

(1991) 06 KAR CK 0051
In the Karnataka High Court
Case No : Writ Petition No. 10424 of 1989

N.G.E.F. Ltd.

APPELLANT

Vs

Assistant Collector of Central Excise

RESPONDENT

Date of Decision : 11-06-1991

Acts Referred:

Central Excise Act, 1944 — Section 3, 37, 37 (1), 37 (2), 4
Central Excise Rules, 1944 — Rule 173B (2A), 7, 8, 9, 9A
Customs Act, 1962 — Section 18

Citation : (1991) 56 ELT 518

Hon'ble Judges : S.R. Rajasekhara Murthy, J

Bench : Single Bench

Advocate : Shri K.P. Jagadeeshan, for the Appellant; Shri Ashok Harnahally, C.G.S.C, for the Respondent

Judgement

1. The petitioner is a Company registered under the Indian Companies" Act and is an undertaking of the Government of Karnataka. The Company is engaged, inter alia, in the manufacture of Transformers, Electric Switch Gears, Switch Boards and other Electrical Goods. Among the electrical goods manufactured by the petitioner Company, are Electrical Laminations and Stampings which are exigible to duty under the erstwhile Entry 28-A of the First Schedule to the Central Excises and Salt Act, 1944.

2. The petitioner has, in this writ petition, challenged the show cause notice dated 21-3-1988 (Annexure-H) as modified by the Corrigenda (Annexures J & K) and has also prayed for issue of a mandamus to respondent No. 1, the Assistant Collector of Central Excise, Bangalore restraining him from proceeding with the proceedings of adjudication pursuant to the impugned show cause notice.

This writ petition was filed on 5-6-1989 and an interim order was issued on 15-6-1989 and after notice to the respondents, Rule was issued on 15-12-1989.

3. The impugned show cause notice was issued by respondent No. 1 consequent on the dismissal of writ petition No. 31466/1981 by this Court by order dated

4-10-1985. In the said writ petition, the petitioner had challenged the constitutional validity of Entry 28-A and the classification laminations under the said entry and had also challenged the levy of excise duty on the laminations captively consumed in the petitioner's factory in the production of transformers. Consequent on the dismissal of the writ petition by this Court and on a remand by the Collector (Appeals), the matter is now pending adjudication before the Assistant Collector.

4. The show cause notice which is challenged in this writ petition is issued for the following purposes :-

(i) to decide the classification of the laminations manufactured by the petitioner-Company under erstwhile Tariff Item 28-A;

(ii) to show cause why the Central Excise Duty of Rs. 1,75,75,571.67 which was provisionally assessed for the period 10-12-1981 to 4-10-1985 should not be finally assessed and recovered;

(iii) to show cause why the claim of the petitioner to refund Rs. 3,10,65,057.41 being the duty paid by the petitioner by mistake, on electrical laminations during the period 1-3-1974 and 10-12-1981 should not be rejected.

5. Before advertng to the facts of the present case, it would be necessary and appropriate to refer, in brief, to the previous writ petition viz., W.P. No. 31466/81 filed by the same petitioner, since the present show cause notice is issued on the dismissal of the said writ petition and to recover the duty which had been stayed by this Court. In that writ petition, the validity of Entry 28-A and the classification and levy of Central Excise Duty on electrical laminations and Stampings manufactured by the petitioner-Company, was challenged. The petitioner had offered the said goods for duty as excisable goods and had included it in the Classification list 17/1980 effective from 1-4-1980. That classification list was approved and the duty payable was determined by the Proper Officer. But the petitioner resisted the classification and levy for the period 21-7-1980 to 21-7-1981 and filed the writ petition 31466/81 challenging the levy.

An interim order was made by this Court in the said writ petition on 10-12-1981 in the following terms :

"Issue Rule Nisi. Issue directions as prayed for. ENR by 2 weeks"

The interim order which was served on the Department was worded thus :

"Pending disposal of the aforesaid Writ Petition, it is hereby ordered by this Court on 10-12-1981 (by Hon"ble Mr. Justice MPCJ) that R 1, their servants, subordinates, officers and agents, are hereby restrained from taking any steps or proceedings whatsoever from levying or collecting, demanding or recovering any duty under Tariff Item No. 28A of 1st Schedule to the Central Excises and Salt Act, 1944 in respect of Laminations prepared by the petitioners for being captively consumed in the manufacture of Transformers."

The writ petition was disposed of ("dismissed" to be precise) on 4-10-1985 permitting the petitioner to file an appeal to the Appellate Collector challenging the classification. The petitioner had, in the said writ petition, contended that the laminations were manufactured by NGEF (Petitioner) suitable for its own design and use as components of transformers and therefore they did not constitute "goods" to attract Central Excise Duty. This Court, while dismissing the writ petition observed in the course of its order that the question whether laminations are excisable goods under the Act is highly technical in nature and the question as to excisability or otherwise under the Act in the light of the contentions of the petitioner raised in the writ petition has to be decided by the Competent Authority appointed under the Act and is therefore not a matter for the High Court to decide. The petitioner was therefore permitted to file an appeal to the Appellate Collector and agitate all the grounds in the appeal. This Court also reserved liberty to the Department to take such action as it deemed necessary for the subsequent period viz., from 21-7-1981 to 4-10-1985 in respect of which this Court had stayed the levy and recovery.

