

(1979) 10 GUJ CK 0009

In the Gujarat High Court

Case No : Special Civil Application No. 899 of 1978

Surgichem

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-10-1979

Acts Referred:

Central Excise Rules, 1944 — Rule 10A, 9(2)
Constitution of India, 1950 — Article 226

Citation : (1980) CENCUS 1

Hon'ble Judges : S.B. Majmudar, J;P.D. Desai, J

Bench : Division Bench

Judgement

S.B. Majmudar, J.—The petitioner challenges in this petition under Article 226 of the Constitution of India two show cause notices issued

by the Superintendent of Central Excise, Assessment Range-II, Rajkot, under Rule 10A of Central Excise Rules, 1944, as well as the orders of

adjudication passed against the petitioner by the departmental authorities under the provisions of the Central Excises and Salt Act, 1944,

hereinafter referred to as "the Act", and as finally confirmed by the Central Government in revision as per Annexure D to the petition.

2. The case of the petitioner is that it is a partnership firm carrying on business of manufacturing Belladonna Plaster "Porofix". Adhesive Plaster and

porofix Corn tapes. The petitioner is a small scale industry manufacturing the aforesaid articles at Rajkot. The case of the petitioner firm is that so

far back as in 1962, the petitioner had inquired of the Assistant Collector, Central Excise, Jamnagar, as to whether surgical dressing were liable to

excise duty. As that juncture, the petitioner was informed by the Assistant Collector that surgical dressing manufactured by the petitioner were not

liable to Central Excise duty under item 14E of the Central Excise Tariff. The case of the petitioner is that the articles manufactured by it which are called adhesive plaster and Porofix Corn tapes are not liable to excise duty. The petitioner had furnished at the relevant time the classification lists as per the provisions of the Central Excise Rules showing that these two articles manufactured by the petitioner were not liable to excise duty. The petitioner had annexed one such list at Annexure B to the petition. The said classification list was submitted by the petitioner firm to the customs authorities under Rule 173-B of the Central Excise Rules on 2nd January. The petitioner's case is that it was removing the goods manufactured by it after payment of duty on Belladonna plaster but it was not paying any duty on two other items, namely adhesive plaster and porofix corn tapes, which were known in the market as Porofix Adhesive. Plasters and Porofix Corn Tapes. The case of the petitioner is that consistently these two items were treated by the department as not liable to excise duty and the petitioner went on manufacturing these two items and clearing them under the self removal procedure without paying any excise duty on these two items.

3. It is the case of the petitioner that in 1971 the Central Excise Tariff was amended and Item No. 60 was inserted in the 1st Schedule to the

Central Excises Act. The said items reads as follows:

Adhesive tapes, all sorts, not elsewhere specified, including cellulose adhesive tapes and paper backed adhesive tapes, in or in relation to the

manufacture of which any process is ordinarily carried on with the aid of power.

The petitioner's case is that there was already existing item 14E in the 1st Schedule to the Act which also did not cover the disputed two items

which are manufactured by the petitioner. The petitioner's further case is that even though the aforesaid situation continued for a number of years

the petitioner was surprised to receive a letter, dated 24th April 1973, wherein for the first time it was stated by the departmental authorities that

the petitioner's adhesive plaster and corn tapes were liable to excise duty at the rate of 10% ad valorem. Thus, the departmental authorities tried to

invoke item 60 as added in the Central Excise Tariff to bring in its coverage these two items manufactured by the petitioner.

4. The petitioner thereafter filed a civil suit in the Civil Court at Rajkot praying for a declaration that adhesive plaster and corn tapes manufactured

by the petitioner were not excisable under tariff item 60 or under any other item and adhesive plaster and corn tapes were not also excisable under tariff item 14E or any other item. It appears that the said suit ultimately was dismissed on the ground that the Civil Court had no jurisdiction to entertain a suit of such a nature. It appears that thereafter the Central Excise authorities issued two show cause notices, both dated 3rd April 1976 calling upon the petitioner to show cause why the amounts mentioned in the show cause notices covering the period from 1971 to 1976 should not be recovered from the petitioner. Both the notices were issued under Rule 10A of the Central Excise Rules and they pertain to the disputed two items manufactured by the petitioner, namely adhesive plaster and corn tapes. These notices are Annexure C to the petition. It appears that pursuant to the said notices the petitioner showed cause, but, thereafter adjudication order passed by the Asstt. Collector of Central Excise confirmed the demands made under the impugned show cause notices. The petitioner challenged the order passed by the Asstt. Collector by filing an appeal before the Collector of Central Excise. Bombay. The said appeal was dismissed on 17th December 1976. Thereafter, the petitioner preferred a revision application on 17th January 1977 before the Central Government. The said revision application was rejected by the Central Government on 21st March 1978. Thus, the final order passed in these proceedings is the orders of the Central Government which is at Annexure D to the petition.

