

(1978) 12 CAL CK 0001
In the Calcutta High Court
Case No : Civil Rule No. 2521 (W) of 1973

Bengal Paper Mill Company Ltd.

APPELLANT

Vs

Superintendent of Central Excise and Others

RESPONDENT

Date of Decision : 20-12-1978

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 10(1), 10A, 233, 52
Central Excises and Salt Act, 1944 — Section 4
Constitution of India, 1950 — Article 226, 226(3)

Citation : (1985) 20 ELT 302

Hon'ble Judges : Sabyasachi Mukherji, J

Bench : Single Bench

Judgement

Sabyasachi Mukherji, J.—The subject matters of challenge in this application under Article 226 of the Constitution are 7 notices issued under the Central Excise Rules, 1944. The particulars of the said notices have been set out in Annexure F at page 61 of the petition. Of these notices the first three notices dated 29th of, January, 1973, cover periods from 1-7-1970 to 30-11-1971 1-10-1966 to 30 6-1970 and 1-12-1971 to 31-1-1972, respectively. The other notices impugned are also notices all dated 29th of January 1973 These cover periods from 27-7-1970 to 31-1-1972, 1-2-1972 to 31-8-1972 and September 1972 to December 1972, respectively. These notices were issued under Rule 10A of the Central Excise Rules, 1944 as it stood at the relevant time. The last notice mentioned above dated 29-1-1973 covering the period from September 1972 to December 1972 was issued on the alleged ground that overweight was found by inspection group by the inspection report No. 26/70 of 19-11-1970. As the last mentioned notice entirely comes within the purview of the Rule 10A of the Central Excise Rules, 1944 at the hearing of this application learned Advocate for the petitioner did not press the challenge so far as this notice was concerned. Therefore, I am confined to consider in this application the six other notices issued under Rule 10A of the said Rules as indicated before. The said Annexure, F, however contains particulars of 115 notices. The other notices being 8 of them

were issued under Rule 10 of the said Rules. Inasmuch as the petitioner has shown cause in respect of those 8 notices in this application the said 8 notices are not under challenge. The copies of the notices which are under challenge have been set out in Annexure "G(1)" onwards from page 62 onwards. The notices are identical in nature and after setting out the particulars of the amount claimed and the period for which these amounts have been claimed the grounds on which the amounts are sought to be recovered are indicated as follows :

"Due to non-levy of appropriate rate of duty on wrappers used for reel cores."

The notices contained the other particulars required to be contained in such show cause notices and it is not necessary for the present purpose to set these out. The petitioner carries on, inter alia, the business of manufacturing paper at its factory situated at Ranigunj in the District of Burdwan. At the said factory various qualities of paper like printing and writing paper wrapping and packing paper etc., are manufactured. At all material times central excise duty under the provision with the Central Excises and Salt Act, 1944 was and is still levied on the manufacture of paper. The different types of papers were and are subjected to different rates of duty under the said Act. General categories of paper have been grouped together for the purpose of levy of duty in particular classes or special classes. The duty on the paper was at all material times and still being levied with reference to the weight of the goods. From time to time notifications had been issued by the Central Government in exercise of the powers under Rule 8 of the Central Excise Rules, 1944 hereinafter referred to as the said rules whereby exemption in respect of part of duty for certain varieties of paper used to be granted. At all times and still, according to the petitioner duty on the packing and wrapping papers was levied at rates different from the other types of papers like printing and writing paper etc. A very insignificant part, according to the petitioner, of the packing and wrapping paper produced at the petitioner's factory used to be utilised at the relevant time for packing the other varieties of paper manufactured at the said factory. Sheets of packing and wrapping paper used to be put on the other varieties of papers produced at the factory for the purpose of marketing the goods. Some qualities of the papers used to be sold after being wound on paper reel cores. Such reel cores were manufactured by the paper manufacturers including the petitioner at the paper mills themselves from the wrapping paper. For the manufacture of such reel cores Sodium Silicate to the extent of approximately 40% of the total weight of the reel cores were used. The remaining 60% of the total weight was approximately the weight of the wrapping paper utilised for the manufacture of the reel cores. It is the case of the petitioner that in accordance with the trade practice and or trade convention prevailing in this country and abroad weight of the paper was inclusive of that of the wrapper or the reel cores in which it was packed and/or wound. The weight of the reel cores or the wrapper was not taken into account separately from the weight of the paper for which they were utilised and no distinction was made in the trade. About the weight of the wrapper or reel cores utilised for packing or binding the different types of papers, the price realised