6. The Appellate Collector in the appeal filed by the petitioner thereafter set aside the classification list approved by the Assistant Collector and directed him to decide the classification of the goods on the basis of evidence if any and make a de novo order. This matter is now pending adjudication before the Assistant Collector. Since the period involved in that Writ Petition 31466/1981 viz., 21-7-1980 to 21-7-1981 is also included in this writ petition claiming refund of duty paid upto 10-12-1981, the Assistant Collector obviously, has not taken up the matter for fresh adjudication. It was submitted by Sri Jagadeeshan, learned Counsel appearing for the petitioner that his client would appear before the Assistant Collector and take a decision on merits after the disposal of this writ petition.

7. When the matter stood thus, the show cause notice was issued as per Annexure-H on 21-3-1988 proposing to complete "final assessment proceedings" in respect of the period 10-12-1981 to 4-10-1985 to levy Central Excise Duty on laminations. This is covered by Para 5(ii) of the show cause notice and the demand of Rs. 1,75,75,571.67 represents the duty sought to be recovered for the said period on the completion of the proposed final assessment.

8. The petitioner has challenged the show cause notice on the following grounds :

(i) that there was no "provisional assessment" made under Rule 9B of the Central Excise Rules for the period covered by the impugned show cause notice that is from 10-12-1981 to 4-10-1985 and hence the proposal to make final assessment and to recover the duty payable as per paragraph 5(ii) of the impugned notice is without jurisdiction and hence is liable to be quashed;

(ii) that in view of the fact, the classification lists 1/1982 and 1/1983 were approved by the proper officer and the duty payable on the basis of the approved classification lists became due and recoverable on such approval, that there was

a final assessment of the duty payable;

(iii) that the demand made as per the impugned show cause notice dated 21-3-1988 is barred by limitation as laid down by Supreme Court in Gokak Patel's case 1987 SC 1161).

An additional ground was urged by the petitioners in the course of the reply to the arguments of the learned standing counsel for the Department. Since no counter was filed by the Department setting out its case, I permitted the petitioner to amend the writ petition adding the following ground.

That the "provisional approval" recorded on the RT 12 returns, cannot be construed as a provisional assessment made under Rule 9B.

9. Elaborating his contentions the learned Counsel for the petitioner Sri Jagadeeshan submitted that the assessment memorandum on the RT 12 returns filed by the petitioner every month from December 1981 to 4th October 1985 cannot be construed as "provisional assessment" made under Rule 9B. Relying on the factual position as borne out from the relevant documents viz., the classification lists and the RT 12 returns and the endorsement made on the respective memoranda, it was demonstrated and urged, with emphasis, that a statutory order as contemplated under Rule 9-B did not come into existence at all. It was therefore submitted by the learned Counsel that RT 12 is not a document of provisional assessment but it is only a document of recapitulation and a separate specific order is required to be made under Rule 9B.

10. The learned Counsel also pointed out that under Rule 9B, provisional assessment may be done only in three circumstances referred to at (a), (b), and (c) of Rule 9B(1) and it was argued that the Department has failed to establish on facts of the present case that a provisional assessment was actually made in accordance with Rule 9B.

11. Referring to the classification lists and the returns in Form RT 12 filed by the petitioner in this case for the relevant period, it was contended by the learned Counsel that the rules do not contemplate "provisional approval" as endorsed in the memorandum of approval on the classification list, and the expression "assessed provisionally" used in Note 2 to the assessment memorandum on RT 12 is not contemplated under the Rules. It would be necessary to reproduce the memorandum of approval by the proper officer made in this case for a better appreciation of the point sought to be made out.

"Memorandum of approval by Proper Officer" (Strike out the portions which are not applicable)

1. Tariff classification and rate of duty leviable in respect of goods mentioned at Sl. No. 1 and 2 to dt. of Item 6 above is approved until further orders. Tariff classification and rate of duty leviable in respect of goods at Sl. No. to of Item 6 above is claimed by the assessee is not approved. Their classification and rate of duty shall be as under, until further orders.

2. Tariff classification and rate of duty in respect of goods described against Sl. No. to of Item 6 above is approved provisionally. Assessments of these goods shall be made by the Central Excise Officer-in-Charge, provisionally under Rule 9B of the Central Excise Rules, 1944.

3. All goods described against Sl. No. to of Item No. 7 shall be treated as non-excisable until further orders. Goods described against Sl. No. to of Item No. 7 which have been claimed by the assessee as non-excisable are excisable. Tariff classification and rate of duty leviable in respect of these goods shall be as under until further orders.

4. Any goods mentioned against Sl. No. 1 to 24 of Item 7 are excisable under different T.I. Nos. as described therein.

Sd/- Signature and stamp of Superintendent, Bangalore Asst. Collector of Central Excise, Dt. East Division, Bangalore."

So also the assessment memorandum on RT 12 (sample produced by the Department) reads thus :

"Assessment Memorandum (Strike out the portions which are not applicable) 1. The assessee has paid the duty on the above goods correctly except to the extent indicated below :

The duty debited less by the assessee, as indicated above should be paid by the assessee within 10 days by debit in his personal ledger account. The assessee may take credit for the duty paid in excess as indicated above in his Personal Ledger Account.

