***IN THE HIGH COURT OF JUDICATURE AT BOMBAY***
***CIVIL APPELLATE JURISDICTION***

***WRIT PETITION NO. 817 OF 2006***

Aditya Birla Fashion & Retail Limited ]
a company incorporated under the ]
Companies Act having its registered ]
office at 7th Floor, Skyling Icon Business ]
Park, 86-92, Off A.K. Road, Marol ]
Village, Andheri (E), Mumbai – 400059 ] ... Petitioners

Versus

1 The Union of India, through the ]
Secretary, Ministry of Finance ]
Department of Revenue, Aayakar ]
Bhavan, M.K. Road, Churchgate, ]
Mumbai – 400 020. ]

2 Textile Committee Cess Appellate ]
Tribunal (TCCAT) through the ]
Registrar, at 4th Floor, New CGO ]
Building, New Marine Lines, ]
Mumbai – 400 020. ]

3 Assessing Officer, Textile Committee ]
Raj Chambers, 978-A, Coimbatore - ]
641 002. ] ... Respondents

Mr. S. Sridharan, senior counsel with Mr. Jas Sanghvi i/b PDS Legal for the Petitioner.

Mr. L.S. Shetty with Mr. M.M. Nair i/b M/s. L.S. Shetty and Associates for the Respondent Nos.2 and 3.

Ms. Rutuja Ambekar for the Respondent No.1 – Union of India.

***<u>CORAM : S.C. DHARMADHIKARI &</u>***
***<u>PRAKASH D. NAIK, JJ.</u>***

***<u>THURSDAY, 21ST SEPTEMBER, 2017</u>***

***<u>ORAL JUDGMENT :</u>*** *[Per S.C. Dharmadhikari, J.]*

1 Leave to amend. Amendment to be carried out forthwith.

2 By this writ petition under Article 226 of the Constitution of India, the petitioners pray for a writ of certiorari or any other writ, order or direction in the nature thereof to call for the records pertaining to their case and after scrutinizing the impugned order as to its legality and validity, to quash and set aside the same.

3 The facts lie in a very narrow compass. The petitioners before us are a public limited company registered under the Companies Act, 1956, and the respondents are the Union of India, the Textile Committee Cess Appellate Tribunal and the Assessing Officer of the Textile Committee.

4 The petitioners were earlier known as M/s. Indian Rayon & Industries Limited. The Division of the petitioners= company, namely, "Madurai Garments" was earlier belonging to M/s. Coats Viyella India Limited. M/s. Indian Rayon & Industries Limited purchased this Division from M/s. Coats Viyella India Limited and now that entity is known as Aditya Birla Nuvo Limited. Aditya Birla Nuvo Limited was demerged and the same was merged with Pantaloons Fashion & Retail. Subsequently, Pantaloons Fashion & Retail has changed its name to Aditya Birla Fashion & Retail Limited.

5 There is a Textile Committee Act, 1963, and there have been Rules made thereunder.

6 On 27th January, 1994, the petitioners were asked to submit returns to the Assessing Officer, Textile Committee and pay the applicable textile cess. The petitioners were informed in terms of section 5A of the Textile Committee Act,1963 (for short TC Act) that cess on textiles and textile machinery manufactured in India is leviable. It should be levied and collected as a duty of excise on all textiles and on all textile machinery manufactured

in India at such rate, not exceeding one per cent ad valorem as the Central Government may, by Notification in the Official Gazette. That duty has to be collected by the Committee in accordance with the Rules made in that behalf from every manufacturer of textile or textile machinery. The petitioners pointed out that the Act and the Rules may not define the term "manufacturer", but this concept has to be understood in the context of the Central Excise and Salt Act, 1944. The petitioners point out that they are engaged in the supply of fabrics purchased from the market to the various independent job workers who manufacture garments as per the specifications provided by the petitioners and thereafter petitioners sell these garments. The fabrics are purchased from the market, supplied to various independent manufacturers who manufacture the garment for the petitioners and for which the petitioners make payment. However, the specifications are given and provided by the petitioners to these job workers, but the petitioners have no control over their manufacturing activities. The garments manufactured are returned to the petitioners and later on sold by the petitioners in their brand name.

7 Having explained all this in detail and specifically alleging that the job workers are independent manufacturers, the petitioners expected the authorities to accept their version contained in their communication dated 24th February, 1994 (Annexure-D).

8 However, there was further correspondence and eventually a letter was addressed (Annexure-E) by which the petitioners apprehended measures being taken to recover the cess. They, therefore, approached the Hon'ble High Court of Karnataka at Bangalore challenging the said communication dated 6th April, 1994.

9 That writ petition being Writ Petition No.17762 of 1994 was disposed of on 21st February, 1998 by observing that the cess will have to be recovered in accordance with law. The law postulates issuance of a show cause notice, a hearing and thereafter a reasoned order which can be tested in appeal. This being the scheme of the law, the petitioners need not apprehend coercive recovery or recovery by unlawful means.

10 It is in pursuance of this order and direction that a show cause notice was issued to the petitioners dated 24th June, 1999, to which the petitioners replied on 14th July, 1999. The petitioners reiterated some of the contentions which we have noted above.

