SUPREME COURT OF INDIA

Supdt. of Taxes, Dhubri

Vs.

Onkarmal Nathmal Trust

C.A.Nos.140-143, 262-275, 678 and 1761-1762 of 1973

(A. N. Ray, C.J.I., H. R. Khanna, K. K. Mathew, M. H. Beg and Y. V. Chandrachud, JJ.)

01.05.1975

JUDGEMENT

A. N. RAY, C. J.

(for himself and on behalf of **Y. V. CHANDRACHUD J**-):-

1. These appeals by special leave raise the question of the validity of notices of demand under the Assam Taxation (on Goods Carried by Road or on Inland Waterways) Act. 1961 hereinafter referred to as the New Act.

2. The Assam Taxation (on Goods Carried by Road or Inland Waterways) Act, 1954 hereinafter referred to as the Old Act was passed by the Assam Legislature in 1954. On 26 September, 1960 this Court declared the Old Act to be ultra vires the Constitution on the ground that prior sanction of the President was not taken. On 6 April, 1961 the New Act was passed by the Assam Legislature. The New Act was published in the Gazette on 15 April, 1961. The New Act was to remain in force with retrospective effect from 24 April, 1954 up to 3 March, 1962.

3. On 28 July, 1961 the New Act was challenged by about 485 assessees in the Assam High Court. The High Court passed an order staying all proceedings. The order staying proceedings continued till the New Act was held ultra vires the constitution by the High Court. On 1 August, 1963, the High Court held the New Act to be ultra vires. On 1 August, 1963 the High Court granted certificate of fitness to appeal to this Court.

4. On 13 December, 1983 on a writ application filed by M/s Khyerbari Tea Co. Ltd. this Court held the New Act to be valid. The decision of this Court is reported in (1984) 5 SCR 975 = (AIR 1984 SC 925) Khyebari Tea Co. Ltd . v. The State of Assam.

5. On 4 March, 1964 the State of Assam an the strength of the certificate granted by the High Court filed an appeal in this Court against the judgment of the High Court dated 1 August, 1963. On 28 October, 1964 this Court granted interim stay of the operation of the judgment of the High Court dated 1 August, 1963. On 29 January, 1965 the interim stay granted by this Court was made absolute subject to the condition that the assessment proceedings in respect of 485 respondents would continue but no levy would be made, and the respondents could initiate assessment proceedings in respect of those assessees. On 1 April, 1968 this Court accepted the appeals filed by the State Government.

6. It is only after the State obtained interim order from this Court an 29 January, 1965 that notices under Section 7 (2) of the New Act were issued. These appeals challenged the validity of those notices. In Civil Appeals No. 140-143 of 1973 notice under Section 7 (2) of the New Act was issued an 4 March, 1965 for the return of the quarter 1 January to 31 March, 1962. In Civil Appeal No. 687 of 1973 notice under Section 7 (2) of the New Act was issued on 4 March, 1965 for the return of the quarter 1 January to 31 March, 1962. In Civil Appeals No. 262-275 of 1973 notice under Section 7 (2) of the New Act was issued on 2 August, 1965 for the return of the quarter 1 October 1961 to 31 December, 1961. In Civil Appeals Nos. 1761-1762 of 1973 notice under section 7 (2) of the New Act was issued on 30 February, 1965 for the return of the quarter 1 October, 1961 to 31 December, 1961. The respondent assessees challenger these demand notices in the High Court on the found that the notices were illegal and beyond the jurisdiction of the State The broad contention of the assessees was that the State Could issue notices within two years from the expiry of the return period and none of the notices was within the time mentioned in the New Act and therefore, the State had no jurisdiction to issue the notice. The State, on the other hand, contended that from 10 August, 1961 to 1 August, 1963 there was an order of the High Court staying all proceedings, and, therefore, it was not possible to issue any notice until the State was permitted by orders of this Court to commence proceedings.

7. The High Court accepted the contention of the assesees. The High Court held that the notices were barred by limitation in terms of the provisions contained in Section 7 (2) of the New Act. Each of the challenged notices was much beyond the date of expiry of two years from the date when

return should have been filed. The High Court held that the provisions contained in the Limitation Act do not apply to legislation of the type of the New Act.

8. Section 8 of the New Act 5 the charging section. Under that section tax is levied on (a) manufactured tea and (b) jute in bales carried by means mentioned therein. The period and the rate for taxes are specified in the schedule. The tax levied on manufactured tea shall be realised from the producer. The tax levied on jute shall be realised from the dealer.

9. Section 7 of the New Act speaks of return. There are four sub-sections of Section 7. The first sub-section requires every producer and dealer to furnish returns of manufactured tea carried in tea containers and jute carried in bales in such form and to such authority as may be prescribed. The second sub-section states that in case of any producer or dealer who, in the opinion of the Commissioner, is liable to pay tax for any return period or a part thereof, the commissioner may serve within two years of the expiry of the aforesaid period, a notice in the prescribed form requiring him to furnish return of goods carried and such producer or dealer shall thereupon furnish the return within the date and to the authority mentioned in the notice. The notices in the present appeals are issued under this sub-section (2) of Section 7 of the New Act. The third subsection states that the returns, during the first year of operation of the New Act, shall be furnish for such period and within such time as may be notified by the Commissioner and thereafter quarterly and within thirty days of completion of the quarter in respect of which the returns are to be filed. The fourth sub-section states that if any producer or dealer discover any omission or other error in any return furnished by him he may furnish a revised return at my time before assessment is made on the original return.

10. Section 9 of the New Act speaks of assessment. There are four sub-sections of section 9. sub-section (1) states that if the commissioner is satisfied that a return furnished by a dealer or a producer under section 7 in respect of any period is correct and complete, he shall, by an order in writing, assess the producer or dealer and determine the tax payable by him on the basis of such return. sub-section (2) states that if the commissioner is not satisfied that a return furnished under section 7 is correct and, complete, he shall serve on the producer or dealer a notice requiring him, on the date and hour and place mentioned therein, either to attend in person or to produce or cause to be produced any evidence on which he may rely in support of his return. Sub-section (3) states that on the day mentioned in the notice under sub-section (2) or as soon afterwards as may be, the Commissioner, after hearing such evidence as the producer or dealer may produce and such other evidence as the Commissioner may require, shall by an order in writing assess the producer or dealer and determine the tax payable by him on the basis of such assessment. Sub-section (4) states that if a producer or dealer fails to make a return as required by Section 7 or having made the return, fails to comply with the terms of the notice issued under sub-section (2) of Section 9, the Commissioner shall, by an order in writing, assess to the best of his judgment the producer or dealer and determine the tax payable by him on the basis of such assessment. It is provided that before making assessment the Commissioner may allow the producer or dealer such further time as he thinks fit to make the return or to comply with the terms of the notice issued under sub-section (2) of Section 9.

11. The Rules under the New Act are framed under Section 32 of the New Act. Rule No.6 states that every dealer or producer shall furnish returns of the total gross weight of jute or tea carried to the Superintendent in Form I. Rule No.8 states that the notice referred to in sub-section (2) of Section 7 may be issued to dealer or producer who have failed to submit returns within the period mentioned in sub-section (3) of Section 7. The notices shall be in Form II. Rule No.9 states that every dealer or producer shall submit to the superintendent every quarter a return so as to reach that officer on or before the dates mentioned therein, 30 April 30 July 30 October and 30 January are the dates on or before which the producer or dealer shall submit return for the quarters preceding these dates, viz. quarters ending 31 March 30 June, 30 September and 31 December respectively.

