CALCUTTA HIGH COURT

Aluminium Corporation of India Ltd

Vs.

Coal Board

A.F.O.O. No. 25 of 1957

(P. Chakravartti, C.J. and S.C. Lahiri, JJ.)

11.09.1958

JUDGMENT

P. Chakravartti, C.J.

1. The controversy in this appeal is as to whether Section 8(1)(1) of the Goal Mines (Conservation and Safety) Act, 1952, so far as it purports to impose a duty of excise on all coal raised and dispatched from collieries in India, is a valid piece of legislation and even if it be valid, whether it applies to so much of the coal raised from the appellant's colliery as is consumed in its own power house. Logically, the second question should come first, because if the section does not apply to the appellant's colliery, it is immaterial to the appellant whether the section is valid or not. I shall, however, deal with the two points in the order in which they were argued.

2. The controversy has arisen in the following way: The appellant, the Aluminium Corporation of India Ltd., is a large concern, manufacturing aluminium and it has its factory at Jaykaynagar in the district of Burdwan. The plants in the factory are driven by electricity, for the supply of which the factory has its own power house. For feeding the power house, coal is required. The appellant has provided itself with a source for getting the coal by taking a lease of a colliery which is situated within the boundaries of the factory. Thus, the factory, the power house and the colliery are all situated within the same compound and all are owned by the appellant as parts of a single industrial unit.

3. The colliery has an average annual output of 55,000 to 70,000 tons of coal. Of that quantity, the bulk is consumed in the power house for generation of the electricity used in the factory for the production of aluminium. The small remainder is sold a railway and other parties. A tabular statement filed by the appellant for live years shows that, on the average, about 50000 tons of coal were consumed in the power house and about 13000 tons were sold to third parties.

4. The distance between the pithead of the appellant's colliery and its power house is about one furlong. The coal consumed in the power house is carried to it from the pithead by means of hand trolleys belonging to the appellant.

5. In March, 1952, Parliament passed an Act, called the Coal Mines (Conservation and Safety) Act in order, as the preamble stated, to provide for the conservation of coal and make further provision for safety in coal mines. The name of the Act is almost a misnomer, because by itself it makes no provision for the furtherance of either of its objectives and it only empowers the Central Government to exercise in that behalf such powers and take or cause to betaken all such measures as it may deem necessary or proper or as may be prescribed. But the Act also provides for the establishment of a body, called the Coal Board and provides further that if the Board considers that for the furtherance of the objectives of the Act it is necessary that certain measures should be undertaken by it directly, it may undertake them. The Board is also empowered to administer a fund, called the Coal Mines Safety and Conservation Fund and directed to apply the moneys for certain specified purposes, including the granting of subventions to collieries.

6. It is validity of the provision made by the fact for feeding the fund which is the principal subject of controversy in this appeal. Section 11 of the Act provides that the Central Government may in each financial year pay to the Board a sum not exceeding the net proceeds of the duties of excise collected under Section 8 during the preceding financial year and Section 12 requires the sum so received by the Board to be credited to the Coal Mines Safety and Conservation Fund. The duty is thus collected under Section 8. That section provides for the levy of a duty of excise on coal and coke and also an additional duty of excise on coking coal. With the latter provision we are not concerned in this appeal. The former provision is contained in Section 8(1)(a) and, so far as it is material, it enacts that,

> "With effect from such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be levied and collected on all coal raised and dispatched * * * from the collieries in India such duty of excise not exceeding one rupee per ton as may be fixed from time to time 000 and different rates of duty may be levied on different grades or descriptions of coal or coke".

7. The notification by which the Central Government fixed the date from which the levy of the duty was to commence was not produced in the case and has not been printed in the paperbook. Indeed, it would seem that there was no separate notification but the date on which the rules laying down the method of assessing and collecting the duty were published in the Gazette was taken to be the date with effect from which the duty became chargeable.

8. Section 17 of the Act empowers the Central Government to frame rules for inter alia "the levy, collection and payment of the duties of excise." In exercise of that power, the Central Government framed Rules 24 to 32 and incorporated them in Chapter V of the body of the Rules, called the Coal Mines Conservation and Safety Rules, which were published on 25-9-1954. Rule 24 which prescribe the method of recovering the duty imposed by Section 8(1)(a) of the Act, makes a distinction between coal dispatched by rail and coal dispatched by other means, namely, by road, river or tramway. In the former case, the duty is to be recovered by means of a surcharge on the freight from the consignor or the consignee according as the freight charges are paid by the one or the other. In the latter case, it is to be recovered in the manner provided for in Rules 29 to 31. Broadly stated, the method prescribed by Rules 29 to 31 is that the owner of the mine shall in the first instance assess himself on the coal dispatched from his colliery and pay the amount assessed into the Government treasury every month and that there shall be a final assessment by

the Chairman of the Coal Board.

9. On 4-11-1954 the Deputy Secretary of the Coal Board wrote to the appellant to say that under the Coal Mines Conservation and Safety Rules, the duty of excise was also to be collected on coal or coke dispatched by means other than rail and that immediate steps should be taken by the appellant to collect and pay the duty on coal so dispatched from its colliery. That letter was followed by another dated 19-1-1955, by which the same Deputy Secretary told the appellant that collections of the duty for the month of October and subsequent months should be deposited immediately. Instead of complying with the direction, the appellant placed the matter in the hands of its Solicitors Messrs Khaitan and Company. They, on 6-4-1935, wrote to the Deputy Secretary to say that the so-called excise duties purportedly imposed by the Coal Mines (Conservation and Safety) Act, were not excise duties at all and, therefore, the imposition of them was beyond the legislative competence of Parliament, it was added that without prejudice to the above contention, their client would be prepared to pay the duty on one or two per cent of the raisings which was roughly the quantity sold to third parties, but it was not liable to pay and was not prepared to pay any duty on the coal used by it in its own factory. The Coal Board did not accept the appellant's contention and continued to press for an early payment of the duty, whereupon, on 7-4-1955, the appellant moved this Court under Article 226 of the Constitution for a writ of mandamus directing the Coal Board to forbear from demanding the duty. A Rule was issued on that application, but ultimately it was discharged by Sinha, J.