2. Duty on the goods removed under gate pass ... and included in this return has been assessed provisionally under Rule 9B and provisions of the said rule shall apply for recovery of deficiency in or refund of excess duty. Assessment is subject to finalisation of price list for the year 1982-83. Differential duty if any is demanded, duty on laminations is payable but for the stay order of the Hon'ble High Court of Karnataka.

Place : Bangalore Sd/- Dated : Signature and Stamp of Central Excise Officer incharge."

12. The argument developed by the learned Counsel for the petitioner on these facts is that the rules do not contemplate "provisional approval" and there can be either an approval of the classification list or rejection for reasons to be recorded or "a provisional assessment" as contemplated under Rule 9B. It is also pointed out that Note 1 and Note 2 in classification list are mutually exclusive and both cannot co-exist. If it is a case of approval and Note 1 is ticked, Note 2 does not arise and the argument is that the department's stand in this behalf is self-contradictory and mutually destructive. It was also argued that Note 2 in the memorandum of assessment made on RT 12 cannot be construed as a provisional assessment order under Rule 9B. In support of this contention, it was

pointed out from Rule 9B(1) that a written order is required to be made by the Proper Officer recording the reasons for making a provisional assessment. Reliance was also placed on Rule 173B(2A) which also speaks of a provisional assessment under Chapter VII which provides for procedure for assessment. It was therefore vehemently urged by Shri Jagadeeshan, on the basis of the undisputed facts borne out from the records that the endorsement, "provisional assessment" mentioned in Note 2 to RT 12 without an order being made is of no consequence and has no independent status. According to the learned Counsel a statutory order must be made under Rule 9B as required under the Rules and it cannot be a matter of inference, but is one of fact.

In this context, a departmental clarification (trade notice) issued by the Central Board setting out the procedure for making provisional assessment was also referred to. The relevant portion from the said clarification is extracted below :

"PROVISIONAL ASSESSMENT - PROCEDURE FOR Instances have come to the notice of the Board where non-observance of legal requirements described under Rule 9B of Central Excise Rules, 1944 relating to provisional assessments have resulted in loss of Government revenue.

2. Provisional assessment can be ordered only under the circumstances mentioned in Rules 9B, 173B (2A) 173C (6) of the Central Excise Rules, 1944. There must be a specific order from the Assistant Collector directing provisional assessment in a particular case clearly stating

1. the grounds on which the provisional assessment has been ordered,
2. rate and value at which duty is to be provisionally paid
3. the amount of differential duty for which bond is executed,
4. the amount of security or surety as may be fixed by Assistant Collector keeping in view the instructions issued by Board from time to time,
5. if any of these conditions are not observed, the assessments will not be considered as provisional, notwithstanding the fact that the words

"provisional assessment", "provisionally approved" etc. are endorsed on the relevant documents".

On these grounds, it was urged by Sri Jagadeeshan that it is not open to the Department to ask this Court to construe the endorsement made on RT 12 as Provisional assessment and the said contention should be rejected out-right.

13. Another point urged by Sri Jagadeeshan, was that the "proper officer" to make a provisional assessment under the Act is either the Collector or the Assistant Collector and not a Superintendent or an Inspector of Central Excise. On this premise it was argued that even on the endorsement on RT 12 should be construed as a provisional assessment, the Inspector of Central Excise is not competent to make an order of provisional assessment and the requirement of

the rules in this behalf is mandatory. The learned Counsel pointed out from the definition of "proper officer" in Rule 2(11), that a proper officer for the purpose of Rule 9B is an Assistant Collector who is also the designated authority under the Rule 5 for purposes of Rule 9B (3). It was therefore submitted that the requirement of the rules as to the proper officer is mandatory and should be strictly followed and the department's case should be rejected. It was also submitted that no bond was taken from the petitioner for the payment of the difference of duty as required under Rule 9B (1) in evidence of "provisional assessment" of any period which further establishes that there was no provisional assessment made in this case.

14. Sri Ashok Haranahally, the learned additional standing Counsel for the Central Government opposed the writ petition and submitted that it deserves to be rejected. It was submitted at the outset that the writ petition itself is not maintainable in the light of the decision of the Supreme Court in Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, and it must be left to the Adjudicating Authority to decide the issues that are urged in the writ petition.

On the merits of the other contentions advanced on behalf of the petitioners, it was contended by the learned counsel that on a proper construction of the endorsement made on the monthly returns RT 12 read alongwith the memorandum of approval on the classification list, it should be held by this Court that a provisional assessment did come into existence. The learned Counsel dealt with in detail and referred to the two classification lists covering the entire period and RT 12 returns (samples of which were produced by him) which will be adverted to latter.

15. The learned Counsel also drew my attention to the interim order passed by this Court in W.P. No. 31466/81 and strongly relied upon the same in support of the department's Case. Referring to the said interim order, it was pointed out that it was a general order of restraint on the department not to levy Central Excise duty on laminations under Entry 28-A during the tendency of writ petition though the writ petition related only to the period of one year from 21-7-1980 to 21-7-1981. The interim order is produced at para 6 of this order. It was argued by the learned Counsel that the petitioner had challenged the very classification of laminations under Entry 28-A and obtained an order not to levy excise duty on the laminations and it is not open to the very same petitioner now to advance an argument opposing the final assessment for the period between 10-12-1981 and 4-10-1985 and that the writ petition should be dismissed on this sole ground. It was pointed that what is now proposed to be done by the department pursuant to the show cause notice is to make a final assessment for the period in question, since no recovery was made by virtue of the interim order issued by this Court at the instance of the petitioner.