12. Form No. I under, Rule No. 6 mentions the name of the dealer, the return period and the details of net weight carried and amount of tax. Form No. II under Section 7 (2) and Rule No.8 state that whereas the person notified carried manufactured tea or jute as the case may be, during the period ending on the date mentioned therein and whereas the carrier is liable to pay tax he is required to furnish a return.

13. The New Act received the assent of the President on 6 April, 1961. It was notified in the Gazette on 12 April, 1961, The New Act was deemed to have had effect as from 24 April, 1954 and remained in force till 31,March, 1962 Section 3 of the New Act refers to the Schedule which specifies the period and rate of tax. The rates vary from year to year. In view of the fact the New Act became retrospective with effect from 1954. Section 7 (3) of the New Act provided that returns during the first year of operation of the New Act "shall be furnished for such period and within such time as may be notified by the Commissioner and thereafter quarterly and within thirty days of completion of the quarter in respect of which the returns are to be filed." It therefore follows that the return for the years during which the New Act became retrospective in operation was to furnish in accordance with the notification to be issued by the Commissioner under Section7(3)of the New Act. The present appeals do not concern that aspect of the New Act. After the New Act came into existence returns were to be furnished by the producers and dealers on 30 April, 30 July, October and 30 January for the preceding quarters. The provisions contained in Section 7 (1) of the New Act enjoined dealers and producers to furnish returns on the dates mentioned in the Rules for the appropriate quarters. The provisions of Section 7 (2) of the New Act contemplate cases where the Commissioner may serve within two years of the expiry of the return period a notice upon producer or dealer who, in the opinion of the Commissioner, is liable to tax for any return period or a part thereof.

14. On behalf of the State the Solicitor General raised three contentions. First, that for the period, 1 October, 1961 to 31 December, 1961 or for the period January 1962 to 31 March, 1962 the state could not issue any notice by reason of stay of proceedings granted by the High Court on 10 August, 1961. It was said that when this Court on 28 October, 1964 granted interim stay of operation of the High Court judgment dated 1 August 1963 it was possible for the State to issue notice. The State issued notice within two years from 28 October, 1964. It Has also said that if the period of two years

be counted from 13 December, 1963 when this Court pronounced the New Act to be valid in the Case of Khyerbari Tea Co. Ltd. (supra) the notices would be within the period of two years from 13 December, 1963. It was emphasised by the Solicitor General that an act of Court granting stay of the proceedings should not be permitted to act adversely to the interest of the State against whom the injunction was granted.

15. The second contention of the Solicitor General was that Section 9 (4) of the New Act confers power on the commissioner to assess to the best of his judgment if a producer or dealer fails to furnish a return as required by Section 7 or having made the return fails to comply with the terms of the notice issued under Section 9 (2) of the New Act. The notice under Section 9 (2) of the New Act refers to cases where if the Commissioner is not satisfied with the return furnished under Section 7 he serves a notice on the assessee to produce evidence in support of the return. The Solicitor General leaned heavily on the words "if a producer or dealer fails to make a return as required by Section 7 and contended that Section 7 (1) of the New Act required the producer or dealer to make a return and that Section 7 (2) of the New Act did not itself require the producer or dealer to make a return but only clothed the Commissioner in certain circumstances to call for a return. Therefore the Solicitor General submitted that the condition precedent to the exercise of power under Sec. 9 (4) of the New Act is a default with reference to Section 7 (1) of the New Act and not the issue of a notice under Section 7 (2) of the New Act. The Solicitor General submitted that at best Section 7 (1) of the New Act regulates the exercise of the power created by Section 9 (4) of the New Act but is not the source and condition of the power.

16. The third contention of the Solicitor, General was that by obtaining and enjoying the benefit of an injunction for the relevant period expiring within the period of two years prescribed by Section 7 (2) of the New Act the respondent must be deemed to have waived the benefit of Section 7 (2) of the New Act. This was amplified to mean that the interim injunctions in the present cases were founded on the postulate that the action restrained during the pendency of the proceedings would be and could be taken if the ground of attack ultimately failed on the conclusion of the proceedings. The Solicitor General further submitted that a party who obtained such an injunction could not set up a plea arising solely from the injunction issued and ultimately dissolved. It was said that by reason of such injunction if a preliminary step like a notice within a particular period became impossible, it must be deem to have been waived just as any provision intended for the protection of the property owner may be waived by him by a course of conduct where it would be unjust to permit it to be set up.

17. The first contention on behalf of the State that it became impossible for the State to issue notice under Section 7 (2) of the New within two years of the expiry of the period of return is unsound on principle and facts. The maxim lex non cogit ad impossibila means that the law does not compel a man to do that which he cannot possibly perform in the present appeals, the applications were moved in the High Court for stay of proceedings. The respondents challenged the validity of the Act, and, therefore, asked for an injunction restraining the State from taking proceedings under the Act. At no stage, did the State ask for variation or modification of the order of injunction. It is well known that if it is brought to the notice of a Court that proceedings are likely to be barred by time

by reason of any order of injunction of stay the court passes such suitable or appropriate orders as will protect the interest of the parties and will not prejudice either party. Even when certificate to appeal to this Court was granted on 1 August, 1963, the State did not ask for any order for stay of operation of the judgment. That is quite often done. For the first,time, on 10 August, 1964 the State filed an application for stay of operation of the judgment of the High Court. The State did not take steps at the appropriate time. This Court on 28 October, 1964 granted an interim order staying the operation of the High Court judgment. The interim order was made absolute on 28 January, 1965 with certain conditionsThe State cannot take advantage of its own wrong and lack of diligence. The state can- not contend that it was impossible to issue, any notice within the period mentioned in Section 7 (2) of the New Act. The State did not endeavour to obtain appropriate orders to surmount the difficulties by reason of the injunction against taking steps within the time contemplated in Section 7 (2) of the New Act. The State is guilty of default.The State had remedies open to take steps by asking for modification of the order. The State had to assert the right that the State was entitled to demand taxes and the respondent was liable to pay the same. The State followed the policy of inactivity. Inactivity is not impossibility. The order of injunction is not to be equated with an act of God or an action of the enemy of the State or a general strike.