5. The contention of the petitioner is that it is not liable to pay any Central excise duty on the disputed two items and the demands made by the authorities for recovery of dues for the past years were null and void and of no effect whatever. The petitioner, therefore, has approached this Court under Article 226 of the Constitution praying for a suitable writ, order or direction against the respondents for permanently restraining them from effecting recovery as per the impugned notices and adjudication order of the appellate and revisicinal authorities, in the hierarchy of proceedings as indicated by us above.

6. Mr. K.S. Nanavuti, learned Advocate appearing for the petitioner, raised the following contentions in support of his petition.

(1) Porofix adhesive tapes as manufactured by the petitioner are not covered by

item 60 of Schedule I to the Act.

(2) Porofix Corn Tapes manufactured by the petitioner are not covered by item 14E of the Schedule to the Act.

(3) Even if the aforesaid articles manufactured by the petitioner are covered by the respective items 60 and 14E, in any case, the Central

Government in the present proceedings as per its revisional order at Annexure D had taken the view that Rule 10A was not applicable to the facts

of the present case but had confirmed the adjudication order passed by the departmental authorities on the basis of Rule 9 (2), the order of the

Central Government was patently bad in law and hence it was liable to be quashed.

7. After addressing us for some time on all the aforesaid three points, Mr. Nanavati for the petitioner submitted that he was not pressing the first

two contentions of his, for the decision of this Court, as the present petition can be disposed of on the third contention raised by him, and,

consequently, ultimately, he addressed us only on the third submission. We accordingly decide the present petition only on the third submission

raised by Mr. Nanavati, and we do not express any opinion on the first two submissions which were originally raised by him, but after some time

were not pressed by him as aforesaid.

8. Under the circumstances we are concerned in the present petition with the sole contention that the revisional order at Annexure D suffers from

patent error of Law and is liable to be quashed. Mr. Nanavati's submission on this aspect has three limbs. The first limb of Mr. Nanavati's

submission for challenging the revisional order of the Central Government at Annex. D is that the Central Government had no jurisdiction to invoke

Rule 9(2) of the rules for upholding the orders of the departmental authorities without arriving at a clearcut finding that the petitioner had removed

the goods in question in a clandestine manner and as such a clearcut finding was not arrived at and in fact could not possibly have been arrived at,

the impugned order was liable to be quashed.

9. The second limb of the contention of Mr. Nanavati was that the present proceedings were a result of the show cause notice at Annex. C

collectively issued to the petitioner under Rule 10A of the Central Excise Rules, 1944 and consequently the Central Government while exercising

its revisional jurisdiction pertaining to the adjudication order passed by the departmental authorities pursuant to such notices could not invoke Rule

9(2) for the first time in petitioner's revision application for maintaining the orders of the departmental authorities without affording the petitioner

any opportunity to meet such a case. In short it was submitted by Mr. Nanavati on this aspect that unless fresh show cause notices under Rule 9(2)

were served on the petitioner, no order could have been passed or sustained under the said rule.

10. The third aspect of Mr. Nanavati's contention was that the invocation of Rule 9(2) was without authority for an additional reason that at the

lime when the Central Government decided the revision application on 21st March 1978, Rule 9(2), as amended, was applicable and it clearly

showed that the period of limitation as prescribed by Rule 10 would apply to cases covered by Rule 9(2), and consequently at the stage at which

the Central Government applied Rule 9(2) for the first time the provision of limitation as provided by Rule 10 was applicable and hence the orders

passed by the departmental authorities seeking to levy excise duty from the petitioner for the past years from 1971 to 1975 at least could not have

been sustained; under Rule 9(2) by the Central Government.

