SUPREME COURT OF INDIA

R.C. Tobacco Private Limited

Vs

Union of India

Transfer Case (Civil) 27 of 2004; C.A. Nos. 881-896/2004; Tc Nos.23- 26 of 2004, 28-36 of 2004; Tp No. 151 of 2004

((Mrs.) Ruma Pal and Tarun Chatterjee)

19/09/2005

JUDGMENT

MRS. RUMA PAL, J.

The dispute in these matters arises out of an exemption which had been granted by the Central Government to new industries by Notification No. 32/99-CE dated 8th July 1999 issued under Section 5A of the Central Excise Act, 1944 (referred to hereafter as 'the Act'). The parties in the various proceedings which are being disposed of by this judgment, represent industries manufacturing cigarettes on the one hand (whom we will refer to as "the petitioners") and the Union of India and the excise authorities on the other (who are described as "the respondents"). Almost all the petitioners are job workers for large tobacco companies. They set up their units under agreements with the large tobacco companies and admittedly produced the cigarettes with the brand names of those companies. The few exceptions to this are noted subsequently.

In December, 1997 the Government of India had announced a separate industrial policy for the North Eastern Region of the country which proposed to stimulate 'synergetic' development of industries in the region by giving a package of incentives which included exemption from excise duties, transport subsidies, capital investment subsidies, interest subsidies and other benefits. Pursuant to this policy, a number of notifications were issued by the concerned Ministries in the Government, the relevant ones for our purpose being the Excise Notifications Nos. 32/99 and 33/99

dated 8th July 1999 by which diverse benefits were given. Briefly stated, under the first notification all excisable goods were exempt from duty under the Act if the goods were produced by new industrial units which commenced their commercial production on or after 24th December 1997 and were located in defined areas specified in the annexure to the notification.

The benefit was given for a period of 10 years from the date of publication of the notification or from the date of the commencement of commercial production whichever was later. The second notification exempted goods produced in specified industries located in areas outside the growth centres. The procedure envisaged for obtaining the exemption under both notifications was that the manufacturer of goods in such industrial units would have to pay excise duty and subsequently claim refund from the excise authorities.

A notification was issued on 31st December 1999, being Notification No. 45 of 1999 withdrawing the excise exemption to cigarettes. However, the exemption was re-introduced on 17th January 2000 by Notification No. 1 of 2001. The petitioners set up units in a specified growth centre and claimed the benefit of Notification No. 32/99. This was allowed to them initially for the first few months. However, from July to October 2000 although some of the petitioners made payment of the excise duty, they were not refunded the amount. Being aggrieved, the petitioners filed writ petitions before the Gauhati High Court. An interim order was passed by the High Court on 19.1.2001 directing the provisional refund of the excise duty by the respondents to the petitioners. Although the exemption was finally withdrawn in respect of cigarettes by Notification No. 1/2001 dated 22nd January 2001, the respondents' prayer for vacating the interim order was rejected by the High Court by its order dated 8.2.2001. While extending the time for the respondents to comply with the interim order, the High Court directed that in verifying the claims for refund, the State Government could not interfere with the exercise of powers of the excise authorities but made it clear that: "This is not to say that the concerned Assistant Commissioner or the Deputy Commissioner of Central Excise Department cannot take in to account any material furnished by the State Govt. authorities in deciding as to whether exemption is due to a manufacturer claiming refund under the said Notification. He may consider such material but the judgment will be that of the Assistant Commissioner or the Deputy Commissioner of Central Excise Department on the question as to whether the amount claimed by the manufacturer under the said Notification is entitled to exemption and refund under the Notification".

Relying on these observations separate orders were passed by the Assistant Commissioner rejecting the claims for refund of the petitioners for the months of July 2000 to January 2001 and also ordering recovery of the amounts already refunded during April to June 2000 forthwith He found that no unit without a Permanent Registration Certificate (PMT) issued by the Directorate of Industries & Commerce, Government of Assam could "legally" go into commercial production and that the earlier order of refund passed "on the basis of such misinformation & misrepresentation of fact with regard to the date of commercial commencement of production would also be unjust/incorrect and devoid of 'legal sanction".

The pending writ petitions were amended to incorporate a challenge to this order. The writ petitions were allowed by the learned Single Judge on 17th May 2002 who held that the petitioners were entitled to refund of excise duty on the cigarettes manufactured from the date of commercial

production till the date the benefit was withdrawn by the Central Government in January 2001. The judgment was affirmed on 4th April 2003 by the Division Bench in the writ appeal filed by the Union of India. The Union of India has challenged the decision before us in the above noted appeals.

