

**(1976) 05 CAL CK 0030**  
**In the Calcutta High Court**  
**Case No : Matter No. 96/75**

Union Carbide Co. Ltd.

APPELLANT

Vs

Assistant Collector of Central Excise and Others

RESPONDENT

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**Date of Decision :** 10-05-1976

**Acts Referred:**

Central Excises and Salt Act, 1944 — Section 11, 2(f), 3  
Constitution of India, 1950 — Article 226  
Central Excise Rules, 1944 — Rule 10, 10A, 11, 173(b)(2), 7

**Citation :** (1978) 2 ELT 180

**Hon'ble Judges :** Sabyasachi Mukharji, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## **Judgement**

Sabyasachi Mukharji, J.—Three questions fall for consideration in this case, namely :

- (1) Whether a pre-end in process article manufactured is exigible to duty under the provisions of the Central Excises and Salt Act, 1944 ?
- (2) If so, when such duties have not been paid over the years, whether such duties can be realised by the Government ?
- (3) Where the manufacturer has over the years paid duties on the basis that such duties were payable on one of the items manufactured by it which has been subsequently held by the authorities to be not dutiable, can the manufacturer enforce refund of the duties paid in an application under Article 226 of the Constitution ?

None of these questions is unique but all the three require restatement and application of the well-settled principles of law to the facts of this case. It is, therefore, necessary to refer to the facts briefly.

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7. On 24th March, 1975 the petitioner moved this application under Article 226 of the Constitution and obtained a rule nisi. It was recorded by this court on 7th May, 1975 that without prejudice to the rights and contentions of the petitioner that the rough rolled zinc used for punching zinc calots was not sheets or strips within the meaning of Tariff Item 26B(2) the petitioner volunteered to clear in future rough-rolled zinc used for punching calots upon payment of an amount equivalent to the duty alleged to be leviable on such rough-rolled zinc. It was further ordered that all future clearances of rough-rolled zinc shall be allowed upon payment in monthly return in R.T. Form 12 and such payment as aforesaid would be subject to the result of the main rule and in the event of the petitioner succeeding in the main rule nisi the respondents to the rule would refund such amount so paid as might be held not payable as duty in law. In this application under Article 226 of the Constitution the petitioner challenges (i) the order dated 3rd January, 1975 of the Appellate Assistant Collector in which the order of the Assistant Collector had merged as well as, (ii) the notice of demand dated 26th April, 1976 under Rule 9(2) of the Central Excises and Salt Rules, 1944, and (iii) the show cause notice for the said demand dated 21st November, 1974 as at page 151 of the present petition. The petitioner also claims refund of the sum of Rs. 2,24,16,981.00p. alleged to have been collected illegally on zinc calots for the period from May 1961 to February 1975.

8. It would be appropriate to discuss the challenge to the order of the Appellate Collector which is at page 155 of the present petition and which has been set out hereinbefore first. The Appellate Collector has held that zinc calots are not exigible to duty under tariff item 26B(2). That decision, therefore, concluded the question whether zinc calots are exigible to duty or not. The question, whether rough rolled zinc prepared or produced by the petitioner in the process discussed above could be considered to be manufacture of excisable goods mentioned under item 26B of the first Schedule to the Act has to be judged in the light of the definition of manufacture u/s 2(f) of the Act, the provision of Section 3 and the meaning to be given to Sheets and Strips" in item 26B(2) of the First Schedule to the Act. Excise is a tax on the production or manufacture of excisable goods. The taxable event is the manufacture or production of the goods. It is not necessary to attract duty that the goods should be sold. If excisable goods are produced or manufactured that is sufficient to attract duty. Whether the goods are consumed, sold or not used thereafter is wholly irrelevant. The above propositions, in my opinion, are the effect of Section 3 read with section 2(f) of the Act and is concluded by the following decisions, namely :-

(1) In re : Central Provinces and Berar,-1939 Federal Court Reports, page 18.

(2) The Province of Madras v. Messrs Boddu Paidanna and Sons,-1942 Federal Court Reports, page 90.

(3) Governor General in Council v. Province of Madras,-1945 Federal Court Reports, page 179.

(4) Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another, .

(5) R.C. Jall Vs. Union of India (UOI), .

(6) In re : Sea Customs Act,-A.I.R. 1963 S.C. 1760.

(7) Union of India (UOI) Vs. Delhi Cloth and General Mills, .

(8) Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc., .

(9) South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others, .

