act admit of two interpretations, then they are not clear; and if one interpretation leads to an

absurdity and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt to the other interpretation". In my view, the interpretation sought to be given by Mr. Nariman in Section 11A is given that would produce a wholly unreasonable result and it is duty of the Court to construe a statute according to literal and grammatical meaning which it had expressed and that the words of enactment must prevail. Under the scheme of the said Act, Section 11A of the said Act was provided as a substantive provision and a complete code for realisation of excise duty in case of short levy or short payment and Section 118 of the said Act also provided the substantive and the machinery provision for refund of any excess excise duty paid which is also a complete code for the same. Parliament introduced a simplified procedure for recovery of the excise duties not paid or short paid etc, and at the same time provided same procedure for the benefit of the assesses for getting refund of duty. The twin sections - Sections 11A and 11B were introduced in the interest of the revenue as well as the assesses and that is the reason why the legislature had not laid down any condition precedent and/or restriction in the matter of exercise of its powers under 11A or 11B of the said Act. In my view also the decision referred to by Mr. Nariman decided by the Tribunal reported in 1987 (13) ECR 1 , had not correctly decided the law on the subject and I hold that the said Tribunal had not correctly interpreted the provision of Section 11B of the said Act, inasmuch as, such interpretation is on the face of it contrary to the plain meaning of the language used in the statute and that would be contrary for the purpose of which Section 11B was introduced and accordingly I am unable to persuade myself to accept the proposition laid down by the said Tribunal that unless the price list is set aside on appeal, the question of refund will not arise. Such an interpretation given by the Tribunal on the face of it is erroneous, in view of the fact that Sub-section (3) of Section 11B provides cases where refund should be made as consequence of an order passed in appeal or revision. If the interpretation given by the Tribunal is accepted that would result in a disastrous effect and that would make the provision of Section 11B(1) completely nugatory and unworkable. If such an interpretation given by the Tribunal is accepted, in that event also the provision of Section 11A should also be made completely nugatory and unworkable. In my view, the Tribunal''s decision is wholly erroneous and contrary to the scope and object of the Act and cannot be sustained on any rules of interpretation. The said tribunal sought to narrow down and abridge the scope and ambit of Section 11B of the said Act to defeat a claim for refund on a proposition which if accepted would produce wholly unreasonable results. The court''s and the tribunal''s duty is to apply rules of interpretation by which it would make sense of the enactment than by opening it to destructive analysis. The tribunal''s view, in my opinion would lead to destructive analysis. The provisions of Section 35A and Section 35EE neither override the provisions of Section 11A nor it could be said that Section 11A is a mere machinery provision which could not be invoked in aid of the powers conferred in Section 35A and/or Section 35EE of the said Act. The later Sections adopted by reference, only the period of limitation and

nothing else. When the language of Section 11A is clear and the powers conferred in other provisions could be invoked only within the period of limitation mentioned in Section 11A of the said Act, makes it clear that the provision of Section 11A is an independent code and/or provision for the purpose of recovery of the excise duty short paid and short levied. In my view, if the interpretation as sought to be given by Mr. Nariman is to be given in Section 11A of the said Act, it would produce a wholly unreasonable result and would also defeat obvious intention of the legislature and further the Court has to do some violence to the words which, in my view, is not permissible. In this connection I may quote the observation of Lord Scarman of the House of Lords, in the case of Duport Steels Ltd. v. Sirs and Others, reported in (1980)1 ALL ER 529 at 551, "But in the field of Statute Jaw the judge must be obedient to the will of Parliament as expressed in its enactment. In this field Parliament makes and unmakes, the law, the judge''s duty is to interpret and to apply the law, not to change it to meet the Judge''s idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the Judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the Judge must say so and invite Parliament to reconsider its provision. But he must not deny the statute. Unpalatable statute law may not be dis-regarded or rejected, merely because it is unpalatable. Only if a just result can be achieved without violating the legislative purpose of the statute may be Judge select the construction which best suits his idea of what justice requires." In my view, when the language of Sections 11A, 35A and 35EE of the said Act are clear and when they are independent provisions, the scope and ambit of Section 11A cannot be curtailed. In my view, Section 11A provides a complete code and is, an independent provision and any other interpretation would, in my view, narrow down, limit and/or abridge the scope and ambit of the provision of Section 11A Of the said Act. If the provision of Section 11A to be harrowed down defeating the obvious intention of the legislation, this would produce a wholly unreasonable result. In my view, the Court will not interpret a statute which would give raise to a destructive analysis. This is not a case where the provision of Section 11A is capable of two alternative interpretations. Even interpreting a revenue statute, the Court should examine the substance and not merely the form of the language and should mould the taxing statute so far as possible to achieve the legislative intent and also to meet with the change of social needs. It is no longer the duty of the Court to interpret a statute strictly to help the evasion. Its duty is not to construe in a manner which will suppress the evasion of tax or duty. In this particular case, the petitioner was admittedly enjoying a concession and/or exemption and the provision of notification giving concession should not be, construed liberally in favour of the taxpayer defeating the purpose of the legislation. While interpreting the provision of law, the Court will try to ascertain the mischief which the statute intended, to remedy from the whole of the enactment and the existing state of law. The object of Section 11A was for recovery of duty short paid or

