

(1987) 03 BOM CK 0003

In the Bombay High Court

Case No : Appeal No. 135 of 1981 in Miscellaneous Petition No. 261 of 1976

Premier Automobiles Ltd.

APPELLANT

Vs

A.K. Bandyopadhyay and Others

RESPONDENT

Date of Decision : 19-03-1987

Acts Referred:

Constitution of India, 1950 — Article 226

Industrial (Development and Regulation) Act, 1981 — Section 18G

Citation : (1990) 29 ECR 195

Hon'ble Judges : Kania, C.J.;Pendse, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Pendse, J.—This is an appeal against the judgment dated February 25, 1981 delivered by Mr. Justice Lentin dismissing the petition filed by the appellants under Article 226 of the Constitution of India to challenge the orders passed by the Assistant Superintendent of Central Excise between March 9, 1973 and September 21, 1973 confirming the demand for payment of additional excise duty, and confirmation of those orders by the appellate and revisional authorities. The facts giving rise to filing of the petition are not in dispute and are required to be briefly stated to appreciate the grievance made by the appellants while challenging the order of the learned single Judge.

2. The appellant-Company manufactures and sells Fiat cars and prior to September 4, 1969 the cars were sold at the price of Rs. 12.660/- fixed by the Government by informal price control. On September 4, 1969 the Company issued a price bulletin raising the price of cars to Rs. 14.862/- with effect from September 8, 1969. On September 21, 1969, the Government of India, Ministry of Industrial Development, Internal Trade and Company Affairs published Price Control Order in exercise of powers conferred by Section 18-G of the Industrial (Development and Regulation) Act, 1951. The Order was called the Motor Cars (Distribution and Sales) Control (Amendment) Order, 1969. The Order, inter alia,

prescribes that no manufacturer or dealer shall after the commencement of the order, sell or offer to sell or otherwise transfer or dispose of motor cars for a price exceeding the price specified in Schedule I to the Order. In respect of Fiat cars manufactured by the appellants, the Schedule prescribes that the price to be charged was Rs. 14,325/- per car. The Explanation to the Schedule sets out that the price specified is ex-factory price inclusive of dealer's commission and does not include excise duty, Central sales tax and local taxes, if any, and transportation charges. The result of issuance of the Price Order was that the retail price of the Fiat car was fixed at Rs. 14,325/-, including the dealer's margin for Rs. 891/-, and therefore, the net dealer's price was fixed at Rs. 13,434/- per car.

3. On September 22, 1969, the appellants preferred Writ Petition No. 327 of 1969 in the Supreme Court under Article 32 of the Constitution challenging the validity and legality of the Price Control Order. The petition was duly admitted, but the Supreme Court declined to grant any interim relief to the appellants. The appellants thereupon informed their dealers on September 26, 1969 that in the invoice an endorsement would be incorporated that the price in the bill was provisional and would be subject to the ultimate decision of the Supreme Court. The endorsement reads as follows:

The price specified in this bill is provisional subject to the decision of the Supreme Court in Writ Petition No. 327 of 1969 filed by the Company. If the Petition is rejected and the Supreme Court held that the Notified Order dated 21st September, 1969 issued by the Government is valid, the price will be confirmed. If however the Petition is allowed and the notified Order is held to be invalid, the price will be adjusted in conformity with our Price Bulletin No. F-I/69 dated 4.9.1969 and it will be Rs. 14,862.00 ex-factory, exclusive of Excise Duty, Sales Tax and all incidentals.

The final bill will be made out in conformity with the Order of the Court. The dealer shall be liable to pay the amount of the final bill.

Between September 21, 1969 and June 30, 1970, the appellants sold 9219 cars and from July 1, 1970 till April 30, 1971, 9769 Fiat cars were sold. The appellants filed a price list before the Excise Authorities showing the price of Rs. 13,434/- per car and paid the excise duty accordingly. The Excise Department was made aware of the endorsement inserted by the appellants in the invoice. The assessment in respect of the cars sold between September 21, 1969 and April 30, 1971 was completed by the Department between January 19, 1970 and May 21, 1971.

4. In the Writ Petition filed by the appellants before the Supreme Court, an inquiry Commission was appointed in the month of May 1970 to determine what price should be fixed in respect of various cars manufactured in the country. After the receipt of the report of the inquiry Commission, the Supreme Court passed the final judgment on November 24, 1971 and the Judgment is reported

in Premier Automobiles Ltd. and Others Vs. Union of India (UOI), . The operative part of the judgment in paragraph 59 reads as under:

It is common ground and counsel for all the parties are agreed that as a result of our decision the impugned order of September 1969 shall be inoperative and ineffective to the extent the prices fixed by it are not in accordance with our decision.

