THE SUPREME COURT REPORTS

CHHOTABHAI JETHABHAI PATEL AND CO.

v.

THE UNION OF INDIA AND ANOTHER

(S. J. IMAM, J. L. KAPUR, K. C. DAS GUPTA, RAGHUBAR DAYAL AND N. RAJAGOPALA AYYANGAR, JJ.)

Excise duties—Retrospective Levy—Validity of enactment—Legislative competence of Parliament—Constitutional validity—Finance Act 1951 (23 of 1951), s. 7(2)—Constitution of India Arts. 19(1)(f), 31, 265, Seventh Schedule, List I, Entry 84, List II, Entry 60.

The appellants who were carrying on business in tobacco had in their licenced warehouse considerable quantity of tobacco on February 28, 1951. On the same day a Bill was introduced in the House of the People containing the financial proposals of the Government of India for the fiscal year beginning April 1, 1951. Clause 7 of the Bill made provision for the amendment of the Central Excises and Salt Act, 1944, by way of alteration of duties, inter alia, on unmanufactured tobacco by imposing an excise duty of 8 annas per lb. Under the provisions of the Provisional Collection of Taxes Act, 1931, the duty could become leviable as from the date of the introduction of the Bill and it was so made. In accordance therewith the appellants paid excise duty on tobacco in their possession at the rates mentioned in the Bill and obtained clearance certificates. On April 28, 1951, the Bill was passed and became Finance Act, 1951, but as passed changes were effected as regards the duty proposed in the Bill. Under s. 7(1) of the Finance Act, the duty on unmanufactured tobacco was increased to 14 annas per lb. Section 7 (2) thereof provided that "the amendments made in the Central Excises and Salt Act, 1944, shall be deemed to have effect on and after March 1, 1951, and accordingly.....recoveries shall be made of all duties which have not been collected but which would have been collected if the amendment had so come into force." In pursuance of s. 7(2) a demand was made upon the appellants on June 22, 1951, for payment of the excess of the

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excise duty payable on tobacco cleared out of the warehouse from March 1, 1951, to April 28, 1951. The appellants challenged the legality of the demand on the grounds, inter alia, that (1) excise duty was a tax on goods which must exist at the time when the tax was levied and it must have been intended and expected by the legislature that it would be passed on to the consumer, and as the retrospective operation of the duties deprived the tax of these qualities they did not fall within the term "duties of excise" in Entry 84, List I of the Seventh Schedule to the Constitution of India, and, therefore, s. 7(2) of the Finance Act, 1951, in so far as it imposed an excise duty retrospectively before the date of its enactment was beyond the legislative competence of Parliament and (2) the impugned levy contravened Art. 19(1)(f), because a retrospective levy of an excise duty deprived the tax payer of the right of passing it on and recovering it from his buyer, and that this constituted a restraint on the right to hold property, which was not saved by cl.(5) of Art. 19.

Held: (1) Parliament acting within its own legislative field had the powers of a sovereign legislature and could make a law prospectively as well retrospectively and the duties leviable under the Central Excises and Salt Act, 1944, as provided by s.7(2) of the Finance Act, 1951, notwithstanding their imposition with retrospective effect and even if it be that they were incapable of being passed on to a buyer from the tax-payer, were "duties of excise" within the meaning of Entry 84, List I of the Seventh Schedule to the Constitution of India.

(2) The levy of the tax retrospectively under s. 7(2) of the Finance Act, 1951, was valid and did not contravene Art. 19(1)(f) of the Constitution.

Per Kapur, J.—(1) Entry 84 in List I deals with taxes on goods manufactured or produced, while Entry 60 in List II deals with the carrying on of trade i.e., an activity in the nature of buying and selling, and the Central Excises and Salt Act, 1944, in its pith and substance relates to duty on goods manufactured or produced and has no relationship with Entry 60.

(2) Reasonableness of tax laws is not justiciable and therefore they cannot fall within cl.(5) of Art. 19. Art. 19(1)(f) and the cl.(5) are part of one scheme and the former is incapable of operating where the latter is inoperative. If considerations of Art. 19(5) are foreign to taxing laws Art. 19(1)(f) can have no application to them.

Case law reviewed.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 140 to 142 of 1952.

Appeals from the judgment and order dated March 24, 1953, of the former Nagpur High Court in Misc. Petitions Nos. 1795-1796 of 1951 and 1 of 1952.

WITH

Petitions Nos. 24, 25 and 93 of 1952.

Petition under Art. 32 of the Constitution of India for enforcement of Fundamental Rights.

G. S. Pathak, S. N. Andley, J. B. Dadachanji and *Rameshwar Nath,* for the appellants/petitioners.

H. N. Sanyal, Additional Solicitor General of India, N. S. Bindra, R. H. Dhebar and *T. M. Sen,* for the respondents.

C. R. Pattabhi Raman and *R. Ganapathy Iyer,* for the interveners (in C. A. No. 141 of 1954).

1961, December 11. The judgment of S. J. Imam, K. C. Das Gupta, Raghubar Dayal and N. Rajagopala Ayyangar, JJ., was delivered by Rajagopala Ayyangar, J., J. L. Kapur, J., delivered a separate judgment.

AYYANGAR, J.—The appellants in Civil Appeal 140 of 1954 are tobacco merchants and manufacturers of biris. They own private warehouses licensed under r. 140 of the Excise Rules, 1944 at Gondia and other places in Madhya Pradesh. *Ayyangar J*

On the 28th of February, 1951 a Bill was introduced in the House of the People, being Bill 13 of 1951 containing the financial proposals of the Government of India for the fiscal year beginning the 1st of April, 1951. Clause 7 of the bill made provision for the amendment of the

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Central Excise Act (Act 1 of 1944) by way of alteration of duties on "tobacco manufactured and unmanufactured." In particular, it provided that "unmanufactured tobacco other than flue-cured and ordinarily used otherwise than for the manufacture of cigarettes" (which included tobacco intended for manufacture into biris) should be charged to an excise duty of 8 annas per lb. and it also imposed a new duty of excise on biris varying from 6 to 9 annas per lb. depending upon the weight of tobacco contained in the biris.

Section 3 of the Provisional Collection of Taxes Act, 1931 (Act XVI of 1931) enacted "Where a bill introduced into the Indian Parliament provided for the imposition or increase of a duty of excise the Central Government might cause to be inserted in the bill a declaration that it was expedient in the public interest that any provision of the bill relating to such imposition or increase shall have immediate effect under this Act". A declaration under this section was made in respect of the provision for imposing the duties on tobacco under cl. 7 of the bill already adverted to. The effect of such a declaration was stated in s. 4 of Act XVI of 1931 in the following terms :—

> "4. (1) A declared provision shall have the force of law immediately on the expiry of the day on which the Bill containing it is introduced.
>
> (2) A declared provision shall cease to have the force of law under the provisions of this Act—
>
> (a) When it comes into operation as an enactment, with or without amendment, or
>
> (b) when the Central Government in pursuance of a motion passed by Parlia-

ment, directs, by notification in the Official Gazette, that it shall cease to have the force of law, or

(c) if it has not already ceased to have the force of law under clause (a) or clause (b), then on the expiry of the sixtieth day after the day on which the Bill containing it was introduced."

In compliance with this law the appellants paid the excise duty at the rates imposed under cl. 7 of the bill and obtained clearance certificates in regard to the tobacco moved out from their warehouses from and after March 1, 1951. Bill 13 of 1951 was passed into law as the Indian Finance Act 1951 (Act XXIII of 1951 on April 28, 1951 but as passed, changes were effected in the duty proposed in the bill, as a result of certain alterations suggested by the Select Committee. Under s. 7 (1) of the Finance Act 1951 while the excise duty on biris was abandoned, the duty on unmanufactured tobacco (other than flue-cured and used in the manufacture of cigarettes) was increased to 14 annas per lb. from the rate of 8 annas per lb. in the bill. Consequential provisions were enacted in s. 7 (2) of the Finance Act which read :

"The amendments made in the Central Excise and Salt Act 1944, sub-cl. 1 shall be deemed to have effect on and from the 1st March, 1951 and accordingly :—

(a) refund shall be made of all duties collected which would not have been collected, if the amendment had come into force on that day, and

(b) recoveries shall be made of all duties which have not been collected but which would have been collected if the amendment had so come into force."

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In pursuance of s. 7 (2)a demand was made upon the appellants on June 22, 1951 for the payment of the duty payable by them, after giving credit for the refund of the duty paid on biris which had been deleted by the Act. The appellants contested the legality of this demand by a petition under Art. 226 which they filed in the High Court at Nagpur urging that the retrospective operation given to s.7(1) by sub-s.(2) thereof was illegal, *ultra vires* and unconstitutional, and besides that the provision in r. 10 of the Excise Rules which contained the machinery for enforcing the demand was not adequate to meet the situation arising out of the change in the law from the provisions of the bill to those of the Act. The learned Judges of the High Court repelled all the contentions disputing the legislative competence and the constitutionality of the legislation contained in s.7(2) of the Finance Act of 1951, but they upheld the objection to the adequacy of the procedure for recovery based on the limited scope of r. 10 of the Excise Rules. Thereafter the Central Government, by a notification dated December 8, 1951, amended the Central Excise Rules, 1944 by the addition of a new r. 10A providing machinery specially designed for the enforcement of a demand like the one arising in the circumstances of the present case. On December 12, 1951 a further and a fresh demand was made for the payment of the duty in terms of s.7(2)(b) of the Finance Act quoted earlier, and the appellants thereupon once again moved the High Court of Nagpur under Art. 226 challenging the validity of the demand on the very same grounds as before. This petition was heard by a Full Bench of the Court and every contention raised by the appellants including that based on the adequacy of the new r. 10A to cover the present case was rejected. The learned Judges granted a certificate under Art. 132 of the Constitution which has enabled the appellants to file this appeal. Before proceeding further it is only necessary to state that there is no material difference between the facts of the

cases covered by Civil Appeals 141, 142 as well as the points raised in the Writ Petitions and that this judgment will cover and dispose of the other appeals and the petitions. We might also, at this stage, mention that other parties who were similarly situated as the appellants in Civil Appeals 140 to 142 of 1954 and who had filed petitions under Art. 226 of the Constitution in the High Court of Madras which are pending there, raising the same points as the appellant's before us, have intervened in these appeals and they have also been heard. Learned Counsel appearing for the interveners adopted the arguments urged in support of the appeal.

Mr. Pathak, learned Counsel who appeared for the appellants urged three point in support of the appeals(1) Section 7(2) of the Finance Act, 1951 in so far as it imposed an excise duty retrospectively before the date of its enactment (April 28, 1951) was beyond the legislative competence of Parliament. The contention on this head was briefly this : The impugned tax was imposed by Parliament in purported exercise of the power to levy "a duty of excise on tobacco" within Legislative Entry 84 of Union List which reads :

> "Duties of excise on tobacco and other goods manufactured or produced in India except....."

An "excise" was basically an indirect tax, *i. e.*, a tax or duty not intended by the taxing authority to be borne by the person on whom it is imposed and from whom it is collected but is intended to be passed on to those who purchased the goods on which the duty was collected ; but when such a tax was imposed with retrospective effect it could not be passed on, so such a levy deprived the tax of its essential characteristic of being indirect. It therefore ceased to be a "duty of excise" and

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became a personal tax of a category quite distinct from "excise" and so was beyond the legislative power of Parliament under that Entry. (2) That the impugned levy was unconstitutional in that it contravened the fundamental right guaranteed to the citizens of India to hold property under Art. 19(1)(f), the point urged being that a retrospective levy of an "excise duty" deprived the tax-payer of the right of passing it on and recovering it from his buyer, that this constituted a restraint on "the right to hold property" (the amount of the tax-levy) conferred by Art. 19(1)(f) and was not saved by cl. 5 of that Article as being a reasonable restraint and should, therefore, be struck down under Art. 13(2). (3) That the terms of r. 10A of the Excise Rules 1944 were insufficient to cover the cases of the appellants and that in consequence the demand made on them and the attempt to recover the sums by resort to the coercive process provided for by s. 11 of the Central Excise Act was illegal and without statutory authority.

We shall now proceed to consider these points in that order. (1) *Want of legislative competence:* To appreciate the submission of learned Counsel it is necessary to set out the steps in the reasoning by which he sought to establish that a "duty of excise" when imposed with retrospective effect ceased to be a "duty of excise" as used in Entry 84 of the Union List. The submission of learned Counsel was this : The term "duty of excise" on goods was universally recognized as a tax on home-produced goods and as a typical instance of an indirect tax. It was a tax on the activity of production or manufacture of goods within the country and that it was levied on or collected from the producer or manufacturer or from those who held such goods. It was, further, not a personal tax but its essential and characteristic nature, which distinguished it from other types of taxes was that it was levied on goods. It had, therefore, in order that it might

truly be a "duty of excise", to satisfy two tests : (a) It had to be an indirect tax, i. e., levied in such a manner that the person from whom the tax was collected was in a position to pass it on to those who acquired the goods from him or at least the taxing authority expected him to pass it on, and laid no impediment on his ability to do it. (b) Being a tax on goods, it was levied on the producer or manufacturer or person in possession of the goods at the time when the person taxed was the owner or had possession and control over the goods. Where neither of these essential elements or attributes was present, and in the present case, according to learned Counsel neither condition was satisfied, the tax-levy would not fall under the category of "duty of excise."