11 The Assessing Officer, however, disagreed with the petitioners and passed an order dated 7th April, 2000.

12 The petitioners carried the matter in appeal and it was urged that during the course of appeal as well, that there are job workers who are independently manufacturing the garment. It is that garment which is received from the job workers by the petitioners, branded and then sold in the market. However, the Appellate Authority, according to the petitioners, insisted that they must provide all the details and having allegedly failed to point out such details of the job workers and their activities, the order of the Assessing Officer came to be confirmed.

13 It is this order of the Appellate Authority which is challenged before us on various grounds.

14 Mr. Sridharan, learned senior counsel appearing for the petitioners would submit that the show cause notice itself is premised on the fact that the petitioners activities, as enumerated hereinabove, are undisputed. If the show cause notice itself proceeds on this basis that the petitioners have got the fabrics further processed upon by the job workers and it is those job workers who have manufactured the garment, then, it was impermissible for the Assessing Officer to hold that the levy is recoverable from the petitioners. Our attention is specifically invited to the show cause notice and equally a communication preceding the same dated 6th April, 1994. In this communication, according to Mr. Sridharan, the Deputy Chief Inspecting Officer of the Committee has alleged that the garments might have been manufactured through some independent job workers, but that does not mean that the ownership of the material lies with them. Since the garments were manufactured on behalf of the petitioners, on account of the petitioners, their ownership would mean they are liable to pay the cess under the Act. Mr. Sridharan has, therefore, submitted that the whole order must be quashed and set aside if this is how the facts have been appreciated and

understood.

15 Mr. Sridharan has emphasized that the petitioner is a marketing concern. The petitioner does not have a manufacturing set up as far as their branded products. The garments which have been branded by the petitioners and sold in the market have been manufactured by independent manufacturers. The petitioners have absolutely no control over nor supervise their activities.

16 Our attention has been invited to sections 5 and 5A of the Act, Rules 3, 4 and 8 of the Rules so also to the copy of the notice at page 88 of the paper-book. Mr. Sridharan would submit that the show cause notice itself states that the petitioners have been termed as 'manufacturers'. However, that was completely incorrect. If the petitioners' activities have been understood and appreciated by the Committee itself in the communication prior to the issuance of the show cause notice, then, the petitioners could not have been termed as manufacturers. Therefore, the assessment order and equally the appellate order affirming it are vitiated by an error of law, apparent on the face of the record.

The conclusions therein can be safely termed as perverse. The factual conclusions therein are also not supportable by the record. Mr. Sridharan submits that there has never been any suggestion, leave alone a conclusive finding that the arrangement, based on which the petitioners are selling the garments in their brand in the market, is sham and bogus. It is in these circumstances that he would submit that being owner of the goods does not attract levy. The levy is attracted only on the manufacturer and which the petitioners cannot be termed as one. It is in these circumstances that Mr. Sridharan criticizes the appellate order and submits that there was no need to have been critical of the petitioners' conduct during the proceedings. The remarks are not only adverse, but wholly unjustified. In such circumstances, he would submit that the impugned order be quashed and set aside.

17 During the course of arguments, Mr. Sridharan has fairly brought to our notice that the understanding of the levy and its justification by the authorities is based on a Division Bench judgment rendered by the Delhi High Court. Mr. Sridharan submits that the assessment order concludes that the

definition of the term “manufacturer” in section 2 clause (f) of the Central Excise Act, 1944, has no application to the Textile Committee Act, 1963. That is even reiterated in the affidavit-in-reply filed by the Assessing Authority before the Tribunal. Later on, the respondents have changed their version and relied upon this definition. However, they realised that when they rely upon this definition, there must be a factual backing so as to not only allege, but establish and prove that the petitioner is a manufacturer. That was hopelessly lacking. The decision of the Delhi High Court was based solely on the definition of these terms. The decision is otherwise distinguishable. That was a case of a public notice issued to manufacturer-exporter to pay the cess under the TC Act. That public notice was challenged on the ground that no cess can be levied on textiles manufactured from out of a handloom and powerloom industry. The Delhi High Court held that the garments exported or manufactured from out of a handloom /powerloom industry is merely a version and that has to be established and proved. In such circumstances, the garments will not be exempt from levy of cess under the proviso to section 5A(1) as the finished garments cannot be said to be textiles manufactured from out of handloon / powerloom industry.

18 Then, the argument was of double taxation in the sense that a basic duty is levied on imported silk materials under the Customs Act, 1962, at the stage of import itself. Therefore, no further cess can be levied under the Act in respect of the goods manufactured out of the same imported silk and that would be a double taxation.

19 Mr. Sridharan would submit that the above two submissions or contentions of the petitioners before the Delhi High Court have been rightly rejected by the Court. That is not an issue relevant for us. The third ground was that a duty of excise can be collected only from the manufacturer of textiles and not from an exporter. Once the registration of those petitioners before the Delhi High Court was as manufacturers-cum-exporters of readymade garments, then, they could not have argued on these lines.

20 Mr. Sridharan would submit that the paragraphs of the judgment heavily relied upon before us by Mr. Shetty

appearing for the Revenue and equally by the Appellate Authority in the impugned order, with greatest respect, does not take into account the binding judgments of the Hon'ble Supreme Court. In that regard, he would invite our attention to the series of judgments rendered on section 2 clause (f) of the Central Excise Act, 1944, by the Hon'ble Supreme Court.

