Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

Excise Tax Appeal No. 12347 of 2018 - DB

(Arising out of OIA-84-AGU-ADT-VAD-2017-18 dated 30/07/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

Lucky Dyeing Mills Pvt Ltd **........Appellant**
C/oShreOnibhaiBaluwala, 404/b,
Asiana Flats, Near Ashok Pan Centre, City Light,
SURAT,GUAJRAT

VERSUS

Commissioner of C.E. & S.T.-Surat-i **......Respondent**
NEW BUILDING...OPP. GANDHI BAUG,
CHOWK BAZAR,
SURAT,GUJARAT,395001

WITH

Excise Appeal No. 12202 of 2018- DB

(Arising out of OIA-CCESA-SRT-APPEALS-PS-410-2017-18 dated 28/03/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

Sunil Dyg & Pth Mills **........Appellant**
V.d. Road,SURAT,
GUJARAT

VERSUS

Commissioner of C.E. & S.T.-Surat-i **......Respondent**
NEW BUILDING...OPP. GANDHI BAUG,
CHOWK BAZAR,
SURAT,GUJARAT-395001

APPEARANCE:
Shri Ankur Upadhyay, Advocate appeared for the Appellant
Shri Rajesh Nathan, Assistant Commissioner (AR), appeared for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR

Final Order No. 12288-12289/2024

DATE OF HEARING: 30.07.2024
DATE OF DECISION: 01.10.2024

RAMESH NAIR

The Appellants are engaged in the manufacture of Man Made Fabrics falling under chapter 54 of the first schedule to the Central Excise Tariff Act, 1985. The Appellants were paying central excise duty as per actual production and clearance basis, however from 16.12.1998 'Compounded Levy Scheme' came into effect after insertion of Section 3A of the Central Excise Act, 1944 and the manufacturer were required to pay duty at the specified rates per chamber per month as per the provisions of Rule 96ZQ of the Central Excise Rules, 1944 read with Notification No. 36/98-CEdt. 10.12.1998. Subsequently, Section 3A of the Central Excise Act, 1944 was omitted w.e.f. 11.05.2001 and Rule 96ZQ of the Central Excise Rules, 1944 was omitted w.e.f. 01.03.2001 without any saving clause.

1.1 The Appellants were issued various show cause notices wherein, demand of differentialcentral excise duty under Compound Levy Scheme was proposed to be demanded along with interest and penalty. The said show cause notices were adjudicated by the adjudicating authority who vide Orders-in-Original dt.30.09.2016 and dt. 12.01.2017 confirmed the demand of central excise duty and dropped the whole demand of interest and penalty.

1.2 The Appellants being aggrieved with the above Orders-in-Original dt.30.09.2016 and dt. 12.01.2017 filed appeals before the Commissioner (Appeals) who vide Orders-in-Appeal dt.28.03.2018 and dt. 30.07.2018 upheld the orders passed by the Adjudicating Authority and rejected the appeals. Hence the present appeals.

2. Shri Ankur Upadhyay, Learned Counsel appearing on behalf of the appellant has submitted in his submission as under:-

that the demand ofCentral Excise Duty as per Compounded Levy Scheme is levied under section 3A of the Central Excise Act, 1944 which has been omitted w.e.f. 11.05.2001 and the procedure of recovery of duty is prescribed under Rule 96ZQ of the Central Excise Rules, 1944 which has also been omitted w.e.f. 01.03.2001 without any saving clause. Therefore, at the time of passing of the Orders-in-Original dt.30.09.2016 and dt. 12.01.2017 by the adjudicating authority and Orders-in-Appeal dt.28.03.2018 and dt. 30.07.2018by the Commissioner (Appeals),neither Section 3A nor Rule 96ZQ was in existence as both the provisions were omitted without having any saving clause. Hence impugned ordersare liable to set aside. The Appellant in support of the above submission placed reliance upon the judgment passed by the Hon'ble Gujarat High Court in the case of Krishna Processors Vs Union of India reported in 2012 (280) E.L.T. 186 (Guj.) which was upheld by the Hon'ble Supreme Court in the case of Shree Bhagwati Steel Rolling Mills Vs CCE reported in 2015 (326) E.L.T. 209 (S.C.).

2.1 Further the Hon'ble Gujarat High Court in the case of Gopal Iron & Steel Co. (Gujarat) Ltd. Vs Union of India reported in (2024) 20 Centax 240 (Guj.) upheld the proposition laid down in the judgment of Krishna Processor (Supra).The Appellant placed reliance also upon the following judgments in support of the above submission:-

- In the case of Arbuda Alloys Pvt. Ltd. Vs CCE, Ahmedabad reported in 2016 (338) E.L.T. 426 (Tri. – Ahmd.)
- In the case of CCE, Jaipur VsAlwar Processors Pvt. Ltd. reported in2014 (308) E.L.T. 720 (Tri. Del.)
- Krishna Processors Vs Union of India reported in 2012 (280) E.L.T. 186 (Guj.)
- Shree Bhagwati Steel Rolling Mills Vs CCE reported in 2015 (326) E.L.T. 209 (S.C.)
- Gopal Iron & Steel Co. (Gujarat) Ltd. Vs. Union of India reported in (2024) 20 Centax 240 (Guj.)

3. Shri Rajesh Nathan, Learned Assistant Commissioner (AR) appearing on behalf of the Revenue, reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the records. We find that the limited issue to be decided in the present appeals is that whether at the relevant time when the orders-in-original were passed in absence of any saving clause and omission of Section 3A of the Central Excise Act,1944 read with Rule 96 ZO, ZP and ZQ of the Central Excise Rules, 1944 whether the orders-in-original passed by the adjudicating authority holding that the appellantsare liable to pay duty as per the compound levy scheme is correct or otherwise. We find that there is no dispute that though the some of the show cause notices were issued prior to omission of Section 3A of the Central Excise Act, 1944 and the provision of Rules, 96 ZO, ZP and ZQ of the Central Excise Rules, 1944but when the orders in original were passed, the Section 3A of the Central Excise Act, 1944 and the provision of Rules, 96 ZO, ZP and ZQ of the Central Excise Rules, 1944 were not in existence as the same were omitted, while omitting this provision no saving clause was made to make this provision operative for the purpose of pending proceedings. In this position in absence of the aforesaid provision and any saving clause the adjudicating authority had no statutory power to decide any matter related to compounded levy scheme in terms of Section 3A of Central Excise Act, 1944 and under the provision of Rules, 96ZO, ZP and ZQ of Central Excise Rules, 1944 for the reason that it is not only the issuance of show cause notices but entire proceedings such as adjudication of such show cause notices has to be governed by statutory provision and the said proceeding was envisaged under Rule, 96 ZO, ZP and ZQ.Once the said Rule was omitted w.e.f.01.03.2001 thereafter, no provision exist by which the adjudication authority has any power to

adjudicate the matter related to the compounded levy scheme in terms of Section 3A of the Central Excise Act, 1944. Therefore, the orders passed by the adjudicating authority are non-est and having no support of any authority of law. On this ground, the entire proceedings of show cause notices and adjudication there of gets vitiated. This issue has been considered by the jurisdictional High Court of Gujarat in the case of Krishna Processors Vs Union of India reported in 2012 (280) E.L.T186 (Guj.) which is reproduced below:-

> *"**15.** In the background of the facts and contentions noted hereinabove, the court is called upon to decide as to :*
>
> *(i) Whether in view of the omission of Rule 96ZQ of the Rules with effect from 1st March, 2001, the adjudicating authority could thereafter have initiated action for breach thereof by issuance of show cause notice and/or could have continued with the proceedings initiated but not concluded prior thereto?*
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> *(ii) Whether any obligation or liability incurred under Section 3A of the Act is saved by Section 6 of the General Clauses Act and whether after the omission of Section 3A of the Act with effect from 11th May, 2001 proceedings initiated under the Rules 96ZQ, 96ZP and 96ZO of the Rules would survive?*
>
> *(iii) Whether Section 38A of the Act saves all obligations and liabilities incurred under Rule 96ZQ of the Rules? If yes, whether the said position would prevail even after the omission of Section 3A of the Act?*
>
> *(iv) Whether in view of Section 132 of the Finance Act, 2001 everything done under the old provision is saved?*
>
> *(v) Whether Rule 96ZQ(5)(ii) of the Rules which does not provide for any inbuilt discretion in respect of the penalty to be imposed thereunder is ultra vires the provisions of the Constitution and the Act? and*
>
> *(vi) Whether the decision of the Supreme Court in the case of Union of India v. Supreme Steels and General Mills Ltd. (supra) concludes the controversy involved in the present case?*
>
> ***16.** Dealing with the first question, it may be germane to refer to the provisions of Rule 96ZQ of the Rules. Rule 96ZQ makes provision for the procedure to be followed by the independent processor of textile fabrics. Sub-rule (1) thereof requires an independent processor of textile fabrics to debit the amount specified thereunder on the annual capacity of production as determined under the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998. Sub-rule (2) thereof provides for debiting the duty payable under sub-rule (1) in the current account maintained by the independent processor under sub-rule (1) of Rule 173G of the Rules. Sub-rule (3) says that 50% of the amount of duty payable for a calendar month under sub-rule (1) shall be paid by the 15th of the month and the remaining amount shall be paid by the end of that month. Sub-rule (4) makes provision for maintaining records etc. Sub-rule (5) which makes provision for payment of interest and penalty is in two parts. The first part provides for payment of interest at the rate of 24% per annum for the*

outstanding period on the outstanding amount if an independent processor fails to pay the amount of duty or any part thereof by the date specified in sub-rule (3); whereas the second part provides for payment of penalty equal to the amount of duty or Rs. 5000/-, whichever is greater, in case of default in making payment in terms of sub-rule (3). In Special Civil Application No. 1984 of 2002, the Superintendent of Central Excise issued a show-cause notice on 4th October, 2001, that is, after Rule 96ZQ came to be deleted. In the other two writ petitions the show cause notices came to be issued prior to deletion of Rule 96ZQ but the proceedings were not concluded when the said rule as well as Section 3A came to be omitted. The question that therefore arises is whether after Rule 96ZQ came to be omitted, the adjudicating authority could have initiated and continued with proceedings under sub-rule (5) of Rule 96ZQ of the Rules.