10. The appellant contends in this appeal, as it did before thy learned trial Judge, that the duty sought to be imposed by Section 8(1)(a) of the Act is not authorised by the Constitution and, therefore, the section is bad and that it is at least bad so far as it may be said to apply to coal consumed by the owner of a mine and such part of it being inseparable, the whole section is bad. A further contention is that in any event, the terms of the section are not attracted to so much of the coal raised from its colliery as is consumed in its own power house. It is also contended that even assuming that the impost is valid and that it is valid even as an impost on the coal consumed by the owner of the mine from which it is raised, it can be collected only by Government themselves and, therefore, the provision for its collection by the Coal Board is bad. The last contention does not appear to have been urged before the learned trial Judge.

11. The argument about the invalidity of Section (1)(a) as I understood it, had two branches which I think I may put correctly in the following form :

> (1) The section is altogether void, because no entry in the Legislative Lists authorizes Parliament to impose an excise duty or indeed any duty on coal raised from mines; and
> (2) that assuming that Parliament could validly .impose an excise duty on coal, still the duty being a duty of excise, it could be imposed only on coal sold to third parties and dispatched to them, but there could be no excise duty on coal which the owner of a mine himself consumed and, therefore, the section providing for the levy of such duty is bad.

It is to be noticed that the section only says that a duty of excise shall be levied on coal "raised and dispatched from coal mines in India" and does not say in terms anything as to the party to whom it may be dispatched. The second branch of the appellant's argument, therefore, assumed that the section is not limited to coal dispatched to third parties, because if it be so limited, it would not apply to the coal consumed in the appellant's power house at all and the appellant

would not be concerned to question its validity. The argument, therefore, rests on the assumption that the section applies to all coal raised and dispatched from the mines, to whomsoever it may be dispatched, as is the respondent's case. But the appellant also contends that, as a matter of construction, the section does not apply to coal consumed by the owner of the mine from which it is raised. Put precisely, the second branch of the appellant's argument must, therefore, be that if Section 8(1)(a) of the Act applies equally to coal dispatched to third parties and coal dispatched to the owner himself and consumed by him, which the appellant disputes, it is wholly bad, because as applied to coal dispatched to and consumed by the owner and thus providing for the levy of a duty which cannot be an excise duty, it is ultra vires the Constitution.

12. The appellant made it clear to us, as it had done before the learned trial Judge, that it did not desire to raise any question as to the duty charged on the coal which it had sold to third parties and dispatched to them. That concession is plainly inconsistent with the argument that Section 8(1)(a) of the Act is wholly ultra vires the Constitution, because if it is, it must be equally invalid, whether it applied to coal consumed by the owner or to coal sold to third parties. I will, however, ignore this inconsistency and shall deal with the appellant's extreme argument on its merits.

13. The respondent contends that the imposition of the duly is authorized by entry No. 84 of List I of the Seventh Schedule to the Constitution and that it is also authorized by entry No. 54. The learned Judge has expressed his inclination to the view that the levy can be supported by reference to entry No. 54, but he has added that the matter admits of doubt. He has, however, held that entry No. 84 clearly authorizes the levy.

14. In my opinion, in order to uphold the impost it is not necessary to draw upon entry No. 54 which, if it at all authorizes the levy of a tax, authorizes a levy of a very different kind. The entry empowers Parliament to make laws on "regulation of mines and mineral development to the extent to which such regulation and development under the Control of the Union is declared by Parliament by law to be expedient in public interest" To the extent that there is no such declaration, "Regulation of mines and mineral development" belongs to the State List and has been provided for in entry No. 23 contained there. There can be no doubt that in enacting the Coal Mines (Conservation and Safety) Act, Parliament purported basically to proceed under entry No. 54 of the Union List, because it declared by Section 3 that it was expedient in public interest that the Central Government should take under it control regulation of coal mines to the extent specified in the subsequent provisions of the Act. The implied reference to entry No. 54 is thus clear. It will be noticed, however, that the Act is concerned only with a part of the matter provided for in entry No. 54, because Section 3 makes no reference to mineral development but speaks only of regulation of coal mines. The power given by entry No. 54 with respect to coal mines is, however, only a power to regulate them by legislation and the question, therefore, is whether in exercise of such regulatory power, Parliament could impose the taxes provided for in Section 8(1)(a) of the Act.

15. In my view, taxes of the kind imposed by Section 8 cannot be supported by reference to the regulatory power. Broadly speaking, taxes are of two kinds, those imposed purely in aid of the revenue and those imposed for the purposes of controlling the thing taxed. Legislation imposing a tax purely as a contribution to the revenues of the State and selecting definitely the thing on which it will be paid or the person who will pay it, is common, but there is also another type of legislation which first Imposes a tax on goods of a certain kind or certain undertakings and then provides that if the goods are produced under certain conditions or the undertaking is carried on in a certain manner, then that shall not be payable. The real import of such a piece of legislation