9. The duty is on manufacture or production of goods. Manufacture implies a change but every change in the raw material is not manufacture eligible to duty. To be manufacture eligible to duty there must be such transformation that a new and different article which can ordinarily come to the market to be bought and sold and known to the market having a distinctive name, character and use must emerge. Furthermore, in order to be dutiable as one of the items mentioned in the First Schedule to the Act the transformation must result in making the article as one as mentioned in the First Schedule. The specific question, is, whether the operation carried on by the petitioner as indicated before to bring into being the rough-rolled zinc can be considered to be manufacture of sheets or strips in terms of item 26B(2) of the First Schedule. The fact that these are used by the petitioner for production of end product and not sold by it is irrelevant. The item provides as follows :-

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10. There must be definite ascertainable or identifiable test to determine what is mentioned in the Schedule. In the case of Union of India (UOI) and Others Vs. The Tata Iron and Steel Co. Ltd., , the Supreme Court was concerned under Central Excises and Salt Act, 1944, Schedule I. Item 26AA(iii) with two expressions "skelp" and "strips". The Supreme Court found that the taxing authorities were not at all certain about the uniform definition of skelp distinguishing it from "strips". There was, in other words, absence of an identifiable test or standard. The Supreme Court was of the opinion that assessment must be on a basis which was certain and identifiable. In the premises, the Supreme Court set aside the assessment. The aforesaid decision emphasises the need for an ascertainable or identifiable test for levy of duty or tax. If an item is defined in the Act or in the Schedule to the Act then of course no difficulty arises because the question whether a particular article is one which is to be included in the item must be decided by reference to the definition provided by the Act. On behalf of the respondents it was contended that in the instant case there was a definition of "sheets" and "strips" in view of the fact that manufacture of zinc sheets and strips in any form or size was included in item 26B(2). In this connection, reliance was placed on the decision of the Supreme Court in the case of Union of India (UOI) Vs. Hindu Undivided Family Business known as Ramlal Mansukhrai, Rewari and Another, . There the Supreme Court was deciding an appeal from the High Court in a decision in a suit where

the question arose whether billets of copper alloys, namely, Kansi and Brass rolled into circles in some form or the other and in different sizes were liable to excise duty under item 26A(2). There, the Supreme Court found that when billets of copper alloys, namely, Kansi and Brass are rolled into circles in some form or the other and in different sizes the process of manufacture of circles was complete even if circles were uncut. Consequently, the rolled circles were liable to excise duty under the item 26A(2). It could not be said, according to the Supreme Court, that only trimmed circles could be considered as circles and as finished product. Even uncut circles were circles as envisaged by the item. The rolling of billets into circles was a process in the course of completion of a manufactured product as contemplated by section 2(f). There was, in that case, no dispute that rolled billets of copper alloys were circles in some form or other and in different sizes. The contention was that uncut circles could not be held to be circles as mentioned in the item. The Supreme Court found that the contention was unacceptable in view of the description of the goods in Item 26A of the First Schedule to the Act. The Supreme Court found on evidence that uncut circles were certainly one form of circles. The Supreme Court was further of the opinion that the contention that uncut circles could not form one form of circles not be accepted because in that case there was no evidence that in commercial community uncut circles were not known as circles. Therefore if these were circles known as circles in the commercial community even though these were uncut then in view of the fact that the item which was made taxable was circles in any form or size the uncut circles were liable to be taxed. This decision does not resolve the question whether the rough-rolled zinc automatically becomes strips or sheets in any form or shape. The Supreme Court as mentioned hereinbefore emphasised that there was no evidence that in commercial community uncut circles were not known as circles. By the aforesaid observation the Supreme Court emphasised the importance of an article being known as such in the commercial community for consideration whether an article in question becomes an article as mentioned in the said Schedule. In the aforesaid right I am of the opinion that as there is no definition as such provided in the Schedule to the Act of either sheets or strips we must find out the identifiable test to determine what is sheet or strip. It was said as early as 1894 by Justice Storey of the United States in in the case of "200 Chets of Tea" (1894) 9 Wheaton (U.S.) p. 435 that the legislature does not suppose merchants to be naturalists or geologists or botanists. Echoing the same though it was observed in the case of King v. Planters Nut and Chocolate Co. Ltd.-1951 Canada Law Reports p. 122 as follows :-

"Now the statute affects nearly everyone, the producer or manufacturer, the importer, wholesaler and retailer, and finally, the consumer who, in the last analysis, pays the tax, Parliament would not suppose in an Act of this character that manufacturers, producers, importers consumers, and others who would be affected by the Act would be botanists. The object of the Excise Tax Act is to raise revenue, and for this purpose to class substances according to the general

usage and known denominations of trade. In my view, therefore, it is not the botanist's conception as to what constitutes a "fruit" or "vegetable" which must govern the interpretation to be placed on the words, but rather what would ordinarily in matters of commerce in Canada be included therein. Botanically oranges and lemons are berries, but otherwise no one would consider them as such."