The same argument was Presented in a slightly different from by saying that though Parliament, generally speaking, had the power to legislate in respect of everyone of the subjects included in the relevant legislative entries whether prospectively, or retrospectively including legislation with regard to taxation, still if the retrospective levy of a tax, altered its essential nature and identity, then the power to legislate retrospectively would be open to Parliament only if the tax in its altered from—i.e., a tax direct and personal—would be open to Parliament to impose. In the case of a "duty of excise" as the tax in the present case was, if imposed retrospectively, deprived it of its essential characteristic of being an indirect tax and a tax on goods, and so the power of Parliament to enact such retrospective legislation would depend upon whether Parliament could impose a tax on a person merely because he happened to produce goods at an antecedent date, or, happened to have had in his control goods of indigenous production at a prior date and if this could not be done, it would follow that Parliament could not impose a "duty of excise" with retrospective effect.

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In support of his submission regarding the nature of an excise duty and that meaning that ought to be attributed to that expression as it occurs in Entry 84 of the union List, Mr. Pathak placed before us judgments of the Privy Council in appeals from Canada and some decisions of the American Supreme Court and of the Australian High Court.

First as to the decisions relating to the Canadian Constitution though learned Counsel referred us to several decisions on the interpretation of the word "excise" in connection with the distinction between direct and indirect taxes in most of the British North America Act, 1867, we do not think it necessary to refer to all of them.

The general line of approach of the Privy Council decisions referred by learned Counsel could be gathered from the observations of Lord Cave in *City of Halifax* v. *Fairbanks' Estate*(1). The impugned tax legislation was a business tax imposed by the Province of Nova Scotia to be paid by every occupier of real property for the purposes of any trade, profession, or other calling carried on for the purpose of gain, the assessment being according to the capital value of the premises. This was challenged *inter alia* on the ground that it was an indirect tax and therefore not within the legislative competence of the Provincial Legislature. Lord Cave said :

> "Thus, taxes on property or income were everywhere treated as direct taxes ; and John Stuart Mill himself, following Adam Smith, Ricardo and James Mill, said that a tax on rents falls wholly on the landlord and cannot be transferred to any one else.....On the other hand, duties of customs and excise were regarded by every one as typical instances of indirect taxation. When therefore the Act of Union allocated the power of direct taxation for Provincial purposes to

(1) [1928] C.A. 117.

the Province, it must surely have intended that the taxation, for those purposes, of property and income should belong exclusively to the Provincial legislatures, and that without regard to any theory as to the ultimate incidence of such taxation. To hold otherwise would be to suppose that the framers of the Act intended to impose on a Provincial legislature the task of speculating as to the probable ultimate incidence of each particular tax which it might desire to impose, at the risk of having such tax held invalid if the conclusion reached should afterwards be held to be wrong..... The imposition of taxes on property and income, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation, just as the exaction of a customs or excise duty on commodities.....would ordinarily be regarded as indirect taxation; and although new forms of taxation may from time to time be added to one category or the other in accordance with Mill's formula as a ground for transferring a tax universally recognized as belonging to one class to a different class of taxation."

Similar passages in relation to a "duty of excise" being an indirect tax occur in other judgments of the Judicial Committee to which learned Counsel drew our attention. Of these, it is sufficient to refer to one more—*Attorney-General for British Columbia* v. *Kingcome Navigation Company, Limited* (1) which raised the question as to whether a tax which was imposed upon every consumer of fuel-oil according to the quantity which he had consumed imposed by the Fuel-Oil Tax Act of 1930 of British Columbia was a direct tax under s. 92, head 2, of the British North America Act, 1867. After extracting the following passage from *Bank of Toronto* v. *Lambe*(2):

(1) [1934] A. C. 45. (2) 12 A. C. 575.

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> "A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs.

Lord Moulton who delivered the judgment of the Board referred to the passage from the judgment of Lord Cave in *City of Halifax* v. *Fairbanks' Estate* (1) just now quoted and went on to add :

> "The ultimate incidence of the tax, in the sense of the political economist, is to be disregarded, but where the tax is imposed in respect of a transaction, the taxing authority is indifferent as to which of the parties to the transaction ultimately bears the burden .....Similarly, where the tax is imposed in respect of some dealing with commodities, such as their import or sale, or production for sale, the tax is not a peculiar contribution upon the one of the parties to the trading in the particular commodity who is selected as the tax payer. This is brought out in the second paragraph of Mill's definition, and is true of the typical custom and excise duties referred to by Lord Cave." The tax was therefore held to be valid.

We consider that not much assistance could be derived from these decisions for the interpretation of the scope or content of the term "duties of excise" in Entry 84 of the Union List. The line of division in Canada between those taxes which a Province could impose and those which it could not was, whether it was direct or indirect. In Canada, taxing powers are divided between the Dominion and the Provinces on the basis of the *incidence* of the tax, the Dominion power extending to "any mode or system of taxation" (vide s. 91 (3) British North America Act, 1867) while that of the

(1) [1928] A. C. 117.

Provinces is restricted to "direct taxation within the Province in order to the raising of revenue for provincial purposes" (Section 92(2) ibid). When therefore the validity of any Provincial tax legislation is challenged in Canada the enquiry is as regards the normal incidence of the tax whether it is "direct" or "indirect." As these expressions had a settled meaning in economic theory, the Courts had necessarily to find out whether the particular tax imposed by the Province fell within the class of "indirect" taxes or not. In such a situation naturally the classification by economists of taxes as those which are "direct" as distinct from those which are "indirect" assumed a vital role in deciding whether the tax impugned is or is not within Provincial power. As pointed out by Gwyer, C. J. in the *Province of Madras* v. *Boddu Paidanna* (1) :

> "The Canadian cases which were cited do not seem to afford any assistance, since analogous problems in Canada are always concerned with questions of direct and indirect taxation ; and if a Provincial tax is held to be an indirect tax, it is unnecessary for the Court to consider whether it may not also be a duty of excise: see, for example *Att.—Gen. for British Columbia* v. *The Canadian Pacific Railway Co.* (1927 A.C. 934), where a tax on every person purchasing within the Province fuel oil for the first time after its manufacture in, or importation into, the Province was held to be invalid as an indirect tax, and the question whether it might not also be bad as an excise duty was left unanswered. In contrast to the case just cited we may refer to *Att. Gen. for British Columbia* v. *Kingcome Navigation Co.* (1934 A. C. 45) in which a fuel oil tax imposed by a Province upon every consumer of fuel oil according to

(1) [1942] F.C.R. 90, 103.

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the quantity which he had consumed was held to be valid as a direct tax, because it was demanded from the very persons who it was intended or desired should pay it."

Similarly, Lord Simonds observed in *Governor General in Council* v. *Province of Madras*(1):

> "little assistance is to be derived from the consideration of other federal constitutions and of their judicial interpretation. Here there is no question of direct and indirect taxation, nor of the definition of specific and residuary powers."

Under the Indian Constitution the scheme of division of the taxing powers between the Union and the States is not based on any criterion dependent on the incidence of the tax. Sir Maurice Gwyer in *In re the Central Provinces and Berar Act XIV of 1938* (2) speaking of the word "excise" as occurring in the legislative lists in the Government of Inida Act (and for this purpose there is no variation in the lists in Schedule VII of the Constitution) said:

> "Its primary and fundamental meaning in English is that of a tax on articles produced or manufactured in the taxing country and intended for home consumption. I am satisfied that this is also its primary and fundamental meaning in India ; and no one has suggested that it has any other meaning in Entry No. 45 (corresponding to Entry 84 in the Union List).
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> It was then contended on behalf of the Government of India that an excise duty is a duty which may be imposed upon home produced goods at any stage from production to consumption; and that therefore the federal legislative power extended to imposing excise

(1) 72 I. A. 91, 102. (2) [1939] I F.C.R. 18, 40.

> duties at any stage. This is to confuse two things, the nature of excise duties and the extent of the federal legislative power to impose them .....There can be no reason in theory why an excise duty should not be imposed even on the retail sale of an article, if the taxing Act so provides. Subject always to the legislative competence of the taxing authority, a duty on home-produced goods will obviously be imposed at the stage which the authority find to be the most convenient and the most lucrative, wherever it may be; but that is a matter of the machinery of collection, and does not affect the essential nature of the tax. The ultimate incidence of an excise duty, a typical indirect tax, must always be on the consumer, who pays as he consumes or expends ; and it continues to be an excise duty, that is, a duty on home-produced or home-manufactured goods, no matter at what stage it is collected."

As Lord Simonds said in the decision, to which reference has already been made after referring to the decision of the Federal Court in the *C.P. Petrol case*(1):—

> "Consistently with this decision their Lordships are of opinion that a duty of excise primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax on goods not on sales or the proceeds of sale of goods,"

and then speaking about taxes on sale of goods the learned Lord continued :

> "The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vender in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes

(1) (1939) I. F. C. R. 18

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are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the exciseable article leaves the factory or workshop for the first time on the occasion of its sale. But that method of collecting the tax is an accident of administration; it is not of the essence of the duty of excise, which is attracted by the manufacture itself."

In view of this clear exposition of the content of the term "duty of excise" in the Indian setting we think, no assistance can be derived for the meaning ascribed and the characteristics attributed to it in the decision construing the relative taxing powers of the Dominion and the Provinces under the British North America Act 1867.

Before dealing with the Australian decision to which Mr. Pathak drew our attention, we could conveniently dispose of the American cases which were referred to by the learned counsel bearing on the meaning of the word "excise". We might point out that the American decisions do not assist the appellant in the least since under the Constitution of the United States practically every tax other than a capitation, a poll tax or a tax on land is termed an "exise duty" and even income-tax was held to be an 'excise' until the decision of the Supreme Court of the United States in *Pollock* v. *Farmers Loan & Trust Co* (1). It has to be borne in mind that the American Constitution provides that direct taxes have to be apportioned among the States according to their respective populations (Art. 1, s. 2, and Art. 1, s. 9, cl. 4). Hence the attempt in the United States has been to bring taxes which according to the classification of economists would be direct taxes within the category of excise or indirect taxes which need not follow the rule as to apportionment among the States. It follows,

(1) 158 U. S. 601.

therefore, that neither the American decisions, nor the understanding by the Courts of that country as to what a duty of excise connotes can be of any utility for deciding the content of that entry in the Indian Constitution. The relevance of the American decisions is, therefore, even remoter than the decisions from Canada which were relied on by the learned Counsel.

Mr. Pathak referred us to some of the decisions in Australia and in particular to *Parton* v. *Milk Board (Victoria)* (1) in support of his submission that the characteristic of being an indirect tax and therefore the capability of being passed on was an essential ingredient and pre-requisite of an excise duty. In this connection it is necessary to point out that the decisions in Canada which were relied on by Mr. Pathak as aids for understanding the import of the expression "duty of excise" in Entry 84, have been treated by the Australian Courts as not helpful to determine the meaning of "excise" in s. 90 of the commonwealth of Australia Act. As explained by Wynes * :

> "In Canada, the distribution of taxation is based upon the direct and indirect character thereof, the Provincial power being limited to direct taxation within the Province. Hence Canadian cases such as the Bank of Toronto v. Lambe are of very little use in settling the question whether or not a tax is a duty of customs or excise within the meaning of the Australian Constitution.

It may be pointed out that under the Australian Constitution taxes levied on commercial dealings in goods produced, such as taxes on sales, have been held to fall within the category of excises. Several of the decisions of the Australian High Court rendered before *Parton* v. *Milk Board (Victoria* (1) dealing with what constituted an excise

(1) 80 C.L.R. 229.

* Wynes' Legislative, Executive and Judicial Powers in Australia (Second Edition), at page 504.

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under s. 90 of the Commonwealth of Australian Act were cited to the Federal Court in the *Province of Madras* v. *Boddu Paidanna* (1) and the learned Chief Justice, after referring to them in detail, observed :

> "We find it impossible to say that the expression 'duties of excise' even in Australia is limited to duties imposed in connection with the production of a commodity alone. We should be disposed to say on the contrary that in Australia all taxes on the sale of commodities are, or may be regarded, as, duties of excise.....Under the Australian Constitution power to impose duties of excise is, as we have said, the exclusive right of the Commonwealth Parliament; the residuary taxing power remains in the States. In the Indian Constitution Act the whole of the taxing power in this particular sphere is expressly apportioned between the Centre and the Provinces, to the one being assigned the power to impose duties of excise, to the other taxes on the sale of goods."

