# M/S. Mangalam Organics Ltd vs Union Of India on 24 April, 2017

## Equivalent citations: AIR 2017 SUPREME COURT 2406, 2017 (7) SCC 221, AIR 2017 SC (CIVIL) 1556, (2017) 3 MAD LJ 882, (2017) 5 SCALE 200

## Author: A.K. Sikri

## Bench: Ashok Bhushan, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1338 OF 2017

| | |
|---|---|
| M/S. MANGALAM ORGANICS LTD. | .....APPELLANT(S) |
| VERSUS | |
| UNION OF INDIA | .....RESPONDENT(S) |

J U D G M E N T

A.K. SIKRI, J.

This appeal arises out of the judgment of the High Court rendered in the writ petition filed by the appellant, wherein the appellant wanted the High Court to exercise its powers under Article 226 of the Constitution of India and issue mandamus to the Central Government directing the Central Government to issue a notification under Section 11C of the Central Excise Act, 1944 (hereinafter referred to as the 'Act') to the effect that duty payable by the appellant on goods manufactured by it shall not be paid.

Section 11C of the Act reads as under:

> "11C. Power not to recover duty of excise not levied or short- levied as a result of general practice.-
>
> Notwithstanding anything contained in this Act, if the Central Government is satisfied-
>
> that a practice was, or is, generally prevalent regarding levy of duty of excise (including non- levy thereof) on any excisable goods; and that such goods were, or are, liable-

to duty of excise, in cases where according to the said practice the duty was not, or is not being, levied, or to a higher amount of duty of excise than what was, or is being, levied, according to the said practice, then, the Central Government may, by notification in the Official Gazette, direct that the whole of the duty of excise payable on such goods, or, as the case may be, the duty of excise in excess of that payable on such goods, but for the said practice, shall not be required to be paid in respect of the goods on which the duty of excise was not, or is not being, levied, or was, or is being, short- levied, in accordance with the said practice.] Where any notification under sub- section (1) in respect of any goods has been issued, the whole of the duty of excise paid on such goods or, as the case may be, the duty of excise paid in excess of that payable on such goods, which would not have been paid if the said notification had been in force, shall be dealt with in accordance in force, shall be dealt with in accordance with the provisions of sub- section (2) of section 11B:

Provided that the person claiming the refund of such duty or, as the case may be, excess duty, makes an application in this behalf to the Assistant Collector of Central Excise, in the form referred to in sub- section (1) Of section 11B, before the expiry of six months from the date of issue of the said notification."

A bare perusal of the aforesaid provision would indicate that if certain conditions mentioned therein are satisfied, the Central Government may issue a notification directing that whole of the duty of excise payable on such goods, or, as the case may be, the duty of excise in excess of that payable on such goods, but for the said practice, shall not be required to be paid. The condition stipulated in the said Section with which the Central Government is to satisfy itself is that there is/was a generally prevalent practice according to which the duty was not, or is not being levied, even when such a duty of excise was otherwise payable on such excisable goods.

We may point out at this stage itself that the High Court vide impugned judgment has come to the conclusion that Section 11C of the Act grants a discretionary power to the Government to issue or not to issue such a notification. The said provision does not mandate the Government to necessarily issue such a notification and in the absence of any obligation on the part of the Government in this behalf, the Courts are precluded from giving any mandamus to the Central Government to exercise such a power and issue the notification.

Before we answer the questions posed above and comment upon the correctness or otherwise of the view taken by the High Court, those seminal and material facts, which have a bearing on the issue, needs to be stated. These facts are as follows:

The appellant is in the business of manufacturing Rosin and Turpentine. Rosin is the resinous constituent of the oleoresin exuded by various species of Pine Tree i.e. Oleo Pine Resin, known in commerce as ‘crude turpentine’. The separation of the oleoresin into the essential oil spirit of Turpentine and Rosin is effected by distillation in large

kettle stills. There are two methods of manufacturing Rosin/Turpentine from Oleo Pine Resin. One method is the vacuum chemical treatment process which uses power in almost all the processes. The second method, commonly known as the Bhatti process, is entirely manual except for the use of power to operate the pump for lifting up the water to the storage tank for the purpose of condensing. Thus, in the second method, power is used, but is confined to operating the pump for lifting up the water to the storage tank for the purpose of condensing. The appellant is using this second method of manufacturing Rosin/Turpentine.

