A

DABUR INDIA LTD. AND ANR.

v.

STATE OF UTTAR PRADESH AND ORS.

JULY 12, 1990

B [SABYASACHI MUKHARJI, CJ., K.N. SAIKIA AND K. RAMASWAMY, JJ.]

Central Excises and Salt Act, 1944: Sections 3, 11B—Homeodent tooth paste—Whether homeopathic medicine or toilet preparation—Whether liable to excise duty.

C

Constitution of India, 1950: Article 263—Dispute under two different central legislations—Under one—State authorities to realise and impose taxes—Under the other Central Government—Refund to be paid or adjusted—Should be subject matter of settlement by the proposed Council.

D

Medicinal & Toilet Preparations (Excise Duties) Act, 1955: Sections 3(1) and 4—'Homeodent' tooth paste—Liability to excise duty.

M/s Dabur India Limited, petitioner in one set of petitions, is a public limited company engaged in the manufacture of Ayurvedic as
E **well as Allopathic medicaments, along with cosmetics. It used to manufacture for and on behalf of M/s Sharda Boiren Laboratories—The petitioner in the second set of petitions—a Homeopathic tooth paste called 'Homeodent' out of the raw-materials supplied by M/s Sharda, on job basis. It accordingly manufactured Homeodent during 1985 to 1988, duly paying duties of excise on Homeodent under the Central**
F **Excises & Salt Act, 1944.**

The Superintendent of State Excise visited the factory of M/s Dabur on 18th January, 1988 and enquired about the excisability of Homeodent under the Medicinal & Toilet Preparations (Excise Duties) Act, 1955. He was told that Homeodent had been classified under the
G **1944 Act in view of the orders passed by the Central Excise authorities. However, when it was revealed that the Homeodent tooth paste was toilet preparation containing alcohol, within the meaning of section 2(k), read with Item 4 of the Schedule, referred to in section 3 of the 1955 Act, the District Excise Officer caused a common notice dated 17.3.1988 to be served on M/s Dabur requiring it to pay duty aggregat-**
H **ing to Rs.68,13,334.20 under the provisions of the 1955 Act on such**

goods manufactured and cleared between January 1985 and January 1988. This order was passed without issuing any notice to show cause, and without affording any opportunity of hearing, to the petitioner. A

The Petitioner sent a representation requesting for compliance with the principles of natural justice and also disputing the amount claimed as duty. On 18th March, 1988 the Superintendent of State Excise modified the earlier order and confirmed the demand of duty amounting to Rs.46.67 lakhs, on provisional basis. On that day the petitioner deposited a sum of Rs.11.66 lakhs and further executed a bank guarantee for the balance. Simultaneously, the petitioner appealed against the order dated 18th March, 1988. The Excise Commissioner dismissed the appeal. No appeal was filed by M/s Sharda against the demand notice of excise duty under the 1955 Act. B C

The petitioner moved the High Court. On 13th May, 1988 the High Court directed the petitioner to file a revision petition with the Central Government. Both the petitioners then approached the Central Government in revision. On 22nd September, 1988 the Additional Secretary to the Government of India in exercise of his revisional powers allowed the revision filed by M/s Dabur and declared the orders of the District Excise Officer and the Excise Commissioner as null and void having been passed in violation of the principles of natural justice. The revision filed by M/s Sharda was not entertained by the Central Government on the ground that a right of appeal was vested in M/s Sharda, which was not availed of. The High Court dismissed M/s Sharda's petition challenging the order of the Central Government declining to entertain its review. Against the order of the High Court M/s Sharda have filed the special leave petition in this Court. D E

On the basis of the revision order, the petitioners called upon the District Excise Officer to refund the amount of Rs.46.67 lakhs recovered from it by way of cash payment and encashment of bank guarantee. The State Excise authorities however failed to grant the refund, and instead issued a fresh show-cause notice to the petitioners jointly on 2nd November, 1988. F

In December 1988, M/s Dabur moved the High Court under Article 226 of the Constitution for quashing and setting aside the show-cause notice dated 2.11.1988 and for refund of duty amounting to Rs.46.67. G

The High Court dismissed the writ petition. The High Court was H

A of the opinion that the question whether Homeodent tooth paste was sans alcohol could not be adjudicated upon under the extraordinary writ jurisdiction. The High Court however came to the conclusion that both the 1944 and 1955 Acts operated in different fields and there was no overlapping between the two. The High Court further observed that where the parties fully acquiesced with the matter and subjected B themselves to the statutory procedure, no action should be allowed to be taken under Article 226 of the Constitution unless the case was patently without jurisdiction. In this connection, it was emphasised by the High Court that once the parties chose the statutory procedure they must go to the logical end.

C It was *inter alia* urged before this Court on behalf of the petitioner that it was not seeking to circumvent the alternative remedy provided under the Act but in view of the conflicting claims of the Central and State Excise authorities seeking to classify Homeodent tooth paste under the respective Acts of 1944 and 1955, the petitioner was left with no other alternative but to challenge the actions by way of writ petition D under Article 226 of the Constitution. It was further contended that Homeodent did not contain alcohol but contained ingredient "mother tincture" containing alcohol, which had a tendency to evaporate during the process of manufacture of Homeodent; that no test result as required under the 1955 Act was obtained to establish whether Homeodent contained alcohol or not; and that on 31st August, 1987 the E Assistant Collector of Central Excise had already passed an order classifying Homeodent under the Act of 1944 which order had been upheld by the Collector of Central Excise (Appeals). The main point that the petitioner sought to emphasis was that the High Court ought to have appreciated that Homeodent tooth paste having been subjected to duty under the provisions of the 1944 Act, the question of levying and recoF vering duty under the 1955 Act did not and could not arise.

Dismissing the petitions, this Court,

HELD: (1) Homeodent is a homeopathic preparation but it is also a tooth paste. Therefore, it is a toilet preparation. Whether or not such G Homeodent would not be dutiable under the Medicinal & Toilet Preparations (Excise Duties) Act, 1955 would depend upon whether it contained alcohol or not. [315E]

(2) It is undisputed that mother-tincture was one of the components that was used in the preparation of Homeodent and it has been H found that alcohol was there and mother tincture was added in the

medicinal preparation as its component. [315G] A

M/s Baidyanath Aryuved Bhawan (Pvt.) Ltd. Jhansi **v.** *The Excise Commissioner U.P.,* **[1971] 1 SCR 590, referred to.**

(3) The authorities charged with the duties of enforcing a particular Act are enjoined with the task of determining the question whether alcohol is contained therein or not. [310D] B

(4) It has been determined by the authorities enjoined to enforce the 1955 Act that Homeodent was a medicinal and toilet preparation and liable to excise duty, and such finding has not been assailed on any cogent ground in any proper manner. If that is the position, then it must be upheld that Homeodent was dutiable. [317D] C