The decision in the Milk Board case follows in general the same lines as did the earlier decisions which have been detailed and discussed by Sir Maurice Gwyer C. J. in *Paidanna's case*(1). In these circumstances we do not consider it useful or necessary to discuss these decisions. Undoubtedly, there are passages in those judgments in the Australian Courts which refer to the fact that an excise duty is an instance of an indirect tax. As regards the general proposition, however, there is little controversy, but these decisions did not lay down that if by reason of the tax being levied retrospectively the duty cannot be passed on it ceased to be a duty of excise. On the other hand, there is express and high authority for the position that a duty of excise could be validly levied with retrospective effect under the Australian Constitution. The question for

(1) [1942] F.C.R 90, 103.

consideration before the privy Council in *Colonial Sugar Refining Company Ltd.* v. *Irving*(1) related to the constitutional validity of the Excise Tariff Act,1902, passed by the Commonwealth Parliament. One of the objections raised to the levy was that on the terms of the enactment which was passed on the 26th of July, 1902, the imposition of the duty could be as and from October 8, 1901, the day on which the Minister had moved a resolution to that effect in the committee of Ways & Means of the House of Representatives. The respondent before the Board who were manufacturers of refined sugar in Brisbane in the State of Queensland questioned the legality of the tax which had been demanded and paid by them in respect of the sugar produced by them between October 8, 1901, and July 26, 1902. Lord Davey delivering the judgment of the Board observed :

> "It is a little difficult to understand the first point taken by the appellants. The Parliament had undoubted power to impose taxation under the express words of s. 51 of the Constitution, and it is not now disputed that the Parliament could, if it thought fit, make the Act retrospective and impose the duties from the date of the resolution. That practice is (it is believed) universally followed in the imperial Parliament, and (their Lordships were told) is common in the Colonial Legislatures in Acts of this description, and for obvious reasons it is convenient and almost necessary. There was nothing, therefore, in either the subject matter of the Act, or in the mode of dealing with it, which was beyond the power of the Parliament."

In our opinion, the above aptly describes and covers the point raised by the appellants in the appeals now before us.

(1) [1906] A.C. 360

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There is no doubt that excise duties have been referred to by the economists and in the judgments of the Privy Council as well as in the Australian decisions as an instance of an "indirect tax", but in construing the expression " duty of excise " as it occurs in Entry 84 we are not concerned so much with whether the tax is " direct " or " indirect " as upon the transaction or activity on which it is imposed. In this context one has to bear in mind the fact that the challenge to the legislative competence of the tax-levy is not directed to the imposition as a whole but to a very limited and restricted part of it. This challenge is confined (a) to the operation of the tax between the period March 1, 1951, and April 28, 1951, and (b) even in regard to this limited period, it is restricted to the imposition of the additional duty of six annas per lb. which was levied, beyond the eight annas per lb. collected from the appellants by virtue of the Finance Bill under the provisions of the Provisional Collection of Taxes Act, 1931. It would seem to be rather a strange result to achieve that the tax imposed satisfies every requirement of a " duty of excise " in so far as the tax operates from and after April 28, 1951, but is not a "duty of excise" for the duration of two months before that date.

Learned Counsel conceded, as he had to, that even on the decision relied upon by him, the fact that owing to the operation of economic forces it was not possible for the taxpayer to pass on the burden of the tax, did not alter the nature of the imposition and detract from its being a " duty of excise ". For instance, the state of the market might be such that the duty imposed upon and collected from the producer or manufacturer might not be capable of being passed on to buyers from him. Learned Counsel urged that this would not matter, as one had to have regard to "the general tendency of the tax " and "the expectation

of the taxing authority" and to the possibility of its being passed on and not to the facts of any particular case which impeded the operation of natural economic forces.

The impediment to the duty being passed on might be due not merely to private bargains between the parties or abnormal economic situations such as the market for a cammodity being a buyers' market. Such impediments may be brought about by the operation of other laws which Parliament might enact, such for instance, as control over prices. If in such a situation were the price which the producer might charge his buyer is fixed by the statute, say under the Essential Supplies Act, and a "duty of excise" is later imposed on the manufacturer, it could not be said that the duty imposed would not answer the description of an "excise duty". Learned Counsel had really no answer to the situation created by such a control of economy except to say that it would be an abnormal economic situation. It could hardly be open to argument that a tax levied on a manufacturer could be stated not to be a "duty of excise", merely because by reason of the operation of other laws the tax payer was not permitted to pass on the tax-levy. The retrospective levy of a tax would be one further instance of such inability to pass on, which does not alter the real nature or true character of the duty.

It might further be pointed out that the submission of the learned Counsel that a tax which according to economic theory is an indirect tax or a tax on goods becomes a direct and a personal tax and a tax of a different nature or category if imposed retrospectively because it was then incapable of being passed on, does not correctly represent the law as laid down by this Court. In common with duties of customs and excise, a tax on the sale of goods is another instance of a typical indirect tax.

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Indeed Lord Thankerton pointed out in *Attorney-General for British Columbia* v. *Kingcome Navigation Company Ltd.* (1) :

> "The ultimate incidence of the tax in the sense of political economist is to be disregarded and referred to a tax imposed in respect of some dealings in commodities such as their import or sale or production for sale as instances of indirect taxes, the tax not being a peculiar contribution upon one of the parties to the trading in the particular commodity selected as the tax-payer."

The question of the validity of the imposition of a sales tax with retrospective effect came up for consideration before this Court in the *Tata Iron & Steel Co. Ltd.* v. *The State of Bihar* (2). An argument similar to the one now presented before us was submitted to this Court in challenge of that levy which was summarized by Das, C.J., in these terms :

> "The retrospective levy by reason of the amendment of s. 4(1) (of the Bihar Sales-tax Act which was impugned) destroys its character as a sales tax and makes it a direct tax on the dealer instead of an indirect tax to be passed on to the consumer."

Dealing with this point the learned Chief Justice said :

> "The argument is that sales-tax is an indirect tax on the consumer. The idea is that the seller will pass it on to his purchaser and collect it from them. If that is the nature of the sales-tax then, urges the learned Attorney-General, it cannot be imposed retrospectively after the sale transaction has been concluded by the passing of title from the seller to the buyer, for it cannot, at that

(1) [1934] A. C. 45. (2) [1958] S.C.R. 1355.

stage, be passed on to the purchaser.....
.....Once that time goes past, the seller loses the chance of realising it from the purchaser and if it cannot be realised from the purchaser, it cannot be called sales-tax. In our judgment this argument is not sound. From the point of view of the economist and as an economic theory, sales-tax may be an indirect tax on the consumers, but legally it need not be so.....This also makes it clear that the sales-tax need not be passed on to the purchasers and this fact does not alter the real nature of the tax which, by the express provisions of the law, is cast upon the seller.....If that be the true view of sales-tax then the Bihar Legislature acting within its own legislative field had the powers of a sovereign legislature and could make the law prospectively as well as retrospectively. We do not think that there is any substance in this contention."

In our judgment this passage covers the argument regarding a duty of excise getting its essential nature altered and ceasing to be a duty of excise if imposed retrospectively. The submission, therefore, lacks any force and is rejected.

It is also necessary to refer to one further matter : Even assuming that the learned Counsel is right in his submission that to be a duty of excise within Entry 84 of the Union List the taxing authority should have expected the tax to be passed on, we consider that learned Counsel is not right in submitting that that condition is not satisfied in the case of the levy now impugned. The provisions of the impunged enactment have to be read in the light of s. 64A of the Sale of Goods Act which enacts :

" In the event of any duty of customs or excise on any goods being imposed, increased decreased or remitted after the making of any

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contract for the sale of such goods without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such goods duty-paid where duty was chargeable at that time :—

> (a) if such imposition or increase so takes effect that the duty or increased duty, as the case may be or any part thereof, is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition, and
>
> (b) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty and he shall not be liable to pay, or be sued for or in respect of, such deduction."

This provision originally formed s. 10 of the Tariff Act VIII of 1894 and was subsequently enacted as s. 10 in the Indian Tariff Act of 1934 (cl Act XXXII of 1934). The object of the statutory provision is that where contracts for the sale of goods are entered into and the price payable therefor determined on the basis of existing rates of duty—either of excise or of customs—neither party shall be prejudiced or advantaged by reason of the increase or decrease of the duty. The question as to the scope of s. 10 of the Tariff Act of 1894 came up for consideration before a Bench of the Madras High Court whose decision is reported in *Narayanan* v. *Kadir Sahib* (1). The suit out of which the second appeal before the High

(1) A.I.R. 1930 Mad. 606.

Court arose was by a buyer of salt for the refund of salt-excise duty which had been reduced after the date of the contract. The transaction of sale between the plaintiff and the defendant took place on March 5, 1922, and the price payable by the plaintiff was based on the rate of duty prevailing on that date. Subsequent thereto the Government of India reduced the duty on salt from Rs. 5/- to Rs. 2/8/- per bag and this was to have effect from a date prior to March 5, 1922. The defendant-firm (the sellers) had obtained from the Government refund of the duty on the salt sold by them to the plaintiff. It was to recover this amount of duty that the suit was filed by the buyer. The learned Judges held that on the terms of s. 10 of the Tariff Act of 1894 (indentical with s. 64A of the Sale of Goods Act) the fact that the contract was no longer executary but that delivery had been made and the price paid, was no bar to the plaintiff succeeding in his suit.

It will be seen that s. 64A is in two parts: the first cl. (a) dealing with the case of an increase in duty and conferring on the seller the right to recover the amount of the increased duty from the buyer, and the second limb (cl. b) making provision regarding the correlated case of a reduction in the duty with corresponding rights to the buyer to obtain the benefit of a reduction. Whatever argument might be raised based upon the language of the second limb of the section, it is not open to doubt that in the case of an increase in duty, the seller would be entitled to recover the duty from the buyer provided: (a) there was no contract to the contrary by which he had precluded himself from claiming such enhanced duty, i. e., the contract having negatived or limited the seller's right to prefer such a claim, or was at least silent as regards what was to happen in the event of the duty being increased, (b) the change in the rate of duty was effected after the date of the contract. In

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these circumstances, it appears to us that there might not be even a factual basis for the complaint of learned Counsel for the appellants that in the case of a retrospective increase in duty, the duty ceases to be a duty of excise by becoming a "direct" tax because it was incapable of being passed on. The answer of learned Counsel to this point regarding the operation of s. 64A of the Sale of Goods Act was merely that the Court could not take account of the provisions of another statute for dealing with the validity of a provision of the Finance Act 1911. The submission has no force at all because s. 64A of the Sale of Goods Act refers in express terms to "duties of excise" and has, therefore, to be read as part and parcel of every legislation imposing a duty of excise. In view of our conclusion, however, that the duty in the present case, notwithstanding its imposition with retrospective effect, and even if it be that it was incapable of being passed on to a buyer from the tax-payer, was a duty of excise within Entry 84 as properly understood it is not necessary to rest it upon this narrower gruond.

In our view, a duty of excise is a tax-levy on home-produced goods of a specified class or description, the duty being calculated according to quantity or value of the goods and which is levied because of the mere fact of the goods having been produced or manufactured and unrelated to and not dependent on any commercial transaction in them. The duty in the present case satisfies this test and therefore it is unnecessary to seek other grounds for sustaining the validity of the tax.

One further aspect of the matter on which some emphasis was laid by Mr. Pathak was that a duty of excise was in its essence a tax on goods and not a personal tax levied on the tax payer such as an income-tax. He urged that being a tax levied on goods notwithstanding that it was

collected from the producer or manufacturer, it followed that the essential attribute or characteristic of that duty was that the producer or manufacturer must own or have possession and control over the goods at the moment of the levy. If this element of ownership, possession or control over the goods by the tax-payer was lacking, learned Counsel urged the duty would not be a duty on the goods but a personal tax levied on the tax-payer.

This is really another aspect of the same argument that a duty of excise is in its nature an indirect tax but learned Counsel submitted that viewed from this angle it would be seen that the duty imposed by the impugned enactment was shown to be not a duty of excise. The grounds upon which the submission of learned Counsel that a duty of excise levied retrospectively was converted into a direct tax and therefore not a duty of excise have been repelled by us which ought to suffice to repel the contention in this form also. Besides, it may also be pointed out that even in strict theory there is no basis for the submission now under consideration. The duty imposed by the impugned Act being retrospective, it operates as from a previous date and admittedly on the date when by force of the enactment the duty was levied the tax-payer was the owner or was in possession and control of the goods. To deny this, would in effect deny the legal effect of the tax being imposed retrospectively and fictionally deemed to be in force on an earlier date.

In dealing with the arguments of learned Counsel on the scope and content of Entry 84 of the Constitution and of the meaning of the expression "duty of excise" in that entry we have also covered the special argument questioning the right of Parliament to impose retrospectively a duty of excise. It was conceded, that Parliament has power to enact laws with retrospective effect and as it was not suggested that laws

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dealing with taxation are any exception to that rule the only ground upon which the learned Counsel could rest this submission was that being an indirect tax, capability of being passed on was an essential characteristic or requirement of a duty of excise, and so its imposition with retrospective effect deprived it of that essential character and therefore rendered it a duty of a diffent nature and for that reason a retrospective imposition of an excise duty was not permissible. It would be seen that this is really the same argument which we have dealt with earlier presented in another form. For the reasons already stated, we find no substance in this form of argument either and we have no hesitation in rejecting it. It need only be mentioned that the passage in judgment of Lord Davey in the *Colonial Sugar Refining Company Ltd.* v. *Irving* (1), already extracted, is sufficient precedent, if authority were needed, to reject this argument.

The second point raised by learned Counsel was that the impugned s. 7(2) of the Act was unconstitutional in that it contravened the fundamental rights guaranteed under Arts. 19(1)(f) and 31(1) and (2) of the Constitution. It was urged that even if the impugned provision was within the legislative competence of Parliament as being covered by Entry 84 of the Union List, the retrospective levy of an excise duty violated the freedom guaranteed by Art. 19 (1)(f)- the right to hold property--and was not saved by Art. 19(5) since the same was not *"a reasonable restraint"* on the rights of the appellant. If Counsel was right so far, his next submission was that the threat to deprive the appellant of the amount of the tax-levy was a deprivation without authority of law—Art. 31(1) and was further a compulsory acquisition of that property without compensation (Art. 31(2)) which was not saved by Art. 31(5)(b)(i) because the

(1) [1906] A.C. 360.

law contemplated by that sub-article was a valid law for the imposition of a tax which satisfied the requirements both of legislative competence and of the rights guaranteed by Part III of the Constitution.

