

(1976) 02 BOM CK 0049

In the Bombay High Court

Case No : Appeal No. 61 of 1972 and Miscellaneous Petition No. 478 of 1970

D.R. Kohli, Collr. of C. Ex., Bombay

APPELLANT

Vs

Krishna Silicate and Glass Works

RESPONDENT

Date of Decision : 19-02-1976

Acts Referred:

Central Excise Rules, 1944 — Rule 10, 10A, 153, 52, 52A
Central Excises and Salt Act, 1944 — Section 3, 37, 38, 4

Citation : (1983) 12 ELT 216

Hon'ble Judges : Kantawala, C.J.;Tulzapurkar, J

Bench : Division Bench

Advocate : Joshi, for the Appellant; Sorabjee and Dhirajalal B. Boda, for the Respondent

Judgement

Kantawala, C.J.—Krishna Silicate and Glass Works Ltd. (hereinafter referred to as "the Company") carried on business of manufacturing glass bottles of various sizes. Its factory was situated at Thane. In or about the year 1961 as result of introduction of Item No. 23A in the First Schedule annexed to the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Act") glass manufactures were liable to pay excise duty. Item No. 23A is as under :-

23A	Glass	and	Glassware	
-----	-----	-----	-----	Tariff Description
of Goods	Rate of Duty	Item	-----	No. Basic Special Excise
-----	-----	-----	-----	23A. Glass and
Glassware :- (1) Sheet glass and plate 10% ad 20% of the basic glass valorem duty chargeable. (2) Laboratory Glassware 5% ad 10% of the basic valorem duty chargeable. (3) Glass shells, glass 10% ad Do. globes and chimneys for valorem laps and lanterns. (4) Other glassware including 15% ad Do. tableware.				
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2. It is common ground that glass bottles manufactured by the Company were

liable to be assessed under the residuary sub-item (4) of Item 23A.

3. The procedure followed by the Company and the Excise Department for levy and collection of excise duty was as under : The year was divided into four quarters beginning with 1st January, 1st April, 1st July and 1st October. The Company used to submit to the Excise Department price lists containing the prices proposed to be charged to the customers during the ensuing quarter. Whenever the goods were required to be removed from the factory the Company used to submit returns in AR 1 form prescribed under the Central Excise Rules, 1944 (hereinafter referred to as "the Rules"). Pending the verification and determination of the price for the purpose of excise duty on the AR 1 from an assessment was made which was described as "Provisional Assessment" and after making a debit entry in the account current maintained as required by the second proviso to Rule 9 the goods were allowed to be cleared by issuance of a gate pass. Such account was settled from the time to time.

4. Initially there was no difficulty whatsoever, but at one time a controversy arose as regards the assessable value to be determined for the purpose of levying and collecting the excise duty on the goods intended to be removed by the Company. To obviate any delay in the clearance of goods a bond was executed by the Company on November 2, 1964 in favour of the President of India. This bond was executed on a representation made by the Company that the goods were liable to be provisionally assessed to excise duty as required by Rule 9B. That fact is clearly mentioned in one of the recitals of the Bond. The bond further recited that final assessment of excise duty on glass bottles manufactured by the Company could not be made for want of full information as regards value of proof thereof. Under this bond the Company was required to observe all the provisions of the Act and the Rules made thereunder. It had to furnish information and/or proof within such time as may be required by the competent office and it undertook to pay all duties, whether excise duty or other lawful charges which may be demandable in respect of goods on the basis of value as finally ascertained by the proper officer. In view of this bond the earlier procedure of assessment which was labelled as "Provisional assessment" was continued and on the said basis before verification of the prices as required by the Act provisional excise duty payable was determined on AR 1 form and an ultimate entry was made in the account current maintained as required by the second proviso to Rule 9.

5. In the present appeal we are concerned with the demand made by the Department for the quarter beginning from April 1, 1966 and ending on June 30, 1967. By the notice of demand dated September 2, 1967 the Superintendent, Central Excise, Bombay, informed the Company that the assessable value approved for glassware (bottles) manufactured by the Company for the quarters ending June 1966, September 1966, December 1966, March 1967 and June 1967 were shown in the annexure to the said notice. By this notice the Company was required to represent its case to the Assistant Collector of Central Excise in case

it felt aggrieved by the decision. Thereafter by the notices of demand purported to be issued under Rule 9B of the Rules dated September 23, September 26, October 17, October 25, and November 17, 1967 the company was called upon to pay the various amounts therein mentioned by way of differential duty payable for the five quarters beginning from April 1, 1966 and ending on June 30, 1967. On receipt of these notices three representations were made by the Company to the Assistant Collector on October 3, November 24 and November 25, 1967 for the said five periods wherein it inter alia stated that the assessable value for determination of the excise duty was approved by the Department after taking into consideration the amounts spent by the Company as transport and service charges; that such charges had no relation with the price of the goods in question and that the inclusion of such transport and service charges in the assessable value of the goods was totally unwarranted and arbitrary and beyond jurisdiction. The Company also requested for a personal hearing to be granted by the Assistant Collector. Such hearing was granted on May 27, 1968 and the representations were ultimately disposed of by the Assistant Collector by his order date July 20, 1968. The Assistant Collector rejected the contention of the Company that the notices of demand were time-barred under Rule 10 observing that they were governed by Rule 10A. He also pointed out that the statement in the notices of demand that they were issued under Rule 9B was untenable but such reference to Rule 9B did not affect the validity or legality of the demand. After referring to the invoices that were submitted by the Company, one set known as K.B. invoices and the other set known as K.P.T. invoices, and after referring to the prices at which similar bottles were sold by two other concerns, namely, New Era Traders and Vitrum Glass Works, he took the view that the service charges were part and parcel of the total price paid by the customers and that no attempt was made to give the exact nature or details of the so-called service charges. He rejected the contention of the Company that service charges were post-factory expenses and were not liable to be included in the assessable value. Substantially on these grounds the representations made by the Company were rejected by him. An appeal preferred by the Company was disposed of by the Collector of Central Excise by his order dated May 12, 1970. The Collector took the view that the issuance of the notices of demand under a wrong Rule, namely Rule 9B has not misled the Company; that there was non-disclosure on the part of the Company of material information in respect of the so-called service charges which entitled the Department to issue the impugned notices of demand. He also took the view that non-disclosure by the Company in respect of recovery of service charges was in fact suppression of material information and such suppression could not be regarded as mis-statement. According to him if a material information was not made known to the Department the case was covered by Rule 10A and the provisions of Rule 10 were not attracted. He also confirmed the finding of the Assistant Collector that the so-called service charges formed part and parcel of the price structure and were not post delivery charges. He rejected the contention of the Company that it was not given a reasonable opportunity to know the evidence relied upon. He took the view that the