Union of India **v.** *Bombay Tyre International Ltd.,* **[1984] 1 SCR 347;** *Mohanlal Magan Lal Bhavsar* **v.** *Union of India,* **[1956] 1 SCC 122 and** *N.B. Sanjana, Assistant Collector of Central Excise, Bombay* **v.** *The Elphinston Spinning and Weaving Mills Co. Ltd.,* **[1971] 3 SCR 506, referred to.** D

(5) Provisions for rebate of duty on alcohol contained in section 4 of the 1955 Act show that multipoint tax on medicinal preparations containing alcohol was within the contemplation, otherwise there was no purpose in incorporating section 4 into the Act. [316B] E

(6) Justice requires that provisions for claiming refund of this duty should be made more clear. However, in the view of the facts and the circumstances that have happened, it is directed that if the petitioners are entitled to any refund of the duty already paid to the Central Government in view of the duty imposition now upheld against them in favour of the State Government such refund application should be entertained and considered in accordance with law. [316E-F] F

(7) In a case of this nature, where there is some doubt as to whether duty was payable to the Central Government under the 1944 Act or whether the item was dutiable under the 1955 Act, it would be just and proper and in consonance with justice infiscal administration that the Central Government should consider in the light of the facts found, if an application is made under section 11B of the 1944 Act, and circumstances of this case, the limitation period under section 11B of the 1944 Act should not apply. This direction must be confined in the facts and the circumstances of this case only. [316G-H; 317A] G H

Citadel Fine Pharmaceuticals Pvt. Ltd. v. *D.R.O.*, [1973] Mad. Law Journal 99; *Union of India* v. *Bombay Tyre International Ltd.*, [1984] 1 SCR 347 and *Assistant Collector of Central Excise* v. *Madras Rubber Factory Ltd.*, [1986] supp. SCC 751, referred to.

(8) Government should consider feasibility of a machinery under a Council to be formed under Article 263 of the Constitution to adjudicate and adjust the dues of the respective Governments. [318D]

(9) This Court would not like to hear from a litigant in this country that the Government is coercing citizens of this country to make payment which the litigant is contending not leviable. Government, of course, is entitled to enforce payment and for that purpose to take all legal steps but the Government, Central or State, cannot be permitted to play dirty games with the citizens to coerce them in making payments which the citizens were not legally obliged to make. If any money is due to the Government, the Government should take steps but not take extra legal steps or manoeuvre. Therefore, the right of renewal of the petitioner of licence must be judged and attended to in accordance with law and the occasion not utilised to coerce the petitioners to a course of action not warranted by law and procedure. [318A-C]

ORIGINAL JURISDICTION: Writ Petition (Civil) No. 426 of 1989 etc. etc.

(Under Article 32 of the Constitution of India).

P. Chidambaram, K.K. Venugopal, Dushyant Dave, R. Karanjawala, Ms. Meenakshi Arora, Mrs. Manik Karanjawala (N.P.), C.S. Vaidyanathan and S.R. Setia for the Petitioners.

Yogeshwar Prasad, R.S. Rana and Ashok Srivastava for the Respondents.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, CJ. The challenge in these writ petitions and special leave petitions is basically to the order dated 18th January, 1989, passed by the District Excise Officer, Gaziabad, seeking to recover duties of excise on Homeodent under the Medicinal & Toilet Preparations (Excise Duties) Act, 1955 (hereinafter called 'the 1955 Act'), even though the product was classifiable under the Central Excises & Salt Act, 1944 (hereinafter called 'the 1944 Act') and was, in

fact, assessed to duty under the said Act between 1985 and 1988. Necessarily, the question arises as to whether, in the facts and circumstances of the case, the 1944 Act would apply or the 1955 Act would apply. The factual dispute is whether in the facts, as enumerated hereinafter, alcohol was present in Homeodent and further whether Homeodent was Homeopathic medicine or toilet preparation and further whether the same was dutiable under the 1944 Act. We must recapitulate the basic facts in the several matters involved herein.

M/s. Dabur India Limited which is the petitioner in special leave petition No. 1610/89 arising out of judgment and order dated 20th December, 1988 in civil miscellaneous writ petition No. Nil of 1988 connected with civil miscellaneous writ petition No. Nil of 1988 of the High Court of Allahabad, and also the petitioner in writ petition No. 426/89, is a public limited company engaged in manufacture of Ayurvedic medicaments and Allopathic medicaments along with cosmetics. It had agreed to manufacture for and on behalf of M/s. Sharda Boiron Laboratories Ltd. (hereinafter called 'the company')—being the petitioner in special leave petition Nos. 135-36/89, used to manufacture and/or produce a Homeopathic tooth paste called 'Homeodent' out of the raw-materials supplied by the company on job work basis. The petitioner states that it accordingly manufactured Homeodent during 1985 to 1988, duly paying duties of excise on Homeodent under the 1944 Act at appropriate leviable rates and recovered the same from the company. According to the petitioner, Homeodent did not contain alcohol but contained ingredients "mother tinctures" containing alcohol. It is stated that alcohol, due to various reasons, has a tendency to evaporate during the process of manufacture of Homeodent.

It is further the case of the petitioner company that during the period from 1979 to 1988 it also manufactured certain other medicinal products containing alcohol which were classifiable under the 1955 Act. The petitioner company held at all material times licence as required under the 1955 Act to manufacture these products. The State Excise authorities enforcing the provisions of the Act had permanently posted an Inspector as also a peon in the factory of the petitioner where these dutiable products were manufactured. The bonded manufactory in which these products were manufactured was under lock and key of the said officers, according to the petitioner. The activities of the petitioner, the petitioner asserts, were clearly within the knowledge of the State excise authorities for over a considerably long period. During the period from 1985-1988, the company supplied

A to the petitioner amongst other ingredients, "mother tinctures" under BM-9 forms, stating clearly that such mother tinctures were intended to be used in manufacture of Homeodent in the factory of the petitioner. These BM-9 forms, according to the petitioner, were filed with the State excise authorities regularly. Therefore, the petitioner asserts that the State excise authorities were aware of the manufacture B of Homeodent by the petitioner and the activity of the company in getting the same manufactured in the factory of the petitioner out of mother tinctures. However, the State excise authorities did not object to the same nor did they call upon either the petitioner or the company to pay duty under the 1955 Act.

