D. R. Kohli and Others

Vs

Atul Products Ltd.

Civil Appeal No. 2277 of 1970

(E. S. Venkataramiah, O. Chinnappa Reddy, Sabyasachi Mukharji JJ)

12.02.1985

JUDGMENT

VENKATARAMIAH, J. -

1. This appeal by certificate under Article 133(1)(a) of the Constitution is filed against the judgment and order dated July 9/10, 1969 in Special Civil Application No. 624 of 1964 on the file of the High Court of Gujarat filed under Article 226 of the constitution by M/s. The Atul Products Ltd., the respondent in this appeal.

2. The respondent is the owner of a factory at Atul in the State of Gujarat in which it has been carrying on the business of manufacturing dyes, chemicals and pharmaceuticals for a number of years. By the Finance Act of 1961 "synthetic organic dyestuffs (including pigment dyestuffs) and synthetic organic derivatives used in any dyeing process" were added as Item 14-D in the First Schedule to the Central Excises and Salt Act, 1944 (hereinafter referred to as 'the Act') with effect from March 1, 1961 and consequently the respondent became liable to pay excise duty imposed by the Act on two of its products known as cibagenes and cibanogenes which were being manufactured by it by virtue of Section 3 of the Act which provided that excise duty prescribed by the Act was leviable on all excisable goods specified in the First Schedule to the Act. Item 14-D in the First Schedule during the relevant period read thus :

> 14-D. Synthetic organic dyestuffs (including pig-Thirty per cent. ment dyestuffs) and synthetic organic derivatives used ad valorem. in any dyeing process.

3. But on November 23, 1961, the Central Government issued a notification under Rule 8(1) of the Central Excise Rules, 1944 (hereinafter referred to as 'the Rules') exempting the dyes specified in the Schedule annexed thereto from the whole of the excise duty leviable thereon if and only if such dyes had been manufactured from any other dye on which excise duty or countervailing customs duty had already been paid. The notification read thus :

> # GOVERNMENT OF INDIA MINISTRY OF FINANCE (DEPARTMENT OF REVENUE) New Delhi, dated November 23, 1961 Agrahayana 2, 1883 S.E. NOTIFICATION Central Excise##

GSR. In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, as in force in India, and as applied to the State of Pondicherry, the Central Government hereby exempts the dyes specified in the Schedule annexed hereto, falling under Item No. 14-D of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) from the whole of the

excise duty leviable thereon if and only if, such dyes are manufactured from any other dye on which excise duty or countervailing customs duty has already been paid.

> # SCHEDULE1. Solubilised Vats,2. Rapid fast colours,3. Rapidogenes,4. Fast Colour Salts, (180/61) Sd. (BN. Banerji)##

4. It may be stated here that cibagenes and cibanogenes which were being manufactured by the respondent belong to the class of days referred to in the Schedule annexed to the above-said notification. After the above notification was issued, the respondent wrote a letter dated December 22, 1961 to the Superintendent of Excise, Bulsar Division, Bulsar which read as follows :

Dear Sir,

Your are aware that under the Notification No. 180/61 of November 23, 1961 issued by the Government of India, Min. of Finance (Dept. of Revenue), Rapidogenes/Rapid fasts and fast colour bases are exempted from the excise duty provided such dyes are manufactured from other dyes on which excise duty or countervailing customs duty has already been paid.

During the course of discussions we had on December 20, 1961 with the Collector of Central Excise and yourself, we pointed that we purchase fast colour and bases, required in the production of Rapidogenes/Rapid fasts either from the manufacturer in Bombay or from the open market. The material which the local manufacturer has offered us was produced before the imposition of excise duty on dyes. He is, therefore, willing to sell us the material without the recovery of excise duty. We now propose to pay the excise duty on the fast colour bases which we will purchase from the local manufacturer so that we do not have to pay excise duty on the final products produced viz. Rapidogenes/Rapid fasts.

Similarly we propose to purchase some quantity of imported fast colour bases from the open market. We will present the materials thus purchased to you for the recovery of excise duty at the rate of 15%.