The result of the decision of the Supreme Court was that the appellant Company was entitled to recover additional sale price for the period commencing from September 22, 1969 till April 30, 1971 and the Company was entitled to recover Rs. 334/- per car sold between September 22, 1969 and June 30, 1970 and Rs. 1353/- per car sold between July 1, 1970 and April 15, 1971.

5. Between March 23, 1972 and July 25, 1972 several show cause notices were served by Superintendent of Central Excise upon the appellants demanding payment of aggregate differential excise duty of Rs. 4,10,552.80 for the period between September 22, 1969 to June 30, 1970 and Rs. 17,62,327.60 for the period commencing from July 1, 1970 to April 15, 1971. These show cause notices were in respect of the additional price which the Company was entitled to recover from the purchasers in accordance with the endorsement in the invoices. The appellants sent their replies to the show cause notice between April 14, 1972 and September 18, 1972. The Superintendent of Central Excise, after consideration of the replies and the contentions advanced on behalf of the appellants, confirmed the demand notices by orders passed on 9th March 1973 and August 21, 1973. The appellants carried appeal against confirmation of the demand notices to the Appellate Collector, but the appeal ended in dismissal by an order dated January 22, 1974. The revision petition filed by the appellants before the revisional authorities also met with the same fate by order dated November 28, 1975. The appellants feeling aggrieved by the order passed by the Excise Authorities, preferred petition before the learned single Judge challenging the demand of additional duty.

5A. Before the learned single Judge, it was contended that the assessment of excise duty has to be made on the basis of wholesale cash price at which the car was sold at the time of removal from the factory. It was claimed on behalf of the appellants that Section 4 does not contemplate any revision of the assessable value on account of any subsequent increase in price. The appellants claimed that the wholesale cash price, for which the Fiat car was sold at the time of removal from the factory was Rs. 13.434/- as determined by the Price Control Order and merely because the Price Control Order was declared as inoperative by the Supreme Court, it is not permissible for the Department to demand the additional duty. The appellants also claimed that the assessment orders passed by the Department were final in nature and once a final assessment is completed then it is not permissible to reopen it. The petitioners/appellants also claimed that Rule 10 of the Central Excise Rules, 1944, as in existence at the relevant time, enabled the Department to claim recovery of duty short levied, but such

exercise is permissible only within period of one year from the date on which duty was paid. The petition was resisted on behalf of the Department by claiming that the wholesale cash price was not Rs. 13,434/- as claimed by the appellants, but was Rs. 13,434/- plus such price as would be fixed by the Supreme Court in the petition filed by the appellants to challenge the Price Control Order. The Department placed strong reliance upon the endorsement inserted by the appellants in the invoice while effecting the sales of Fiat cars. The Department did not dispute that the assessment orders were final and not provisional as contemplated under Rule 9-B. The Department claimed that merely because final assessments were made by the Department would not prevent the Department from claiming higher duty in view of the price fixed by the Supreme Court. The Department also claimed that the recovery can be effected under Rule 10-A which does not prescribe for any limitation as contemplated under Rule 10. The learned single Judge accepted the contentions urged on behalf of the Department and dismissed the petition by the judgment, which is under challenge.

6. Shri Taraporewala, learned Counsel appearing on behalf of the appellants, has reiterated the submissions urged before the learned single Judge, and the two principal contentions advanced by the learned Counsel are (i) that the assessable value of cars has to be determined on the basis of the price actually prevalent at the time of sale and there is no scope for applying any technical or hyper-technical theory of deemed retrospective effect in view of the decision of the Supreme Court, and (ii) that the assessments in question were finally completed by the Excise Authorities and were not left provisional, and therefore, such a final assessment cannot be reopened except within the time limit and for the conditions required under Rule 10 of the Excise Rules. Shri Shah, learned Counsel appearing on behalf of the Department, on the other hand submitted that the decision of the learned single Judge requires no interference in this appeal, as the learned Judge has correctly appreciated the provisions of law dealing with the right of the Department to demand additional duty.