11. The Supreme Court reiterated the same view in the case of Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Akola, , Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh, , South Bihar Sugar Mills Ltd. v. Union of India and Ors. reported in (1968) 3 S.C.R. p. 211, Minerals and Metals Trading Corporation of India, Ltd. Vs. Union of India (UOI) and Others, . The same view was also reiterated by the Supreme Court in Civil Appeal NO. 1446 of 1974 Dunlop Ltd, v. Union of India and Civil Appeal No. 2476 of 1972, Madras Rubber Factory v. Union of India (judgment delivered on 6-10-75). It follows, therefore, that in interpreting the meaning of the words in fiscal statute where the words are not defined the acceptance of the words by trade and their popular meaning should be the guide and should be taken as the meaning. It is, therefore, necessary to consider whether the respondent authorities have proceeded on the correct basis for determining whether the rough-rolled zinc produced by the petitioners in the manner as described before can be called either sheets or strips. If such rough-rolled zinc can be considered to, be sheets or strips then in whatever forms these are and in whatever sizes these will be exigible to duty. Counsel for the respondents contended before me that the test of being known in the market as indicated by the Supreme Court in the case of Union of India v. Delhi Cloth Mills Ltd.- 1917 ELT 199 was not placing the correct emphasis on the nature of the excise duty as had been enunciated by the Supreme Court in its earlier decisions. Counsel submitted that in order to be exigible to duty sale in the market was irrelevant. Counsel is right in saying that in order to be exigible to duty sale is not relevant but production or manufacture is the only relevant factor. But in order to be particular goods as mentioned in the Item of the Schedule unless that Item is defined under the Act or in the Schedule the goods produced must be known as such in the market. The concept of being known to the market is important not from the point of view whether the goods are sold as such but from the point of view whether the goods are manufactured. On this aspect I do not see any conflict between the Supreme Court's earlier view and the later view as expressed in the case of Union of India v. Delhi Cloth Mills Ltd. (supra). Counsel then submitted that the Supreme Court was dealing in the last mentioned case with Section 2(f) before it was amended. The definition of the word "manufacturer" u/s 2(f) was amended in 1964 as follows :

"The word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account."

This amendment, in my opinion, does not in any way affect the decision. It cannot be disputed that after the amendment there cannot be any distinction between the manufacture of goods for sale and the manufacture of goods for one's own purposes other than sale. But u/s 2(f) as it originally stood the position could not have been different. The change brought about by the Amending Act was only in the definition of "manufacturer". The definition of the word "manufacture" u/s 2(f) was wide enough to include any process incidental or ancillary for the manufacture of a product, and the word "manufacturer" had to be construed accordingly. The amendment does not, in my opinion, affect the position. This has been clearly explained in the decision of the Division Bench of the Madras High Court in the case of *The Commissioner, Corporation of Madras v. The Assistant Collector of Central Exise, I.D.O., Madras and Anr.* reported in 1973 Tax LR. 1863.

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13. The Standards Institution lays down specification for most of the commodities and manufactured articles which figure in our trade and commerce. Therefore, where a standard specification for an item is indicated in the Indian Standard Specification as in this case, it is evident that rolled zinc sheets and strips are known as such and there are such commodities as sheets and strips. But it was contended on behalf of the petitioner that the specification laid down by the Indian Standard Specification was not the specification in respect of the goods rough rolled zinc prepared by the petitioner. Such specifications are as follows:-

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This specification in my opinion indicated an article by what was commercially known to distinguish it from other goods. But as indicated before the Indian Standards Institution drawn up specifications of the commodities which figure in our home market as well overseas market. Therefore when an item of goods is specified by the Indian Standards Institution, in my opinion, that is certainly evidence of the fact that the said item is known as such in the trade or commerce. The Indian Standards Institution is not dealing with the goods in future. It must be presumed that these specifications were laying down standards of the goods that are known in the trade or commerce at the present moment. Therefore, when an item is specified in the specifications issued by the Standards Institute, it is certainly a piece of evidence which must be considered by the relevant authority. It is, however, necessary to consider whether particular article is required to be of certain standard and if that standard is not reached whether those articles become such goods. It was observed by the Supreme Court in the case of *South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others*, of the report that the fact that the gas generated did not conform to the specifications of the Indian Standards Institution did not matter for the gas might be sub-standard, provided what was produced was gas as specified in the item. Therefore, the fact that an item of gas was specified in the Standards

Institution Specification was certainly an evidence which must be judged in proper light. If, however, in the context of dispute that the item does not conform to the specification laid down in the Standards Institution, then whether the article produced which was not according to the standard would be sub-standard or was known in the market as that kind of goods or not would have to be judged on evidence independent of this specification. It has not been so judged in the instant case before me.

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18. Counsel for the petitioner invited this Court on the evidence to hold that rough-rolled zinc prepared or manufactured by the petitioner in the process described as above is not liable to excise duty under Tariff Item No. 26B(2). He said on the evidence before the respondent authorities as well as before me submitted that I Should hold that the article is not dutiable. As I have mentioned before, the true test is to find out whether these items are known in the market as such. Even if these do not conform to the specifications of I.S.S., the I.S. Specification is a piece of evidence and it is necessary to consider on evidence whether articles not according to the specification are known in the market goods as indicated in Tariff Item 26B(2). Certain evidence have been produced after the enquiry and relied on by the respondents as mentioned in Annexure "H" to the affidavit-in-opposition. Having regard to the state of affairs, in my opinion, it will not be proper for this Court at this stage to determine whether this article is exigible to duty. The proper order, therefore, would to set aside the order of the Appellate Collector and direct him to determine the question afresh in accordance with law and in accordance with the principles indicated in this judgment after taking into consideration all relevant and material evidence.