We have now to request you to advise your Inspector at Atul to accept the excise duty on the fast colour bases, which we will purchase either from the local manufacturer or from the open market.

Thanking you in mean while, we remain.

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Yours faithfully

for the Atul Products Ltd.

Sd. (S. K. Soman)

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5. The Superintendent of Central Excise, Bulsar Division, Bulsar sent a reply dated January 4/6, 1962 to the above letter stating that there was no objection to the payment of excise duty on fast colour bases purchased by the respondent and that if evidence of payment of excise duty on fast colour bases was produced the dyes manufactured by using those fast colour would not be liable to

duty under the notification referred to above. He also instructed the Deputy Superintendent of Central Excise to receive duty on such fast colour bases which went into the production of cibagenes or cibanogenes (processed dyes) by the respondent. The respondent accordingly paid the duty and was exempted from payment of duty on cibagenes and cibanogenes manufactured by it. The departmental audit party later on noticed that the concession shown to the respondent was not in order since it was only when duty had been paid on the basic dyes at the time of their manufacture when they were chargeable to duty and they had been purchased by the respondent thereafter, the respondent would get exemption from the duty payable on the products manufactured by it by employing such basic dyes. The audit party was of the view that the respondent which had purchased the basic dyes at the time when (sic no) duty was leviable on them could not claim exemption from payment of excise duty on the final products manufactured by it by using such basic dyes, by voluntarily paying duty on the basic dyes after March 1, 1961 in accordance with law in force then. The audit party was further of the view that there was short levy of excise duty on account of the above mistake since the respondent had paid excise duty on the basic dyes at 30% ad valorem whereas it was liable to pay duty at 30% ad valorem on the products manufactured by it which were costlier than the basic dyes. The Assistant Collector of Central Excise at Surat therefore issued five notices under Rule 10-A of the Rules to the respondent all on May 20, 1964 calling upon it to show cause as to why the deficit amount of excise duty should not be recovered in respect of the excisable goods manufactured by it at different periods before that date. We reproduce below one of such notices, the contents of which were more or less the same except with regard to the amount claimed and the number of the relevant demand notice :

> # INTEGRATED DIVISIONAL OFFICE : CUSTOMS AND CENTRAL EXCISE, SURATNo. VI(RR) 21-13/62/II(iv) Surat, May 20, 1964 NOTICE##

Whereas it has been reported that M/s Atul Products Limited, Atul have manufactured synthetic organic dyes namely Cibanogenes from basic dyes lying in stock as on February 28, 1961/March 1, 1961 with them/purchased from the market and having voluntarily paid duty on all such basic dyes in stock/purchased from the market as referred to above manufactured and cleared from November 23, 1961 onwards the processed dyes (final product) without payment of duty at the time of clearance from their factory.

2. The Deputy Superintendent, Central Excise, Atul has raised demand No. 10175 dated January 6, 1964 for the amount of Rs. 2930.22 for the recovery of duty as a result of the assessment of the final processed dyes; because the processed dyes were not eligible for exemption from duty on the ground that duty was voluntarily paid on the basic dyes which were in stock/purchased from the market as on February 28, 1961 when such payment of duty on the stock of basic dyes as on February 28, 1961 was not warranted.

3. M/s Atul Products Ltd., Atul have represented this dispute vide their letter No. SL/437/9581 dated March 25, 1964 against Demand No. 10175 dated January 6, 1964.

4. M/s Atul Products Ltd., Atul should show cause to the undersigned as to why the demand referred to above issued by the Deputy Superintendent, Central Excise, Atul should not be confirmed.

5. M/s Atul Products Ltd., Atul are further directed to produce at the time of showing cause all they evidence upon which they intend to rely in support of their defence.

6. M/s Atul Products Ltd., Atul should also indicate in the written explanation whether they wish to be heard in person before the assessment dispute is finalised.

7. If no cause is shown against the action proposed to be taken within ten days of the receipt of this notice or they do not appear before the undersigned when the case is posted for hearing the case will be decided ex parte.