Immediately after the decision of the Division Bench of the Gauhati High Court, Section 154 of the Finance Act, 2003 was enacted by Parliament. The section reads as follows: "154.Amendment of notifications issued under Section 5-A of the Central Excise Act.-(1) The notifications of the Government of India in the Ministry of Finance (Department of Revenue)Nos.G.S.R.508(E), dated the 8th July, 1999 and G.S.R.509(E), dated the 8th July, 1999, issued under sub-section (1) of Section 5-A of the Central Excise Act read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special importance)Act, 1957 and sub-section (3) of Section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, by the Central Government shall stand amended and shall be deemed to have been amended in the manner as specified against each of them in column (3) of the Ninth Schedule, on and from the corresponding date specified in column (4) of that Schedule retrospectively, and accordingly, notwithstanding anything contained in any judgment, decree or order of any Court, Tribunal or other authority, any action taken or anything done or purported to have been taken or done under the said notifications, shall be deemed to be and always to have been, for all purposes, as validly and effectively taken or done as if the notifications as amended by this sub-section had been in force at all material times."

(2) For the purposes of sub-section (1), the Central Government shall have and shall be deemed to have the power to amend the notifications referred to in the said sub-section with retrospective effect as if the Central Government had the power to amend the said notifications under sub-section (1) of Section 5A of the Central Excise Act read with sub- section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of Section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), retrospectively at all material times

(3) No suit or other proceedings shall be maintained or continued in any court, tribunal or other authority for any action taken or anything done or omitted to be done, in respect of any goods under the said notifications, and no enforcement shall be made by any court, tribunal or other authority of any decree or order relating to such action taken or anything done or omitted to be done as if the amendments made by sub-section (1) had been in force at all material times.

(4) Recovery shall be made of all amounts of duty or interest or other charges which have not been collected or, as the case may be, which have been refunded but which would have been collected or, as the case may be, which would have not been refunded if the provisions of this section had been in force at all material times, within a period of thirty days from the day on which the Finance Bill, 2003 receives the assent of the President, and in the event of nonpayment of duty or interest or other charges so recoverable, interest at the rate of fifteen per cent, per annum shall be payable from the date immediately after the expiry of the said period of thirty days till the date of payment.

Explanation. - For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if the

notifications referred to in sub- section (1) had not been amended retrospectively by that sub-section.

The Ninth Schedule referred to in Section 154(1) insofar as it is relevant seeks to amend Notification No. 32/99 dated 8th July 1999 with effect from 8th July 1999 by excluding cigarettes falling under Chapter 24 of the First Schedule or the Second Schedule to the Central Excise Tariff Act, 1985. In other words, the exemptions available to the manufacturers of cigarettes from 1999 upto 27th January, 2001 (except for a short period between 31st December 1999 and 17th January 2000 during which it was not available), was rescinded retrospectively. This meant that the excise duties already refunded to the petitioners would be liable to be recovered, no further refund would be made and that the petitioners would be liable to pay the excise duties not paid when the exemption was in force i.e. between 8th July 1999 and 27th January 2001.

A second batch of writ petitions were filed by the petitioners before the High Court challenging Section 154 as being unconstitutional. They were transferred to this Court at the instance of the Union of India and listed for hearing along with the appeals and are also being disposed of by this judgment. If the challenge to the retrospective operation of Section 154 is rejected by us, any decision on the Union of India's appeals from the judgment of the High Court would necessarily be rendered infructuous. The petitioners challenge to Section 154, therefore, is considered at the outset. Mr. Harish N. Salve appeared for M/s R.C. Tobacco Pvt. Ltd. (referred to briefly as 'RCT') in Transfer Case No. 27 of 2004. RCT manufacturers cigarettes as a job worker under an agreement with M/s Godfrey Philips India Ltd. Mr. Salve said that there was no dispute that RCT was a new industrial unit within the meaning of Notification No. 32 of 1999

It was also submitted that the exemption was granted without any condition attached except that the unit must be a new unit and must be located in one of the growth centres etc. It is said that the High Court had correctly held that RCT fulfilled all the pre-requisites for grant of the refund. It is said that the inclusion of tobacco as an exempted industry was not by accident. In fact, when the exemption was withdrawn in December 2000, it was consciously re-introduced in January 2001. Mr. Salve conceded the legislative competence of Parliament to enact laws that have retrospective effect. However, it is contended the retrospectivity particularly of subordinate legislation must be subjected to greater scrutiny. No reasons were given for retrospectively removing a benefit consciously granted. He says that where the retrospective legislation is unreasonable it would violate Article 14 and 19 of the Constitution and would have to be struck down as unconstitutional. It is submitted that a change in policy, which is sought to be given a retrospective effect and which seeks to unsettle settled rights and to deprive people of benefits already enjoyed and causes financial burdens would clearly be unreasonable and arbitrary.