It was further argued by Sri Ashok Haranahally that the interim order was in operation against the department until the writ petition was dismissed on 4-10-1985. It was pointed out that though the subject matter of the writ petition

was in respect of only one year viz., 21-7-1980 to 21-7-1981, a general order of stay was issued for future periods also and the department was restrained from taking any action to levy and to collect the duty payable on laminations. The application filed by the department to vacate the interim order was also dismissed by this Court and thus the department could not collect the Central Excise Duty amounting to nearly Rs. 39 lakhs every year. It was therefore vehemently argued by the learned Counsel that all these circumstances must be taken into consideration for deciding this writ petition.

16. On the principal question whether there was a provisional assessment, Sri Ashok Haranahally submitted the following points for consideration :

(i) that the assessment memorandum recorded on RT 12 returns filed by the petitioner every month from December, 1981 upto 4th October 1985 should be construed as "provisional assessment" made under Rule 9B in the special circumstances of the case;

(ii) that the expression "provisional approval" referred to in Note 2 to the classification list should be considered alongwith the endorsement on RT 12 while deciding point No. (i).

(iii) both the endorsements read together and properly construed and on a reasonable construction, the only inference that can be drawn from these facts is that it is a case of "provisional assessment".

17. In this context, the learned counsel relied upon certain observations made by the Bombay High Court in *D. N. Kohli v. Krishna Silicate Co.*, (1989 (12) ELT 216) as to the criterion for making the provisional assessment as explained in that case. On facts, it was found by Bombay High Court, after perusal of all the documents such as AR 1 Forms etc., that it was a case of "incomplete assessment". For arriving at this conclusion the High Court took into consideration several circumstances such as AR 1 Forms for removal of the goods on which it was labelled as "provisional assessment" and the bond executed by the assessee and other relevant facts. The Bombay High Court observed that all the relevant documents must be looked into before it is presumed in a particular case whether the assessment is provisional or final. Though their Lordships (Kantawala CJ and Tuljapurkar J.) held against the assessee on merits, the writ petition was allowed only on ground of violation of principles of natural justice the HC remanded the matter.

18. The more important decision relied upon by Sri Ashok on this issue, is the decision of the Supreme Court in *Assistant Collector v. National Tobacco Co. of India* [1978 (2) ELT (146)]. The learned Counsel for the petitioner also relied upon this decision. But according to the department's counsel, the observations made therein are in favour of the department rather than the petitioner. The Supreme Court revised the view of the High Court and held that the department could not be barred completely from assessing or completing the assessment even in the absence of an order of provisional assessment. The decision of Delhi

High Court in Ajanta Iron and Steel Company Pvt. Limited Vs. Union of India and others, was also cited in this context.

19. The learned Standing Counsel further submitted that Rule 9-B is enacted only to help the assessee and a strict or technical construction tending to affect the interests of the revenue prejudicially should be avoided. Reliance was also placed on Rule 9B(1)(c) which is a residuary provision under which it is permissible to make a provisional assessment for reasons other than those mentioned in (a) & (b). It was therefore argued by the learned counsel, that the inevitable conclusion that follows from the facts narrated above can only be that the classification lists, though approved, did not and could not culminate in final assessment and the recovery or collection of the duty also could not be enforced in view of the stay order by the High Court and the proceedings rested with the endorsement made on each RT 12 thus :

"Duty on the goods removed under gate pass/passess and included in the return has been assessed provisionally under Rule 9B".

The interim order restraining the department from levying and collecting the duty payable on laminations was in force till the writ petition was dismissed on 4-10-1985 and it is in these circumstances that final assessment was not made. It was therefore vehemently argued by Sri Ashok that his contention should be upheld and the writ petition dismissed, and the department be allowed to make final order of assessment in the peculiar circumstances of the case and the interests of the revenue.

20. It was argued by Sri Jagadeeshan in reply that the endorsements made on RT 12 cannot, by any stretch of imagination, be construed as "provisional assessment" and the department should not be permitted to argue contrary to the mandatory requirement of making a provisional assessment as contemplated under Rule 9B read with other rules governing the procedure for assessment prescribed in Chapter VII-A. The learned Counsel relied upon the decisions of the Delhi High Court reported in International Computers Indian Manufacturers Ltd. and another Vs. Union of India and others, I do not propose to refer the decisions of CEGAT cited by both sides and therefore, they are excluded from being considered.

The thrust of the argument of Sri Jagadeeshan was that both on facts as well as law, no statutory order of provisional assessment as contemplated under Rule 9B can be said to have come into existence. The additional circumstance that no bond was insisted upon nor called upon to be executed as required under Rule 9-B(1) was also sought to be relied upon by the learned Counsel.