is that the legislature desires the goods to be produced or the undertaking to be carried on in the manner which would exempt them from the tax and that the tax is really a penalty for producing the goods or carrying on the undertaking in a contrary manner of which the legislature disapproves. By impossible the tax, the legislature thus regulates the production of the goods or the carrying on of the undertaking concerned. By way of illustrating a taxing statute of the regulatory type, I may refer to the Australian Act, Act XVI of 1916, an Act relating to Duties of Excise, which provided that a duty of excise shall be payable on certain kinds of goods specified in the Schedule to the Act and then provided that the Act shall not apply to goods manufactured under fair conditions as to remuneration of labor, the fairness to be determined in certain enumerated ways. That Act was held to be in substance not an exercise of the power of taxation but au exercise of the power to regulate conditions of labor, In the present case Sinha, J., has held, though not without an expression of doubt, that while power of regulation would not ordinarily include power of taxation, it may include such power where funds are required for implementing the object of an Act passed for the purpose of regulation. In my opinion, where under a particular constitution, a legislature is given power to make laws for the regulation of a certain thing but no independent power of taxation with respect to that thing, it may be possible to read into the power to regulate a power to raise by taxation the funds, necessary for furthering the object by any law that may be made. The legitimacy of such construction of the power even in such circumstances has been doubted, but it cannot certainly be legitimate in a case where the power to levy a tax for the object concerned has been separately granted. It is true that a constitution is not a statute but is an authority for the making of statutes and, therefore a head of power in a legislative list contained in a constitution is only an expression of a purpose with respect to which laws may be made. Such a head is not to be rigidly construed but on the other hand, as has been said, a construction most beneficial to the widest possible amplitude of the power conferred must be adopted. Yet in construing a head of power in a legislative list and determining the content of the power granted, one must consider it by reference to other separate and independent grants made to the same legislature by the same constitution and also - although that question does not arise here to the grants made to the other legislature. The Indian Constitution, while giving power to Parliament to legislate with respect to regulation of mines to the extent that it declares Union control to be expedient, also gives it power to impose duties of excise on all but certain excepted goods, manufactured or produced in India. Coal comes within the definition of goods given in the Constitution and it is not excepted. It also appears to be the scheme of the conferment of legislative power under the Constitution that the power to levy a tax as a contribution to the public revenue is always directly and independently given. The head "Regulation of Mines" must, therefore he construed in the light of these facts. I am accordingly of opinion that the power to impose a tax on coal in aid of public revenues of the country is not intended to be comprised in the power to regulate mines and the tax imposed by Section 8(1)(a) of the Coal Mines (Conservation and Safety) Act being such a tax and not a tax designed to control the production of coal, it cannot be said to be authorized by entry No. 54.

16. I do not, however, think that the case of Attorney-General for the *Dominion of Canada v. Attorney-General for the Province of Alberta*[1], on which the appellant relied in the court below has any relevancy to the present question. That case belongs to a line of decisions concerned with a very different point arising under the Constitution of Canada. In Canada, a question has often arisen as to whether the Dominion Parliament can use its plenary power of taxation for the achievement of a regulatory purpose with regard to a matter belonging to the jurisdiction of provincial legislatures, when it cannot realise that purpose by direct legislation inasmuch as the

matter is included in the provincial list. The case cited is one of several decisions where it has been held that the general authority of the Dominion Legislature under the British North America Act to make laws for the "regulation of trade and commerce" does not entitle it to make laws with respect to a matter which, although related to trade and commerce, has been specifically assigned to provincial legislatures and, therefore, a Dominion Act imposing a levy which is not a tax raised as a contribution to the revenue, but really a tax designed to regulate in an indirect manner the matter which could not be directly regulated, is ultra vires. In the present case, there is no conflict from this point of view between the Parliament and the State Legislatures, because Regulation of Mines belongs to Parliament as well, subject to a condition which has been fulfilled in the present case. Indeed, it is the State Legislatures which have no jurisdiction, because under the words of entry No. 23 of the State List, the power of the State) Legislature is subject to the provisions of List I, so that when Parliament has taken over the matter by making the necessary declaration, the State Legislatures are deprived of jurisdiction to the extent that the matter has been taken over. The case cited, therefore, has no application where the legislature concerned has both the plenary power of taxation and the regulatory power with respect to a particular matter and where the question is whether a particular levy can be said to be authorised by the regulatory power rather than the power of taxation. In such a case, the answer must depend upon the nature of the levy. If it is not a levy designed to regulate the thing taxed but only a levy in aid of the revenue, it would obviously fall under the power of taxation and not under the regulatory power.

17. Entry No. 54 being thus out of the way, the next question is if the imposts are authorized by entry No. 84. In my view, it plainly is. Under entry No. 84, Parliament is authorized to make laws with respect to duties of excise on, inter alia goods manufactured or produced in India 'Goods' as defined in Article 366(12) of the Constitution, includes all materials, commodities and articles. Coal is certainly a material or a commodity. The appellant's first objection to entry No. 84 is that although coal may be a material or a commodity, it is not something which is produced and, therefore, the entry which applies only to goods produced in India cannot apply to coal. No question of manufacture obviously arises. As to production, it is said that coal produces itself and the raising of coal from the mines cannot be said so be its production. This argument does not appear to me to be correct Although, coal is undoubtedly a natural product, the operations required to bring it un to the surface and to make it marketable or even usable is so elaborate of expensive that to speak of the mining and condition of coal as its production is wholly

[1]1910 A.C. 588

appropriate. Sinha, J. has referred to books of geography sneaking of quantities of coal produced in different countries. It appears to me with respect, that the use, of the term in the books of geography, particularly physical geography, may not be sufficient to show tint coal is a commodity which can correctly be said to be produced so as to be a proper subject-matter of a duty of excise imposed under the authority of entry No. 84. In speaking of some mineral as being produced by a country or in describing a country as producing a mineral, books of geography merely mean that the mineral can be found in the subsoil of the country concerned and when some quantity is mentioned, it means that so much is the average yield. They regard the coal only as the product of the Country's subsoil. The word 'produced' appearing in entry No. 84 is used in juxta position with the word 'manufactured' and used in connection with a duty of excise and consequently it appears to contemplate some expenditure of human skill and labour in bringing the goods concerned into the condition which would attract the duty. It is not required that the goods should be manufactured in the sense that raw material should be used to turn out

something altogether different, but it is still required that they should be produced in the sense that some human activity should be spent on them and they should be subject to some processes in order that they may be brought to the state in which they may become fit for consumption. As the learned Judge has pointed out coal has to be raised from the bowels of the earth, broken, sifted and graded before it can be offered to consumers. To speak of coal as produced in the sense to its being made a material of consumption by human skill and labour is thus entirely correct and has a sanction of approved usage. The Judicial Committee for example, observed in the case of *The King v. Caledonian Collieries, Limited*[2], that the respondents before them were "producers of coal." The appellant's contention that coal is not covered by entry No. 84, because it is not something which can be said to be produced, must, therefore, be overruled.