The submission of Mr. Pathak on this part of the case was briefly as follows. A law which imposes a tax and provides for its levy and collection is as much a law, as a law under other non-taxation entries of the legislative list. All laws including laws imposing taxes are within Part III of the Constitution being laws under Art. 13(2) thereof and unless any particular Article was inapplicable to such laws by reason of obvious irrelevance every Article in the Part would apply to them and without such a law satisfying the test of reasonableness or constitutionality laid down in the various Articles guaranteeing the several. Fundamental rights the statute in question could not be pronounced valid and enforceable.

We shall be referring to the manner in which Mr. Pathak sought to urge that the impugned provision offended Art. 19(1) (f), but before doing so, it is necessary to notice the submission which Mr. Sanyal invited us to accept.

He raised a broad contention that no law imposing a tax could be impugned on the ground of violation of Part III of the Constitution in general and in particular of Art. 19(1) (f) or Art. 31. His submission was that the validity of tax laws were governed solely by Art. 265 and that such laws were not governed by Part III of the Constitution and specially because the money sought to be taken by the State as tax by virtue of a fiscal enactment was not "property" within Art. 19(1) (f) and that the expression "laws for the purpose of imposing a tax" used in Art. 31(5) (b) (i) saved all laws from the operation of Art. 31 whether such laws be within legislative competence or not, as

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also whether or not such laws were repugnant to Part III of the Constitution.

Before adverting to the decisions on which reliance was placed for this position two things might be pointed out : (1) that Art. 265 merely enacts that all taxation—the imposition, levy and collection shall be by law ; and (2) that the Article beyond excluding purely executive action does not by itself lay down any criterion for determining the validity of such a law to justify any contention that the criteria laid down exclude others to be found elsewhere in the Constitution for laws in general. If by reason of Art. 265 every tax has to be imposed by "law" it would appear to follow that it could only be imposed by a law which is valid by conformity to the criteria laid down in the relevant Articles of the Constitution. These are that the law should be (1) within the legislative competence of the legislature being covered by the legislative entries in Schedule VII of the Constitution ; (2) the law should not be prohibited by any particular provision of the Constitution such as for example, Arts. 276(2), 286 etc., and (3) the law or the relevant portion thereof should not be invalid under Art. 13 for repugnancy to those freedoms which are guaranteed by Part III of the Constitution which are relevant to the subject matter of the law. The reference therefore to Art. 265 does not lead necessarily to the result envisaged by Mr. Sanyal.

The entire argument of Mr. Sanyal on this part of the case was rested on the observations contained in two decisions of this Court, *Ramjilal* v. *Income-tax Officer, Mohindargarh* (1) and *Laxmanappa Hanumantappa Jamkhandi* v. *The Union of India*(2). We do not understand these decisions as laying down any such broad proposition. We are further

(1) [1951] S.C.R. 127. (2) [1955] 1 S.C.R. 769.

satisfied that the learned Judges could not have meant that if a law imposing a tax was outside the legislative compentence of the legislature enacting it, as the argument before us appeared to suggest it could be a law under which a person could be deprived of his property under Art. 31(1) or regarding which a person could not move this Court for relief under Art. 32. Such a proposition would be contrary to a long catena of cases of this Court of which it is sufficient to refer to *Mohammad Yasin* v. *The Town Area Committee, Jalalabad* (1), *State of Bombay* v. *The United Motors (India) Ltd.* (2), *The Bengal Immunity Company Limited* v. *The State of Bihar* (3) and *Ch. Tika Ramji* v. *The State of Uttar Pradesh* (4). In all these cases the legislation imposing the tax or the fee which had been held not to have been within the legislative competence of the authority imposing the tax or the fee was struck down on the ground that those laws violated the freedom guaranteed by Part III of the Constitution. Learned Counsel laid some stress on the fact that in these cases the tax or fee was held to be unconstitutional as imposing an unreasonable restraint on the right to carry on a trade or business guaranteed by Art. 19(1)(g) and not as an infringement of the right to hold "property" under Art. 19(1)(f). In our opinion nothing turns on this, for it is the deprivation of the freedom "to hold property" that is the direct result of the tax and the restraint on the business by reason of the collection of the illegal tax or the procedures prescribed for such collection is only an indirect and incidental effect thereof.

Nor do we find it possible to accept even the more limited proposition that whatever be the position in regard to tax laws which lack legislative competence, once a tax law is covered by an entry in the Legislative List and does not contravene direct prohibitions like those in Arts. 276 (2) or 286

(1) [1952] S.C.R. 578.
(2) [1953] S.C.R. 1069.
(3) [1955] 2 S.C.R. 603.
(4) [1956] S.C.R. 393.

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etc., such a law is immune from the limitations imposed by Part III of the Constitution.

Mr. Sanyal is right in his submission that the levying of taxes though it might involve taking private property for a public use is entirely distinct from the power of eminent domain which is covered by Art. 31(1)(2) and that the saving in Art. 31(5)(b)(i) of such laws is really by way of abundant caution. It has been stated that where "property is taken under a taxing power, the persons so taxed may be said to be compensated for their contribution by the general benefits which they receive from the existence and operation of Government. But this is not to say that the burden of a tax that may be constitutionally laid upon an individual needs to be justified by a showing that he, individually will receive benefit from the expenditure of the proceeds of the tax, and much less that the degree of that burden may be measured by the amount of benefit that the tax payer is excepted to receive (1)". It would, therefore, be obvious that a tax law need not satisfy the tests of Art. 31(2).

But it does not follow that every other Article of Part III is inapplicable to tax laws. Leaving aside Art. 31(2) that the provisions of a tax law within legislative competence could be impugned as offending Art. 14 is exemplified by such decisions of this Court as *Suraj Mal Motha* v. *Sri A. V. Visvanatha Sastri* (2) and *Shree Meenakshi Mills Ltd., Madurai* v. *Sri A. V. Visvanatha Sastri* (3) In *Moopil Nair* v. *State of Kerala* (4) the Kerela Land Tax Act was struck down as unconstitutional as violating the freedom guaranteed by Art. 14. It also goes without saying that if the imposition of the tax was discriminatory as contrary to Art. 15, the levy would be invalid.

It might very well be that a distinction might have to be drawn between the legality of the

(1) Willoughly Law of the U.S. (2nd Students Edn. p. 282).
(2) [1951]1 S.C.R. 448. (3) 1 S.C.R. 787.
(4) [1961] 3 S.C.R. 77.

quantum of a tax levied which might not be open to challenge under Art. 19(1)(f) and the incidence of the tax or the procedure prescribed therein either for the assessment or the collection which might be open for being tested with reference to all the freedoms including that contained in Art. 19(1)(f). In fact in *Moopil Nair* v. *State of Kerala* (1) already referred to, certain provisions of the Act therein challenged which prescribed the procedure for the levy of the tax were struck down on the ground of being obnoxious to Art. 19(1)(f). Having regard to the very limited controversy before us we do not consider it necessary to embark on any further or more detailed examination of this question, except to say that we cannot accept the argument of the learned Additional Solicitor General that by reason of Art. 265 tax laws are outside Part III of the Constitution.

In support of the submission that a tax levied with retrospective effect was unconstitutional as being an unreasonable restriction on the right to hold property (Art. 19(1)(f)). Mr. Pathak relied on the decisions in *Nichols* v. *Coolidge* (2). The tax in question was an estate duty on property passing on death and in the items to be included for computing the value of the estate was included not merely all property of which the deceased died possessed, on the date of his death but also that which he had transferred by gifts within a period of two years before his death. This inclusion of property transferred to third persons not in contemplation of death but by the grantor in the ordinary and natural course of the transaction of his affairs so that the donees might enjoy the properties absolutely, was held to be unconstitutional as offending the rule as to "due process" contained in fifth amendment to the constitution. Justice McReynolds delivering the opinion of the Court said:

(1) [1961] S. C. R. 77. (2) 71 Law Ed. 1184.

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"Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough ..... Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. This Court has recognised that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the fifth Amendment. We must conclude that s. 402(c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a deceased prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

Learned Counsel also referred us to a few later decisions of the American Supreme Court in which retrospective taxation has been held arbitrary and capricious and to amount to a violation of the due process clause contained in the 5th Amendment. In regard to these decisions, two points have to be noted: (1) that the decisions of Supreme Court of the United States are not uniform and there are undoubtedly decisions of the Court of a later date which speak the other way. In *Third National Bank* v. *White* (1) the Supreme Court upheld an estate tax which operated retrospectively. It is in view of these decisions that Mr. Ballard states in an article in the Harvard Law Review (*), referring to *White*'s *case* (1)

(1) (1932) 287 U.S. 577 (*) 48 Harvard Law Review, P. 592.

"It seems accurate to say that the decision marks for practical purposes the passing of 'arbitrary retroactivity' in the field of the estate tax.....And the present status of Nichols v. Coolidge is not entirely clear.....Since the Nichols case can be distinguished on its facts, it may well give way.....In any event.....it would seem that after the White case no application of the estate tax can be successfully resisted on the score of retroactivity."

For instance in *Welch* v. *Henry* (1) which related to an enactment imposing income tax which had retrospective operation, Justice Stone delivering the Judgment of the Court referring to *Nichols* v. *Coolidge* (2) and other cases in which observations broadly stating that any retrospective tax legislation was obnoxious to the requirement of due process, stated :

"Even a retroactive gift tax has been held valid where the donor was forewarned by the statute books of the possibility of such a levy. In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation."

"Any classification for taxation is permissible which has reasonable relation to a legitimate end of governmental action. Taxation is but the means by which government distributes the burdens of its cost among those who enjoy its benefits. And the distribution of a tax burden by placing it in part on a special class which by reason of the taxing policy of the State has escaped all tax during the taxable period is not a denial of equal protection.

(1) 305 U.S. S.C.R. 135, 146; 83 Law Ed. 87.
(2) 71 Law Ed. 1184.

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> Nor is the tax any more a denial of equal protection because retroactive..... A tax is not necessarily unconstitutional because retroactive. Milliken v. United States and cases there cited. Taxtation is neither a penalty imposed on the taxpayer not a liability he assumes by contract. It is but a way of apportioning the cast of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax is not enough to point out that the taxable event, the receipt of income, antedated the statute."

In *Untermyer* v. *Anderson*(1) which was concerned with the validity of a tax on gifts which was made to operate from a date before it was enacted, Justice Holmes stated :

> ".....I find it hard to state to myself articulately the ground for denying the power of Congress to lay the tax. We all know that we shall get a tax bill every year. I suppose that the taxing act may be passed in the middle as lawfully as at the begining of the year. A tax may be levied for past privileges and protection as well as for those to come,"

and Justice Brandeis made the added observations which have been repeatedly quoted in later decisions as well as in text books :

> "For more than half a century, it has been settled that a law of Congress imposing a tax may be retroactive in its operation..... Each of the fifteen income tax acts adopted from time to time during the last sixty-seven years has been retroactive, in that it applied

(1) 72 Law Ed. 645, 647.

> to income earned, prior to the passage of the act, during the calendar year..... ..The need of the government for revenue has hitherto been deemed a sufficient justification for making a tax measure retroactive whenever the imposition seemed consonant with justice and the conditions were not such as would ordinarily involve hardship. On this broad ground rest the cases in which a special assessment has been upheld.....Liability for taxes under retroactive legislation has been 'one of the notorious incidents of social life'.....Recently this Court recognized broadly that 'a tax may be imposed in respect of past benefit'."

It would thus be seen that even under the constitution of the United States of America the unconstitutionality of a retrospective tax is rested on what has been termed "the vague contours of the 5th Amendment." Whereas under the Indian Constitution that grounds on which infraction of the rights a property is to be tested not by the flexible rule of "due process" but on the more precise criteria set out in Art. 19(5), mere retrospectivity in the imposition of the tax cannot per se render the Law unconstitutional on the ground of its infringing the right to hold property under Art. 19(1)(f) or depriving the person of property under Art. 31(1). If on the one hand, the tax enactment in question were beyond legislative competence of the Union or a State necessarliy different considerations arise. Such unauthorised imposition would undoubtedly not be a reasonable restriction on the right to hold property besides being an unreasonable restraint on the carrying on of business, if the tax in question is one which is laid on a person in respect of his business activity.

Mr. Pathak also presented his argument on this head in a slightly different form. He submitted that the Constitution-makers had contemplated that a duty of excise would be imposed only when the

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manufacturer or the producer was in possession and control of the goods at the moment of the imposition, and therefore would be in a position to pass it on and obtain payment from the purchaser of the duty paid by him to State. The imposition of the levy retrospectively however deprive him of this benefit of passing on the burden which he would normally have. This restriction or impairment of his right to pass on the duty, he urged rendered the restriction imposed on him in the shape of the obligation to pay the duty unreasonable. Learned Counsel admitted that as the imposition would yield to the Exchequer more money, the restriction on appellants' right to hold property could not be denied to be in the "interest of the general public" within Art. 19 (5) but his submission was that it lacked the character of "reasonableness" because it deprived him of the right to pass on the tax to others. It was further admitted that it was only if learned Counsel was right in his submission regarding the infraction of Art. 19 (1) (f) that any question of the violation of Art. 31 (1) could arise. It would be seen that it is the same argument as was presented to challenge the legislative competence of Parliament to enact the legislation. Only the nomenclature employed is different and adapted to suit the need of bringing it into the fold of an impairment of fundamental rights under Part III of the Constitution. As Evatt, J. observed in *Broken Hill South Limited (Public Officer)* v. *The Commissioner of Taxation (New South Wales)* (1) "It is not proper to deny to the lagislature the right of solving taxation problems unfettered by legal categories." If notwithstanding that according to economic theory or doctrines propounded by economists a duty of excise does not cease to be such, merely because it is imposed at a time or in circumstances (as pointed out earlier in conjunction with a system of price control) in

(1) 56 C.L.R. 337, 379.

which it cannot be passed on one fails to see any substance in the argument that the imposition of such a tax is an unreasonable restriction on the exercise of the fundamental rights to hold property guaranteed by Art. 19 (1) (f).