To the last argument of Sri Jagadeeshan, Sri Ashok pointed out Rule 221-A, under which the Central Government and the State Government is exempt from executing any bond or furnishing such security or surety as required by or under any provisions of the Rules

So far as the contention of the petitioner regarding "Proper Officer" for the purpose of Rule 9B is concerned, it was argued on behalf of the department that Proper Officer as defined by Rule 2(11) means "any Officer". The decision of this Court in *Inspector of Central Excise and Others Vs. S.T. Venkataramanappa and Others*, was relied upon in this context.

21. Before dealing with the contentions urged by both sides, it would be useful and necessary to summarise the relevant provisions of the Act and Rules which call for consideration. The charging Section 3 which provides for levy and collection of Central Excise Duty on all excisable goods in such manner and at such rate as may be prescribed. Section 4 provides for the manner of determination of the value of the goods for purpose of levy of excise duty. Power to make rules to carry into effect the purpose of the Act is conferred on the Central Government u/s 37 of the Act. Chapters III and VII-A of the Central Excise Rules are relevant to be considered.

Chapter III provides for procedure for levy, refund and exemption from duty.

Chapter VII-A prescribes the procedure for removal of goods, determination of duty, making an order of assessment and all other incidental matters including recovery.

Chapter III may be taken up first for consideration.

This Chapter starts from Rule 7 which provides for recovery of duty. Rule 8 confers on the Central Government the power to authorise exemption from duty in special cases. Under Rule 9, it is stipulated that no excisable goods shall be removed from any place where they are produced, cured or manufactured until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in the rules. Rule 9A fixes the date for determination of duty and tariff. Rule 9B provides for making a provisional assessment in the circumstances referred to therein. This rule is important for the purpose of this case and required to be carefully analysed.

Chapter VII-A :

Chapter VII-A prescribes the procedure for removal of excisable goods on determination of duty, by procedures, manufacturers or private warehouse licensees.

This Chapter, starts from Rule 173A. It says that Chapter VII-A shall prevail if there is conflict between the provisions of Chapter VII-A and the provisions contained in any other Chapter in relation to excisable goods.

Rule 173B :

Prescribes the procedure for the various steps in the proceedings for assessment and removal of excisable goods on a payment of duty and other related matters. The first stage in this process is filing of classification list in prescribed form by all assesseees as required by Rule 173B giving the description of goods, the rate

of duty payable and other particulars for approval by the Proper Officer.

Under sub-rule (2), the Proper Officer approves the classification list with such modifications as are considered necessary.

Sub-rule (2A) provides for making "provisional assessment" of the goods by the Proper Officer, if the assessee desires to avail of such assessment or on his own accord.

Rule 173C :

Price list is filed under this rule in prescribed form showing the price of each of such goods and the trade discount if any and all other necessary particulars. Sub-rule (2) provides for amendment of price list or filing of a fresh price list or an additional list in the circumstances referred to therein.

Sub-rule (3) :

The price list is approved by the proper officer after making such modifications as he may consider necessary so as to bring the value shown in the said price list to the correct value for the purpose of assessment as provided in Section 4 of the Act and determine the duty payable on the goods intended to be removed in accordance with the price list.

Sub-rule (5) provides for "provisional assessment" of the goods, if the proper officer is of the opinion that further enquiry is necessary or for any other reasons to be recorded in writing, the price list cannot be approved. Where the assessee disputes the price list approved by the Proper Officer under sub-rule (2), he may pay the duty under protest and remove the goods under sub-rule (8).

The next important rule is 173G, which provides for procedure to be followed by the assessee in the matter of payment of duty, maintenance of statutory registers and provides for self removal system by crediting the duty to PLA Account. Monthly returns in Form RT 12 have to be filed as required under sub-rule (3) giving particulars of goods removed, duty paid etc.

Under Rule 173-I, assessment is done by the Proper Officer, determining the duty due on the goods removed and the assessment is completed on the assessment by endorsing in the memorandum of the return on the basis of the information contained in the returns. The other rules in this Chapter are not necessary for the purpose of this case. This is the Scheme of the Rules relating to determination of duty on the excisable goods and their removal after payment of the duty.

In the light of this scheme of these rules referred to above, the question that arises for decision on the facts borne out from the relevant documents in this case is, whether the assessment memorandum made on RT 12 returns for the relevant period can properly be construed as "provisional assessment" under the rules ?

22. Now the contentions :

I have carefully considered the arguments advanced by both the learned counsel and have carefully pursued each one of the documents relied upon both sides. In fact, both the counsel relied upon a common set of documents. But the interpretation and construction placed on these documents viz., classification lists and the monthly returns filed in form RT 12 and the endorsements made thereon, are diametrically opposite.

At the outset, it must be mentioned that the construction and interpretation to be placed on the endorsements made by the department on the classification lists and on the monthly returns RT 12 is purely an inference that should follow on an appreciation of facts and all other circumstances of the case.

23. The principal argument of Sri Jagadeeshan is that on the undisputed facts and on a proper interpretation of the relevant documents viz., the classification list and the RT 12 returns and the endorsements made thereon, no provisional assessment came into existence and hence the show cause notice proposing to make final assessment for the period 10-12-1981 to 4-10-1985 and the demand to pay differential duty of Rs. 1,75,75,531.67 should be struck down as without jurisdiction besides being barred by time.