19. There is another aspect of the matter which must be considered. On behalf of the petitioner it was contended that if rough rolled zinc was subjected to duty in the manner indicated above, then this would result in repetitive duty which was not permissible. Counsel drew my attention to Annexures "R", "S" and "T" of the petition where it is indicated how after rough-rolled zincs are produced calots are prepared and after preparation of calots, these very materials, the petitioner contended, would be liable to duty over and over again. In the process of punching calots out of rough rolled zinc some sizeable scraps come out in the same process. The petitioner produces three major types of calots in the said factory, namely, hexagonal calots, round calots and small size calots. The percentage of scrap generated in the punching of calots is approximately 25% in the case of hexagonal calots, 40% in the case of round calots and 65 % in the case of small size calots. The said scraps are remitted according to the petitioner and rolled again into the rough rolled zinc out of which calots are punched. The petitioner, therefore, submitted that if the petitioner was to pay duty on rough rolled zinc, then the duty paid scrap when turned into rough rolled zinc in the process mentioned above would again attract duty. This would be repetitive duty which was not permissible under the law according to the petitioner. In my

opinion this contention urged by the petitioner cannot be accepted. As mentioned hereinbefore, the duty is on the process of manufacture. If there are separate and different processes of manufacture, and each process results in such transformation that a new and distinct article known in the market as such comes into being then each process would be subject to duty. If what remains after calots are punched from rough-rolled zinc are scraps, then using these scraps by remitting and making again the rough-rolled zinc would be a separate and independent manufacturing process which would be liable to duty. If, however, what remains after calots are punched are not scraps but still rough-rolled zinc, then further remitting may not expose the said article to further duty under Tariff Item 26B(2). It is in this light the decision in the case of Union of India (UOI) and Others Vs. Tata Iron and Steel Co. Ltd., Jamshedpur, has to be considered. That decision dealt with the notification issued under Rule 8 granting exemption. When certain exempted items have been used in the further process then if duty is imposed again that may be an occasion for repetitive duty. In such a case, the proper remedy of the petitioner would be to move the government to issue notification exempting the petitioner from the burden of duty in respect of scraps. But in my opinion it cannot be said that there was any repetitive duty not permissible under the law in the instant case.

20. My attention was drawn to several other decisions on this aspect viz. the decision of mine in the case of Photo Optical Company Pvt. Ltd. v. Union of India and Ors.- 1976 Tax LR 1430; the decision of the Bombay High Court in Misc. Petition No. 401 of 1963, Cosmos India Rubber Works Private Limited v. G. Koruthu Collector of Central Excise and Two others; the decision of the Delhi High Court in Civil Writ No. 357 of 1970, Caltex Oil Refining (India) Ltd.v. The Union of India and Ors. ; and the decision of the Gujarat High Court in First Appeal No. 128 of 1972 with Special Civil Application No. 97 of 1972 (Under Articles 226 and 227 of the Constitution of India) and First Appeal No. 970 of 1973, The Union of India and Ors v. C.M.C. India, Ahmedabad. In the view I have taken as mentioned before it is not necessary for me to refer to the decisions in any details. As regards the various points taken in the said 20 points objection I will deal with those points at the relevant time.

21. In the view I have taken for the reasons mentioned before I set aside the order dated the 3rd January, 1975, by the Appellate Collector Which is annexure to the present petition, in so far as it held that sheets and strips from which calots are manufactured by the petitioner are assessable to central excise duty under Tariff Item 26B(2). So far as he has held that zine calots are not exigible to duty the same is not disturbed. The Appellate Collector is directed to re-hear the matter to re-determine the question in the manner indicated above after giving reasonable opportunity and until that decision is made, the order of the Assistant Collector which was under appeal before the Appellate Collector would remain stayed and should not be given effect to.

22. The next aspect that requires consideration in this case is whether the notice

issued under Rule 9(2) of the Central Excise Rules, 1944 has been issued without jurisdiction. The said notice calls upon the petitioner to pay excise duty from the period 3rd March, 1971 upto the end of March, 1974 on the basis that zinc sheets and strips from which calots are punched are assessable to duty and have escaped assessment. The said notice as mentioned before has been issued under Rule 9(2) of the Central Excise Rules, 1944. It is, therefore, necessary to set out the relevant rules. Chapter III of the Rules deals with levy and refund of and exemption from duty. Rule 7 deals with recovery of duty. Rule 8 deals with power to authorise exemption from duty. Rules 9(1) and (2) so far as the same are material for our present purpose are as follows :

