

*Bejore* : S. S. Kang and A. P. Chowdhri, JJ.

HIND RUBBER FACTORY,—*Petitioner.*

*versus*

UNION OF INDIA AND OTHERS,—*Respondents.*

*Amended Civil Writ Petition No. 4516 of 1984*

May 30, 1989.

*Central Excise and Salt Act, 1944—S. 2(d)—Central Excise Rules, 1944—Rule 8—Tariff Items 16-A and 36 and 1st Schedule—Notification under Rule 8 exempting rubber chappels from levy of excise duty—Effect of exemption—Whether goods cease to be excisable.*

*Held*, that the definition of the expression "excisable goods" consists of two parts. The first part lays down that such goods are those which are specified in the First Schedule. The second part is that such goods are subject to a duty of excise. It is significant to note that the two parts of the definition are not disjunctive and, therefore, it cannot be held that being subject to a duty in the context means actual levy of the excise duty. The expression "being subject to" according to Shorter English Oxford Dictionary, means—exposed or open to; prone to or liable to ..... having a tendency prone or disposed of. It follows that the goods mentioned in the Schedule to the Act are liable to attract excise duty. The definition does not mean that the duty must be imposed in order to make the goods excisable goods. To understand the significance of the expression 'subject to', it would be profitable to compare it with the expression 'subjected to'. If the latter expression had been used it could be said that exemption from excise duty under Rule 8 would make the 'excisable goods' non-excisable or outside the definition. The expression occurring in the definition is 'subject to'. It cannot be disputed that even after exemption the exempted 'excisable goods' continues to be included in the schedule and remains liable to reimposition of excise duty e.g., by withdrawal of the exemption notification. Rule 8 of the Rules under which the Central Government is empowered to grant exemption itself shows that exemption may be granted from time to time which necessarily implies that the exemption granted may be withdrawn. Granting of exemption under rule 8 does not have the effect of either deleting the goods covered by the exemption notification from the Schedule or adding any goods in that Schedule. In other words, the exemption notification under rule 8 does not affect the First Schedule to the Act except in so far as the excise duty is concerned. There is no provision under the Act empowering the Central Government to add to

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or delete from the excisable goods mentioned in the First schedule. The first Schedule is a part of the enactment and only Parliament is empowered to amend the same. This has actually been done on several occasions by the Finance Acts. We are thus of the considered view that rubber chappals manufactured by the petitioner did not cease to be excisable goods within the meaning of the Central Excise and Salt Act, 1944 because of the exemption granted under Rule 8 of the Central Excise Rules, 1944.

(Paras 26, 27).

*AMENDED CIVIL WRIT PETITION under Articles 226 and 227 of the Constitution of India praying that :—*

- (i) *a writ of mandamus or any other writ, order or direction may be issued quashing the impugned show cause notice dated 1st June, 1984 contained in Annexure P-8;*
- (ii) *a writ of mandamus or any other writ, order or direction may be issued, quashing the impugned circular letter dated 26th August, 1981 contained in Annexure P-9;*
- (iii) *any other writ, order or direction as this Hon'ble Court may deem fit in the circumstances of the case, may be issued;*
- (iv) *issue of advance notices on the respondents may kindly be dispensed with in view of the urgency of the matter;*
- (v) *Costs of this writ petition may kindly be allowed to the petitioner.*

*It is further prayed that during the pendency of the writ petition in this Hon'ble Court, further proceedings in pursuance of the show cause notice dated 1st June, 1984 (Annexure P-8) may kindly be stayed.*

Civil Misc. No. 4836 of 1987.

*Application under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure praying that this Hon'ble Court may be pleased to permit the petitioner to urge the additional ground set out herein above and accordingly allow amendment of the petition.*

R. L. Batta, Senior Advocate, Vinod Aggarwal, Advocate with him, for the petitioner.

H. S. Brar, Advocate. P. S. Tei and H. P. Singh, Advocates with him, for the Respondents.

## JUDGMENT

A. P. Chowdhri, J.

(1) Whether any goods which are exempted from the payment of Excise Duty under a notification issued in pursuance of Rule 8 of the Central Excise Rules, 1944 (hereinafter referred to as 'the Rules') ceases to be excisable goods within the meaning of Section 2(d) of the Central Excise and Salt Act, 1944 ('the Act' for short) is the short but important question raised in this writ petition.