21 Then, Mr. Sridharan would submit that there is no allegation that the job work arrangement in the case of the petitioners is tainted or can be termed as an agency or principal – agent relationship. On the other hand, the show cause notice itself is based on the understanding that the relationship is on principal to principal basis.

22 It is in these circumstances that once the show cause notice itself styles the petitioner as owners of the garments and not manufacturers, the entire proceedings are without jurisdiction and *ab initio* void.

23 Similarly, our attention was also invited to the fact that those job workers/manufacturers having not been proceeded

against or proceeded against, but no recovery possible therefrom means the petitioner becomes liable for the levy is the other incorrect understanding of the levy. Therefore, Mr. Sridharan would submit that looked at from any angle, the levy is not imposable and recoverable. Consequently, on this short ground alone, the orders be quashed and set aside.

24 Alternatively and without prejudice to the above, Mr. Sridharan would submit that the demand in this case is barred by the law of limitation. The proceedings were initiated by the Committee in 1994 seeking to impose cess from 1st April, 1975 onwards. The demand raised by the show cause notice dated 26th June, 1999, is for the period 1981-1982 till 1998-1999. It is erroneousy held by the authorities that no period of limitation is applicable and the proceedings could have been initiated any time. However, that is not a correct understanding of the law and there is always a reasonable period presumed for initiation of the proceedings. If the proceedings are not initiated in a reasonable time, then, the demand of this nature is hit by delay and laches.

25 Further, alternatively and without prejudice, the

argument is that no assessment can be based on sales tax returns. By its very nature the sales tax is a tax on sale of goods. The assessment of sales tax and the records pertaining thereto can never be of any assistance so as to impose and calculate the cess under the TC Act. In such circumstances, even on this count, according to him, the demand cannot be sustained. Mr. Sridharan would submit, therefore, that the writ petition be allowed.

26 Mr. Sridharan places reliance on the following judgments :

*(i) Nath Bros. Exim International Ltd. vs. UOI AIR 1997 DELHI 383.*

*(ii) Ujagar Prints Etc. Etc. vs. UOI & Ors 1989 (39) ELT 493 (SC).*

*(iii) CCE vs. M.M/Khambatwala1996 (89) ELT 22(SC).*

27 On the other hand, Mr. Shetty appearing on behalf of the respondents would submit that the issue raised in the writ petition is squarely covered by a judgment of this Court in the case of *J.K. (Bombay) Limited vs. Union of India & Ors. Writ Petition No. 160 of 1995* decided on 7th August, 2001. The

controversy is identical to that dealt with in this judgment and Mr. Shetty would rely upon the observations and conclusions therein.

28 He also relies upon the judgment of the Delhi High Court in the case of *M/s. Nath Bros. Exim International Ltd. vs. Union of India* reported in *AIR 1997 383*, which has been followed and applied by this Court in the above judgments.

29 Mr. Shetty then points out as to how the levy has been understood and explained and there is no basis for accepting the arguments of Mr. Sridharan in that regard. The levy has been understood to be a levy on manufacture of textiles and textile machinery. However, there may be a few articles of textiles manufactured by parties on job work basis. If the article is liable to cess, then cess should be paid jointly and severally by the job workers or the supplier of raw material on the value of the product manufactured. Therefore, a simultaneous or joint proceeding against both is permissible and when there is an arrangement which is clearly demonstrating that the petitioners and parties like them were the manufacturers, then, appropriate

apportionment can be also made.

30 Mr. Shetty, therefore, would submit that the writ petition has no substance and ought to be dismissed with costs.

31 For properly appreciating these contentions, we would have to make a reference to the Act and the Rules.

32 As is evident, the Act is enacted by the Parliament on 3rd December, 1963. The Act contains definitions in section 2. The term "Committee" is defined in section 2 clause (b) to mean the committee established under section 3. The words "handloom industries", "power loom" and "power loom industry" are defined in section 2 clauses (ca), (da) and (db). The word "textile machinery" is defined in section 2 clause (f) to mean an equipment employed directly or indirectly for the processing of textile fibre into yarn and for the manufacture of fabric therefrom by weaving or knitting and includes equipment used either wholly or partly for the finishing, folding or packing of textiles. The word "textile" is defined in section 2 clause (g) to mean any fabric or cloth or yarn or garment any other article

made wholly or in part of cotton or wool or silk or artificial silk or other fibre, and includes fibre.