16.1 *On behalf of the revenue, twin contentions have been raised. Firstly, that there is a saving clause while deleting Rule 96ZQ inasmuch as the Notification dated 1st March, 2001 has amended the Central Excise Rules except as respects things done or omitted to be done before such amendment. The other contention is that, even if there is no saving clause in the notification, Section 38A was brought on the statute book with effect from 28th February, 1944 and, therefore, the action could be initiated, continued and concluded even after the omission of Rule 96ZQ as the regular provisions of the Act would continue to apply. In this regard, it may be relevant to notice some facts. Rule 96ZO, 96ZP and 96ZQ came to be omitted by Notification 6/2001-C.E. (N.T.), dated 1st March, 2001. Subsequently, Section 3A of the Act came to be omitted with effect from 11th May, 2001 by Finance Act, 2001. Section 38A, came to be inserted in the Central Excise Act with effect from 28th February, 1944 and reads thus:*

> ***38A. Effect of amendments, etc. of rules, notifications or orders. -*** *Where any rule, notification or order made or issued under this Act or any notification or order issued under such rule, is amended, repealed, superseded or rescinded, then, unless a different intention appears, such amendment, repeal, supersession or rescinding shall not -*
>
> *(a) revive anything not in force or existing at the time at which the amendment, repeal, supersession or rescinding takes effect; or*
>
> *(b) affect the previous operation of any rule, notification or order so amended, repealed, superseded or rescinded or anything duly done or suffered thereunder; or*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule, notification or order so amended, repealed, superseded or rescinded; or*
>
> *(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under or in violation of any rule, notification or order so amended, repealed, superseded or rescinded; or*
>
> *(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid.*
>
> *and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the rule, notification or order, as the case may be, had not been amended, repealed, superseded or rescinded.*

16.2 *At this juncture it may be germane to refer to the decision of the Supreme Court in the case of M/s. Rayala Corporation Pvt. Ltd. v. Director of Enforcement, New Delhi (supra), wherein the court was dealing with a* *question whether proceedings could be validly continued on the complaint in respect of the charge under Section 132-A(4) of the Defence of India Rules, 1962. By the Defence of India (Amendment) Rules, 1965, Rule 132A came to be deleted in the following terms :-*

> *"In the Defence of India Rules, 1962, Rule 132-A (relating to prohibition of dealings in foreign exchange) shall be omitted except as respects things done or omitted to be done under that rule." (Emphasis supplied)*

The Supreme Court held that the language contained in the said clause can only afford protection to action already taken while the rule was in force, but cannot justify initiation of a new proceeding which will not be a thing done or omitted to be done under the rule but a new act of initiating a proceeding after the rule had ceased to exist. The court observed that the language used in the notification only affords protection to things already done under the rule, so that it cannot permit further application of that rule by instituting a new prosecution in respect of something already done. It was held that consequently after omission of Rule 132-A of the Defence of India Rules, no prosecution could be instituted even in respect of an act which was an offence when that rule was in force. In the facts of the said case, simultaneously with the omission of Rule 132-A of the Defence of India Rules, Section 4(1) of the Act was amended so as to bring the prohibition contained in Rule 132-A(2) under Section 4(1) of the Act. The Supreme Court observed that when Section 4(1) of the Act was amended, the Legislature did not make any provision that an offence previously committed under Rule 132-A of the Defence of India Rules would continue to remain punishable as an offence for contravention of Section 4(1) of the Act, nor was any provision made permitting operation of Rule 132-A itself so as to permit institution of prosecutions in respect of the said offences. On this interpretation, the court held that the complaint made for the offence under Rule 132-A(4) of the Defence of India Rules, after 1st April, 1985, when the rule was omitted, has to be held invalid.

***16.2.1** The court made reference to the Privy Council case in Wicks v. Director of Public Prosecution wherein the saving clause laid down that the operation of that Act itself was not to be affected by the expiry as respects things previously done or omitted to be done. It was observed that in the said case the prosecution had been started before the Defence of India Act ceased to be in force and, secondly the language introduced in the amended sub-section (4) of Section 1 of the Act had the effect of making applicable the principles laid down in Section 6 of the General Clauses Act, so that a legal proceeding could be instituted even after the repeal of the Act in respect of an offence committed during the time when the Act was in force. The court noted that the notification of the Ministry of Home Affairs omitting Rule 132-A of the Defence of India Rules did not make any such provision similar to that contained in Section 6 of the General Clauses Act. The court observed that consequently, it is clear that, after the omission of Rule 132-A of the Defence of India Rules, no prosecution could be instituted even in respect of an act which was an offence when the rule was in force. The court further observed that when Section 4(1) of the Act was amended, the Legislature did not make any provision that an offence previously committed under Rule 132-A of the Defence of India Rules would continue to remain punishable as an offence of contravention of Section 4(1) of the Act, nor was any provision made permitting operation of Rule 132-A itself so as to permit institution of prosecutions in respect of such offences. It was held that the consequence is that the complaint was incompetent even in respect of the offence under Rule 132-A(4).*

***16.3** Examining the facts of the present cases in the light of the aforesaid decision, vide Notification No. 6/2001-C.E. (N.T.), dated 1st March, 2001, the Central Government in exercise of powers conferred by Section 37 of the Act* *inter alia made the Central Excise (Third Amendment) Rules, 2001 further to amend the Central Excise Rules, 1944 except as respects things done or omitted to be done by such amendment. Vide clause 7 of the said notification, Rule 57AI, Rule 96ZO, Rule 96ZP and Rule 96ZQ came to be omitted from the Central Excise Rules, 1944. A perusal of the notification dated 1st March, 2001 issued by the Central Government omitting Rules 96ZQ, 96ZO and 96ZP shows that the same does not make any provision similar to that contained in Section 6 of the General Clauses Act, nor does the same make any provision that liability under Rule 96ZQ would continue under the regular provisions after its omission. In M/s. Rayala Corporation (supra), the notification afforded protection to things already done under the rule; so also in the present case, the notification affords protection to things already done under the rules. When Section 38A came to be inserted, the Legislature did not make any provision permitting operation of Rule 96ZQ so as to permit initiation of proceedings under the said Rules. In M/s. Rayala Corporation (supra), it was held by the Supreme Court that Section 6 of the General Clauses Act cannot obviously apply on omission of Rule 132-A of the Defence of India Rules for two obvious reasons: (i) Section 6 applies only to repeals and not to omissions and (ii) Section 6 applies when the repeal is of a Central Act or Regulation and not of a rule. In the facts of the present case, Section 6 of the General Clauses Act would not be applicable to Rule 96ZQ of the Rules as the said section applies only in case of repeal of a Central Act and Regulation and not of a rule. In the circumstances, Rule 96ZQ can be saved provided there is some other saving clause expressly provided in the Act or in the Rules.*

16.4 *In Kolhapur Canesugar Works Ltd. v. Union of India (supra) the question that arose for determination before the Supreme Court was whether after omission of old Rules 10 and 10A of the Central Excise Rules, 1944 and its substitution by the new Rule 10 by the Notification No. 267/77 dated 6th August, 1977 the proceedings initiated by the notice dated 27th April, 1977 could be continued in law. The court was of the considered view that in such a case the court is to look to the provisions in the rule which has been introduced after the omission of the previous rule to determine whether a pending proceeding will continue or lapse. If there is a provision therein that pending proceedings will continue and be disposed of under the old rule, as if the rule has not been deleted or omitted, then such proceeding will continue. If the case is covered by Section 6 of the General Clauses Act or there is a parimateria provision in the statute under which the rule has been framed, in that case also, the pending proceedings will not be affected by omission of the rule. In the absence of any such provision in the statute or in the rule, the pending proceedings would lapse on the rule under which the notice was issued or proceedings were initiated being deleted/omitted. The court held that the position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as law that never existed. To this rule, an exception is engrafted by the provisions of Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus, the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted, and in its place, another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings, then it can be reasonably inferred that the intention of the Legislature is that the pending proceedings shall not continue but fresh proceedings for the same purpose may be initiated under the new provision. Adverting to the facts of the present case, in view of the language contained in the notification dated 1st March, 2001, the same can only afford protection to action already taken while Rule 96ZQ was in force,* *but cannot justify initiation of a new proceeding which will not be a thing done or omitted to be done under the rule but a new act of initiating a proceeding after the rule had ceased to exist. In the circumstances, in the present case, upon omission of Rule 96ZQ of the Rules, in view of the language contained in the Notification dated 1st March, 2001, action already taken while the rule was in force would be protected. However, no new proceeding could be initiated after the rule had ceased to exist.*

17. *However, the aforesaid observations would be subject to what is held in respect of the second question viz., whether after the omission of Section 3A of the Act with effect from 11th May, 2001 proceedings initiated under Rules 96ZQ, 96ZP and 96ZO of the Rules would survive?*

17.1 *Dealing with the second question, Section 3A of the Act enables the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. This clause came to be inserted in the Act by the Finance Act, 1997. The reason behind introducing this provision appears to be that in certain sectors like induction furnaces, steel re-rolling mills, etc. evasion of excise duty on goods is substantial and the production is not disclosed accurately and collection of excise on their production capacity is thought of as appropriate. Under the scheme evolved in this provision the annual production capacity of mills and furnaces is determined by the Commissioner of Central Excise in terms of the rules to be framed under Section 3A(2) of the Act by the Central Government. Thereafter, the assessee would be liable to pay duty based on such determination.*