C On 1st January, 1985, the petitioner states, the petitioner filed classification list classifying Homeodent under the Act of 1944, declaring therein the ingredients of Homeodent. On 17th January, 1985, the classification list filed by the petitioner on 1.1.1985 was approved finally and Homeodent was held to be classifiable under the Act of 1944. On 31st August, 1987 the Assistant Collector of Central Excise D passed an order which was an appealable one classifying Homeodent under the Act of 1944. The petitioner asserts that this order had subsequently been upheld by the Collector of Central Excise (Appeals), New Delhi, on an appeal filed by the company. However, on 18th January, 1989 the Superintendent of State Excise, Bulandshahr visited the factory of the petitioner and after inspecting the same, enquired E about Homeodent. It is the case of the petitioner that it had explained that Homeodent was classified under the Act of 1944 in view of the orders passed by the Central Excise authorities. However, it is stated that the Superintendent of State Excise, Bulandshahr called upon the petitioner to furnish details in respect of Homeodent including its ingredients and total value of clearances etc. On 20th January, 1988 F the petitioner addressed a detailed letter to the Superintendent of State Excise, Bulandshahr, explaining its stand, and that duty had been paid thereon. State Excise authorities, thereafter, did not take any action against the petitioner nor did they take out samples of Homeodent tooth paste to get appropriate results as required under the Act of 1955 and the rules framed thereunder. However, on 17th G March, 1988 the Superintendent of State Excise, Bulandshahr passed a demand order directing the petitioner to deposit a sum of Rs.68,13,334.20 being the alleged duty payable on 'Homeodent' manufactured and cleared between January, 1985 and January, 1988. This order was passed without issuing any notice to show cause and, according to the petitioner, without affording the petitioner any H opportunity of hearing. The petitioner on the same day sent a rep-

resentation requesting for compliance with the principles of natural justice and disputing the claim for duty. On 18th March, 1988 the Superintendent of State Excise, Bulandshahr, modified his earlier order and confirmed the demand of duty amounting to Rs.46.67 lakhs on provisional basis. Once again the petitioner was neither served with a show cause notice nor was afforded an opportunity of personal hearing, according to the petitioner. While passing either of the orders, no test result, it is asserted, was obtained to establish whether Homeodent contained alcohol or not. However, on 18th March, 1988 the petitioner deposited a sum of Rs.11.66 lakhs. The petitioners also executed a bank guarantee in favour of the District Magistrate, Ghaziabad, for a sum of Rs.35 lakhs.

On 6th April, 1988 the petitioners filed an appeal before the Excise Commissioner, U.P. against the illegal orders of the District Excise Officer. The petitioners also appeared for personal hearing before the Excise Commissioner through their advocate on 23rd April, 1988. On 5th May, 1988 the Excise Commissioner, U.P., passed an order dismissing the appeal of the petitioners. However, petitioner No. 1 states that copy of the order was not served upon it. The petitioner No. 1 further asserts that without serving a copy of the order on it and without intimating whether the order had been passed or not, the District Excise Officer approached M/s. Grindlays Bank for encashment of the bank guarantee of Rs.35 lakhs and coerced, according to the petitioners, the bankers to encash the same forthwith. Thereafter, the petitioner moved the High Court of Allahabad against the illegal actions of the respondents. The High Court directed the authorities to serve a copy of the order and restrained the respondents from encashing the bank guarantee. It is stated that while the High Court of Allahabad was considering the writ petition of the petitioner and had granted stay as aforesaid, the respondent District Excise officer encashed the bank guarantee of Rs.35 lakhs without even calling upon the petitioner first to pay the amount. On 13th May, 1988 the High Court of Allahabad directed the petitioner to file a revision petition with the Central Government. A revision petition was filed along with stay application on 28th May, 1988. Thereafter, the Central Government granted stay against recovery of the balance amount of Rs.21.46 lakhs. On 22nd September, 1988 the Additional Secretary to the Government of India in exercise of his revisional powers allowed the revision of the petitioners and declared the orders of the District Excise Officer dated 17th and 18th March, 1988 as upheld in appeal by the Excise Commissioner as null and void having been passed in violation of principles of natural justice. Thereupon it, the petitioners state,

called upon the District Excise Officer and the District Magistrate to refund the amount of Rs.46.67 lakhs recovered from it by way of cash payment and encashment of bank guarantee in view of the revision order. The case of the petitioner is that the State Excise authorities failed to grant the petitioner refund as prayed for despite the order of the revisional authorities. On 2nd November, 1988 the District Excise Officer issued a show-cause notice requiring the petitioner to show cause as to why an amount of Rs.68.13 lakhs be not recovered from it in respect of Homeodent manufactured and cleared during January, 1985 to January, 1988. In December, 1988 the petitioner moved the High Court of Allahabad under Article 226 of the Constitution of India, *inter alia*, praying for a writ of mandamus for quashing and setting aside the show-cause notice dated 2.11.1988 and for refund of duty amounting to Rs.46.67 lakhs. On 20th December, 1988 the High Court of Allahabad dismissed the writ petition filed by the petitioner. It is stated that on 10th January, 1989 this Court upon special leave petitions Nos. 135-36/89 filed by the company was pleased to issue notice and directed stay of operation of the notice of demand. Thereafter, on 20th January, 1988 the District Excise Officer directed the petitioner to appear for personal hearing in response to the show cause notice. The petitioner appeared before the District Excise Officer without prejudice and submitted a detailed reply to the show cause notice and also contended during personal hearing that the notice was required to be withdrawn. In its reply the petitioner categorically stated that the reply was being submitted without prejudice to petitioner's right to move this Court by way of a special leave petition. Thereafter, the petitioner moved this Court on 21st January, 1989. It is, therefore, necessary to refer to the judgment and order dated 20th December, 1988 in civil writ petition No. Nil/88 connected with civil miscellaneous writ petition No. Nil/88 in the High Court of Allahabad.

It appears that M/s. Dabur India Limited had filed the said writ petition in the High Court challenging the show-cause notice dated 2nd November, 1988 by the District Excise Officer, Ghaziabad. Another writ petition being writ petition No. 1160/88 which is the subject matter of special leave petition Nos. 135-36/89 was filed by M/s. Sharda (the company) for quashing the order of the Central Government dated 3.6.1988 which was annexure-1 to the writ petition. These two were disposed of by the said judgment. The question that was mainly involved therein was that the contention of the petitioner that the Homeodent did not contain alcohol, though one of the ingredients of such preparation was mother tincture containing alcohol and the same was assessable under Item 14FF of the 1944 Act. The Asstt.