The unreasonableness was evident from the 'flip-flop' of the Union of India in issuing notifications granting, then withdrawing, again granting, before finally withdrawing the benefit in respect of cigarettes in the short space of about a year and a half. The final withdrawal of the exemption effected by Section 154 was also followed by the re-grant of exemptions from duties above 8% to tobacco products other than cigarettes. This erratic behaviour was, according to Mr. Salve, the ground on which this Court in Tata Motors v. Maharashtra struck down retrospective legislation as arbitrary and unconstitutional. It was further submitted that although promissory estoppel operates

only against the executive and not against statute, when the legislature violates promises and representations made by the government, it is a facet of unreasonableness that must be taken into account in evaluating the constitutionality of the law under Articles 14 and 19.

It is argued that if the Government subsequently goes back on the representations made in a tax exemption Notification by causing Parliament to enact a law with retrospective effect to reclaim the benefits so conferred, then the reasonableness of the law must certainly be judged in the light of the representations made by the Government. Mr. R. Nariman appearing on behalf of Kreesna Industries P. Ltd in Transfer Case No. 32 of 2004 has supported Mr. Salve and adopted his arguments. His client manufactures cigarettes under an agreement with ITC Limited. Mr. Nariman's submission is that the fact that the industrial units were set up by job workers under an agreement was an irrelevant consideration as far as the industrial policy as declared by the Central Government and the Notification No. 32 of 1999 were concerned.

This was the concurrent finding of both the courts below. It is said that the Union of India had full knowledge of the circumstances under which his client set up the industrial unit and gave the industry the benefit of the notification after being satisfied that all pre-requisites under the notification had been fulfilled. As far as the retrospective denial of the exemption is concerned, it is said that it stands on a different footing from a validating act. The former amounted to an imposition of tax for the first time whereas the latter merely rectified a defect in the statute by which the assessee was, from the outset, intended to be made liable. Reliance has been placed on the observations of Beg, CJ in Madan Mohan Pathak v. Union of India at 344 as well as the dissenting view of AN Sen, J in Lohia Machines Ltd. v. Union of India . It is submitted that in the present case the retrospectivity was harsh and excessive since there is in fact a retrospective imposition of excise duty.

It is contended that the justification for such retrospective imposition of a tax must be overwhelming. No such overriding consideration had been disclosed. Furthermore, the unit would be crippled if it were asked to pay the excise duty now. In any event, it is submitted that after the enactment of Section 154, a demand was made for the amount refunded and for payment of excise duty for the remaining period. According to Mr. Nariman, the demand which was raised cannot be sustained as it was made without issuing any show cause notice and in contravention of Section 11A of Central Excise Act, 1944. He has relied on the decisions in East India Commercial Co. Ltd. vs. The Collector of Customs, Calcutta as well as M/s. J.K. Cotton Spinning and Weaving Mills Ltd. vs. Union of India para 31, National Agricultural Co-operative Marketing Federation of India Ltd. vs. Union of India & Ors. para 29 in support of the submission.

Mr. Dave appearing on behalf of North East Tobacco Company in Transfer Case No. 25 of 2004 has claimed not to be a job worker for any other company. He says that unlike most other units his clients had not left the State of Assam after the denial of exemption of excise duty. While adopting the arguments of Mr. Salve and Mr. Nariman, it is his submission that Section 11A of the Central Excise Act, 1985 was clearly attracted to the case and the non-compliance with the provisions thereof rendered the demand inoperative. This argument of Mr. Dave is sought to be sustained by the decision in M/s. J.K. Cotton Spinning and Weaving Mills Ltd. v. Union of India & ors. . The benefit of the exemption as opposed to other units had been passed on to his client's customers and,

it is submitted, it would be inequitable to impose excise duty retrospectively at this stage.

Mr. Goswami appeared on behalf of M/s. Kaziranga Tobacco Products (P) Ltd. and New Zone India (P) Ltd. in Transfer Case Nos. 23 and 24 of 2004. The two companies are job workers for Vazir Sultan. It is claimed that the units were set up by local persons who had made huge investments after borrowing money for land and machinery and had been granted the relief of exemption after a full disclosure of all the facts to the excise authorities. In fact whatever benefits had been obtained, had been utilized by the unit to promote other industries in the State. Mr. Goswami also submitted that the retrospective imposition of excise duty after three years was unreasonable as has been held in Chairman, Railway Board & Ors. v. C.R. Rangadhamaiah and Ors. 6 at 638. The policy of granting such exemption was the outcome of experts opinion and after the exemption was reintroduced in respect of cigarettes in January, 2000, it was extended to four other North Eastern States namely Meghalaya, Mizoram, Nagaland and Manipur before its final withdrawal in January 2001

Similarly, the A.S.S Cigarette Company which was a job worker under an agreement with Godfrey Phillips India has stated in TC No. 26 of 2004 that their Unit was set up by local industrialists and that they had deposited the excise duty after borrowing and since the withdrawal of the exemption in 2001 they had been manufacturing non-tobacco products. New Tobacco Company in TC No. 36 of 2004 has claimed that it is not a job worker and in fact the unit still continues to operate in Assam but has stopped the manufacture of cigarettes.