from the customer and the bills and invoice raised on them was, according to the petitioner, inclusive of the weight of the wrapper or the reel cores. As the weight of wrapper or reel cores was very insignificant to the total weight of the paper that weight of the wrapper or reel cores was treated in the trade as that of the packed or wound paper duties. Indeed, according to the petitioner, it was impractical and was extremely difficult to ascertain the weight of the wrapper or reel cores in respect of each of the packages of manufactured paper. In accordance with the said trade practice, the petitioner asserts the weight of the wrapper and/or reel cores was ignored both in the cases of superior and inferior varieties of paper. The Central Excise authority, according to the petitioner, did not levy any duty on the wrapping paper utilised for packing or for the manufacture of reel cores for widening up at rates other than those applicable to the rate of the paper contents. As a result in respect of papers of higher quality then wrapping papers higher excise duty used to be recovered in respect of the wrapping paper utilised for packing in the manufacture of reel cores and in respect of the inferior grades of paper duty at lesser rate used to be levied in respect of wrapping paper. In calculating the weight of the packed paper Central Excise authorities used to include the weight of the wrapper or the reel cores as the weight of the paper contents and levied duty accordingly.

2. The petitioner states that there were representations made on behalf of the trade and as a result of such representation the Central Excise authorities agreed that duty on wrapping paper utilised for packing of the different varieties of paper would be levied at the rate appropriate to the paper contents. The petitioner states that such representations or assurances or promises had been made by the Central Excise authorities and the respondents with a view that the manufacturers of papers might act thereupon and adjust their affairs accordingly. The said representation or promise and/or procedure regarding the assessment was made after fully considering according to the petitioner, the practical difficulties of the paper manufacturers and the recognised trade practice and/or convention. The petitioner asserts that it was agreed on the basis applicable and weight of such wrapping paper in accordance with such representation and/or assurance and/or agreed procedure for assessment according to the petitioner, the petitioner had paid duty in respect of wrapping paper utilised for packing or for the manufacture of reel cores at the rate applicable to the paper contents. The weight of such wrapping paper was included in the weight of the paper contents and duty was assessed accordingly. The petitioner states that the petitioner did not realise and/or recover any duty from its buyers at different rates for the wrapping papers utilised for packing and paper contents. It is the case of the petitioner that in calculating the weight of the paper on reel cores the entire weight of the reel cores used to be taken by the excise authorities. As mentioned hereinbefore, approximately 40% of the weight of the reel cores consisted of Sodium Silicate utilised for manufacture of reel cores at the rate applicable to the paper contents in respect of the weight of the reel cores relating the Sodium Silicate. The said assessment of duty was made on the basis of the

said representations or assurances.

3. In March 1961 the Central Excise authorities wanted to change the procedure for assessing the wrapping paper utilised for packing, printing and writing paper. The Excise authorities wanted to assess the wrapping paper utilised for packing and printing and writing papers separately. The change however was not given effect to in view of the representation made by the paper manufacturers and the old practice continued. The petitioner in this connection has referred to two trade notices dated 28th of March, 1961 and 22nd of May, 1961 respectively. The said trade notice dated 28th of March, 1961 which was issued by the Collector of Central Excise, Calcutta and Orissa stated as follows :

"It has been decided that the existing practice of assessment of wrapping paper at the rate appropriate to paper packed in such wrapping paper shall continue except in cases where wrapping paper is used for packing of printing and writing paper falling under item 17(3) of the Central Excise Tariff. While "Wrapping paper" used for packing paper falling under item 17(3) of the Central Excise Tariff viz. "printing and writing paper, other sorts" will be assessed to duty at the rate of 35 np per kilogram, the paper packed, namely, printing and writing paper will be assessed at 22 np per kilogram. To facilitate assessment, the manufacturers should declare the weight of packing and wrapping paper used in packing one ream of printing and writing paper of different sizes to the Central Excise Officer posted to paper Mill which subject to certain percentage test weighment by experiment by the Central Excise Officer, would be accepted. The wrapping and packing paper, the weight of which would thus be ascertained on experiment will be assessed to duty at 35 n/p per kilogram. Wrapping paper when cleared as such from the factory will be assessed to duty as heretobefore, i.e. at the rate applicable to wrapping paper.