Collector of Central Excise, Ghaziabad, had taken the view that the Homeodent was classifiable under sub-heading No. 3306-02 of the Chapter 33 of the Central Excise Tariff Act, 1985 and on that duty @ 15% *ad valorem* was leviable. This duty computed at the said rate by the Central Excise authorities was paid, according to the petitioner, on the goods manufactured from 1.1.1986. On 18th January, 1988 the District Excise Officer made a surprise inspection of the units of the petitioner and when it was revealed that the Homeodent tooth paste manufactured by M/s. Dabur was toilet preparation containing alcohol within the meaning of Section 2(k), read with Item 4 of the Schedule, referred to in section 3 of the 1955 Act, and was therefore assessable to duty @ 100% *ad valorem*. The District Excise Officer, Ghaziabad, therefore had caused a common notice dated 17.3.1988 to be served on the petitioner requiring it to pay duty aggregating to Rs.68,13,334.20 under the provisions of the 1955 Act on such goods manufactured from 1st January, 1985 till the date of notice. As mentioned hereinbefore, against this notice some representation was made by the petitioner to the District Excise Officer and thereupon the petitioner was directed to deposit provisionally the excise duty to the tune of Rs.46,55,451.45 under the 1955 Act and the same was deposited by the petitioner. Such demand wad challenged by M/s. Dabur in appeal before the Excise Commissioner. The Excise Commissioner affirmed the order of the District Excise Officer and dismissed the appeal. No appeal was filed by M/s. Sharda against the demand notice of excise duty under the 1955 Act. However, both the petitioners approached the Central Govt. in revision under Rule 128 of the 1956 Rules. The revision of M/s. Dabur was disposed of by the Central Govt. and the result was communicated by the Additional Secretary to the Govt. of India by the order dated 22.9.1988. The contention of M/s. Dabur that the demand was raised on it without any opportunity of being heard and in violation of principles of natural justice, was accepted and a direction was given that the case be adjudicated upon *de nove* after giving a show cause notice and proper opportunity of being heard to the party. The revision filed by M/s. Sharda was also not entertained by the Central Government on the ground that a right of appeal was vested in M/s. Sharda which could have been exercised upto 17.6.1988, which was not done.

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However, pursuant to the order of the Central Government, the District Excise Officer issued the impugned show-cause notice dated 2.11.1988 to the petitioners jointly, validity of which was challenged by them in the writ petition and the other writ petition has been filed by M/s. Sharda only to challenge the order of the Central Govt. refusing

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A to entertain its revision. The learned Judges in the judgment under appeal noted that the petitioner did not advance any argument on the merits of the question; whether Homeodent tooth paste is assessable to duty under the 1944 Act or under the 1955 Act and rightly so because that involved a factual scrutiny which could hardly be gone into by the High Court. The High Court was of the opinion that the B question, whether Homeodent tooth paste is sans alcohol, cannot be adjudicated upon under the extra-ordinary writ jurisdiction. On behalf of the petitioners before the High Court two contentions were raised. Firstly that the Central Govt. having set aside the order of District Excise Officer, Ghaziabad, whereunder excise duty to the tune of Rs.46,66,451.45 was paid, there was no justification for the respon- dents to retain that amount thereafter and a writ of mandamus be C issued against the respondents directing them to refund this amount; and secondly, that under Rule 11 of the 1956 Rules when duties are short levied, a written demand by the proper officer being made within six months from the date on which the duty was paid, the short fall could be recovered. The submission was that no duty can be recovered D for the period anterior to six months to be reckoned from the date of payment of duty. It was, therefore, urged that the show cause notice was invalid, inasmuch as the District Excise Officer, Ghaziabad, had exceeded the jurisdiction in having recovered the duty beyond limitation.

E The High Court addressed itself to the question whether Article 226 of the Constitution of India was a proper remedy. We are not really concerned with this question. The High Court, however, came to the conclusion that both the 1944 & 1955 Acts operate in different fields and there is no overlapping between the two. If the Homeodent tooth paste is found to be assessable to duty under the 1955 Act then it F will not amount to review of the order of the Central Excise authorities. It was emphasised before the High Court that adjudication by the Central Excise authorities does not stop the State Excise authorities from considering the case under the provisions of the 1955 Act. Both the Acts are mutually exclusive and the authorities there- under are fully empowered to consider the assessability separately, G according to the High Court. The High Court came to the conclusion that where the parties fully acquiesced with the matter and subjected themselves to the statutory procedure, no action should be allowed to be taken under Article 226 of the Constitution unless the case is patently without jurisdiction. The orders having been made under the statutory provisions, the Court should be loath to interfere under H Article 226 of the Constitution of India. It was emphasised by the High

Court that once the parties choose the statutory procedure they must go to the logical end. The Central Govt. had directed the State Excise authorities to adjudicate the case *de novo* and, therefore, the District Excise Officer, Ghaziabad, had no option but to issue show-cause notice. So the show-cause notice dated 22nd November, 1988 was jointly given to the petitioner pursuant to the direction of the Central Government much after the orders had been passed initially or in appeal. Therefore, the common show-cause notice to the parties cannot, according to the High Court, be characterised as a sparking point and from the backdrop of the case stated above, it is amply clear that the Excise authorities had not assumed jurisdiction to proceed against the petitioner for the first time by way of a show-cause notice dated 2nd November, 1988 rather it had been issued at much subsequent stage pursuant to the direction of the Central Government. The High Court came to the conclusion that the show-cause notice having been issued in accordance with the directions of the Central Govt. in the revisional jurisdiction which the petitioner itself subjected to, cannot be assailed under Article 226 of the Constitution. So this show-cause notice dated 2nd November, 1988 cannot be equated with the show-cause notice given at the initial stage to assume jurisdiction in the matter. The High Court also came to the conclusion that no writ can be issued in favour of the parties who remain sitting on the fence and took a chance of the proceedings taken up under the statutory provisions going in their favour. The High Court held the petitioner who had resorted to statutory remedies on its own could not be permitted to take recourse under Article 226 of the Constitution of India, in the event of their having become successful under the former.

Coming to writ petition No. 1160/88 wherein the order of the Central Government refusing to entertain the revision had been challenged. The Central Government had refused to entertain the revision on the sole ground that the right of appeal that vested in M/s. Sharda could not be exercised thereby. The High Court, however, came to the conclusion that the case of M/s. Dabur was that it is manufacturing Homeodent tooth paste on job basis under the loan licence of M/s. Sharda as per the specifications and control and the raw-material of the latter but factually both the petitioners are different entities under the law and therefore each petitioner had to pursue its own remedy. Therefore, on an analysis of the material, the High Court found that there was nothing to interfere with the order of the Central Government.

Therefore, the questions that fall for determination are firstly,

whether the High Court was justified in dismissing the writ petition of the petitioner on the ground of alternative remedy particularly when the writ petition challenged the actions of the respondents in seeking to levy and recover duties of excise under the 1955 Act as being without jurisdiction and/or without authority of law. The next question that arises is whether the High Court was justified in dismissing the writ petition challenging particularly in two sets as has already been subjected to duty of excise under the 1944 Act. The next question that falls for consideration is whether the High Court was justified in dismissing the writ petition of the petitioner which had prayed for refund of duties of excise amounting to Rs.46.67 lakhs illegally recovered from the petitioner on Homeodent tooth paste under the 1955 Act in pursuance of the order which was declared null and void in revision by the Central Government. It is also necessary to consider whether the High Court was justified in dismissing the writ petition of the petitioner particularly when it challenged levy and recovery of duty under 12 of the 1956 Rules framed under the 1955 Act when the said rules have already been declared to be invalid and without jurisdiction by a Division Bench of the Madras High Court in the case of *Citadel Fine Pharmaceuticals Pvt. Ltd.* v. *D.R.O.*, [1973] Madras Law Journal p. 99.