17.2 *Rule 96ZQ of the Rules which provides for procedure to be followed by independent processors of textile fabrics, comes into play after the Commissioner of Central Excise determines the annual capacity of production on processed textile fabrics under Section 3A of the Act read with the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998. Rule 96ZQ proceeds to lay down the manner of payment of duty, payment of interest/penalty and such other incidental matters. Section 3A has been omitted by the Finance Act, 2001 with effect from 11th May, 2001 without any saving clause. On behalf of the Revenue, reliance had been placed upon the decision of the Supreme Court in the case of General Finance Company v. Assistant Commissioner of Income Tax (supra) to contend that omission also amounts to a repeal of an enactment and as such, the provisions of Section 6A of the General Clauses Act would be applicable and all proceedings and liabilities incurred under the omitted provisions would be saved. A Constitution Bench of the Supreme Court in the case of M/s. Rayala Corporation (supra) held that Section 6 of the General Clauses Act would not apply to the omission of a provision in an Act but only to repeal, omission being different from repeal. The aforesaid view has been reiterated by another Constitution Bench of the Supreme Court in the case of Kolhapur Canesugar Works Ltd. v. Union of India (supra) wherein the court agreed that the earlier view taken in M/s. Rayala Corporation (supra) that Section 6 of the General Clauses Act only applies to repeals and not to omission and applies when the repeal is of a Central Act or regulation and not of the rule. Insofar as Section 3A of the Act is concerned, the second part would not be applicable since the present case relates to omission of a section. However, the first part namely that Section 6 of the General Clauses Act only applies to repeals and not to omissions would be squarely applicable to the facts of the present case. Reliance placed by the Revenue on the decision of the Supreme Court in the case of General Finance Company (supra) is misconceived inasmuch as in the said case the Supreme Court after finding force in the submissions advanced by the learned counsel, observed that it was constrained to follow the two decisions of the Constitution Benches of the Supreme Court in the case of M/s. Rayala Corporation Pvt. Ltd. and Kolhapur Canesugar Works Ltd. The court, accordingly held that the view taken by the High Court was not consistent with what was stated by the Supreme Court in the decisions aforesaid and* *the principle underlying Section 6 of the General Clauses Act as saving the right to initiate proceedings for liabilities incurred during the currency of the Act will not apply to omission of a provision in an Act but only to repeal, omission being different from repeal as held in the said decisions.*

17.3 *Thus, even in General Finance Company Ltd. (supra), the Supreme Court has not taken a different view and has followed the aforesaid two decisions. Section 6 of the General Clauses Act, therefore, has no application in the present case. The decision of the Supreme Court in General Finance Company Ltd. (supra), therefore, does not carry the case of the Revenue any further.*

17.4 *Thus, any obligation or liability etc. acquired, accrued or incurred under Section 3A of the Act would not be saved by Section 6 of the General Clauses Act. The next question that arises for consideration is as to whether after the omission of Section 3A of the Act with effect from 11th May, 2001 proceedings initiated under Rules 96ZQ, 96ZP and 96ZO of the Rules would survive, or in other words what would be the position of obligations or liabilities incurred under Rules 96ZQ, 96ZP and 96ZO of the Rules after the omission of Section 3A. As noticed earlier, Rule 96ZQ of the Rules only lays down the procedure to be followed by the independent processor of textile fabrics, the manner of payment of duty and the consequences of non-payment of duty within the prescribed period, etc. Likewise, is the case with Rules 96ZP and 96ZO of the Rules. Rules 96ZQ, 96ZP and 96ZO are not the charging provisions. The charging provision is Section 3A of the Act and Rules 96ZQ etc. are merely machinery provisions. Thus, any liability which accrues is under Section 3A of the Act. Accordingly, when the charging Section itself is deleted without any saving clause, no recovery under the said Section can be made by resorting to Rule 96ZQ of the Rules. Action, if any, can be taken only under the regular provisions of the Act.*

18. *The next question that arises for consideration is whether Section 38A of the Act saves the obligations and liabilities incurred under Rule 96ZQ of the Rules, and whether the said position would prevail even after the omission of Section 3A of the Act.*

18.1 *On a plain reading of Section 38A of the Act, it is manifest that the same operates only in respect of amendment, repeal, supersession or rescinding of any rule, notification or order. In the present case, Rule 96ZQ has not been amended, repealed, superseded or rescinded, but has been omitted. As held by the Supreme Court in the case of M/s. Rayala Corporation (supra), omission and repeal are different things and omission does not amount to repeal. Similarly, considering the dictionary meaning of rescind and amend, the same are not synonymous with the word 'omit'. Under the circumstances, Section 38A of the Act would not save any obligation, liability etc. acquired, accrued or incurred under any rule, order or notification which has been omitted. As a necessary corollary, it follows that Rules 96ZQ, 96ZP and 96ZO of the Rules having been omitted vide the notification dated 1st March, 2001, any liability or obligation acquired, accrued or incurred thereunder would not be saved under Section 38A of the Act.*

18.2 *If one were to assume that any liability, obligation etc. acquired, accrued or incurred under Rules 96ZQ, 96ZP and 96ZO of the Rules is saved by Section 38A of the Act, the next question that would arise for consideration is as to whether the said position will prevail even after omission of Section 3A of the Act. In this regard, it may be noted that Section 38A came to be inserted in the Central Excise Act, 1944 vide Section 131 of the Finance Act, 2001 whereas Section 3A came to be omitted vide Section 121 of the said Act. Section 38A of the Act, inter alia protects any right, privilege, obligation, liability acquired, accrued or incurred; or any investigation, legal proceeding or remedy as if the rule, notification or order, as the case may be, had not been amended, repealed, superseded or* *rescinded. Section 38 does not speak of giving protection to any right, privilege, obligation, liability acquired, accrued or incurred under any rule, notification or order; or any investigation, legal proceeding or remedy etc., in case the rule has been omitted. Thus, Section 38A would not protect any right, privilege, obligation or liability acquired, accrued or incurred, or any investigation, legal proceeding, remedy in respect of such right, privilege, obligation, liability etc. under Section 3A for two reasons, viz., (a) Section 38A only protects any right, liability etc., acquired, accrued or incurred under any rule, notification or order and not under any section; and (b) Section 38A governs only repeal, amendment etc. and not omission. Thus, Section 38A of the Act would in no manner save obligations or liabilities incurred under Section 3A of the Act.*

18.3 *In the light of the aforesaid discussion, this court is of the view that upon the omission of Rules 96ZQ, 96ZP and 96ZO from the statute book on 1st March, 2001, no action could thereafter have been initiated thereunder. However, in view of the fact that the notification dated 1st March, 2001 amends the Central Excise Rules except as respects things done or omitted to be done by such amendment, the pending proceedings already initiated under Rules 96ZQ, 96ZO and 96ZP could continue. Whereas after the omission of Section 3A of the Act, no action whatsoever could be initiated, continued or taken under the said provision or the rules framed thereunder or framed in respect thereof. In the circumstances, the contention raised on behalf of the petitioners that as vide clause 7 of notification dated 1st March, 2001, Rules 96ZO, 96ZP and 96ZQ were omitted without any saving clause and Section 3A was also omitted vide Section 121 of the Finance Act, 2001 on 11th May, 2001 without any saving clause, all proceedings which were pending as on 11th May, 2001 as regards Rules 96ZO, 96ZP and 96ZQ would thereafter automatically lapse, merits acceptance. Consequently, no orders could have been passed against the petitioners under the said provisions if the actions against the petitioners were not concluded at the time of omission of Section 3A of the Act.*

19 *As regards the fourth question, viz., whether in view of Section 132 of the Finance Act, 2001 everything done under the old provision is saved, on behalf of the Revenue, reliance has been placed upon Section 132 of the Finance Act, 2001 to contend that the same validates all actions taken or anything done or omitted to be done or purported to have been taken or done or omitted to be done under any rule, notification or order made or issued under the Central Excise Act and that all such actions shall be deemed to be and to always have been, for all purposes, as validly and effectively taken or done or omitted to be done as if the amendment made by Section 131 of the Finance Act, 2001 had been in force at all material times. In this regard, it may be pertinent to note that what Section 132 validates is all actions covered under Section 131 of the Finance Act, 2001, that is, Section 38A of the Act as if the same had been in force at all material times. In the present case, apart from the fact that Section 38 of the Act, does not save the provisions which have been omitted, even if it is assumed that omissions are covered thereunder, the same would be applicable only for the period prior to 11th May, 2001, till Section 3A came to be omitted. Section 38A saves actions taken or rights and liabilities accrued under any rule, notification or order made or issued under the Act. The same does not save any action taken or rights and liabilities accrued under any provision of the Act. Thus, Section 3A stands unconditionally omitted from the statute book without any saving clause in favour of pending proceedings. All actions thereunder must, therefore, stop at the stage where they were when the provision came to be omitted, and if the proceedings had not been concluded before the omission came into effect, the same cannot be concluded thereafter.*

19.1 *In the facts of the present case, as noticed earlier, in Special Civil Application No. 1984 of 2002, the show-cause notice itself has been issued* *on 4th October, 2001, that is, after the omission of Rules 96ZQ, 96ZO and 96ZP of the Rules whereas in the other two writ petitions the show cause notice had been issued prior to omission of said rules, however, the proceedings had not been concluded prior to the omission of Section 3A of the Act. Insofar as intitiation of proceedings after omission of the Rule 96ZQ, 96ZP and 96ZO is concerned, as held hereinabove, the same is not saved by the notification dated 1st March, 2001 whereby the said rules came to be omitted. Insofar as continuance of proceedings under the said rules after the omission of the said rules is concerned, as held hereinabove, after omission of Section 3A of the Act without any saving clause, the power to conclude those proceedings disappeared from the scene. Therefore, even in case of proceedings initiated prior to the omission of Rule 96ZQ, 96ZP and 96ZO of the Rules, if the same were not concluded prior to the omission of Section 3A of the Act, there was no power to proceed further and conclude the same. Under the circumstances, any action taken under Rules 96ZQ, 96ZO and 96ZP of the Rules after Section 3A of the Act came to be omitted from the statute book without any saving clause, would be without authority of law and as such any orders passed in respect thereof after the omission of Section 3A of the Act would be non est. As a result of the aforesaid discussion, the orders impugned in the present petitions are required to be quashed and set aside as being without authority of law.*