Assessment of wrapping paper used for packing, printing and writing paper falling under Item 17 (3) of the Tariff shall be regulated from 1-3-1961 in the light of this order."

4. More or less similar instruction was issued on 22nd*of May, 1961 which contained the following :

"The order contained in the Collectorate Trade Notice No. 38/paper-2/1961 dated 28-3-1961 envisage assessment of "Wrapping paper" used for packing, printing and writing paper falling under Item 17 (3) of the Tariff at the rate of 35 naya paise per kilogram and the paper packed, namely, printing and paper at 22 naya paise per kilogram. In consideration of the difficulties experienced by the trade in the matter of accounting of such paper in the statutory records and having regard to the fact that there is likelihood of excess price being charged from the consumers by the dealers, it has been decided that wrapping & packing paper used in the packing of printing and writing paper should also be assessed at the rate appropriate to printing and writing paper packed in such wrapping paper. This order is effective on and from 16th May 1961."

5. It is the case of the petitioner that on the basis of the said representation and/or assurance and/or promise made by the Central Excise authorities regarding the manner of assessment of wrapping paper utilised for packing the paper on the manufacture of reel cores the petitioner had paid duty under the Act. The petitioner states that the petitioner did not realise of recover duties on other basis from its customers in respect of wrapping paper at rate different than that for the packed paper and acted to its detriment and had altered its position. The petitioner had also suffered assessment to be made and duty to be recovered on wrapping paper at rates higher than these applicable to it in respect of wrapping paper utilised in packing the superior qualities of paper. The petitioner had also paid duty on the basis of the above procedure of 40% of the weight of the reel cores utilised for winding the paper although the said weight was not of the packing paper but of Sodium Silicate. It is the case of the petitioner that no duty in any event was leviable in respect of the weight of the said chemical.

6. On the 5th of August, 1971 the petitioner received a letter from the respondent No. 2 herein namely, the Assistant Collector of Central Excise, Burdwan Division regarding the assessment of paper reel cores. There were also certain other communications to the same effect received from the Inspector of the Central Excise by a letter dated February 1972. It may be mentioned that previously by a trade notice it was stated that the Orders contained in the trade notice dated 22nd of May, 1961 which I have set out herein before it has been decided that the orders contained therein should be given retrospective effect from the 1st of March, 1961 and excess recoveries, if any, made should be refunded. In the letter dated 4th of August, 1971 the Assistant Collector stated as follows :

"The practice followed hitherto in regard to assessment of Reel Cores, is irregular and should be discontinued with immediate effect.

2. Since Reel Cores are not excisable, the practice of assessing such Reel Cores along with the paper assessed, is without authority of law, wrapping paper should be assessed to duty and after payment of duty, should be utilised for manufacture of Reel Cores. An account of such duty paid wrapping paper should be maintained in Form II, as envisaged in Para 24 of the S.R.P. Hand Book, 2nd Edition. The said account is subject to verification by the Central Excise Officers. A proforma of the Form is enclosed.

PROFORMA

_____	Date	Opening	Receipt	Total	Issues	Quantity	Closing	Remarks	balance
-----	No. & Dt.	balance	No. & Dt.	of of	Docu-	quantity	ments(s)	Documents	___

_____ 3. While determining the duty on the paper packed in Reel Cores, the weight of Reel Cores should be deducted from the total weight of paper."

7. In the letter dated 2nd of February, 1972 the inspector had also stated inter

alia as follows :

"I am directed to refer to the Board's letter of even number dated 27-7-1970 on the above subject and to say that doubts have been raised whether the instructions contained in the case supersedes all the previous instructions in the matter.

The practice to be followed in the matter of assessment of containers and contents is clearly laid down in para 2 of the letter dated 27-7-1970 Any previous instructions including those contained in Para 13(9) of the Commodity Supplement on Paper and Boards letter F. No. 8/0/67-CXVI, dated 1-4-1969 which are not in conformity with the instruction dated 27-7-1979 should be deemed to have been superseded by the letter."

8. Along with the letter he enclosed the letter from the Secretary Central Board and Excise dated 1st of May, 1970 which referred to the observations of the Public Accounts Committee and stated, inter alia, as follows :

"I am directed to refer to Para 28 (ii) of Audit Report on Revenue (Civil Receipts 1969, on the above subject and reproduce below the observations/recommendations that have been made by the Public Accounts Committee in their 11th Report:

"The Committee observe that wrapping paper used in the manufacture of Reel Cores was erroneously assessed to duty at the same rate writing paper would on reel cores. While Committee note that, the correct procedure for assessment is not being followed in all the Collectorates, they would like to point out that mistake occurred in as many as six Collectorates. This case as well as to the case of assessment of wrapping paper mentioned elsewhere in this Report, points to the need for clear cut instructions to collectors in the matter of assessment whenever containers and contents are assessable at different rates of duty."