The next main question requiring consideration is whether the respondents were acting within their jurisdiction while levying duty of excise on Homeodent under the 1955 Act when in the manufacture of Homeodent alcohol had not been used as a raw material but mother tinctures containing alcohol had been used and particularly when at the final stage of manufacture Homeodent did not contain any trace of alcohol.

The question that has really to be determined in this case is, whether firstly Homeodent was classifiable under the 1944 Act or 1955 Act and who will determine that; and secondly, which Act will prevail in the facts and circumstances of the case.

In this connection, it may be mentioned that M/s. Sharda had applied for a licence and was granted a loan licence to manufacture tooth paste as per the provisions of Drugs & Cosmetics Act, 1944 and the Rules framed thereunder. The said licence was granted under rule 139B and was in Form 31A for manufacture of cosmetics. Subsequently, Homeodent was envisaged by the Drug authorities as a homeopathic medicament and licence had been granted accordingly. It is the case of the petitioner that tooth pastes were manufactured by the petitioner company for and on behalf of the loan licensee from the

following chemicals and ingredients:

A

"Potassium Chlorate BPC 73 Sodium Benxoate IP Sodium Flouride BP Plantago Offionle Mt HP 1 Cochloric Armorocie MT NP 1 Cochloric Officincie MT HP 1 Phytolecca Decandra NT Methyl Parehudron Benxoate IP Prophyle Paraphydroxy Benxoate IP Calcium Carbonate IP Sodium Alginete USP NF 1980 Titenium Oxide BP Precipitate Silico USP NF Liquid Sodium Socicylate 15 381: 1972

B

Sodium Leuryle Sulphate (High Purity) Saccharine IP"

C

It is further to be noted that the final product i.e. the tooth paste is a homeopathic semi-solid compound in which mother tincture was completely absent or present in fractionally negligible quantity, depending upon the manufacturing conditions, vaccum and the temperature. It is the case of the petitioner that at the time the tooth paste is manufactured, packed and is ready for delivery, the alcohol would D diminish completely and would not be left at all. Nor can it be so traced upon any chemical testing. In this connection, the petitioner sought to crave leave to several documents and some test examination reports. According to the Laboratory test which the petitioner produced, the alcohol content was absent in the nine samples sent by the loan licensee. It was further stated that the Govt. of India had issued E instructions vide letter dated 19th December, 1957 requiring for determination of alcohol content of any product the samples must be sent to specified laboratories. Despite the said position, it is the case of the petitioner that the Excise authorities acting under the 1955 Act, had never withdrawn any sample of tooth paste manufactured by the petitioner within their knowledge between 1985 and 1988 a sufficiently F long period during which their inspector-in-charge was physically present in the factory of M/s. Sharda and had not only access but knowledge of the activities including the manufacture of the said tooth paste. The Superintendent of Excise, Bulandshahr, visited the factory of the petitioner-company on 18th January, 1988 and after inspecting the same enquired about the exciseability of Homeodent tooth paste. G The petitioner's officers explained that Homeodent was classified under the 1944 Act and the duty had been paid accordingly. Subsequently, the Superintendent (Excise) called upon the petitioner to furnish details about the quantity and value of Homeodent manufactured and cleared between 1985 and 1988. In pursuance thereof, the petitioner replied vide his letter dated 20th January, 1988 and in H

details explained the reasons by Homeodent was not liable to duty under the 1955 Act. In pursuance of the reply of the petitioner no action was taken and the petitioner assumed that the matter had been closed. The petitioner has given detailed episodes of harassment.

The main point that the petitioner seeks to emphasis in this case is that the High Court ought to have appreciated that the petitioner's product Homeodent tooth paste having been subjected to duty under the provisions of the 1944 Act, the question of levying and recovering duty under the 1955 Act did not and cannot arise. Therefore, the impugned actions of the respondents were required to be set aside by issuing appropriate writ of mandamus. The High Court was, therefore, in error, according to the petitioner, in dismissing the writ petition without appreciating this contention. The High Court ought to have appreciated that the petitioner was not seeking to circumvent the alternative remedy provided under the Act but in view of the conflicting claims of the Central and State Excise authorities seeking to classify Homeodent tooth paste under the respective Acts of 1944 and 1955, the petitioner was left with no other alternative but to challenge the actions by way of writ petition under Article 226 of the Constitution. It is contended that the High Court ought to have appreciated the actions of the State authorities were *ex facie* and without authority in law in so far as they sought to levy and recover duty on Homeodent tooth paste under the 1955 Act. Therefore, the petitioner was justified in challenging such actions by way of a writ petition before the High Court. It was further urged that the High Court had committed an error on the ground of alternative remedy before the High Court as also the demand raised against it could not be justified under Rule 12 beyond a period of six months as prescribed under Rule 11 particularly in view of the fact that Rule 12 as had been declared to be invalid and without jurisdiction as per the judgment of the Madras High Court. It is further contended that the High Court committed an error in dismissing the writ petition of the petitioner challenging the demand of duty made by the State Excise authorities amounting to Rs.68 lakhs particularly in view of the fact that as per S.4 of the 1944 Act which is made the basis of valuation even under the Act of 1955 as per the Explanation II to the Schedule as interpreted by this Court in the cases of *Union of India & Ors.* v. *Bombay Tyre International Ltd. etc.*, [1984] 1 SCR 347 and *Asstt. Collector of Central Excise & Ors.* v. *Madras Rubber Factory Ltd etc.*, [1986] Suppl. SCC 751 the duty liability could not exceed the sum of Rs.26 lakhs. It was further emphasised that the High Court committed error in not directing the State Excise authorities to refund the amount of Rs.46.67 lakhs which was recovered from

the petitioner under Orders dated 17/18.3.1988 which were declared to be null and void having been passed without giving any opportunity of hearing. A

The Sahibabad factory of M/s. Dabur India Ltd. was set up in the year 1979. From the very beginning the petitioner had undertaken the job of manufacturing various products covered under the 1955 Act. B The petitioner had obtained the necessary licence and fell under the purview of the 1955 Act. Section 6 of the 1955 Act stipulates that the Central Govt. may, by notification in the Official Gazette, provide that from such date as may be specified in the notification, no person shall engage in the production or manufacture of any dutiable goods or of any specified component parts or ingredients of such goods or of specified containers of such goods or of labels of such containers C except under the authority and in accordance with the terms and conditions of a licence granted under this Act. Dutiable goods have been defined in the Act vide Clause (c) of s. 2 i.e. meaning thereby the medicinal and toilet preparations specified in the Schedule as being subject to the duties of excise levied under the Act. D