short levied and in my view, the provision of Section 11A could not be interpreted in a manner which would defeat the very purpose and/or object for which the same is enacted. Accordingly, in my view, this contention of Mr. Nariman must be overruled. In my view, that within the scope and ambit of Section 11A of the said Act, the impugned show cause notice was issued rightly.

FINDING ON (d) :

33. The next submission of Mr. Nariman was that the Notification No. 215/86 dated 27th March, 1986 is on the face of it without jurisdiction and accordingly the respondent No. 3 who was delegated with the power of a collector under the Central Excise & Salt Act, 1944 should be prohibited from exercising any jurisdiction in the mater and as such the impugned notice issued by the respondent No. 3 should be held to be illegal. Incidentally it may be mentioned that the validity of the Notification No. 215/86 dated 27th March, 1986 was also the subject matter of challenge before the Madras High Court in Writ Petition No. 5004 and 5122/87 and Mr. Justice Madan of the Madras High Court by the order and judgment dated 8th September, 1987 overruled the contentions of the petitioner in that case, viz., Messrs Asia Tobacco Co. Ltd. and held that the said notification was issued validly by the Central Board of Excise and Customs in exercise of the powers conferred under Rule 4 of the Central Excise Rules, 1944 read with section 2(b) of the said Act. The decision of the learned single Judge of the Madras High Court was also affirmed by the Division Bench of the Madras High Court consisting of Chief Justice Chandarkar and Justice M. Srinivasan in Appeal No. 1801 and 1802/87 wherein their Lordships of the Division Bench of the Madras High Court by the judgment dated 11th November, 1987 were pleased to hold that there was no infirmity in the said notification. It was held in that case that the Central Board of Central Excise and Customs had been invested with the power to delegate such power upon such authority. The petitioner''s case is that Rule 2(ii) of the said Rules conferred power on certain collectors to exercise some territorial jurisdiction, viz., collectors were appointed to exercise powers within a State as a part of the State. Accordingly, under the Scheme of the said Act read with the Rules that a single person could not be appointed as a Collector to exercise jurisdiction throughout the territory of India, and it was stated that if the same was allowed to be done in that event it will lead to some annomolous position and particularly in view of the fact that the respective territorial collectors have their jurisdiction in the matter and in this case if one officer is also conferred with such a jurisdiction all over India, in that event it will overlap the jurisdictions of other officers. The validity, of the notification in question was gone into by the learned single Judges and the Division Bench of the Madras High Court in details. In this connection it may be noted that Mr. Nariman submitted that the Madras High Court did not consider all the aspects of the matter and particularly the permissibility of conferring concurrent jurisdiction inasmuch as in the Act there is no express provision by which the authorities could confer concurrent jurisdiction in respect of the self same mater on two sets of officers. If