18. The second contention of the State that the State has power under Section 9 (4) of the New Act to pass an order of best judgment assessment is unmeritorious. The provisions contained in S. 7 of the New Act indicate these steps. A producer or dealer is to furnish a return for the preceding quarter on 30 April, 30 July, 30 October and January. Where a producer or dealer is liable to pay tax for any return period and he does not furnish a return the Commissioner may, with in two years of the expiry of the period, serve a notice requiring him to furnish a return. The provisions contained in Section 9 (4) of the New Act with regard to best judgment assessment apply where a producer or dealer fails to make a return or having made the return fails to comply with the terms of the notice under Section 9 (2) of the New Act. A notice under section 9 (2) of the New Act. is served where the Commissioner is not satisfied with the return furnished under Section 7 of the New Act. The words "if a producer or dealer fails to make a return as required by Section 7" occurring in Section 9 of the New Act apply to failure to make a return as contemplated by both sub-sections (1) and (2) of Section 7 of the New Act. To accede to the contention of the Solicitor General that the words "if a producer or dealer fails to make a return as required by Section 7" occurring in Section 9 the New Act apply only to a return under sub-section (1) of Section 7 of the New Act is to read new words into the legislation. In order to have the best judgment assessment under Section 9 (4) of the New Act, there must be first a failure to furnish a return under Section 7 (1) of the New Act or a failure to furnish a return after notice under Section 7 (2) of the New Act. Further, the contention of the Solicitor General means that there will never be any question of limitation of time with regard to service of notice by the commissioner to file a return. Section 7 (2) of the New Act is a Section conferring power and jurisdiction on the authorities to tax by calling upon the producer or dealer to file a return within the time mentioned therein. If a return under Section 7 (1) is not made, the service of a notice under Section 7 (2) of the Act is the only method for initiation of valid assessment proceedings under the Act. The period of two years under Section 7 (2) of the New Act is a Fetter on the power of the authority and is not just a bar of time. No assessment can be legally made under section 9 (4) of the New Act without service of a notice under section 7 (2) of the New Act within two years in case where the assessee has not submitted any return under section 7 (1)of the New Act,

19. The Words "If a producer or dealer fails to make a return as required by Section 7"occurring in Section 9 of the New Act make it clear that Section 9 can come into operation only when there is a failure to comply with the requirements of Section 7 and not the requirements only under sub-section (1). Reference may be made to Section 11 of the New Act. Section 11 deals with escaped assessment. There is a time limit for initiating an escaped assessment under Section 11 of the New Act. The time limit is two years from the end of the return period. It is the scheme of the Act that the service of notice within two years of the return period is an imperative requirement for initiation of assessment proceeding as also reassessment proceeding under the Act.

20. This Court in state of Assam v. D. C. Choudhuri (1970) 1 SCR 780 = (AIR 1970 SC 2057) considered the provisions of Assam Act IX of 1939. Sections 19 and 20 of the Assam Act of 1939 are pari materia with Sections 7 and 9 of the New Act. Section 19 (1) of the Assam Act of 1939 required persons whose agricultural income exceeded the limit of taxable income prescribed to furnish within thirty days as specified in the notice a return. Section 19 (2) of the Assam Act of 1939 stated that in the case of any person whose total agricultural income is, in the opinion of the Agricultural Income Tax Officer, of such amount as to render such person liable to payment of agricultural income-tax for any financial year, the Agricultural Income Tax Officer may serve in that financial year a notice requiring him to furnish a return. Section 20 (4) of the Assam Act of 1939 provided that if persons failed to make a return under sub-section (1) or sub-section (2) of Section 19 or failed to comply with terms of a notice under sub-section (2) of section 20 or to produce any evidence required under sub-section (3) of Section 20, the Agricultural Income Tax Officer shall make the assessment in the best of his judgment. Section 30 of the Assam. Act of 1939 provided that it for any reason the Agricultural income has escaped assessment for any financial year the Agricultural Income Tax Officer may at any time within three years of the end of that financial year serve on the person liable to pay tax a notice at fully mentioned therein and may proceed to assess or re-assess as stated in the Section,

21. In the Assam case (AIR 1970 SC 2057) (supra) the assessees received a notice in 196I to furnish returns for the years 1949-50 to 1953-54. The assessees did not submit any return. Thereafter they received a notice of demand for payment of tax on the basis of best judgment assessment under Section 20 (4) of the Assam Act. 'The assessees were not served with any notice under section 19 (2) of the Assam Act which provided for a notice to be served on the assessee during the respective financial year, nor under Section 30 of the Assam Act which dealt with escaped assessment. The purchasers of the tea estate were similarly served with assessment orders under Section 20 (4) of the Assam Act. The purchasers were also not served with any notice under Section 19 (2) or Section 30 of the Act. This court held that if no return was made pursuant to the general notice under Section 19 (1) of the Act, assessment could be made against an assessee under Section 19 (2) of the Act serving an individual notice during that financial year. Once that financial year was over and no return was made in response to general notice under Section 19 (1) of the Act and no individual notice was served under Section 19 (2) of the Act there could arise a case of escaped assessment. 'The only, way to bring escaped assessment income to tax was to initiate proceedings where notice in accordance with Section 30 was served within three years of the end of that financial year. No such proceedings were initiated in that Assam case (supra), and, therefore, the assessment orders were quashed. The Assam case is an authority for the proposition that if no notice is served in accordance with the provisions of the Act there cannot be any initiation of assessment proceedings

and there would be no jurisdiction to assess.

22. In the present case the notices of demand were illegal. The best judgment assessment which was made under Section 9 (4) of the New Act would be attracted only if there was a failure to furnish a return as contemplated in sub-Sections (1) and (2) of Section 7 or failure to comply with the terms of the notice under Section 9 (2) of the New Act.

23. The third contention of the solicitor General is that the respondents waived service of a notice within two years of the expiry of the return period by reason of the order of injunction obtained by them. Waiver is either a form of estoppel or an election. The doctrine of estoppel by conduct means that where one by words or conduct willfully causes another to believe in the existence of certain state of things and induces him to act on that belief, or alter his own previous position the former is concluded from averting against the latter a different state of things as existing at that time. The fundamental requirement as to estoppel by conduct is that the estoppel must concern an existing state of facts. There is no common law estoppel founded on a statement of future intention. The doctrine of promissory estoppel is applied to cases where a promiser has been estopped from acting inconsistently with a promise not to enforce an existing legal obligation. This doctrine differs from estoppel properly so called in that the presentation relied upon need not be one of present fact. The second requirement of an estoppel by conduct is that it should be unambiguous. Finally, an estoppel cannot be relied on if the result of giving effect to it would be something that is prohibited by law. Estoppel is only a rule of evidence. One cannot found an action upon estoppel. Estoppel is important as a step towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said .

24. In Dawson's Bank Limited v. Nippon Menkwa Kabushika Kaisha, 62 Ind App 100 = (AIR 1935 PC 79) the distinction between estoppel and waiver was explained by stating that estoppel is not a cause of action, but waiver is contractual and may constitute a cause of action. The reason stated there it that waiver is an agreement to release or not to assert a right. There is no such thing "as estoppel by waiver'.

25. The two decisions on which the Solicitor General relied in support of the application of the principle of waiver in these appeals are Vellayan Chettiar v. Province of Madras, 74 Ind App 223 = (AIR 1947 PC 197) and Kammins Ballrooms Co. Ltd v. Zenith Investments (Torquary) Ltd., 1971 AC 850. In Vellayan Chettiar's case (supra) it was held where the Secretary of state took objection to the sufficiency of Notice under Section 80 of the Code of Civil Procedure in his written statement, but raised no issue on the point when issues were settled, and took no objection during the trial the Court held that another defendant was not competent to raise this issue at a later stage as the Secretary of State had waived notice. A notice under Section 80 of the Code of Civil Procedure is procedural with regard to institution of a suit. A notice under Section 80 of the Code of Civil Procedure is not a part at the cause of action. In the notice under Section 80 of the Code of Civil Procedure the cause of action has to be stated.