Insofar as the first method of manufacturing Rosin/Turpentine is concerned, wherein power is used in all the processes, there is no dispute that it is treated as a manufacturing process with the aid of power and the units were manufacturing these products using this methodology or covered by the provisions of the Act. There are about ten units which are adopting this method and are paying the excise duty under the Act on the goods so manufactured.

Majority of the units, i.e. about 300 in number, are using the Bhatti method whereby use of power is confined to lifting of water to overhead tanks for condensation of Turpentine vapours collected as liquid Turpentine in tanks. The Rosin which remains in the kettle is removed in buckets, usually cooled and dispatched in drums. However, this Court has held in a case that even this process would be treated as manufacturing process with the aid of power even when such power is used to a limited extent. That judgment is reported in Commissioner of Central Excise, Nagpur v. Gurukripa Resins Private Limited[1] which was rendered on 11.07.2011, which fact would again be discussed while dealing with the sequence of events leading to the instant appeal.

What is emphasised at this stage is that it is a common case of the parties that excise duty on the goods manufactured by the appellant is, otherwise, payable in law. Insofar as the history of payment of excise on these goods is concerned, record shows that vide notification No. 179/77-CE dated 18.06.1977, the Central Government had exempted all goods, falling under Item No.68 of erstwhile First Schedule to the Central Government Excise and Salt Act (1 of 1944) in or relation to the manufacturing of such goods where no process is ordinarily carried on with the aid of power, from the whole of the duty of excise leviable thereon. The Department of Revenue had issued clarification dated 16.01.1978 to the effect that the aforesaid notification covers those units which are manufacturing Rosin and Turpentine oil where no power is used in the manufacture of Rosin but power is used for drawing water into the tank through which the coils containing oil vapours pass. This notification was issued in exercise of powers conferred by sub rule (1) of Rule 8 of the Central Excise Rules, 1944. However, this notification was superseded by another notification dated 01.03.1986 thereby withdrawing the aforesaid exemption. It was followed by the Circular dated 27.05.1994 clarifying that all earlier circulars/instructions/ tariff advices issued prior to March 1986 in the context of old

tariff had been withdrawn.

A show cause notice dated 04.10.2004 was issued to the appellant by the Excise Department demanding duty of Rs.10,91,99,456/- on the aforesaid products manufactured by the appellant and cleared during the period 01.04.1999 to 31.08.2003. It was followed by further notices to the same effect covering the period September-October, 2003 to March, 2004; April, 2004 to November, 2004; and December, 2004 to September, 2005 for the amount of Rs.50,760/-, Rs.66,44,602/-, Rs.1,01,92,867/- and Rs.81,44,105/- respectively. One more unit M/s. Gurukripa Resins Pvt. Ltd., Nagpur (for short 'Gurukripa') was also issued similar show cause notices. Case of the appellant is that out of 300 units using Bhatti method, only these two units were picked up for raising demand of excise.

Gurukripa had challenged the order of assessment passed in its case by filing the appeal before the Central Excise and Service Tax Appellate Tribunal, Mumbai (for short 'CESTAT'). The said appeal of Gurukripa was allowed vide judgment dated 14.01.2004. The Department challenged the order passed by the CESTAT in the case of Gurukripa, in which the Revenue succeeded as that appeal was allowed by this Court vide its judgment dated 11.07.2011, as pointed out above.

This Court held that the process of lifting of water into the cooling tank was integrally connected with the manufacture of these goods and hence, if the power was used for lifting of water, the exemption would not be available. This Court also held that the TRU's circular of 1978 was not applicable since the same stood withdrawn in 1994.

In view of the aforesaid judgment rendered in the case of Gurukripa Resins Private Limited, appeals filed by the appellant before the CESTAT came to be dismissed. However, the Tribunal restricted the Department to recover the dues falling within the period of limitation only, i.e. for a period of one year. This drastically reduced the demand of excise inasmuch as the excise demanded for the period from 01.04.1999 to 31.08.2003 became time barred. Both the Department as well as the appellant have challenged the said order of the CESTAT before the High Court of Bombay and the matter is still pending there.