comparison of the prices of the Company's articles with those of other manufacturers made by the Assistant Collector was not only apt but quite necessary as the comparison was in respect of articles of identical specifications supplied to identical customers. On these findings the appeal preferred by the Company was rejected and it is thereafter that the Company filed the present petition on July 27, 1970.

6. Before the trial Court it was inter alia contended on behalf of the Company that the notices of demand could not be issued under Rule 9B if regard be had to the provisions of that Rule. It was urged that the case was covered by the provisions of Rule 10 as the primary ground on which the said notices of demand were issued was a mis-statement as regards the value of the goods for the purposes of determination of excise duty. It was submitted that as the said notices of demand were issued beyond a period of three months the same were time barred. It was also urged that as the provisions of Rule 10 were applicable, there was no scope for exercising the powers under Rule 10A which was residuary Rule. Apart from these contentions, it was urged that both the Assistant Collector as well as the Collector violated the principles of natural justice, because the evidence and material which had been considered and made the basis of the impugned orders was not disclosed nor was any reasonable opportunity given to the Company to rebut the same. It was also urged that no opportunity was given to meet the adverse inferences that were sought to be drawn by the Assistant Collector and the Collector against the Company. Kania J. before whom the petition came up for hearing took the view that as the provisions of Rule 10 were applicable in the present case the notices of demand were clearly time-barred as they were issued after a period of more than three months from the date on which the duty was first payable or adjusted in the account of the Company. He also rejected the alternative contention that was urged on behalf of the Department that the said notices of demand were justifiable under Rule 9B. He also took the view that even assuming that the service charges were liable to be included in the assessable value of the goods, that by itself would not enable the Department to make the assessment under Rule 9B if the conditions of that Rule were not fulfilled. Apart from these contentions a plea of promissory estoppel was also raised on behalf of the Department which was negated by the learned Judge. The learned Judge also took the view that the Assistant Collector and the Collector had violated the principles of natural justice by gathering material from New Era Trade and Vitrum Glass Works without giving any opportunity to the Company to meet the said material and also without giving any opportunity to it to cross-examine the witnesses from whom such information were gathered. He further took the view that even the inferences that were drawn from the K.P.T. invoices issued by the Company were adverse to the Company and no opportunity was given to it to meet such adverse inferences. Accordingly, he took the view that in an event as the principles of natural justice were violated the impugned five notices of demand and the order of the Assistant Collector and that of the Collector were

liable to be quashed. Accordingly he allowed the petition in terms of prayer (a) thereof. The respondents, who are the officers of the Central Excise Department, have preferred this appeal against the said judgment and order of the learned Judge.

7. Before us only two contentions are urged by Mr. Joshi on behalf of the Excise Department. Firstly he submitted that the five impugned notices of demand were issued by the Department under Rule 10A; that Rule 10 is applicable only in those cases where there is a completed assessment and the conditions of that Rule are fulfilled or satisfied, while Rule 10A is attracted when the case is not covered by Rule 10, both in a case where there is a completed assessment and also in a case where there is an incomplete assessment. He submitted that in the present case, having regard to the procedure adopted by consent of the company there was an incomplete assessment on the basis of the price list furnished by the Company before such price list was verified for determination of the value for the purpose of levying and collecting excise duty. He submitted that Rule 10A is comprehensive enough to include within its scope a case of short levy or deficiency by reason of an incomplete assessment or even a provisional assessment (popularly so-called) which does not fall within the four corners of Rule 9B. Secondly he submitted that the learned Judge was in error in taking the view that the Assistant Collector and the Collector violated the principles of natural justice. He submitted that the bills furnished by the New Era Traders and Vitrum Glass Works were relied upon merely by way of comparison but they were not relied upon as forming the basic ground on which adjudication was made or order was passed by either the Assistant Collector or the Collector. In any event, he submitted that when the appeal was heard before the Collector the Company had ample opportunity to meet the inferences that could be drawn either from the bills issued by the New Era Traders or Vitrum Glass Works or even the inferences drawn from the K.P.T. invoices which from time to time were issued by the Company to its customers. He further submitted that in the present case no prejudice whatsoever was caused to the Company and even if the rules of natural justice were technically violated the Company was not entitled to challenge the order of the Assistant Collector and that of the Collector without showing any prejudice.