It is stated that the State Excise authorities had posted an officer in the factory of the petitioners at Sahibabad for physical control on a part-time basis. In the year 1985, an officer in the rank of an Inspector was posted at the said factory on full time basis for physical supervision and control. Hence, all the activities of the petitioner were within the E knowledge of the respondent Excise authorities. The version of the petitioner is that on an inquiry from M/s. Sharda Bairon Laboratories Ltd. for manufacturing of Homeodent tooth paste on job work basis out of the raw-material and packing materials to be supplied by the said loan licensee, M/s. Sharda, petitioner No. 1 undertook the job. The petitioner-company had filed a list classifying the said Homeodent F tooth paste under Tariff item 14FF of the 1944 Act as the said tooth paste did not contain any alcohol directly. The classification list was filed in the prescribed Form and with all the particulars. It was further checked up by the Inspector Range Inspector and it was subsequently approved by the Assistant Collector, Central Excise, according to the petitioner. G

On 31st August, 1987 there is indeed an order of the Asstt Collector of Central Excise, Division II, Ghaziabad, stating that the tooth paste in question was classifiable under the 1944 Act and not under the 1955 Act. It has to be understood that under the 1955 Act the duties go to the State Govt. while under the 1944 Act the duties go H

to the Central Govt., though both these Acts are central legislations. The authorities charged with the duties under the 1944 Act are Central Govt. employees and Central Govt. authorities are different and distinct from the authorities of the State Govt. under the 1955 Act. The basic question that has to be decided is whether in such a situation who or which authority will decide if the product in question would be leviable to duty under the 1944 Act and go to the coffers of the Central Government or whether it will be leviable under the 1955 Act and the realisations go to the State Govt.

In the facts and circumstances of this case, that will depend on the question whether alcohol was used as any of the ingredients in production of the product or manufacture thereof. That there was production and/or manufacture and as such excise was leviable, there is no dispute. The question is, whether in the process any ingredient was used containing alcohol in respect of a product which is medicinal in nature and as such would be dutiable under the 1955 Act. (Homeodent is a homeopathic preparation but it is also a tooth paste. Therefore, it is a toilet preparation. Whether or not such Homeodent would be dutiable under the 1955 Act, would depend upon whether it contained 'alcohol' or not. The authorities charged with the duties of enforcing a particular Act are enjoined with the task of determining the question whether alcohol is contained therein or not. It is the case of the petitioner that they had paid duties of excise on Homeodent tooth paste manufactured by it on behalf of loan licensees under the 1944 Act. The total amount of duty claimed to have been paid for the said period amounted to Rs.6,26,570.47. The petitioners rely heavily on the test certificates issued by the Homeopathic Pharmacopia Laboratories of the Ministry of Health & Family Welfare, Govt. of India, which state that they had failed to detect any alcohol in the 9 batches of the tooth paste given to them for testing. The petitioner asserts that tooth paste is a homeopathic semi-solid compound in which mother tincture is completely absent or is present in negligible quantity with any alcohol that may be present in pheropest completely and that there are no traces of the same in the final product upon chemical testing. In January, 1988 there was an inquiry about the exciseability of Homeodent tooth paste by the Superintendent of Central Excise, under the 1955 Act. The gravamen of the charge is the order issued by the Distt. Excise Officer, Ghaziabad, on 17th March, 1988 which was issued without notice to the petitioner and without giving it any opportunity. The Distt. Excise Officer, however, on demand from the petitioner had modified the earlier order of 17th March, 1988 and had issued on 18th March, 1988 a demand notice for

Rs.46,66,451.45. It is the grievance of the petitioner that as it was carrying on the manufacture under the 1955 Act, it had applied for licence and the respondent authorities without assigning any reason, refused to renew the licence of the petitioner company. The implication of such absence of renewal is that the petitioner was being called to pay an illegal demand. It, therefore, was forced to close down its manufacturing operations. The petitioner avers that in the meeting which took place between the Excise Commissioner and the Managing Director of the petitioner-company on 14th March, 1988 the petitioner was orally informed that the licence would be renewed upon payment of dues under the orders dated 17th and 18th March, 1988, as aforesaid. The petitioner further states that it was told by the Excise Commissioner to deposit 1/3rd of the amount forthwith and execute a bank guarantee for the remaining amount. According to the petitioner, it had deposited the sum of Rs.11,66,000 and consequently the L-1 licence was renewed for a period from 25.3.1988 to 31.3.1988. Then on 1st April, 1988 the petitioner was once again forced to close down its manufacturing activity in the absence of further renewal of licence for the period from 1.4.1988 to 7.4.1988.

A B C D

It is stated that the petitioner-company had filed an appeal before the Commissioner under rule 127 of the 1956 Rules and upon compliance with the conditions of the State authorities, the licence was renewed from 7.4.1988 on *ad hoc* basis for a period of 3 months upto 30th June, 1988. The case of the petitioner is that the hearing of the appeal before the Excise Commissioner was over on 23.4.1988. However, no order thereupon was passed. On 7th March, 1988 M/s. Grindlays Bank, who are the bankers of the petitioner, issued a bank guarantee inquiring whether any orders had been passed by the Excise Commissioner and whether the sum covered under the bank guarantee had become due. The petitioner was informed by the bankers that the District Excise Officers and other officers present in the bank had served an order requiring the Bank to clear the bank guarantees. The petitioner states that at that time it had no information as to the order of the Excise Commissioner but later on it came to learn that the Excise Commissioner had passed an order on 5th May, 1988 but the same was not communicated to it; and the bank guarantees were enforced without giving the petitioner any opportunity of filing any revision petition. The petitioner thereafter moved a writ petition before the Allahabad High Court which directed that the said bank guarantee should not be encashed until 13th May, 1988. According to the petitioner, the bankers under coercion were compelled to encash the bank guarantee on 9th May, 1988 and issue a draft for an amount of Rs.35 lakhs. The

E F G H

A writ petition of the petitioner came up for hearing before the Allahabad High Court and it was directed to file a revision petition within two weeks from 13.5.1988 and the same should be considered on merits. The High Court had stayed the recovery of an amount of Rs.21,46,134.20 till the disposal of the stay application.

B On 22nd September, 1988 the Additional Secretary to the Govt. of India allowed the revision petition of the petitioner and set aside the orders of the District Excise Officer, dated 17-18th March, 1988. Thereupon the petitioner called upon the District Excise Officer, to refund the amount of Rs.46,47,000 but the respondents failed to refund and neglected it. The respondents had issued a show-cause notice calling upon the petitioner as to why an amount of Rs.68.13 C lakhs be not recovered on Homeodent tooth paste manufactured and cleared between 1985 and 1988. The High Court had dismissed the writ petition which is the subject-matter of another special leave petition. Respondent No. 3 i.e. the District Excise Officer. Ghaziabad, vide his order dated 19.1.1989 had confirmed the show-cause notice issued by D him on 2nd November, 1988 and also confirmed the demand for Rs.68,50,745.20. The said order dated 19th January, 1989 is the subject-matter of challenge in writ petition No. 426/89.