18. It was then contended that even if coal might properly come within 'goods produced in India,' as contemplated by entry No. 84 still the entry could apply only to coal sold to third parties and could not apply to coal consumed by the producer himself. The reason given was that the entry contemplated coal as the subject-matter of a duty of excise and such a duty being only a duty which could be passed on to third parties and would not have to be borne ultimately by the manufacturer or producer from whom it was collected in the first instance, it could be imposed only on coal purchased by third parties. On that reasoning Section 8(1)(a) of the Act was said to be ultra vires, at least so far as it applied to coal consumed by the owner of the mine himself.

19. It will be noticed that the ground of attack on the validity of the section which I have just mentioned has two aspects. On the one band it raises a question of construction and on the other, a question of validity. The language in which the section is expressed is general'. It speaks of coal raised and dispatched' and does not say whether coal dispatched to the owner of the mine himself is also included. If it be correct to say that a duty which falls on the person from whom it is collected as if the statute selected him to pay it cannot be an excise duty, there may be an argument that the legislature must be presumed not to have passed an invalid law and, therefore, Section 8(1)(a) of the Coal Mines (Conservation and Safety) Act ought to be construed as not covering coal dispatched to the owner of the mine himself for consumption by him. This would be looking at the section from the point of view of its true construction. On the other hand, it may be

[2]1928 A.C. 358

contended that the language of the section is perfectly general and since it is capable of being applied to coal raised by the owner of a mine and dispatched to himself and as so applied it would be ultra vires, the whole section is bad. This would be regarding the section from the point of view of its validity.

20. Both branches of the above contention rest on the basis that a duty which is not susceptible of being pissed on to third parties, but is to be borne by the party who pays it cannot be a duty of excise. The concept of excise duty underlying this contention cannot be accepted as correct under the Indian Constitution, "Excise," as the Judicial Committee observed in the case of *Atlantic Smoke Shops Ltd. v. Conlon and Attorney-Central for Canada*[3], "is a word of vague and somewhat ambiguous meaning." It seems to have received different interpretations under different constitutions but one characteristic of it which has beer accepted as common is that it is a tax on goods and not on consumption or manufacture or sale and, as the Privy Council observed in the case of Attorney-General for ***British Columbia v. Kingcome Navigation Co. Ltd., (1934) AC 45***,

> "it may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted."

Both the above decisions were under the British North America Act and Lord Simon's statement in the former case that "the word 'excise' is usually (though by no means allways) employed to indicate a duty imposed on home-manufactured articles in the course of manufacture before they reach the consumer." and Lord Thankerton's statement in the latter case that excise duties are in their essence "trading taxes" would seem not to be applicable to the concept of excise as adopted in the Government of India Act, 1935. That concept does not regard it as essential that the duty should be imposed on goods in the course of their manufacture, nor that it should be a trading tax. In theory, even a tax on sale of commodities can be regarded as a tax on the commodities themselves and so a duty of excise, as Gwyer, C.J., pointed out in the case of G.P. and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, In re, 43 Cal WN FC 1 : (AIR 1939 FC 1), but the question in each case is what duties the Constitution Act concerned intimated to be regarded as duties of excise. Where a legislature is given power to make laws with respect to duties of excise and an Act passed in exercise of that power is impugned as ultra vires, the question first to be determined is what, on a true construction of the enactment conferring the power, the power is interfered to be and at what or up to what stage it may be exercised and secondly, whether the duty imposed by the impugned Act could in any circumstances be called a duty of excise. The nature and content of the power to impose a duty of excise conferred on the Central Legislature by the Government of India Act, 1935, come to be elaborately considered by the Federal Court in 43 Cal WN FC 1 : (AIR 1939 FC 1) and subsequently in the case of *Province of Madras v. Messrs. Bodhn paidaina and Sons*[4]*,* The scheme of the conferment and distribution of legislative power under the Government of India Act, 1935, was exactly the same as that under the present Constitution and the entry in the Central List regarding duties of excise on goods, entry No. 45, was exactly the same as entry No. 84 in List I of the present Constitution, both reading "Duties of excise; on tobacco and other goods manufactured or produced in India with certain common exceptions not material here. Dealing with entry No. 45, the Federal

[3]1943 AC 550

[4]46 Cal WN FC 33: (AIR 1942 FC 33).

Court held by a majority in 43 Cal WN FC 1 : (AIR 1939 FC 1), that the power given by the entry to the Central Legislature to make laws with respect to duties of excise was a power to impose by law duties on the manufacturer or producer of the excisable goods and did not extend further, the power to impose a tax on sates of the goods after their manufacture or production being a power to impose a sales-tax which was reserved to the provinces. A line was drawn at the point where manufacture or production ended. The question on which side of the fine a tax on the first sale in a State of the goods manufactured or produced would fall was expressly kit open in the first case but it was answered in the second where it was held that such a tax, although imposed on the manufacturer or producer, would be a sales-tax, being imposed on him qua senior and not a duty of excise imposed on him qua manufacturer or producer. In the second case, Gwyer, G.J., in delivering the unanimous Judgment of the Court, observed that a manufacturer or producer might in a case be subject to a double duty, a duty of excise imposed on the goods manufactured or produced and also a sales-tax imposed on the first sales of the goods. In explaining the possible liability to an excise tax in such a case, the learned Chief Justice made

inter alia the following observation.