Sd. H. H. Dave May 20, 1964 Assistant Collector.##

6. The particulars of the demand notices and the amounts claimed in the said five notices were as follows :

#Demand Notice Date Amount Rs. Period of clearance No.1. 10163 October 24, 1963 18,349.21 January 1, 1962 to May 31, 19632. 10166 November 11, 1963 8,142.06 August 3, 1963 to November 13, 19633. 10174 January 6, 1964 1,80,593.47 December 30, 1961 to May 30, 19624. 10175 January 6, 1964 2930.22 Supplementary to 10163 and 101665. 10179 February 25, 1964 8349.00 December 24, 1964 ---------- 2,18,363.96##

7. The respondent sent a common reply to the above notice on June 19, 1964. The respondent contended that it had cleared the products manufactured by it namely cibagenes and cibanogenes in accordance with the Rules. It pleaded that there was no justification to conclude that it had paid excise duty on fast colour bases used by it in manufacturing the said goods voluntarily as the Superintendent, Central Excise, Bulsar had confirmed that according to Government of India's notification dated November 23, 1961 it was required to pay excise duty on the fast colour bases before they were used in the production of the said processed dyes and also had written that the Dy. Superintendent of Central Excise, Atul was being instructed to recover duty on the said fast colour bases. The respondent also pleaded that Rule 10-A of the Rules was not applicable to the case and hence no demand could be made. After considering the representations made by the respondent to the above notices, the Assistant Collector overruled the objections of the respondent by his orders dated July 20, 1964 and directed it to pay the amounts which had been demanded in the notices by issuing appropriate notices of demand. Aggrieved by the said orders passed by the Assistant Collector of Central Excise and the notices of demand the respondent filed a writ petition under Article 226 of the Constitution before the High Court of Gujarat questioning their correctness and praying for an order directing the excise authorities not to recover the amounts claimed in the notices from the respondent. The High Court held that the respondent was entitled to the exemption under the notification in respect of the goods manufactured by it as excise duty had been paid on the dyes used in the manufacture of the said goods. The High Court, therefore, allowed the writ petition quashing the orders of the Assistant Collector and the notices of demand impugned in the writ petition and directing the excise authorities not to recover the sums mentioned therein by its judgment dated July 9/10, 1969. This appeal is filed by the Union of India against the judgment of the High Court.

8. The two principal questions which arise for consideration before us in this appeal are : (i) whether the respondent was entitled to the benefit of the exemption notification dated November 23, 1961 when the dyes said to have been used by the respondent in the manufacture of other dyes were not liable for payment of excise duty when they were manufactured that is, before the introduction of Item 14-D into the First Schedule to the Act even though duty may have been paid on them after the introduction of Item 14-D and (ii) whether the demands made in this case fall within the scope of

Rule 10-A of the Rules or under Rule 10 thereof.

9. It is not disputed that the dyes in respect of which duty had been paid in this case had been manufactured at a time when no duty was leviable on them. This case actually began with the letter written by the respondent on December 22, 1961 within one month after the exemption notification dated November 23, 1961 was issued. In the said letter the respondent no doubt stated that "the material which the local manufacturer has offered us was produced before the imposition of excise duty on dyes". But it was followed by the sentence "We now propose to pay the excise duty on the fast colour bases ....". In that letter there was a request made to the Superintendent of Central Excise to accept excise duty on the fast colour bases which the respondent would purchase either from the local manufacturer or from the open market. The letter did not contain any particulars about the quantity of such dyes which the respondent wished to purchase or its value. The Superintendent of Central Excise in his reply stated that there was no objection to the payment of excise duty on fast colour bases purchased by the respondent and that if evidence of payment of excise duty on fast colour bases was produced, the dyes manufactured by using those fast colour bases would not be liable to duty under the notification. The above reply was intended to convey in effect what the notification stated. It was perhaps assumed that payment of excise duty would arise only when it was payable under law. The language of the notification left no room for doubt at all. It stated that if and only if such dues were manufactured from any other dye on which excise duty or countervailing customs duty had already been paid, they would be exempted from duty. Payment of excise duty on dyes was possible only if they had been manufactured after the introduction of Item 14-D into the First Schedule to the Act. Admittedly in this case the dyes which were used by the respondent had been manufactured prior to that date.