33 Section 3 envisages establishment of the Textile Committee which shall be a body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of property and to contract and may, by that name, sue or be sued. It is to be established by the Central Government and its head office shall be in Bombay. The functions of the Committee are set out in section 4 which reads thus :

> *"**4. Functions of the Committee.** (1) Subject to the provisions of this Act, the functions of the Committee shall generally be to ensure by such measures, as it thinks fit, standard qualities of textiles both for internal marketing and export purposes and the manufacture and use of standard type of textile machinery.*
>
> *(2) Without prejudice to the generality of the provisions of sub-section (1), the Committee may –*
>
> *(a) undertake, assist and encourage, scientific, technological and economic research in textile industry and textile machinery;*

*(b) promote export of textiles and textile machinery and carry on propaganda for that purpose;*

*(c) establish or adopt or recognise standard specifications for –*

*(i) textiles, and*

*(ii) packing materials used in the packing of textiles or textile machinery, for the purposes of export and for internal consumption and affix suitable marks on such standardized varieties of textiles and packing materials;*

*(d) specify the type of quality control or inspection which will be applied to textiles or textile machinery;*

*(da) provide for training in the techniques of quality control to be applied to textiles or textile machinery;*

*(e) provide for the inspection and examination of –*

*(i) textiles;*

*(ii) textile machinery at any stage of manufacture and also while it is in use at mill-heads;*

*(iii) packing materials used in the packing of textiles or textile machinery;*

> *(f) establish laboratories and test houses for the testing of textiles;*
>
> *(g) provide for testing textiles and textile machinery in laboratories and test houses other than those established under clause (f);*
>
> *(h) collect statistics for any of the above mentioned purposes from –*
>
> *(i) manufacturers of, and dealers in, textiles;*
> *(ii) manufacturers of textile machinery; and*
> *(iii) such other persons as may be prescribed;*
>
> *(i) advise on all matters relating to the development of textile industry and the production of textile machinery;*
>
> *(j) provide for such other matters as may be prescribed.*
>
> *(3) In the discharge of its functions, the Committee shall be bound by such directions as the Central Government may, for reasons to be stated in writing, give to it from time to time."*

34 A perusal of this section would indicate that by sub-section (1), subject to the provisions of this Act, the functions of

the Committee shall generally be to ensure by such measures, as it thinks fit, standard qualities of textiles both for internal marketing and export purposes and the manufacture and use of standard type of textile machinery. The whole emphasis appears, therefore, to be on empowering the committee to exercise all such powers as may be necessary and expedient for the purpose of carrying out its functions under the Act. The Committee can collect statistics for any of the purposes mentioned in section 4 from manufacturers and dealers in textiles and manufacturers of textile machinery and such other persons as may be prescribed. Then comes section 5A which reads as under :

> ***"5A. Imposition of cess on textiles and textile machinery manufactured in India.*** *(1) There shall be levied and collected as a cess for the purposes of this Act, a duty of excise on all textiles and on all textile machinery manufactured in India at such rate, not exceeding one per cent. ad valorem as the Central Government may, by notification in the Official Gazette, fix:*
>
> *Provided that no such cess shall be levied on textiles manufactured from out of handloom or powerloom industry.*
>
> *(2) The duty of excise levied under sub-section (1) shall be in addition to any cess or duty leviable on*

*textiles or textile machinery under any other law for the time being in force.*

*(3) The duty of excise levied under sub-section (1) shall be collected by the Committee, in accordance with the rules made in this behalf, from every manufacturer of textiles or textile machinery (hereinafter in this section and in sections 5C and 5D referred to as the manufacturer).*

*(4) The manufacturer shall pay to the Committee the amount of the duty of excise levied under sub-section (1) within one month from the date on which he receives a notice of demand therefor, from the Committee.*

*(5) For the purpose of enabling the Committee to assess the amount of the duty of excise levied under sub-section (1), -*

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

*(b) every manufacturer shall furnish to the Committee a return, not later than fifteen days after the expiry of the period to which the return relates, specifying the total quantity of textiles or textile machinery manufactured by him during the said period and such other particulars as may be*

*prescribed."*

35 Thus, there shall be levied and collected a cess for the purposes of the TC Act, a duty of excise on all textiles and on all textile machinery manufactured in India. Sub-section (3) of section 5A says that the duty of excise levied under sub-section (1) shall be collected in accordance with the rules made in this behalf, from every manufacturer of textiles or textile machinery. Once it is conceded before us that this duty of excise levied under sub-section (1) of section 5A of the TC Act is in addition to any fees and duty leviable on textiles or textile machinery under any other law for the time being in force, then, there is no double taxation.

36 However, what is running throughout the section 5A and prior sections together with the sub-sections thereof so also the Act as a whole is a common thread, namely, that this duty shall be levied and collected as a cess and as a duty of excise on all textiles and on all textile machinery manufactured in India. It is the manufacturer who shall pay to the Committee the amount of duty of excise levied under section 5A(1) within one month

from the date he receives a notice of demand therefor from the Committee. It is the Committee, therefore, which is empowered to call for the returns from every manufacturer if it feels to do so and, therefore, sections 5B and 5C would denote that every authority set up and established under the TC Act so as to levy assess and recover the cess has to bear in mind that the recovery of duty of excise is from the manufacturer and if he fails to pay, then, that can be recovered from him in accordance with law. It is a very short but precise enactment and containing few sections, out of which we have referred to the material ones. It is not necessary for us, therefore, to then refer to all other provisions for what we have understood this levy to mean being in addition to the excise duty payable on manufacture of goods and in this case textiles.

37 By section 20, there is a power to make rules and the rules have been made. By section 22, there is a power conferred in the Central Government to make rules and, *inter alia*, in the manner in which the duty of excise leviable under section 5A may be assessed, paid or collected and the manner in which any refund of such duty paid or collected in excess of the amount due,

may be made.

