

PETITIONER:
STATE OF KERALA

Vs.

RESPONDENT:
M/S MADRAS RUBBER FACTORY LTD. ETC. ETC.

DATE OF JUDGMENT: 19/12/1997

BENCH:
S.C. AGRAWAL, B.N. KIRPAL, D.P. WADHWA

ACT:

HEADNOTE:

JUDGMENT:

THE 9TH DAY OF DECEMBER, 1997

Present:

Hon'ble Mr. Justice S.C.Agrawal

Hon'ble Mr. Justice B.N. Kirpal

Hon'ble Mr. Justice D.P. Wadhwa

K.N. Bhat, Additional Solicitor General; A.S.Nambiar, John Mathew, Harish n. Salve, R.F.Nariman, Joseph Vellapally, Sr. Advs., G.Prakash, Dhruv Agarwal, Ms. Suman Khaitan, Gouri Rasgotra, K.R. Nambiar, Ravinder Narain, Ashok Sagar, Amit Bansal, Sonu Bhatnagar, Vineet Kumar, Yakesh Anand Sanjeev Anand, B.V. Desai, Shashi Soharu, P.J. Mehta, P.N. Ramalingam, K.K.Bhaduri, M.P.Vinod, Advs. with them for the appearing parties.

J U D G M E N T

The following Judgment of the court was delivered:

CIVIL APPEAL NOS. 3435-36/21, 69/92, 659/93, 657/93, 4983/91, 5656-57/94, 5594-95/95, 5759/95, 5760-61/95, 5762, 5763-64, 5765, 5766, 5767, 5768-72, 6226, 8014, 9182, OF 1995, 4869/91, 7230/93, 5296/93, 2193/93, 9183/93, 4742/91, 3442-43/91, 10386-89/96, 2253/93, 2254/93, 2355/93, 2356/93, 11027, 11769, 11626, 11029-30, 11028, 9518 OF 1996, 4300/93, 1699-1704/88, 4593/89, and Civil appeal Nos 8874-8875 of 1997 arising out of S.L.P. (C) Nos. 9649-50 of 1997 KIRPAL, L.

Special leave granted in SLP (Civil) Nos. 9649-50 of 1997.

The only question which arises for consideration in this batch of cases is whether the cess payable under the provisions of the Rubber Act, 1947 will form part of the purchase turnover of the respondents under the Kerala General Sales Tax, 1963.

M/s M.R.F. Ltd., Ceat Tyers of India Ltd., Bata India Ltd., Goods Year India Ltd. etc., hereinafter referred to as the dealers, are the respondents in these cases. They purchased rubber in Kerala. This rubber was purchased either from the producer or from the dealers. The rubber so purchased was either used in the manufacture within the State of Kerala or was sent out of the State for use elsewhere.

Under the provisions of Section 5 of the Kerala General

Sales Tax Act, 1963 (hereinafter referred to as 'the Sales Tax Act') the tax on rubber is a single point tax. According to the said section read with the schedule thereto the tax is leviable on the last producer of rubber within the State. The liability to pay tax on the purchases so made under the Sales Tax Act is not in dispute but what has been contended by the dealers is that in computing the turnover on which the tax is to be paid, the quantum of cess payable under the provisions of the Rubber Act, 1947 (hereinafter referred to as the "Rubber Act") could not be included in the purchase turnover. The contention of the dealers before the Sales Tax Authority, was that the said cess was not a part of the purchase price and therefore, not includible in their turnover. The assessing authority did not agree and following the decision of the Kerala High Court in the case of Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes) Vs. Bata India Ltd. and Ors. ([1986] 62 STC 436), it included the cess in the purchase turnover of the dealers. This order was confirmed in appeal by the Deputy Commissioner and thereafter by the appellate Tribunal.

The revision petition filed by the dealers came up for hearing before the Kerala High Court. A Division Bench of that Court was of the opinion that there was conflict between two decisions of that High Court and, therefore, the case was referred to a Full Bench.

By judgment dated 29th March, 1989 the Full Bench, by majority, allowed by revision petition holding that the earlier decision in Bata's case (supra) was wrongly decided and the cess payable and paid under the rubber Act and the Rules could not form part of the dealers' purchase. In view of the importance of the point in issue the High Court granted certificate for leave to appeal this Court. Hence these appeals.