8. Mr. Sorabjee on behalf of the Company and on behalf of Krishna Glass Pvt. Ltd. and Dhirjalal B. Boda, who have been permitted to intervene in this appeal, submitted that the Act and the Rules contemplate only two types or kinds of assessment, (1) a provisional assessment as permitted by Rule 9B and (2) a final assessment as contemplated by Rule 52. He submitted that in the present case there was no valid provisional assessment as it could not have been made in conformity with the provisions of Rule 9B but there was a final and completed assessment as contemplated by Rule 52. All the necessary steps which constitute a valid and final assessment under Rule 52 did take place in the present case, viz. (1) there was an application for removal of goods after presenting AR 1 form; (2) there was an assessment of duty by the competent officer having

regard to the particulars furnished under this form; (3) there was collection of duty by the Excise Department by debiting the amount of the duty assessed in the account current maintained with the Department in view of the second proviso to Rule 9 and that the said account was settled regularly every month, and (4) there was clearance of goods by the assessee upon payment of duty and issue of gate passes. He submitted that the validity or effectiveness of an assessment under Rule 52 is not detracted from nor impaired by reason of insertion of the words "provisional assessment in AR 1 form" or of a declaration to pay the differential amount of duty when later on determined. This factor, according to his submission, may possibly raise an issue of estoppel, but it cannot affect the legal efficacy of the assessment duty made under Rule 52. He urged that the present case cannot be said to be a case of an incomplete assessment; that such was not the basis of the order passed either by the Assistant Collector or that passed by the Collector. He urged that sole basis and foundation of the Department for invoking the provisions of Rule 10A is suppression of material facts about the recovery of service charges by issue of separate K.P.T. invoices which fact according to the Department did not fall within the meaning of the expression "mis-statement" used in Rule 10. In brief, his submission was that it was impossible for the Department to make a provisional assessment as contemplated by Rule 9B, that there was already a final assessment made after AR 1 forms were submitted from time to time and duty was assessed thereon and entries were made in the account current maintained with the Department before the goods were cleared. Such a case was directly covered by Rule 10 and as the notices of demand were issued after the expiry of the prescribed period of three months under Rule 10, they were rightly held to be time-barred by the learned Judge. Coming to the plea as regards violation of the principles of natural justice he submitted that an assessment being a quasi-judicial proceeding if the principles of natural justice were violated, then the order passed was liable to be set aside on that ground. According to his submission the rules of natural justice were violated, then the order passed was liable to be set aside on that ground. According to his submission the rules of natural justice were violated in the present case inasmuch as the evidence and material which had been considered and made the basis of the impugned orders was not disclosed to the Company, nor was any reasonable opportunity given to it to rebut the same. He also submitted that no opportunity whatsoever was given to the company for meeting the adverse inferences that has been drawn by the Assistant Collector and the Collector. The evidence and material which according to him was considered by these authorities but was kept back from the Company consisted of (a) material regarding the prices charged by New Era Traders and Vitrum Glass Works; (b) the insinuation that service charges were not in reality service charged at all but it was a device adopted by the Company to reduce its liability for payment of excise duty and (c) inferences sought to be drawn from the above material, non-bifurcation of certain bills and the so-called inability to establish that service charges were exclusively meant for services rendered.

9. Before considering the rival contentions urged on behalf of both the parties, it will be necessary to summarise the relevant provisions of the Act and the Rules which call for consideration. The charging section is section 3 Under the said section 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 as, and at the rates set forth in the First Schedule. The determination of value for the purposes of excise duty is provided for in section 4. Such value has to be determined in the manner prescribed-where under the Act, any article is chargeable with duty at a rate dependent on the value of the article. In the present case as ad valorem excise duty is payable in respect of the bottles manufactured by the Company the assessable value has to be determined as contemplated by Section 4. Power to make the Rules is conferred by section 37. Such Rules are to be made to carry into effect the purposes of the Act. u/s 38 all Rules made and notification issued under the Act shall be made and issued by publications in the official Gazette. All such rules and notifications shall thereupon have effect as if enacted in the Act.

10. In exercise of the powers conferred by section 37 of the Act the Rules have been made. Chapter III of the Rules provides for levy and refund of, and exemption from, duty. Rule 7 provides that every person who produces, cures or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty or duties leviable on such goods, at such time and place and to such person as may be designated, in, or under the authority of these Rules, whether the payment of such duty or duties is secured by bond or otherwise. Under Rule 9 no excisable goods shall be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export, or manufacture of any other commodity in or outside such place, until the excise leviable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the Collector may require, and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form. The third proviso to this Rule permits a current account to be maintained with the Department. Under this proviso the Collector may, if he thinks fit, instead of requiring payment of duty in respect of each separate consignment of goods removed from the place or premises specified in this behalf, or from a store-room or warehouse duly approved, appointed or licensed by him keep with any person dealing in such goods an account-current of the duties payable thereon and such account shall be settled at interval, not exceeding one month and the account holder shall periodically make deposit therein sufficient in the opinion of the Collector to cover the duty due on the goods intended to be removed from the place of production, curing, manufacture or storage. Rule 9B contains provisions as regards provisional assessment to duty. It is unnecessary to refer to the provisions of this Rule, because, even though before the trial Court an attempt was made by the Department to justify alternatively the issuance of the notices of demand having

regard to the provisions of the Rule, no such attempt has been made before us in this appeal. In fact in view of the decision of the Calcutta High Court in the case of Assistant Collector of Central Excise v. Gobinda Glass Works, 72 Calcutta Weekly Notes, 137 for the purposes of the appeal it has been conceded by Mr. Joshi on behalf of the Department that it will not be permissible to the Department to make a provisional assessment as contemplated by Rule 9B. Rules 10, 10A and 52 are important and they are as under :-

"10. Recovery of duties or charges short-levied, or erroneously refunded. - 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 person chargeable with the duty or charge, so short-levied, or to whom such refund has been erroneously made, shall pay the deficiency or pay 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.

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.