ABN Company in TP) No. 151 of 2004 has said that it has closed down the manufacture of cigarettes after the withdrawal of the exemption. Mr. A.K. Ganguly has appeared on behalf of Union of India and sought to justify the validity of Section 154 by saying that the Section merely gave effect to what was all along the intention behind the Notification No. 32 of 1999. The object of the industrial policy declared in 1997 was to give long lasting benefit to the State in the form of increased investments in industries with consequential benefits by way of increased employment opportunities to the local population. The grant of benefits was part of a package deal with the State getting enduring benefits in return for a short term loss of revenue. The operation of the notification did not attain this objective. The manufacture of cigarettes was a controlled industry. The large tobacco companies avoided all the controls by setting up these industrial units and taking undue advantage of the benefits granted by the exemption Notification. There was no delay in Parliament stepping in since it clarified the law immediately after the decision of the Division Bench. The Central Government which was exercising delegated power under Section 5-A of the Act could not prevent Parliament from undoing the clear error in the exercise of power by the Central Government in granting the exemption or from correcting its vacillating attitude. Parliament's right to legislate was unimpeded.

It was contended that the retrospective levy of excise duty was justified in the circumstances particularly when the liability to pay excise duty was merely suspended by the exemption notifications. The further argument is that there was no question of issuing a fresh show cause notice after the enactment of Section 154, as the demand related to and arose out of proceedings which culminated in the orders of the Asstt. Commissioner impugned before the High Court. The orders had not been appealed from under the Act. According to Mr. Ganguly, the previous orders of refund were only provisional and the subsequent orders of the Assistant Commissioner were the

final orders rejecting the claims of refund. The setting aside of the order by the High Court was immediately followed by the enactment of Section 154. It is said that Section 154 stands by itself and provides for the method of recovery and that the section could not be said to be unreasonable.

It is submitted that the fact that the section may operate harshly in individual cases would not be sufficient reason for striking down the Section as unreasonable. In the majority of cases the units had not passed on the benefits granted by the exemption to their customers and had on the other hand realized the duty from their customers.

The competence of Parliament and State legislatures to repeal, amend or supersede an exemption notification is unquestionable. The power to do so retrospectively cannot be and is also not doubted. The limitation on this power is that the legislation must not conflict with other provisions of the Constitution. As far as fiscal legislation is concerned, the limitation is implicit in Article 265 of the Constitution which provides that no tax shall be levied or collected except by authority of law. # As was held by this Court in Chhotabhai Jethabhai Patel and Co. V. The Union of India and Anr : *"If by reason of Art. 265 every tax has to be imposed by "law" it would appear to follow that it could only be imposed by a law which is valid by conformity to the criteria laid down in the relevant Articles of the Constitution. These are that the law should be (1) within the legislative competence of the legislature being covered by the legislative entries in Schedule VII of the Constitution; (2) the law should not be prohibited by any particular provision of the Constitution such as for example Arts. 276(2), 286 etc. and (3) the law or the relevant portion thereof should not be invalid under Article 13 for repugnancy to those freedoms which are guaranteed by Part III of the Constitution which are relevant to the subject matter of the law. (pg.30)*

*A law cannot be held to be unreasonable merely because it operates retrospectively. Indeed even judicial decisions are in a sense retrospective. When a statute is interpreted by a court, the interpretation is, by fiction of law, deemed to be part of the statute from the date of its enactment. The unreason ability must lie in some other additional factors. The retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it can be held to be so unreasonable as to violate constitutional norms. "Where for instance it appears that the taxing statute is plainly discriminatory or provides no procedural machinery for assessment and levy of the tax, or that it is confiscatory, courts would be justified in striking down the impugned statute as unconstitutional. In such cases, the character of the material provisions of the impugned statute is such that the court would feel justified in taking the view that, in substance, the taxing statute is a cloak adopted by the legislature for achieving its confiscatory purposes". ** (Rai Ramkrishna vs. State of Bihar:) The question to be answered therefore is whether Section 154, which is in terms retrospective, is ex facie discriminatory, or so unreasonable or confiscatory that it violates Articles 14 and 19 of the Constitution.

The factors which are generally considered relevant in answering this question are (i) the context in which retrospectivity was contemplated, (ii) the period of such retrospectivity, and (iii) the degree of any unforeseen or unforeseeable financial burden imposed for the past period. The context in which legislation is enacted is to be distinguished from the motives which impelled it to act. The latter are irrelevant # (See K.C. Gajapati Narayan Deo & Ors. v. The State of Orissa 11; RS Joshi v. Ajit Mills Ltd. 108). **The justification put forward by the**

respondent for enacting Section 154 was therefore really unnecessary. Nevertheless, while we cannot for that reason analyse the justification, we may at least consider the plea as setting out the background in which the Section was passed.