In order to examine the rival contentions it is necessary to refer to the relevant provisions of the Sales Tax Act and the Rubber Act and the rules framed thereunder. In respect of MRF the assessment years in question are 1972-73, 1976-77 and 1977-78. At that time under Schedule I Entry 71 of the Sales Tax Act rubber was taxable at the point of last purchase in the State, by a dealer, who was liable to pay under Section 5 of Act. The relevant provisions of the said Act and the Rules are as follows:

"Section 2 (xxvii):

"TURNOVER" means the aggregate amount for which goods are either bought or sold, supplied or distributed by a dealer, either directly or through another, on his own account or on account of other, whether for cash or for deferred payment for other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce, grown by himself or grown on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover.

Section 2 (xxv):

"TAXABLE TURNOVER" means the

turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed, but shall not include the turnover of purchase of sale in the course of inter-state trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into territory of India.

Section 5:

Levy of "tax on sale or purchase of goods:- (1) Every dealer (other than a casual trader or agent of a non-resident dealer) whose total turnover for a year is not less than one lakh rupees and every casual trader or agent of a non-resident dealer, whatever be his total turnover for the year, shall pay tax on his taxable turnover for that year.

(i) In the case of goods specified in the First or second Schedule, at the rates and only at the points specified against such goods in the said schedules.

Schedule I

ENTRY 71

"Rubber" At the point of last purchase in the State by a dealer who is liable to tax under Section 5."

Rules 8 : Determination of total turnover : (1) Save as provided in "sub-rules (2) and (3) the total turnover of a dealer for the purpose of these Rules shall be the amount for which the goods are sold by the dealer.

(2) In the case of goods mentioned below the total turnover of a dealer for the purposes of these rules shall be the amount for which the goods are bought by the dealer :-

(a) (i) grabled pepper
(ii) Ungrabled pepper

(b) green and dried ginger

(c) xxxxxxxxxx

(d) xxxxxxxxxx

(e) xxxxxxxxxx

xxxxxxx

(n) rubber"

The controversy being with regard to the Inclusion of the cess payable under the Rubber Act, 1947 on the purchase

turnover of the dealers, it is appropriate to refer to the relevant provision, namely, section 12 of the Rubber Act 1947 and Rule 33 D framed under the said Act, which are as follows :

"Imposition of rubber cess:- (1) With effect from such date as may be notified by the Central Government in this behalf, there shall be levied and collected as a cess for the purposes of this Act a duty of excise on all rubber produced in India at such rate not exceeding one anna per pound of rubber so produced as the Central Government may by the same or a like notification, from time to time :

(2) The said duty of excise shall be payable by the owner of the case on which the rubber is produced, and shall be paid by him to the board within one month from the date on which he receives a notice of demand therefor from the Board.

(3) The said duty of excise may be recovered as if it were an arrear of land revenue.

(4) For the purpose of enabling the Board to assess the amount of the duty of excise payable by the owner of an estate under this section-

(a) the Board shall by notification in the Gazette of India, fix the period in respect of which assessments shall be made and

(b) Without ***** to the provisions of Section 20, every owner of an estate shall furnish to the Board a return stating **** amount of rubber produced on the estate in each over period not later than fifteen days after the expiry of the period to which the return relates:

Provided that in respect of an estate situated only partly in India. The owner shall in the said return show separately the amounts of rubber produced within and outside India.

(5) If any owner of an estate fails to furnish in due time the return referred to in sub-section (4) or furnishes a return which the board has reason to believe is incorrect or defective, the Board may assess the amount payable by that owner in such manner as may be prescribed.

(6) Any owner of an estate aggrieved by an assessment made under this section may within three months of the service of the notice under sub-section (2) apply to the District Judge for the cancellation or modification of the assessment,

and the District Judge shall, after giving the Board an opportunity of being heard, pass such order (which shall be final) as he thinks proper.

(7) The proceeds of the duty of excise collected by the Board and any of the fees levied under this Act (all of which shall form part of the consolidated Fund of India) reduced by the cost of collection as determined by the Central Government, shall, if Parliament by appropriation made by law in this behalf so provides, be paid to the Board for being utilised for the purposes of this Act."