> "There is in theory, nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed or given away," and again :
> "It is the fact of manufacture which attracts the duty, even though it may be collected later; and we may draw attention to the Sugar Excise Act in which it is specially provided that the duty is payable not only in respect of sugar which is issued from the factory but also in respect of sugar which is consumed within the factory."

21. Sinha, J. has relied upon these observations as showing that under the Indian Constitution, a duty of excise can be imposed by the Central Legislature on goods manufactured or produced in India immediately upon their manufacture or production, irrespective of how or by whom they are consumed and even if the manufacturer or producer consumes them himself. In taking that view, the learned Judge was undoubtedly right. When the case went to the Privy Council their Lordships upheld the decision of the Federal Court and held that a duty of excise was primarily a duty Levied upon a manufacturer or producer in respect of the commodity manufactured or produced. It was, they said, a tax upon goods, not upon sales or the proceeds of sales. The learned Judge was, therefore, right in taking the decision of the Federal Court as establishing that there could be a duty of excise on goods manufactured of produced in India simply by reason of the circumstance that they had been so manufactured or produced and that the fact that the goods were subsequently consumed by the manufacturer or producer himself could be no far to the imposition of such duty. When, however, the learned Judge said further that the observations relied upon by him completely answered the problem in the present case, I find myself unable to agree.

22. In my view, it is necessary to understand carefully what the Federal Court, subsequently upheld by the Privy Council, actually decided. The Court had before it competing claims of the Central and the Provincial Legislatures to the right to impose a tax on the first sale of goods manufactured or produced in India. The actual question was whether a Madras Act, in so far as it imposed a tax on the first sale in Madras of goods manufactured or produced in India, was ultra vires the Government of India Act, 1935 and that question defended on whether such a tax was duty of excise and so wither the competence of the Central Legislature under entry No. 45 of the Central List or tales tax belonging to the exclusive jurisdiction of the Provincial Legislatures under entry No. 48 of the Provincial List. In holding that such a tax was not a duty of excise, the Court explained what a duty of excise was and pointed out that it was a duty on goods manufactured or produced, attaching solely on their manufacture or production and, therefore, for the purposes of the duty, what happened to be goods afterwards, whether they were sold to third parties or consumed by the manufacturer or producer himself was immaterial and, irrelevant the Privy Council endorsed that view and said more tersely and definitely that a duty of excise was a duty on the commodities themselves and not a duty on their sale or sale proceeds. The true meaning of the observations of the Federal Court is that the characteristic which marks a duty of excise is that it is a duty on goods and manufacture or production within the country being the sole and sufficient basis for imposing the duty on the goods concerned, where that basis is present and the duty is imposed on that basis, it is a duty of excise, irrespective of whether the goods are subsequently sold to others or consumed by the owner or producer. This observation

contemplates a duty imposed on the goods simpliciter upon their manufacture or production. The Federal Court, however, did not decide or say that even a duty imposed on goods upon their production and disposal was a duty of excise. If, for example, a duty was imposed on goods produced in India and consumed by the producer and it was called a duty of excise, the Federal Court did not say that the duty could be rightly so called. In the present case, Section 8(1)(a) of the Coal Mines (Conservation and Safety) Act imposes a duty not simply on coal raised but it imposes a duty on coal, "raised and dispatched from the collieries". On the exposition given by the Federal Court and the Privy Council, a duty imposed on coal raised from the collieries would clearly be a duty of excise, the fact that it was raised within India being sufficient. But the Act adds to raising, that is, the production, a further requirement, namely, dispatch. The question whether a duty imposed on coal not simply raised, but raised and dispatched from collieries is a duty of excise is not covered by the decision of the Federal Court.

23. The duty imposed by the Act in the present case is to be computed on the tonnage of the coal dispatched at a rate not exceeding one rupee per ton as may be prescribed. If the addition of the requirement of dispatch to the production of the coal raises a question as to whether the duty imposed can be called a duty of excise, such a question will be common to the case where the dispatch is to third parties and the case where the dispatch is to the producer himself. In the case of coal dispatched to third parties on sale to them, a contention might possibly be raised - though whether it could be sustained I do not say - that the so-called excise duty was really a sales tax in disguise and, therefore, beyond the competence of Parliament on the principles laid down by the Federal Court in the two cases I have already mentioned. No such contention, however, was raised in the present case, but on the other hand, the appellant made it clear that it did not at all question the levy on coal sold and dispatched to third parties. The only question, therefore, is whether a duty, not being a duty imposed simply on coal raised but being a duty imposed on coal raised and dispatched, can be a duty of excise, if imposed when the despatch is to the producer himself for his own consumption.
24. The addition of the requirement of dispatch does create a difficulty, but, as I have pointed out, it is not a difficulty peculiar to the case where the dispatch is to the producer himself, but arises equally in the case where the dispatch is to third parties. I shall, therefore, deal with the general question. The argument against the validity of the section from this aspect of the case must be that since the duty imposed by the Act is not imposed on the goods, as produced or manufactured but is a duty imposed on them upon their dispatch, it cannot be a duty of excise. I think, however, that the argument is answered by another observation of the Federal Court in the second of the cases, which also was endorsed by the Privy Council, After pointing out that, in theory the legislature could impose a duty of excise on a commodity as soon as it came into existence, Gwyer, C.J. proceeded to observe as follows :

> "A taxing authority will not ordinarily impose such a duty, because it is much more convenient administratively to collect the duty (as in the case of most of the Indian Excise Acts) when the commodity leaves the factory for the first time and also because the duty is intended to be an indirect duty which the manufacturer or producer is to pass on to the ultimate consumer, which he could not do if the commodity had, for example, been destroyed in the factory itself".