After the judgment of this Court in Gurukripa Resins Private Limited, several trade associations made representations to the Government with a request to grant benefit under Section 11C of the Act. On receiving these representations, the Central Board of Excise and Customs decided to float a survey to ascertain a general practice during the period from 27.05.1994 to 27.02.2006. Consequently, the survey letter was issued on 14.03.2012. On the basis of this survey, the Department came to the conclusion that there was no such practice of non-levying excise duty on these products. Objections were raised to the finding of the said survey on the ground that only ten units in the survey were considered as against the total units of approximately 300. This led to ordering a re-survey vide letter dated 23.01.2013. According to the appellant, this re-survey revealed that though there were many units across the country which had turnover exceeding SSI but they were also never levied excise duty during the aforesaid period, and this phenomenon establishes that there was a general practice of not demanding excise duty from the units, which were using Bhatti method. Whether this plea of the appellant is factually correct or not would be discussed at an

appropriate stage.

Fact of the matter is that after thorough consideration, the Finance Ministry decided on 15.09.2014 not to issue any such notification under Section 11C of the Act as it was going to benefit only two companies, which includes the appellant. This decision was communicated by the Department of Revenue to the All India Manufacturer Organisations vide letter dated 30.09.2014. Challenging the aforesaid decision, the appellant filed writ petition in the High Court of Delhi with the following prayers:

> "(a) Issue a writ of certiorari or any other similar writ or direction for quashing the decision, communicated vide letter dated 30.09.2014 of the respondent that the notification under Section 11C of the Central Excise Act, 1944 cannot be issued for extending the benefits of not requiring to pay the Central Excise Duty to the units manufacturing Rosin and Turpentine without the aid of power, except for the purpose of using electricity to pump, for lifting up water for condensation to overhead tank, for the period from 27.05.1994 to 28.02.2006, even though the practice of non-levy on these units for the said period has already been established in a survey done by the Department;
>
> (b) Issue a writ of mandamus or any other similar writ or direction to the respondent to issue the notification under Section 11C of the Central Excise Act, 1944 for extending the benefits of not recovering the Central Excise Duty from the units manufacturing Rosin and Turpentine without the aid of power, except for the purpose of using electricity to pump for lifting up water to overhead tank, for the period from 27.05.1994 to 28.02.2006; and
>
> (c) Pass any other order or direction as the Court may think fit and proper." It is this writ petition which has been dismissed by the High Court vide impugned judgment dated 16.02.2016.

Submission of Mr. S. Ganesh, senior advocate, and Mr. Prashant Bhushan, advocate appearing for the appellant, was that it stood established from the re-survey conducted by the Department itself that there was a general practice of not demanding excise duty from Bhatti manufacturers, though, in this survey, only around 125 units could be examined as the Department could not get full details of the remaining industries and moreover, most of them were small scale industries availing benefit under SSI exemption. The learned counsel argued that still this survey indicated that there were at least 39 units whose turnover exceeded SSI limit but no excise duty was demanded from those units as well. The appellant relied upon following noting dated 20.05.2014 of the Commissioner (Central Excise):

> "11. ...it is clear that majority of the units were not paying duty during this period and that show cause notices were issued in respect of 2 units i.e. M/s. Gurukripa Resins (P) Ltd. and M/s. Dujodwala Industries. In respect of unregistered units no show cause notices have been reportedly issued.

.....

The reasons for not filing any declaration by unregistered units are not clear. It could be a case of non-payment of duty or alternatively a belief by these units that they covered by the TRU clarification of 1978 and hence do not require registration. The precise reasons for not filing declaration can only be explained by field formations who are reportedly not having complete records. However, the fact remains that a number of unregistered units did not pay the duty even when they had crossed the SSI limit and the department also did not demand such duty from them. ...This can, therefore, also be considered as a case of non-levy as well as that of non-payment..." The Under Secretary, Central Excise in his noting dated 22.08.2014 has stated that:

" ... The re-survey has indicated that there were at least 39 unregistered units which had turnover more than SSI exemption limit either once or more than once during 1994-1995 to 2005-06. ...It could be concluded that there was a practice of non levy of duty." Finally, the Member Central Excise also in his noting dated 11.09.2014 has observed;

" ... the issue was again examined after conducting a fresh survey. It was found that though there was a practice of non-levy of duty, issuance of Section 11 [C] notifications will only benefit two companies, namely, M/s. Gurukripa Resins Pvt. Ltd., Nagpur and M/s. Dujodwala Industries, Mumbai. Decision was taken with the approval of the then revenue secretary [p/112 N.S.] That section 11 [C] notification cannot be issued to favour only a few select industries and it was decided to reject the request." It was, thus, argued that there was a specific finding of the Department itself that there was a prevalent practice of non-levy of duties on units which manufactured the same products and use power only to pump water to the cooling tank. It was, thus, argued that conditions mentioned under Section 11C of the Act for issuing the notification were clearly fulfilled.