10. In reaching its decision the High Court, however, relied on the decision of this Court in Innamuri Gopalan v. State of A.P. ((1964) 2 SCR 888 : (1964) 1 SCJ 67 : (1964) 14 STC 742) In that case the Court had to construe a notification issued by the Government of Andhra Pradesh granting exemption to textile goods from the levy of sales tax under the Andhra Pradesh General Sales Tax Act, 1957 (A.P. Act 6 of 1957). But it, however, contained a proviso that in the case of any class of such goods in respect of which additional duties of excise are leviable by the Central Government under Clause 3 of the Additional Duties of Excise (Levy and Distribution) Bill, 1957 read with Section 4 of the Provisional Collection of Taxes Act, 1931 (Central Act XVI of 1931) the exemption would be subject to the dealer proving to the satisfaction of the assessing authority that additional duties of excise had been so levied and collected on such goods by the Central Government. In the above said case certain dealers who had sold textile goods which were not subject to additional duties of excise claimed that they were entitled to the exemption even though they had not paid such additional excise duty. The State Government pleaded that the dealers would be entitled to claim exemption if and only if such additional excise duty had been levied and collected and since the goods in question were not liable to such additional excise duty, they were not entitled to claim the exemption. This Court rejected the contention of the State Government and held that on a plain reading of the notification relied on in that case all varieties of textile goods had been generally exempted from payment of sales tax but where any additional excise duty had been levied in respect of any kind of textile goods then the dealer had to show proof of levy and payment of such duty. Accordingly the case of the dealers was upheld. In the case before us, the notification relied on by the respondent is couched in a different language. It specifically states that if and only if the dyes are manufactured from any other dye on which excise duty or countervailing customs duty has already been paid, the exemption can be availed of by the manufacturer of such dyes. The above decision of this Court is, therefore, clearly distinguishable from the present case. With great respect to the High Court it should be stated that the distinction pointed out above was not noticed

by it.

11. The decision in Hansraj Gordhandas v. H. H. Dave, Assistant Collector of Central Excise & Customs, Surat ((1969) 2 SCR 253 : AIR 1970 SC 755 : (1970) 1 SCJ 554) does not also have any bearing on this case. There the Court was concerned with the meaning of the notification in question which had granted exemption from payment of excise duty on cotton fabrics manufactured on powerlooms owned by cooperative societies registered prior to March 31, 1961. The appellant had produced with his own hired labour cotton fabrics on the powerlooms owned by a cooperative society under a contract. Still the Court found that the appellant was entitled to the benefit of exemption since he had manufactured the goods on the powerlooms owned by a cooperative society as per the notification. The crucial question in all such cases is whether the case falls within the scope of the law granting exemption or not and there can be no dispute about that principle. The difficulty arises only when the said principle is to be applied to the facts of a given case. As mentioned earlier, in this case the case of the respondent did not fall under the notification granting exemption since the basic dyes used by it in producing other processed dyes were not subject to levy of excise duty when they were manufactured and cleared.

12. We do not agree that in this case the principle of promissory estoppel can be pleaded as a bar against the contention of the Department. The respondent had not done anything prejudicial to its interest relying upon any representation made on behalf of the Department. It is not the case of the respondent that it would not have manufactured the dyes but for the advice given by the Department. On the other hand it is obvious that the respondent had before it the exemption notification which alone could be the basis for its actions. The Department was not also expected to tender legal advice to the respondent on a matter of this nature.

13. After giving our earnest consideration to the case before us we are of the view that under the notification exemption could be claimed only where the dyes used in the manufactureof other dyes were liable to payment of excise duty when they were manufactured and such duty had been paid. A voluntary payment of excise duty on dyes which were not liable for such payment would not earn any exemption under the notification. The finding recorded by the High Court on the above question is, therefore, liable to be set aside.