In dealing with observation of the Federal Court that a manufacturer or producer might be

subject to a double duty, one a duty of excise and another a sales tax and that in actual fact there might be an overlapping the Privy Council observed as follows :

> "In law there is no overlapping. The taxes are separate and distinct imposts. If, in fact, they overlap, that may be because the taxing authority, imposing a duty of excise. Finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale, but that method of collecting the tax is an accident of administration : it is not of the essence of the duty of excise which is attracted by the manufacture itself".

See *Governor-General in Council v. Province of Madras*[5], These observations make it clear that although a duty of excise is a duty on the goods themselves and the goods may be made liable to be charged to the duty immediately upon their manufacture or production, yet a particular Act, imposing the duty, may defer the collection of it to a later stage, particularly the stage when the goods leave the place of their manufacture or production. The fact that the state of collection is fixed by reference to the first movement of the goods does not, however make inch movement an essential prerequisite for the imposition of the tax. The further condition added bears only on the collection of the duty and not on its imposition. It was pointed out on behalf of the respondent that the language of Section 8 was that the duty "shall be levied and collected on all coal raised and dispatched" and it was contended that the words "levied" and "collected" in, the first part and "raised" and "dispatched" in the second part were, in both cases, to be taken distributively and that what the section meant was that the duty would be levied on all coal raised and collected on all coal dispatched. I do not think that such a break-up of the words of the section leads one anywhere, because it would mean that although a duty would be imposed on all coal as soon as it was raised, the duty would be collected only on as much of the coal as was dispatched and as to the rest, the duty, although imposed,

[5]49 Cal WN 381 at p. 384:(AIR 1945 PC 98 at p. 101)

would not be collected. In my view, the problem is capable of a simpler answer. The answer is that, under the section, dispatch of the coal is not a condition precedent to the imposition of the tax, but is intended only to indicate a point of time at which the tax is intended to be imposed and collected. The addition of the word "dispatched" does not, therefore, make the duty any the less a duty of excise.

25. Even this, however, does not solve the whole problem. The appellant's next contention was that although the duty imposed by Section 8(1)(a) of the Act might be a duty of excise in spite of the fact that it was to be levied not on coal raised but on coal "raised and dispatched", it was still not chargeable on coal which the appellant might itself consume, because the section did not intend such coal to be charged. This argument was put forward on a textual basis. It was contended that, as a matter of construction, coal "raised and dispatched from collieries" ought to be given the meaning 'dispatched to third parties' first, because one could not despatch something to oneself at the same place and, secondly, because the duty, being a duty of excise, which is ordinarily intended to be passed on to others, the construction that only coal dispatched to third party purchasers was contemplated ought to be preferred. To my mind, the most difficult problem in the case was raised by this contention.

26. The question on this last contention of the appellant is not what a duty of excise may in

theory be, but what Section 8(1)(a) of the Coal Mines (Conservation and Safety) Act means and intends. On a fair construction of its language, can it be said that the section, by imposing a duty of excise on "all coal raised and dispatched from the collieries in India", imposes it even on coal which the owner of a colliery may take from it for his own use in the power-house of a factory to which the colliery is but an adjunct and which being a part of the same establishment, is situated in the immediate vicinity of it and within the same compound ? To state the question in narrower terms, can the words "dispatched from the collieries" be fairly taken to cover a case of coal moved from a colliery by its owner to an adjacent power-house for consumption there, where the colliery, the power-house and the factory served by it are all situated near one another within the same compound and constitute together a single industrial unit belonging to the owner ? Sinha, J., held that as soon as coal left the colliery, it was 'dispatched' and whether its destination was an adjacent factory or a remote place or whether it was dispatched to a third party or to the owner himself was immaterial. In my view, the question is not capable of so simple an answer.

27. 'Dispatched' means sent from one place to another. It is true that, speaking generally, one may dispatch goods to oneself. The self-consignee method of dispatch of goods by railway, steamship or aircraft is well-known. It was also conceded on behalf of the appellant that if a person had a colliery at one place, say Asansol and a factory at another, say Calcutta and he brought up coal from his Asansol colliery for consumption in the Calcutta factory, it might quite appropriately be said of the coal so brought up that it had been dispatched from the colliery at Asansol. Identity of the person sending a certain consignment of goods and the person receiving them or unity of the ownership of the concern from which goods are sent and the concern to which they are sent would not therefore, by itself make the word 'dispatched' inapplicable. But the position in the present case is not exactly the position in the hypothetical case just mentioned. This is not a case where two different concerns, whether situated closely to each other or far apart, are owned by the same person and goods were sent from one to the other. This is a case where the establishment from which the goods were sent and the establishment to which they were sent are all parts of one and the same concern, necessarily owned by the same person as parts of the same property; and goods of one kind produced in one part of the concern were moved to another part, situated close by, for use in the production of goods of another kind. To cite two analogous cases, it is as if in a spinning and weaving mill, a quantity of yarn was sent from the spinning department to the weaving department to be used there in the production of cloth by the mill or as if in a book-binding establishment making its own glue, a quantity of glue was sent from the section where it was made to the section where books were actually bound for the there in the binding. It is true that, physically, he spinning department in the former case is not the same as the weaving department and so is not the section where glue is made in the latter case the same as the section where the binding of books takes place. In the present case also, the colliery is not the same as the power-house. Yet, it does not appear to me that the yarn in the first of the illustrations or the glue in the second or the coal in the present case can appropriately be said to have been 'dispatched'. 'Dispatch' carries with it the idea of sending to a different and separate, place which has no connection with the place from which the goods are sent. Movement from one part to another of the same establishment is not 'dispatch'.