The Board desire that proper care should be taken to ensure that where both the container and the content are liable to excise duty separately under different Tariff Items or different sub-items of the same Tariff Item, they are assessed separately at the rates appropriate to them. It is also desired that the position regarding assessment of containers and contents wherever these are liable to different rates of duty may be brought to the notice of this Ministry so that suitable instruction, if found necessary, could be issued."

9. There was a further letter dated 2nd of February, 1972 from the Inspector which reiterated the stand indicated in the previous letter dated 22nd of February, 1972 which I have set out hereinbefore.

10. Thereafter, during the period December 1971 to November 1972 nine notices of demand under Rule 10 and/or Rule 10A of the said rules were served by the Inspector to the petitioner requiring the petitioner to pay alleged differential duty for packing various types of papers. It is not necessary for my present purpose to set out the said notices. The petitioner challenged the said notices as null and

void and thereafter by the orders dated 19th of January, 1973 and 29th of January, 1973, the said nine notices of demand were cancelled. Thereafter, the fifteen notices which I have mentioned before particulars whereof are in Annexure "F" to the petition were issued. As I have indicated before I am concerned now with challenge to the six notices issued under Rule 10A of the Central Excise Rules as it stood at the relevant time. The Central Excise Rules have from time to time been amended and therefore, it is material to set out Rule 10 and Rule 10A of the said rules as these stood at the relevant time,

"10. Recovery of duties or charges short-levied, or erroneously refunded-

(1) When duties or charges have been short-levied through inadvertence, error, collusion or mis-construction on the part of an officer, 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 proper officer may, 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, serve a notice on the person from whom such deficiency in duty or charges is or are recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice.

(2) The Assistant Collector of Central Excise, after considering the representation, if any, made by the person on whom notice is served under Sub-rule (1), shall determine the amount of duty or charges due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined within ten days from the date on which he is required to pay such amount or within such extended period as the Assistant Collector of Central Excise may, in any particular case, allow.

10A. Residuary powers for recovery of sums due to Government-

(1) Where these rules do not make any specific provisions 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, the proper officer may serve a notice on the person from whom such duty, deficiency in duty or sum is recoverable requiring him to show cause to the Assistant Collector of Central Excise why he should not pay the amount specified in the notice.

(2) The Assistant Collector of Central Excise, after considering the representation, if any, made by the person or whom notice is served under Sub-rule (1), shall determine the amount of duty, deficiency in duty or sum due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined within ten days from the date on which he is required to pay such amount or within such extended period as the Assistant Collector of Central Excise may, in any particular case, allow."

11. The grounds of challenge in this application have been mainly set out in paragraph 34 and mainly centered round on grounds (d), (e) and (g). It is not necessary to set out those grounds as I will deal with the argument on those grounds. In the affidavit-in-opposition affirmed by one Sunil Kr Dutta Gupta, Assistant Collector of Central Excise, Asansol Division in answer to the rule nisi, he has stated after setting out the circumstances under which the notices were issued, *inter alia*, as follows :

"The allegations contained in paragraph 22 of the petition are denied and disputed. I say that the differential duty became payable in the light of the Board's directives dated 3-1-1966 and 27-7-1970 in respect of assessment of packing and wrapping paper used for manufacture of re-rolls and assessment of container and content liable to excise duty at different rates under different Tariff Items or different sub-items of the same Tariff Item. Thus, the short-levy arose not through inadvertence, error or misconstruction on the part of the assessing officer or through mis-statement as to quantity, description or value of such goods by the petitioner (i.e. the assessee) which would call for action under Rule 10 of the said Rules. The relevant show cause notices were, therefore, issued by the Respondent No. 1 directing the petitioner to show cause as to why the petitioner should not be required to pay the amount of duty short-levied, which was recoverable under Rule 10A of the said Rules. The Respondents crave leave to refer to Rules 10 and 10A of the said Rules for determination of true term, scope and effect thereof."