7. Section 4 of the Central Excise Act prescribes that where any article is chargeable with duty at a rate dependent on the value of the article, then such value shall be deemed to be the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold at the time of its removal. Shri Taraporewala urged that the wholesale cash price, at which the cars were sold, was the control price of Rs. 13,434/- per car and it was not permissible to charge higher price as the appellants would have been liable to a penalty under the provisions of Section 24 of the Industries Act. The learned Counsel urged that as the wholesale cash price was Rs. 13,434/- and as the appellants had paid excise duty on the basis of that price, it was not permissible for the Superintendent of Central Excise to demand additional duty by taking into consideration the fact that the decision of the Supreme Court enabled the appellants to recover additional amount in respect of the cars already sold. The submission of the learned Counsel cannot be accepted. The wholesale cash price was not Rs. 13,434/- as claimed by Shri Taraporewala, but an additional price

which the Company has set out in the Price Bulletin and which the customer would be liable to pay in case of success of the appellants in the Supreme Court in the writ petition filed to challenge the Price Control Order. The said fact becomes evident by mere perusal of the endorsement inserted by the appellants in the invoice and which endorsement has been set out hereinabove. The endorsement unmistakably sets out that the price of Rs. 13,434/- is provisional and subject to the decision of the Supreme Court in the writ petition filed by the Company. It was further clarified that in case the Company succeeds in the writ petition and the Price Control Order is held to be invalid, then the price would be adjusted in conformity with the price bulletin and the price would be Rs. 14,862/- ex-factory and exclusive of excise duty, sales-tax and all incidentals. In other words, the wholesale cash price for sale of the Fiat car was Rs. 13,434/- plus liability to pay additional price in case of success of the Company in the Supreme Court. In this connection, the explanation "the wholesale cash price for which an article is sold or is capable of being sold" in Section 4(a) of the Excise Act cannot be over-looked. It was claimed by the Company that the Fiat car is capable of being sold for Rs. 14,862/- and that was the price which was agreed to be paid by the customer, provided the Supreme Court strikes down the Price Control Order. It is undoubtedly true that the amount charged by the Company at the time of sale of the car was Rs. 13,434/- but the Company reserved the right to recover additional amount and the customer agreed to accept the liability to pay that amount, in case the Supreme Court decided in favour of the Company. It is, therefore, obvious that the wholesale cash price for sale of the car after the decision of the Supreme Court was Rs. 14,862/- and the appellants were liable to pay the excise duty on the basis of that amount. It is also clear that the Company did not accept Rs. 13,434/- as the wholesale cash price at the time of sale of cars. The Company also made this fact clear to the Department and to the customers by inserting an endorsement in the invoice. In these circumstances, we are unable to find any infirmity in the finding of the learned single Judge that the wholesale cash price was not Rs. 13,434/- but Rs. 14,862/- The first submission urged by the learned Counsel, therefore, must fail.

8. Shri Taraporewala then submitted that the assessment of excise duty by the Department was final and once such final orders of assessments were passed between January 19, 1970 and May 20, 1971 it was not permissible for the Department to demand additional duty even assuming that the wholesale cash price was Rs. 14,862/- as claimed by the Department and not Rs. 13,434/-. Shri Taraporewala submitted that the assessments in question were finally completed and were not provisional under Rule 9-B or incomplete. The learned Counsel urged that once an assessment has become final, then it cannot be reopened except in accordance with the requirement of conditions and during the period of limitation prescribed under Rule 10. Rule 10 prescribes period of limitation of one year for recovery of short levied duty and the period commences to run from the date when the duty was paid. The learned Counsel argued that the show cause notices issued by the Department were clearly barred by limitation prescribed

under the Act Shri Taraporewala invited our attention to the illustrative order of assessment passed by the Superintendent of Central Excise, Range II, Division III on January 19, 1970, copy of which is annexed at page 130 of the Paper-book. The declaration in respect of the sales effected by the Company was filed in Form R.T. 12 and the Company declared that the prices set out in the Form are in accordance with the records and books of the Company. The Form sets out the total number of cars manufactured and the total number of cars which left the factory and the value of the goods. It also sets out the amount of duty paid. At the foot of this Form is the Assessment Memorandum and the relevant portion reads as under:

1. The Assessee has paid the duty on the above goods correctly except to the extent indicated below:

The duty short levied as indicated above should be paid by the assessee within ten days by debit in his account-current (P.L.A.). The Assessee is advised to lodge an application for refund of the duty paid in excess as indicated above.

2. Duty on the goods cleared under Gate Pass No. (s) and included in this return has been assessed provisionally under rule 9-B and provisions of the said rule shall apply for recovery of deficiency in or refund of excess duty.