52. Clearance on payment of duty. - When the manufacturer desires to remove goods on payment of duty, either from the place or premises specified under Rule 9 or from a store-room or other place of storage approved by the Collector under Rule 47, he shall make application in triplicate (unless otherwise by rule or order required) to the proper officer in the proper Form and shall deliver it to the officer at least twelve hours (or such other period as may be elsewhere prescribed or as the Collector may in any particular case require or allow) before it is intended to remove the goods. The officer shall, thereupon, assess the amount of duty due on the goods and on production of evidence that this sum as has been paid into the Treasury, or paid to the account of the Collector in the Reserve Bank of India or the State Bank of India, or has been despatched to the Treasury by money-order shall allow the goods to be cleared."

11. Form AR 1 annexed to these Rules provides for an application to be made by a manufacturer for removal of excisable goods on payment of duty.

12. Before the controversy as regards payment of additional duty for the quarters, with which we are concerned, arose, on November 2, 1964 the Company executed in favour of the President of India a general bond for

provisional assessment of goods to excise duty in the Form B13 (Gen-Sec.). The first recital in this bond provided :

"WHEREAS final assessment of excise duty of glass bottles and containers (Hereinafter called "goods") manufactured/cured/warehoused at Majiwada, Thana, by the obligors (company) from time to time could not be made for want of full information as regards value/depreciation/quality or of proof thereof or for the non-completion of the chemical or other tests in respect thereof or otherwise."

13. The second recital in this bond was as under :-

"AND WHEREAS the obligors as per provisions contained in rule 9B of the Central Excise Rules, 1944, have requested the Government to make provisional assessment of excise duty of the said goods pending final assessment;"

14. Under this bond the Company undertook its obligation to observe all the provisions of the Rules as they may relate to such provisional assessment. It agreed to furnish such information or proof as may be called for by the competent officer and it also agreed to pay all dues or other lawful charges which may be demanded in respect of goods on the basis of value as finally ascertained by the competent officer within the time stipulated therein. As indicated in one of the recitals, the company having regard to the provisions of Rule 9B of the Rules requested the Government to make provisional assessment of excise duty of the goods pending final assessment. It has to be considered in the present case whether the bond loses all efficacy and becomes useless once it is conceded by the Department that a provisional assessment in conformity with the provisions of Rule 9B was not permissible in this case in view of the decision of the Calcutta High Court in *Gobinda Glass Works*" case 72 C.W.N. 137. Undoubtedly the bond was executed upon a representation by the Company on the footing that the provisional assessment was permissible under Rule 9B. However, it is not on the basis of the present bond that the action is supposed to be taken by the Department against the Company. It is one piece of material on which reliance is placed by Mr. Joshi to contend that when the goods were allowed to be cleared there was no completed assessment as there was no final determination of the prices on the basis of which excise duty is to be determined. The bond is in fact referred to in the petition itself and though it was executed on the footing that a provisional assessment under Rule 9B was permissible, still the other provisions of the bond clearly indicate in what manner the goods were permitted to be cleared by the Company. The very first recital in this bond makes it amply clear that final assessment of excise duty on the bottles manufactured by the Company was not possible inter alia for want of full information as regards the value thereof or proof thereof. So far as the bond is concerned, even though it is executed on November 2, 1964 it continues to remain in operation for the subsequent period until it is duly cancelled in the manner permissible in law. It is common ground that for each one of the quarters for which goods were permitted to be cleared by the Company AR 1 forms were submitted from time to

time by the Company to the Department. There were two alterations made in the forms that were submitted by the Company if regard be had to the prescribed form under the Rule. Each one of the AR 1 forms submitted by the Company for the relevant quarters contained the words "provisional assessment" as and by way of heading. Such words are not to be found in the prescribed form. It also contained a declaration to the following affect :-

"We hereby declare that we shall be responsible for payment of differential excise duty if the prices adopted for assessment are found to be incorrect."

15. Such AR 1 forms for provisional assessment containing this declaration have been signed by the Company and it is on the basis thereof that amount of excise duty payable in respect of the goods mentioned in the form has been determined and adjustment of entry is made in the current account maintained as contemplated by the second proviso to Rule 9. After such entry was made gate pass was issued and the goods were allowed to be cleared or removed. For all the relevant quarters with which we are concerned, for the first time approved assessable values were conveyed by the Superintendent to the Company by his letter dated September 2, 1967. The use of the expression "approved" along with the words "assessable value" really indicates that when the goods were allowed to be cleared the assessable value was initially provisionally determined upon acceptance of the prices mentioned in the price list submitted from time to time in the beginning of each quarter and the final approved assessable value is determined by the Department after verification of the prices in the said price list and modifying the same as may be permissible having regard to the provisions of section 4 of the Act.

16. The argument of Mr. Sorabjee on behalf of the Company and the interveners is that there was clearance of goods permitted by the Department upon payment of duty after final assessment as contemplated by Rule 52 and if the duty paid as a result of such final assessment to be re-assessed then the provisions of Rule 10 will be attracted. He urged that under Rule 10 re-assessment proceedings can only be made within a period of three months from the date on which the duty was paid or adjusted in the owner's current account and as in the present case notices of demand were issued after the expiry of this period of three months, the same were time-barred. His argument further was that Rule 10A provides for merely residuary powers for recovery of the sums and the language thereof makes it amply clear that Rule 10A will not be attracted in a case where the provisions of Rule 10 are applicable. The steps which are to be taken before clearance of goods is permissible under Rule 52 are scrutinised by a Division Bench of this Court in Appeal No. 69 of 1963 N. B. Sanjana, Assistant Collector of Central Excise v. Elphinstone Spinning & Weaving Company Ltd. 1978 (2) E.L.T. (J 399) (S.C.) decided by Mody and Kohli JJ. on 1/2 and July 1965. In this judgment the provisions of Rule 52 and Rule 52A which provides for issuance of a gate-pass so as to enable delivery of goods were considered. These Rules according to the learned Judges lay down the procedure to be followed when the

manufacturer wants to remove the goods. The main characteristics of that procedure are four and they are enumerated as under :-

"The manufacturer must fill up the appropriate form, being Form AR 1 as prescribed by the rules. Thereafter there has to be an assessment of the duty leviable which takes place on the basis of that form. The third is that the manufacturer must pay the amount of duty as so assessed. The fourth is that upon such payment being made the excise authority grants and the manufacturer receives permission to remove the goods. Such permission is granted in the form of a gate-pass under Rule 52A."