11. So far as the first limb of the submission of Mr. Nanavati is concerned, it appears to us clear that it is well made out. Rule 9(1) and (2) of the

Central Excise Rules read as under :½

9(1)--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 duty 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 any application in the proper form and on obtaining the permission of the proper officer on the form;

Provided that such goods may be deposited without payment of duty in a store-room or other place of storage approved by the Collector under

Rule 27 or Rule 47 or in a warehouse appointed or licensed under Rule 140 or may be exported under bond as provided under Rule 13:

Provided further that such goods may be removed without payment or on part-

payment of duty leviable thereon if the Central Government, by notification in the official Gazette, allow the goods to be so removed under Rule 49:

Provided also that 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.

(1-A) Where a person keeping an account current under the third proviso to Sub-rule (i) makes an application to the Collector for withdrawing an

amount from such account current, the Collector may, for reasons to be recorded in writing, permit such person to withdraw the amount in

accordance with such procedure as the Collector may specify in this behalf.

(2) If any excisable goods are, in contravention of Sub-rule (1) deposited in, or removed from, any place specified therein, the producer or

manufacturer thereof shall pay the duty leviable on such goods upon written demand made, within the period specified in Rule 10, by the proper

officer, whether such demand is delivered personally to him, or is left at his dwelling house, and shall also be liable to a penalty which may extend

to two thousand rupees, and such goods shall be liable to confiscation.

It is now well settled that before Rule 9(2) can be invoked, it has got to be established that the removal of excisable goods in contravention of Rule

9(2) had been effected in a clandestine manner. The Supreme Court in the case of N.B. Sanjana, Assistant Collector of Central Excise, Bombay

and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., had an occasion to consider the scope and ambit of Rule 9(2). On

this aspect the Supreme Court held in the aforesaid case that Sub-rule (1) of Rule 9 provides for the time and the manner of payment of duty. In

order to attract Sub-rule (2) of Rule 9, the goods should have been removed in contravention of Sub-rule (1). It has been further observed in the

said decision that in order to attract Sub-rule (2) of Rule 9. the goods should have been removed clandestinely and without assessment. In that case before the Supreme Court there was no controversy that whenever the goods were cleared by the respondent, necessary applications had been made to the officer concerned and the latter had passed nil-duty assessments. Thus, the Supreme Court found in the case before it that the goods had been removed with the express permission of the excise authority and after order of assessment was made. No doubt the duty payable under the assessment was nil. On these facts the Supreme Court held that Rule 9(2) could not be attracted at all. It was further observed that Sub-rule (2) of Rule 9 is a penal provision, as apart from the duty payable, the parties were also made liable thereunder to penalty and they also incurred the risk of the goods being confiscated. Thus, Rule 9(2) would apply only to a case where there had been a conscious evasion of payment of duty. A prior judgement of the Supreme Court in J.K. Steel Ltd. Vs. Union of India (UOI), was also relied upon in Sanjana's case supra.

12. In that light of this settled legal position, it has got to be considered as to whether the petitioner at the relevant time had removed goods in a clandestine manner before Rule 9(2) can be pressed in service against the petitioner by the departmental authorities. A mere glance at the impugned order at Annex. D as passed in revision by the Central Government shows that it did not really apply its mind to this vital aspect. In fact, a clear finding about the clandestine removal of goods with a view to evade excise duty is a condition precedent to the application of Rule 9(2).

The impugned order of the Central Government at Annexure D has completely by-passed this main issue by observing that the approval of classification list did not preclude issue of demand notices and follow up actions under Rules 9 and 10 of the Central Excise rules. On the facts of the present case it is very clear that the petitioner had been openly removing the disputed goods after manufacturing them and after filing with the departmental authorities the required classification lists from time to time. In fact, the impugned revisional order at Annex. D shows that the petitioner had submitted a classification list as early as on 24th July 1970 showing production of the disputed goods and its intention to remove them without payment of duty as they were not liable to excise duty according to the petitioner. It is true that at the time when the classification list

was filed on 24-7-70 by the petitioner under Rule 173-B of the Central Excise Rules, Tariff Item 60 was not on the Schedule, but Tariff Item 14E

was already there. Tariff Item 60 was inserted on 29-5-1970 and even thereafter the petitioner went on submitting necessary classification lists

from time to time. One such list is at Annexure "B" to the petition. It is a classification list furnished as late as on 2nd January 1973 by the petitioner

to the excise authorities. Even in the said classification list under Rule 172-B, in column 5, it has been clearly mentioned by the petitioner that