Shri Taraporewala points out that both Clauses 1 and 2 were cancelled by the Superintendent of Central Excise, and therefore, it was clear that the officer was satisfied that the duty was paid correctly and the assessment order was not a provisional assessment as contemplated under Rule 9-B of the Excise Rules.

Rule 9-B (1) reads as follows:

9B. Provisional assessment to duty:

(1) Notwithstanding anything contained in these rules,-

(a) where the proper officer is satisfied that an assessee is unable to produce any document or furnish any information necessary for the assessment of duty on any excisable goods; or

(b) where the proper officer deems it necessary to subject the excisable goods to any chemical or any other test for the purpose of assessment of duty thereon; or

(c) where an assessee has produced all the necessary documents and furnished full information for the assessment of duty, but the proper officer deems it necessary to make further inquiry including the inquiry to satisfy himself about the due observance of the conditions imposed in respect of the goods after their removal for assessing the duty;

the proper officer may, either on a written request made by the assessee or on his own accord, direct that the duty leviable on such goods shall, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally at such rate or such value (which

may not necessarily be the rate or price declared by the assessee) as may be indicated by him if such assessee executes a bond in the proper form with such surety or sufficient security in such amount, or under such conditions as the proper officer deems fit, binding himself for payment of the difference between the amount of duty as provisionally assessed and as finally assessed.

Shri Taraporewala contends that the assessment orders passed by the Superintendent of Central Excise were not provisional but were final and that fact is not disputed by Shri Shah, appearing on behalf of the Department-respondents, What Shri Shah submits is that the assessment orders were final because at the time of sale of the cars and even on the date when the assessments were completed the Price Control Order was in operation and wholesale cash price for sale of Fiat cars could not have been fixed in excess of what was prescribed by the Price Control Order. Shri Shah submits that though the assessments were final, it was permissible for the Department to demand additional duty as soon as the Company was entitled to recover additional price in respect of sale of cars during the relevant period. Shri Shah contends that if the wholesale cash price, for which the cars were sold, was something more than Rs. 13,434/- per car as fixed by the Price Control Order, then the Department is justified in calling upon the Company to pay additional excise duty and the mere fact that the assessments were final would not deprive the Department from collection of duty which is lawful. While appreciating the submission urged on behalf of the Department, it is necessary to bear in mind that the Company, while effecting the sale, has made it clear that the price charged at the time of removal of the car from the factory was one fixed by the Price Control Order and which was under challenge in a writ petition filed before the Supreme Court. The Company made it clear that in case of success in the petition the Company would recover the price set out in the price bulletin and the purchaser had agreed to pay that additional amount. It is, therefore, obvious that though the assessment orders passed by the Superintendent of Central Excise were final in nature, it was open for the Department to demand additional duty when the wholesale cash price was something in addition to Rs. 13,434/-. It is not in dispute [that the Company was entitled to recover the additional amount over that of Rs. 13,434/- per car and that right which the Company was claiming was under cloud while the Price Control Order was in operation and as soon as that cloud was lifted, the wholesale cash price, for which the car was sold, must be considered as Rs. 14,862/-. In these circumstances, in our judgment. the learned single Judge was right in holding that in the facts and circumstances of the case, merely because final assessments were made by the Department would not prevent the Department from claiming higher duty. The learned single Judge was right in concluding that the assessments were final and complete to the extent that they were made on the footing that the price charged by the Company was merely provisional and the invoices issued by the Company contained the representation that the price was not final but merely provisional. Indeed, the endorsement inserted in the invoice clearly sets out that the final bill

would be preferred only after the decision of the Supreme Court. It is not in dispute that, both the appellants and the Department, were aware of the fact that the final price was dependent on the decision of the Supreme Court. It cannot be ignored that the Department could not have completed the assessment by taking into consideration any price in excess of the price fixed under the Price Control Order, and therefore the mere fact that the assessment orders were final would not shut out the Department from claiming the additional duty.

9. Shri Taraporewala then submitted that as the assessment orders were final in nature it was not permissible for the Superintendent of Central Excise to demand additional duty unless the claim falls within Rule 10 of the Excise Rules. Rule 10 deals with recovery of duties or charges short levied or erroneously refunded, and the relevant portion of the Rule reads as under:

where duty or charges have been short levied through inadvertence error, collusion or misconstruction on the part of an officer, or through misstatement as to the quantity, description or value of such goods on the part of the owner...then the person chargeable with duty or charge so short levied shall pay the deficiency on written demand by the proper officer...