Section 12 of the Rubber Act, after its amendment by Act 21 of 1960, is extracted herein below:

"Imposition of new rubber cess:-

(1) With effect from such date as the Central Government may, by notification in the official Gazette appoint, there shall be levied as a cess for the purposes of this Act, a duty of excise on all rubber produced in India at such rate, not exceeding fifty naya paise per kilogram of rubber so produced as the Central Government may fix.

(2) The duty of excise levied under sub-section (1) shall be collected by the Board in accordance with rules made in this behalf either from the owner of the estate on which the rubber is produced or from the manufacturer by whom such rubber is used.

(3) The owner or, as the case may be, the manufacturer shall pay to the Board the amount of the duty within one month from the date on which he receives a notice of demand therefor from the Board and if he fails to do so the duty may be recovered from the owner or the manufacturer, as the case may be, as an arrear of land revenue.

(4) For the purpose of enabling the Board to assess the amount of the duty of excise levied under this section

(a) the ***** shall, by notification in the Official Gazette, fix a period in respect of which assessments shall be made and

(b) without prejudice to the provisions of section 20, every owner and every manufacturer shall furnish to the Board a return not later than fifteen days after the expiry of the period to which the return relates, stating-

(i) in the case of an owner, the

total quantity of rubber produced on the estate in each such period: Provided that in respect of an estate situated only partly in India are owner shall in the said return show separately the quantity of rubber produced within and outside India.

(ii) in the case of a manufacturer, the total quantity of rubber user by him in such period out of the rubber produced in India.

(5) If any owner of or manufacturer fails to furnish within the time prescribed the return referred to in sub-section (4) of furnishes a return which the Board has reason to believe is incorrect or defective, the Board may assess the amount payable by that owner in such manner as may be prescribed.

(6) Any owner of an estate aggrieved by an assessment made under this section may within three months of the service of the notice under sub-section (2) apply to the District Judge for the cancellation or modification or a assessment, and the District Judge shall, after giving the Board an opportunity of being heard, pass such order (which shall be final) as he thinks proper.

(7) The proceeds of the duty of excise collected by the Board and any of the fees levied under this Act (all of which shall form part of the Consolidated Fund of India) reduced by the cost of collection as determined by the Central Government, shall, if Parliament by appropriation made by law in this behalf so provides, be paid to the Board for being utilised for the purposes of this Act, if parliament by appropriation made by law in this behalf so provides."

Rule 33-D of the Rubber Rules, reads thus:-

"(1) Every manufacturer shall by demand notice sent through registered post or in such other manner as the Board may direct be intimated of the amount assessed on the quantity of rubber acquired during the periods specified in rule 33 (c). On receipt of such notice, the manufacturer shall pay to the Board the amount specified therein either in cash at the Board's office at kottayam or by money order or by bank draft or cheque duly crossed and payable at kottayam to the Board within 30 days from the date of receipt of

the said notice.

(2) On such demand being made, if a manufacturer fails to pay the amount within the due date, the Board may take step to report the fact to the Central Government or the State Government concerned for recovery of the outstanding amount as an arrear of land revenue."

On behalf of the appellant it was submitted by Mr. K.N. Bhat, learned Additional Solicitor General, that under Section 12 (1) what is levied is a cess which is duty of excise on all rubber produced in India. Before the amendment in 1960 this duty was payable by the owner of the estate. After its amendment the Rubber Board is empowered to collect the duty of excise levied under Section 12 either from the owner of the estate or from the manufacturer by whom the rubber is used in accordance with the rules. The incidence of duty of excise was relatable to the production of rubber and this position did not alter after the amendment in 1960. The incidence of the cess, being in the nature of duty of excise, it was submitted, continued to be related to the production of rubber only and it was for the sake of convenience that it was thought expedient that this cess, instead of being collected from the innumerable producers of rubber could most conveniently be collected from the ultimate user thereof, namely, the manufacturer. It was submitted that the definition of turnover in Section 2 (xxvii) of the Sales Tax Act was wide enough to include the liability to pay cess under the Rubber Act as being part of the purchase turnover.