Proceeding on the aforesaid basis, submission of the learned counsel for the appellant was that once conditions of a particular statutory provision were fulfilled, the Government was obligated to exercise the power with the issuance of a required notification. It was argued that this power rested in the Central Government under Section 11C of the Act coupled with the duty and, therefore, the Central Government was duty bound to exercise the power once the conditions stipulated therein were fulfilled. In support, reference was made to the judgment of the Privy Council in Julius v. Lord Bishop of Oxford & Anr.[2], which was followed by this Court in Ambica Quarry Works v. State of Gujarat & Ors.[3], where it was explained that the very nature of the thing empowered to be done may itself impose an obligation to exercise the power in favour of a particular person. It was held that this is especially so where the non-exercise of the power may affect that person's substantive rights. Para 13 of this judgment was specifically relied upon which reads as under:

"13. It was submitted by Shri Gobind Das that the said rule was in pari materia with sub-rule (b) of Rule 18 of Gujarat Minor Mineral Rules, 1966. Often when a public authority is vested with power, the expression "may" has been construed as "shall" because power if the conditions for the exercise are fulfilled is coupled with duty. As observed in Craies on Statute Law, 7th Edn., p. 229, the expression "may" and "shall" have often been subject of constant and conflicting interpretation. "May" is a permissive or enabling expression but there are cases in which for various reasons as soon as the person who is within the statute is entrusted with the power, it becomes his duty to exercise it. As early as 1880 the Privy Council in Julius v. Lord Bishop of Oxford [(1880) 5 AC 214] explained the position. Earl Cairns, Lord Chancellor speaking for the judicial committee observed dealing with the expression "it shall be lawful" that these words confer a faculty or power and they do not of themselves do more than confer a faculty or power. But the Lord Chancellor explained there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one coupled with a duty must depend upon the facts and circumstances of each case and must be so decided by the courts in each case. Lord Blackburn observed in the said decision that enabling words were always compulsory where the words were to effectuate a legal right." Learned counsel also drew our attention to the judgment in the case of Dhampur Sugar Mills Ltd. v. State of U.P. & Ors.[4] wherein the Privy Council decision in Julius was again referred to about enforcement of the obligation to which the power is coupled with duty, by issuing order for that purpose. It was submitted that in the said case, the Court had directed the Government to constitute an Advisory Council while rejecting the contention of the Government that it was for the Government to exercise its discretion. It was also submitted that the same approach and legal position has been laid down in D.K. Basu v. State of West Bengal & Ors.[5] where it was held that the power of the State Governments to set up the State Human Rights Commissions was not a power simpliciter but a power coupled with the duty to exercise such power, especially so because it touched the right of affected citizens to access justice, which was a fundamental right covered by Article 21. The said duty of the State Government was accordingly enforced by the Court by issuing a mandamus or direction to set up the Commissions/fill up the vacancies within a time bound period. Again in Aneesh D. Lawande & Ors. v. State of Goa & Ors.[6], this Court gave a direction to enforce the obligation which was held to be annexed to the power conferred on the Government. Reference was also made to Suresh Chand Gautam v. State of Uttar Pradesh & Ors.[7] on this very aspect.

Another submission of the counsel for the appellant was that the solitary reason furnished by the respondent for not exercising its powers under Section 11C of the Act was that such a notification, if issued, was going to benefit only two assessees. It was

submitted that this could never be a valid or tenable ground for the Government to refuse such a notification, more so, in a situation where the demand notices were issued to two assessees only and other similarly situated persons were spared. Learned counsel also submitted that the Central Government in the past had issued a notification under Section 11C of the Act in individual cases i.e. where the benefit of the Court is to only one identified assessee. On this very premise, another submission developed by the appellant was that issuance of notification under the said provision became all the more necessary and imperative in order to remove discrimination, which situation was created by the Department by roping in only two assessees and not demanding the excise duty from other assessees though identically placed. According to the appellant, non-issuance of the notification resulted in violation of appellant's fundamental rights under Article 14 as well as Article 19(1)(g) of the Constitution. It was, thus, argued that the Government could not take shelter under the plea that the power under Section 11C of the Act was a discretionary power and it was amenable to judicial review under Article 226 of the Constitution. Submission was that mandamus of this nature had been issued earlier. Example of cases titled Choksi Tube Company Ltd. v.