The particular context of the section impugned in this case was the industrial policy formulated by the Central and the State Government of Assam for the development of that State. The obvious intention behind the grant of the package of incentives including an exemption from payment of excise duties was to stimulate further industrial growth in the area with enduring benefits not only to the local populace by way of employment opportunities but also to the economic welfare of the State. The State Government's insistence from the very outset on the need to regulate the industries which were claiming the benefit of the exemption was to ensure that these objects were attained. According to the Union of India the exemption notification, at least as interpreted by the High Court, did not effectuate that intent. As it transpired none of the industrial units manufacturing cigarettes were prepared to contribute to this object and their investment in the manufacture of cigarettes was co-extensive with the period of the exemption.

The loss of revenue suffered by the Union and the State by the various subsidies and exemptions granted was the quid in return for which the petitioners were not prepared to suffer any quo. With the withdrawal of the exemption, all of them without exception immediately closed down their cigarette manufacturing units and a large majority have shifted out of the State. Clearly if the grant of the exemption had operated as it was intended to, it would have been unnecessary to enact Section 154. # The High Court may have been right in construing the exemption notification as it stood. Yet the respondent can contend that that the words should have been used in the exemption so as to provide for sufficient safeguards to ensure that the benefit of exemption was granted only to those industries which would in turn permanently invest in the State. By the retrospective enactment this defective expression of the object of the policy, was rectified.

The Exemption Notifications were issued under Section 5A of the Central Excise Act, 1944 as a delegate of Parliament. In a Cabinet form of Government, the Executive is expected to reflect the views of the legislature. It would be impossible for Legislatures to deal in detail and cater to the innumerable problems which may arise in implementing a statute. When the power of subordinate legislation is conferred by Parliament in certain matters it can only lay down the policy and guidelines and expect that what is done by the Executive is in keeping with such policy. It does of course retain control over its delegate and can exercise that control by repealing the action of the delegate . Consequently if the Executive has failed to carry out the object of Parliament, such control may be exercised by retrospectively enacting what the Executive ought to have achieved. #

A somewhat similar situation arose in the case of Epari Chinna Krishna Moorthy vs. State of Orissa and Ors. . In that case the State Government had issued an exemption notification under Section 6 of the Orissa Sales Tax Act, 1947 for which gold ornaments were ordered to be exempted from sales tax "when the manufacturer selling them charges separately for the value of gold and the cost of manufacture". The Notification was issued on 1st July, 1949. The petitioners, who were registered

dealers under the Orissa Sales Tax Act filed returns claiming exemption from sales tax. Up to June, 1952 the claims for exemption were allowed by the Department. Subsequently, the assessments were reopened on the ground that the exemption had been wrongly granted. The matter ultimately came up before the High Court.

The High Court allowed the petitioners' claim for exemption under the notification in question holding that the expression "manufacturer" meant the first owner of the finished products for whom the ornaments were made either by his pre-paid employee or even by independent artisans on receipt of the raw materials and labour charges from him. On 1st August, 1961 the Orissa Sales Tax Validation Act, 1961 was passed. It provided that notwithstanding anything contained in any judgment, decree or order of any Court, the word "manufacturer" meant and was always to be deemed to have meant a person who by his own labour produces the ornaments or a person, who owns or runs manufactories for that purpose. The petitioners did not fall within this definition of manufacturer.

They accordingly challenged the 1961 Act on three grounds; 1) that since the exemption had been granted by the State Government, it was not open to the legislature to take away the exemption notification; 2) that the provisions of 1961 Act contravened Article 14; and 3) that the retrospective operation of the impugned Section was unconstitutional because it imposed an unreasonable restriction on the petitioners fundamental rights under Article 19(1)(g). In negativing these arguments a Constitution Bench of this Court said:- *"What the legislature has purported to do by S. 2 of the impugned Act is to make the intention of the notification clear. Section 2 in substance declares that the intention of the delegate in issuing the notification granting exemption was to confine the benefit of the said exemption only to persons who actually produce gold ornaments or employ artisans for that purpose. We do not see how any question of legislative incompetence can come in the present discussion. And, if the State Government was given the power either to grant or withdraw the exemption, that cannot possibly affect the legislature's competence to make any provision in that behalf either prospectively or retrospectively."* ***

Although the length of time is not by itself decisive the effect of the retrospectivity of the legislation in this case is less than two years. The tussle between the excise authorities and the petitioners started almost immediately upon the latter claiming and obtaining refunds of the excise duty paid by them on the manufacture of cigarettes. The refusal of the excise authorities to refund, on their interpretation of the notification, led to the filing of the writ petitions. The writ petitions were allowed on 17th May, 2002. In the meanwhile the exemption was already withdrawn in January 2001. The decision was then challenged in appeals by the Union of India which were finally dismissed by the Division Bench on 4th April, 2003. Therefore between 2000 to 2003 the dispute as to the purport of the exemption notification during the period of their operation from July 1999 to January 2001 was pending in Court.