The learned counsel appearing on behalf of the dealers submitted that on the correct interpretation of Section 2 (xxvii) of the Sales Tax Act, the aggregate of the sum by the buyer to the seller "including payment made on his behalf" would constitute a part of the turnover of the buyer for levy of sales tax. The cess which was to be paid under the Rubber Act was not required to be paid by the manufacturer on behalf of the seller because according to Section 12 (2) read with Rule 33-D, though the incidence of the duty was on the production of rubber but it was not the liability of the producer. After the amendment of Section 12 in 1960 and with the promulgation of Rule 33-D, neither producer nor the dealer was required to pay the cess under Section 12 at any point of time. Inasmuch as there was no statutory liability on either the producer or the dealer to pay the cess, therefore, the quantum of cess payable on the goods purchased by the dealer could not be regarded as being part of the purchase price or turnover. The liability to pay tax was only of the manufacturer and it arose not by reason of the purchase of rubber but it arose when the manufacturer used the same.

That the cess which is collected is a duty of excise on all the rubber produced in India is evident from the provisions of Section 12 (1) of the Rubber Act. The rate of cess is prescribed in Section 12(1) itself. The excise duty referred to in Section 12(1) is not determined with reference to any price but the duty is determined by applying a fixed rate to the weight of the rubber produced. This sub-section was not amended in 1960. The main change brought about relates only to the manner of collection of duty. After the amendment of sub-section (2) of Section 12 the duty is to be collected by the Board in accordance with the rules made in this behalf either from the owner of the estate on which the rubber is produced or from the

manufacturer by whom such rubber is used. What is important to note, however, is that the opening words of the sub-section (2) refers to "the duty of excise levied under sub-section (1) [emphasis added]. These words clearly provide that the levy of excise duty is not under sub-section (2) but is under sub-section (1) of Section 12. It is the duty which is statutorily levied under sub-section (1) on the rubber produced which is to be collected, under sub-section (2), in the manner provided by the rules.

By reason of Section 12 (1) of the Rubber Act a cess at the rate prescribed is statutorily levied on the rubber so produced and the liability to pay the said amount of cess gets attached to the rubber so produced. If the rules do not provide for the excise duty to be paid by the producer then whoever purchases the said rubber would be purchasing goods to which is attached the liability of payment of duty. In other words, the duty element would be inherent in the price which is paid for the purchase of the said goods. The duty of excise is one which is directly relatable to the production or manufacture of goods but can be collected at a latter stage is now no longer open to doubt in view of several decisions of this Court some of which are R.C. Jall Vs. Union of India (AIR 1962 Sc 1281), Guruswamy and Co. Vs. State of Mysore [(1967) 1 SCR 548], Jullundur Rubber Goods Manufacturers' Association Vs. Union of India (AIR 1970 SC 1589, A.B. Abdul Kadir Vs. State of Kerala [(1976) 2 SCR 690] and McDowell and company Ltd. Vs. Commercial Tax Officer {91985) 59 STC 277 SC].

In an effort to show that the Rubber Act and the Rules framed thereunder provide that the liability to pay the cess arises only when the manufacturer uses the rubber and that the liability was not of the producer and, therefore, cess could not form part of the purchase turnover, reliance was placed on the decision of this Court in Jullundur Rubber Goods Manufacturers' Association Vs. Union of India [(1970) 2 S.C.R. 68], wherein after referring to Rules 33 (e), 33A, 33B and 33D (1), this Court had observed at page 79 as follows:-

"Now the above Rule seems to contemplate the filing of return both by the owners of rubber estates and manufacturers. But under Rule 33D the demand notice can be sent only to a manufacturer on receipt of which the must make payment to the Board of the amounts specified therein. On his failure to make such payment the Board can take steps for recovery of the amounts due as arrears of land revenue by reporting to the Central Government or the State Government as the case may be. There is no such procedure prescribed with regard to owners of estates. It would follow that under the rules the demand notice is to be sent only to the manufacturers and the amounts of duty are to be realised from them alone. The substantive provisions of sub rules (4), (5) and (6) of Section 12 also contemplate assessment being made with regard to the returns to be furnished by owners and

manufacturers. Any person aggrieved by an assessment has been given the right of appeal to the District judge. But as pointed out earlier, there is no provision either in the statute or in the rules for a demand to be made and a coercive process to be employed in the event of failure to make the payment. That is done by Rule 33D alone from which it would be manufacturers who are liable to pay the amount of duty. The rules can, therefore, be said to make a definite provision with regard to the category of persons from whom the collection of the duty is to be made, namely, the manufacturers."