17. It is strenuously urged by Mr. Sorabjee that each one of the four characteristics above enumerated is fully complied with before goods were permitted to be cleared by the Company in the present case for the relevant periods with which we are concerned. He submitted that admittedly AR 1 form to be submitted by the Company to the Department gives the necessary particulars. A specimen of such form duly filled up is to be found as Ex. C to the petition. The form is headed "Application for removal of excisable goods on payment of duty" and it is purported to be filled up under Rules 9, 9B, 52, 93 and 153 of the Rules. It is common ground that no attempt has been made to score out unnecessary Rules in the present case. Though the prescribed form AR 1 does not contain any particulars to be furnished indicating whether it is provisional or final assessment, it is admitted before us for the purposes of this Appeal that each one of the forms submitted by the Company for the relevant periods to the Department contained words "provisional Assessment" at the top thereof. Apart from this heading of "provisional assessment" the company before its submission added declaration in this form to the effect that it would be responsible for payment of differential excise duty if the prices adopted for assessment are found to be incorrect. It is such an application for removal of goods that has been considered by the Inspector of Central Excise and he made the relevant entries in this form under the heading "Assessment memorandum". The memorandum inter alia contains the number of packages, quantity or value of goods on which duty is assessed, the rate of duty and the total amount payable by way of excise duty. It is undoubtedly true that the Inspector when he signed this assessment memorandum has not indicated anything to the effect that it was merely a provisional assessment. Bearing this factor in mind it was strongly urged by Mr. Sorabjee that even though the application was for provisional assessment and it contained a declaration for payment of differential duty payable in case the prices were found to be not correct, still this was a final assessment within the meaning of Rule 52. Such a contention can only be accepted if the various parts of this form are looked at in mere isolation. To determine the question whether the assessment in a particular case is provisional or tentative or final it is necessary to look at the whole of the document and it will not be permissible to the Court or any competent authority to dissect various parts thereof into water-tight compartments. This form was submitted for the relevant quarter after the bond was executed by the Company on November 2,

1964. That bond clearly contained a recital to the effect that it was not possible to make final assessment of excise duty immediately for want of full information as regards the value or proof thereof. Actually under that bond the company undertook to pay all dues whether excise duty or other lawful charges as may be demandable in respect of such goods on the basis of value as finally ascertained by the competent officer. It was after such a bond was executed that the present AR 1 form was submitted by the Company. If the intention of the parties was that a final assessment had to be made which would permit a manufacturer to clear the goods as contemplated by Rule 52 and Rule 52A, one fails to understand why each one of the AR 1 forms that were submitted by the Company to the Department bore the heading "provisional assessment". Equally no explanation is offered by Mr. Sorabjee why a declaration to pay differential amount of excise duty was contained in this form if there was to be a final assessment. If the assessment memorandum is looked at in this background it is quite clear that this assessment memorandum was signed by the Inspector not by way of final assessment, but by way of incomplete assessment which has been described in this form as provisional assessment. That it was so is very clear from the subsequent conduct of the Officer of the Department, because, by a notice dated September 2, 1967 the Superintendent gave intimation to the Company as regards the amount determined as assessable value for the glass wares for the relevant periods. It is implicit in this notice that for the first time the assessable value of the glass wares is determined by the competent authority when this notice or letter is sent, even though earlier by reason of signing the assessment memorandum on AR 1 form and issuance of a gate-pass and the making of a debit entry in the current account by way of adjustment the goods have been permitted to be cleared. Thus if the bond dated November 2, 1964, the AR 1 form for provisional assessment containing the declaration to pay differential amount of duty and the notice dated September 2, 1967 mentioning the figure of approved assessable value are taken into account, then it is quite clear that the assessable value for the purposes of section 4 is determined for the first time when such notice dated September 2, 1967 was issued. It is not possible to accept the contention of Mr. Sorabjee that when the assessment memorandum in AR 1 form was signed by the Inspector the value of the goods for the purpose of excise duty was finally determined and there was a final assessment.

18. It is undoubtedly true that in some of the relevant documents with which we are concerned, namely, the bond dated November 2, 1964, the AR 1 form and the five impugned notices of demand which were issued initially, reference is made to Rule 9B but in view of the decision of the Calcutta High Court in *Gobinda Glass Work's* case 72 C.W.N. 137 it is quite clear that upon proper interpretation of Rule 9-B such reference was clearly unjustified. The Division Bench of the Calcutta High Court in that case has taken the view that assessment and Provisional assessment of duty under the Central Excise and Salt Act and Rules read with the relative Finance Act can only be in accordance with the statutory