38 In accordance with this power flowing from the Act, Textile Committee (Cess) Rules have been made and duly notified on 31st March, 1975. In Rule 2(e) the term "manufacturer" is defined to mean the manufacturer referred to in sub-section (3) of section 5A. Maintenance of Register is contemplated by Rule 3 and that is the obligation of every manufacturer of textiles and textile machinery. Submission of monthly returns is contemplated by Rule 4 and the revision of returns by Rule 5. Rule 6 empowers an Assessing Officer to assess the amount of the cess payable by each manufacturer for each quarter on the basis of the data furnished in monthly returns referred to in Rule 4. Then, Rule 7 enables issuance of notice of demand to the manufacturer for payment of cess under Rule 6.

39 The assessment is contemplated in terms of Rule 8 which reads as under :

> *"8. **Assessment when return is not furnished or furnished incorrectly etc.-** If any manufacturer fails to furnish the return referred to in rule 4 within the period specified therein, or*

> *furnishes a return which the Committee has reason to believe is incorrect or defective, the Assessing Officer may, after giving the manufacturer an opportunity of being heard, assess the amount of cess on the basis of figures obtained from the Central Excise Department or on the basis of the average of the cess levied during the previous two quarters immediately proceeding the quarters for which assessment is being made.*

40 Mr. Shetty heavily relied on the object of the TC Act to submit that is laudable and we must give a meaning to the words and expressions consistent with it. In that regard, he relied upon the judgment of the Hon'ble Supreme Court in the case of *The Sirsilk Ltd. & Ors. vs. The Textiles Committee & Ors.* reported in *AIR 1989 SC 317*. He would submit that the following paragraphs of this judgment are relevant :

> *"10 In order to appreciate the rival contentions, it is necessary to set out the background in which the Textiles Committee was constituted, the object and purpose of the Textiles Committee Act as also the relevant provisions of the said Act and the Rules made thereunder. The history of the legislation has been set out in the counter-affidavit filed on behalf of the Textiles Committee and is as follows.*
>
> *11 The Second world war gave a completely*

*sheltered market for Indian Textiles and created an unprecedented boom for their products. They were, however, for a variety of reasons, unable to withstand the severe international competition they had to face in foreign markets with the return of normal conditions after the war. Alive to the various problems faced by the Textile Industry in general and the Cotton Textile Industry in particular, the Government of India took timely steps to arrest the crisis by adopting various measures to safeguard production and export of cotton textiles and to assure the efficiency of the Cotton Textile Industry. It was in this context that the Cotton Textiles Fund Ordinance, 1944' was promulgated, establishing a `Fund' for supervising the exports of cloth and yarn and for development of technical education, research and other matters in relation to the Cotton Textile Industry. The Cotton Textiles Fund Committee which was appointed as the body to perform the various functions imposed under the Ordinance did very useful work during the period from 1945 to 1964 for the improvement of the said industry and so as to enable it to meet the competition of foreign textiles in international market. The Ordinance, promulgated in 1944 establishing the Cotton Textiles Fund Committee, had provisions to safeguard exports of Cotton Textiles only. As more and more items of textiles such as wool. silk, art silk and other man-made fibre fabrics and yarn started finding their way into the international market in increasing quantities.*

*it became necessary for the Government of India to create a homo- genous entity to look after and promote the improvement and safeguard for all such textile items. It was also necessary to take such step in the case of these schemes of the Textile Industry both for improving standards in such industry and because the same were in many ways connected and inter-related with the Textile Industry. Such action and inter-relation arose because of the nature of the commodities and because in many cases composite fibres and textiles were produced and many units engaged in production of such synthetics and other materials were also engaged in the Cotton Textile Industry.*

*12 Parliament accordingly enacted the Textiles Committee Act (hereinafter referred to as `the Act') which received the assent of the President on December 3, 1963. It was PG NO 890 meant to re-enact the provisions of the aforesaid Ordinance and to make the same applicable to all textiles including all synthetic fibres i.e. rayon yarn, staple fibre, nylon yarn, man-made fibre commonly known as artificial silk.*

*13 The avowed object and purpose of the Act, as reflected in the long title, is to provide for the establishment of a Committee for ensuring the. quality of textiles and textile machinery and for matters connected therewith. S. 2(f) of the Act* *defines `textile machinery' to mean the equipment employed directly or indirectly for the processing of textile fibre into yarn and for the manufacture of fabric therefrom by weaving or knitting and to include equipment used either wholly or partly for the finishing, folding or packing of textiles.*

*... ... ... ...*

*29 For all these reasons the contention that rayon yarn and nylon yarn manufactured by the appellants and the petitioners are made wholly of filaments and not of fibres and therefore did not come within the purview of textiles as defined in S. 2(g) of the Act prior to its amendment and therefore they were not liable for payment of the fee levied under r. 21 of the Rules, cannot prevail.*