Therefore, the basic question now is, whether the authorities under the 1955 Act were entitled and authorised to levy duties under E the Act. In the orders dated 18-19th January, 1989 passed by the District Excise Officer which is in vernacular and a translation of which is given in Annexure XIV to the writ petition, states that in reference to a confidential letter dated 13th January, 1988 of the Deputy Excise Commissioner, Meerut Division, during the surprise inspection of the premises of M/s. Dabur India Ltd. and M/s. Sharda, F Ghaziabad on 18th January, 1988 by Sri Lal Ji Rai, the then Distt. Excise Officer & Excise Superintendent, Bulandshahr, it was found that M/s. Dabur India Ltd. had been manufacturing a toilet preparation i.e. Homeodent tooth paste containing, according to the said order, alcohol for M/s. Sharda Boiron. The question is, did they do so. How does one find it out? As stated in the order, there is no dispute G but if it was, then calculating the duty u/s 3 of the 1955 Act a sum of Rs.68,13,334.28 would be found due. The Officer found that there was a conspiracy and without knowledge of the officer-in-charge in a clandestine manner this production was carried on. This is an answer, according to the impugned order, u/s 7 of the 1955 Act. Section 7 deals with the offences and penalties under the Act and provides that if any H person contravenes any of the provisions of a notification issued u/s 6

or evades the payment of any duty of excise or fails to supply any information which he is required to supply, he shall for every such offence be punishable to the punishment mentioned in the section. The officer has further found that as against an outstanding sum of Rs.68,13,334.28, Rs.11,67,000 had been deposited. After narrating the incident and the presence of the counsel and lawyers the officer was of the opinion that nothing has been brought to his notice which required revision of the previous order. So, therefore, a break up was given and out of Rs.68,50,745.20, the actual duty payable Rs.46,67,000 has already been realised and, therefore, the balance duty is Rs.21,83,745.28 and they have failed to realise the same.

In view of this Court's order dated 10th January, 1989, whereby this Court had directed that the proceedings might go on but the demands will not be enforced, inasmuch as orders dated 18-19th January, 1989 reiterate the order of 17th March, 1988 it is necessary to refer to the order dated 17th February, 1988 passed by the District Excise Officer, Ghaziabad. Therein it stated that both the units were jointly and severally inspected on surprise visits i.e. the units bonded laboratories, and on the basis of the information collected it was revealed that Dabur India Ltd. was manufacturing a suitable toilet preparation containing alcohol named Homeodent without obtaining necessary licence. According to the said order the product had been manufactured outside the bonded premises approved under the L-1 licence and the duty payable on this product had not been paid. The order further states that on the basis of the information and the stock a sum of Rs.68,13,334.20 was payable and a challan to that effect was issued. In the first letter dated 13th March, 1988, Dabur India Ltd. wrote to the Distt. Excise Officer, that the classification of Homeodent tooth paste made by the Excise Officer as toilet preparation was erroneous, as this preparation, according to Dabur India Ltd., should be classified under Item 2 of the Schedule to the 1955 Act as a Homeodent preparation and not under Item 4. Item 3 to the Schedule of 1955 Act contains the following: "Homeopathic preparations containing alcohol". Item No. 4 is "Toilet preparations containing alcohol or narcotic drugs or narcotic". So the question raised here is whether the tooth paste is primarily a toilet preparation or a homeopathic preparation. Such a question really, in our opinion, must be justiciable by the authorities enjoined to enforce the provisions. On the basis that the product was a homeopathic item, a sum of Rs.6245.29 was paid. The petitioner further stated as follows:

"Assuming and not admitting that your classification is

correct, even then your calculation of duty of the product is eroneous on the following points:

a. The total wholesale value of the goods manufactured as on 18.1.88 is Rs.65,93,915.63.

b. A trade discount @ 20% has to be deducted from this wholesale price Rs. 13,26,373.27.

The balance amount comes to Rs.52,67,542.36. The excise duty element in this amount comes to Rs.26,33,771.18.

The assessable value comes to Rs.26.33,771.18. The calculation chart showing these calculations is attached as Annexure 'B'.

3. Kindly note that for central Excise purpose the exciseable value declared to the CE Deptt. on the total goods manufactured upto 18.1.88 is only Rs.46,66,451.45 and the wholesale price of these goods is Rs.66,31,866.35 only. This too is evident from Annexure 'B'.

We would, therefore, request you to kindly amend your demand notice accordingly.

Please note that the foregoing is without any prejudice whatsoever to any arguments that may be raised by us at the time of hearing with the Commissioner UP, Excise, Allahabad or during any legal proceedings arising out of your aforementioned demand notice or adjudicatory order of the Commissioner. We also reserve the right to adduce further grounds in our defence and support at any/all future occasions in this connections."

On 18th March, 1988 there was further amendment by the Distt. Excise Officer, Ghaziabad, he stated as follows:

"With reference to this office's notice No. 185/1-2 dated 18.3.88 both the units are jointly and severally informed that in the application letters dated 17.3.88 received separately from both the units, the total wholsale price of the total Homeodent tooth paste manufactured has been declared as Rs.65,739,15.63. It has also been informed that

for the purpose of Central Excise Duty, the total assessable value of the total quantity of Homeodent tooth paste manufactured uptil 19.1.88 is Rs.46,66,451.45 and that the total wholesale price on this quantity has been declared as Rs.66,31,866.35 to the Central Excise Deptt.

Based on your declaration and clarification given in your above application and on the basis of statistics and declarations that exciseable value on a provisional basis for the total quantities of the cosmetics homeodent tooth paste containing alcohol, which has been sold uptil 18.1.88 and which in stock on 18.1.88 has accepted as Rs.46,66,451.45 instead of Rs.6,81,334.20. This does not mean that this value has been finally accepted.

One to the fore mentioned, the amount of Rs.68,13,331.20 is amended to Rs.46,66,451.45 in the office's notice No. 185/1-2 dated 18.1.88. On this partial amendment, both the units are jointly and severally ordered to provisionally deposit Rs.46,66,451.45 instead of Rs.68,13,324.20 as duty in the State Treasury, Ghaziabad immediately on receipt of this notice, under the appropriate account head and to produce a copy of the receipted Treasury Challan as proof of deposit in this office."