provisions. These are not common law rights and, therefore, a provisional assessment can only be made in accordance with the provisions of Rule 9B, because no other provisions in the Act or the Rules have been brought which enable a provisional assessment to be made. Rule 9B makes it clear that a manufacturer, curer or owner of goods warehoused may ask for provisional assessment only in a case where the assessment of the goods involves two or more alternative basis. Provisional assessment under Rule 9B is a statutory matter and must come within its four corners. One might call an assessment "Provisional" in the larger or dictionary sense, but that will not make it a provisional assessment under Rule 9B. It is common ground at the stage of the hearing of this Appeal that the assessment in the present case does not involve two or more alternative basis and therefore a provisional assessment in the manner contemplated by Rule 9B was not permissible. In the present case, the assessment was labelled as "Provisional" simply on the footing that time would be required to determine the real assessable value of the goods for the purposes of exact amount of excise duty and till proper proof was furnished and the prices mentioned in the price list were verified it was not possible to determine the correct amount of excise duty payable. As such a case cannot be regarded as one where the assessment of the goods involves "two or more alternative basis" provisional assessment as contemplated by Rule 9B was not permissible in the recent case.

19. The question, however, that remains to be considered is whether the issuance of the impugned notices of demand was permissible having regard to the provisions of Rule 10 or Rule 10A. Rule 10 will apply when duties have been short-levied through inadvertence, error, collusion or misconstruction 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. There is, however, a limitation prescribed for recovery of such duties short-levied because, under this Rule the owner is under an obligation to pay the deficiency of duties short-levied on a written demand by the competent officer being made within three months from the date on which the duty was paid or adjusted in the owner's account current if any. It cannot be disputed that if the provisions of Rule 10 are applicable in the present case, then the impugned notices of demand are clearly issued after the expiry of the period of three months mentioned in this Rule. While Rule 10A is a residuary rule for recovery of amount due to the Government, its provisions will be attracted only if (1) the 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 and (2) a written demand is made by the proper officer calling upon the owner to pay such duty or deficiency in duty. So far as Rule 10A is concerned, it is quite apparent that there is no period of limitation prescribed and if the case is capable of falling within the provisions of Rule 10A, then a written demand to pay the duty or deficiency in duty can be made at any time irrespective of any limitation. The provisions of Rule 10 and Rule 10A have been considered by the Supreme Court in the case of Assistant Collector of Central

Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., . In that case the Company was required to furnish quarterly consolidated price-lists which used to be accepted for purposes of enabling the Company to clear its goods, but according to the Collector these used to be verified afterwards by obtaining evidence of actual sales in the market before issuing final certificates that the duty had been fully paid up. The particulars of the cigarettes to be cleared were furnished by the Company on forms known as AR 1 forms required by Rule 9 of the Rules. For facilitating collection of duty, the Company maintained a large sum of money in a current account with the Central Excise authorities who used to debit in this account the duty leviable on each stock of cigarettes allowed to be removed. This current account known as "personal ledger account" was maintained under the third proviso to Rule 9. In the past the Company used to furnish its quarterly price-lists to the Collector on forms containing nine columns one to show the "distributors" selling price". Until July 1957, so long as this firm was used by the Company, no difficulty seems to have been experienced in checking the prices. But, after this column was dropped from the new form of six columns, the excise authorities seem to have encountered some difficulty in valuing the cigarettes for levying excise duty. They, therefore, changed the basis of assessment itself from "the Distributors" Selling Price" to "the wholesale cash selling price at which stockists or agents are selling the same to an independent buyer in the open market". The Authorities took the view that such a change could be made having regard to the provisions of section 4 of the Act. The Deputy Superintendent of Central Excise informed the Company of this change of basis on November 5, 1958 by a letter which also asked the Company to furnish its price lists immediately, for determining the correct assessable value of its cigarettes. Thereafter on November 7, November 12 and November 13, 1958 the Deputy Superintendent served notices upon the Company demanding the various sums therein mentioned These sums consisted of two items one, an amount payable as basic central excise duty and the other an amount payable as additional central excise duty on account of short levy for certain brands of cigarettes cleared from the Company's factory for the various periods therein mentioned. These three notices were challenged before the Calcutta High Court by filing a writ petition under Article 226 of the Constitution. All the three impugned notices were quashed by a single Judge of that Court on the ground that the Company had not been given any opportunity of being heard so as to enable it to meet the material collected behind its back which formed the basis of the demands under the aforesaid three notices A question of limitation was also raised at that stage, but at the request of both the parties that question was not decided. The notices were quashed but it was made clear that the said order would not prevent the Excise Authority from proceeding to take any step that may be necessary for such assessment or for the recovery thereof in accordance with law. The judgment of the single Judge of the Calcutta High Court is reported in National Tobacco Co. of India Ltd. Vs. Collector of Central Excise and Others, . After that judgment a fresh notice was issued by the Assistant Collector of Central Excise on April 21, 1960 to the Company intimating to it that the Excise