The last of the points urged was that r. 10A was not apt to cover the recovery of the duty which was a subject of demand dated December 12, 1951. The learned Judges of the High Court rejected this submission and, in our opinion, correctly. Rule 10 under which the first demand of June 22, 1951, was made ran :

> "10. Recovery of duties or charges short levied or erroneously refunded.—When duties or charges have been short-levied through inadvertance, error, collusion or misconstruction on the part of an offic r, or through mis-statement as to the quantity, description or value of such goods on the part of the owner, or when any such duty or charge, after having been levied, has been owing to any such cause, erroneously refunded the person chargeable with the duty or charge, so short-levied, or to whome such refund has been erroneously made shall pay the deficiency or repay the amount paid to him in excess, as the case may be, on written demand by the proper officer being made within three months from the date on which the duty or charge was paid or adjusted in the owners account-current, if any, or from the date of making the refund."

The contention which was then urged was that the short-levy which led to the demand was not caused through inadvertance, error etc., which are set out in this rule and that consequently there was a defect in the operative machinery for collection of the refund. This objection of the present appellants was upheld by the Full Bench of the

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Nagpur High Court and it was as a result of this decision that rule 10 A was framed. This rule reads :

> "10A. Residuary powers for recovery of sums due to Government.—Where these rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules, such duty deficiency in duty or sum shall, on a written demand made by the proper officer, be paid to such person and at such time and place, as the proper officer may specify."

The words "deficiency in duty if the duty has for any reason been short-levied" are in our opinion, wide enough to include cases of deficiency arising like those in the circumstances of the present case, viz., where 8 annas out of the 14 annas of the duty has been collected in the first instance but 6 annas remains to be collected. We consider, therefore, that there is no substance in the objection that r.10A is not wide enough to cover the recovery of the duty from the appellants.

The result is that these appeals fail and are dismissed with costs. There will, however, be only one hearing fee for all the cases. The writ petitions also fail and are dismissed, without any order as to costs.

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KAPUR J.— The appellants are manufacturers, warehousemen and merchants of tobacco and they have private licensed warehouses which are governed by r. 140 of the Rules made under the Central Excise & Salt Act (Act 1 of 1944), hereinafter termed the "Act."

According to their allegations in the petition under Art. 226 of the Constitution, the appellants had a considerable quantity of tobacco in their licensed

warehouses on February 28, 1951. On the same day the Central Bill (Bill No. 13 of 1951) was introduced in the House of the People, one of the clauses of which related to the duty of excise for the financial year beginning April 1, 1951. According to the Bill, on unmanufactured tobacco a duty of 8 As. per lb. and 6 to 9 As. (per 1000) Biris was to be imposed. This Bill was amended and by this amendment the duty on tobacco other than Biri tobacco was fixed at 6 As. per lb. on Biri tobacco 14 As. per lb. and no duty was imposed on manufactured Biris. As a result of the operation of ss. 3 & 4 of the provisional Collection of Taxes act (Act XVI of 1931) the duty became leviable as from the date of the introduction of the Bill. The petitioners have stated that in accordance with the provisions of the Bill that was introduced, they paid excise duty on tobacco in their possession at the rates mentioned in the Bill and obtained clearance certificates in accordance with the Rules under the Act. On April 28, 1951, the Finance Bill was passed and became Finance Act, 1951 (Act XXIII of 1951). By s. 7 of that Act the first schedule to the Central Excise and Salt Act was amended in accordance with what has been stated above. By s. 7. (2) of the Finance Act. 1951, it was provided that the amendment made in the first schedule to the Act shall be deemed to have effect on and from the first day of March 1951. A demand was subsequently made from the appellants in respect of excess duty payable on tobacco cleared out of the store houses from March 1, 1951, to April 28, 1951.

Thereupon the appellants filed a petition under Art. 226 of the Constitution in the High Court at Nagpur. The grounds of the attack as to the constitutionality of the tax were decided against the appellants but the petition succeeded on the ground that there was no machinery

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provided under the Act for recovery of the tax. This judgment is reported as *Chhotabhai Jethabhai Patel & Co.* v. *The Union of India* (1). On December 8, 1951, the Central Government by a notification amended the Central Excise Rules by adding r. 10A which provided machinery for the collection of tax. The rule was :—

> "10-A. Residuary powers for recovery of sums due to Government.—Where these rules do not make any specific provision for the collection of any duty or of any deficiency in duty if the duty has for any reason been short levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules, such duty, deficiency in duty or sum shall on a written demand made by the proper officer be paid to such person and at such time and place as the proper officer may specify."

After the introduction of this rule a fresh demand was made on December 12, 1951, for excess duty on the tobacco cleared. The appellants again filed a petition in the High Court of Nagpur which was decided against them and against that judgment the appellants have come to this court on a certificate under Art. 132 of the Constitution. The question submitted to this Court is as to the validity of the said tax on the ground of its repugnancy to the Constitution of India.

Counsel for the appellants has raised two questions against the legality of the taxes ; (1) The Parliament had no power to make a retrospective legislation while making a law under item 84 of List I so as to affect goods that had been cleared from the warehouses after payment of proper duties at the rates prevailing on the date that the goods were cleared because (a) Parliament's power to make retrospective laws is subject to constitutional limitations, namely, the language

(1) I.L.R. [1952] Nag. 156.

of item 84 of List I ; (b) duty of excise as defined in the Constitution and its nature and character is such that it is not capable of being exercised after the goods on which it is imposed are no longer in possession of the warehousemen and after they have passed into the common stock of the country ; (2) legislation of this character imposes an unreasonable restriction under Art. 19 (1) (f) ; and (3) r. 10-A does not apply to the facts of the case and does not authorise the collection of the duty imposed.

The first point relates to the legislative competency of Parliament. Item 84 of List I provides : Item 84 "Duties of excise on tobacco and other goods manufactured or produced in India....." In the corresponding item under the Government of India Act, 1935, the same lanugage was used so that the nature of the duties remains the same both under the Constitution and under the Government of India Act, 1935 Section 3 of the Act empowers the levying of duties specified in the First Scheduld. The relevant portion of that section is as follows :—

> Section 3(1) "There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates set forth in the First Schedule."

By s. 7 (2) of the Act retrospective effect was given to the duties imposed by the Finance Act taking effect as and from the First day of March, 1951.

> S. 7(2) "The amendment made in the Central Excises and Salt Act, 1944, by subsection (1) shall be deemed to have had effect on and from the first day of March 1951....."

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The effect of this deeming provision is that the new rates of duties must be taken to have been imposed and become operative as if they were in the bill as and when the bill was introduced in Parliament: *Venkatachalam* v. *Bombay Dyeing & Manufacturing Co. Ltd.*(1).

The contention raised is as to the nature of the duty of Excise. It was argued that Excise Duty is a tax on goods which must exist at the time when the tax is levied and it must have been intended and expected by the legislature that it will be passed on to the consumer and as retrospective operation of such duties has not got these qualities when the goods are no longer in possession of the person sought to be taxed they do not fall within the term "duty of excise" and therefore they are beyond the legislative competence of Parliament. To support his contention, counsel for the appellants relied on *Bank of Toronto* v. *Lambe* (2) where the question for decision was as to whether certain taxes imposed on commercial corporations carrying on business were direct taxes or indirect taxes of the Provinces or the Dominion. Lord Hobhouse at p. 582 relying upon the definitions given by John Stuart Mill said :—

> "Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs."

The same distinction was brought out in some other Canadian cases decided by the Privy Council ; *City of Halifax* v. *Estate of J. P. Fairbanks* (3) which related to the nature of "Business Tax" which was held to be a direct tax ; *Attorney-General*

(1) [1959] S.C.R. 703, 707. (2) [1887] 12 A.C. 575.
(3) [1928] A.C. 117.

for British Columbia v. *Mc Donald Murphy Lumber Company Ltd.* (1); & *Attorney-General for British Columbia* v. *Kingcome Navigation Company Limited*(2) *Attorney-General for Manitoba* v. *Attorney-General for Canada* (3) and *Brewers & Malster's Association of Ontario* v. *The Attorney-General for Ontario* (4)

Reference was next made to an Australian case *Parton* v. *Milk Board (Victoria)* (5) where two necessary qualities of the duty of Excise were stated to be that it must be levied on goods which are in existence and the taxpayer should be able to pass it on to the consumer.

But as was pointed out by Gwyer, C.J., in *the Province of Madras* v. *Boddu Paidanna* (6) :

> "The Canadian cases which were cited do not seem to afford any assistance since analogous problems in Canada are always concerned with direct and indirect taxation....."

Dealing with the same distinction the Privy Council said in *Governor-General in Council* v. *Province of Madras* (7) :—

> "Little assistance is to be derived from the consideration of other federal constitutions and of their judicial interpretations. Hence there is no question of direct and indirect taxation....." The Indian Constitution is unlike any that have been called to their Lordships' notice in that it contains what purports to be an exhaustive enunciation and division of legislative powers between the Federal and Provincial Legislatures."

The Excise duty in England came to be imposed as a scheme of revenue and taxing divice by Pym and approved by the Long Parliament. It consisted of charges on wine and tobacco and some

(1) [1930] A.C. 357.
(2) [1934] A.C. 45.
(3) [1925] A.C. 561, 566.
(4) [1897] A.C. 231.
(5) 80 C.L.R. 229.
(6) [1942] F.C.R. 90, 103.
(7) 72 I. A. 91, 102.

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other articles were added later. The basic principle of duties of Excise was that they were taxes on the production and manufacture of articles which could not be taxed through the customs house. The revenue derived from that source is called excise revenue proper. In England it was later on extended to comprise other taxes but the fundamental conception of the term is that it is a tax on articles produced or manufactured in the country. It was in this sense that the word "duty of excise" was understood in Australia (*Peterswald* v. *Bartley*)(1).

The importance of legislative practice of a country was pointed out by the Privy Council in a Canadian case *Croft* v. *Dunphy* (2) where it was held that when a power is conferred to legislate on a particular topic it is important in determining the scope of the power to have regard to what is ordinarily treated as embraced within that topic in the legislative practice in England, U.S.A. and the Dominions and of India, the Federal Court considered the nature of duty of Excise in *Re The Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act (In re A Special Reference under s. 213 of Government of India Act, 1935)* (3), generally known as the "Central Provinces" case. In that case the Act of the Provincial legislature levying a tax on retail sale of motor spirit was held to fall within item 48 in List II of the 7th Schedule of the Constitution Act and not a duty of Excise within the meaning of entry 45 of List I of that Schedule. The nature of the duty was considered by the Court. Gwyer, C. J., after referring to the distionary meaning of the word "excise" said at p. 41 :—

> "But its primary and fundamental meaning in English is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption. I am satisfied that that is also its primary and fundamental meaning in India; and no

(1) 1 C.L.R. 497.
(2) [1933] A. C. 156.
(3) [1939] F.C.R. 18.

one has suggested that it has any other meaning in entry No. 45."

At p. 47 the learned Chief Justice said :—

> "The expression "duties of excise", taken by itself, conveys no suggestion with regard to the time or place of their collection. Only the context in which the expression is used can tell us whether any reference to the time or manner of collection is to be implied. It is not denied that laws are to be found which impose duties of excise at stages subsequent to manufacture or production; but so far as I am aware, in none of the cases in which any question with regard to such a law has arisen was it necessary to consider the existence of a competing legislative power such as appears in entry No. 48."

But Mr. Pathak relied on the observations of the learned Chief Justice at p. 50 where he said :—

> "Thus the Central Legislature will have the power to impose duties on excisable articles before they become part of the general stock of the Province, that is to say at the stage of manufacture or production, and the Provincial Legislature an exclusive power to impose a tax on sales thereafter."

But these observations only mean this that when there is a competition between the duty, imposed at the stage of manufacture of production and a tax imposed on sales thereafter, the sphere of the Central and the Provincial Legislatures comes into operation but, as the previous passages, show, it does not in any manner vary the meaning of the word "excise" nor does it accept a further qualification which is sought to be included in that phrase as a necessary quality of that tax that unless it is capable of being passed on to the consumer or the person taxed can indemnify, himself, it is not a duty of excise. At p. 47, the learned Chief Justice

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observed that in the expression "duties of excise" no suggestion as to time or place of collection was implied. Sulaiman, J., pointed out at p. 73 that in the Indian Constitution it was not necessary to to go into the fine niceties of distinction between direct and indirect taxation because in the Indian Act no such division existed and that ultimate incidence of tax was not a crucial test under the Indian Constitution. Again at p. 77, Sulaiman, J., said :—

> "The essence of a tax on goods manufactured or produced is that the right to levy it accrues by virtue of their manufacture or production. It is immaterial whether the goods are actually sold or consumed by the owner or even destroyed before they can be used. If a duty is imposed on the goods manufactured or produced when they issue from the manufactory then the duty becomes leviable independently of the purpose for which they leave it and irrespective of what happens to them later."