(2) M/s Hind Rubber Factory, the petitioner in the present case is engaged in the business of manufacturing cheap rubber chappals in its factory for the last more than 20 years. It has also started manufacturing transmission rubber beltings for the last six years. Footwears including rubber chappals fall under tariff item No. 36 of the First Schedule to the Act whereas transmission rubber beltings (T.R.B.) fall under item No. 16-A (4) of the First Schedule.

(3) The expression "Excisable goods" is defined under section 2(d) of the Act to mean "goods specified in the First Schedule as being subject to a duty of excise and includes salt." Rule 8 of the Central Excise Rules, 1944 (for short "the Rules") empowers the Central Government to exempt by notification any excisable goods from the whole or part of the duty leviable. Section 6 and Rule 174 provide for taking of licence in relation to specified goods manufactured in India. Rule 174-A empowers the Central Government to exempt any goods from the operation of Rule 174 i.e. from taking a licence for those goods.

(4) The Central Government,—*vide* notification dated 24th July, 1967 issued under Rule 8 of the Rules exempted certain goods from the duty of excise leviable thereon. This notification was amended from time to time with the result that at the material time footwears of the value not exceeding Rs. 30 pair were exempted from the whole of the duty of excise leviable thereon.

(5) In exercise of the powers conferred by Rule 8 the Central Government had issued another notification No. 80/80-CE dated 19th June, 1980 which was subsequently amended,—*vide* notification No. 123/80-CE dated 18th July, 1980, whereby excisable goods of the descriptions specified in column No. 3 of the table thereto annexed and falling under such item number of the First Schedule of the Act

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as is specified in the table and cleared for home consumption on or after the first day of April in any financial year were exempted if the aggregate value of the clearances of the specified goods did not exceed Rs. 5 lacs. Through a notification dated 1st March, 1981 the exemption of first clearances for home consumption was raised from Rs. 5 lacs to Rs. 7.5 lacs.

(6) Rubber products produced by the petitioner fall under Item No. 19 tariff No. 16-A of the table annexed with the notification. Notification No. 83/83-CE dated 1st March, 1983 covering exemption incorporates an explanation IV which reads as under :—

“For the purpose of computing the aggregate value of clearances of any excisable goods, which are exempted from the whole of the duty of excise leviable thereon by any other notification (not being a notification where exemption from the whole of the duty of excise leviable thereon is granted based upon the value of quantity of clearances made in a financial year) issued under sub-rule (1) of rule 8 of the Central Excise Rules, 1944 and for the time being in force, shall not be taken into account.”

Vide another notification exemption from licensing control was available to certain specified manufacturers.

(7) On 13th March, 1984, the staff of Assistant Collector Central Excise and Customs, Jalandhar, respondent No. 3 inspected the record of the petitioners factory relating to the production of the rubber chappals and transmission rubber beltings. They also took away certain books of the petitioners. Statement of Mohinder Pal Singh partner of the petitioners' firm was also recorded which gave the sale figures of rubber chappals and T.R. beltings for the years 1979-80 to 1983-84 which are as under :—

Period	Sale of rubber chappals.	Sale of TR beltings.
1979-80	16,57,500.87	3,93,846.31
1980-81	21,04,318.10	3,98,931.65
1981-82	26,51,641.50	5,98,825.39
1982-83	37,55,462.02	5,88,244.46
1983-84	50,86,155.79	5,98,118.95.”

(8) The chappals manufactured by the petitioner fall under tariff Item No. 36 of First Schedule and were fully exempt from the payment of the Excise Duty because the value of each pair was less than Rs. 15. As such a declaration regarding the manufacture of chappals was not filed by the petitioners. They also did not obtain any licence because they were exempted from the provisions relating to licensing also.

(9) Transmission rubber beltings falling under tariff Item No. 16-A of the First Schedule were exempt from whole of the Excise Duty upto the value of clearances of Rs. 5 lacs during the year 1979-80 and 1980-81 upto the value of Rs. 7.5 lacs during the years 1981-82 and 1982-83 under notification No. 80/80-CE dated 19th June, 1980 as amended.