14. The next question relates to the appropriate provision of law under which action could have been taken in this case by the Central Excise authorities. This question was not decided by the High Court in view of its finding on the liability of the respondent to pay excise duty on the products manufactured by it. Since we have not agreed with the decision of the High Court on this point, it has become necessary for us to decide this question in this appeal. While the Department asserts that it was open to it to proceed under Rule 10-A of the Rules, the respondent contends that even if there was any short levy, the proper Rule applicable to its case was Rule 10 and not Rule 10-A. Rule 10 and Rule 10-A of the Rules during the relevant period ran as follows :

> 10. Recovery of duties or charges short-levied, or erroneously refunded. - When duties 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, or when any such duty or charge, after having been levied, has been owing to any such cause, erroneously refunded, the person chargeable with the duty or charge, so short-levied, or to whom such refund has been erroneously made, shall pay the deficiency or pay the amount paid to him in excess, as the case may be, on written demand by the proper officer

being made within three months from the date on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund.

10-A. Residuary powers for recovery of sums due to Government. - Where these Rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules, such duty, deficiency in duty or sum shall, on a written demand made by the proper officer, be paid to such person and at such time and place, as the proper officer may specify.

15. The points of difference between the above two Rules were 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 was a residuary clause applied to those cases which were not covered by Rule 10 and that (ii) whereas under Rule 10, the deficit amount could not be collected after the expiry of three moths from the date on which the duty or charge was paid or adjusted in the owner's account-current or from the date of making the refund, Rule 10-A did not contain any such period of limitation. The scope of these two Rules has been considered by this Court in two decisions i.e. N. B Sanjana, Assistant Collector of Central Excise, Bombay v. Elphinstone Spinning & Weaving Mills Co. Ltd. ((1971) 3 SCR 506 : (1971) 1 SCC 337 : AIR 1971 SC 2039) and Assistant Collector of Central Excise, Calcutta Division v. National Tobacco Co. of India Ltd. ((1973) 1 SCR 822 : (1972) 2 SCC 560 : 1973 Tax LR 1607) In addition to the above two points of distinction between Rules 10 and 10-A of the Rules, this Court further held in Sanjana case ((1971) 3 SCR 506 : (1971) 1 SCC 337 : AIR 1971 SC 2039) following the decision in Gursahai Saigal v. C.I.T. ((1963) 3 SCR 893 : AIR 1963 SC 1062 : (1963) 48 ITR 1) that in calculating the period of limitation, the expression 'paid' in Rule 10 should not be literally construed as 'actually paid' but as "ought to have been paid" in order to prevent a person, who had not paid any excise duty at all which he should have paid from escaping, from the net of Rule 10 of the Rules. In National Tobacco Co. case ((1973) 1 SCR 822 : (1972) 2 SCC 560 : 1973 Tax LR 1607) this Court observed at pages 836-37 thus :(SCC p. 573 : paras 22, 23, 24)

Rules 10 and 10-A, placed side by side, do raise difficulties of interpretation. Rule 10 seems to be widely worded as to cover any "inadvertence, error, collusion or misconstruction on the part of an officer", as well as any "misstatement as to the quantity, description or value of such goods on the part of the owner" as causes of short levy. Rule 10-A would appear to cover any "deficiency in duty if the duty has for any reason been short levied", except that it would be outside the purview of Rule 10-A if its collection is expressly provided for by any Rule. Both the Rules, as they stood at the relevant time, dealt with collection and not with assessment. They have to be harmonised. In N. B. Sanjana case ((1971) 3 SCR 506 : (1971) 1 SCC 337 : AIR 1971 SC 2039), this Court harmonised them by indicating that Rule 10-A, which is residuary in character, would be inapplicable if a case fell within a specified category of cases mentioned in Rule 10.