In a subsequent case *The Province of Madras* v. *Messrs. Boddu Paidnna & Sons*(1) Gwyer, C. J., again went into the question of the nature of the duty of excise under the expression "duties of excise" and said at p. 101 :—

> "There is in theory nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed or given away. A taxing authority will not ordinarily impose such a duty, because it is much more convenient administratively to collect the duty (as in the case of most of the Indian Excise Acts) when the commodity leaves the factory for the first time, and also

(1) [1942] F. C. R. 90, 103.

because the duty is intended to be an indirect duty which the manufacturer or producer is to pass on to the ultimate consumer, which he could not do if the commodity had, for example been destroyed in the factory itself. It is the fact of manufacture which attracts the duty, even though it may be collected later; and we may draw attention to the Sugar Excise Act in which it is specially provided that the duty is payable not only in respect of sugar which is issued from the factory but also in respect of sugar which is consumed within the factory."

The Privy Council described the nature of the duty of Excise in *Governor-General in Council* v. *Province of Madras* (1) as a duty which is primarily levied on a manufacturer or producer in respect of the commodity manufactured or produced. At p. 103 Lord Simonds referred to *In re Central Provinces & Berar case* (2) and to *Baddu Paidanna case* (3) and said :—

"The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of his sales, may as is there pointed out in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale. But that method of collecting the tax is an accident of administration ; it is not of the essense of the duty of excise, which is attracted by the manufacture itself. That this is so is clearly exemplified in those excepted cases in which the Provincial, not the Federal legislature has power to impose a duty of excise."

(1) 72 I.A. 91, 102. (2) [1939] F.C.R. 18
(3) [1942] F.C.R. 90, 103.

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Thus according to the Indian cases decided on the nature of duties of excise ultimate incidence is not of any importance or relevance. In dealing with excise duty (1) there is no mention of a direct or indirect taxes ; the Indian Legislature has avoided this incidence to be characteristic of the tax ; (2) taxable event is the manufacture or production of goods ; it is immaterial what happens to them afterwards whether they are sold, consumed, destroyed or given away; (3) it is not a necessary incidence that the manufacturer must be able to pass it on to the consumer or indemnify himself ; (4) the general tendency of its being passed on may be there but it may be prohibited by the circumstances, economic or otherwise. The fact that the manufacturer has no chance to get the tax from the buyer does not affect the legality of the tax ; it was so held in the case of sales tax in *The Tata Iron & Steel Co. Ltd.* v. *The State of Bihar* (1) where the nature of the excise duty was discussed. At page 1369 the observations of Gwyer C. J. in *Boddu Paidanna case* (2) and of the Privy Council in *Governor-General in Council* v. *Province of Madras* (3) were quoted with approval. It may be noted that in the *Tata Iron & Steel Co. case* (1) the tax was a retrospective tax and was imposed at a time when in the Sales Tax Act no provision was made for passing on the Sales Tax to the purchaser. In the *Union of India* v. *Madan Gopal Kabra* (4) it was pointed out that Parliament was not precluded from exercising the power of imposing a retrospective tax and therefore it was competent to make a law imposing a tax on the income of any year prior to the commencement of the Constitution. As was pointed out in that case under Arts. 245 and 346 of the Constitution read with the relevant entry in List I of Schedule VII Parliament is empowered to make laws with regard to taxes and no limitation or restriction is imposed in regard to

(1) [1958] S.C.R. 1355. (2) [1942] F.C.R. 90, 103.
(3) 72 I.A. 91, 102. (4) [1954] S.C.R. 541, at p. 555.

retrospective legislation. See *Sargood Bros.* v. *The Commonwealth* (1) where retrospective laws about the levying of Customs were held valid. See also *Welch* v. *Henry* (2) On the ground of retrospectivity alone therefore the tax is not uncostitutional.

In view of what has been said above the cases decided in Canada or Australia cannot have any application.

It was next contended that a retrospective tax purporting to be a duty on goods when the goods had been disposed of would be a tax not under item 84, List I of the Seventh Schedule but one under item 60 of List II, i.e., tax on profession, trade, calling and employment—the submission being that the word "trade" would include manufacture. This contention was sought to be supported by the observations of Lords Davey in *Commissioner of Taxation* v. *Kirk* (3):—

> "The word 'trade' no boubt primarily means traffic by way of sale or exchange or commercial dealing, but may have a larger meaning so as to include manufactures."

In *National Association of Local Government Officers* v. *Bolton Corporation* (4)Lord Wrights in interpreting the word "trade" in s. 11 of the Industrial Courts Act, 1919, said:—

> "Sect. 11 of the Act of 1919 shows that 'trade' is used as including 'industry' because it refers to a trade dispute in the industry of agriculture."

But this latter case has no application because there the word "trade" was interpreted in relation to a section of a particular Act and trade in that context has quite a different meaning. In *Skinner* v. *Jack Breach Limited* (5), Lord Hewart, C. J., in interpreting the word "trade" in Trade Boards Act held that the word "trade" indicates a process of buying

(1) 11 C.L.R 258, 305.
(2) 83 L. W. 87, 93.
(3) [1900] A. C. 588. 592.
(4) 1943 A. C. 166, 184.
(5) [1927] 2 K. B. 220, 225.

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and selling but it was by no means an exhaustive definition. It might also mean a calling or industry or class of skilled labour.

The duty of Excise in item 84 should be given the widest construction unless for some reason it is cut down either by the terms of that item itself or by other Parts of the Constitution. The legislative history of the duty of Excise shows the nature of the tax. The word "trade" in item 60 of List II has reference to the carrying on of an activity in the nature of buying and selling and may in a different context mean a calling or an industry. Therefore reading the two items together it is obvious that item 84 deals with taxes on goods manufactured or produced and item 60 deals with the carrying on of trade i.e., an activity in the nature of buying and selling and the Act in its pith and substance relates to duty on goods manufactured or produced and has no relationship with item 60 of List II.

Even assuming that the nature and tendency of the duty of Excise is, as contended by Mr. Pathak that it can be passed on to the consumer, even than the complaint of the appellants that they have been deprived of that opportunity is not well founded, because of s. 64-A of the Indian Sale of Goods Act (3 of 1930), which was s. 10 in the Indian Tariff Act, 1934. It was originally taken from the British Tariff Act, 1901, 1 Edw. VII Ch. 7. Section 64-A of the Indian Sale of Goods Act is as follows : —

> S. 64-A. "In the event of any duty of customs or excise on any goods being imposed, increased, decreased or remitted after the making of any contract for the sale of such goods without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such goods duty-paid where duty was chargeable at that time, —

(a) if such imposition or increase so takes effect that the duty or increased duty, as the case may be, or any part thereof, is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty, and he shall not be liable to pay, or be sued for or in respect of, such deduction."

This section provides for the recovery by the seller of the amount of increase in duty from the purchaser where the increase takes effect subsequent to the contract and for the right of the purchaser to recover from the seller the duty in cases where there is a similar decrease and this right exists both before the delivery is given, taken and price received or paid as the case may be: *Narayanan Chettiar* v. *Kidar Sahib*(1). Counsel for the appellants attempted to counter this submission by relying upon a judgment of the Privy Council in *Prabhudas* v. *Ganidada* (2). In that case the Government duty had not been reduced but the Buyer claimed that it had constructively been decreased because the tariff valuation had been reduced and so constructively it must be reckoned that there was a decrease in the duty on the goods sold. This contention was negatived by the Privy Council and it was held that a change of duty means a change in the rate of duty, and not a change of tariff value. Thus assuming that the contention of the appellants is correct as to the nature of the excise duty it cannot be said that in the present case the appellants were

(1) I.L.R. 53 Mad. 680. (2) 52 I.A. 196.

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deprived of the opportunity of recovering the additional duty from the purchaser and therefore the duty lost its character of being excise duty and was transformed into a different tax. This argument of the appellants is therefore without substance and must be overruled.

The constitutionality of the tax and retrospective imposition of enhanced duty on tobacco was further challenged on the ground of violation of the fundamental rights of the appellants under Art. 19(1)(f) of the Constitution which it was submitted is not saved by cl. (5) of that article because it is not a reasonable restriction in the interest of the general public. The grounds of attack may be stated in this way : (1) that the nature of an excise duty is such that normally it is passed on to the purchaser by the manufacturer or the producer and it has that tendency and quality ; (2) as the impugned duty was enhanced at a time when the appellants had cleared their goods after paying the then prevailing duty, it was not possible for them to realize the excise duty from any purchaser and (3) at the time of the clearance of the goods the appellants had paid all the taxes under the then existing law and the new liability rendered them liable to pay an illegal exaction or in the alternative to suffer the consequences of non-payment which are of a drastic nature. On this basis it was submitted that the imposition was an unreasonable restriction on the fundamental rights of the appellants guaranteed under Art. 19(1) (f).

At this stage an examination of the extent of the State's power of taxation will be helpful. This power is one of the three governmental powers of the State; the other two being police power and power of eminent domain.

The power of taxation is the legal capacity of government to impose charges upon persons or their property to raise revenue for governmental

purposes. A tax is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. *Welch* v. *Henry* (1), but the constitutionality of a tax does not depend upon a showing of benefits; protection and taxation are not correlative terms. Willis Constitutional, Law, p. 224 : Tax is levied against the person and not against property. Property only serves as a basis for computing the measure of each person's liability. Weaver on Constitutional Law, p. 513 :

> "The power of taxation is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden which, in the case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading and at no point does the power of the government affect more constantly and intimately all the relations of life than through the exactions made under it."

(Cooley's Constitutional Limitations, Vol. 2, 8th E l. p. 987.)

Chief Justice Marshall said in *M'Culloch* v. *Maryland* (2) :—

> "The power of taxing the people and their property is essential to the very

(1) 83 L. Ed. 87. (2) 4 L. Ed. 579, 607.

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existence of government, and may be legitmately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself." (See Willoughby on the Constitution of the United States, Vol. 2 at p. 666).

As the exigencies of the government cannot be limited, no limits can be prescribed to the exercise of the right of taxation. Every individual must bear a portion of public burden and that portion is determined by the legislature. According to the American Supreme Court the power of taxation is very wide and uncontrolled.

In *M'Culloch* v. *Maryland*(1) Chief Justice Marshall said :—

> ".....it is unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power." See also *Graves* v. *Schmidlapp*(2) (per Chief Justice Stone).

In *Pacific Insurance Co.* v. *Soule*(3) the Court said:—

> "Congress may prescribe the basis fix the rate, and require payment as it may deem proper within the limits of the constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the government."

Again in *Veazie Bank* v. *Fenno* (4), it was said :—

> "It is insisted.....that the tax in this case is excessive and so excessive as to indicate a purpose on the part of the congress to destroy the franchise of the bank, and is, therefore beyond the constitutional power of

(1) 4 L. Ed. 579, 607.
(2) 86 L. Ed. 1097.
(3) 7 Wall. 433.
(4) 8 Wall. 533.

congress.....The first answer to this is that the judicial cannot prescribe to the legislative department of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the Courts but to the people by whom its members are elected.'

In *Patton* v. *Brady*(1), the Court observed :—

"It is no part of the function of a Court to enquire into the reasonableness of the exercise of the power of taxation either as respects the amount or the property on which it is imposed."

In *Welch* v. *Henry*(2), at p. 94 it was observed :—

"The equitable distribution of the costs of government through the medium of an income tax is a delicate and difficult task. In its performance experience has shown the importance of reasonable opportunity for the legislative body, in the revision of tax laws, to distribute increased costs of government among its tax payers in the light of present need for revenue and with knowledge of the sources and amounts of the various classes of taxable income during the taxable period preceding revision. Without that opportunity accommodation of the legislative purposes to the need may be seriously obstructed if not defeated."

Thus according to American view (1) the power to tax is an attribute of sovereignty; (2) tax is a rateable contribution of each individual in a State towards the amount of revenue which is essential for the existence and operation of a public governing body; (3) it being essential for the very existence of an organised State, it may be exercised on objects to the utmost extent to which the legislature may choose to carry it and (4) the needs of

(1) 46 L. Ed. 713. (2) 83 L. Ed. 87.

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the revenue are only known to the legislature and the court cannot enquire into the necessity of imposing a tax or the objects on which the imposition should be made or the extent of the imposition. In the very nature of things the courts are unable to go into the propriety, extent or economics of a particular tax or the policy underlying it, which must depend upon a multitude of circumstances, which can only be known to the government or the legislature.

As the appellants have relied on certain American decisions where certain taxing laws operating retrospectively were tested on the touchstone of "due process of law" clause it becomes necessary to examine the extent of that doctrine. "The taxing power of Federal Government," says Prof. Willis (Constitutional Law, p. 378), "is limited by the procedural requirements of the due process clause. Notice and hearing, though not a judicial tribunal, are required where the tax is based on the value of the property. Jurisdiction, also, is a requirement for all forms of taxation, though the rules as to jurisdiction vary with the kind of tax levied." According to Willoughby, Constitution of the United States, Vol. III, p. 1875, the due process of law obliges the exercise of the taxing power to conform to the following rules :—

1. That the tax shall be for a public purpose.
2. That it shall operate uniformly upon those subject to it.
3. That either the person or the property taxed shall be within the jurisdiction of the government levying the tax.
4. That in the assessment and collection of the tax certain guarantees against injustice to individuals, especially in the case of specific as distinguished from *ad valorem* taxes, by way of notice and

> opportunity for a hearing shall be provided."