From the above the learned counsel contended that this Court had clearly held that the statutory liability for payment of cess was on the manufacturer alone who would be paying the same directly to the Central Government and/or the Rubber Board. It was submitted that no part of this amount which is directly paid by the manufacturer to a person other than the grower of rubber in fulfilment of its own statutory liability could form part of the sale price which a manufacturer has to pay.

In our opinion the aforesaid decision does not lead to the inference which the dealers are seeking to derive. In Jullundur Rubber Goods manufacturers' Association case (supra) the challenge was to the amended provisions of the Rubber Act, 1947 whereby Section 12(2) was amended giving the discretion to the Rubber Board to frame rules for the purpose of providing whether to collect the cess from the consumer or the manufacturer. Three contentions had been raised before the Court and they were as follows:-

"The contentions which have been raised are: (1) the duty sought to be imposed under s.12 as amended being outside the ambit of Entry 84 of List I in the Seventh Schedule to the Constitution is beyond the legislative competence of the Parliament; (2) Section 12(2) suffers from the vice of excessive delegation. It confers uncontrolled and unrestricted discretion upon the Rubber Board to levy upon and collect duty of excise from either the owners of the rubber producing estates or the users so called manufacturers (of rubber) without specifying the circumstances under which it should be imposed upon the one or the other nor has any guiding policy of principle been laid down in the Act for making a choice. (3) In any case, the Rules which have been framed do not satisfy the provisions of s. 12(2) of the Act and do not indicate with sufficient clarity and precision on whom the levy is to be made and from whom the duty is to be collected as between the owners of

the estates and the manufacturers." While dealing with the said three contentions this Court upheld the validity of Section 12 (2) and in support of contention (1) it has been argued that once the incidence of tax was shifted to the user by reason of Section 12 (2), the tax would cease to be one which will fall within entry 84. This contention was repelled with the Court observing at page 73 as follows:

The above statement of law in no way support the argument that the excise duty cannot be collected from persons who are neither producers nor manufacturers. Its incidence certainly falls directly on the production of manufacture of goods but the method of collection will not affect the essence of the duty. In our opinion sub-section (2) of s.12 provided for the method of collection as the excise duty can be collected either from the producers or from the manufacturers as defined by the Act which would include members of the appellant association who use rubber in the manufacture of chappals."

Having categorically come to the conclusion that the Incidence of cess falls directly on the production or manufacture of the goods while dealing with the third contention relating to the interpretation of the rules the Court observed that the rules did make a definite provision with regard to the category of persons from whom the collection of duty was to be made. When this Court observed that under the rules it is only the manufacturers who are liable to pay the amount of duty, it was referring only to the persons or the stage at which the duty which is levied under Section 12(1), is to be collected. In other words, the rules state as to who was to discharge the liability of cess imposed under Section 12 (1) by payment of the amount of duty.

It was also contended by mr. Harish N.Salve, learned senior counsel appearing for the dealers, that the manner in which the consideration has been made and the components thereof do not matter and any payment made directly or indirectly by the buyer to the seller, including any sum paid by the buyer for and on behalf of the seller, would be includible in the turnover as long as the same is paid as a term of the contract of sale. It is the aggregate of the sums paid by the buyer to the seller "including payment made on his behalf", which would constitute a part of the turnover of the buyer for levy of purchase tax. It was further submitted that the right of the seller to recover the said amount must flow from a contract to sell the goods. If, however, the seller has any statutory right to pass on any burden of any charge or levy to the buyer, then such a sum is not a part of his turnover. In this connection reliance was placed on Anand Swarup Mahesh Kumar Vs. The Commissioner of Sales Tax ([1981] 1 S.C.R. 707). In this question arose whether payment of this fee could be included in the turnover of producers for assessment of sales tax under the Act. Anand Swarup's case (supra) was considered and distinguished by a Constitution Bench of this Court in McDowell & Company Ltd. Vs. Commercial Tax Officer ([1985] 59 STC 277). The decision in McDowell's case (supra) clearly supports the submissions urged on behalf of the appellant.