*30 The various activities undertaken by the Textiles Committee for the development of the textile industry and the promotion of textile exports which have expanded considerably, and the duties entrusted to the Committee to ensure the quality of all textiles whether made wholly or partly of cotton wool, silk, artificial fibre or silk, particularly when Indian Textiles by and large and artificial silk or man-made fibres like rayon yarn, viscose staple fibres and nylon yarn as well as fabrics made of artificial silk, are facing ever increasing competition in PG NO 906 the international market from other exporting countries like Japan, China etc. and the production* *and export of textiles having substantially increased, the legislature thought it necessary to make adequate provision and accordingly created a Textiles Fund under S. 7 of the Act to meet the expenditure of the Textiles Committee which necessarily has to be on a larger scale. At the time when the Textiles Committee was established under S. 3, the legislature accordingly provided for the establishment of a Textiles Fund constituted under S. 7 of the Act from out of which the expenditure of the Committee has to be defrayed. Sub-s. (1) of S. 7 provides that the Committee shall have a Fund to be called the Textiles Fund and there shall be credited thereto various items specified in cls. (a) to (d), apart from all the moneys standing to the credit of the Cotton Textiles Fund established under the repealed Ordinance, immediately before the date on which the Textiles Committee came to be established, which by virtue of S. 24(2)(a) stood transferred to and formed part of the Textiles Fund, and such sums of money as the Central Government after due appropriation made by Parliament in that behalf, pays to the Committee in each financial year by way of grant, loan or otherwise for purposes of enabling the Committee to discharge its functions under the Act. There are only two other sources of income. One of the main sources of revenue, as indicated in cl. (c), is the income derived from the levy of the fee under r. 21 of the Rules, and the other that indicated in cl. (d) viz. all moneys received by the Committee by way of grant, gift,*

> *donation, contribution, transfer or otherwise. After the imposition of the duty of excise as a cess by S. 5A of the Act introduced by Act No. 51/73, the income derived from such cess becomes another source. Sub-s. (2) of S. 7 provides that the moneys in the Fund shall be applied for (a) meeting the pay and allowances of the officers and other employees of the Committee and administrative expenses of the Committee, and (b) carrying out the purposes of the Act. Sub-s. (3) of S. 7 provides that all moneys in the Fund shall be deposited in the State Bank of India or be invested in such securities, as may be approved by the Central Government.*
>
> *31 ... ... ... ... It is not in dispute that the Textiles Committee has over the years built up a huge infrastructure and the Central Government has spent crores of rupees to make the legislation effective and meaningful and to bring about an overall improvement in the quality and standard of the textiles including man-made fibres or artificial silk so that our country may continue to retain its rightful place in the world market in a fiercely competitive international trade."*

41 While it is true that there is a law and arming this Committee with the power to levy, assess and recover the cess, what we find is that preceding the adjudication and the impugned

orders, there was a correspondence. The whole correspondence commenced when the Textile Committee on 27th January, 1994, invited the attention of the petitioners' predecessor in title to the enactment. It also invited the attention of the petitioners predecessor to the definition of the term 'manufacturer' as understood by law and specifically the Committee. It says that the manufacturer includes the person who employ hired labour or who engage in production or manufacture of textile goods on their own account. Then, our attention was invited to the return filed by textile manufacturers and it is alleged that the petitioners have not submitted the required monthly returns from 1st April, 1975 onwards. The petitioners were requested to submit the returns covering the period from April, 1975 or from the date of commencement of the production to the date of issuance of this communication immediately so that the cess amount can be determined. A copy of the balance sheet may be sent in support, in lieu or excise return, namely, RT 12. On receipt of this communication, the petitioners' predecessor clarified that they cannot be construed to be a manufacturer of textiles. It was urged that textiles may include garments, but the petitioners do not manufacture garments. The garments were manufactured by independent manufacturing organizations and these are independent establishments with their own factory sheds, machinery, labour and administrative skills and finance. The petitioners are in no way concerned with any aspect of running these independent units. These manufacturers are paid a fabrication charge for manufacturing garments, which are finalized periodically after appropriate negotiations and are in line with the market rates. The allegation was specifically denied and it was also denied that the manufacturer in this case is not a person employed as hired labour, namely, engaging in production and manufacturing of textile goods on account of the petitioners. Thus, the petitioners throughout clarified that there could be independent manufacturers of garments in the market to whom the petitioners may forward their fabric and it is not to the named or specified job worker and even otherwise this job worker is not an agent, but operating independent and on his own.

42 The definition, therefore, of the term "textiles" was emphasized and equally the Act and the Rules and essentially section 5A thereof. However, the Textile Committee proceeded to assert and as noted above. However, the Committee's opinion

appears to be founded on the communication dated 6th April, 1994, copy of which is at pages 84 and 95 of the paper book. It makes interesting reading :

> *"... ... ... ...*
>
> *As pointed out by you, the garments might have been manufactured through some independent job contractors which does not mean that the ownership o the materials lies with them. Since the garments manufactured on your behalf and on account of enjoyment of ownership the garment material, you are liable to pay the cess to the Textiles Committee as required under the Act. You are therefore requested to submit the returns and pay cess from the date of inception of your firm. In case you require any clarification you may call on the undersigned on any working day between 9:15 a.m. to 5:30 p.m. to clarify any doubt."*

43 When the petitioners predecessor approached the High Court of Karnataka at Bangalore, it was clarified before that Court that there are specific objections and there is a denial of the liability. The levy cannot be thrust upon the petitioners, save and except in accordance with law. It is, therefore, that on 24th June, 1999, the Committee proceeded to issue the show cause notice. Throughout the petitioners were referred to as manufacturers.

44 However, in the reply to show cause notice the petitioners' predecessor asserted that it is not a manufacturer of textiles and hence there cannot be a levy of cess on it. The written submissions and with this common thread flowing through it are on record.