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23. In order to attract Sub-rule (2) of Rule 9 the excisable goods must in contravention of Sub-rule (1) be deposited in or removed from any place specified therein, the producer or manufacturer thereof is made liable to pay duty leviable on such goods on written demand made by proper officer and also would be liable to penalty which may extend to Rs. 2,000/- and also liable to confiscation. Therefore, if a manufacturer has removed excisable goods in contravention of Sub-rule (1), then he becomes liable to pay duty on demand and he exposes himself to penalty and to confiscation. Sub-rule (1) of Rule 9 imposes an obligation that excisable goods shall not be removed from any place where these are produced, cured, or manufactured or a place appertaining thereto. I need not concern myself with the proviso to the said sub-rule. The scope and effect of these rules have been the subject matter of judicial interpretation.

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24. In the case of N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., , the Supreme Court held that in case of ambiguity word should not be construed literally but in the context in which it occurred in order to discover its appropriate meaning. In order to attract Rule 10 it was not necessary that some amount of duty ought to have been assessed and that amount ought to have been also actually paid. This Rule applied to a case where there had been a nil assessment in which case entire duty later on assessed must be considered to be duty originally short levied In the circumstances the Rule 10A did not apply. Dealing with Rule 9(2) the Supreme Court observed as follows at page 2048 of the Report :

"The above reasoning leads to the conclusion that Rule 10A does not apply to the case on hand Then the question is whether the demands could be justified under Rule 9(2). Even here we find considerable difficulty in sustaining the notice under this rule. Sub-rule (1) of Rule 9 provides for the time and the manner of payment of duty. In this case there is no controversy that whenever goods were cleared by the respondents, necessary applications had been made to the officer

concerned and the latter had passed orders of assessment to nil duty. To attract Sub-rule (2) to Rule 9, the goods should have been removed in contravention of Sub-rule (1). It is not the case of the appellants that the respondents have not complied with the provisions of Sub-rule (1). We are of the opinion that in order to attract Sub-rule (2), the goods should have been removed clandestinely and without assessment. In this case there is no such clandestine removal without assessment. On the other hand, goods had been removed with the express permission of the Excise authorities and after order of assessment was made. No doubt the duty payable under the assessment order was nil. That, in our opinion, will not bring the case under Sub-rule (2). That Sub-rule (2) is a penal provision is shown from the fact that apart from the duty payable, the party is also made liable to a penalty and he also incurs the risk of the goods being confiscated. That Rule 9(2) applies only to cases where there has been an evasion from payment of duty is clear from the decision of this Court in *J.K. Steel Ltd. Vs. Union of India (UOI)*, . Though on certain other aspects there was a difference of view amongst the learned Judges, on this aspect the decision is unanimous. There is absolutely no material placed before us by the appellants which would justify the issue of the notice under Rule 9(2)."

25. As mentioned hereinbefore the Supreme Court noted that Rule 9 (2) applied only to cases where there had been evasion from payment of duty and this the Supreme Court found to be the decision of the Supreme Court in the case of *J.K. Steel Ltd. Vs. Union of India (UOI)*, as the Supreme Court observed that in order to attract Sub-rule (2) of Rule 9 the goods should have been removed in contravention of Sub-rule (1). That condition perhaps would be fulfilled in the instant case if it is held that the rough-rolled Zincs out of which zinc calots are prepared were exigible to duty under Tariff Item 26B(2) because admittedly on this there has been no payment of duty. But the Supreme Court observed, further, that in order to attract Sub-rule (2) the goods must be removed clandestinely and without assessment. Therefore it was necessary to attract the applicability of the said Rule, not only that the goods exigible to duty had escaped duty but such goods must have been removed clandestinely. Thus the Supreme Court was induced to hold because the consequence of non-compliance with Rule 9(1) would be not only to attract the provisions for payment of duty but to expose the manufacturer to the provisions of confiscation of goods as well as to penalty. It was in this background that the Supreme Court held that unless there was an element of evasion-evasion meaning deliberate non payment with knowledge of the fact that duty was payable, Sub-rule (2) of Rule 9 cannot be attracted. In the case of *R.K. Audim and Others Vs. Special Steel Ltd., Bombay and Another*, the Supreme Court dealt with an additional duty sought to be recovered on the ground that the original imposition was at a lower rate but to misapprehension of the Department. In such a case only Rule 10 and not Rule 10A would apply. If, however, in this case Rule 10 was the proper rule to be applied then the fact that the notice was given under Rule 9(2) would not make the notice invalid ; the notice would still be upheld to the extent it is permissible