The matters were then carried to this Court by the Union of India. While the proceedings were pending and the issue was still at large, Section 154 was enacted. In these circumstances, the Parliament cannot be blamed for having at least awaited the decision of the High Court, nor can the statutory provision be questioned as being unreasonably retrospective. # (See in this connection Rai Ram Krishna vs. State of Bihar , 1675 para 18).

The pendency of the proceedings before the Courts meant that there was a possibility of an outcome adverse to the petitioners however strong the petitioners may have considered their case to be. If this Court had reversed the view of the High Court, the petitioners would have had to bear the burden of the excise duty for the period they had manufactured the cigarettes. It could not have been predicted with any certainty that the appeals of the Union of India would fail. By enacting Section 154, Parliament has forestalled a decision by this Court and in effect taken away the basis for the decisions of the High Court. In the circumstances, it could not be said that the financial burden was unforeseen or unforeseeable.

In Chairman Railway Board vs. C.R. Rangadhamaiah (supra) the impugned notifications had sought to curtail pensionary rights with retrospective effect. The notifications were held to be unconstitutional on the grounds that when the pension had been granted to the employees, Articles 31(1) and 19(1)(f) were available, both of which were violated by such retrospective operation. It was also held that it was violative of Articles 14 and 16 of the Constitution because it had the effect of reducing the amount of pension that had become payable to employees who had already retired from service on the date of issuance of the impugned notifications according to the rules in force at the time of their retirement. However the right of the petitioners to the exemption in the present case can at best be described as a precarious one. It is established law that benefits granted by exemptions may be modified or withdrawn. By the notification the accrued liability to pay excise duty is merely suspended. Such an exemption by its very nature is susceptible to being revoked or modified or subjected to other conditions. The Government and a fortiori the Parliament is free to determine the priorities in the matter of utilization of finances and the courts cannot place an embargo on the Government or on the plenary power of Parliament to withdraw the benefit on the basis of any principle of promissory estoppel. It has been said: *"It is necessary that the Legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called 'small repairs'. Moreover, the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen.*

*Thus, the interest in the retroactive curing of such a defect in the administration of government outweighs the individual's interest in benefiting from the defect The Court has been extremely reluctant to override the legislative judgment as to the necessity for retrospective taxation, not only because of the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of government among those who benefit from it ." **

As we have said, Mr. Salve relied on Tata Motors Ltd. vs. State of Maharashtra & Ors., to contend that despite the enormous powers of Parliament to legislate prospectively or retrospectively, unless the material is disclosed why there was an 'on again and off again' exemption, Section 154 must be held to be arbitrary and therefore unconstitutional. In that case Rule 41E of the Bombay Sales Tax Rules 1959 allowed benefit of set-off in respect of all waste goods or scrap goods or bye- products. This benefit was sought to be taken away by Section 26 of the Maharashtra Tax Laws (Levy Amendment and Repeal) Act, 1989 which amended Rule 41E. The validity of such retrospective amendment to Rule 41E was challenged. It was contended that as a result of the amendment the assessee was deprived of the benefit for a period 8 years after which the benefit was reintroduced by

another amendment of Rule 41E in 1992. This Court held that in absence of any material as to why the benefit under Rule 41E had been denied for a particular period, Section 26 of the 1989 Amendment Act deserved to be quashed.

The Court found in favour of the assessee because there was no reason whatsoever forthcoming for the withdrawal of the benefit retrospectively for a limited period. The decision is distinguishable. In this case, the reasons for the retrospective enactment of Section 154 have been given and as we have also said, those reasons are at least factually plausible. The next challenge of the petitioners is based on Section 11A of the Act, the relevant extracts of which reads: "11-A RECOVERY OF DUTIES NOT LEVIED OR NOT PAID OR SHORT LEVIED OR SHORT-PAID OR ERRONEOUSLY REFUNDED- (1) When any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

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

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid-

(A) where under the rules made under this Act a periodical return, showing particulars of the duty paid on the excisable goods removed during the period to which the said return relates, is to be filed by a manufacturer or a producer or a licensee of a warehouse, as the case may be, the date on which such return is so filed;

(B) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(C) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder.

(b) in a case where duty or excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(c) in the case of excisable goods on which duty of excise has been erroneously refunded, the date of such refund. The contention is that Section 154 violates Section 11A in that it does not envisage the service of any notice and it seeks to allow recoveries to be made after the periods of limitation provided.