was submitted by Mr. Nariman that section 2(b)/Rule 2(ii) of the said Rules clearly indicates that the collector could only be appointed in the manner indicated only in respect of the part of the State or whole of the State and that in the instant case the notification is ultra vires the provisions of the Act and and/or the rules framed thereunder. It was further stated that in the instant case there were as many as five collectors who could exercise jurisdiction in this matter and that under such circumstances in the absence of any specific rule such a power could not he conferred upon the respondent No. 3 concurrently. In this connection Mr. Nariman relied on the decision of the Andhra Pradesh High Court in the case of Balaji Rice Company v. Commercial Tax Officer reported in 55, Sales Tax cases page 292 wherein the Division Bench of the Andhra Pradesh High Court held that under the relevant provisions of the Andhra Pradesh Sales Tax Act., the concurrent jurisdiction could not be conferred on two different authorities in respect of the self same-area. In the instant case it was submitted by the revenue, that there is no question of application of the principles laid down by the Andhra Pradesh High Court, inasmuch as, the word "local limit" it not mentioned in Section 2(b) of the Central Excise & Salt Act and/or 2(ii) of the said Rules and it was submitted that the reasons given by the Andhra Pradesh High Court in the said Sales Tax case against conferring concurrent jurisdiction contrary to the provisions of the Sales Tax Act have no manner of application in the facts and circumstances of this case. It was rightly held by the learned single Judge and the Division Bench of the Madras High Court in the case referred to that Rule 4 of the Central. Excise Rules read with the powers conferred u/s 2(b) of the said Act confer jurisdiction upon the Central Board to issue such notification. In my view when Central Board had been conferred with the jurisdiction to appoint an officer to exercise the powers conferred under the Act and/or the rules thereunder, can that power be limited and narrowed down as sought to be argued by Mr. Nariman in the instant case. It is firmly established principle that whatever may fairly be regarded as incidental to or consequent upon, those things which the legislature has authorised, and not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires. (See Attorney General v. Great Eastern Railway (1880) 5 AC 473 at 478). Relying upon the principles laid down by the House of Lords in the aforesaid case in my view unless the Statute in question had expressly prohibited conferring such concurrent jurisdiction, the notification cannot be declared to be ultra vires, particularly in view of the fact that such a power, even assuming that it does not directly flow from Rule 4 of the said Rules should be held to be incidental or consequent upon those things which the, legislature have authorised upon the authorities particularly in view of the object of the Act. The jurisdiction of an officer appointed by the Central Board should not also be'' interfered with unless it could be shown that either it is prohibited under the law or is contrary to law. In the instant case certainly it cannot be said that the petitioner would be in a most disadvantages position if notice were issued by 5 different collectors than by one collector in respect of all the areas and on the basis of a single show cause notice in respect of the self same mater, and in my view it would

not cause any prejudice or injury to the petitioner and further such a power is, in my view, reasonable, and incidental to the exercise of the statutory powers expressly conferred upon the respondent. In my view the ultra vires doctrine could not be made applicable in the facts and circumstances of the case inasmuch-as it is not intended to perpetrate any direct interference with the rights of individual without specific legal authority and is not intended to harass and cause'' prejudice to any party. Accordingly, I hold that the learned single Judge and the learned Judges of the Division Bench of the Madras High Court in the case mentioned above had rightly decided that the notification No. 215/86 dated 27th March, 1986 was legal and valid and as such I hold that the respondent No. 3 had jurisdiction to issue the impugned show cause notice. I am constrained to take this view apart from the decision of the Madras High Court and the observation by the House of Lords mentioned above but also because of the observation of Denning L., J. in Magor and St. Mellons RDC v. Newport Corporation reported in (1950)2 All ER 1226 that "We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis".

35. FINDING ON (e) : The last point that was raised on behalf of the petitioner by Mr. Nariman was that Shri N.K. Bajpai, the respondent No. 3 herein, was thoroughly biased and prejudiced, against the petitioner company and as such a writ of prohibition must go against the respondent No. 3 prohibiting him from adjudicating the matter on the ground that the said respondent No. 3 was biased and prejudiced against the petitioner Company. It was alleged against the respondent No. 3 that (i) he was personally involved in this matter as the said Shri Bajpai, the respondent No. 3, had the occasion to know the petitioner company and its affairs while the said officer was posted at Calcutta for sometime, and was aware of the problems of the petitioner company that the cigarettes of the petitioner company was being sold at a price higher than the printed price, (ii) that in the Reward Rules it was provided that the Respondent No. 3 would be eligible to get a cash reward for unearthing the evasion of the excise duty and certain other officers working under him would also be entitled to get cash rewards in case the evasion is established and as such it was suggested that the said reward rule had created a personal and departmental, interest which would cause serious prejudice to the petitioner inasmuch as it was alleged that it would be in the interest of these officers to sustain the evasion, even though there had been no evasion, only for getting the cash reward.