under Rule 10. In support of this proposition reference may be made to the very decision of the Supreme Court in the aforesaid case of N.B. Sanjana and Ors. v. E.S. and W. Mills Co. Ltd. (supra) and also the case of J.K. Steel Ltd. Vs. Union of India (UOI), . It was contended that Rule 10 would be inapplicable because there cannot be any question of short levy in the instant case because the goods had been removed without payment of any duty or without assessment in respect of rough rolled zincs out of which zinc calots were punched ; but as the Supreme Court observed that even in a case of nil assessment Rule 10 would be applicable. In the instant case zinc sheets and strips which were used for other purposes and which were manufactured by the petitioner, as indicated before, for instance, addressograph strips, photo-engraver sheets, pack inert sheets and zinc electrodes were assessed to duty as sheets. Therefore, if these other rough rolled zincs out of which zinc calots are prepared have not been subjected to duty, then it must be held that there was short levy or nil assessment in respect of these items. For the applicability of Rule 9(2) it was necessary firstly that the goods must have been removed in contravention of Sub-rule (1). Sub-rule (1) postulates that no excisable goods shall be removed from any place where they are produced, cured, or manufacturer 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. If rough rolled zincs out of zinc calots are punched are excisable goods then they admittedly have have been removed for consumption without payment of duty. To that extent Rule 9 (1) has been violated. But the question is, have these goods been removed clandestinely ? These goods were produced at the places as per site plan approved by the Excise authorities. Detailed procedures both under the "Self-removal procedure" as well as the "physical control procedure" which enjoined specific and detailed duties on the part of the Excise authorities have been set out. It is not the case that the goods were not manufactured or prepared at the places as indicated in the site plan approved by the Excise authorities. In these circumstances, can it be said that the goods have been removed clandestinely ?

26. Rule 9(2) does not require any notice to show cause to be given but in the instant case such a notice was given dated the 21st November, 1974 which has been set out hereinbefore. That of course, does not affect the validity of the impugned notice under Rule 9(2) because giving an additional opportunity does not in any way affect the jurisdiction to issue the notice if the respondent authorities have such jurisdiction. But in the notice to show cause why the demands should not be made under Rule 9(2) it has not been alleged that there are any other materials in the possession of the respondent authorities to come to the conclusion that the goods in question have been removed clandestinely.

27. In the affidavit-in-opposition of Ashutosh Pal affirmed on the 14th January, 1976 in paragraph 4 (1) it has been stated that after the receipt of the petitioner's letter dated 30th March, 1971 necessary inquiries were made and it was found that the petitioner had purposely misdescribed "calots" as "zinc

circles" in order to evade payment of higher duty on zinc sheets and strips. It was stated in that paragraph that "calots" were manufactured by the petitioner out of zinc sheets/strips by way of punching and it was further alleged that the petitioner described "calots" as circles falling under Item .No. 26B (2) in order to evade payment of higher duty on zinc sheets/strips to the extent of the scrap which arose after punching of calots from the zinc sheets and strips. This paragraph has been verified as being based on information from records. No records, however, were produced or offered to be produced at the time of the hearing of this application which would show that at the enquiry it was established that the petitioner purposely misdescribed calots as circles in order to evade payment of duty on zinc sheets and strips out of which such calots were punched. In that view of the matter, it is not possible to accept that there are any materials from which it can be said that the goods in question, in view of the procedure followed by the petitioner for the removal of the goods which have been described herein by fore, were removed clandestinely. It may be that such goods were removed inadvertently inadvertence on the part of the officer concerned, without knowing that such goods were excisable and inadvertently on the part of the manufacturer. As was observed by Mr. Justice Banerjee in the case of *Albert David Ltd. v. Union of India* (supra) everybody is presumed to know the law. That is unfortunately a maximum which is still adhered to in judicial and legal administration though it has become absolutely unreal. The concept that everybody is presumed to know the law was itself of doubtful validity originally. Even in ancient times when laws were few the maxim at best might have represented half truth. But now with so many complex laws with numerous bye-laws etc. it would be perhaps more nearer to truth and reality to say that nobody knows the laws. But even if we adhere to that legal concept that everybody is presumed to know the law must also presume that the excise authorities are presumed also to know the law ; in that background of unreal presumption it cannot be said that the goods in question were removed secretly or in clandestine manner. In view of the detailed site plan and process flow chart submitted by the petitioner, there are no material in this case to come to the conclusion that the goods were removed clandestinely. \* \* \* \*

30. In the instant case, in my opinion, it is necessary to consider whether Rule 10 or Rule 10A will apply. In order to come within Rule 10A, as has been held by the Supreme Court in the decision noted hereinbefore, the other rules should be found to be inapplicable. Rule 10A was a residuary provision. In this case if rough-rolled zincs out of which the zinc calots are prepared are excisable, then surely the duty in respect of the same had been short-levied or not collected either through inadvertence of the respondent authorities or because of the misstatement or misdescription of the goods on the part of the manufacturer. If that is the position, then in my opinion, Rule 10 would be applicable. If Rule 10 would be applicable, then the petitioner would be liable for duties for a period of one year prior to the date of the issue of the impugned notice.