12. In support of this application learned Advocate for the petitioner urged three grounds. He submitted that on the face of these show cause notices which are impugned in this application, Rule 10A of the said rules has no application and the alleged grounds would be covered under Rule 10. Therefore, the notices having been issued beyond the period contemplated by Rule 10 the notices were barred and without jurisdiction. It was, secondly, submitted that payment had been made on the basis of agreed assessments and the revenue had no right to question such agreed assessments in the manner purported to be done. As a part of the said submission he urged that, in any event, in view of the administrative circulars which I have set out hereinbefore which amounted, according to the learned Advocate for the petitioner, representation on behalf of the Revenue, and upon which the petitioner had acted to its detriment, the revenue authorities were estopped from challenging the said previous procedure and issuing the impugned notices on the alleged grounds.

13. It is well-settled that where a case is covered by Rule 10 of the said rules the same cannot be reopened under Rule 10A of the said rules because Rule 10A deals with residuary powers of recovery of sums due to the Government. If a particular contingency or a particular ground for short-levy or non-levy of duty is covered by the grounds mentioned by any other rule including Rule 10 of the said rules then Rule 10A would have no application. This principle is clear from the plain reading of the said Rule 10, but has also been clarified by the principles

enunciated by the Supreme Court.

14. In the case of N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., the Supreme Court reiterated that in order to attract Rule 10 it was not necessary that some amount of duty ought to have been assessed and that amount should actually have been paid. The rule applied to a case where there had been a nil assessment in which case entire duty later on assessed must be considered to be duty originally short-levied.

15. The Supreme Court reiterated that such a situation would be covered by Rule 10 and Rule 10A would not apply to such a case. This principle was again reiterated by the Supreme Court in the case of R.K. Audim and Others Vs. Special Steel Ltd., Bombay and Another, where the Supreme Court reiterated that where additional duty was sought to be recovered on the ground that the original imposition was at lower rate due to mis-apprehension of the Department, Rule 10 would be applicable and not Rule 10A. Basing his argument upon these principles on behalf of the petitioner it was urged that in the background of the facts and circumstances of the case the grounds indicated in the impugned show cause notices at best amounted to certain non-levy or short-levy at the appropriate rate on wrappers used for levy due to misapprehension on the part of the assessing authority. He submitted and, in my opinion rightly, that the misapprehension, if there be any which was disputed on behalf of the petitioner might have been caused due to some wrong circulars of the higher authorities. Learned Advocate urged that the cause of misapprehension was irrelevant. There was no mis-statement or any ground which could not be described as inadvertence, error, collusion or mis-construction of an officer. Even if it be called that there was a mis-statement on the part of the assessee because of the circular that would also come within the mischief of Rule 10. Misapprehension on the part of the assessing authority or mis-construction on the part of the assessing authority. Authority would still come within the mischief of Rule 10 of the said Rules. In aid of this proposition reliance may be placed on the observations of the Division Bench of this Court in the case of Inspector Central Excise v. Bengal Paper Mill-%2 C.W.N. at page 766.

16. In aid of the submission that the assessing authority was bound to act in compliance with the instructions of the superior authority while he was making the assessment reliance was placed on Rule 233 of the Central Excise Rules, 1944 which authorises the Central Board of Revenue and Customs to issue instruction; while on the rules reference may be made to Rule 8 of the said Rules which authorises the Central Government by notification to exempt certain excisable goods from duty and also which empowers the Central Board of Revenue now the Central Board of Excise and Customs to exempt from payment of duty under certain circumstances of exceptional nature on any excisable goods. It was urged that acting on the instructions of the circulars which I have set out hereinbefore there have been agreed procedure of assessments and the