(10) The petitioners were served a show cause notice dated 1st June, 1984 (Copy Annexure P/8). Alongwith it were appended Annexures 'A' and 'B' showing details of sale of T.R. Beltings and rubber chappals by the petitioner. It was stated in the show cause notice that the petitioners had manufactured and cleared excisable goods namely T.R. beltings falling under tariff Item No. 16-A and valued at Rs. 17,69,660.36 without applying for/obtaining L-4 licence and without payment of Central Excise Duty amounting to Rs. 4, 64, 535.80 during the years 1980-81, 1981-82 and 1982-83. It was stated in the notice that the aggregate value of the clearance of all excisable goods i.e. rubber chappals falling under tariff Item No. 36 and T.R. beltings falling under tariff Item No. 16-A had exceeded Rs. 20 lacs during the financial years 1979-80, 1980-81 and 1981-82 and the exemption from payment of Central Excise Duty contained in notification No. 80/80-CE dated 19th June, 1980 (as amended) was not available to the petitioners during the succeeding years 1980-81, 1981-82 and 1982-83 respectively. The petitioner was required to explain as to why penal action should not be taken against the petitioners under Rule 173-Q of the Rules and why Central Excise Duty amounting to Rs. 4,64,535.80 be not recovered from the petitioner.

(11) It seems that show cause notice had been issued in pursuance of the circular letter dated 26th August, 1981, issued by the Government of India in which it was clarified that notification No. 80/80-CE dated 19th June, 1980 as amended which granted exemption from excise Duty did not provide for exclusion of the value of goods not specified in the table under the said notification from the aggregate

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value of the clearances under the said notification. According to the said circular, therefore, for the purpose of computing the aggregate value of the clearance in respect of transmission rubber beltings the entire valuation of the goods covered under tariff Item No. 36 regarding rubber chappals would have to be taken into account. As the total valuation exceeded the permissible limit the petitioner was being held liable to pay Duty. Aggrieved, the petitioner filed the present writ petition.

(12) The writ petition is resisted by the respondents and construction on the statutory provisions contained in the Act, Rules and notifications sought to be placed by the petitioner is not accepted. It is submitted that in view of explanation No. V appended to notification No. 80/80 dated 19th June, 1980 nothing contained in the notification applied to the petitioner as the value of clearances of all excisable goods exceeded Rs. 20 lakhs during the preceding Financial year. Rubber Chappals being not one of the specified items mentioned in the Schedule annexed to the notifications, the value of Rubber Chappals was not eligible for deduction in computing the value of clearances as per explanation appended thereto which reads as under :—

“If the aggregate value of the clearances of all excisable goods by him or on his behalf for home consumption, from one or more factories, during the financial year, had exceeded rupees twenty lacs.”

Explanation with regard to computing the aggregate value of clearances under the said notification has already been extracted above.

(13) According to the respondents the T.R. beltings manufactured by the petitioners did not qualify for exemption under notification No. 80/80-CE dated 19th June, 1980 as the value of the clearances of all excisable goods (value of T.R. beltings plus rubber chappals) exceeded Rs. 20 lacs during the preceding financial year. It is not necessary to refer to the other averments in the written statement.

(14) The crucial point for determination in this case is as to whether the value of the rubber chappals manufactured by the petitioners, which goods have been exempted from the Excise Duty because the value of each pair did not exceed Rs. 15, can be taken

into account while computing the value of T.R. beltings manufactured by the petitioners for the purpose of exemption from Excise Duty under notification No. 80/80-CE dated 19th June, 1980. For determining this question it has to be decided as to whether goods which are exempt from Excise Duty under some other notification issued by the Central Government have not to be taken into account while computing the value of the T.R. beltings for exemption from Excise Duty under notification dated 19th June, 1980.

(15) It is common case of the parties that the value of the T.R. belting in any financial year did not touch or exceed Rs. 20 lacs and if the value of the rubber chappals manufactured by the petitioner are not to be taken into account then the T.R. beltings manufactured by the petitioners also stand exempted from Excise Duty under notification dated 19th June, 1980.

(16) The main question arising for consideration as stated in the very beginning is whether any excisable goods ceased to be excisable goods on exemption being given by the Central Government in pursuance of rule 8 of the Rules.