(iii) That the entire search and seizure took place under the order and control of the respondent No. 3, Shri Bajpai and further he had occasion to go through the intelligence Reports against the petitioner and as such the said Shri Bajpai had committed itself to a view prejudicially against the petitioner in advance of an enquiry and that Shri Bajpai would not be able to bring an impartial judgment to

bear on the matter. Further it was suggested that the said Shri Bajpai had issued the show cause notice in which certain positive findings had been made against the petitioner and as such the respondent No. 3 should not be allowed to dispose of the matter as the said authority could not act impartially as required in the matter.

iv) That the said Shri Bajpai had made certain press statements after the search and seizure wherein it is stated that - "It is too early to determine the extent of evasion" and further stated that "incriminating documents had been seized and were being examined". Mr. Nariman suggested that these statements clearly indicate that the said Shri Bajpai had already formed an opinion that there had been evasion, but only thing that was required to be determined was the extent of such evasion various case laws were cited from the Bar on the question of bias. In this connection it is not necessary in my view to discuss all the case laws, inasmuch as, it is firmly established principle that the decisions of the administrative authorities are liable to be set aside if it could be established that there was real likelihood of bias and/or reasonable suspicion of bias. A real likelihood of bias means at least a substantial possibility of bias and that is not necessary to prove actual bias or real bias but merely by establishing that there is reasonable apprehension of bias the said authority can be disqualified from acting in the matter.

36. In order to examine the question of bias on the, part of the Respondent No. 3 - Shri Bajpayee, the Court has to find out what is the case made out in the petition by the petitioner. The reward rule was placed extensively by Mr. Nariman, to suggest that the said rule created a departmental bias. I have perused the said reward rule and it appears to me that in so many clear words there is no provision in the said reward rules which entitled the said Shri Bajpai to get any reward and further the informers and the persons who have helped to detect evasion, including some of the officers may get reward if the evasion is ultimately unearthed. No particulars is given in the petition, no materials has been disclosed in the petition as to who are the officers working under the respondent No. 3 would be entitled to any reward in the matter. Under the reward rules even the informer on whose information the evasion is unearthed is entitled to reward. In this case no material has been disclosed to show or suggest that any of the officers working under Mr. Bajpai would get-any reward. Simply because the reward rules entitled an officer to get a reward, in my view, is not sufficient to prove a case of bias, inasmuch as, the case of bias has to be established with some materials and not merely on the basis of some vague allegations and/or on the basis of mere interpretation of the reward rules. Further it is alleged that Shri Bajpai had made certain press statements which was not controverted by Mr. Bajpai but it was rightly pointed out on behalf of the Revenue that unless the context or in relation to what question the said answer was given, was disclosed, in that event the Court should not draw any inference from such isolated statements. It was also rightly pointed out by the Revenue that the newspaper reports could not be relied as it is, unless some persons who had heard such statements being made by the Respondent No. 3 had come forward before this

Court with an affidavit and secondly such an isolated statements without disclosing the context in which it was stated it will not give a clear picture and on the basis of an isolated statements from the whole statements it would not be possible to draw any inference of bias against Shri Bajpai. Further the allegation that the order of search and seizure, was passed by Bajpai and that whole thing happened under his control and supervision which had been denied by the respondents. There was no material on record to substantiate all these allegations against Shri Bajpai. There is no material before this Court that Shri Bajpai had occasions to peruse the report excepting the statement made from the Bar that the said Shri Bajpai must have looked into these things before the search and seizure was conducted. Admittedly in this instant case there is no allegation of personal hostility against the respondent No. 3 and/or his personal involvement in this matter, but a case of real likelihood of bias was sought to be made against the respondent No. 3 at the initial stage when a show cause notice had been issued against the petitioner by the Respondent No. 3. In my view if an administrative authority is expressly empowered by statute to make a draft order or provisional decision and is then empowered to entertain representations and- consider objections against it with a view to decide whether or not to give it final effect, then the question of bias cannot come into play inasmuch as such a state of affair is neither intrinsically offensive nor abnormal in the process of administration. But one thing is clear that the authority must act fairly and with a mind open to persuasion and fairness may well require- observance of the principles of natural justice. Secondly, ordinarily an authority is disqualified from adjudicating whenever circumstances point to a real likelihood that he will have a bias, by which is meant and operative prejudice whether conscious or unconscious in relation to a party or the issue before him. In this particular case the proceeding has been undertaken and initiated by a very high officer of the Central Government. It is also well known principles firmly established by several decisions of the Supreme Court that when power is conferred upon a very high official the possibility of misuse of that power is less than the power conferred upon an ordinary official and in my view the same principle shall apply in case of bias. In the instant case the said Shri Bajpai has to exercise his power which is not at all a discretionary power but he has to give his decision objectively on the basis of materials and documents on record and on the basis of submissions and/or representations made by the parties before the said authority. Standards applicable to the principle of bias, in my view in case of exercise of discretionary power is quite different from a case where a statutory authority had to give his decision objectively on the basis of the evidence and materials on record, which has to be given after hearing the affected parties. In such case a decision is given objectively and subject to scrutiny by the Appellate and/or Revisional authorities. The degree of substantial prejudice in both the cases is not same. When in case like this, a party complains before the Court that certain officer is biased, the Court will not adopt same standard as in the case of exercise of discretionary power by an authority whose decision is more or less subjective. In the case of discretionary power, the substantial risk or prejudice of a party appearing