respondents was not competent to deviate from the said procedure of assessments. Reliance in this connection was placed on the observations of the Supreme Court in the case of *Union of India v. Anglo Afghan Agencies-* AIR 1968 S.C. page 718 where the Supreme Court has reiterated the principle that where a party acting under representation contained in Clause 10 of a certain scheme issued by the Textile Commissioner had acted to its detriment the Government would be compelled to carry out the said representation and would not be permitted to resile from the said representation. It was urged that in this case the Government had agreed to the procedure by which the petitioner had suffered detriment by payment of higher duty in certain cases and also paying duty on the Chemical Sodium Silicate which was not taxable. Therefore, the petitioner had acted to its detriment and the Government should not be permitted to resile from the stand taken. In the case of *Bijoy Kr. Sadhukhan Vs. Income Tax Officer Non Companies*, Mr. Justice B.N. Banerjee, has reiterated that there could be an agreed scheme of assessment like the concessional scheme or disclosure proceeding. It is well-settled that by agreement there could not be imposition of fresh taxes but by agreement or arrangement there could be certain assessment which in certain cases may be beneficial to the revenue and certain cases may be detrimental to the revenue. But once assessments have been made on such agreed basis the Government should not be permitted to resile from the said basis followed specially in cases where the party concerned has acted to its detriment thereby. The same principle was reiterated by the Supreme Court in the case of *Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another*, . See also in this connection the observations of the Bombay High Court in the case of *Tata Iron & Steel Co. Ltd. v. N.C. Upadhaya*-1971-96 ITR page 1 where at pages 16-17 the Bombay High Court observed that by circular the Central Board of Revenue could deviate from the provisions of Income Tax Act and the Supreme Court had given effect to such circulars. The Bombay High court further observed that the binding nature of the circulars issued by the Central Board of Revenue must be confined to tax laws and or the purpose of giving administrative relief to the tax payer but not for purpose of imposing a burden on him. In those circumstances it cannot be said, learned Advocate for the petitioner argued, that there was any mistake or misapprehension or mis-statement which could justify reopening in the instant case and the Government was estopped.

17. On behalf of the respondent it was urged that the circular dated 27th of July, 1970 was not the subject matter of challenge in this case. Learned Advocate argued that if the circular dated 27th of July, 1970 was the correct position then the subsequent circulars dated 2nd of February, 1972 or 4th of August, 1971 were irregular and contrary to the previous circular. Therefore, he submitted that the duty had been non-levied or short-levied, acting on wrong circulars. He sought to urge that it was not a case of any mis--construction or error on the part of the officer nor on the part of the assessee and therefore the impugned show cause notices which were to give effect to the previous circular of 27th July,

1970 could not come within the purview of Rule 10 and as such Rule 10A was attracted. I am unable to accept this contention. It is true that the non-levy or short-levy which are being sought to be recovered by the show cause notices impugned in this case was not perhaps due to error or mis-construction on his own on the part of the officer making the assessments nor perhaps could it be said that there was any mis-statement voluntarily made by the assessee but the assessments were made properly by the assessing authorities and if the contention of the learned Advocate for the respondent is to be accepted then such error or mis-construction on the part of the officer or mis-statement on the part of the assessee had been caused by erroneous subsequent circulars of the revenue authorities ignoring the previous circular of 27th of July, 1979. As I have mentioned before the point or the situation which caused the error or which caused the mis-construction on the part of the officer or even induced the mis-statement on the part of the assessee are irrelevant, whether the said error was volitional or induced on the part of the assessee or of the officer is irrelevant if it comes within the meaning of error or mis-construction on the part of the officer or mis-statements to the quantity or Value or description of the goods on the part of the assessee. Learned Advocate for the respondent in this connection drew my attention to the observations of the Supreme Court in the case of Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., where at page 2573 in paragraph 29 the Supreme Court cautioned that too wide construction put on Rule 10 would make Rule 10A useless. Therefore, these two rules should be read together. In order to appreciate the caution of the Supreme Court it must be realised in what context the said observations of the Supreme Court were made. The Supreme Court in that case was dealing with Rule 8, Rules 9, 10 and 52 of the Central Excise Rules, 1944 as these stood before 1st of August, 1959. There the manufacturer had removed goods on the strength of account current kept under Rule 9 proviso 3 followed by ostensible settlement of accounts by making debit entries. According to the Supreme Court adjustment was not levy or assessment and therefore, the case fell beyond Rule 10. In those circumstances there was power to ascertain deficiency in duty and complete the assessment under Rule 10A, read with Section 4 of the Act. The Supreme Court in this connection considered the word "assessment" with the word "levy". Here the situation is entirely different. It is indisputable in this case that duty has been levied and there has been assessment on the old basis. Therefore, the context in which the Supreme Court cautioned on the wide construction of the expression used in Rule 10 of the said rules does not apply in the present case. I am concerned with the question whether there was short-levy on which I must proceed on the basis of the show cause notice is the case of the revenue and then I must consider whether the alleged ground of short-levy was through inadvertence or error or mis-construction on the part of the officer or mis-statement as to the quantity, description or value of such goods, on the part of the owner. It is abundantly clear that if the case of revenue is to be accepted, as I must do for the purpose of this application, there was short-levy caused through inadvertence and error in ignoring the circular by the Officers issuing

instructions contrary to the previous circular. As I said the case of inadvertence, error or mis-construction on the part of the officer or the cause of mis-statement if any by the assessee as to the quantity, description or value of the goods on the part of the owner is irrelevant provided there was short-levy through either inadvertence, error or mis-construction on the part of the officer or mis-statement as to the quantity, description or value of the goods. In that view of the matter I am of the opinion that this objection on the part of the respondent cannot be sustained.