26. In the case of Kammins Ballrooms Co. 1971 AC 850 (supra) the tenants made a request for a new tenancy. The landlords stated that they would oppose an application to the court for such new tenancy. When the tenants filed an application for grant of a new tenancy, the landlords filed an answer but took no objection to the application being premature. Thereafter the landlords wrote to the tenants that they would make a preliminary objection that the application was premature. The County Court Judge held that S, 29 (3) of the relevant Act which provided time for making the applications went to the jurisdiction of the count and would not be the subject of estoppel or waiver. The Court of Appeal affirmed that decision. The House of Lords affirmed the decision on a different ground. The majority view of the House of Lords was that the requirements of Section 29 (3) of the Act were only procedural and the landlords had a right to ignore or object to the tenant's premature application but Could not waive that right. The majority view further held that the landlords had not waived their right to object that the application was bad. In a statute dealing with landlords and tenants rights and obligations are created for landlords and tenants. A procedural requirement imposed for the benefit on protection of one party alone has some times been construed as, subject to implied exception that it can be waived by the party for whose benefit it is imposed. In that context, 'waive' means that the party has chosen not to rely upon the man-compliance of the other party with the requirement, or has disentitled himself from relying upon it either by agreeing with the other party not to do so or because he has so conducted himself that it would not be fair to allow him to rely upon the non-compliance.

27. A distinction arises between the provisions which confer jurisdiction and provisions which regulate procedure. Jurisdiction can neither be waived nor created by consent. A procedural provision may be waived by conduct or agreement. In the case of Kammins Ballrooms Co., 1971 AC 850 (supra) it was said that waiver arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is inconsistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be legal consequence of what he did. He is sometimes said to have "waived" the alternative right as for instance a right to forfeit a lease or to rescind a contract of sale for wrongful repudiation or breach of condition. This is also sometimes described as "election" rather than "waive? Another type of waiver debars a person from raising a particular defence to a claim against him. It arises when he either agrees with the claimant not to raise that particular defence or so conducts himself as to be estopped from raising it.

28. In the present case, the respondent cannot be said to have waived the provisions of the statute. There cannot be any wavier of a statutory requirement or provision which goes to the jurisdiction of assessment. The origin of the assessment is either an assessee filling a return as contemplated in the Act or an assessee being called upon to file a return as contemplated in the Act. The respondents challenged the Act. The order of injunction does not amount to a waiver of the statutory provisions. The issue of a notice under the provisions of the Act relates to the exercise of jurisdiction under the Act in all cases. Revenue statutes are based an public policy. Revenue statutes protect the public on the one hand and confer power on the State on the other.

29. The decision in William Shepard v. O. E. D, Barrom (1908) 194 U. S. 558 = 48 L Ed. 1115 on which the Solicitor Generals relied for the proposition that the constitutionality of a rule of assessment can be waived does not have any application in the present case.In the American decision (supra) an objection against the frontage rule of assessment for a public improvement, prescribed by the state laws, was not allowed to be urged to defeat the collection of the assessments. The reason was that the abutting owners who petitioned for the improvement under the Act, actively participated in carrying out the work, recognized the justice of the assessments from time to time during its progress, and signed a statement for the purpose of inducing the issuance and purchase of country improvement bonds to the effect that the work had been properly done. In the American decision (supra) the work was done at the instance and request of the owners. The Court found an implied contract arising from facts that the party at whose request and for whose benefit the work had been done would pay for it in the manner provided for by the Act under which the work was done.

30. It is against principle to suggest that the appellants did anything wrong or they are taking advantage of anything wrong Jeesel M. R. in Re. Hallett's Estate Knatchbull v. Hallett (1880) 13 Ch. D. 696 at p. 727 said "Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilised countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly" The respondents were entitled to impeach the statute under which they were made liable. The respondents have done no wrong. The respondents are not taking any advantage of any act of theirs. The State was entitled to resist the respondents. The State did so by contending that the Act was valid, but the State took no steps during the pendency of the litigation to take directions from the Court to serve notices of demand upon the appellants to keep alive the right of the respondents.

31. For these reasons the contentions of the Solicitor General fail. The appeals are dismissed. Parties will pay and bear their own costs.

K. K. MATHEW J. (for himself and on behalf of **H. R. KHANNA J.**):-

In these appeals, by special leave, the question for consideration is whether the High court of Assam was right in quashing the notices issued to the respondents on the dates specified in each of the writ petitions filed by the respondents.

32-33. The notices were issued under the Assam Taxation (on Goods Carried by Road or on Inland Waterways) Act, 1961 (hereinafter called 'the Act') passed by the legislature of Assam on 6-4-1961 with retrospective effect from 24-4-1954 and published in the gazette on 15-4-1961. The Act was to be operative upto 31-3-1962. it was passed consequent upon the declaration of the invalidity of the

Assam Taxation (on Goods Carried by Road or on Inland Waterways) Act, 1954, this Court in Atiabari Tea Co. Ltd. v. The State of Assam (1961) 1 SCR 809 = (AIR 1961 SC 232). The respondents challenged the validity of the Act before the High Court of Assam in writ petitions and they applied for injunction restraining the appellants from taking any proceedings under the Act, Interim orders of injunction were passed on various dates. The appellants opposed the interim orders of injunction. A common order war passed by the Court on 18-9-1961 making the orders absolute and restraining the appellants from taking any proceedings under the Act. Thereafter, in some of the cases the appellants did not oppose the orders of interim injunction as it would have been a futile exercise and the interim orders in these cases were also made absolute.

34. The High Court allowed the writ petitions on 1-8-1963 and declared the Act ultra vires the powers of the legislature and granted certificates of fitness to appeal to this Court.

35. M /s. Khyebari Tea Co. Ltd. and another approached this Court under Article 32 of the Constitution praying for a declaration that the Act was ultra vires the powers of Assam Legislature and this Court by its judgment dated 13-12-1963 held that the Act was valid-see Khyebari Tea Co. Ltd. v, The State of Assam (1964) 5 SUB 975 = (AIR 1964 SC 925).

36. Against the decision of the High Court declaring the Act ultra vires, the State of Assam filed appeals before this Court on 4-3-1964 and applied for stay on 10-8-1964 and interim stay of the order of the High Court declaring the Act ultra vires was granted on 28-10-1964 and the orders of stary were made absolute on 29-1-1965. This Court allowed the appeals filed by the appellants on 1-4-1968 declaring the Act to be valid.

37. Notices were issued by the Superintendent of Taxes to the respondents on various dates specified in the respective writ petitions after this Court passed orders staying the operation of the order at the High Court for filing the returns for the quarters mentioned in the writ petitions. These were the notices that the respondents successfully challenged before the High Court.

38. The question which arose for consideration before the High Court of Assam was, whether, since no notices were issued within the time specified in Section 7 (2) at the Act, the respondents could be called upon to file returns.