Authorities proposed to complete the assessment for the various periods therein mentioned and gave a opportunity to the Company for the purpose of discussing the points therein mentioned. Even a personal hearing was offered to be given with liberty to the Company to produce such evidence as it may like at the time of the hearing. The validity of that notice was challenged by the Company by filing a second petition for writs of prohibition and mandamus against the Collector on the ground that the notice was barred by time and was issued without jurisdiction so that no proceedings founded on it could be taken. A prayer for quashing the notice was allowed by the learned single Judge of the Calcutta High Court on January 3, 1964 on the ground that the notice was barred by the provisions of Rule 10. An appeal preferred by the Collector was dismissed by a Division Bench of the High Court and against the decision of the Division Bench an appeal was preferred to the Supreme Court. The Supreme Court considered the distinction that exists between the term "levy" and the term "assessment". According to the Supreme Court the term "levy" is wider in its import than the term "assessment". It may include both "imposition" of a tax as well as assessment. The term "imposition" is generally used for the levy of a tax or duty by legislative provisions indicating the subject-matter of the tax and the rates at which it has to be taxed. The term "assessment" on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods or property or whatever may be the object of the tax in a particular case and determining its amount. Although the connotation of the term "levy" seems wider than the term "assessment" which it includes yet it does not seem to extend to collection. Reference was also made to section 3 of the Act where both the expressions "levied" and "collected" were used. According to the Supreme Court, the expression "levy" has not been used in the Act or the Rules as meaning actual collection. The Supreme Court further held that it was unable to accept the view that merely because the "account current" kept under the third proviso to Rule 9 indicated that an accounting had taken place, there was necessarily a legally valid or complete levy. The making of debit entries was only a mode of collection of the tax. Even if payment of actual collection of tax could be spoken of as a de facto "levy", it was only provisional and not final. It could only be clothed or invested with validity after carrying out the obligation to make an assessment to justify it. Moreover, it is the process of assessment that really determines whether the levy is short or complete. It is not a factual or presumed levy which could in a disputed case prove an "assessment". This has to be done by proof of the actual steps taken which constitute "assessment". A mechanical adjustment and ostensible settlement of accounts by making debit entries could only be equated with an assessment, because, assessment being a quasi-judicial process involves due application of mind to the facts as well as the requirements of law. The Supreme Court took notice of the fact that Rule 10 seemed to be so widely worded as to cover any inadvertence, error, collusion or misconstruction on the part of an officer as well as any mis-statement as to the quantity, description or value of such goods on the part of the owner as causes of short levy. Rule 10A would appear to cover

any deficiency in duty if the duty has for any reason been short levied, except that it would be outside the purview of Rule 10A if its collection is expressly provided for by any Rule. According to the Supreme Court Rule 10 should be confined to cases where the demand is being made for a short levy caused wholly by one of the reasons given in that rule so that an assessment has to be reopened. On the facts it found that the real reason for the alleged short levy was a failure of the Company to supply the fuller information it used to supply previously and not just a mis-statement. If the ba

20. se does not clearly come within the classes specified in Rule 10, this Rule should not be invoked because a too wide construction put on Rule 10 would make Rule 10A useless. The two Rules have to be read together. Rule 10A seems to deal only with collection and not with the ascertainment of any deficiency in duty or its cause by a quasi-judicial procedure. It, however, is to be read in conjunction with section 4 of the Act. A quasi-judicial proceeding, in the circumstances of such a case, could take place under an implied power. It is well established rule of construction that a power to do something essential for the proper and effectual performance of the work which the statute has in contemplation may be implied. Coming to Rule 52 it is observed that although that Rule makes an assessment obligatory before goods are removed by a manufacturer, yet, neither that rule nor any other rule, has specified the detailed procedure for an assessment. There is no express prohibition anywhere against an assessment at any other time in the circumstances of a case like the one before the Supreme Court where no assessment as it is understood in law took place at all. On the other hand Rule 10A indicates that there are residuary powers of making a demand in special circumstances not foreseen by the framers of the Act or the Rules. If the assessee disputes the correctness of the demand an assessment become necessary to protect the interest of the assessee. The Supreme Court took the view that a case like the one before it fell more properly within the residuary class of unforeseen cases. From the provisions of section 4 of the Act read with Rule 10A an implied power to carry out or complete an assessment, not specifically provided for by the Rules can be inferred. No writs of prohibition or mandamus were therefore called for in the circumstances of the case.

21. It was urged by Mr. Joshi on behalf of the Department that the present case falls directly within the ratio of the Supreme Court judgment in National Tobacco Company's case, while on the other hand, it was sought to be distinguished by Mr. Sorabjee on the ground that in the case before the Supreme Court there was not even a provisional assessment and a mere entry was made in the account current without making an assessment. Mr. Sorabjee is right when he says that there is no clear observation to the effect that when the AR 1 forms were submitted to the Department actual assessment was made by the competent authorities, but if regard be had to the observations of the Calcutta High Court then it is implied that a provisional assessment was made on AR 1 form submitted by the Company. See Assistant Collector of Central Excise Vs. National

Tobacco Co. of India Ltd., . The Supreme Court has set aside the decision of the Division Bench of the Calcutta High Court, on the ground that when there is no complete assessment then there is an implied power under Rule 10A to complete such assessment so as to determine the amount of short levy. Such a case is not covered by Rule 10 and power can be exercised under the residuary Rule 10A for which no limitation is prescribed. It can, however, be said that even though both the parties were under a mistaken impression that there was provisional assessment under Rule 9B, but on facts it was a case of incomplete assessment which permitted the authorities to complete assessment at a later stage.

22. It was sought to be urged by Mr. Sorabjee that from the way in which orders are being passed by the Assistant Collector and the Collector it appeared that both of them have proceeded on the footing that there is a mis-statement as regards the value of the goods and therefore the case was covered by Rule 10. It is not possible for us to accept this contention for more than one reason. In the first place, as there was no completed assessment on the earlier occasion when an endorsement was made under the assessment memorandum and a debit entry was made in the account current it was clearly a case of incomplete assessment which upon determination of the assessable value of the goods was to be completed in course of time. That such was the position is quite apparent it regard be had to the bond executed in November 1964, the expression "provisional assessment" and the declaration to pay differential amount of duty in AR 1 form and the notices of demand indicate that it is thereby that the assessable value has been approved by the competent officer. These facts really therefore go to show that really and truly it was a case of incomplete assessment which was sought to be completed in the manner permissible in law and such a case, as held by the Supreme Court in National Tobacco Company's case is covered by the residuary Rule 10A rather than Rule 10. The plea in the affidavits made by the various Excise Officers is clear that it was a case of incomplete assessment. It is unnecessary to refer to all the statements made in the affidavits in reply made by the respondents but suffice it for the present case if reference is made to what is stated by Tendulkar, Assistant Collector in his affidavit affirmed on January 25, 1971. He has stated that the Company's price list was not approved and accepted by the concerned Central Excise Officer and it was open to the Central Excise Authorities to refuse clearance of the Company's manufactured products till the price lists submitted by the Company were accepted and approved on the Company furnishing the requisite information and to assess the duty on the basis of approved and accepted price lists. It was only at the request of the Company and on its giving an express undertaking that it would be responsible for payment of differential amount of excise duty if the prices adopted for assessment were found to be incorrect, the goods in question were provisionally assessed on the basis of the prices declared by the Company instead of assessing the same on the basis of approved and accepted prices. These averments are consistent with the above documents to which we have referred and really go to show that rather than a case of mis-statement as