20. *Dealing with the question as regards the vires of Rule 96ZQ(5)(ii) of the Rules which arises only in Special Civil Application No. 1984 of 2002, it may be necessary to refer to the provisions of Rule 96ZQ of the Rules.*

20.1 *Rule 96ZQ of the Rules insofar as the same is relevant for the present purpose reads thus:-*

> ***"96ZQ. Procedure to be followed by an independent processor of textile fabrics. -*** *(1) An independent processor of textile fabrics falling under Heading Nos. 52.07, 52.08, 52.09, 54.06, 54.07, 55.11, 55.12, 55.13 or 55.14, or processed textile fabrics of cotton or man-made fibres, falling under Heading Nos. or sub-heading Nos. 58.01, 58.02, 5806.10, 5806.40, 6001.12, 6001.22, 6001.92, 6002.20, 6002.30, 6002.43 or 6002.93, of the First Schedule to Central Excise Tariff Act, 1985 (5 of 1986), shall debit an amount of duty of Rs. 2.0 lakhs per chamber per month, Rs. 2.5 lakhs per chamber per month, Rs. 3.0 lakhs per chamber per month or Rs. 3.5 lakhs per chamber per month, as the case may be, on the annual capacity of production as determined under the Hot-air Stenter Independent Textile Processors Annual Capacity Determination Rules, 2000.*
>
> *(2) The amount of duty payable under sub-rule (1) shall be debited by the independent processor in the account current maintained by him sub-rule (1) of Rule 173G of the Central Excise Rules, 1944.*
>
> *(3) Fifty per cent of the amount of duty payable for a calendar month under sub-rule (1) shall be paid by the 15th of the month and the remaining amount shall be paid by the end of that month.*
>
> *(4) The independent processor shall continue to maintain records, and file returns, pertaining to production, clearance, manufacturing, storage, delivery or disposal of goods, including the materials received for or consumed in, the manufacture of excisable goods or other goods, the goods and materials in stock with him and the duty paid by him, as prescribed under the Central Excise Rules, 1944 and the notifications issued thereunder.*
>
> *(5) If an independent processor fails to pay the amount of duty or any part thereof by the date specified in sub-rule (3), he shall be liable to, -*

(i) pay the outstanding amount of duty along with interest at the rate of twenty-four per cent, per annum calculated for the outstanding period on the outstanding amount; and

(ii) a penalty equal to an amount of duty outstanding from him at the end of such month or rupees five thousand, whichever is greater.

20.2 *Sub-rule (1) of Rule 96ZQ lays down the manner in which duty is required to be paid on the annual capacity of production as determined under the Determination Rules. Sub-rule (3) thereof provides that fifty per cent of the amount of duty payable for a calendar month under sub-rule (1) shall be paid by the 15th of the month and the remaining amount shall be paid by the end of that month. Thus, the amount payable under sub-rules (1) and (2) is required to be paid in two instalments one before the 15th of the month and the remaining before the end of that month. Sub-rule (5) lays down that if an independent processor fails to pay the amount of duty or any part thereof by the date specified in sub-rule (1), he shall be liable firstly to pay the outstanding amount of duty alongwith interest at the rate of twenty four per cent per annum calculated for the outstanding period on the outstanding amount. Clause (ii) of sub-rule (5) which is impugned in the present case makes provision for imposition of penalty equal to an amount of duty outstanding from such independent processor at the end of such month or Rs. 5 ,000/-, whichever is greater. As noted earlier, the petitioners had paid the first instalment after a delay of four days on 19th July, 2000 and the second instalment after a delay of three days on 3rd October, 2000. However, insofar as the delay of four days in payment of the first instalment is concerned, the petitioners were liable to pay only the interest at the rate of twenty four per cent on the outstanding amount for the period during which the amount was outstanding, whereas in respect of the second instalment, apart from payment of interest at the rate of twenty four per cent on the amount outstanding for the period it was outstanding, the petitioners were also liable to pay penalty of an amount equal to the amount of duty outstanding from them at the end of the month.*

20.3 *Thus, clause (ii) of sub-rule (5) of Rule 96ZQ imposes penalty equal to the amount of duty outstanding only in respect of the amount which is outstanding at the end of the month. Though there may be delay of fifteen days in the payment of the first instalment all that is leviable under the rule is interest at the rate of twenty four per cent. However, even if there is even one day's delay in paying the amount after the end of the month, the assessee becomes liable to pay penalty equal to the amount of duty outstanding from him.*

20.4 *Thus, in case an independent processor fails to pay the amount of duty outstanding from him at the end of any month, he is ipso facto liable to penalty equal to an amount of duty outstanding or Rs. 5,000/-, whichever is greater. The delay in payment may be of one day or a hundred days. Notwithstanding the extent of delay, the assessee would be liable to pay an equal amount of duty outstanding from him at the end of the month. Thus, the rule does not leave any discretion to the adjudicating authority as regards imposition or non-imposition of penalty as also regarding the amount of penalty to be imposed. In fact, the provision makes it obligatory on the part of the adjudicating authority to impose a penalty equal to an amount of duty outstanding from the assessee at the end of a particular month. Moreover, the penalty is required to be imposed merely in case of default in payment of the outstanding amount before the end of the month, even in absence of any dishonest or contumacious conduct on the part of the assessee.*

20.5 *In this regard, it may be pertinent to note that Rule 96ZQ has been framed in exercise of the power conferred by Section 37 of the Act. Sub-section (1) of Section 37 of the Act empowers the Central Government to frame rules to carry into effect the purposes of the Act. Sub-section (2)* *enumerates in particular as to what the rules may provide, which is without prejudice to the generality of the foregoing power. A perusal of the categories enumerated under sub-section (2) thereof indicates making provision for imposition of penalty in respect of any delay in payment of duty does not find place therein. However, sub-section (3) of Section 37 provides that in making rules under the said section, the Central Government may provide that any person committing a breach of any rule shall, where no other penalty is provided by the Act, be liable to a penalty not exceeding five thousand rupees. Thus, by virtue of sub-section (3) of Section 37, in case no other penalty is provided by the Act, the Central Government is empowered to make provision for imposition of penalty not exceeding five thousand rupees for committing a breach of any rule. Rule 96ZQ has been framed in exercise of powers under Section 37 of the Act. Hence, by virtue of sub-section (3) of Section 37, the Central Government is expressly empowered to provide for a penalty not exceeding five thousand rupees in case of breach of the said rule. However, clause (ii) of sub-rule (5) of Rule 96ZQ of the Rules provides for imposing penalty equal to the amount of duty or rupees five thousand whichever is greater on the amount of duty outstanding from an independent processor at the end of the month. The question that therefore arises for consideration is whether the Central Government has the power to make provision for imposition of penalty greater than five thousand rupees.*

20.6 *On behalf of the petitioners, it has been contended that penalty is in the nature of a tax and that Article 265 imposes a limitation on the taxing power of the State insofar as it provides that the State shall not levy or collect a tax except by authority of law, that is to say, a tax cannot be levied or collected by a mere executive fiat. It must be done by an authority of law, which must mean valid law. In the case of Collector of Central Excise, Ahmedabad v. Orient Fabrics (P) Ltd. (supra), the Supreme Court has affirmed the view taken by the Delhi High Court that penalty is additional tax and as such, the constitutional mandate requires a clear authority for imposition thereof. The levy of penalty which is an additional tax has to be under authority of law which should be clear, specific and explicit. Adverting to the facts of the present case, Rule 96ZQ has been framed under Section 37 of the Act. Section 37 of the Act does not expressly authorise the Central Government to levy penalty which is an additional tax, greater than five thousand rupees. Sub-section (3) of Section 37 of the Act makes it explicit that in case no other penalty is provided under the Act, the Central Government may provide that any person committing a breach of any rule shall be liable to penalty not exceeding five thousand rupees. Thus, the power to levy penalty conferred on the Central Government under Section 37 of the Act is limited to an amount not exceeding rupees five thousand. The learned advocate for the petitioner, therefore, appears to be justified in contending that the imposition of penalty equal to the amount of duty is without authority of law.*

20.7 *The Supreme Court in the case of K.T. Moopil Nair v. State of Kerala (supra) has held thus :-*

> *"7. The most important question that arises for consideration in these cases, in view of the stand taken by the State of Kerala, is whether Article 265 of the Constitution is a complete answer to the attack against the constitutionality of the Act. It is, therefore, necessary to consider the scope and effect of that Article. Article 265 imposes a limitation on the taxing power of the state insofar as it provides that the State shall not levy or collect a tax, except by authority of law, that is to say, a tax cannot be levied or collected by a mere executive fiat. It has to be done by authority of law, which must mean valid law. In order that the law may be valid, the tax proposed to be levied must be within the legislative competence of the legislature imposing a tax and authorising the collection thereof and, secondly, the tax must be subject to the conditions laid down in Article 13 of the Constitution.*

One of such conditions envisaged by Article 13(2) is that the legislature shall not make any law which takes away or abridges the equality clause in Article 14, which enjoins the State not to deny to any person equality before the law or the equal protection of the laws of the country. It cannot be disputed that if the Act infringes the provisions of Article 14 of the Constitution, it must be struck down as unconstitutional. For the purpose of these cases, we shall assume that the State Legislature had the necessary competence to enact the law, though the petitioners have seriously challenged such a competence. The guarantee of equal protection of the laws must extend even to taxing statutes. It has not been contended otherwise. It does not mean that every person should be taxed equally. But it does mean that if property of the same character has to be taxed, the taxation must be by the same standard, so that the burden of taxation may fall equally on all persons holding that kind and extent of property. If the taxation, generally speaking, imposes a similar burden on everyone with reference to that particular kind and extent of property, on the same basis of taxation, the law shall not be open to attack on the ground of inequality, even though the result of the taxation may be that the total burden on different persons may be unequal. Hence, if the legislature has classified persons or properties into different categories, which are subjected to different rates of taxation with reference to income or property, such a classification would not be open to the attack of inequality on the ground that the total burden resulting from such a classification is unequal. Similarly, different kinds of property may be subjected to different rates of taxation, but so long as there is a rational basis for the classification, Article 14 will not be in the way of such a classification resulting in unequal burdens on different classes of properties. But if the same class of property similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property. It must, therefore, be held that a taxing statute is not wholly immune from attack on the ground that it infringes the equality clause in Article 14, though the courts are not concerned with the policy underlying a taxing statute or whether a particular tax could not have been imposed in a different way or in a way that the Court might think more just and equitable. The Act has, therefore, to be examined with reference to the attack based on Article 14 of the Constitution."