Porofix Adhesive Plaster B.P.C. and Porofix Corn Tapes are not liable to any excise duty. Thus the petitioner was manufacturing the disputed

items and was duly bringing this fact to the notice of the concerned departmental authorities, and its consistent stand was that those items were not

liable to excise duty. Various classification lists were filed from time to time by the petitioner mentioning this aspect and they seem to have been

approved by the departmental authorities. Mr. S.B. Vakil, learned Advocate appearing for the respondent, submitted that even though the

classification lists are approved, there is no estoppel against the respondent and they can still seek to levy proper excise duty. This may or may

not be true. But the short question with which we are concerned in the present case is whether in view of these facts, it can ever be said that the

petitioner was guilty of any clandestine removal of the concerned disputed goods from its factory with a view to evade excise duty. It has to be

recalled at this stage that item 60 under which the department sought to cover adhesive tapes manufactured by the petitioner came on the Schedule

only on 29-1-1971. Thereafter also the petitioner went on submitting the classification lists showing these items as non-excisable. The duty of the

petitioner is to point out the facts regarding the goods which it has manufactured from time to time, No further duty lies on the petitioner to point

out the correct position of law to the departmental authorities and if the departmental authorities in spite of being posted with all the necessary facts

about the goods manufactured by the petitioner, due to negligence or otherwise, failed to apply the correct provision of the Central Excise Act and

failed to raise requisite demands at proper time, it cannot be said that the petitioner had clandestinely removed these goods so as to attract liability

under the Rule 9(2) which is of a penal nature as held by the Supreme Court in Sanjana's case (supra). So far as the clearance of adhesive tapes

were concerned, the petitioner had already pointed out to the departmental authorities that it was clearing these goods on the basis that they were not liable to pay excise duty. If Tariff Item 60 was subsequently introduced, it was for the departmental authorities to have raised proper demands, which they did not seem to have done. But for that the petitioner cannot be blamed or penalised. It is further to be noted that as early as in 1962, the Assistant Collector of Central Excise, Jamnagar, had informed the petitioner that the surgical dressings manufactured by it were not liable to Central Excise duty under item 14E of the Central Excise Tariff. The said letter of the Assistant Collector, Jamnagar is at Annexure A to the petition. Under the aforesaid circumstances, (if the petitioner having posted the departmental authorities with all the necessary facts as regards type of goods manufactured by it had been clearing them from time to time under the self removal procedure, after filing necessary classification! lists with the departmental authorities, and if the departmental authorities failed to raise proper demands for the levy of excise on these two disputed items, it cannot be said that the removal by the petitioner of these goods was in any clandestine manner, or in any way it was a clandestine removal with a view to evade payment of excise duty. Hence, it must be held that the very condition precedent to the invocation of power under Rule 9(2) in the present case is missing. The petitioner can by no stretch of imagination be said to have removed the concerned items of goods in any clandestine manner so as to incur liability under Rule 9(2). Hence the Central Government had no authority or jurisdiction to pass such an order under Rule 9(2) for the first time in revision to sustain the orders of the departmental authorities stemming from the two show cause notices) Thus, the first ground of attack of Mr. Nanavati against the revisional order of the Central Government at Annex. D must be upheld. As we have upheld the first submission of Mr. Nanavati for attacking the revisional orders at Annexure D, it is not necessary for us to examine two additional submissions raised by Mr. Nanavati for attacking the same order. We have already mentioned, in earlier part of this judgment, that Mr. Nanavati attacked the impugned order at Annexure p on the additional grounds that the petitioner had not been given due show cause notices under Rule 9(2), and in any case, the Central Government could not have invoked Rule 9(2) at a time which was beyond the period of limitation prescribed by

Rule 10. On these additional grounds, we express no opinion as it is not necessary for us to decide them.