39. Before we proceed to consider the question, it is necessary to set out the relevant provisions of the Act.

40. The Act is an Act to levy a tax on foods carried by vehicles. Section 3 (1) is the charging section and it says that subject to the provisions of the Act, there shall be levied a tax on (a) manufactured tea and (b) jute in bales carded by motor vehicle, cart, trolley, boat, animal and human agency at any other means except railways an airways in such manner and in respect of such period and at such rate as specified in the schedule. Sub-sections (1) and (2) of Section 7 read:

"(1) Every producer and dealer shall furnish returns of manufactured tea carried in tea containers and of jute carried in bales in such form and to such authority as may he presented.

(2) In the case of any producer or dealer who, in the opinion of the Commissioner, is liable to pay tax for any return period or a part thereof, the Commissioner may serve within two years of the expiry of the aforesaid period, a notice in the prescribed form upon him requiring him to furnish a return of, goods carried and such producer or dealer shall thereupon furnish he return within the date and to the authority mentioned in the notice '

Section 9 (4) provides:

"If a producer or dealer fails to make a return as required by Section 7 or having made the return, fails to comply with the terms of the notice issued under sub-section (2) of this Section, the Commissioner shall, by an order in writing, assess to the best of his judgment the producer or dealer and determine the tax payable by him on the basis of such assessment;

Provided that before making assessment the Commissioner may allow the producer or dealer such further time as he thinks fit to make the return or to comply with the terms of the notice issued under sub-section (2) of this section."

41. There is no dispute between the parties that the turn year period specified in section 7 (2) expired on 31 -12-1963 and that all the impugned notices were issued after the expiry of that period.

42. The High Court was at the view that since no notices were issued to the respondents by the Commissioner within the period specified in Section.7 (2), the respondents were not liable to furnish returns. The High Court held that the issue of notices within the period specified in the sub-section was a condition for the exercise of the power to call for returns.

43. The learned Solicitor General appearing for the appellants submitted that it was on account of orders of injunctions passed by the High Court that notices could not be issued to the respondents by

the Commissioner and that before the period for the issue of notice under Section 7 (2) expired, namely, 31-12-1963, the High Court had declared the Act to the ultra vires the powers of the legislature which completely disabled the Commissioner from issuing the notices within the period specified in the sub-section.

44. According to the solicitor General, Section 7 (2) postulates ability on the part of the Commissioner to issue notices during the two-year period as required by the sub-section and therefore it cannot apply to a case where it was rendered impossible for the Commissioner to issue the notices within that period by an act of the Court. He submitted that the liability to submit the return was created by Section 7 (1) and that issue of notice under Section 7 (2) was only a step in the procedure for making the assessment and therefore if a dealer failed to make the return in accordance with Section 7 which of course, would include the liability created by Section 7 (1) to file the return, it would be open to the appropriate officer to assess the dealer to the best of his judgment under Section 9 (4) and therefore, even it no notice under Section 7 (2) was issued within the two-year period, that would not in any way disable the officer concerned to make a best judgment-assessment under Section 9 (4). He further submitted that by obtaining and enjoying the benefit of the orders of injunction, the respondents must be deemed to have waived their right to insist upon the notices within the period specified in Section 7 (2) He contended that after having successfully prevented the Commissioner from issuing the notice within the period by obtaining the orders of injunction, the respondents should not be heard to say that they were entitled to notices within period specified in Sec.7 (2) of the Act.

45. On the other hand, it was argued on behalf of the respondents that issue of notice within the period specified in Sec. 7. (2) was a condition for the exercise of the jurisdiction to make the assessment and as no notice were issued within the period specified in Sec. 7 (2), the condition precedent for the liability to file returns was not fulfilled and there was, therefore, no liability for the respondents to file returns, or power in the authorities to make assessments. In other words, the argument for the respondents was that Section (1) by itself did not create any liability to submit the return within any period, that the liability to submit the return could arise only when the Commissioner issues the notice within the period specified in Section 7 (2) and, since no such notices were issued to the respondents before the expiry of two years from the date specified in Section 7 (2), the Commissioner became functus officio both for the reason that the period of two years specified in Section 7(2) had expired and also for the reason that the operation of the Act came to an end and that they could not, therefore, be assessed to tax. They also contended that by approaching the High Court and obtaining orders of injunctions, they never waived their right to insist upon the notice within the period. 'They submitted, by approaching the court and obtaining the orders of injunction, they were exercising their right as ordinary citizens and no inference of waiver of their right to the notices within the period specified in Section 7 (2) would be permissible.

46. The question for consideration is whether, the respondents, after having obtained the orders of injunction from the Court restraining the appellants from taking any proceedings under the Act and thereby prevented the Commissioner from issuing the notices during the period, could, thereafter, insist upon the notices within that period as a condition for their liability to file the returns or for the

authorities for making the assessments, and whether the Commissioner could have issued the notices before the appeals were preferred against the order of the High Court declaring the Act as invalid and stay of that order was obtained from this Court.

47. The respondents obtained the orders of injunction from the Court which the Court would not have issued, had the Court known at the time that the Act was intra vires the powers of the legislature as it ultimately turned out to be by the decision of this Court. The Court issued the orders of injunction on the basis at its view that the respondents had a prima facie Case; but when ultimately this Court declared that the Act was valid justice requires that the respondents should not be allowed to set up the contention that they were entitled to get the notices within the period during which the injunction orders operated or within the period during which the judgment at the High Court declaring the Act ultra vires remained in operation. In other words, the respondents, after having Successfully prevented the Commissioner from issuing notices by virtue of the orders of injunction obtained by them from the High Court, should not be heard to say that they were entitled to notices as they themselves made it impossible for the Commissioner to issue the notices within the period by obtaining the orders of injunction. When the orders of injunction were passed by the Court restraining the appellants from taking any proceedings under the Act, could the Commissioner have issued the notices? Clearly not. If it was impossible for the Commissioner to issue the notices to the respondents within the period by virtue of the orders of injunction, could the law insist upon the issue of the notices within that period? Again, the answer must be no. And the Commissioner could not have issued the notices after the High court, by its order declared the Act to be invalid until the operation of that order was stayed by this Court.

48. The law in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling performance of that which is impossible. ..... where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and as not remedy over, there the law will in general excuse him: and though impossibility of performance is in general no excuse for not performing an obligation which a party has expressly undertaken by contract, yet when the obligation is one implied by law, impossibility of performance is a good excuse." (see Broom's Legal Maxims 10th ed. (1939 pp. 162-163). The same principle has been stated in Craies on Statute Law (6th ed., P. 268):

"Under certain circumstances compliance with the provisions of statutes which prescribe how something is to be done will be excused. Thus, in accordance with the maxim of law, Lex non cogit ad impossibilia, if it appears that the perfomance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God or the King's enemies, these circumstances will be taken as a valid excuse".

49. We think the circumstance that the appellants were prevented by the orders of injunction from taking any proceedings under the Act coupled with the tact that the High court declared the Act to be invalid, made it impossible for the commissioner to issue the notices within the period specified

in Section 7 (2). There is no reason to distinguish between an Act of God or King's enemies preventing an act being done and the circumstances here which put it beyond the control of the commissioner to issue the notices.

50. It was argued for the respondents that issue of notices within the period specified in Section 7 (2) was a condition for liability to file the return and since no notices were issued within the period, the liability to file the return did not arise and the Court cannot extend the time for issuing the notices.