Shri Taraporewala urged that it is permissible for the Superintendent of Central Excise to demand duty short levied provided such demand is made within a period of one year from the date on which duty or charge was paid. The learned Counsel urged that as the demand was not made within the stipulated period, the Superintendent of Central Excise could not have demanded duty in exercise of powers under Rule 10. The submission was controverted on behalf of the Department by urging that the power was exercised by the Superintendent under Rule 10-A of the Central Excise Rules and not under Rule 10. Rule 10-A deals with residuary powers for recovery of sums due to the Government and reads as under:

10-A. Where these rules do not make any specific provision for 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 or any amount payable to the Central Government under the Act or these Rules, such duty, deficiency in duty or sum shall on a written demand made by the proper officer be paid to such person and at such time and place as the proper officer may specify.

The principal difference between Rule 10 and Rule 10-A is that while Rule 10 prescribes for recovery of duty short levied due to inadvertence, error, collusion or misconstruction on the part of the officer, Rule 10-A applies in all other cases of short levied duty. Rule 10 prescribes for limitation, while powers under Rule 10-A can be exercised without any restriction. Shri Taraporewala urged that as the assessment orders were final and not provisional, the Superintendent could have exercised powers only under Rule 10 and not under Rule 10-A. It is not possible to accept the submission of the learned Counsel, it is now well settled

that powers under Rule 10 can be exercised provided the duty was short levied through inadvertence, error, collusion or misconstruction on the part of an officer. It is, therefore, clear that it is not every case of short levy of duty which attracts Rule 10, but it is necessary that such short levy is due to the inadvertence, error, collusion or misconstruction on the part of the officer. The question which requires determination in this case is whether Rule 10 is attracted to the facts of the case. It is not in dispute that orders of assessment passed by the Superintendent between January 19, 1970 and May 20, 1971 do not suffer from any infirmity and the duty paid could not be termed as short levied. The duty was assessed and recovered by the Department on the basis of the wholesale cash price, being Rs. 13,434/- per car. At the relevant time the Price Control Order was in operation and the wholesale cash price could not be anything more than Rs 13,434/-. The assessments completed by the Department at the relevant time, therefore, do not suffer from any infirmity and the duty could not be said to be short levied, and therefore, the question of short levy of duty through inadvertence, error/collusion or misconstruction on the part of the officer did not arise. Shri Taraporewala contended that there was error on the part of the officer, because the assessments were finalised and not kept provisional under Rule 9-B. It was urged by the learned Counsel that the error committed by the officer in treating the assessments as final led to the short levy of duty. It is not possible to accept the submission of the learned Counsel. The error contemplated by Rule 10 is in respect of short levy of the duty and it cannot be even debated that the duty levied by the officer at the relevant time was not short levied. The question of short levy of duty arose because of subsequent development and that is the order passed by the Supreme Court holding that the Price Control Order was inoperative. The order of the Supreme Court enabled the appellants to recover price in excess of Rs. 13,434/- as the appellants had sold the cars by inserting an endorsement in the invoice providing that in case of success in the Supreme Court the Company would be entitled to recover and the purchaser would be liable to pay the amount as set out in the price bulletin issued by the appellants. The purchaser was therefore required to pay total price at Rs, 14,862/- and that became the wholesale cash price at which the car was sold. The subsequent development resulted into alteration of the wholesale cash price from Rs. 13,434/- to Rs. 14,862/- and this alteration necessitated recovery of additional duty from the appellants u/s 4 of the Central Excise Act. In our judgment, in these circumstances, the submission of Shri Taraporewala that Rule 10 would attract to the facts of the case and the demand made by the Superintendent of Central Excise was barred by limitation and therefore the order confirming the demand stands vitiated, cannot be accepted.

9A. In our judgment, the learned single Judge was right in his conclusion that the facts of the case attract provisions of Rule 10-A. Rule 10-A is a residuary provision and apply in all cases where Rule 10 does not apply. It was not disputed by Shri Taraporewala that the right to recover duty short levied arises either under Rule 10 or Rule 10-A and therefore if the case does not fall within

the ambit of Rule 10 then Rule 10-A must squarely apply. In this connection it would be advantageous to refer to two or three decisions of the Supreme Court where ambit of Rule 10 and 10-A was considered. In a decision reported in Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., , the Supreme Court observed in paragraph 25 of the Judgment that Rule 10 should be confined to "s 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. Then in paragraph 29 of the Judgment, the Supreme Court observed that if the case does not clearly come within the classes specified in Rule 10, then this rule should not be invoked, because a too wide construction put on Rule 10 would make Rule 10-A useless. The Supreme Court pointed out that the two rules have to read together, and thereafter observed:

It is true that Rule 10-A seems to deal only with collection and not with the ascertainment of any deficiency in duty or its cause by a quasi-judicial procedure. If, however, it is read in conjunction with Section 4 of the Act, we think that a quasi-judicial proceedings, 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.