31. But the question whether Rule 9, Rule 10 or Rule 10A will apply, is dependent

upon the question whether rough rolled zincs out of which zinc calots are punched, are excisable at all. As I have held that the question must be determined or redetermined by the Appellate Collector in the manner indicated above. In my opinion, it would be sufficient to hold for the purpose of this application that the impugned notice under Rule 9(2) is invalid inasmuch as the goods in question had not been removed clandestinely, but the said notice can be treated as notice under Rule 10 to the extent applicable and for the period enforceable provided rough rolled zincs out of which zinc calots are punched, are exigible to duty as zinc sheets or strips. Therefore, until the said determination is made, the said notice will not be given effect to and if it is held ultimately that rough-rolled zincs are not dutiable the said impugned notice would not be given effect to in any event. But, if, on the other hand, it is held that rough rolled zincs are dutiable then to the extent permissible for the period under Rule 10, the demand in the said notice would be enforceable and would be valid.

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32. The last aspect which requires consideration in this case is the claim of the petitioner for refund. Zinc calots have been held to be not exigible to duty. The petitioner since April, 1961 upto December, 1973, has been assessed to duty on zinc calots and even for subsequent periods have paid such duty under the circumstances mentioned hereinbefore. The petitioner has given a chart of the amount of duty paid on zinc calots for the period from May, 1961 to February, 1975 in Annexure "U" to the petition. The amount claimed by the petitioner comes to Rs. 2,24,16,981.00. In respect of the period upto December, 1973, assessments have been made and even after December, 1973, the petitioner has paid duty on zinc calots under protest. The question is, when it has been held by the Appellate Collector in the order referred to hereinbefore on the 3rd of January, 1975, that zinc calots are not assessable to duty, whether in those circumstances the petitioner is entitled to refund of excise duty paid. If so, can that claim for refund be enforceable in an application under Article 226 of the Constitution. The petitioner has based its claim for refund on the fact that the petitioner paid the said duty on a mistaken basis that such duty was payable although the petitioner was not liable in law or in fact to pay such duties. The petitioner, further, stated that the petitioner discovered the said mistake when the petitioner received the order of the Appellate Collector on the 11th January, 1975. Prior thereto it has to be mentioned that the petitioner on the 30th March, 1971, which is Annexure "F" to the petition represented to the Superintendent of Central Excise that zinc calots manufactured by the petitioners at its factory were not excisable goods and did not come within the description of Tariff Item No. 26B(2). On behalf of the respondents it was contended that the petitioner was not entitled to refund because there was no case of any mistake. It was contended, secondly, that the petitioner had deliberately paid duty on zinc calots in order to avoid payments of higher duty on zinc sheets and strips out of which zinc calots were prepared. There was no question of payment by mistake. It was, then submitted that the assessment in respect of zinc calots had been properly

made by the competent assessing authorities and they had jurisdiction to make the assessment though the assessment might be erroneous. It was then contended that part of the claim had become barred by limitation because the petitioner had discovered the mistake as early as 30th March, 1971 and it was urged that refund should be refused to the petitioner on the ground of unjust enrichment because excise being essentially an indirect tax the manufacturer must have passed on the liability to the consumers and must have realised the duties from the consumer of batteries. Therefore, the petitioner would be doubly enriched if there was order for refund. Lastly it was urged that the claim to obtain refund was controlled by Rule 11 of the Central Excise Rules and as such the rule limited the claim only to a period of three months. In aid of this submission several decisions were relied upon in this case. I need not refer to all the decisions because most of these were reviewed in the decision of the Andhra Pradesh High Court in the case of Gurram Sreeramulu Gariapati Anjaneyulu and Co. and Ors. v. The State of Andhra Pradesh and Ors.-Sales Tax Cases 120. There the division bench of the Andhra Pradesh High Court after reviewing several decisions observed that to entitle the party to refund of tax, the tax must have been collected by State and paid by the party under a mistake common to both the parties. But the assessee would not be entitled to refund of the tax as a matter of course merely because it had been paid under a mistake. The right to such refund was subject to questions of estoppel, waiver, limitation and the like (sic) refund of money paid under a mistake, the period of limitation was three years from the date of discovery of the mistake, for claiming the same relief by way of a petition under Article 226 of the Constitution, the filing of such a petition within a period of three years cannot be said to be unreasonable delay. Having regard to the facts and circumstances of the case, the court might consider the delay unreasonable even if it was less than the period of limitation prescribed for a civil action for the remedy of refund. But delay must always be held to be unreasonable if the petition was filed beyond three years, Among the facts and circumstances of the case it would be relevant for holding whether a petitioner was entitled to such refund or not, the fact that the assessment order was not void but was merely erroneous in law or on the facts would be a relevant circumstance. If the assessment order cannot be questioned in a civil court, the refund of tax also could not be ordered by a civil court. That being so, even in a petition under Article 226 of the Constitution there cannot be an order for refund when the assessment order itself being quashed and in consideration whether the assessment order also should be quashed, the fact that the petitioner has not availed himself of the alternative remedy provided under the Act cannot be ignored. The fact that for getting the assessment order quashed, the jurisdiction of the High Court should have been invoked within the period of six months must also be kept in view. If the petition was filed beyond that period, the petitioner must satisfactorily explain that delay in approaching the High Court.