18. It was next urged that in some of the notices which have been impugned the period mentioned were prior to the period of the subsequent circulars dated 4th of August, 1971 or 22nd of May, 1961. But, I have set out a copy of the trade notice No. 55/4/61 issued by the Collector of Central Excise which appears at page 27 of the petition which clearly and categorically states that order contained in those circulars should be given retrospective effect from the 1st of March, 1961. Therefore, the submission that the part of the period mentioned in the impugned notice were covered by the original circular dated 27th of July, 1970 would be of no assistance to the respondents.

19. On behalf of the respondent reliance was also placed on certain observations of the Supreme Court in the case of Commissioner of Income Tax, Madras v. P. Firm Muar-1971 56 ITR page 67 where the Supreme Court observed that where the assessee had opted for the scheme it did not preclude from claiming the money received by it were not taxable. The equitable doctrine against the approbate and reprobate did not apply in such a case. The said principle in my opinion, would not be applicable in the instant case. An item which was not taxable article cannot be made taxable by consent of an assessee. But an item which was taxable could be taxed at a lower rate for administrative reasons and if the assessee is made to act on such assessment and suffer detriment thereby then the assessee was not precluded from challenging that the Government could not change its stand. Reliance was placed on behalf of the respondents on the case of The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others, in aid of the proposition that there could not be any estoppel in such circumstances. But the observations in that case were made in entirely different context. It is well settled that there would not be any estoppel against statute but when a statute or the law permits certain procedure to be followed and parties act on that procedure even if some detriment to the revenue or the Government accrues as a result of such procedure the Government cannot resile from such a procedure. In this connection, learned Advocate also drew my attention to the observations in the case of Dunlop India Ltd. v. Union of India (1976) S.C. Cases 242: AIR 1977 S.C. page 596. Reliance was placed on the said decision for the proposition that whether there was an error or mis-construction or inadvertence on the part of the officer or whether there was any mis-statement on the part of the assessee was a matter that can be gone into the proceeding that would follow if cause is shown. The petitioner had an effective and an alternative remedy. Therefore, at this stage the petitioner was not

entitled to seek the aid of Article 226 of the Constitution. I am unable to accept this position. If on admitted facts an authority purports to act without jurisdiction then to make the party go and suffer through the departmental proceeding is not a remedy for the wrong that he has complained of. Therefore, it cannot be said that there was any effective and alternative remedy in the departmental proceedings envisaged. This principle has been reiterated by this Court in the case of N.C. Banerjee v. Commercial Tax Officer-81 C.W.N. page 836. This principle has been reiterated by a Division Bench of this Court in the decision in the case of Manindra Mohon Sarkar v. Income Tax Officer Project Circle, North Bengal- 112 ITR page 47 cal.

20. I am, therefore, of the opinion that the grounds alleged in the impugned show cause notice are covered by Rule 10 of the said Rules and on an undisputed facts period of limitation for Rule 10 has expired. Therefore, the notices were clearly beyond the limitation and without jurisdiction. I, further, hold that in view of the manner in which the assessments have been made by the respondent authorities for the periods covered by the six impugned notices the respondent authorities are estopped and/or precluded from trying to reopen the assessments for the grounds and in the manner purported to be done. In view of the nature of the act of the respondents I am also of the opinion that Article 226(3) of the Constitution would not be a bar in entertaining this application. Indeed it would be the duty on the part of the Court to restrain the officers concerned from acting in an illegal manner without jurisdiction on undisputed facts and exposing the petitioner to the procedure of departmental proceedings.

21. In the premises, the notices under Rule 10A mentioned above are quashed and the respondents are restrained from giving any effect to the same. Therefore, the notices dated 29th of June, 1973, bearing Serial Nos. 1, 2, 3, 5, 7, and 8 in annexure "F" of the present petition are quashed. The respondents are restrained from giving any effect to the same or proceeding in respect thereof. The Rule nisi is made absolute to the extent indicated above. In the facts and circumstances of this case, however, there will be no order as to costs.