51. Let us assume that the provision for issue of notice within the period specified in Section 7 (2) was mandatory and was a condition precedent for the liability to file the returns. Even so, the respondents could have waived the benefit of it and, in fact, they did waive it by their conduct. In other words, even if the issue of notices within the period provided in Section 7 (2) was mandatory and no liability to file the returns arose until the notices were issued, the respondents could have waived the benefit of the notices as the issue of notices was only for the benefit of the respondents and did not subserve any principle of public policy.

52. In Vellavan Chettiar v. Province of Madras, AIR 1947 PC 197 the question arose whether notice under the provision of Section 80 of the Civil Procedure code was mandatory and could be waived by the party entitled to it. The Privy Council said that although the provision for issue of notice was mandatory, the party which was entitled to the here it of notice could waive it. The language of Section 7 (2) is, no doubt, mandatory, but the sub-section was not enacted on the basis of any public policy. Its purpose is only to give a dealer notice of his duty to submit the return created by sub-section (1) of section 7. Whenever a statute makes the performance of an act within a specified period mandatory and it is seen from the provisions of the statute that the performance of the act within the period is solely for the benefit of a party and no question of public policy is involved in its performance 'within period, it has been held,that the party entitled to insist upon its performance within the period can waive it. As the issue of notice within the period specified in Section 7 (2) is clearly for the benefit of the dealer and if he, by his conduct, evinces an intention that he will not insist upon it, then it will be inconsistent with all notions of justice to hold that he should be allowed to insist upon it the respondents clearly knew when they applied and obtained the orders of injunction that the Commissioner would he disabled from issuing the notices under Section 7 (2) during the period of the operation of the orders of injunction. And the law made it impossible for the Commissioner to issue the notice as long as the order of the High Court declaring the Act as invalid remained in operation. How then could the Commissioner have issued the notices to the respondents within the period specified in Section 7 (2)?

53. In Graham v. Ingleby (1848) 1 Exch 651 at pp. 655-56, the question was whether the statute 4 Anne., c. 16, Section 11 which enacted that "Do dilatory plea shall be received in any court of record, unless the party offering such plea, do by affidavit, prove the truth thereof, or show some probable matter to the Court to induce them to believe that the fact of such dilatory plea true" was

for the benefit of a party and could be waived. The defendant pleaded in abatement, and purported to verify the plea by an affidavit, but the words "before me" were omitted from the jurat. The plaintiff replied by traversing the plea, made up the issue and delivered it, with notice at trial for the ensuing Liverpool Assizes. Also both parties took further steps in the action Pollock C. R. said:

"The affidavit is bad, by reason of the omission of the words "before me" in the jurat. It is the same as if there had been no affidavit. With respect to the other question....Suppose there had been no affidavit whatever, and the plaintiff had replied, joining issue, and a trial had taken place, the event of which was a verdict in favour of the defendant, upon which judgment was entered up, could the whole proceedings have been set aside because there was no affidavit? It is clear that they could not. The question then is, what is the meaning of the statute of Anne? In my opinion, that Act had not any public policy or its object, but solely the protection of plaintiffs against the delivery and effect of dilatory pleas. It enacts, that no such plea shall be received, unless verified by affidavit. If a plaintiff chooses to waive that provision, which is introduced for his benefit, he cannot afterwards sign judgment for want of such affidavit..,..

"Parke B. said:

"I concur in opinion with the Lord Chief Baron. The present affidavit is equivalent to no affidavit. The question then is, what is the meaning of the statute of Anne, which requires an affidavit of verification as a condition precedent to a valid plea in abatement? If that enactment be intended for the sole benefit of plaintiffs; then the maxim applies "Quilebet potest renunciare juri pro se introducto. It is evident that the requirements of that statute are solely for the benefit of plaintiffs, and in order to prevent them from being delayed in their suits; and that they have no reference whatever to other suitors or to the rest of the Queen's subjects. It follows, that although an affidavit,is so detective as to amount to no affidavit, a plaintiff may, if he choose, waive the benefit of his right, and join issue on the plea and go to trial; and if he does so, he cannot afterwards avail himself of the provisions at the statute. So, if he should demur to this plea, he would, in like manner, waive the benefit of the statute. If it were otherwise, the inconvenience would be great, as already pointed out.

54. These observations were quoted with approval by Lord Pearce and their correctness affirmed by Lord Diplock in Kammins Co. v. Zenith Investments 1971 AC 850 (H. L. (E)). Lord Diplock made it clear that waiver is a word which is sometimes used loosely to describe a number of different legal grounds on which a person may the debarred on asserting a substantive right which he once possessed or from raising a particular defence to a claim against him which would otherwise be available to him. He observed that there is a type of waiver which arises in a situation where a person is entitled to alternative rights inconsistent with one another as when he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely an one of them and the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did. He then said that there is a second type of waiver which debars a person from raising a particular defence to a claim against him when he either agrees with the claimant not to raise that particular defence or so conducts

himself as to be esteemed from raising it.

55. Isaacs J. in delivering the judgment of the High Court of Australia in Craine v. Colonial Mutual Fire Insurance Co. Ltd. (1920) 28 CLR 305 at p. 327 said:

". . . . . .'Waiver' is a doctrine of some arbitrariness introduced by the law to prevent a man in certain circumstances from taking up two inconsistent positions (see per James LJ in Placer v. Rawlins (1872), 7. Ch, App. 259, at p. 268 et seq. It is a conclusion of law the necessary facts are established. It looks, however, chiefly to the conduct and position of the person who is said to have waived, in order to see whether he has 'approbated' so as to prevent, him from 'reprobating -in English terms, whether he as elected to get some advantage to which he would not otherwise have been entitled so as to deny to him a later election to the contrary (see per Lord Shaw in Pitman v. Crum Ewing, (1911) AC 217, at p. 239. His knowledge is necessary, or he cannot be said to have approbated or elected."

56. In Corporation of Toronto v. Russell, 1908 AC 493, the Judicial Committee held that where a notice in writing of intention to purchase compulsorily was required to be given to the owner of lands, the provision being entirely for his benefit, he might waive it.

57. The High Court granted the order of injunction on the basis that there was a prima facie case for the respondents. The High Court held that the Act was invalid on the basis of its view that it was ultra vires the powers of the state Legislature. But when this Court declared that the High Court was wrong and that the Act was valid, justice requires that neither the order of injunction nor the order of the High Court declaring the Act invalid should prejudice the rights of the parties as ultimately declared, No act of a court should prejudice a party. That is the first principle of justice, it was the orders of injunction and the order declaring the Act as ultra vires which made it impossible for the Commissioner to issue the notices within the period specified in Section 7 (2). When this Court, by its judgment, upheld the appellants contention that the Act was valid, how could the appellants be put in the position which they would have occupied had the High Court not passed those wrong orders, except by dispensing with the necessity of issuing notices within the time? The principle of restitution requires that the party pre judiced by a wrong order of the court should be put in the position which be or it would have occupied the wrong order not been passed.