28. The above, however, may not be conclusive, but helpful light is thrown on the true meaning of the section by the provisions of Section 8(2). Section 8(1)(a) imposes a duty of excise on "all coal raised and dispatched * * * from the collieries in India." Clause (b) of the Sub-Section' imposes an additional duty on "all coking coal raised and dispatched from - the collieries in India." There can be no doubt that 'coking coal' of Clause (b) is a variety of coal, included in "all

coal" of Clause (a), both because there can be no coal outside the all-embracing language of Clause (a) and because, otherwise, the duty imposed by Clause (b) on coking coal could not be an additional duty. It is nest to be noticed that the phrase "raised and dispatched from the collieries in India" is common to Clauses (a) and (b). The latter clause, therefore, means that on coking coal "raised and dispatched from the collieries in India", on which a duty of excise has been levied under Clause (a), an additional duty may also be levied. Even ordinarily, a Legislature using the same language in two clauses of the same Sub-Section in connection with the same thing, must betaken to have used it in the same sense, unless there is something repugnant to such interpretation in the subject-matter or context, but in the present case the identity of meaning is indisputable. It is not that the same language has been used in different contexts or in connection with different things so that the identity of its meaning is a matter of construction and inference. The same language, viz., "raised and dispatched from the collieries in India," has been used in the two clauses to describe and particularise the same thing, viz., "coking coal" mentioned directly in Clause (b) and as included in "all coal" in Clause (a) and. indeed, the description in Clause (b) is a repetition of the description in Clause (a) intended to mark the identity of the thing described in order to the making of provision for an additional duty thereon. Out of "all coal raised and dispatched from the collieries in India", which is dealt with generally in Clause (a) and laid under a duty of excise by that clause, a further provision with respect to "coking coal raised and dispatched from the collieries in India" is made in Clause (b) by way of prescribing the levy of an additional duty on such coal. There can thus be no question that the words "raised and dispatched" have been used in Clauses (a) and (b) of Section 8(1) of the Act in the same sense.

29. As to what 'coking coal raised and dispatched from the collieries in India' is contemplated by Clause (b), Section 8(2) gives a clear indication. That Sub-Section reads as follows :

> "(2) Where coking coal, in respect of which an additional duty of excise has been levied and collected under Clause (b) of Sub-Section (1), is dispatched to any person for use in India and -
> (a) the use of coking coal is, in the opinion of the Central Government, essential for carrying on any industrial or other process in which such person is engaged; or
> (b) the dispatch of the coking coal is made under the orders of the Board, although it was not specifically indented for by such person;
>
> then, the Central Government shall cause to be paid to that person a sure equivalent to the additional duty of excise so collected on the coking coal received and used by that person."

30. The Sub-Section contemplates coking coal on which an additional duty has been levied and collected and, therefore, it contemplates coking coal which has been "raised and dispatched from the collieries", because it is only on such coking coal that both the duty and the additional duty can be levied. The Sub-Section is, however, not concerned with all coking coal raised and dispatched from the collieries, but only with coking coal "dispatched to any person for use in India." The limitation "for use in India" has been introduced for the obvious reason that in the case of coking coal dispatched for use outside India, neither of Clauses (a) and (b) of the Sub-Section, which specify the circumstances in which the additional duty shall be refunded, can apply. But apart from that limitation, the words "dispatched to any person" cannot, on a normal construction, be taken to cover a case of dispatch of coking coal by the owner of it to himself.

Assuming that construed literally and in the absence of any other indication of a more limited meaning, "dispatched to any person" might be taken to include dispatch of coal from a colliery by the owner thereof to himself, Clauses (a) and (b) make it fairly clear that only dispatch to another person is contemplated. If dispatch to the owner himself is also included, it would be odd, where the owner is engaged in earning on some industrial or other process for which use of coking coal is found essential, to collect the additional duty from him in the first instance and then refund it to him under Clause (a) of the Sub-Section. It would be more odd for the Coal Board to order under Clause (b) dispatch of coking coal to the owner of the colliery himself. These clauses thus clearly contemplate dispatch by the owner to another person. In the case of Clause (a) it may at first sight appear that the clause may reasonably apply even to a case of dispatch by the owner to himself, because the initial levy of the additional duty is to be made on the whole quantity of the coking coal dispatched, while the refund is to be of only the duty collected on so much of the coal as is actually received and used. It may appear that since the latter quantity may be less, there would be no oddity, even in a case of density by the owner to himself, in first taking from him the duty on the whole quantity dispatched and then giving back to him the portion found refundable by reference to the actual consumption. In my view, the clause might properly be taken to comprehend that meaning if the latter part of it contained only the word 'used' and not also the word 'received'. One cannot receive something from oneself and I do not think it can properly be said that the word 'received' has been used, because a part of the coking coal dispatched may be lost in transit and, therefore, the use of the word is not inappropriate even when the despatchce is the owner himself. A fair and reasonable view of the words used by the Legislature and the intention they express must be taken. It is also to be noticed that Section 8(2) directs the additional duty to be paid back to the person to whom the coking coal has been dispatched, which presupposes that it is he who has paid the duty. This is in accord with the common notion of a duty of excise that it is a duty which can be passed on to others and the basis on which Section (8)(2) proceeds appears to be that coking coal has been dispatched by the owner of a colliery to a different person to whom he has also passed on the duty by including it in the price or the freight and who has ultimately paid it and, therefore, it is to him that the refund of the duty is to be made. In my opinion, the words "dispatched to any person" in the opening paragraph of Section 8(2), taken along with the words "received by that person" and "cause to be paid to that person" in the concluding paragraph, suggest unmistakably that the Sub-Section has in view only dispatch to a person other than the owner and despatcher. Such meaning of the Sub-Section appears even more clearly from Clause (b), because not only would it be odd for the Coal Board to order a dispatch of coal to the owner himself, but there could also be no question of the owner himself indenting for coal from his own mine. It thus appears from Section 8(2) that the "coking coal in respect of which an additional duty of excise has been levied and collected under Clause (b) of Sub-Section (1)", that is to say, 'coking coal raised and dispatched from collieries in India', is coking coal dispatched by owners of colleries to persons other than themselves. It can by no means be said that Section 8(2) is not co-extensive with Section 8(1)(b) and that it is concerned only with the special case where evoking coal is dispatched to a person other than the owner and such person satisfies the requirements of either Clause (a) or Clause (b). The Sub-Section covers all coking coal, "dispatched to any person", on which an additional duty has been levied and collected under Sub-Section 1(b), excepting only coking coal dispatched for use outside India. If it shows the dispatch contemplated to be dispatch to a person other than the owner, as in my view it does, the same must be the contemplation of Section 8(1)(b) as well and, for reasons I have given earlier, the contemplation of Section 8(1)(a). This meaning of Section 8 in both of its Sub-Sections, which is suggested by its language,