regards value it was a case of incomplete assessment which was sought to be completed at a later stage upon the value being verified.

23. That takes us to the question whether the Assistant Collector and/or the Collector had violated the principles of natural justice while passing the impugned order. At the outset it may be stated that as held by the Calcutta High Court in the National Tobacco Company's case reported in National Tobacco Co. of India Ltd. Vs. Collector of Central Excise and Others, , as assessment is a quasi-judicial process before determining the final assessable value as contemplated by section 4 of the Act an opportunity has to be given to the manufacturer for showing cause why the prices declared in the AR 1 form ought not to be accepted. Such an opportunity in fact was not given in the present case. On the other hand, mere intimation was given by the Superintendent by his letter dated September 2, 1967 as regards the assessable value determined by the Department and subsequently five notices of demand were issued calling upon the Company to pay the differential amount of duty in respect of the goods cleared during the relevant quarters. When representations were made by the Company against such notices of demand they were treated as an appeal and heard by the Assistant Collector. It is clear from the order of the Assistant Collector dated July 20, 1968 that he not only referred to the K.P.T. invoices issued by the Company but drew adverse inferences therefrom without giving any opportunity to the Company to explain its position. He went further and referred to even instances of sale by New Era Traders and Vitrum Glass Works in respect of bottles of the same capacity and kind. It is common ground that at no time any opportunity was given to the Company to have its say in respect of the instances of sale by New Era Traders and Vitrum Glass Works nor was any opportunity given to cross-examine the persons from whom such information was gathered. When an appeal was preferred by the Company before the Collector inter alia challenging the order of the Assistant Collector on the ground of violation of principles of natural justice, the Collector categorically took the view that at no time the Company explained satisfactorily with necessary documents that the so-called "service charges" recovered under K.P.T. invoices were exclusively spent for the services stated to have been rendered to their customers nor had the Company at any time come forward to show the exact nature of services and the details of service charges. He took the view that the very fact that the total value of K.B. and K.P.T. invoices tallied with the contract price fairly well established that the Company's obvious intention in splitting up the prices was to keep low the prices declared to the Department and in consequence make a saving in the Central Excise duty. He affirmatively held that the so-called service charges formed a part and parcel of the price structure and were not post delivery charges. So far as the instance of sale by New Era Traders and Vitrum Glass Works were concerned, he found that the comparison of the Company's invoices with those of these two concerns was not only apt but quite necessary because the comparison was in respect of articles of identical specifications supplied to identical customers. These findings of the Collector

clearly show that inferences were drawn from the K.P.T. invoices and reliance was placed upon the instances of sale by New Era Traders and Vitrum Glass Works not merely by way of comparison but they formed the very basis of the order. If they formed the very basis of the order, then it is not disputed by Mr. Joshi on behalf of the Department that principles of natural justice would be violated. Our attention was invited by Mr. Sorabjee to an unreported decision of the Supreme Court in Civil Appeals Nos. 1362 and 1368 of 1967 [Collector of Central Excise and Land Customs, Shillong & Anr. v. Sanawarmal Purohit & Anr. since reported in 1979 (4) E.L.T. (j 613) (S.C.) decided on February 16, 1968. The Supreme Court in this case has pointed out the three principal circumstances on which the Collector of Customs founded his conclusions. The Supreme Court pointed out that these circumstances may undoubtedly be relied upon by the Collector in support of his conclusion but before his conclusion should be founded thereon it was necessary for the Collector of Customs to hold an enquiry in which due notice of those circumstances was given and the offenders were given an opportunity to meet the inferences arising therefrom and to comment thereon. Thus it is very clear that both the Assistant Collector as well as the Collector had violated the principles of natural justice inasmuch as evidence and material which was considered and made the basis of the impugned orders was not disclosed to the Company, not was a reasonable opportunity given to the Company to rebut the same. It is not possible to accept the contention of Mr. Joshi that these materials were relied upon only for supporting the finding otherwise arrived at on the material disclosed to or within the knowledge of the Company. Thus, in our opinion, the learned Judge was right in taking the view that the impugned notices of demand and orders were issued and passed by the Superintendent, the Assistant Collector and the Collector of Central Excise in violation of the principles of natural justice.

24. In the result, the appeal fails and is dismissed. As the appellants have partially succeeded in one of the contentions and have failed in the rest of the contentions, the fair order as to costs will be that each party shall bear its own costs of the appeal. Liberty to the appellants attorneys to withdraw the sum of Rs. 500/- deposited by the appellants as security for costs.

25. As the notices of demand as well as the orders are quashed by the order of the learned Judge and which we have confirmed on the ground of violation of the principles of natural justice, it will be open to the Company to contend that the amounts mentioned in the K.P.T. invoices were reflecting post manufacturing expenses and were not part of manufacturing cost, in case fresh action is taken by the Excise Department.