20.8 *In Special Courts Bill, 1978, In re, (1979) 1 SCC 380, the Supreme Court stated various propositions which emerge from its judgments in relation to cases arising under Article 14 of the Constitution. The relevant propositions may be referred to :*

"(4) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(7) The classification must not be arbitrary and must be rational, that is to say, it must not only be based on some qualities or characteristics which are found to be in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentiation which

distinguishes those that are grouped together from others and (2) that the differentia must have a rational relation to the object sought to be achieved by the Act.

(8) The differentia which is the basis of the classification and the object of the Act are different things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring penalties or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the penalties sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation provided such classification is not arbitrary in the sense above mentioned."

***20.9** The validity of Rule 96ZQ(5)(ii) of the Rules may be examined in the light of the aforesaid legal position. As noted hereinabove, Rule 96ZQ(5)(ii) is mandatory in nature and even in case of a delay of one day, penalty equal to the amount of outstanding duty would be leviable. The rule does not require consideration as regards the period of delay or the gravity of default on the part of the concerned assessee and proposes to treat all assessees equally. An assessee paying the second instalment after one day of the specified date and an assessee paying such amount after a hundred days of the specified date are treated equally, despite the fact that in the later case, the same would show deliberate default on the part of the concerned assessee. Thus, it is apparent that the rule treats unequals as equals, thereby violating Article 14 of the Constitution.*

***20.10** Another aspect of the matter is that except for the manufacturers of specified textile products and other manufacturers governed by Section 3A of the Act, no other manufacturer of any other excisable goods is governed by the provisions of Rule 96ZQ(5)(ii) of the Rules or similar provisions under Rule 96ZP. In case of any other manufacturer, the regular provisions of the Act would be applicable.*

***20.11** By way of illustration, the facts of the present case may be taken into consideration. The impugned order has been passed against the petitioners imposing penalty equal to the amount of duty on account of delay of three days in depositing the outstanding amount of duty before the end of the month. The petitioners in reply to the show-cause notice have explained the reason. It is the case of the petitioners that the petitioners had deposited the amount on 29th September, 2000 and challan was also deposited. 30th September, 2000 was half-year closing and it was closed for public transaction and the next working day was 3rd October, 2000, 1st October being a Sunday and 2nd October being a public holiday on account of Gandhi Jayanti. So the bank put 3rd October, 2000 in the TR-6 challan. Thus, it is apparent that though the petitioners had deposited the entire amount on 29th September, 2000, for the reasons mentioned in its reply, the bank had put the date 3rd October, 2000 in the TR-6 challan. However, in view of the mandatory nature of clause (ii) of sub-rule (5) of Rule 96ZQ, the respondents even in such circumstances, were left with no option but to impose penalty equal to the amount of duty. Thus, it is apparent that clause (ii) of sub-rule (5) of Rule 96ZQ operates very harshly on an assessee despite there being no fault on his part in making deposit of the amount within the prescribed time limit.*

***20.12** At this juncture, it may be pertinent to refer to Section 11AC of the Act which provides for levy of penalty for short-levy or non-levy of duty in case where such short-levy or non-levy is by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of the provisions of the Act or rules made thereunder with an intent to evade payment of duty. The said section provides that in such case, the person shall be liable to pay penalty equal to the amount of duty as determined under sub-section (2) of Section 11A of the Act. However, despite the fact* *that Section 11AC operates where there is fraud, collusion or wilful mis-statement or suppression of facts or contravention with the intention of evading payment of duty, the proviso thereto provides for payment of only 25 per cent of the penalty in case where the amount is paid within 30 days from the date of communication of the order of the Central Excise officer determining such duty. Thus, even in serious cases of fraud and collusion, wilful mis-statement, etc., the parent Act provides for levy of only 25 per cent of the penalty where the amount is paid within a period of 30 days. Whereas under Rule 96ZQ(5)(ii), merely by dint of the fact that the amount has been paid after a delay may be of even only one day, the assessee is liable to pay penalty equal to the amount of outstanding duty. There is no discretion vested in the adjudicating authority to reduce the amount of penalty. Thus, the provisions under Rule 96ZQ(5)(ii) of the Rules evidently are more onerous than the provisions of Section 11AC of the Act which make provision for levy of penalty in case of fraud, collusion, mis-statement etc. Thus, it is apparent that the rule operates to the prejudice of the assessees covered under the said rule namely, independent processors of textile fabrics. In the circumstances, clause (ii) of sub-rule (5) of Rule 96ZQ is clearly violative of Article 14 of the Constitution of India inasmuch as the same discriminates between two classes of persons namely, independent processors of textile fabrics and other manufacturers who are not covered by Rule 96ZQ.*

20.13 *On behalf of the petitioners, it has further been pointed out that in case of manufacturers who are not covered under Section 3A of the Act and have been discharging their duty liabilities under Section 3 of the Act read with the procedure prescribed under Rule 49 of the Rules, similar facility of payment of duty for clearance made during the first fortnight of the month by the 20th of that month and clearances made during the second fortnight of the month by the 5th day of the succeeding month has been provided. In case of default in payment of amount of duty by due date, Rule 49 makes the manufacturer liable for interest at the rate of 24% per annum on the outstanding amount, however, no penalty at all is provided under Rule 49 in case of default in payment by such manufacturers. Thus, manufacturers of goods specified under Section 3A of the Act are evidently subjected to harsh treatment of unreasonable penalty under Rule 96ZQ(5)(ii) compared to manufacturers of other excisable goods. Moreover, considering the nature of the penalty prescribed even for one day's delay, it is apparent that the said provision would amount to imposition of an unreasonable restriction on the petitioners right to conduct business thereby rendering the said provision as violative of Article 19(1)(g) of the Constitution.*

20.14 *In the light of the above discussion, this court is of the view that clause (ii) of sub-rule (5) of Rule 96ZQ of the Rules is ultra vires Articles 14 and 19(1)(g) of the Constitution of India as well as Section 37 of the Central Excise Act and is beyond the authority of the rule making power of the Central Government and as such, is required to be struck down.*

20.15 *The above view taken by this court finds support in the decision of the Punjab & Haryana High Court in the case of Bansal Alloys and Metals Pvt. Ltd. v. Union of India (supra) wherein the court has held that the provision for minimum mandatory penalty equal to the amount of duty even for slightest bona fide delay without any element of discretion is beyond the purpose of legislation. The object of the rule is to safeguard the revenue against loss, if any. The penalty has been provided in addition to interest. Mere fact that without mensrea, an assessee can be punished or a penalty could be imposed is not a blanket power without providing for any justification. The court, accordingly, held the provisions of Rules 96ZO, ZP and ZQ permitting penalty for delay in payment, without any discretion and without having regard to the extent and circumstances for delay to be ultra vires the Act and the Constitution.*

21. *The next question that arises for consideration is as to whether the decision of the Supreme Court in the case of Union of India v. Supreme Steels (supra) concludes the issue involved in the present case. A perusal of the aforesaid decision of the Supreme Court indicates that in the said batch of cases, vires of Rule 96ZO of the Central Excise Rules had been challenged on the ground that it is inconsistent with the provisions of the Act. Before the Supreme Court, the counsel for the parties had informed that the matter remained confined to a period of three years only as the scheme so introduced has since been dropped. The learned counsel appearing on behalf of the manufacturers stated that they do not challenge the validity of Section 3A of the Act. It was submitted that the excise duty may be charged according to the said provision, on the basis of actual production but for the period of whole year. On behalf of the Union of India, the learned counsel had submitted that there is no dispute with the offer made and also that the assessment shall be made for the whole period of one year namely, the financial year. The court observed that no dispute thus remained on the point and the excise duty shall accordingly be assessed in respect of matters not yet closed and still pending before the concerned authorities. Thus, the subject matter of challenge before the Supreme Court was to the vires of Rule 96ZO and Section 3A of the Act. However, the said challenge was not prosecuted in view of the consensus arrived at between the parties. Before the Supreme Court, no contention was raised to the effect that in view of Rules 96ZQ, 96ZP and 96ZO of the Rules being omitted with effect from 1st March, 2001 or that Section 3A of the Act being omitted with effect from 11th May, 2001, any proceedings taken under the said provisions would be without authority of law. A perusal of the second part of the judgment indicates that it was contended on behalf of the manufacturers that the part of sub-rule (3) which provides that in case excise duty is paid according to the said sub-rule, in that event, the manufacturer shall not avail the benefit available under sub-section (4) of Section 3A of the Central Excise Act, 1944 is bad. In relation to the said contention, the Supreme Court placed reliance upon its earlier decision in the case of Commissioner of Central Excise & Customs v. M/s. Venus Casting (P) Ltd. (supra) wherein it has been held that two procedures namely one as provided under sub-section (4) of Section 3A of the Central Excise Act and the other as provided under sub-rule (3) of Rule 96ZO of the Central Excise Rules are alternative procedures and the assessee has to opt for one. Once having done so, he cannot claim the benefit of the other.*