receives further support from the fact that the duty imposed by the section is a duty of excise and that duty, in its common form, is a duty which can be passed on to another person. All these reasons, in my opinion, converge to suggest that the true meaning of Section 8(1)(a) is that it imposes a duty of excise on all coal dispatched from collieries in India to third parties. Even if the true meaning of the section be doubtful, which in my view it is not, the benefit of the doubt should go to the appellant.

31. To sum up my conclusions on this part of the case; A duty of excise can be imposed on goods immediately on their manufacture or production in the country, regardless of whether they are sold to third parties or consumed by the manufacturer or producer himself. If Section 8(1)(a) of the Act had imposed the duty on "all coal raised from the collieries in India", it would have been a perfectly good duty of excise. But the section does not impose the duty on "coal raised" but imposes it on "coal raised and dispatched". The added requirement of dispatch is not, on the one hand, an essential pre-requisite for the imposition of an excise duty, nor does it, on the other hand, make the duty any the few a duty of excise. It only marks the point of time to which the legislature has chosen to defer the collection of the duty, though the effect is that on coal raised from the collieries in India but not dispatched there from, the duty imposed by the section is not to be levied. As to the constitutional validity of duty, its nature being that it is a levy imposed as a contribution to the revenues of the country and not a license or other fee intended to regulate coal-mining, the law imposing it cannot be said to be legislation under item 54 of the Union list, but it is good legislation under item 84 of the same list, since coal raised from mines can well be said to be" goods produced". But the scope of the law is a further question. Under it, even in the case of coal moved from the collieries, it must be 'dispatched' in order that the duty may be attracted. Assuming one can dispatch goods to oneself and even assuming that, in theory, goods sent by a producer to himself can be the subject of a duty of excise, it is clear from the common language of Sections 8(1)(a) and 8(1)(b), as elucidated by Section 8(2) of the present Act, that Section 8(1)(a) only contemplates coal dispatched from a colliery to a person other than the owner. In any event, goods merely moved from one part of an establishment to another by way of domestic appropriation cannot be said to be 'dispatched' and, therefore, in the present case, where the colliery, the powerhouse and the factory are all situated within the same compound and constitute together a single industrial unit belonging to the appellant, coal taken from the colliery to the powerhouse about a furlong away for use there in the generation of electricity for the manufacture of aluminum by the factory cannot be said to be "dispatched" within the meaning of Section 8(1)(a) and cannot be charged to the duty prescribed thereby.

32. The third contention of the appellant was that in any event the provision of the Act empowering the Coal Board to collect the duty was ultra vires the Constitution. It was pointed out that under Article 272 of the Constitution, Union duties of excise were to be levied and collected by the Government of India and it was contended that collection by any other agency or party was clearly unauthorized. This argument was based upon a misreading of both the Constitution and the Act concerned. The Act by itself does not say who will collect the duty but only says that it shall be collected "by such agencies and in such manner as may be prescribed". It need hardly be pointed out that any tax collected by the Government of India may be collected by their agents and need not be collected by their servants alone. Specific provision for the collection of the duty is made in Chapter V of the Rules and, under Rule 24 of these Rules, the duty on coal or coke, dispatched by rail is to be collected by the railway officials as a surcharge on the freight. I do not think it will be disputed that such collection is collection by Government.

As to the duty on coal dispatched by means other than rail, Rule 29 requires the owner to record in a register the quantity of coal dispatched by him during a month and pay the duty on that quantity, as computed by himself, into the Government treasury, making it creditable to the Central Government in a special account. This again cannot be disputed as a collection by Government themselves. Only any further duty that may be payable by the owner on the coal dispatched by him by means other than rail, is to be paid as the Coal Board after final assessment directs. Rule 29(6) provides that the Chairman of the Board shall make a final assessment and if he finds any further amount to be due, he shall direct the owner to pay the amount into the Government treasury. If this be collection by the Coal Board, it is really a collection by an agent of the Central Government, because under Section 5(1) of the Act, the Board is to "exercise such powers and discharge such duties as may be assigned to it by and under the Act" and by the Rule framed under Section 17 of the Act the Central Government has conferred the power of collection on the Coal Board. There is thus no substance in this contention of the appellant.

33. For reasons given earlier, the appellant's contention on the construction of Section 8(1)(a) of the Act succeeds. The appeal is accordingly allowed and the judgment and order of Binha, J. are set aside. The appellant's application under Article 226 of the Constitution is allowed to the extent that a writ of mandamus will go to the Respondent, directing it to forbear from levying and collecting any duty of excise under Section 8(1)(a) of the Coal Mines (Conservation and Safety) Act, 1952, on coal taken from the appellant's colliery at Jaykaynagar to its power-house at the same place and within the same compound for consumption therein.

34. There will be no order for costs.

S. C. Lahiri, J.

35. I agree.

Appeal allowed.