In McDowell's case excise duty on sale of liquor was payable by the appellant - manufacturer. The appellant sold the liquor to buyers who themselves paid the excise duty directly but the department sought to include the amount representing the excise duty paid by the buyer as a part of the appellant's turnover for the purpose of levy of sales tax. Referring to the earlier decisions of this Court, it was observed that "the incidence of excise duty was directly relatable to manufacturer but its collection can be deferred to a latter stage as a measure of convenience." It was accordingly held that the excise duty paid by the buyer would be regarded as part of the consideration for the sale and includible in the taxable turnover. Anand Swarup's decision was distinguished by this Court in the following words:

"Mr. Sorabji in the course of his submission relied on a Division Bench decision of this Court in Anand Swarup Mahesh Kumar V. Commissioner of Sales Tax (1980) 46 STC 477 (SC); 1981 1 SCR 707. This Court was considering the liability for sales tax under the corresponding U.P. Act in respect of a dealer carrying on business at Mandi Anandganj, Baraut in the District of Meerut. The sales tax authorities had included in the dealer's purchase turnover "market fee" and the commission payable to the commission agent operation within the market area for the purpose of computing sales tax. The decision turned on the definition of "turnover of purchase" in the U.P. Act and the provision of the Adhiniyam and the Rules made thereunder. Market fee and commission payable to an agent are very different from excise duty and a very different position emerges in law in regard to them. No support is available from that occasion for the appellants case. We would like to point out that the relevant consideration is not whether the law permits the incidence of the duty to the duty to be passed on to the purchaser but whether there is a prohibition against the passing of it. If there is no bar, the incidence would be passed on to the purchaser in accordance with normal commercial practice.

On behalf of the dealers it was also contended that though Section 12 (2) postulates that the cess can be collected either from the owner of the estate of manufacturer, it can, in no circumstances, be collected from the dealer from whom the manufacturers purchase raw rubber. Therefore, it was submitted, that the sale price to the licensed dealer is wholly independent of the cess paid by the manufacturer on his own account to the Central Government. In our opinion, there is an inherent fallacy in this contention. As we have already noted, and this is

apparent from the reading of Section 12(1) and (2), the incidence of the duty arises the moment the rubber is produced. On the rubber so produced duty at a specified rate becomes payable. When the producer sells the said rubber to a licensed dealer it would be legitimate to infer that in determining the amount of price payable the incidence of the cess would be taken into account. What is purchased by the licensed dealers is rubber to which is attached a charge of cess payable at the prescribed rate. Even though the rubber Act and the Rules framed thereunder do not contemplate that the licensed dealer has to pay the cess, nevertheless because the goods are not to be used by the licensed dealer but have ultimately to be used by the manufacturer, therefore, the transfer of the goods by the dealer to the manufacturer would occasion the realisation of the cess by the department from the manufacturer. The cess which will be so realised is the one which stood imposed by the provisions of the statute itself, viz., Section 12 (1), at the time when the rubber was produced and before it was purchased by the dealers or manufacturers.

It is no doubt true that Section 12 (1) does not specifically state that the taxable person is a producer or the grower of the rubber. It is, however, not possible to accept the contention that the rules alone are to be looked at in order to fix the liability of payment of cess. Section 12 (1) and 12(2) have to be read together. Excise duty being a levy on the manufacture or production of goods could ordinarily have been collected at the stage itself. This was, in fact, the position prior to the amendment of Section 12 (2) in 1960. Section 12 (2) after amendment makes it very clear that the levy of cess is under sub-section (1) Section 12 and not under sub-section (2). It is only with regard to the collection of the cess that an option is given to collect the same either from the producer or the manufacturer. A charge under a taxing statute can only under the Act and not under the Rules. The rules normally provide for the procedure to be followed for the realisation of the statutory dues. It is in this context that sub-section (2) enables the framing of the rules whereby the duty instead of being realised from the producer is realised at a latter stage, namely, from the manufacturer. Once the liability of payment of cess has got attached to the rubber when manufactured and that duty is ultimately paid by the end user, namely, the manufacturer, it would be implicit that the element of the cess payable would be one of the factors in determining the price payable in respect thereof.