33. In this case as I have mentioned before, one of the main contentions was that there deliberate attempt on the part of the petitioner to avoid payment of

higher duty on zinc sheets and strips. I have held that there is no material for the issue of notice under Rule 9(2) of the Central Excise Rules on the aforesaid basis, still I cannot ignore this as an aspect to be considered in a claim for refund. On the question of undue enrichment reliance was placed on the observations of Masud, J. in the of Electric Lamp Manufacturers India Private Ltd. v. Collector of Central Excise, Calcutta- 1978 E.L.T. ( 84). Of course the facts of the instant case are different from the facts in that case, inasmuch as there was positive evidence that the manufacturer had realised duties from the consumers, such evidence is not available in the instant case but it may be presumed that though as a matter of law excise duty is payable by the manufacturer, as a matter of fact it is passed on to the consumers. But that in my opinion is no ground to invoke the theory of unjust enrichment. If unjust enrichment is not to be permitted to a litigant, it should not also be permitted to the State. The State has no right to collect unauthorised tax or illegal tax. Good fiscal administration enjoins that all lawful taxes should be properly collected and taxes which are not due if realised by the State should be refunded. Such fiscal administration alone ensures the atmosphere of tax compliance. But a question of limitation also arises in this case, quite apart from the question of Rule 11 which in my opinion is not applicable, in the facts and circumstances under which the claim for refund has arisen as was pointed out by the division bench of the Patna High Court in the case of Rohtas Industries Ltd. Vs. Union of India (UOI), .

34. There is another aspect of the matter. I have directed that Appellate Collector would re-determine the question whether zinc sheets and strips are exigible to duty. If zinc sheets and strips are eligible to duty then for the period the zinc sheets and strips have not borne duty a claim for set off against the claim for refund of the money payable by the petitioner u/s 11 of the Act would arise because Section 11 of the Act provides that in respect of any duty or any other sums payable to the Central Government under any provisions of the Act or the rules made thereunder, the officer empowered by the Central Board of Revenue to levy such duty may deduct the amount so payable from any money owing to the person from whom such money may be recoverable. If that is the position, then until this question is determined it is premature at this stage to ask for refund. For the aforesaid reason in my opinion, the appropriate orders would be to direct as follows :-

(1) The order dated 03rd January, 1975 passed by the Appellate Collector in so far as it held that rough rolled zincs out of which zinc calots are punched are assessable to Central Excise Duty is set aside and he will re-consider the matter in accordance with law and in accordance with the observations made in this judgment after giving reasonable opportunity to the parties for adducing such further evidence as he considered necessary. In so far as he held that zinc calots are not exigible to duty the same is upheld.

(2) Until that decision is made the order of the Assistant Collector dated 05th July, 1972 should not be given effect to and the demand notice dated 26th April,

1974 and the show cause notice should not be given effect to.

(3) If it is ultimately held by the Appellate Collector that rough-rolled zincs out of which calots are punched are not dutiable then the said demand notice and the said show cause notice in respect of the demand notice should not be given effect to any further and the petitioner would be entitled to take such steps as it would be entitled to under the law to claim refund of duties paid, for zinc calots, including applying to the respondent authorities for claiming such refund. And in that even the respondent authorities would consider such application in accordance with law.

(4) If, on the other hand, it is held that rough-rolled zincs out of which zinc calots are punched are assessable to duty then the demand notice for the same dated 26th April, 1974 in so far as is within the period covered by rule 10 from the date 26th April, 1974 would be enforceable against the petitioner. But before enforcing the same, the respondent should give credit to the petitioner for the amount realised from the petitioner on account of duty for zinc calots, on account of duty for zinc calots.

(5) In case it is held that rough-rolled zincs out of which calots are made are exigible to duty then classification list made by the petitioner under Rule 173(b) (2) should be amended accordingly and the petitioner should be directed to amend the classification list. In case it be held that rough rolled zincs are not assessable to duty as zinc sheets or strips after disposal of the matter by the Appellate Collector the petitioner should be directed to amend or vary the classification list accordingly.

(6) Until the said decision is made and the said adjustments are given effect to the petitioner should go on paying the duties in terms and in the manner the petitioner has been paying pursuant to the interim order of this court and on final order being passed adjustment or refund should be made accordingly, as the case may be.

(7) This order will not in any way prejudice the right of the petitioner to institute such proceeding for claiming refund of the balance sum on account of duty on zinc calots as the petitioner is entitled to under the law.

(8) The Appellate Collector will give his decision within four months from this date.

(9) This rule is made absolute to the extent indicated above. (10) There will be no order as to costs.

(10) There will be no order to costs.