45 What we then find is that the Assessing Officer in the order dated 7th April, 2005, though aware of this stand of the petitioners, proceeded on the footing that as long as the petitioners' predecessor is engaged in the production and sale of garments and the garments so produced are sold, it is immaterial whether the garments are actually manufactured by the independent job workers / contractors. Their engagement by the the petitioners may be strictly for the limited purpose of making garments as per required quality specifications and other requirements, but there is degree of control and supervision, though not limited to the actual production of the garments and that is still being exercised by the petitioners. Therefore, the direction to manufacture a specific quality of garments and issued to these independent job workers was understood as an

arrangement by which the petitioners could be termed as a manufacturer.

46 We do not see any supporting materials for this factual conclusion. If there has to be a finding and conclusion of degree of control and supervision, though not limited to the actual production of the garments, then, the materials in that behalf have to be referred to. One cannot confuse and contradict oneself in appreciating and determining the issue at hand. The conclusion which the Assessing Officer reaches and particularly in paragraph 1(a) is, therefore, not borne out from the record. Thus, the preceding communications set out the case of the Committee and reproduced as above. The show cause notice terms the petitioners "manufacturer" but the assessment order while admitting that the petitioners may not be a manufacturer, then proceeds to hold that the manufacture is on account of the petitioners. The persons who are manufacturing are not termed as job workers and independent, but contractors. What is then held against the petitioners is that the job workers have been engaged by the petitioners strictly for the purpose of making garments as per the required quality specifications and other

requirements of the petitioners. Therefore, there is a degree of control and supervision though not limited to the actual production of garments. The Assessing Officer holds that it is not the case of Madura Garments, the predecessor of the petitioners, that the garments so manufactured by independent job workers / contractors, once they are so manufactured, are directly sold by the job workers/manufacturers and the sale proceeds are appropriated by them. There are no details or factual materials referred to support the finding. Pertinently the petitioners asserted that it is not only one job worker but several parties are undertaking the said job for the petitioners. Thus, the initial duty and obligation of the respondents before seeking to recover the cess from the petitioners has not been discharged. We are, with greatest respect, confused by such an approach. We do not see how the cess can be levied once the petitioners have been marketing the garments manufactured by persons who are styled as job workers merely because the manufacturers/job workers do not sell the product manufactured themselves in the market. This understanding, according to the Assessing Officer, shows that the petitioners being the sellers of the garments manufactured by these persons, means the petitioners themselves can be termed as manufacturers of textiles. It is this lighthearted and casual approach of the Assessing Officer which is rightly criticized before us. In fact, the Assessing Officer goes ahead and further to hold that the products are admittedly handed over to the petitioners' predecessor by these persons and those manufactured garments are purportedly sold by the petitioners through selling agents/distributors. The last finding and conclusion really cinches the whole matter. The Assessing Officer finds and holds that the ownership of the products so manufactured and all rights pursuant thereto lie with the petitioners or their predecessor. Therefore, the incidence of cess cannot be upon the job workers and it is the petitioners who are liable to pay cess as per the Act.

47 This is really making a short shrift or resorting to a short cut. Those who are brought within the purview of the Act are manufactures of textiles and textile machinery. What is clearly envisaged by the law is that the duty will be in addition to an excise duty on manufacture of textiles and textile machinery. It is that cess which can be recovered by the Textile Committee for fulfilling the object and purpose of setting up such a

Committee and the Textile Committee Act as a whole. Thus, the above reproduced paragraphs of the judgment in *Sirsilk* will not assist the respondents and though the law seeks to fulfill a social purpose, its application and implementation has to be in terms of its provisions and nothing not provided therein can be read into it.

48 The Assessing Officer concedes that the term "manufacturer", though not defined under the Textile Committee Act, would have the same meaning as under the Excise Act, 1944, or Rules framed thereunder. However, the cases relied upon by the petitioners and equally the decisions of the Hon'ble Supreme Court would have no bearing, according to the Assessing Officer, for what is done is a process of manufacturing. Though it is by independent job workers / contractors, it is under the supervision of the petitioners.

49 As held above by us, there is absolutely no material referred in the Assessing Order or in the show cause notice which would enable the Assessing Officer to conclude that the petitioners can be brought within the purview of the Act and the

cess can be recovered from them on the foundation that the process of manufacturing may be by independent persons, but under the control and supervision of the petitioners. A mere statement by the petitioners in their reply to the show cause notice or in the preceding correspondence that they gave specifications to the garment manufacturers to manufacture a specific garment which is capable of being then branded by the petitioners and sold under its popular name, is not enough to hold and conclude as above. That statement, without anything more, will not mean that there is such degree of supervision as is ordinarily expected and envisaged in law which would enable the authorities to conclude that it is really the petitioners including in such activities. The degree of control and supervision is so pervasive and deep that it is none other than the petitioners who manufacture the goods can be the conclusion only if there are supporting factual materials and which have remained uncontroverted.