These principles of taxation are not peculiar to America but are accepted in all countries which have parliamentary democracies and govern the Indian taxation system also.

In some American decisions retroactive tax laws were held to be inconsistent with due process : *Nichols* v. *Coolidge*(1) ; *Helvering* v. *Helwholz*(2) *Blodgett* v. *Holden* (3). But the decision in those cases rested on the ground that the tax could not reasonably be anticipated by the taxpayer at the time of the voluntary act which the statute later made the taxable event e.g., the gift by the descendent of the whole or a part of his interest in property. As was explained in *Welch* v. *Henry*(4) at p. 93 :

> "Since, in each of these cases, the donor might freely have chosen to give or not to give the taxation, after the choice was made of a gift which he might will have refrained, from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive, imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer. And even a retroactive gift tax has been held valid where the donor was forewarned by the statute books of the possibility of such a levy, *Milliken* v. *United States,* 75 L. Ed. 809....."

In that case the retroactive operation of a tax on dividends was upheld and the objection on the ground of inconvenience in being called upon, after the customary time for levy and payment of the

(1) 71 L.Ed. 1184.
(2) 90 L.Ed 76.
(3) 7 L.Ed. 205.
(4) 83 L.Ed. 87.

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tax had passed, to bear a governmental burden of which he had no warning and which he did not anticipate was held to be unsustainable. The contention that the retroactive application of the Revenue Acts is a denial of the due process guaranteed by the Constitution has not been accepted in America as an invariable rule. *Welch* v. *Henry*(1) and the other cases there cited.

The doctrine of due process of law has received various interpretations in America which have not always been consistent. Sometimes it has favoured personal liberty and sometimes social control sometimes personal liberty as a matter of substance. Sometimes it has protected personal liberty by extending due process to matters of substance and sometimes it has protected social control by broadening the scope of police power or the power of taxation or the power of eminent domain. Willis' Constitutional Law, p. 659. Brandeis J., *in Untermyer* v. *Anderson*(2) dealing with the presumption of validity of a taxing statute observed :

> "The presumption should be particularly strong where as here the objection to an act arises not from a specific limitation or prohibition on congressional power but only out of the 'vague contours of the 5th Amendment prohibiting the depriving any person of liberty or property without due process of law'. Holmes J., in *Adkins* v. *Children's Hospital*, 76 L. Ed. 785, 800."

It was because of the varying meanings and concepts which have from time to time been attached to "due process of law" that the framers of the Indian Constitution did not adopt it in the Constitution; on the other hand they tried to give more defined boundaries to the area of fundamental rights in Arts. 19 and 31 which deal with rights of property

(1) 83 L. Ed. 87. (2) 72 L. Ed. 645.

and in Arts. 19, 20, 21 and 22 which relate to protection of personal liberty and this Court rejected it in *A. K. Gopalan's case* (1) and in the *State of West Bengal* v. *Subodh Gopal Bose* (2).

The constitutionality of the duty of excise was challenged in the present case on the ground of violation of Art. 19 (1) (f) of the Constitution. The argument is that a taxing law under Art. 265 is as much a law as any other and therefore falls within the definition of law under Art. 13(3)(a), and if it contravenes any of the fundamental rights under Part III, then to the extent of the contravention it is void. Counsel relied on the second *Kochuni case* (3).

Article 19 guarantees personal freedoms subject to certain restrictions. Its relevant portion is as follows :

> Art. 19 (1)(f). "All citizens shall have the right .....
> .....
> to acquire, hold and dispose of property ;
>
> Art. 19(5). " Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes or prevent the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

As has already been said the power to tax is the legal capacity of the State to raise from all those subject to its authority a certain amount of revenue essential so the existence and operation of government. A tax is not a penalty but a contribution of monies for governmental purposes by

(1) [1950] S.C.R. 88, 100. (2) [1954] S.C.R. 587, 605.
(3) [1960] 3 S.C.R. 887, 889, 915.

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persons who may be residents or non-residents citizens or non citizens, living persons or legal *personae* who are privileged to enjoy its benefits, but those are not co-relative. It implies an equality of burden and regular distribution of expenses of government among the persons taxed. It is levied by authority of law equitably, uniformly or in echelons on all persons subject to it.

The appellants alleged that they had sold their goods during the period when the Finance Bill was before Parliament. Variations in the rates of duties are not unexpected, it being within the power of Parliament to do so both prospectively and retrospectively. It is not suggested that such variations are unknown in legislative practice or that the legislators were not entitled to amend a money bill as introduced. If the appellants' contention is sustained then it will mean the deprivation of Parliament of its right to choose the objects of taxation and therefore Parliament will only vary the rates of duties proposed by the Executive or the time of their effectiveness at the peril of their being declared invalid although they may be within its legislative competence and may in its opinion be necessary for the carrying out of its policies or subserve the proper governance of the country.

In the Indian Constitution there is an exhaustive enunciation and distribution of legislative powers, including powers as to taxation, between the State Legislatures and Parliament. Subjects of taxation are distributed in the three Legislative Lists and areas of the respective fields of Parliament and State Legislatures as to taxes are defined. In Parts XII and XIII limitations on legislative competence of the various legislatures as to taxation are indicated and emphasis is placed on the preservation of the economic unity of

India. Article 265 is in Chapter XII and provides :—

"No tax shall be levied or collected except by authority of law," which means that all taxation has to be under a law enacted by a legislature of competent jurisdiction and subject to constitutional limitations. This Court in 1950 rejected the applicability of the doctrine of "due process of law" to Indian constitutional problems : *A. K. Gopaln's case* (1) ; *The state of West Bengal* v. *Subodh Gopal Bose* (2). In the latter case it was also held that the Indian Constitution recognises no fundamental right to immunity from taxation and that is why presumably no constitutional protection is provided against the exercise of that power. Per Patanjali Sastri, C.J., p. 614. Das, J. (as he then was), held the power of taxation to be distinct from police power (i.e. regulatory power of the State) and the power of Eminent Domain (i.e. the power of the State of compulsory acquisition of property). Dealing with protection against taxation he said in *Subodh Gopal's case* (2) at p. 652 :—

> "Our Constitution makers evidently considered the protection against deprivation of property in exercise of police power or of the power of eminent domain by the executive to be of greater importance than the protection against deprivation of property brought about by the exercise of the power of taxation by the executive, for they found a place for the first mentioned protection in Art. 31 (1) and (2) set out in Part III dealing with fundamental rights while they placed the last mentioned protection in article 265 to be found in Part XII dealing with finance etc. So with regard to all the three sovereign powers we have complete protection against the executive organ of the State."

(1) [1950] S.C.R. 88,100. (2) [1954] S.C.R. 587,605.

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Again at p. 653 he observed :—

> "Apart from this, what I ask is, our protection against the legislature in the matter of deprivation of property by the exercise of the power of taxation? None whatever. By exercising its power of taxation by law the State may deprive us, citizen or non-citizen of almost sixteen annas in the rupee of our income." (See also p. 654).

In *Ramjilal* v. *Income Tax Officer* (1) Das, J. (as he then was), observed at pp. 136-137 :—

> "Reference has next to be made to article 265 which is in Part XII, Chapter I, dealing with 'Finance'. That article provides that no tax shall be levied or collected except by authority of law. There was no similar provision in the corresponding chapter of the Government of India Act, 1935. If collection of taxes amounts to deprivation of property within the meaning of article 31(1), then there was no point in making a separate provision again as has been made in article 265. It, therefore, follows that clause (1) of article 31 must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, for otherwise article 265 becomes wholly redundant. In the United States of America the power of taxation is regarded as distinct from the exercise of police power or eminent domain. Our Constitution evidently has also treated taxation as distinct from compulsory acquisition of property and has made independent provision giving protection against taxation save by authority of law. When Dr. Tek Chand was asked if that was not the correct position, he did not advance any cogent or convincing answer to refute the conclusion put to him. In our opinion, the protection against imposition

(1) [1951] S.C.R. 127.

and collection of taxes save by authority of law directly comes from article 265, and is not secured by clause (1) of article 31. Article 265 not being in Chapter III of the Constitution, its protection is not a fundamental right which can be enforced by an application to this court under article 32. It is not our purpose to say that the right secured by article 265 may not be enforced. It may certainly be enforced by adopting proper proceedings. All that we wish to state is that this application in so far as it purports to be founded on article 32 read with article 31(1) to this court is misconceived and must fail."

A similar decision was given and similar language used by Mahajan, C.J., in *Laxmanappa Hanumantappa* v. *Union of India* (1) :—

"It was held by this Court in *Ramjilal* v. *Income Tax Officer, Mohindergarh* (2), that as there is a special provision in article 265 of the constitution that no tax shall be levied or collected except by authority of law, clause (1) of article 31 must therefore be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, and inasmuch as right conferred by Article 265 is not a right conferred by Part III of the constitution, it could not be enforced under article 32."

Ramjilal's case (2) was quoted with approval in *Bengal Immunity Co. Ltd.* v. *State of Bihar* (3). Thus early after the establishment of this Court opinion was expressed excluding the applicability of fundamental rights in Part III to taxing Statutes. But it is important to notice that the Article which was sought to be applied in those cases was Art. 31 (1) which deals with deprivation of property

(1) [1955] 1 S.C.R. 769 at p. 772. (2) [1951] S.C.R.127.
(3) [1955] 2 S.C.R. 603, 619.

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and not Art.19 which is regulatory of the rights of a citizen of personal liberty, property and avocation.

It was contended that the impugned tax illegally deprives the appellants of their property and was therefore unconstitutional. In support reference was made to *Suraj Mal Mohta & Co.* v. *A. V. Viswanatha Sastri* (1) (under Art. 14); *Shree Meenakshi Mills Ltd.* v. *Sri A. V. Viswanatha Sastri* (2) (under Art. 14); *Purshottam Govindji Halai* v. *Shree B. M. Desai, Additional Collector of Bombay* (3) (under Arts. 14 and 21); *M. Ct. Muthiah* v. *The Commissioner of Income-tax, Madras* (4) (under Art. 14); *A. Thangal Kunju Mudaliar* v. *M. Venkatachalam Potti* (5) (under Art. 14); *Bidi Supply Co.* v. *The Union of India* (6) (under Art. 14); *Panna Lal Binjraj* v. *Union of India* (7) (under Arts. 14 and 19(1)(g);) and *Collector of Malabar* v. *Erimal Ebrahim Hajee* (8). These are the cases in which the validity of taxation laws was attacked under the Articles above mentioned.

In *Panna Lal Binjraj* v. *The Union of India* (7), the assault was not against the imposition or the vires of the tax but against the vires of s. 5(7A) of the Indian Income-tax Act which empowers the Commissioner of Income-tax to transfer any case from one Income-tax Officer subordinate to him to another and empowers the Central Board of Revenue to transfer any case from one Income-tax Officer to another. This attack was based on the contravention of Arts. 14 and 19 (1)(g). It was held that the discretion vested in the authorities empowered to make the transfer is not discriminatory and there was no interference with the right of the citizen to carry on his trade or calling. In *Collector of Malabar* v. *Erimal Ebrahim Hajee* (8) the attack against the recovery of income-tax under s. 46 (2) of the Income-tax Act was based on Arts. 14, 19 and 22. There again the question for decision was not the imposition of the tax but

(1) [1955] 1 S.C.R. 448
(2) [1955] 1 S.C.R. 787.
(3) [1955] 2 S.C.R. 887.
(4) [1955, 2 S.C.R. 1247.
(5) [1955] 2 S.C.R. 1196.
(6) [1956] S.C.R. 267.
(7) [1957] S.C.R. 233.
(8) [1957] S.C.R. 970, 976.

the mode of recovery and at Page 976 this ground of attack was rejected and reference was there made to the *State of Punjab* v. *Ajaib Singh* (1); *Purshottam Govindji Halai* v. *Shree B. M. Desai, Additional Collector of Bombay* (2). Another case relied upon by the appellant's counsel was *Western India Theatres* v. *The Cantonment Board, Poona,* (3) in which the tax was imposed on cinema houses with larger seating capacity and the attack was on the ground of Art. 14 but that was repelled.

The appellant's counsel also referred to the *Bengal Immunity Co. Ltd.* v. *State of Bihar* (4) where the vires of the sales tax imposed on inter-State transactions was attacked. The High Court in the case had held that the petition under Art. 226 was misconceived overlooking the fact that the contention raised was that in so far as the tax purported to act on non-residents in respect of inter-State sales it was ultra vires of the Constitution. At. p. 619, Das, C. J., observed :—

> "It is also true that article 31 which protects citizens and non-citizens alike cannot be availed of as it deals with deprivation of property otherwise than by way of levying or collecting taxes as held by this Court in *Ramjilal* v. *Income-tax Officer, Mohindergarh* [1951] S. C. R. 127, and that, therefore the Act does not constitute an infringement of the fundamental right to property under that article. It is, however, clear from article 265 that no tax can be levied or collected except by authority of law which must mean a good and valid law. The contention of the appellant company is that the Act which authorises the assessment, levying and collection of sales tax on inter-State trade contravenes and constitutes an infringement of Art. 286 and is, therefore, ultra vires, void and unenforceable. If, therefore, this contention be well founded,

(1) [1953] S. C. R. 254.
(2) [1955] 2 S.C.R. 887.
(3) [1959] Supp., 2 S.C.R. 63.
(4) [1955] 2 S.C.R. 603, 619.