The aforesaid analysis is also supported by a recent decision of this Court in the case of Mohan Breweries a Distilleries Ltd. Vs. Commissioner Tax Officer, Madras and Ors. [JT 1997 (8) 36]. In that case liquor was manufactured by the appellants. According to Section 18 B of the Tamil Nadu prohibition Act, 1937 excise duty at a specified rate was leviable on all excisable items manufactured under any licence granted under the Act. Section 18 C provided that the excise duty under Section 18B could be paid in one or more of the ways provided under Section 18C. Rule 22 of the TNIMFL Rules, 1981 provided that the excise duty shall be paid by the person who removes the goods from a manufactory. Sub-rule (2) of Rule 22 further provided that a vend fee of rupees two per bulk litre shall be paid by the licensee on all stocks of Indian-made Foreign Spirit issued from the manufacturer. Rule 15 (1) of the Tamil Nadu Indian-made Foreign Spirits (supply by wholesale) Rules, 1981 required the licensee, namely, the wholesaler to pay the excise duty on removal of the stock by him. The contention which was

raised by the manufacturer was that in view of the provisions of the Act and the said Rules, the liability to pay the excise duty lay not upon the manufacturer but upon the wholesaler, who was the licensee who was required to pay under the aforesaid Rule 15 (1) of the Tamil Nadu Indian-made Foreign Spirits (supply by wholesale) Rules, 1981. In this connection it was submitted that the manufacturer neither collected the excise duty from the wholesaler nor had they statutory or contractual authority to realise the same from it and, therefore, the manufacturers were not liable to pay sales tax on the excise duty which was neither part of the sale price nor a consideration for the sale. Repelling this contention it was held that excise duty was levied upon the goods manufactured, though its collection may be deferred to such latter stage as was administratively or otherwise most convenient. After referring to as case in Union of India Vs. Bombay Tyre International Ltd. and Ors. [1984 (1) SCC 467], it was observed that the method of collection did not affect the essence of duty but only related to the machinery of collection for administrative convenience. Dealing with Rule 22 and its effect, it was observed that "as we look at it, the primary obligations to pay excise duty on the IMFL is of the manufacturer thereof. Rule 22 only provides for a convenient method for its collection. When the excise duty is collected from a party removing the IMFL from the factory its producer, other than the manufacturer, the payment of excise duty is in discharge of the obligation of the manufacturer. That party does not, as it would ordinarily do, pay the excise duty component along with the sale price of the IMFL it purchases from the manufacturer; it pays the sale price to the manufacturer and it pays the excise duty into the Treasury for and on behalf of the manufacturer. In effect, therefore, the element of excise duty does enter into the turnover of the manufacturer just as much as it would ordinarily do. The definition of "turnover" in Section 2 (r) of the Sales Tax Act, referring as it does to "the aggregate amount for which goods are bought or sold" and "whether for cash or ...other valuable consideration", is wide enough to cover such excise duty. That the excise duty does not physically enter the manufacturer's till is, as held in the second Mc Dowell case, not the decisive test for determining whether or not it would be a part of the manufacturer's turnover."

In our opinion the aforesaid decision is clearly applicable to the present case. Like the Mohan Breweries case the excise duty under Section 12 (1) is levied on the production or manufacture of rubber at the rate specified thereunder. It is only by Rule 33 (1) similar to Rule 22 of TNIMFL that the cess had to be paid at a stage subsequent to the production. Merely because for the sake of convenience the excise duty, which would essentially be payable at the time of production of rubber is realised at a latter point of time it cannot mean that the excise duty, in the form of cess, was not part of the sales turnover of the producer and correspondingly, be the purchase turnover of the purchaser of rubber.

In our opinion, therefore, the incidence of duty is directly relatable to the production of rubber. The character of levy is not altered merely because the payment of duty is deferred till the purchase of the rubber by the manufacturer. The character of levy is on the production of the rubber and the duty paid should, therefore, be deemed to be part of the price that the producer had paid for the goods purchased. Neither a provision for deferred payment nor the liability case on the manufacturer of rubber goods

for payment of the duty to facilitate easy collection, can alter the duty as being one on the production of rubber as provided by Section 12 (1) of the Rubber Act and such duty even though paid later, will be a part of the price of goods purchased and would, therefore, form part of the producers turnover.

For the aforesaid reasons these appeals are allowed and the judgment under appeal is set aside and the decision of the Sales Tax Authorities restored. There will be no order as to costs.

JUDIS