Whereas, on the other hand, it has been the endeavour of the department to establish that on a proper construction of the documents the only reasonable inference that should follow is that an order of provisional assessment did come into existence and the further steps now taken by the department by issue of the show cause notice to complete the final assessment for the entire period in question and to demand the differential duty should be upheld as valid in law.

24. Let me now take up the documents one by one and examine them in the light of the opposite construction sought to be placed by either party and its legal effect. The classification lists 1/82 and 1/83 filed by the assessee govern the period for which the demand is now made as per the show cause notice.

As can be seen from the classification list (the photocopies of which were produced by the department's counsel), electrical laminations in respect of which the duty payable is now in dispute, were classified as dutiable under Entry 28A of Schedule I to the Act and the classification lists were approved by the Assistant Collector. Note No. 1 and Note No. 2 to the Memorandum of Approval are reproduced earlier at Page 11. The substance of these endorsements is that the tariff classification and the rate of duty leviable on the goods was approved by the Assistant Collector.

Under Note 2 however, it was stated that the classification list is approved provisionally and it was also mentioned therein that the assessment of the goods shall be made by the Officer Incharge, provisionally under Rule 9B.

The criticism on this memorandum of approval is that Note 1 and Note 2 which are both ticked are inconsistent with one another and it was argued that they are

mutually exclusive. It was demonstrated that if the classification list is approved, the question of making a provisional assessment under Note 2 does not arise. It was also argued that there could be only one order either of approval or rejection of the classification and if the classification list cannot be approved for any reason, the proper Officer may resort to provisional assessment to duty under Rule 9B. If it is a case of rejection of classification list, an order must be made after hearing the assessee and this order becomes an order of adjudication under the Act which is applicable.

It was next argued by Sri Jagadeeshan that the memorandum of approval of the classification list be read along with the memorandum of assessment on the monthly returns RT 12 and so read and reconciled, this is a clear case of final approval of classification followed by an order of assessment. In support of this contention, the scheme of assessment was referred to. Monthly returns are filed in Form RT 12 as required u/s 173G(3) showing the quantity of excisable goods removed on payment of duty and quantity of goods removed without payment of duty and other particulars. The RT 12 returns shall be accompanied by other documents such as gate passes showing payments made, copies of Account current maintained as per RG 23 register and other documents which the Collector may require. This is followed by an order of assessment made under 173-I. This assessment is made on RT 12 determining the duty payable on the goods removed by making necessary endorsement in the assessment memorandum. The assessment is completed quantifying the duty paid/payable on the basis of the information contained in the returns. This is the normal procedure adopted by the department for levy, assessment and collection of duty in accordance with the procedure laid down by the Rules. The argument of the learned Counsel developed on the basis of the procedure for assessment mentioned above is that once the classification list is approved and endorsed as per Note 1, Note 2 is excluded. If the classification is not approved for any reason, then the procedure contemplated under Rule 9B must be resorted to viz., a provisional order of assessment must follow and the goods allowed clearance on accordance with procedure laid down in Rule 9B. It was therefore argued that the two endorsements which are both ticked by the Inspector of Central Excise are inconsistent and self-contradictory. It was also pointed out that none of the three conditions to make a provisional assessment as contemplated under Rule 9B existed in the present case and the only conclusion that can follow is, there was no provisional assessment made by the department.

The learned Counsel for the petitioner relied upon a decision of Delhi High Court in *International Computers Indian Manufacturers Ltd. and another Vs. Union of India and others*, in which the scope of Section 18 Customs Act which is analogous to Rule 9B of the Excise Rules came up for consideration. It was held on facts that none of the conditions of Section 18 were shown to have been attracted with reference to the clearance made. It was further held that the demand made after six months from the date of assessment was time barred. The other decisions relied upon by the learned Counsel do not assist the

petitioner's case.

26. But the real question, which is a vexed question, in this case is about the legal effect that flows from the endorsements made on the classification lists and the monthly returns. This question should have been the subject matter of adjudication to be decided by the appellate authority constituted under the Act. It is purely a question of fact and any conclusion must follow an appreciation of the facts, materials on record and all other circumstances considered together. Since Rule is issued in the present case, I am left with no alternative and therefore, I proceed to decide this question on merits.

Normally, the assessment should be completed pursuant to the approval of the classification list which gives the particulars of the goods and the classification for the purpose of levy etc., RT 12 as rightly submitted by Sri Jagadeeshan is a document of recapitulation and is not a document of provisional assessment. But this contention and the proposition should be examined in the light of the endorsements made on both the documents and circumstances in which they were made. No doubt, the classification lists in this case were approved by the Proper Officer without any controversy. But after approving the classification lists, it was stated in Note 2 to the memorandum of approval that the tariff clarification rate of duty is approved provisionally. It is also mentioned in the said Note 2 that the concerned Officer may make provisional assessment on the goods under Rule 9B.

27. The first question to be asked is whether there was a final assessment done on the RT 12 returns as required to be made under Rule 173-I ? Note 2 to the assessment memorandum (on RT 12) says that the goods have been assessed provisionally under Rule 9B. The entire Note 2 reproduced at Page 12 may be seen. What it says is that the duty on the goods removed under gate pass(es) and included in the returns have been assessed provisionally under Rule 9B. The further endorsement written in hand in Note 2 is important viz., that the differential duty is payable but for the stay order of High Court." Though the duty leviable on the goods as per the classification list, was approved and there was no dispute as to the duty payable by the assessee, it did not result in an assessment i.e., a final order determining the duty payable which is required to be made under Rule 173-I. In some of the endorsements made on RT 12 returns, it is stated that "the assessment is made provisionally" subject to the approval of the price list (final) 2/82, 1/83 and 1/84. Similar endorsements are made on all the other returns for the other periods, according to department.