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the remedy by way of a writ must, on principle and authority, be available to the party aggrieved.

The next case relied upon by counsel for the appellants was *Kailash Nath* v. *State of U. P.* (1) which was a case under the U. P. Sales Tax Act, the plea of the petitioners was that the goods sought to be taxed had been exported overseas and therefore not liable to sales tax. It was held that if a tax is levied without due legal authority on any trade or business then it is open to the citizen to approach this Court under Art. 32, since his right to carry on trade is violated or infringed by the imposition of the tax and Art. 19 (1)(g) "comes into play". There again the taxation law itself was not challenged on the ground of violation of any fundamental right, which has reference to property, but the imposition of the tax was assailed on the ground that it was not imposeable on the transactions which had been entered into.

In support of the proposition that the taxation laws are assailable under the provisions of Art. 19(1) *State of Travancore-Cochin* v. *Shanmuga Vilas Cashew Nut Factory* (2) was relied upon. That was not a petition under Art. 32 or a matter under Art. 19(1)(f) but one under Art. 286(1) and the question in dispute was whether the transaction was in the course of inter-State trade. *Himatlal Harilal Mehta* v. *The State of Madhya Pradesh* (3) was also a similar case. Article 19(1)(g) was applied because of the unconstitutionality of the tax under Art. 286(1)(a). *M/s. Ram Narain Sons Ltd.* v. *Asst. Commissioner of Sales Tax* (4) was also a case under Art. 286 of the Constitution and was not a matter falling under Art. 19(1) of the Constitution.

In all these cases relied upon by counsel for the appellants the basis of attack was (1) that the

(1) A.I.R. 1957, Sc. 790.
(2) [1954] S.C.R. 53.
(3) [1954] S.C.R. 1122.
(4) [1955] 2 S.C.R. 483.

tax was not within the legislative competence of the legislature imposing the tax and therefore the tax was being illegally recovered from the assessee or (2) an objection was taken to the differential mode of imposition and collection and use of a more stringent procedure i.e., illegal discrimination between persons similarly situated e.g., under Taxation on Income (Investigation Commission) Act. The imposion of an illegal tax not within the legislative competence of the legislature, a colourable piece of legislature imposing a tax which is not a tax but is an imposition of a confiscatory nature, a breach of principles of natural justice or imposing an unimposeable tax have all been held to be violative of the right to carry on trade under Art. 19(1)(g). But they do not support the proposition that the tax if otherwise valid can be declared unconstitutional and can be subject to judicial review on the ground of being excessive or being retrospective in operation or being imposed on one article rather than another. These cases do not support the proposition which has been contended for by the appellants that the very imposition of the tax is a contravention of the right of the assessee to acquire, hold (or own) or dispose of property or on the ground of contravention of Art. 31.

In the *State of Bombay* v. *Bhanji Munji* (1), it was also held that Art. 19(1)(f) read with cl. (5) postulates the existence of the property which can be enjoyed and over which rights can be exercised because otherwise the reasonable restriction contemplated by cl.(5) cannot be brought into play. That was the uniform view held in this Court till the majority judgment in *Moopil Nair's case*(2) which relied on the second Kochuni case i.e., *Kavalappara Kottarathil Kochuni etc. etc.* v. *The State of Madras* (3). But the latter was not a taxation case. It was held in that case (Kochuni case) that all laws within

(1) [1955] 1 S.C.R. 777. (2) [1961] 3 S.C.R. 77.
(3) [1963] 3 S.C.R. 887, 889, 915.

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Art. 13 are subject to Part III and that for a law to be valid it must satisfy two tests (1) of being enacted by a legislature having legislative competence and (2) it should not contravene any of the fundamental rights.

The above opinion is not in accord with the opinion of this court in *A. K. Gopalan's case* (1); *Ram Singh* v. *State of Delhi* (2); *State of Bombay* v. *Bhanji Munji* (3); *The Daily Express case* (4) and *The Hamdard Dawakhana case* (5).

The question of the applicability of Art. 19(1)(f) of the Constitution to taxing matters was considered in *K. T. Moopil Nair* v. *The State of Kerala* (6). That was a case in which a tax at a flat rate was levied on forest lands in the State of Kerala and this Court by majority held that the tax so imposed was unconstitutional on the ground of infringement of Arts. 14 and 19(1)(f). The reasons given by the learned Chief Justice were :

(a) In the procedure to be adopted for the levying of the tax, there was no provision for a notice to be given to the assesstee;

(b) There was no procedure for rectification of mistakes committed by the assessing authorities;

(c) There is no procedure for obtaining the opinion of a superior Civil Court on a question of law as is generally found in all taxing stautes

(d) No duty was cast upon the assessing authority to act judicially; and

(e) There was no right of appeal provided to the assessee.

The provisions of the Act were held in the majority judgment to be confiscatory. It was observed by the learned Chief Justice at p. 559 :—

> "That the provisions aforesaid of the impugned Act are in their effect confiscatory is clear on their face. Taking the extreme

(1) [1950] S.C.R. 88, 10
(2) [1951] S.C.R. 451, 455.
(3) [1955] 1 S.C.R. 777.
(4) [1959] S.C.R. 129, 132.
(5) [1960] 1 S.C.R. 314.
(6) [1961] 3 S.C.R. 7.

case, the facts of which we have stated in the early part of this judgment, it can be illustrated that the provisions of the Act, without proposing to acquire the privately owned forests in the State of Kerala after satisfying the conditions laid down in Art. 31 of the Constitution, have the effect of eliminating the private owners through the machinery of the Act."

Thus the impugned statute in that case was held to be violative of Art. 19(1)(f) because its procedural part made no provision for giving a hearing to the assessees or for appeal nor was the Assessing Authority required to act judicially and the imposition though called a tax was in effect confiscatory and therefore a colourable piece of legislation. Sarkar, J., in his minority judgment remarked that reasonableness of the rate was not assailed but what was assailed was the imposition of a flat rate per acre without any reference to productivity.

Undoubtedly *Moopil Nair's case* (1) did hold that a law under Art. 265 was also a law within Art. 13 and if it contravened Art. 14, it was liable to be struck down and that such law must also pass the test of the limitations prescribed in Part III of the Constitution but it did not lay down that all Articles in Part III would be applicable to taxation laws nor did it decide contrary to *Ramjilal's case* (2) that Art. 31(1) would apply to taxation law which is otherwise invalid. But it is difficult to hold that a regulatory Article like Art. 19(1) was intended to limit the powers of the Legislature to impose taxes and thus to discharge its duty in regard to country's financial needs and policies.

The contention of infringement of the appellants' right under Art. 19(1)(f) is unsound and must be rejected and the reasons are these:—

Firstly : Clause (5) of Art. 19 allows the enacting of laws which impose "reasonable restrictions"

(1) [1961] 3 S.C.R. 77. (2) [1951] S.C.R. 127.

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in the interests of the general public. The use of the term "reasonable restrictions" is indicative of regulation of the right to the personal rights mentioned in sub-cl. (f) of the first clause. It must have relation to the existence of the thing to be regulated. There can be no regulation of things not in existence. Therefore where an Act is deprivatory as the imposition of a tax is it cannot fall within Art. (19)(1) but under the specific Art. 31, which relates to deprivation of property. Imam, J., in *The Collector of Malabar* v. *E. Ebrahim Hajee* (1) said at p. 976 :—

> "If the property itself is taken lawfully under Art. 31, the right to hold or dispose of it perishes with it and Art. 19(1)(f) cannot be invoked."

That was a case where the Income-tax Officer issued a certificate under s. 46 (2) of the Income-tax Act and the Collector proceeded to recover under s. 48 of Madras Revenue Recovery Act.

Secondly: All taxation, as shown by its very nature and object, is in the interest of the general public because it is a contribution for governmental expenditure from all persons who in some measure are entitled to its benefit.

Thirdly: There is no means or measure for determining the reasonableness of the restrictions which is an objective determination. The needs of the revenue cannot be known to the courts and cannot be determined by them, and the sources of revenue are entirely within the knowledge of the legislature and it is for that department of the State to determine how the burden will be distributed and why, because that department is the policy making body and is familiar with the economics and the resources of the country and its needs. It is for that department in its discretion to select

(1) [1957] S.C.R. 970, 976.

anything for taxation or to exclude it. Cooley's Constitutional Limitations, Vol. II, p. 986 (note).

Fourthly: The power to tax is an attribute of sovereignty and it is an accepted principle that the exercise of that power is not subject to judicial control because no Constitutional Government can exist without the power to raise money for its needs and the only security against abuse is in the structure of the Government. That power carries with it the power to determine when and how the tax shall be levied. *S. Ananthakrishnan* v. *The State of Madras* (1), *M'Culloch* v. *The State of Maryland* (2). There is no indication that the Indian Constitution has rejected or modified the American concept of the sovereignty of the State in regard to the power of taxation.

Fifthly: Article 19 (1) declares the right of a citizen and cl. (5) prescribes its limits. If a taxation statute is within Art. 19(1)(f) it must be capable of being upheld as a reasonable restriction on the holding of property etc. On the submission of the appellants all taxes will be restrictions. If they are restrictions then their reasonableness will be justiciable depending upon the appreciation of established facts. How are the courts to judge ? All the necessary data for determining reasonableness can never be before a court which in the very nature of things is available only to the legislature. Can the court say that a particular tax is excessive or unreasonable or can the court say which particular source should be taxed and which particular income group should bear the burden of taxation or what the policy of the State as to taxation should be. It would seem therefore that the reasonableness of tax laws is not justiciable and therefore they cannot fall within clause (5) of Art. 19. Article

(1) A.I.R. 1952, Mad. 395. (2) 305 U.S. S.C.R. 135, 146, 83, Ed. 87.

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19(1)(f) and cl. 5 are part of one scheme and the former is incapable of operating where the latter is inoperative. If considerations of Art. 19(5) are foreign to taxing laws Art. 19(1)(f) can have no application to them.

Sixthly: Applicability of Art. 19(1)(f) to taxation laws will mean that laws which are otherwise valid will be inapplicable to citizens but will be applicable to non-citizens. At any rate such law will operate differentially between one set of taxpayers and another i.e., between citizens and non-citizens. This will violate the very principle of due process relied upon by the appellants.

Seventhly: In American due process which has a variable concept has not been applied to retrospective operation of tax laws except to tax on voluntary gifts of property and that also was doubted in *Welch* v. *Henry* (1).

Eighthly: Retroactive duty of excise will be a valid imposition in the case of persons who have not sold their tobacco between the period of the introduction of the bill and the enactment of the Finance Act but will be invalid in the case of persons placed as the appellants.

Ninthly: The acceptance of the appellants' argument would mean that they can recover any excess duty paid, excess because of subsequent decrease, but would not be liable to pay any similar increase in duty in spite of s. 64-A of the Indian Sale of Goods Act under which variations in the rates of duties become operative on contracts of sale and purchase.

Tenthly: It has been held that Art. 31 is inapplicable to deprivation by taxation. *Ramjilal's* case (2); *Lakshmanppa Hanumantappa* v. *The Union of India* (3); and taxation laws are expressly excluded from the operation of Art. 31(2) by

(1) 83, L. Ed. 87. (2) [1951] S.C.R. 127.
(3) [1953] 1 S. C. R. 769, at p. 772.

cl. 5(b)(i) of that Article. If the appellants' contention is correct then deprivation although not protected under Art. 31 will be subject to regulatory control under Art. 19(1)(f).

Eleventhly: To put it in the words of the American Supreme Court in *Ogden* v. *Saunders*(1)

"It is but a decent respect due to the wisdom the integrity and the patriotism of the legislative body, by which law is passed to presume in favour of its validity, until its violation of the Constitution is proved beyond all reasonable doubt".

Twelfthly: The challenge to the legality of the tax in dispute is not based and is unsustainable on the ground of specific limitation or prohibition on Parliamentary power but has been raised on the ground of the infringement of an article containing the principles of the State's power of control. The cases dealing with legislative incapacity are inapplicable to the latter ground of assault. Cases such as *Mohammad Yasin* v. *The Town Area Committee, Jalalabad*(2) (a case of a licence fee which is not a tax), *The State of Bombay* v. *United Motors India Ltd.* (3) (a case of inter-State trade) and *Bengal Immunity Co.* case (4) (which was also a case of inter-State trade and some of the provision of the impugned Act there were held to be unreasonable restriction on the right to carry on trade) and *Ch. Tika Ramji's* case (5) (a case dealing with the imposition of the restriction on the right to purchase except through a particular society) were not cases in which the imposition of a tax was challenged on the ground of infrigement of Art. 19(1)(f).

I, therefore, agree that appeals be dismissed with costs. One hearing fee.

Appeal dismissed.

(1) 6 L. Ed. 606, 625.
(2) [1952] S.C.R. 572, 578.
(3) [1953] S. C. R. 1069.
(4) [1955] 2 S. C. R. 603, 619.
(5) [1956] S.C.R. 393.