(17) The contention of learned counsel for the petitioner is that cheap rubber *chappals* covered under Item No. 36 of the First Schedule having been exempted from excise duty by a notification under rule 8, it ceased to be excisable goods and, therefore, turn over on that account could not be taken into consideration while assessing excise Duty payable on the other item, namely transmission rubber belting being manufactured by the petitioner.

(18) We find that there is a divergence of opinion in the various High Courts in the country and the matter has not yet been finally decided by the Supreme Court.

(19) The High Courts of Madhya Pradesh and Allahabad have taken the view that excisable goods cease to be excisable goods after total exemption from excise duty. In *Tata Export Ltd. v. Union of India and others* (1), a Division Bench held that excisable goods cease to be excisable goods after total exemption from excise duty. In coming to this conclusion the Bench relied on *The State of Tamil Nadu v. M. K. Kandaswami etc. etc.* (2). The latter case before the Supreme Court was under Tamil Nadu General Sales Tax Act (1 of

(1) 1985 E.L.T. 732 (M.P.)

(2) A.I.R. 1975 Supreme Court 1871.

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1959). It was observed that scheme of the Act involves three inter-related but distinct concepts which may conveniently be described as 'taxable person', 'taxable goods' and 'taxable event'. All the three must be satisfied before a person can be saddled with liability under the Act. It was further pointed out that the expression "goods the sale or purchase of which is liable to tax under the Act" was in the nature of definition of "taxable goods". The expression "the sale or purchase of which is liable to tax under the Act" was held to qualify the term "goods" and excluded by necessary implication goods, the sale or purchase of which was totally exempted from tax at all points, under section 8 or section 17(1) of the Act. It was, therefore, held that the goods so exempted—not being "taxable goods" could not be brought to charge under section 7-A of the said Act. It was thus in view of the peculiar provisions under the Tamil Nadu General Sales Tax Act that the above case was decided. In our considered view this does not provide an authority for the proposition that excisable goods ceased to be so when exemption is granted under rule 8. Apart from the aforesaid Supreme Court decision there is no other reasoning mentioned in *Tara Export Limited's case* (supra).

(20) Reliance has next been placed by the learned counsel for the petitioner on a Division Bench judgment in *E. Septon and Company Private Limited v. Superintendent of Central Excise and another* (3). In coming to the conclusion that excisable goods, when exempted from excise duty ceased to be excise goods, the Bench relied on an earlier Division Bench decision of the same Court in *M/s Nagarath Paints Private Limited v. The Union of India and others* (4), which in turn followed a Single Bench decision of Delhi High Court in *Sulekh Ram and Sons v. Union of India* (5). The decision in *M/s. Nagarath Paints' case* (supra) has since been reported in 1983 (33) E.L.T. 58. The law laid down in *Sulekh Ram's case* (supra), which was followed in *M/s Nagarath Paints' case* (supra) and in turn in *E. Septon's case* (supra) was overruled by a later Division Bench judgment of Delhi High Court in *Vishal Andhra Industries v. Union of India* (6). In *Nagarath Paints' case* (supra) while referring to *Sulekh Ram's case* (supra) it was observed by the Bench in

(3) 1985 (19) E.L.T. 57 (All)

(4) Civil Misc. Writ No. 2615 of 1972 decided on 5th December, 1977-33 E.L.T. 58.

(5) 1972 Tax Law Reports-1978 E.L.T. (J) 525.

(6) 1983 E.L.T. 2265 (Del)



*E. Septon's case* (supra) that decisions of the Supreme Court in *Kailash Nath v. State of U.P.*, (7) and *J. K. Steel Ltd. v. Union of India* (8), were followed. Both these Supreme Court decisions have been duly explained in *Karnataka Cement Pipe Factory Industrial Estate v. Superintendent of Central Excise and another* (9). It was observed as under :—

(i) *Kailashnath & Another v. State of U.P.* (1957 S.C. 790).

(ii) *M/s J. K. Steels Ltd. v. Union of India* (1970 S.C. 1173).