21.1 *Another contention raised on behalf of the Revenue was that the petitioners having not raised the contention with regard to lack of jurisdiction before the appellate authority, they cannot be permitted to challenge the show-cause notice at a belated stage. It was contended that the petitioners after participating in the adjudication proceedings and challenging the same on merits, are not entitled to challenge the show-cause notice on the ground that the same involves a pure question of law. It was submitted that the petitioners are estopped from raising such issue as the petitioners have not only given it up but have also not deliberately canvassed the same. It was further pointed out that the petitioners in the petitions have placed reliance upon the decision of the Supreme Court in Union of India v. Supreme Steels (supra) and have acquiesced with the fact that the concerned authorities could decide the matters which are pending before them. It was submitted that in the circumstances, it is not permissible for the petitioners to now raise the contention regarding lack of jurisdiction on the part of the adjudicating authority once having taken shelter of the said decision of the Supreme Court.*

21.2 *In this regard, a perusal of the averments made in the petition indicates that the petitioners have sought to raise a new plea as regards lack of jurisdiction on the part of the adjudicating authority to adjudicate upon the show-cause notice on the ground that at the time when the impugned orders were actually passed, the provisions of Rules 96ZO, 96ZP and 96ZQ of the*

Rules and Section 3A of the Act stood deleted and as such, no orders could have been passed against the petitioners under the said provisions. In this regard it may be apposite to refer to the decision of the Supreme Court in the case of Union of India v. Sube Ram and Others, (1997) 9 SCC 69, wherein it has been held that in case the court has no jurisdiction, the decision of the court would be a nullity and the same can be raised at any stage. In Balvant N. Viswamitra and Others v. YadavSadashiv Mule (dead) through Lrs. and Others, (2004) 8 SCC 706, the Supreme Court held that a defect of jurisdiction of the court goes to the root of the matter and strikes on the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is a nullity. Validity of such decree or order can be challenged at any stage even in execution or collateral proceedings. Again in ChiranjilalShrilalGoenka v. Jagjit Singh, 1993 (2) SCC 507, the Supreme Court held that a decree passed by a court without jurisdiction on the subject matter or on the grounds on which the decree is made goes to the root of its jurisdiction or lacks inherent jurisdiction is a coram non judice. A decree passed by such a court is a nullity and is nonest. Its invalidity can be set up whenever it is sought to be enforced or acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the very authority of the court to pass decree and cannot be cured by consent or waiver of the party. In the case of Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School and Others, 1993 (4) SCC 10, the Supreme Court held that generally, a point not raised before the Tribunal or administrative authorities may not be allowed to be raised for the first time in the writ proceeding, more so when the interference in the writ jurisdiction which is equitable and discretionary is not a must as indicated by the Supreme Court in A.M. Allison v. State of Assam, AIR 1957 SC 227, particularly when the plea sought to be raised for the first time in a writ proceeding requires investigation of facts. But if the plea though not specifically raised before the subordinate Tribunals or the administrative and quasi-judicial bodies, is raised before the High Court in the writ proceeding for the first time and the plea goes to the root of the question and is based on admitted and uncontroverted facts and does not require any further investigation into a question of fact, the High Court is not only justified in entertaining the plea but in the anxiety to do justice which is the paramount consideration of the court, it is only desirable that a litigant should not be shut out from raising such plea which goes to the root of the lis involved.

21.3 *In the light of the principles enunciated in the above referred decisions of the Supreme Court, it is apparent that the plea sought to be raised by the petitioners is a jurisdictional issue and goes to the root of the case. In the circumstances, this court is of the view that it is permissible for the petitioners to challenge the validity of the impugned orders on the ground of lack of jurisdiction even at this stage, though the same had not been raised before the adjudicating authority. The contention that the petitioners had not only given up their challenge but had also not deliberately canvassed the same and as such, are estopped from raising such plea at this stage, does not merit acceptance inasmuch as the Supreme Court in the case of ChiranjilalGoenka (supra) has held that the defect of jurisdiction strikes at the very authority of the court to pass decree which cannot be cured by consent or waiver of the party. In the circumstances, the court is of the view that the decision of the Supreme Court in the case of Union of India v. Supreme Steels (supra), does not conclude the controversy involved in the present case nor are the petitioners precluded from raising the controversy as regards jurisdiction for the first time in this writ proceeding.*

22. *For the foregoing reasons, the petitions succeed and are accordingly allowed. Rule 96ZQ(5)(ii) of the Central Excise Rules, 1944 is held to be ultra vires Articles 14, 19(1)(g) and 265 of the Constitution of India. It is further* *held that after the omission of Rules 96ZQ, 96ZP and 96ZO of the Rules with effect from 1st March, 2001 no proceedings could have been initiated thereunder and after the omission of Section 3A of the Act with effect from 11th May, 2001, without any saving clause, no pending proceeding under the said rules which had not been concluded before the omission came into effect, could be concluded thereafter. The proceedings culminating into the impugned orders having been initiated/concluded after the omission of Rules 96ZQ, 96ZP and 96ZO of the Rules and Section 3A of the Act are, therefore, without any authority of law and as such, cannot be sustained. The impugned orders dated 9th November, 2001/1st January, 2002 (Special Civil Application No. 1984 of 2002), dated 31st December, 2003 (Special Civil Application No. 3637 of 2004) and dated 30th October, 2001 (Special Civil Application No. 6779 of 2003) are hereby quashed and set aside. Rule is made absolute accordingly in each of the petitions with no order as to costs.*

23. *Registry to keep a copy of this order in each of the petitions.*

24. [Judgment]. *At this stage, Mr. Darshan Parikh, learned senior standing counsel has requested that the judgment be stayed for a period of twelve weeks from today. In the facts and circumstances of the case, the request is declined."*

- The Similar case has been considered by the Hon'ble High Court of Gujarat in the case of Gopal Iron & Steel Company (Gujarat) Ltd. (supra) wherein the Hon'ble Court has passed following order:-

"23. Having heard learned advocates for the respective parties and considering the material placed on record as well as, as per the decision of this Court in case of Krishna Processors (Supra) which is upheld by the Hon'ble Apex Court in case of Shree Bhagwati Steel Rolling Mills (Supra), it would be germane to refer to the controversy in nutshell arising in these appeals. Sofar as the issue of merits are concerned, we refrain ourselves from addressing to such issues of determination of APC as the only issue which is required to be considered is, whether the respondent authorities would have continued with the proceedings under Rule 96ZP read with Section 3A of the Act after the omission of both the rules and the provisions in the Year 2001 or not. In the facts of the case, admittedly the show-cause notices were issued prior to the year 2001 however, the proceedings continued before this Court and before the Tribunal thereafter and upon remand of the matter by the Tribunal before the Commissioner of Central Excise in the year 2009, the impugned order is passed in the year 2010 and in response to the remanded proceedings, the petitioner has raised the dispute with regard to the continuation of the proceedings after the omission of the Rules 96ZP and Section 3A of the Act before the Commissioner of Income Tax. However the respondent Commissioner has without considering such submissions, held that the provisions of Sub-rule 3 of Rule 3 of the Hot Rolling Mills Annual Capacity Determination Rules 1997 read with provision of Sub-rule 1 of Rule 96ZP will be applicable in the facts of the case and decided the issue against the petitioner by fixing the APC for the various periods from 1998-99 onwards by raising the demand of Rs.33,52,443/-. On perusal of the impugned order, it appears that the respondent authorities have not considered the aspect of continuation of the proceedings. However, it is also true that at the relevant time, the decision of this Court in case of Krishna Processors (Supra) was not available. This Court has delivered the judgment in case of Krishna Processors (Supra) in the year 2012, which was considered by the Hon'ble Apex Court in the case of Shree Bhagwati Steel Rolling Mills (Supra) in the year 2015 by confirming the same.

24. Therefore it would be necessary to refer to the various findings arrived at by this Court in case of Krishna Processors (Supra) with regard to the issue arising in this petition to decide as to whether the proceedings would have been continued by the respondent authorities after the omission of the Rules 96ZP and Section 3A of the Act or not. This Court in case of Krishna Processors (Supra) after considering the submissions made by both the sides has formulated the following issues:

> *"15. In the background of the facts and contentions noted herein above, the court is called upon to decide as to:*
>
> *(i) Whether in view of the omission of rule 96ZQ of the Rules with effect from 1st March, 2001, the adjudicating authority could thereafter have initiated action for breach thereof by issuance of show cause notice and/or could have continued with the proceedings initiated but not concluded prior thereto?*
>
> *(ii) Whether any obligation or liability incurred under section 3A of the Act is saved by section 6 of the General Clauses Act and whether after the omission of section 3A of the Act with effect from 11th May, 2001 proceedings initiated under the rules 96ZQ, 96ZP and 96ZO of the Rules would survive?*
>
> *(iii) Whether section 38A of the Act saves all obligations and liabilities incurred under rule 96ZQ of the Rules? If yes, whether the said position would prevail even after the omission of section 3A of the Act?*
>
> *(iv) Whether in view of section 132 of the Finance Act, 2001 everything done under the old provision is saved?*
>
> *(v) Whether rule 96ZQ(5)(ii) of the Rules which does not provide for any inbuilt discretion in respect of the penalty to be imposed thereunder is ultra vires the provisions of the Constitution and the Act? And*
>
> *(vi) Whether the decision of the Supreme Court in the case of Union of India vs. Supreme Steels and General Mills Ltd. (supra) concludes the controversy involved in the present case?"*

25. So far as issue raised in this petition is concerned, we are concerned with the issue no.2, as to whether the obligation or liability incurred under Section 3A of the Act is saved by the General Clauses Act and whether after omission of Section 3A of the Act with effect from 11.05.2001 proceedings initiated under Rules 96ZQ, 96ZP and 96ZO of the Rules would survive or not. This Court while deciding the said issue no.2 has held as under:

> *"17. However, the aforesaid observations would be subject to what is held in respect of the second question viz., whether after the omission of section 3A of the Act with effect from 11th May, 2001 proceedings initiated under rules 96ZQ, 96ZP and 96ZO of the Rules*
>
> *17.1 Dealing with the second question, section 3A of the Act enables the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. This clause came to be inserted in the Act by the Finance Act, 1997. The reason behind introducing this provision appears to be that in certain sectors like induction furnaces, steel re-rolling mills, etc. evasion of excise duty on goods is substantial and the production is not disclosed accurately and collection of excise on their production capacity is thought of as appropriate. Under the scheme evolved in this provision the annual production capacity of mills and furnaces is determined by the Commissioner of Central Excise in terms of the rules to be framed under section 3A(2) of the Act by the Central Government. Thereafter, the assessee would be liable to pay duty based on such determination.*