Union of India & Ors.[8] and Union of India & Ors. v. N.S. Rathnam & Sons[9] were given.

It was also argued that there was no delay whatsoever on the part of the appellant in filing the writ petition and objection of the respondent to this effect was untenable. The rejection order of the Minister came only in September, 2014 and the writ petition was filed shortly thereafter. The only reason why the appellant was compelled to pay excise duty was that it could not obtain an interim stay in the writ petition filed by it. It is, thus, submitted that in the event of the appellant succeeding in the present case, there should be an order for refund of the amount paid by the appellant, along with interest thereon at a rate which this Court considers reasonable.

Countering the aforesaid submissions with equal vehemence and also adopting the reasoning given by the High Court in the impugned judgment in support of its conclusion, Mr. A.K. Sanghi, learned senior counsel appearing for the respondent, submitted that Section 11C of the Act was an enabling provision which empowered the Central Government to issue a notification in the Official Gazette for not recovering whole of the excise duty payable on certain goods or recovering the excise duty lesser than the normal duty payable. He emphasized the opening words of Section 11C, i.e. 'power not to recover duty of excise...'. His argument, thus, was that it is a provision which empowers the Government to issue such a notification and, therefore, this power was discretionary in nature. His further submission was that since waiver of the duty can be by issuance of a notification in the Official Gazette, such a power was in the nature of subordinate legislation and as per the settled law, courts refrain from issuing any mandamus to exercise a statutory function. He further submitted that the Central Government had, for valid reasons, decided not to issue any such notification. According to him, reason for not issuing the notification, namely, that it was to benefit only two parties, was a valid reason and such a policy decision taken for not exercising power under Section 11C of the Act was not open to judicial review. Without prejudice to this argument, his another plea was that the exercise carried out by the Government, culminating into the aforesaid decision of not

exercising the power, was based on valid and justified grounds, which was rested on valid considerations and the Court would not substitute its own decision for that arrived at by the Government.

Dilating on the aforesaid argument, Mr. Sanghi submitted that the most important events which had to be kept in mind were that the show cause notices were issued to the appellant as well as Gurukripa and in the case of Gurukripa the legal position was finally determined by this Court vide judgment dated 11.07.2011 holding that the process of lifting of water into cooling tank was integrally connected with the manufacture of the goods and, hence, if power is used for lifting of water, the exemption would not be available. The argument of Mr. Sanghi was that once this position was legally settled, it was not open to the appellant to nullify the effect of the said judgment by seeking a direction to issue notification under Section 11C of the Act.

The aforesaid narration makes it clear that three issues arise for consideration – the first question is as to whether these conditions are satisfied in the instant case? Secondly, if it is found that the goods which are excisable goods liable for levy of duty under the Act, but there has been generally prevalent practice not to demand duty or levy the duty, or demand lesser duty on such goods, whether it is mandatory on the part of the Central Government to issue a notification under Section 11C of the Act requiring that no such duty shall be payable or lesser duty shall be payable on such goods? Thirdly, if the Government chooses not to exercise this 'power', whether the Court can issue a mandamus to the Central Government to pass such a notification exercising its power under Section 11C of the Act?

We have bestowed our serious consideration that this case deserves to the issues involved.

It may be remarked in the first instance that, undoubtedly, as far as duty under the Excise Act on the goods manufactured and cleared for sale by the appellant is concerned, the same is payable under the provisions of the Excise Act. It is the appellant's own case that the legal position in this behalf, before the judgment dated 11.07.2011 in the case of Gurukripa Resins Private Limited, was somewhat fluid and uncertain. Those units manufacturing Rosin and Turpentine by using power in all processes are concerned, i.e. vacuum chemical treatment process, were admittedly liable to pay the excise duty and were paying also. However, insofar as the units adopting Bhatti process (to which category the appellant belongs and wherein the whole of the process is manual, except for one process, viz. use of power to operate the pump for lifting up the water to storage tank for the purpose of condensing) are concerned, whether this process would amount to manufacturing process or not, was unclear. Moreover, most of these units which were resorting to Bhatti method were small scale units and were enjoying the exemption from payment of excise duty on that ground. Therefore, they were not within the net of revenue in any case. Five registered units were paying the excise duty. The Department issued show cause notices to the two units which were registered with it but not paying the duty, as according to the Revenue, even the use of power for lifting of water to overhead tanks for condensation of Turpentine vapours collected as liquid Turpentine in tanks would be manufacturing process and, therefore, excise duty payable. Others were not registered and were SSI Units. It so happened that at some point of time, few of them had ceased to be SSI units. However, the Department remained unaware of that. It was for this reason

that notices could not be issued to the others. When the matter is looked from the aforesaid angle, it cannot be said that there was a conscious practice which was generally prevalent not to recover duty of excise.