50 We do not think that the levy could be, therefore, imposed on the petitioners.

51 Even on the point of limitation we find that the petitioners' contentions are well founded.

52 It could not be that the Act comes into force in 1963, the returns are not filed from 1st April, 1975, but the authority wakes up to initiate the process of recovery in 1994 by calling upon the petitioners to pay the cess from 1981-82. Assuming that it could have been so levied, but once the above finding is rendered, we do not think that we should pursue this issue any further. It is only to emphasize as to how unreasonable, unfair and unjust the authorities were in their approach with regard to levy and in proceeding against the petitioners that we have referred to this finding and conclusion on the point of limitation as well.

53 The Appellate Authority has passed an order and by terming the petitioners stand as dubious. We do not think that there was any reason for terming the petitioners' conduct as shameless. There was no basis for holding that the petitioners have not approached the Appellate Authority or the Tribunal with clean hands. There was no question of the petitioners

suppressing material facts. The frustration of the Appellate Authority / officer is apparent when he does not have materials in his possession, but still holds that the petitioners are manufacturers, this dejection does not justify his approach of criticizing the petitioners in such strong language.

54 We do not think that apart from such aspersions being cast on the petitioners and the petitioners' conduct being faulted, the Appellate order contains anything which would enable us to hold that the Committee was justified in proceeding against the petitioners.

55 Then what remains is the reliance placed by Mr. Shetty on the two decisions. The Delhi view has indeed been referred by a Division Bench of this Court. However, the Division Bench was dealing with a case of a company carrying on business, *inter alia*, of manufacture of fabricated garments sold under the brand name "Park Avenue". The petitioners before this Court did not pay any cess on the garments cleared by them during the period 1980-81to 1991-92. The only argument before this Court was fabrication of garments out of duty paid fabrics does not

amount to manufacture of textiles. Secondly, as the fabrics are duty paid, levying of Textile Committee cess amounts to recovery of tax on the same article twice over.

56 The second contention was dealt with first and we have no hesitation in agreeing with the Division Bench that there is no question of any double taxation.

57 That is not the issue before us.

58 Secondly, the Division Bench was justified in relying upon the language of section 5A(1). The language being plain, unambiguous and clear, there was no difficulty in rejecting the primary argument of the petitioners before this Court that the cess was leviable once it is held that they are manufacturers. The petitioners had only contended that though the cess is leviable on manufacture of textiles and textile machinery, but their activity demonstrating that they are manufacturers of garments out of duty paid fabrics, there was nothing by which they could escape the levy. They, therefore, made another desperate attempt to avoid making payment of cess by urging that their activities are

not confined to manufacture, but sales, and the Committee is proceeding to levy cess and recover it on sale of textiles as well. However, in the absence of any factual material to support this stand of the petitioners, the Division Bench rightly held that at the stage at which the matter was brought before this Court, it is difficult to interfere with the levy, imposition and recovery of Textile Committee cess. Thus, there are no particulars which would justify the interference by this Court and particularly for the reason that on the textiles traded as well, the duty is attempted to be recovered.

59 Beyond this, we do not see any reason to refer to this judgment and it is clearly distinguishable on facts.

60 Equally, the observations of the Delhi High Court have to be seen in the context of factual materials before it. There, the first petitioner was an incorporated company. It was a registered Export House engaged in the export of readymade garments, including silk. The Textile Committee had found that the stand of the petitioners before the Delhi High Court that they were merely exporters is factually incorrect.

61 The Delhi High Court concluded that the petitioners could have been proceeded against. It is clear from paragraph 22 of this judgment that the petitioner is registered with the Textile Committee as a manufacturer and exporter of readymade garments. That stand of the Textile Committee in the counter affidavit has not been countered or denied, leave alone expressly contested. In such circumstances, there was factual material to hold that the levy was imposable and recoverable from the petitioners.

62 In such circumstances, we do not think that we should refer to the further paragraphs in this judgment for we are of the opinion that a wider question or larger controversy need not be addressed for the purpose of this petition. This petition can be conveniently disposed of by referring to the limited factual issue before us and equally the response of the petitioners which remains uncountered by the Committee. The Committee itself proceeds on the footing that the petitioners are owners of the garments though not manufacturers, then, we do not see any reason for the Committee then to proceed against them.

Secondly, the Committee could not prove and establish that though the manufacture of textiles is by independent contractors / job workers, over that activity the petitioners had such control which can be said to be complete. In the absence of any factual materials, this finding was clearly perverse.

63 For the reasons that we have aforestated and finding that the impugned order is vitiated by total non application of mind, errors of law apparent on the face of the record and perversity, the writ petition succeeds. The impugned order cannot be sustained. It is quashed and set aside. Rule is made absolute accordingly.

64 The bank guarantee furnished by the petitioners shall stand discharged and it shall be duly returned as cancelled, after endorsing it as such, to the petitioners.

65 The petitioners have deposited a sum as crystallized in the interim order and which sum is lying deposited with the respondent No.3. That sum of Rs.70,00,000/- shall be refunded to the petitioners with simple interest at the rate of six per cent per

annum from the date of deposit until the actual refund. Since the interim order itself stipulates the time to grant the actual refund, we record the statement of Mr. Shetty that in the event the respondents do not succeed in obtaining any order from the higher court, this amount shall be returned with interest, as above, within three months from today.

66 The writ petition, accordingly, stands disposed of.

***PRAKASH D. NAIK, J.*** ***S.C. DHARMADHIKARI, J.***