28. What flows from a reading of these endorsements and what is its legal effect ? Whether it is a case of provisional assessment or a final assessment is the question in controversy to be decided. If it is not a provisional assessment, as contended on behalf of the petitioner, what is its effect on the impugned show cause notice and the proceedings proposed to be taken as per the notice ? If it is construed as a provisional assessment, then the department is safe and the show cause notice will have to be upheld as valid in law. If it is held that final

assessment had been done and the duty payable was ascertained and determined on the approval of the classification lists for the relevant periods and what was stayed by the interim order made by this Court W.P. 31466/81 was only recovery of the duty levied, then the recovery now sought to be made pursuant to the show cause notice would be barred by limitation u/s 11A(1).

29. These are the various aspects of the case that arise for consideration on the arguments advanced by both sides.

It has to be noted at the outset, that the classification of laminations under Entry 28A was approved by the Proper Officer including the rate of duty payable on the goods. There is no dispute that the price list which was filed by the petitioner under Rule 173B was also approved. In the assessment that followed, though the petitioner was liable to pay full duty as per the approved classification lists and the price lists, it was mentioned in the assessment memorandum that "the assessment is subject to finalisation of price list for the year 1982-83". It was further mentioned therein that the differential duty due on the laminations was not recovered by virtue of the stay order passed by this Court in W.P. 31466/81. Hence it was endorsed in the assessment memorandum on RT 12 also (it was submitted on behalf of the department that such recording was made for the entire period) that the duty was provisionally assessed under Rule 9B.

These are the undisputed facts borne out from the records on the basis of which an argument was advanced on behalf of the department that the final assessment could not be completed on any of the monthly returns nor any recovery made since the High Court had restrained the department from levying, collecting or demanding the duty, nor was any recovery permitted under the Interim order. It was therefore submitted on behalf of the department that the final assessment under Rule 173-I must now be permitted to be completed having regard to the facts of the case, and the circumstances in which the assessments were left in an incomplete stage.

30. I have given careful thought to the submissions made by the learned counsel for both the parties. Having regard to the scheme of the Rules provided for assessment in Chapter VII-A, all the stages of assessment from the stage of filing of classification list, price list and the RT 12 returns had been gone through in this case except the final assessment and determination of duty payable followed by recovery as per the Rules. The department's case is advanced on the basis of these undisputed facts borne out from the records that it was only a case of provisional assessment and not a final assessment, as evidenced by the endorsement made on RT 12 returns and it should be so construed by this Court on the peculiar facts of the case referred to in detail supra.

In order to appreciate the contentions of the Department, it would be useful to refer to the decision of Supreme Court in National Tobacco's case [1978 (2) ELT 146]. The facts in brief involved in that case were :-

A notice issued by the department to complete the assessments for various

periods, on the basis of the revised value for purposes of Section 4 of the Central Excise Act was challenged before the Calcutta High Court in a writ petition, on the ground the notice was barred by time and hence without jurisdiction. The Calcutta High Court held there was not enough material on record to conclude that there was any "provisional assessment" under Rule 10B (now Rule 9B). The assessee failed to produce before the Supreme Court any order made as contemplated under Rule 10B nor was there any evidence that the Company was asked to furnish a bond for the difference of duty. It was borne out from the records that the price lists supplied by the Company were being provisionally approved pending acceptance of their correctness as to the real value of the goods, as a matter of practice. It was the contention of the assessee Company before the Supreme Court that the facts disclosed there was substantially a "provisional assessment" although it did not conform to the technical procedural requirements of such an assessment.

The Supreme Court concluded on the facts of the case that it was neither a provisional assessment nor a final assessment, but it was a case of "incomplete assessment". On the peculiar facts of the case, the Supreme Court observed (at paragraphs 16 to 19) that it was admittedly a case of "incomplete assessment." The observations of the Supreme Court occurring in Para 17 which has a bearing is reproduced and it reads :

"17. Section 4 of the Act lays down what would determine the value of excisable goods. But, the Act itself does not specify a procedure for assessment presumably because it was meant to be provided for by the Rules. Section 37(1) of the Act lays down that "the Central Government may make rules to carry into effect the purposes of this Act". Section 37, sub-section (2), particularises "without prejudice to the generality of the foregoing power" that "such rules may provide for the assessment and collection of duties of excise, the authorities by whom functions under this Act are to be discharged, the issue of notice requiring payment, the manner in which the duty shall be payable, and the recovery of duty not paid". It is clear from Section 37, that "assessment and collection of duties of excise" is part for the purpose of the Act, and Section 4 dealing with the determination of value for the purposes of the duty, also seems to us to imply the existence of a quasi-judicial power to assess the duty payable in cases of dispute. "Collection", seems to be a term used for a stage subsequent to "assessment". In a case where the basis of a proposed assessment is disputed or where contested question of fact arise, a quasi-judicial procedure has to be adopted so as to correctly assess the tax payable. Rule 52 certainly makes an "assessment" obligatory before removal of goods unless the procedure for a "provisional assessment" under Rule 10-A (now Rule 9B) is adopted. But, if no quasi-judicial proceeding, which could be described as an "assessment" either under Rule 52 or "provisional assessment" under Rule 10B (now Rule 9B) takes place at the proper time and in accordance with the rules, is the Collector debarred completely afterwards from assessing or completing assessment of duty payable ?"