The first of the above decisions did not deal with the interpretation of the term 'excisable goods'. The Supreme Court only laid down that in interpreting a notification issued under an enactment both should be read together. Their Lordships further observed, that the notification having been made in accordance with the power conferred by the statute, it has a statutory force and validity and therefore, exemption under the notification is to be construed, as if it is contained in the Act itself.

In *J. K. Steels Ltd.* case, the Supreme Court reiterated the same principle and held :

“.....the levy and exemptions are parts of the same scheme of taxation. The two together carry into effect the purpose of the legislation. For finding out the true scheme of a taxing measure, we have to take into consideration not merely the levy but also the exemptions granted.”

(21) We are in respectful agreement with the above observations of S. R. Rajasekhara Murthy, J. Apart from what is stated above no reasoning is given for the conclusion reached by the learned Judges in *E. Septon's case* (supra). The contrary view namely that excisable goods do not cease to be excisable goods on exemption being granted under rule 8, has been taken by the High Courts of Patna, Delhi,

(7) A.I.R. 1957 S.C. 790

(8) A.I.R. 1970 S.C. 1173

(9) 1986 (23) E.L.T. 313 (Karnataka).

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Karnataka, Andhra Pradesh and Madras, besides the C.E.G.A.T., Special Bench 'C', New-Delhi.

In *Shri Madhav Mill Private Ltd. v. Collector of Central Excise and others* (10), a Division Bench of Patna High Court had to deal with two contentions, namely :—

- (i) *Maida* having been exempted from excise duty was not excisable goods, the value of which could be taken into account for the annual turnover; and
- (ii) Even after *maida* had been exempted from the excise duty, it could not be included in the expression "all excisable goods cleared" used in the first proviso to the notification granting the exemption.

B. S. Sinha, J. dealt with only the second question and held that the proviso to the notification granting exemption to *maida* referred only to such excisable goods on which excise duty had been paid. In a separate order, Lalit Mohan Sharma, J. (who now adorns the Supreme Court Bench) dealt with the first question and held in paragraph 27 as under :—

"On a close examination of the Act along with the First Schedule and the rules, I do not find myself in a position to accept the petitioner's stand. It is true that the expression is not intended to include every article mentioned in the First Schedule, but at the same time it is also clear that the definition is not entirely dependent upon liability to pay duty for. If that were so, the sub-section would not have mentioned the First Schedule. A reference has been made to both the First Schedule and to the liability in regard to the excise duty and they have been connected by the every significant words "as being". Giving effect to every word in the sub-section, its meaning appears to be that all goods which are subject to duty by virtue of being included in the First Schedule must be treated as excisable. The second part is merely descriptive. Whether a particular article is subject to duty or not by reason of any other provision does not appear to be relevant. What has

to be seen is whether by reason of its being included in the First Schedule, it is subject to a duty or not. A reference to the Schedule indicates that *maida* is still retained there as item 1 with the rate of duty as 10 paise per kilogram in column 3. It is, therefore, specified in the First Schedule as being subject to a duty and comes squarely within the definition."

(22) A Division Bench of Delhi High Court in *Vishal Andhra Industries's case* (supra) also came to the conclusion that excisable goods do not become 'non-excisable' after exemption under rule 8. The following observations may be extracted from the judgment with advantage :—

".....It will be seen that Rule 8 grants exemption from payment of duty on excisable goods. Thus Rule 8 itself postulates that the goods on which exemption has been granted are excisable. By issue of a notification goods do not cease to be excisable goods. They remain excisable goods so far as any item in the Schedule includes them. Undoubtedly item No. 68 of the First Schedule continues to cover aluminium utensils. They are, thus, excisable goods. What happens by issue of a notification under Rule 8 is that a manufacturer becomes entitled to claim exemption and not that the goods cease to be excisable goods. The condition precedent to the applicability of Rule 8 is the existence of excisable goods. Exemption from payment of duty is different from goods being excisable or not. Undoubtedly, as item No. 68 still continues to cover aluminium utensils they are excisable goods ....."

(23) The same view was taken by Karnataka High Court in *Karnataka Cement Pipe Factory Industrial Estate v. Superintendent of Central Excise and another* (11). In this decision, the learned Judge explained some of the authorities in which a contrary view had been taken and relied on the decisions of High Courts of Madras, Andhra Pradesh and Delhi. It was held that character of a product, as excisable goods, does not depend upon the actual levy of duty, but depends upon the description as excisable goods as contained in the First Schedule to the Act. It was pointed out that the First Schedule

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to the Act gives description of the goods which are excisable and the rate of duty. It was further pointed out that it was significant that in respect of some of the goods given in the Schedule, duty was nil.