No doubt, at the instance of and on the request made by the Association, a survey was got conducted to find out as to whether there was any general practice in this behalf or not. The result of the first survey was unfavourable to the appellant inasmuch as in respect of registered units, the survey revealed that the general practice of such units not paying duty was not established. It was noticed that five registered units were paying duty throughout the period. Two units had not paid duty and show cause notices were issued to them (these are the appellant and Gurukripa). The Association of which the appellant was a member, had sent a list of 250 units obtained by it under the Right to Information Act. However, what was found was that these units were unregistered and presumed to be under SSI and, therefore, for these reasons, the excise duty was not demanded from them. From this, it is difficult to draw an inference that there was a general practice not to demand duty. The Association demanded fresh survey and request in this behalf was received with the backing of a Minister.

As per the appellant, in the second survey, this general practice stood established. For this purpose, the appellant is relying upon certain extracts from the Noting dated 20.05.2014 of the Commissioner (Central Excise). The said Noting, when read in entirety, does not categorically admit of any such practice. What it reveals is that in the second survey it was found that 37 unregistered units had crossed SSI exemption limit at least once, but they were not paying duty during the period in question. From this the Director in his note had observed that there was practice of not paying the duty. However, what is significant is that the Commissioner (Central Excise) in his Note dated 20.05.2014 specifically stated that he was not in agreement with the aforesaid conclusion arrived at by the Director, which was highly debatable. He remarked that despite the judgment of this Court in Collector of Central Excise, Jaipur v. Rajasthan State Chemical Works, Deedwana, Rajasthan[10], relevant question was as to whether there was a practice and non-levy of duty during the relevant period. This is because Section 11C of the Act comes into play only when legally the duty is levied but still there is a practice of non-levy of duty.

What appears to us is that the Department remained under the impression that those units which were unregistered and because of SSI status exempted from payment of excise duty were not liable to pay the duty and, therefore, did not issue any notices to them. Even when 37 unregistered units had crossed the SSI exemption limit at least once, the Excise Department could not catch them either because of its negligence or it remained under the bona fide belief that they were still enjoying the exemption. It is only during the second survey these facts came to be noticed by the Department. It has come on record that by that time recovery of duty from them was too late as these cases had become time barred, meaning thereby, had these cases been within the limitation period, the Department would have taken action of recovery even qua them. From this, it cannot be said that there was a general practice. No doubt, some of the officers have formed an opinion to the contrary by treating the aforesaid as a case of non-levy of duty. However, as pointed out above, such a view was termed as debatable. It is only because of this reason that the matter took a different turn and was processed on the premise that there was such a practice but still the benefit of the notification

under Section 11C, if issued, would be available only to two units. This can be seen from paragraph 13 of the following Noting dated 20.05.2014 of the Commissioner (Central Excise):