13. Mr. Vakil for the respondents, however, submitted that this Court comes to the conclusion that the Central Government in revision was not

justified in invoking Rule 9(2) to sustain the orders of the departmental authorities as passed against the petitioner, then, in any case the said orders

could have been well sustained under Rule 10A of the Central Excise Rules. Mr. Vakil's submission was that this was a case of non-levy wherein

for one reason or another, the disputed goods manufactured by the petitioner were not brought to tax by the departmental authorities and

consequently without any inhibition of the period of limitation, the departmental authorities could invoke their powers under Rule 10A to recover

the amount of non-levy of excise duty on the concerned goods from the petitioner. Mr. Vakil submitted that once Rule 10A is invoked by the

department, no question of limitation can arise and similarly no question of any clandestine removal of goods by the petitioner can survive. It is not

possible for us to entertain the aforesaid submission of Mr. Vakil. The petitioner had invoked our jurisdiction under Article 226 of the Constitution

of India for quashing the impugned order passed by the Central Government in revisional proceedings. Thus, in substance, the petitioner invokes

certiorari jurisdiction of this court. If we find the impugned order suffers from any jurisdictional error, or any patent error of law, or is in breach

of principles of natural justice, such an order passed by the Central Government in exercise of its revisional jurisdiction can be quashed by this

Court. But we cannot thereafter as it were substitute the order of the Central Government by any other appropriate order or any other provision of

the Central Excise Rules as Mr. Vakil would like us to do. If the petitioner had failed to point out any patent or jurisdictional error committed by the

Central Government, which as the revisional authority, was exercising quasi-judicial powers, the petition would have failed. But if on the other

hand, any patent error of law or jurisdictional error is pointed out, the order of revisional authority would be illegal and void. As held by the

Supreme Court in the case of *Thahur Birendra Singh v. The State of Madhya Pradesh*, (1969) 3 SCC 489, the jurisdiction of the High Court

under Article 226 is a circumscribed jurisdiction. In that case before the Supreme Court which arose from a petition filed initially before the

Madhya Pradesh High Court an order was passed by the Collector of Jabalpur prohibiting the writ petitioner from cutting and removing any forest

produce over certain areas of lands in village Sunchara. The said order of the Collector was confirmed by the Additional Commissioner of

Jabalpur in appeal and it was further confirmed by the Board of Revenue when the writ petitioner's appeal was dismissed by the Board. These

orders were challenged before the Madhya Pradesh High Court by the writ petitioner. The Madhya Pradesh High Court took the view that the

revenue Courts had made a wrong approach to the main question and as there were errors of law apparent on the face of the record, the orders

of the departmental authorities were liable to be quashed. The Madhya Pradesh High Court having quashed the orders of the quasi-judicial

authorities directed at the same time that the case be remitted to the Collector for a fresh decision with advertance to the observations of the High

Court made in that order after giving to the writ petitioner an opportunity of being heard. These directions issued by the High Court while quashing

the orders of the quasi-judicial authorities resulted in appeal before the Supreme Court. While upholding the contention of the appellant before the

Supreme Court, it was held in the said judgment that the High Court should have quashed the orders without giving any further directions. Once the

orders complained of were quashed, the matter should have been left at large without any further directions leaving the revenue authorities free to

take any steps allowable under the law. It was observed by the Supreme Court that while exercising its writ jurisdiction the High Court was not

sitting in appeal over the decision of the Boasd of Revenue, and the High Court should have quashed the orders without giving any further

directions. In view of the aforesaid pronouncement of the Supreme Court, it is not possible for us to entertain the submission of Mr. Vakil that the

impugned order of the Central Government in exercise of its revisional jurisdiction can be sustained, if not under Rule 9(2) then under Rule 10A

and that we should accordingly substitute an order under Rule 10A in place and stead of the impugned order. It is net open to us to adopt such a

course and we express no opinion on the question as to whether Rule 10A is attracted in the facts of the present case or not.

14. As a result of the aforesaid discussion, it must be held that the order of the Central Government in exercise of the revisional jurisdiction and

which is at Annex. D to the petition is null and void and without jurisdiction inasmuch as it purports to apply Rule 9(2) to the facts of the present case, when Rule 9(2) could not have been pressed in service by the respondents. On that short ground we quash and set aside the impugned order of the Central Government at Annex. D leaving the departmental authorities free to take any steps allowable to them under the law. We accordingly grant relief to the petitioner to the aforesaid extent and consequently the rule is made absolute to this limited extent. In the facts and circumstances of the case there will be no order as to costs.