(24) A Division Bench of Madras High Court in *Tamil Nadu (Madras State) Handloom Weavers Co-operative Society Ltd. v. Assistant Collector of Central Excise, Erode* (12), took the same view. V. Ramaswami, J, now the Chief Justice of this Court, speaking for the Division Bench rejected the contention of learned counsel for the petitioner with these observations :—

“We are unable to agree with the contention of learned Counsel. We are of the view that the words “as being subject to a duty of Excise” in the definition of the term “excisable goods” are only descriptive of the goods specified in the First Schedule, and have no reference to the factum of their Liability to duty. In fact, it is seen that some of the rate of duty as ‘NIL’. It could not be contended that these goods are not ‘excisable goods’. In this connection, we may also refer to section 3, which is the charging section, which provides for the levy and collection of excise duty on all excisable goods produced or manufactured in India at the rate set forth Schedule, thereby showing that excisable goods in the definition in the section refer only to the description of the goods in column (2) of the First Schedule, and not to the rate of duty in column (3) of that Schedule. ....”

(25) The same view was taken by C.E.G.A.T., Special Bench ‘C’, New Delhi in *Shree Shankar Industries, Bombay v. Collector of Central Excise, Bombay* (13). To the same effect is the view taken by a learned Single Judge in *Andhra Pradesh Paper Mills Ltd. Rajahmundry v. Assistant Collector of Central Excise, Rajahmundry and another* (14). The relevant discussion is to be found in paragraph 13 at page 216.

(26) In view of the above authorities, except the High Courts of Madhya Pradesh and Allahabad, a large majority of the other High Courts have taken the view that excisable goods do not cease to be excisable goods on exemption being granted under rule 8 of the

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(12) 1978 E.L.T. (J.) 57.

(13) 1984 (17) E.L.T. 402 (Tribunal)

(14) 1980 E.L.T. 210 (A.P.)

Rules. In support of the same conclusion, we may add some more reasons. The definition of the expression "excisable goods" consists of two parts. The first part lays down that such goods are those which are specified in the First Schedule. The second part is that such goods are subject to a duty of excise. It is significant to note that the two parts of the definition are not disjunctive and, therefore, it cannot be held that being subject to a duty in the context means actual levy of the excise duty. The expression "being subject to" according to Shorter English Oxford Dictionary, means exposed or open to; prone to or liable to ..... having a tendency prone or disposed of. It follows that the goods mentioned in the schedule to the Act are liable to attract excise duty. The definition does not mean that the duty must be imposed in order to make the goods excisable goods. To understand the significance of the expression 'subject to', it would be profitable to compare it with the expression 'subjected to'. If the latter expression had been used it could be said that exemption from excise duty under Rule 8 would make the 'excisable goods' non-excisable or outside the definition. The expression occurring in the definition is 'subject to'. It cannot be disputed that even after exemption the exempted 'excisable goods' continues to be included in the schedule and remains liable to reimposition of excise duty e.g., by withdrawal of the exemption notification. Rule 8 of the Rules under which the Central Government is empowered to grant exemption itself shows that exemption may be granted from time to time which necessarily implies that the exemption granted may be withdrawn. Granting of exemption under rule 8 does not have the effect of either deleting the goods covered by the exemption notification from the Schedule or adding any goods in that Schedule. In other words, the exemption notification under rule 8 does not affect the First Schedule to the Act except in so far as the excise duty is concerned. There is no provision under the Act empowering the Central Government to add to or delete from the excisable goods mentioned in the First Schedule. The First Schedule is a part of the enactment and only Parliament is empowered to amend the same. This has actually been done on several occasions by the Finance Acts.

(27) We are thus of the considered view that rubber *chappals* manufactured by the petitioner did not cease to be excisable goods within the meaning of the Act because of the exemption granted under rule 8 of the Rules. The main question having been decided against the petitioner, the petition must fail. The same is accordingly dismissed with costs.

R.N.R.