> "13. In this regard, as pointed out by U.S. at page 97/NS, the benefit of any 11C Notification will be available only to 2 units. No show cause notice can be issued to the unregistered units for the period 1994-2006 as the same is already time barred. Thus, the trade at large is not affected. In F.No. 52/2/2008-CX.1, a view has earlier been taken that the provisions of Section 11C are exceptional and are generally applied in an issue affecting the trade at large. Section 11C is not applied for one or two individual units to override the judicial decision of the Apex Court rendered against the individual units." When the matter is examined taking into consideration all the facts in totality, we are of the view that there is no clinching evidence to suggest the existence of a general practice not to levy excise duty. Under the impression that it was to be demanded from registered units and five such registered units were, in fact, paying the duty, show cause notices were issued to the remaining two units, namely, the appellant and Gurukripa. That itself negates the argument of existence of general practice of not levying the duty of excise. It is stated at the cost of repetition that merely because some unregistered firms which were initially getting the SSI exemption, but omitted to be covered under the Act on their crossing the SSI limits, would not, in our opinion, establish any such practice.
>
> In this behalf, it also needs to be highlighted that as far as the Department is concerned, it had taken a categorical stand that even those units which are using Bhatti method for manufacture of Turpentine and Rosin were covered by the Act and that was the reason for issuing of show cause notices to the two units. This view, which the Department had nurtured while issuing the notices, has been vindicated in view of the judgment of this Court in Gurukripa Resins Private Limited. Interestingly, after the said judgment, even the appellant paid the duty of excise. The entire effort now is to recover back the said duty by seeking issuance of a notification under Section 11C of the Act. Such a situation, to our mind, cannot be countenanced.
>
> In view of our answer to Question No.1, it may not even be necessary to deal with these two questions. However, since the Department itself proceeded on the basis that there was a general practice, we would like to discuss these issues as well on merits. These can be taken together for discussion.
>
> Insofar as the argument based on obligation of the Government to issue such a notification is concerned, a clear distinction is to be made between the duty to act in an administrative capacity and the power to exercise statutory function. If a public authority is foisted with any duty to do an act and fails to discharge that function, mandamus can be issued to the said authority to perform its duty. However, that is done while exercising the power of judicial review of an administrative action. It is entirely different from judicial review of a legislative action.

According to de Smith[11], the following legal consequences flow from the aforesaid distinction:

(i) If an order is legislative in character, it has to be published in a certain manner, but it is not necessary if it is of an administrative nature.

(ii) If an order is legislative in character, the court will not issue a writ of certiorari to quash it, but if an order is an administrative order and the authority was required to act judicially, the court can quash it by issuing a writ of certiorari.

(iii) Generally, subordinate legislation cannot be held invalid for unreasonableness, unless its unreasonableness is evidence of mala fide or otherwise shows the abuse of power. But in case of unreasonable administrative order, the aggrieved party is entitled to a legal remedy.

(iv) Only in most exceptional circumstances can legislative powers be sub- delegated, but administrative powers can be sub-delegated.

(v) Duty to give reasons applies to administrative orders but not to legislate orders.

Issuance of a notification under Section 11C of the Act is in the nature of subordinate legislation. Directing the Government to issue such a notification would amount to take a policy decision in a particular manner, which is impermissible. This Court dealt with this aspect recently in the case of Census Commissioner and Ors. Vs. R. Krishnamurthy[12]. Following discussion from the said judgment is useful and worth a quote:

> "25. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue Notification regarding the manner in which the census has to be carried out and the Central Government has issued Notifications, and the competent authority has issued directions. It is not within the domain of the Court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the Executive. If a policy decision or a Notification is arbitrary, it may invite the frown of Article 14 of the Constitution. But when the Notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner.

26. In this context, we may refer to a three-Judge Bench decision in Suresh Seth v. Commr., Indore Municipal Corporation : (2005) 13 SCC 287 wherein a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956 so that a person may be debarred from simultaneously holding two elected offices, namely, that of a Member of the Legislative Assembly and also of a Mayor of a Municipal Corporation. Repelling the said submission, the Court held:

"In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under out constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court Employees' Welfare Assn. v. Union of India MANU/SC/0582/1989:(1989) 4 SCC 187 (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in State of J & K v. A.R. Zakki MANU/SC/0293/1992 : 1992 Supp (1) SCC 548. In A.K. Roy v. Union of India MANU/SC.0051/1981 : (1982) 1 SCC 271 it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature."

29. In this context, it is fruitful to refer to the authority in Rusom Cavasiee Cooper v. Union of India MANU/SC/0011/1970 : (1970) 1 SCC 248, wherein it has been expressed thus:

"It is again not for this Court to consider the relative merits of the different political theories or economic policies... This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of Parliament in enacting a law"." As can be seen from the extracted portion of the said judgment, in Supreme Court Employees Welfare Association v. Union of India[13], it was categorically held that no court can direct a legislature to enact a particular law. Similarly when an executive authority exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact the law which it has been empowered to do under the delegated legislative authority.

We may also refer to the judgment of this Court in the case of Common Cause v. Union of India and Others[14].