The observations made by the Supreme Court in paragraph 30 quoted herein-above, clearly answers the submission of Shri Taraporewala that Rule 10-A deals only with collection and it is not permissible for the Department to exercise the powers under that rule for ascertaining the deficiency in duty. Rule 10 has to be read in conjunction with Section 4 of the Act and there is always an implied power while exercising powers under Rule 10-A to assess the duty escaped. The Supreme Court in a subsequent decision reported in D.R. Kohli and Others Vs. Atul Products Ltd., held in paragraph 15 of the Judgment that the points of difference between Rule 10 and 10-A are that (i) whereas Rule 10 applied to cases of short levy through inadvertence, error, collusion or misconstruction on the part of an officer, or through misstatement as to the quantity, description or value of the excisable goods on the part of the owner, Rule 10-A which is a residuary clause applies to those cases which are not covered by Rule 10. The Supreme Court referred to the earlier decision reported in N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., and Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., with approval. The Supreme Court further observed that in cases where Rule 10 is not attracted, Rule 10-A, which is a residuary provision, must necessarily attract and in case of application of Rule 10-A the question of limitation does not arise. The principle laid down in these two cases was reiterated in another decision of the Supreme Court reported in Andhra Re-rolling Works, Hyderabad Vs. Union of India (UOI) and Others,

9B. In view of the law laid down by the Supreme Court, it is clear that Rule 10

has no application to the facts and circumstances of the present case and the Department was perfectly justified in exercising powers under Rule 10-A of the Central Excise Rules.

10. Shri Taraporewala finally urged that even if Rule 10 applies to the facts and circumstances of the case, still the Superintendent of Central Excise could not have exercised powers under Rule 10-A in respect of completed assessments. The learned Counsel in support of the submission referred to the decision of the Supreme Court reported in *Second Additional Income Tax Officer, Guntur Vs. Atmala Nagaraj and Others*, . The Supreme Court was considering the question as to whether in exercise of powers u/s 35(5) of the Income Tax Act, final assessment made before April 1, 1952 could be reopened by the Income Tax Officer because of a note added to the order of assessment that action u/s 35 would be taken after the firm's assessment. The Supreme Court observed that such a note made unilaterally by the Income Tax Officer would not enable to open the final assessment because the final assessment would not be provisional one in view of the note. The Supreme Court in the last paragraph of the Judgment, while dealing with the contention that assessment of the partners was provisional and reference was made to the note that action u/s 10 would be taken when the assessment of the firm was completed, and therefore the assessment was not final, observed that the assessment was final notwithstanding remark in the order of assessment. The Supreme Court observed that the order was not a provisional assessment u/s 23-B of the Act and was not stated to be so, and being a final assessment it could be rectified only under the law as it stood then. The law at the relevant time did not include the fiction enacted by Sub-section (5) and therefore could not be used in those cases which have been finally closed before April 1, 1952. Relying on these observations it was urged by Shri Taraporewala that the assessment orders in the present case were final and the mere fact that in the invoices issued by the Company an endorsement was inserted that the price was not final but provisional and the final price would be determined after the decision of the writ petition filed by the appellants in the Supreme Court, would not make it a provisional assessment. The learned Counsel urged that as the assessment was final the powers under Rule 10-A could not have been exercised. We have already pointed out that though the assessment was final, the liability of the appellants to pay excess duty arises because of subsequent development and that duty could be ascertained in exercise of powers u/s 4 of the Act read with Rule 10-A of the Excise Rules and that power cannot be affected merely because the assessment was final at the time when the orders were passed by the Superintendent of Central Excise. In our judgment, the decision relied upon by Shri Taraporewala has no application to the facts of the present case. In our judgment, the learned single Judge was right in concluding that powers exercised by the Excise Authorities under Rule 10-A and demanding additional duty from the appellants could not be faulted with. The appellants did not challenge the correctness of the quantum of duty demanded by the Department.

11. Accordingly, appeal fails and is dismissed with costs.