According to the respondents the refunds granted under the notifications dated 8th July, 1999 were not the "normal" refunds made under the Act but were of a special kind for which the complete machinery was provided under the Notifications. The submission is that since the exemption notifications themselves had been withdrawn by Section 154, the amounts refunded thereunder were recoverable independently of Section 11A under Section 154(4).

There are two aspects to this dispute. The first is the question of limitation and the second the question of notice. As far as the first aspect is concerned refund of duty under the Act has been provided for by Section 11B. The Section specifies the manner and circumstances under which refunds of duty may be made. It is neither of the parties' case that the refund made to the petitioners of the excise duty paid by them was under this Section. # In the present case Paragraph 2 of the Notification 32/99 prescribed for the method for giving effect to the exemption. It provided:

(a) The manufacturer shall submit a statement of the duty paid from the said account current to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, by the 7th of the next month in which the duty has been paid from the account current.

(b) The Assistant Commissioner or Deputy Commissioner of Central Excise, as the case may be, after such verification, as may be deemed necessary, shall refund the amount of duty paid from the account current during the month under consideration to the manufacturer by the 15th of the next month.

(c) If there is likely to be any delay in the verification, the Assistant Commissioner or Deputy Commissioner of Central Excise, as the case may be, shall refund the amount on provisional basis by the 15th of the next month to the month under consideration, and thereafter may adjust the amount of refund by such amount as may be necessary in the subsequent refunds admissible to the manufacturer.

The claim for refund is subject to verification but the refund must be granted even before such verification on a provisional basis. It was for that reason that the learned single Judge had directed the refund by an interim order but allowed the Assistant Commissioner to independently verify the claims. Although Section 11A does not refer to Section 11B, it speaks of duties "erroneously refunded". It cannot therefore refer to the refunds made to the petitioners under the notifications as there was no error in the provisional refunds made under the notifications to the appellants. What was sought to be recovered under Section 154 was not an erroneous refund but a benefit provisionally granted. #

In J.K. Cotton Spinning & Weaving Mills Ltd. vs. Union of India relied upon by the petitioners, by virtue of the retrospective amendment of Rules 9 and 49 of the Central Excise Rules in 1982, commodities obtained at an intermediate stage of manufacture in a continuous process were deemed to have been 'removed' within the meaning of Rule 9(1) thereby making such intermediate products

dutiable under the Act with effect from the commencement of the Act i.e. 1944. In this context the Court held that the amended Rules 9 and 49 would take effect subject to Section 11A. The decision is distinguishable.

The circumstances in which the Court held that the demands for duty could only be limited to six months prior to the amendment was unquestionably different from those present in the case before us. What we have to consider here is whether the benefit granted in 1999 could be withdrawn in 2003. Besides the Court in J.K. Cotton Spinning & Weaving Mills Ltd's case rejected the contention of the Union of India that Section 51 of 1982 Finance Act by which the amendments were made to Rules 9 and 49 overrode the provisions of Section 11A saying 'if the intention of the legislature was to nullify the effect of Section 11A, the legislature would have specifically provided for the same'. Similarly our decision in National Agricultural Cooperative Marketing Federation of India Ltd. vs. Union of India which dealt with an amendment to Section 80P(2)(a)(iii) of the Income Tax Act, 1961 noted that 'the amendment does not seek to touch on the periods of limitation provided in the Act, and in the absence of such express provision or clear implication, the legislature clearly could not be taken to intend that the amending provisions authorizes the Income Tax Officer to commence proceedings which before the new Act came into force, had, by the expiry of the period provided become barred".

In the present case Section 154(4) specifically and expressly allows amounts to be recovered within a period of thirty days from the day the Finance Bill, 2003 received the assent of the President. It cannot but be held therefore that the period of six months provided under Section 11A would not apply. On the question of notice prior to the recovery irrespective of Section 11A, it is contended by the petitioners relying on the decision of this Court in East India Commercial Co. Ltd. vs. The Collector of Customs , 361 that whether a statute provides for notice or not, it was incumbent upon the respondents to issue notice to the petitioners disclosing the circumstance under which proceedings are sought to be initiated against them and that any proceedings taken without such notice would be against the principles of natural justice. Assuming that the principle were applicable to the case before us, in fact notices of personal hearing were served on the petitioners by the Assistant Collector for a personal hearing before the Assistant Collector passed the orders by which the petitioners were held liable to repay the refunds made and to pay the excise on the goods cleared for the subsequent periods.

The High Court's decision setting aside the orders as being contrary to the Exemption Notification was sought to be overcome by Section 154(1). In other words, by virtue of Section 154(1), notwithstanding the decision of the High Court, the orders of the Assistant Collector, which were purported to have been taken under the notifications, were validated as if the notifications as amended had been in force when the orders were passed.