58. It was contended on behalf of the respondents that the appellants should have specifically told the High Court at the time the injunction orders were made absolute that if the commissioner was not permitted to issue the notices within the period specified in Section 7 (2), it would be impossible for the appropriate authority to call for the returns and make the assessments and that at any rate the appellants should have subsequently apple to the Court for modification of the injunction orders to the extent of permitting the Commissioner to issue the notices within the period and the failure of the appellants to do so shows lack of diligence on their part and that the Court should not help

parties who were not diligent in their conduct.

59. We do not think there is any substance in the argument. It was after consideration of the arguments of both sides that the court made the interim orders of injunction absolute on 18-9-1961 at stating that the appellants were restrained from taking any proceedings under the Act. Thereafter in some applications for injunctions, the appellants did not enter appearance and object to interim orders of injunction being made absolute, knowing full well that since the Court had passed a considered order on 18-9-1961, it would be futile to urge further objections to the grant of injunction by the Court. That apart, the Commissioner had time to issue the notices from 1-8-1963 when the High Court declared the Act to be ultra vires till 31-12 1963 when the two-year period expired. But as the Act was declared bad, it was impossible for him to issue the notices within the period. Nor is there any substance in the argument of the respondents that the appellants should have approached this Court when this Court by its judgment in Khyerbari Tea Co. Ltd. case (supra) declared the Act to be intra vires and moved the Court for stay of the operation of the judgment of the High Court. We think that the appellants were bound to appeal to this Court against the order of the High Court declaring the Act as invalid in order to get rid of the effect of that judgment as that judgment was binding between the parties to it notwithstanding the decision in Khyerbari Tea Co. Ltd. case (supra) that the Act was valid. The appellants were, therfore, entitled to a reasonable period for filing appeals and for applying for stay of the judgment of the High Court declaring the Act to be ultra vires.

60. It may be recalled that the judgment in Khyerbari Tea Co. Ltd. case (AIR 1964 SC 925) (supra) was rendered on 13-12 1963 and the appellants preferred the appeals to this Court on 4-3-1964. How is it possible to say that the appellants were guilty of laches when it is seen that they filed the appeals within the period of limitation prescribed by law? We have to judge the rights of the parties on the basis of the law and cannot allow ourselves to be swayed by any sentimental considerations.

61. We think the respondents were bound to file the returns even though the notices were not issued to them within the period specified in Section 7 (2). The liability to file the return was created by Section 7 (1) and as the requirement of notice within the period specified in Section 7 (2) could not have been insisted upon by the respondents for the reasons which we have given, the authority empowered to make the assessment under Section 9 (4) was competent to do so, We think the High Court went wrong in allowing the writ petitions.

62. We would, therefore, set aside the orders of the High Court, dismiss the writ petitions and allow the appeals without any order as to costs.

M. H. BEG, J.:-

I have had the advantage of going through the judgments of the learned Chief Justice and my learned Brother Mathew, I regret that I am compelled to reach a conclusion which amounts to holding that the taxing authorities will, in the circumstances of these cases, have no right whatsoever left to assess the respondents for taxes which they were found finally entitled to realise when this Court held the Assam Taxation (on Goods Carried by Road or on Inland Waterways) Act, 1961, (hereinafter referred to as 'the Act'), to be valid on 13-12-1963. Under the provisions of the Act which we have to interpret, this seems to be the result. As my approach is perhaps slightly different from the one adopted by My Lord the Chief justice, I will state my reasons also.

63-64. If it shocks one's conscience to think that the mere fact that the High Court's orders prohibiting the Commissioner from proceeding under the Act should completely frustrate the intentions of a statute which was ultimately found by this Court to be quite valid and existing for the relevant period in the eye of law, it should disturb ones equanimity no less that those who represented or advised the taxing authorities of the state should not have brought to the notice of the High Court the great loss to the exchequer of the State and the possible automatic victory which the respondents may secure by mere lapse of time. The High Court would, I have no doubt, have suitably modified its orders to meet the requirements of law and justice in such cases if the possible consequences of its orders had been brought to its notice.

65. In agreement with My Lord the Chief justice, I do not think that taxing authorities of the State were faced with a situation which could approximate to one where an "Act of God" had robbed them of the power to act or that they could not possibly have done anything at all within the time fixed by Section 7, sub-section (2) at the Act. I fully share the view that the taxing authorities were inexcusably non-chalant or unconcerned about the possible consequences or their neglect or inactivity upon the revenues of the State. It was at least the duty of the party adversely affected to have brought the relevant provisions of the law to the notice of the Court before it issued the injunctions, or, at any rate, even afterwards but within the time prescribed for the notice under Sec.7 (2) of the Act. A party affected cannot go to sleep over its rights and then attempt to shift the blame on to the Court for the consequences which flow from the orders passed so that it may be able to plead: "Actus Curaie Nenminem Gravabit" (An act of the Court shall prejudice no man"). Such a plea appears to me to be disingenuous. It cannot apply to a case where the damage done to the powers of the taxing authorities was attributable to their own remisness or to that of their legal advisers.

66. The next question is: Did the acts or conduct of the petitioners-respondents or anything else in the case operate as a waiver or an estoppel which prevented them from agitating the serious question whether the right of the taxing authorities to realise any tax from them under the Act had became extinguished by lapse of time with the Commissioners power to issue notices prescribed by Section 7 (2) of the Act?

67. If a waiver is a matter of agreement and not of an inference from any misleading conduct, the

parties concerned must apply their minds to the subject matter of what is waived by an agreement between them before any alleged waiver can arise. It is contended here on behalf of the state that it must be assumed that the respondents waived their right to get a notice under Section 7 (2) of the Act when they obtained the injunctions from the High Court. The authorities cited on behalf of the appellant, which have been discussed by my learned Brother Mathew, do afford grounds for contending that a compliance with a provision intended for the benefit of a party may be waived by the party for whose protection it is designed. But, even in such cases, I think must be at least present to the mind of the party waiving a right by adopting a course or action what the underlying assumption is or what the consequence of its conduct is going to be. One can only make an assumption on which an injunction rests if it flows necessarily from the language of the Court's order or anything else on record. But, there is nothing here either in the Courts orders or anywhere else on record to provide a basis for such an assumption.

68. Furthermore, the waiver, even where both sides have agreed to waive the operation of a statutory provision, cannot extend to a case in which the effect may be either to oust the jurisdiction conferred-by statute or to confer a jurisdiction which, according to the statute, is not there. In other words, if a notice under Section 7 (2) of the Act is a condition precedent to the exercise of jurisdiction to make the best judgment assessment, I do not think that the doctrine of waiver will confer jurisdiction so as to enable parties to avoid the effect of violating a mandatory provision on a jurisdictional matter even by agreement. If, on the other hand, want of notice under Section 7 (2) of the Act is not a condition precedent to the exercise of jurisdiction to make a best judgment assessment - and, that seems to me to be the crux of the matter on this question it does not appear to me to be necessary to resort at all to a doctrine of a dubious or deemed waiver. In that case, waiver or no waiver, the power to assess would subsist. And, as that power has to be exercised quasijudicially, the taxing authorities could issue a notice to show cause why they should not assess on such materials as they have, even if their power to issue a notice asking for a return under Section 7 (2) may have been lost by lapse of time. The power to issue a suitable notice to show cause according to rules of natural justice when a quasi-judicial function bas to be exercised, can be, as we have repeatedly held, implied and read into the nature of the function to be performed even if it is not expressly mentioned.