before that authority is very high than a case like this where a top ranking officer of the Central Government has to exercise his power on the basis of a show cause notice issued, he has to confine the order on the basis of the materials and documents and records and on the basis of the representations and objections that may be made before the said authority. In my view the Court''s approach to the principles of bias in case of decision given subjectively and decision given objectively should be different as conceptually the principles of bias cannot be uniform in both the cases. In case of subjective decisions bias plays very important role but in case of objective decisions like this, bias plays a very negligible and insignificant role. Accordingly, on the basis of the above principles and materials on record I am unable to hold that the proceeding in this case will be vitiated on the ground of bias and/or interest in case the same is allowed to be conducted by the respondent No. 3. Further on the basis of some remote or purely speculative allegations before this Court I am unable hold that the said reward rule had created any interest or likely to create any interest for which the concept of departmental bias or institutional bias could be invoked in the instant case. Further I am of the view that this is neither offensive nor abnormal in the process of revenue administration in our country to issue a show cause notice and to pass final order upon hearing the parties by the same officer. Further in my view the statements made by the respondent No. 3 as stated in the petition did not indicate any bias in the absence of full text of such statement and that such statement, on the face of it, did not or could not indicate any bias and/or likelihood of bias. True impartiality is one of the characteristics of a good administration and that public confidence in the administrative process can only be commanded when the persons entrusted with the responsibility for making a decision are not motivated by any desire to deal with the parties otherwise than in a manner which an objective appraisal of the facts and the furtherance of the public duty imposed upon the tribunal require. But in case of the nature before me for upholding an abstract principle of law : the Court will not allow such a plea to be raised at the instance of a party against whom large scale evasion of public revenue is alleged. If in such a case a party is granted relief on this score that would shake the public confidence in the judicial process of this country.

37. It was also alleged that Mr. N.K. Bajpai, respondent No. 3 herein, if he is allowed to act as an adjudicating authority, in that event he would be acting as an witness, prosecutor and a Judge. I do not find any- substance in this contentions, inasmuch as, there is no- materials on record oh the basis of which it could be said that the respondent No. 3 had any personal knowledge in the matter which is likely to be reflected in the adjudication proceedings. Secondly, it is not unusual that the person who issues the show cause notice is to hear the matter and that there is no allegation that the respondent No. 3 is likely to act not fairly and properly. Accordingly, this contention cannot be upheld. Lastly it was contended that an affidavit in-opposition was filed on behalf of the respondent No. 3 by one of his subordinates and in which certain conclusive statements were made regarding the

evasion of duty. I have looked into a copy of the affidavit filed ''before the Madras High Court in which the show causes notice issued against some other party in connection with this case, was issued and was the subject matter of challenge. The said affidavit was not personally affirmed by the respondents No. 3 but by one of his subordinates and there the statements might be a reproduction from the show cause notice and that from the said statements it cannot be held that the respondent No. 3 was in any way biased and indicated any pre-conceived views of the Respondent No. 3, Shri Bajpai in the matter. Accordingly, the contentions regarding bias in this regard alleged against respondent No. 3 fails. With regard to the allegations of personal involvement of Mr. Bajpai in the matter by coming to know of the affairs of the petitioner company while his short stay in Calcutta, I do not find that even accepting the allegations as it is, a case of bias and/or likelihood of bias had been made out and there was no materials on record also to show or to indicate that the respondent No. 3 had passed any order for search and seizure and/or had occasions to deal with the Intelligence Report if any. I am unable to entertain these objections on the ground of bias on the basis of some mere speculative and vague allegations and/or on the basis of some hypothesis. The respondent No. 3 may be the head of the department and may be that as a matter of routine administrative acts he might have performed duties and passed orders but that cannot by itself prove the case of bias. Accordingly I do not find any merit on the allegations of bias and accordingly 1 also reject the same.

Accordingly, all the contentions raised by Mr. Nariman, the learned counsel appearing on behalf of the petitioner fails and the rule is discharged, all interim orders are vacated. There will be no order as to costs.