A grievance has been raised by the petitioners that cigarette manufacturers have been unfairly discriminated against. We are unable to accept the submission for several reasons. First, there is a presumption in favour of constitutionality of a statute, a presumption which only the clearest and weightiest evidence can displace. Second, we can take judicial notice of the fact that cigarettes have been treated as a class apart for the purposes of levy of excise duty with the manufacture of cigarettes probably yielding the highest revenue to the exchequer. As was said in R.K. Garg vs.

Union of India by the following words: "The presumption of constitutionality is indeed so strong that in order to sustain it, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."

Third "another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc." (ibid).

The final question is that of the relief to be granted. The petitioners can be broadly classified into three groups:

A. Job workers for large cigarette companies which have closed down the units with the withdrawal of the exemption and left the State of Assam.

B. Job workers for large cigarette companies which have closed down their cigarette manufacturing units but started new business in other products.

C. Industrial units which have set up their own units and have reinvested their earnings in their businesses in the State after closing down the manufacture of cigarettes. Some units have admittedly not passed on the excise duty benefits to their customers. On the other hand the large cigarette companies have recovered the excise duty from the customers. Other units claim to have passed on the benefit of the entire exemption to their customers.

All the petitioners however claim that they would be financially crippled if they were called upon to repay the refund of the excise duties or pay the excise duty on the cigarettes manufactured by them. According to them the quantum of excise duties would far exceed their profits from the manufacture of cigarettes.

The respondents on the other hand have urged that the petitioners were merely fronts for the large cigarette companies which had misused the notification to avoid the excise duty otherwise payable by them. This was clear from the agreements entered into between them and the various industrial units through which they claimed the benefits. The agreements showed inter alia that the entire set up was financed by the large companies. The arrangement was back to back so that with the withdrawal of the exemption, the units would be closed down. The promptness with which a unit went into commercial production after it was set up in a few days showed that there was no real investment by the petitioners.

Many of the units had not even got permanent registration before they went into production and claimed refund of large amounts of excise duty. Admittedly the large cigarette companies had not only not passed on the benefit of exemption but had levied and retained the excise duty on the cigarettes manufactured by the petitioners for the customers of the large companies. The petitioners

who were admittedly in group A have refuted this and contend that their relationship with the large cigarette companies was on a principal to principal basis and that under their agreements they alone would be liable to pay the excise duty now demanded by the respondents under Section 154.

We are not in a position to determine the disputes raised. However we cannot lose sight of the fact that although excise duty like other indirect taxes may be passed on to the customer of the goods under the law as it now stands, it is the manufacturer of the excisable goods to whom the excise authorities will look for payment. How the manufacturer will adjust its liability with its customers does not concern the respondents nor can they be asked to recover their dues from persons who may have ultimately taken on the responsibility to pay the excise duty as a result of an agreement with the manufacturer. (See in this connection State of Rajasthan vs. J.K. Udaipur Udyog Ltd. 0, 692). Furthermore having upheld the constitutional validity of Section 154 it would be a pyrrhic victory for the Union of India if they could not in fact recover the tax. It is not a case where the legislation has merely withdrawn the exemptions.

The consequences of the withdrawal have been statutorily provided for including the recovery of the excise duties refunded or not paid. The effective period of such imposition is about eight months. The State has been deprived of revenue without any corresponding benefit. It may be that the retrospective operation may operate harshly in some cases, but that would not by itself invalidate the demand. [See: Epari Chinna Krishna Moorthy vs. State of Orissa (supra)] It needs to be emphasized that in effect the retrospective operation extended over a very short period and principles of equity must give way to express statutory provision. As was said in Story on Equity (3rd Eng.Ed.1920)p.34:-" Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it" .

No doubt in British Physical Lab India Ltd vs. State of Karnataka & Ors. 8 relied upon by the petitioners the Sales Tax Authorities proposed to recover the difference in duty from manufacturers within the State having regard to the fact that the notifications giving them the benefit of a lower rate of tax had been struck down. This court held that they should not do so. The rationale behind the decision has been explicitly stated in Texmaco Ltd vs. State of Andhra Pradesh 7. In directing that the State shall not collect the amount of sales tax that had become payable by reason of the quashing of the notifications, this Court noted that the notifications had been intended to protect the local cement industries. The quashing of the notifications should have the effect of putting the local cement industry and the same industry outside the State on par. It could not place the former in a disadvantageous position qua the later. Apart from this, the respondent-State had also not contested the factual position. The circumstances in which this Court directed the State not to collect amount of sales tax which had become payable only by reason of the Order quashing the notifications issued under the State Sales Tax Act do not exist here. What we are considering in this case is a positive statutory mandate directing the consequences of the withdrawal of the exemption notifications. **For the reasons stated we dismiss the transferred writ petitions without any order as to costs. #**