17.2 Rule 96ZQ of the Rules which provides for procedure to be followed by independent processors of textile fabrics, comes into play after the Commissioner of Central Excise determines the annual capacity of production on processed textile fabrics under section 3A of the Act read with the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998. Rule 96ZQ proceeds to lay down the manner of payment of duty, payment of interest/penalty and such other incidental matters. Section 3A has been omitted by the Finance Act, 2001 with effect from 11th May, 2001 without any saving clause. On behalf of the Revenue, reliance had been placed upon the decision of the Supreme Court in the case of General Finance Company vs. Assistant Commissioner of Income Tax (supra) to contend that omission also amounts to a repeal of an enactment and as such, the provisions of section 6A of the General Clauses Act would be applicable and all proceedings and liabilities incurred under the omitted provisions would be saved. A Constitution Bench of the Supreme Court in the case of M/s. Rayala Corporation (supra) held that section 6 of the General Clauses Act would not apply to the omission of a provision in an Act but only to repeal, omission being different from repeal. The aforesaid view has been reiterated by another Constitution Bench of the Supreme Court in the case of Kolhapur Canesugar Works Ltd. vs. Union of India (supra) wherein the court agreed that the earlier view taken in M/s. Rayala Corporation (supra) that section 6 of the General Clauses Act only applies to repeals and not to omission and applies when the repeal is of a Central Act or regulation and not of the rule. Insofar as section 3A of the Act is concerned, the second part would not be applicable since the present case relates to omission of a section. However, the first part namely that section 6 of the General Clauses Act only applies to repeals and not to omissions would be squarely applicable to the facts of the present case. Reliance placed by the Revenue on the decision of the Supreme Court in the case of General Finance Company (supra) is misconceived inasmuch as in the said case the Supreme court after finding force in the submissions advanced by the learned counsel, observed that it was constrained to follow the two decisions of the Constitution Benches of the Supreme Court in the case of M/s. Rayala Corporation Pvt. Ltd. and Kolhapur Canesugar Works Ltd. The court, accordingly held that the view taken by the High Court was not consistent with what was stated by the Supreme Court in the decisions aforesaid and the principle underlying section 6 of the General Clauses Act as saving the right to initiate proceedings for liabilities incurred during the currency of the Act will not apply to omission of a provision in an Act but only to repeal, omission being different from repeal as held in the said decisions.

17.3 Thus, even in General Finance Company Ltd. (supra), the Supreme Court has not taken a different view and has followed the aforesaid two decisions. Section 6 of the General Clauses Act, therefore, has no application in the present case. The decision of the Supreme Court in General Finance Company Ltd. (supra), therefore, does not carry the case of the Revenue any further.

17.4 Thus, any obligation or liability etc. acquired, accrued or incurred under section 3A of the Act would not be saved by section 6 of the General Clauses Act. The next question that arises for consideration is as to whether after the omission of section 3A of the Act with effect from 11th May, 2001 proceedings initiated under rules 96ZQ, 96ZP and 96ZO of the Rules would survive, or in other words what would be the position of obligations or liabilities incurred under rules 96ZQ, 96ZP and 96ZO of the Rules after the omission of section 3A. As noticed earlier, rule 96ZQ of the Rules only lays down the procedure to be followed by the independent processor of textile fabrics, the manner of payment of duty and the consequences of nonpayment of *duty within the prescribed period, etc. Likewise, is the case with rules 96ZP and 96ZO of the Rules. Rules 96ZQ, 96ZP and 96ZO are not the charging provisions. The charging provision is section 3A of the Act and rules 96ZQ etc. are merely machinery provisions. Thus, any liability which accrues is under section 3A of the Act. Accordingly, when the charging section itself is deleted without any saving clause, no recovery under the said section can be made by resorting to rule 96ZQ of the Rules. Action, if any, can be taken only under the regular provisions of the Act."*

26. Ultimately, in conclusion, it was held as under:

"22. For the foregoing reasons, the petitions succeed and are accordingly allowed. Rule 96ZQ (5) (ii) of the Central Excise Rules, 1944 is held to be ultra vires Articles 14, 19(1)(g) and 265 of the Constitution of India. It is further held that after the omission of rules 96ZQ, 96ZP and 96ZO of the Rules with effect from 1st March, 2001 no proceedings could have been initiated thereunder and after the omission of section 3A of the Act with effect from 11th May, 2001, without any saving clause, no pending proceeding under the said rules which had not been concluded before the omission came into effect, could be concluded thereafter. The proceedings culminating into the impugned orders having been initiated/concluded after the omission of rules 96ZQ, 96ZP and 96ZO of the Rules and section 3A of the Act are, therefore, without any authority of law and as such, cannot be sustained. The impugned orders dated 9th November, 2001/1st January, 2002 (Special Civil Application No.1984 of 2002). dated 31st December, 2003 (Special Civil Application No.3637 of 2004) and dated 30th October, 2001 (Special Civil Application No.6779 of 2003) are hereby quashed and set aside. Rule is made absolute accordingly in each of the petitions with no order as to costs."

27. The decision of this Court was challenged before the Hon'ble Apex Court along with similar issue arising out of the various decisions rendered by the various High Courts by following the decision in case of Krishna Processors (Supra) rendered by this Court. The Hon'ble Apex Court in case of Shree Bhagwati Steel Rolling Mills (Supra) was mainly concerned with the levy of interest and penalty under Rules 96ZO, 96ZP and 96ZQ of the Central Excise Rules 1994 which were held to be ultra vires by this Court in the case of Krishna Processors (Supra) and the rules relating to levy of penalty were struck down as being ultra vires and violative of Articles 14 and 19(1)(g) of the Constitution of India.

28. The Hon'ble Apex Court after considering the effect of the decision in case of The Fibre Board's (Supra) wherein the view was taken that an "omission" would amount to a "repeal" after referring to several authorities of the Hon'ble Apex Court and G.P.Singh's Principles of Statutory Interpretation, Section 6A of the General Clauses Act, 1897 and a passage in Halsbury's Laws of England, arrived at the conclusion that "omission" would amount to a "repeal" for the purpose of Section 24 of the General Clauses Act and since the same expression namely "repeal" is used both in Section 6 and Section 24 of the General Clauses of the Act, the construction of the said expression in both the sections would therefore include within it "omissions" made by the legislature.

29. After considering the submissions of both the sides, it was held by the Hon'ble Apex Court as under:

"13. From this it is clear that when Section 6 speaks of the repeal of any enactment, it refers not merely to the enactment as a whole but also to any provision contained in any Act. Thus, it is clear that if a part of a statute is deleted, Section 6 would nonetheless apply. Secondly, it is clear, as has been stated by referring to a passage in

Halsbury's Laws of England in the Fibre Board's judgment, that the expression "omission" is nothing but a particular form of words evincing an intention to abrogate an enactment or portion thereof. This is made further clear by the Legal Thesaurus (Deluxe Edition) by William C Burton, 1979 Edition. The expression "delete" is defined by the Thesaurus as follows:

"Delete: - Blot out, cancel, censor, cross off, cross out, cut, cut out, dele, discard, do away with, drop, edit out, efface, elide, eliminate, eradicate, erase, excise, expel, expunge, extirpate, get rid of, leave out, modify by excisions, obliterate, omit, remove, rub out, rule out, scratch out, strike off, take out, weed wipe out." Likewise the expression "omit" is also defined by this Thesaurus as follows:-

"Omit:- Abstain from inserting, bypass, cast aside, count out, cut out, delete, discard, dodge, drop exclude, exclude, fail to do, fail to include, fail to insert, fail to mention, leave out, leave undone, let go, let pass, let slip, miss, neglect, omittere, pass over, praetermittere, skip, slight, transire." And the expression "repeal" is defined as follows:-

"Repeal:- Abolish, abrogare, abrogate, annul, avoid, cancel, countermand, declare null and void, delete, eliminate, formally withdraw, invalidate, make void, negate, nullify, obliterate, officially withdraw, override, overrule, quash, recall, render invalid, rescind, rescindere, retract, reverse, revoke, set aside, vacate, void, withdraw."

14. On a conjoint reading of the three expressions "delete", "omit", and "repeal", it becomes clear that "delete" and "omit" are used interchangeably, so that when the expression "repeal" refers to "delete" it would necessarily take within its ken an omission as well. This being the case, we do not find any substance in the argument that a "repeal" amounts to an obliteration from the very beginning, whereas an "omission" is only in futuro. If the expression "delete" would amount to a "repeal", which the appellant's counsel does not deny, it is clear that a conjoint reading of Halsbury's Laws of England and the Legal Thesaurus cited hereinabove both lead to the same result, namely that an "omission" being tantamount to a "deletion" is a form of repeal."

30. In view of the above conspectus of law, neither Section 3A nor Rule 96 ZP existed on the statute book when the Commissioner passed the order in November 2010 as the aforesaid provisions have been omitted vide notification no.6/2001 dated 01.03.2001, the aforesaid rule was omitted whereas Section 3A came to be omitted vide Section 121 of the Finance Act 2001, which would amount to repeal of Section 3A as well as Rule 96(ZP). When the order dated 09/10 April, 2003 was passed by the Commissioner against which the appeal was preferred before the Appellate Tribunal the provisions were omitted. We are therefore of the opinion that in view of the omission of the provision which would amount to repeal, the Commissioner had no jurisdiction to take any action including passing of any order fixing APC or to pass an order of recovery of the compounded levy amount from the petitioner company. Therefore the impugned order dated 18.11.2010 passed by the Commissioner is hereby quashed and set aside being without jurisdiction as no orders could have been passed against the petitioners under the said provision as the action initiated against the petitioner was not finally concluded at the time of omission/ repeal of the provisions.