Another paragraph, which according to me has a direct bearing on this case (perhaps overlooked by Sri Ashok) is reproduced below :

31. The question whether there was or was not an implied power to hold an inquiry in the circumstances of the case before us, in view of the provisions of Section 4 of the Act read with Rule 10A of the Central Excise Rules was not examined by the Calcutta High Court because it erroneously shut out consideration of the meaning and applicability of Rule 10A. The High Court's view was based on an application of the rule of construction, that where a mode of performing a duty is laid down by law it must be performed in that mode or not at all. This rule flows from the maxim : *Expressio unius est exclusio alterius*". But, as was pointed out by Wills J. in *Colquhoun v. Brooks*, (1988) 21 QBD 52 this maxim "is often a valuable servant, but a dangerous master This rule is subservient to the basic principle that Courts must endeavour to ascertain the legislative intent and purpose and then adopt a rule of construction which effectuates rather than one that may defeat these. Moreover, the rule of prohibition by necessary implication could be applied only where a specified procedure is laid down for the performance of a duty. Although Rule 52 makes an assessment obligatory before goods are removed by a manufacturer, yet neither that rule nor any other rule, as already indicated above, 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 us 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 becomes necessary to protect the interest of the assessee. A case like the one before us falls more properly within the residuary class of unforeseen cases. We think that 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."

31. The other decision relied upon by the Counsel for the Department is the Bombay High Court decision in *D.N. Kohli, Collector of Central Excise, Bombay Vs. Krishna Silicate and Glass Works and Another*, On facts of that case, the High Court concluded that it was a case of provisional assessment. To arrive at this finding, several documents such as A.R.1 Forms, the bond executed by the assessee and other facts having a bearing on the case were considered together. The Court further observed that 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 documents and all the documents together for arriving at any conclusion and no single document should be considered in isolation (See para 12).

Two decisions are relied upon by the Department in support of its contentions. In

the first case of Calcutta High Court in *Khaddah Company Ltd. Vs. Union of India (UOI)*, it was held that if the assessing authorities were not themselves sure as to what would be the correct classification of a product and after examining the classification, the assessment made by the department must be deemed to be provisional.

The second case is from Delhi High Court in *Ajanta Iron and Steel Company Pvt. Limited Vs. Union of India and others*, On facts, it was held by the Delhi High Court that the show cause notice impugned was issued beyond the limitation in view of the fact there was approval recorded by the Assistant Collector to the classification list filed by the petitioner and further held that there was nothing on record to indicate, it was a provisional assessment.

32. On taking a overall view of the facts and circumstances of the case into consideration, what emerges from such consideration is, that there was no final assessment made in this case for the entire period covered by the show cause notice even though classification lists were approved. On the special facts of the case, and the situation in which the Department was placed, it can safely be said that it was an "incomplete assessment" even if it cannot be called a "Provisional assessment" made strictly in accordance with Rule 9B. I derive support for this view of mine, from the observations of Supreme Court in *Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd.*, and the Bombay High Court decision in *D.N. Kohli, Collector of Central Excise, Bombay Vs. Krishna Silicate and Glass Works and Another*,

This is also a rare case of unforeseen circumstances. The Department may legitimately rely on the endorsements made on the assessment memoranda (RT 12) in support of its stand that it is a case of "provisional assessment". The argument of the learned Counsel for the Department that this case is covered by the residuary powers under Rule 9B(1)(c) also merits acceptance.

In the ultimate analysis, I conclude that the petitioner has failed to establish that there was a final assessment made by the Department for the relevant period. I therefore exercise my discretion under Article 226 in favour of the Revenue and my decision on the facts is that the Department must be allowed to complete the final assessment pursuant to the show cause notice and the Department cannot be barred completely from making a final assessment and recover the duty payable in accordance with law.

33. This was undoubtedly a very hard case for the Department to sustain its action proposed to be taken as per the show cause notice. A very strong case was made out by Sri Jagadeeshan, that the show cause notice is clearly without jurisdiction both on facts and limitation to recover the duty which was already determined as payable. His endeavour was to establish that no provisional assessment was made in accordance with law on all the monthly returns for the relevant period. For this argument, he did not take advantage of the fact that the department had not filed any statement of objections controverting the

allegations made by the petitioner.

34. Placed in this situation, Sri Ashok Haranahally has been able to persuade me to agree with his contentions. I place on record my appreciation for the efforts taken in arguing the case of the department, which was beset with difficulties and was not an easy task.

35. For the reasons stated above, I uphold the contentions of the Department and as a consequence I hold that the impugned show cause notice (Annexure-H) is perfectly justified both on facts as well as law and the Department must be allowed to complete the assessment for the entire period and recover the duty payable in accordance with law.

36. For the reasons stated above, the writ petition is dismissed.