In that case, though the legislature had made amendments in the Delhi Rent Act, it was left to the Government to notify the date of coming into force the said

amendments. Government did not notify any date. A writ was filed seeking issuance of mandamus to the Government to notify the date, which was dismissed by the High Court. While approving the said decision in the aforesaid judgment, the Court referred to various earlier judgments on the subject. It was held that not only Parliament is empowered to give such a power to the executive to decide when the Act is to be brought into force, but also held that mandamus cannot be issued to the Government to notify the amendments. In the process, the Court also made the following observations which are relevant in the present context:

"27. From the facts placed before us it cannot be said that Government is not alive to the problem or is desirous of ignoring the will of the Parliament. When the legislature itself had vested the power in the Central Government to notify the date from which the Act would come into force, then, the Central Government is entitled to take into consideration various facts including the facts set out above while considering when the Act should be brought into force or not. No mandamus can be issued to the Central Government to issue the notification contemplated under Section 1(3) of the Act to bring the Act into force, keeping in view the facts brought on record and the consistent view of this Court." Various judgements cited by the appellant would have no application in the instant case as all these judgments pertain to judicial review of administrative action. In such cases power of the Court to issue mandamus certainly exists when it is found that a public authority/executive is not discharging its statutory duty.

The matter can be looked into from another angle as well. When 'power' is given to the Central Government to issue a notification to the effect not to recover duty of excise or recover lesser duty than what is normally payable under the Act, for deciding whether to issue such a Notification or not, there may be various considerations in the mind of the Government. Merely because conditions laid in the said provisions are satisfied, would not be a reason to necessarily issue such a notification. It is purely a policy matter. No doubt, the principle against arbitrariness has been extended to subordinate legislation as well (See : Indian Express Newspapers, Bombay v. Union of India[15]). At the same time, the scope of judicial review in such cases is very limited. Where the statute vests a discretionary power in an administrative authority, the Court would not interfere with the exercise of such discretion unless it is made with oblique end or extraneous purposes or upon extraneous considerations, or arbitrarily, without applying its mind to the relevant considerations, or where it is not guided by any norms which are relevant to the object to be achieved.

In the counter affidavit filed by the respondent, it is categorically mentioned that the policy of the Government is not to issue the notification under Section 11C of the Act when it benefits only a few assesses. It is mentioned that the specific policy of the Government is that when a large section of trade is affected and any relief is proposed to be given, a notification under Section11C of the Act is issued. When the reasons

furnished by the Government in not exercising its power to issue notification under Section 11C of the Act are seen in this perspective, namely, such a notification, if issued, is going to benefit only two units, we find them to be valid and justified. While dealing with the challenge to the constitutional validity of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, in the case of Madria Chemicals Ltd. Etc. Etc. v. Union of India and others Etc. Etc.[16], this Court noted that the legislature came up with the said legislation as a matter of policy to have speedier legal method to recover the dues. It was held that such a policy decision of the legislature could not be faulted with nor was it a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy. As already pointed out above, it is impermissible for this Court to tinker with such policy decision more particularly when it is found that the decision is not irrational and is founded on valid considerations. It has also to be borne in mind that in the instant case the appellant has already paid the duty. Section 11C contemplates those situations where duty is not paid. It does not cover the situation where duty is paid and that is to be refunded.

Examination of the matter in the aforesaid perspective would provide an answer to most of the arguments of the appellants. It would neither be a case of discrimination nor it can be said that the appellants have any right under Article 14 or Article 19(1)(g) of the Constitution which has been violated by non-issuance of notification under Section 11C of the Act. Once the appellant accepts that in law it was liable to pay the duty, even if some of the units have been able to escape payment of duty for certain reasons, the appellant cannot say that no duty should be recovered from it by invoking Article 14 of the Constitution. It is well established that the equality clause enshrined in Article 14 of the Constitution is a positive concept and cannot be applied in the negative.

As a result, this appeal is found to be bereft of any merit and is, accordingly, dismissed.

.....J. (A.K. SIKRI) .....J. (ASHOK BHUSHAN) NEW DELHI;

APRIL 24, 2017.

---

(2011) 13 SCC 180
[2] 1880 (5) A.C. 214
[3] (1987) 1 SCC 213
[4] (2007) 8 SCC 338
[5] (2015) 8 SCC 744
[6] (2014) 1 SCC 554
[7] (2016) 11 SCC 113

[8] (1997) 11 SCC 179
[9] Civil Appeal No. 1795 of 2005, decided on 29.07.2015
[10] (1991) 4 SCC 473
[11] Judicial Review of Administrative Action
[12] (2015) 2 SCC 796
[13] (1989) 4 SCC 187
[14] (2003) 8 SCC 250
[15] (1985) 1 SCC 641
[16] (2004) 4 SCC 311