31. The petition therefore succeeds and is accordingly allowed. The impugned order dated 18.11.2010 passed by the Commissioner of Central Excise Ahmedabad-II is hereby quashed and set aside on the ground that no proceedings were permissible against the petitioner company for recovery of the compounded levy amount for years 1998-1999 and 1999-2000, because *when the impugned order was passed, the provision of Section 3A of the Act read with Rule 96ZP of the Rules and the notification were omitted and repealed in absence of any saving clause with effect from 2001. Rule is made absolute to the aforesaid extent. No order as to costs."*

- This Tribunal also considering the same issue in Arbuda Alloys Pvt. Ltd. (supra) following the Hon'ble Gujarat High Court judgment Krishna Processor (supra) taken the same view, the relevant order is reproduced below:-

"3. *After hearing both the sides and on perusal of the records, we find that the main contention of the learned Senior Advocate on behalf of the appellants is that the impugned orders cannot be sustained on the ground that the adjudication proceedings was completed in 2006, long after omission of Section 3A read with Rule 96ZP in 2001, without any saving clause. He submits that the issue is covered by the decision of the Tribunal, in the case of Commissioner of Central Excise, Jaipur v. Alwar Processors Pvt. Limited - 2014 (308) E.L.T. 720 (Tri.-Del.). In that case, by order dated 3-7-2000, the Assistant Commissioner confirmed the demand of duty for the period 16-12-1998 to 27-2-1999 and for the period 28-2-1999 to 5-11-1999. On appeal, the Commissioner (Appeals) by order dated 28-3-2001, set aside the adjudication order and remanded the matter to the Assistant Commissioner for de novo adjudication. In the said order, the duty demand for the period 16-12-1998 to 27-2-1999 was set aside and the demand for the period from 28-2-1999 onwards, was remanded to the Assistant Commissioner for de novo adjudication. In de novo adjudication, the Assistant Commissioner by order dated 10-2-2004 confirmed the demand of duty for the period 28-2-1999 to 5-11-1999 under Rule 96ZQ(5)(ii) of the erstwhile Rules. By Order (Appeal) dated 16-5-2005, the Commissioner (Appeals) allowed the appeal of the assessee on the ground that assessee is not covered under the Compounded Levy Scheme notified under Section 3A of the Central Excise Act, 1944 read with erstwhile Rule 96ZQ of the Central Excise Rules. Revenue filed appeal before the Tribunal. The Tribunal held as under :-*

> *"7. The Hon'ble High Court relying upon the judgments in the case of Rayala Corporation Pvt. Ltd. reported in (1969) 2 SCC 412 and subsequent judgment of the Apex Court in the case of Kolhapur Cane Sugar Works Ltd. reported in 2000 (119) E.L.T. 257 (S.C.) concluded that no proceedings could have been initiated under the omitted Rule 96ZQ after omission of Section 3A w.e.f. 11-5-2001 in absence of any saving clause. The Court further held that all proceedings which were pending as on 11-5-2001, even if initiated prior to omission of Rule 96ZQ would thereafter automatically lapse and no order could be passed if they were not concluded at the time of omission of Section 3A w.e.f. 11-5-2001. In this judgment, the Hon'ble High Court has also considered the judgment of Punjab & Haryana High Court in the case of Shree Bhagwati Steel Rolling Mills v. CCE, Chandigarh reported in 2007 (207) E.L.T. 58 (P & H) and expressed its disagreement. In view of the above judgment of the Hon'ble Gujarat High Court, which is based on the judgment of the Apex Court in the case of Rayala Corporation Ltd. (supra) and Kolhapur Cane Sugar Works Ltd. (supra), after omission of Rule 96ZQ w.e.f. 1-3-2001 and omission of Section 3A of the Act without saving clause w.e.f. 11-5-2007, the proceedings initiated prior to omission which had not been concluded as on 11-5-2001 would lapse. In this case, though, initially the show cause notice issued prior to 1-3-2001 had been adjudicated by the Asstt. Commissioner, the Commissioner (Appeals) had set aside the orders*

> *and had remanded the matter for part of the period of dispute to the Asstt. Commissioner for de novo adjudication and de novo proceedings were concluded in 2004, long after omission of Rule 96ZQ with effect from 1-3-2001 and Section 3A with effect from 11-5-2001 without any serving clause and therefore the same would lapse. In view of this, we do not find any merit in the Revenue's appeal. The same is dismissed."*

- The principal bench of this Tribunal also dealing with the similar case ofAlwar Processors Pvt. Ltd. (supra) has taken the same view as per the following order:-

"5. *We have considered the submissions from both the sides and perused the records.*

6. *Though the show cause notices for duty demand of Rs. 45,55,061/- had been issued during the period prior to omission of Rule 96ZQ i.e. prior to 1-3-2001 and these show cause notices had initially been adjudicated during the period prior to 1-3-2001, on appeal being filed to the Commissioner (Appeals), vide appellate order dated 28-3-200l of the Commissioner (Appeals), the Asstt. Commissioner's order was set aside and the matter was remanded to the original adjudicating authority for de novo adjudication for quantification of duty demand for period from 28-2-1999 to 5-11-1999 and the de novo adjudication proceedings were completed only in 2004 long after omission of Section 3A w.e.f., 11-5-2001 and omissions of Rule 96ZQ w.e.f. 1-3-2001 without saving clause. The point of dispute is as to whether the proceedings initiated before 1-3-2001 would survive after omission of Rule 96ZQ without saving clause w.e.f. 1-3-2001 and omission of Section 3A without serving clause w.e.f. 11-5-2001. We find that this issue was considered by the Hon'ble Gujarat High Court in case of Krishna Processors v. Union of India (supra), wherein Hon'ble High Court considered the following issues :-*

> *"(i) Whether in view of the omission of Rule 96ZQ of the Rules with effect from 1st March, 2001, the adjudicating authority could thereafter have initiated action for breach thereof by issuance of show cause notice and/or could have continued with the proceedings initiated but not concluded prior thereto?*
>
> *(ii) Whether any obligation or liability incurred under Section 3A of the Act is saved by Section 6 of the General Clauses Act and whether after the omission of Section 3A of the Act with effect from 11th May, 2001 proceedings initiated under the Rules 96ZQ, 96ZP and 96ZO of the Rules would survive?*
>
> *(iii) Whether Section 38A of the Act saves all obligations and liabilities incurred under Rule 96ZQ of the Rules? If yes, whether the said position would prevail even after the omission of Section 3A of the Act?"*

7. *The Hon'ble High Court relying upon the judgments in the case of Rayala Corporation Pvt. Ltd. reported in (1969) 2 SCC 412 and subsequent judgment of the Apex Court in the case of Kolhapur Cane Sugar Works Ltd. reported in 2000 (119) E.L.T. 257 (S.C.) concluded that no proceedings could have been initiated under the omitted Rule 96ZQ after omission of Section 3A w.e.f. 11-5-2001 in absence of any saving clause. The Court further held that all proceedings which were pending as on 11-5-2001, even if initiated prior to omission of Rule 96ZQ would thereafter automatically lapse and no order could be passed if they were not concluded at the time of omission of Section*

3A w.e.f. 11-5-2001. In this judgment, the Hon'ble High Court has also considered the judgment of Punjab & Haryana High Court in the case of Shree Bhagwati Steel Rolling Mills v. CCE, Chandigarh reported in 2007 (207) E.L.T. 58 (P & H) and expressed its disagreement. In view of the above judgment of the Hon'ble Gujarat High Court, which is based on the judgment of the Apex Court in the case of Rayala Corporation Ltd. (supra) and Kolhapur Cane Sugar Works Ltd. (supra), after omission of Rule 96ZQ w.e.f. 1-3-2001 and omission of Section 3A of the Act without saving clause w.e.f. 11-5-2007, the proceedings initiated prior to omission which had not been concluded as on 11-5-2001 would lapse. In this case, though, initially the show cause notice issued prior to 1-3-2001 had been adjudicated by the Asstt. Commissioner, the Commissioner (Appeals) had set aside the orders and had remanded the matter for part of the period of dispute to the Asstt. Commissioner for de novo adjudication and de novo proceedings were concluded in 2004, long after omission of Rule 96ZQ w.e.f. 1-3-2001 and Section 3A w.e f. 11-5-2001 without any serving clause and therefore the same would lapse. In view of this, we do not find any merit in the Revenue's appeal. The same is dismissed."

In view of the above judgments as of now it is settled that in absence of any saving clause while omitting the provision of Section 3A of Central Excise Act, 1944and Rules, 96 ZO, ZP and ZQ of the Central Excise Rules, 1944 adjudication order passed after 01.03.2001, the adjudication proceeding is not legal and correct, consequently no demand can be confirmed. As regard the Revenue's heavy reliance on the Hon'ble Supreme Court judgment in the case of Shree Bhagwati Steel Rolling Mills Vs CCE reported in 2015(326) E.L.T.209 (S.C.), we find that firstly the case of Shree Bhagwati Steel Rolling Mills (supra) was on the issue of demand of interest and imposition of penalty as the assessee is in that case has not disputed the payment of duty. Therefore, the Hon'ble Apex court judgment in the case of Shree Bhagwati Steel Rolling Mills (supra) is distinguished. Secondly, the Hon'ble Gujarat High Court in Gopal Iron & Steel Co. (Gujarat) Ltd. (supra) considered the Hon'ble Supreme Court judgment in the case of Shree Bhagwati Steel Rolling Mills and thereafter mentioned the same view as expressed in the case of Krishna Processor Vs Union of India. Therefore, the reliance by the Revenue on the case of Shree Bhagwati Steel Rolling Mills is of no help to the Revenue. As per our above discussion and finding supported by various judgments of Hon'ble High Court and co-ordinate benches of this Tribunal supra, we are of the view that since the Orders-in-original, itself are without authority of law, demand confirmed under the said orders-in-original cannot be sustained. Therefore, the impugned orders are not sustainable.

5. Accordingly, we set aside the impugned orders and allow the appeals with consequential relief.

(Pronounced in the open court on 01.10.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Bharvi