In view of the facts alleged and found by the District Excise Officer, Ghaziabad, as mentioned hereinbefore, it appears to us that the Homeodent was a medicinal and toilet preparations and liable to excise duty. This Court in *M/s Baidyanath Ayurved Bhawan (Pvt.) Ltd., Jhansi* v. *The Excise Commissioner, U.P. & Ors.*, [1971] 1 SCR 590 has held that in order to attract duty under the 1955 Act, all that is required is that a medicinal preparation should contain alcohol. Alcohol may be part of the preparation either because it is directly added to the solution or it came to be included in it because one of the components of that preparation contained alcohol. It is undisputed that mother-tincture was one of the components that was used in the preparation of Homeodent and it has been found that alcohol was there and mother tincture was added in the medicinal preparation as its component. That was not the case before any authorities in this case but being present it was found in liquid form which incidentally again was disputed because test reports were not accepted by the petitioner but according to the respondent authorities, indicated the presence of alcohol. Section 3(1) of the 1955 Act was attracted. This Court in the

aforesaid decision further reiterated that even if the imposition of excise duty under section 3(1) of the said Act on preparations in which alcohol was indirectly introduced attracts multipoint taxation that by itself would not render the duty illegal. The provisions for rebate of duty on alcohol contained in Section 4 of the said Act show that multipoint tax on medicinal preparations containing alcohol was within the contemplation of the legislature otherwise there was no purpose in incorporating section 4 into the Act. In this connection, section 4 of the 1955 Act may be referred to which is as follows:

> "4. *Rebate of duty on alcohol, etc., supplied for manufacture of dutiable goods*—Where alcohol, narcotic drug or narcotic had been supplied to a manufacturer of any dutiable goods for use as an ingredient of such goods by, or under the authority of, the collecting Government and a duty of excise on the goods so supplied had already been recovered by such Government under any law for the time being in force, the collecting Government shall, on an application being made to it in this behalf, grant in respect of the duty of excise, leviable under this Act, a rebate to such manufacturer of the excess, if any, of the duty so recovered over the duty leviable under this Act."

In this case, however, the case of the petitioner is that duty has been recovered under the 1944 Act; if any refund has to be made, it must be made in accordance with law. There is a question of limitation for claiming refund of this duty. The provisions are not clear. In such a situation, it appears to us that the justice requires that provisions should be made more clear and in the view of the facts and the circumstances that have happened, we would direct that if the petitioners are entitled to any refund of the duty already paid to the Central Government in view of the duty imposition now upheld against them in favour of the State Government such refund application should be entertained and considered in accordance with law. We are conscious in giving this direction, we are not strictly following the letter and the provisions of the Act. But in a case of this nature, where there is some doubt as to whether duty was payable to the Central Government under the 1944 Act or whether the item was dutiable under the 1955 Act, it would be just and proper and in consonance with justice in fiscal administration that the Central Government should consider in the light of the facts found, if an application is made under section 11B of the 1944 Act and pass appropriate order. Such application should be made within four months from the date of the judgment. In the facts

and the circumstances of this case, the limitation period under section 11B of the 1944 Act should not apply. This direction, in our opinion, must be confined in the facts and the circumstances of this case only. A

Our attention was drawn to the observations of this Court in *Union of India & Ors. etc. etc.* v. *Bombay Tyre International Ltd. etc. etc.*, (supra) in respect of the valuation. But the point not having been taken at any stage before the authorities, it is not proper for us at this stage to go into this question. We will proceed in view of the facts and the circumstances of this case and to do justice between the parties on the basis that the duty has been correctly imposed. We have looked into the order of the District Excise Officer, Ghaziabad and we find that all relevant facts have been considered and no facts were brought before us contrary to the findings nor any contentions of substance raised which can induce us to hold to the contrary. B C

Reference may also be made to the observations of this Court in *Mohanlal Maganlal Bhavsar & Ors.* v. *Union of India & Ors.*, [1986] 1 SCC 122 for the test to determine whether an item of medicinal preparation falls under Item 1 of the Schedule to the 1955 Act. It has been determined by the authorities enjoined to enforce that Act and such finding has not been assailed on any cogent or reliable ground in any proper manner. If that is the position, then that order must be upheld but it must be upheld that Homeodent was dutiable and as such the impugned order was correctly passed by the District Excise Officer. D E

Our attention was drawn to the observations of this Court in *N.B. Sanjana, Assistant Collector of Central Excise, Bombay & Ors.* v. *The Elphinstone Spinning and Weaving Mills Co. Ltd.*, [1971] 3 SCR 506. But in view of the facts on which the parties rested their case before the authorities, it is not necessary at this stage to go into this controversy. F

In the aforesaid view of the matter, we are of the opinion that the impugned order dated 18th January, 1989 passed by the District Excise Officer, Ghaziabad, must be given effect to and thereafter the petitioner's application for refund, if any, made before the authorities under section 4 of the 1944 Act within the time indicated as before should be disposed of in the manner indicated above, if made. G

Before we part with this case, two aspects have to be adverted to—one was regarding the allegation of the petitioner that in order to compel the petitioners to pay the duties which the petitioners con- H

tended that they were not liable to pay, the licence was not being renewed for a period and the petitioners were constantly kept under threat of closing down of their business in order to coerce them to make the payment. This is unfortunate. We would not like to hear from a litigant in this country that the Government is coercing citizens of this Country to make payment of duties which the litigant is contending not to be leviable. Government, of course, is entitled to enforce payment and for that purpose to take all legal steps but the Government, Central or State, cannot be permitted to play dirty games with the citizens of this country to coerce them in making payments which the citizens were not legally obliged to make. If any money is due to the Government, the Government should take steps but not take extra legal steps or manoeuvre. Therefore, we direct that the right of renewal of the petitioner of licence must be judged and attended to in accordance with law and the occasion not utilised to coerce the petitioners to a course of action not warranted by law and procedure. Secondly, in a situation of this nature, we are of the opinion that the Government should consider feasibility of setting up of a machinery under a Council to be formed under Article 263 of the Constitution to adjudicate and adjust the dues of the respective Governments. In these peculiar facts, it appears that the dispute is under two different central legislations and under one the State authorities will realise and impose the taxes on finding on certain basis and under the other the same transaction may be open to imposition by Central Government authorities on a particular view of the matter. In such a situation, how and wherein the refund should be made of any duty paid in respect of part of a transaction to one of the authorities, the State or the Centre, to be adjusted should be the subject matter of a settlement by the Council to be set up under Artcle 263 of the Constitution. This is a matter on which we draw the attention of the concerned authorities for examination because section 3 of the 1955 Act and section 3 of the 1944 Act may overlap similar transaction in certain cases.

Writ petitions are disposed of with the aforesaid directions. Special leave granted in SLP (Civil) No. 1610 of 1989 (*M/s. Dabur India* v. *State of U.P. & Ors.*,) and SLP (Civil) Nos. 135-36 of 1989 (*Sharde Bairon Laboratories* v. *State of U.P. & Ors.*). Appeals are disposed of in the light of the directions given hereinbefore. Save as aforesaid all interim orders are vacated.

In the facts and the circumstances of the case, the parties will pay and bear their own costs.

R.S.S. Petitions disposed of.