69. Again, I do not see what representations the petitioners-respondents had either made or could be deemed to have made by any silence of theirs so as to mislead the taxing authorities. The presumption is that everybody knows the law whether this be so or not in fact. Hence, no "estoppel in pais" or equitable estoppel, as contemplated by Section 115 Evidence Act, could arise here. Also, there could be no "estoppel by record" as it was neither actually nor constructively in issue whether the party obtaining an injunction in its favour was or was not to get the benefit of, lapse of the time prescribed for a notice under Section 7 (2) of the Act. And, therefore, there could be no decision actual or constructive, on such an issue. That issue could only arise after the time prescribed had expired whatever be the reason why a party could not act during the prescribed time.

70. We have been reminded by both sides of what Rowlatt, j., an outstanding authority on law relating to taxation, said in Cape Brandy Syndicate v. I. R. C. (1921) 1 KB 64 at p. 71:

". .. . .in a taxing Act one has to look at what is dearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, noting is to be implied. One can only look fairly at the language used".

I do not think that this was meant to exhaust all principles of interpretation or construction of every type of provision in a taxing statute or to apply to every situation which may arise. In a system, such as ours, where the constitutionality of all statutes, including taxing statutes, can be subjected to judicial review-other principles also are, not infrequently, invoked. If, however, Section 9 (4) of the Act is to be literally interpreted on this point, we cannot read into it, by implication, an obstacle to the best judgment assessment, which is not there. It reads as follows:

"9 (4) If a producer or dealer fails to make a return as required by Section 7 or having made the return, fails to comply with the terms of the notice issued under sub-section (2) of this Section, the Commissioner shall, by an order in writing, assess to the best of his judgment the producer or dealer and determine the tax payable by him on the basis of such assessment:

Provided that before making assessment the commissioner may allow the producer or dealer such further time as he thinks fit to make the return or to comply with the terms of the notice issued under sub-section (2) of this Section".

71. It will be seen that section 7 deals with "returns' whereas Section 9 deals with "assessment, and Section 9 (4) deals specifically with the power to make the best judgment assessment. On a reading of Section 9 (4), it appears that the two conditions for an exercise of jurisdiction under it are alternative conditions linked with the disjunctive'or'. A failure to comply with the terms of the notice issued under Section 7 (2) is only one of these two alternative sets of conditions. And, this set of conditions comes into existence only after the issue of the notice under Section 7 (2) which initiates the proceedings. It is, however, difficult to see how a mere failure to make a return by itself amounts to initiation of proceedings. Even if the first part of Section 9 (4) could conceivably apply to a forty after the expiry of two years, during which period a dealer or producer "may' get a notice under Section 7 (2) of the Act to make return, yet, the proceedings will have to be commenced by some kind of notice that could, as indicated above, be a notice in exercise of an implied power to observe rules of natural justice although it could not, after the lapse at the prescribed time, be technically a notice under Section 7 (2) of the Act. Assuming that the power to issue notice under Section 7 (2) is not mandatory but only directory, inasmuch as the commissioner "may" issue the required notice, and, furthermore, even assuming, for the purposes of argument, that such a notice meant or the benefit of a party can be and has been waived by it, yet, I fail to see how an assessment under Section 9 (4) could escape the bar created by Section 11 of the Act. This Section shows that a notice to make a return within two years of the expiry of the return period is a condition precedent to exercise jurisdiction to assess. And such a notice could only be one under Section 7 (2) of the Act.

72. Section 11 of the Act. which seems to clinch the crucial issue, reads as follows:

"11. If in consequence of definite information which has come into his possession, the commissioner is satisfied that any producer or dealer, though liable to pay tax in respect of any period, has nevertheless failed to make the return required of him or that tea or jute chargeable to tax has excaped assessment in any period or has been under-assessed, the commissioner may, at any time within two years of the expiry of that period, serve on the producer or dealer liable to pay tax a notice requiring him to furnish within such period, as may be mentioned in the notice, a return of manufactured tea in tea containers or jute in bales carried, in the prescribed form and may proceed to assess or re-assess the producer or dealer and the provisions of this Act shall, so far as may be, apply accordingly:

Provided that the tax shall be charged at the rate at which it would have ordinarily been charged, had there been no escape or evasion".

73. If this provision imposes a limitation upon the power of the commissioner to assess in every case of escaped assessment, whatever may be the reason for the escape, the best judgment proceedings against the respondents would be barred by the passage of two years the return period. This result must, on the language of Section 11, flow from it, and not from mere failure of the Commissioner to issue a notice under Section 7(2) of the Act, which the commissioner "may" only serve within two years of the expiry of the return period.

74. Here, I may refer to State of Assam v. D. C. Choudhuri (1970) 1 SCR 780 = (AIR 1970 SC 2057) where, inter alia, Section 30 of the Assam Agricultural Income-tax Act, which was found to correspond to Section 34 of the Indian Income-tax Act, 1922, was relied upon by this court to hold that there is a bar against the proceedings for escaped assessment. Section 30 of the Act reads as follows:

"If for any reason any agricultural income chargeable to agricultural income-tax has escaped assessment for any financial year, or has been assessed at too low a rate or has been the subject of undue relief under this Act, the Agricultural Income-tax officer may, at any time within three years of the end of that financial year, serve on the person liable to pay agricultural income-tax on such agricultural income or, in the case of a company on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 19, and may proceed to assess or reassess such income, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

Provided.....,..."

75. If we compare Sec. 11 of the Act before us with Section 30 of the Assam Agricultural Income-tax Act, we find that, although, the language of Section 11 of the Act before us is somewhat different from that of Section 30 of the Assam Agricultural Income-tax Act, yet, the effect is the same. On the language of Section 11 of the Act before us, it is evident that every case where tea or jute chargeable to tax has escaped assessment for any period or has been under-assessed, the Commissioner must take action within two years of the expiry of the return period. I think it is this part of the Act which will operate as a bar to the jurisdiction of the Commissioner to tax any escaped assessment beyond two years of the return period. Therefore, quite apart from the question whether on the mere language of Section 7 (2) and Section 9 (4) a failure to issue a notice under Section 7 (2) of the Act within the return period constitutes a bar to proceedings under Section 9 (4) of the Act I do not see how a failure to issue such a notice would not become a bar due to the clear provisions of Section 11 of the Act This bar, at any rate, is against exercise of jurisdiction to assess beyond the prescribed period. The notice here is part of the procedure for assessment. There is no power given to issue it beyond the period fixed. There is no provision of the Act making anything like Section 5 or Section 14 of the Limitation Act applicable to proceedings for escaped assessment under the Act. We cannot by an exercise of our judicial power of interpretation defeat the clear effect of the enacted law. If the law was badly drafted or has revealed a gap which its makers did not foresee, the remedy of the State lies elsewhere.

76. I would, therefore, in agreement with My Lord the Chief Justice, dismiss these appeals, but, in the circumstance of these cases, award no costs to either side.

ORDER

In accordance with the judgments of the majority, the appeals are dismissed. The parties will pay and bear their own costs.

Appeal dismissed.