It was pointed out in Sanjana case ((1971) 3 SCR 506 : (1971) 1 SCC 337 : AIR 1971 SC 2039), that the reason for the addition of the new Rule 10-A was a decision of the Nagpur High Court in Chhotabhai Jethabhai Patel and Co. v. Union of India (AIR 1952 Nag 139 : ILR 1952 Nag 156), so that a fresh demand may be made on a basis altered by law. The Excise authorities had then made a fresh demand, under the provisions of Rule 10-A, after the addition of that rule, the validity of

which challenged but upheld by a Full Bench of the High Court of Nagpur. This Court, in Chhotabhai Jethabhai Patel and Co. v. Union of India (1961 Supp 2 SCR 1 : AIR 1962 SC 1006), also rejected the assessee's claim that Rule 10-A was inapplicable after pointing out that the new rule had been specifically designed "for the enforcement of the demand like the one arising in the circumstances of the case".

We think that Rule 10 should be confined to cases where the demand is being made for a short levy caused wholly by one of the reasons given in that an assessment has to be reopened.

16. This Court further observed at page 840 : (SCC p. 575, para 30)

Although Rule 52 makes an assessment obligatory before goods are removed by a manufacturer, yet, neither that rule nor any other rule, as already indicated above, has specified the detailed procedure for an assessment. There is no express prohibition anywhere against an assessment at any other time in the circumstances of a case like the one before us where no "assessment", as it is understood in law, took place at all. On the other hand, Rule 10-A indicates that there are residuary powers of making a demand in special circumstances not foreseen by the framers of the Act or the Rules. If the assessee disputes the correctness of the demand an assessment becomes necessary to protect the interests of the assessee. A case like the one before us falls more properly within the residuary class of unforeseen cases. We think that, from the provisions of Section 4 of the Act, read with Rule 10A, and implied power to carry out or complete an assessment, not specifically provided for by the Rules, can be inferred.

17. In the instant case there has been no assessment of the manufactured goods at all as contemplated by Rule 52 of the Rules and the delivery of the goods has taken place contrary to Rule 52-A of the Rules. Rule 52 and Rule 52-A as they stood at the relevant period are set out below :

> 52. Clearance on payment duty. - When the manufacturer desires to remove goods on payment of duty, either from the place or a premises specified under Rule 9 or from a store-room or other place of storage approved by the Collector under Rule 47, he shall make application in triplicate unless otherwise by rule or order required to the proper officer in the proper Form and shall deliver it to the officer at least twelve hours or such other period as may be elsewhere prescribed or as the Collector may in any particular case require or allow before it is intended to remove the goods.

The officer, shall, thereupon, assess the amount of duty due on the goods and on production of evidence that this sum has been paid into the Treasury or paid in the account of the Collector in the Reserve Bank of India or the State Bank of India, or has been dispatched to the Treasury by money-order shall allow the goods to be cleared.

> 52-A. Goods to be delivered on a gatepass. - (1) No excisable goods shall be delivered from a factory except under a gatepass in the proper From or in such other form as the Collector may in any particular case or class of cases prescribe signed by the owner of the factory and countersigned by the proper officer.

18. The facts of this case indicate that the Department was virtually inveigled into a trap by the respondent suggesting that it was too eager to pay excise duty on certain goods which to the knowledge of the respondent were not liable for excise duty with the object of getting the benefit of the right to clear its products which were liable for higher excise duty because of their increased

value without paying any duty at all. Rule 10 of the Rules deals with four kinds of mistakes on the part of an officer which bring a case within its sweep. Of them 'inadvertence', 'error' and 'misconstruction' are mistakes which can be committed unilaterally by the officer himself. 'Collusion' involves a pact between two or more persons to defraud the Government. This case does not involve any such unilateral mistake on the part of an officer or collusion as explained above. Nor is this a case where through misstatement as to the quantity, description or value of such goods on the part of the owner short levy has occasioned. Further the error in this case has not taken place at the time of the assessment or at the time when assessment ought to have been made under Rule 52. The discussion and correspondence between the assessee and the officers concerned had taken place on December 20, 1961, December 22, 1961 and January 4/6, 1962 without reference to the actual goods. The goods were actually manufactured and cleared afterwards. The reply of the Superintendent of Central Excise dated January 4/6, 1962 was in the nature of an advice and not an assessment as contemplated under Rule 52. Hence this case is not covered by Rule 10 of the Rules at all. Rule 10-A of the Rules which is a residuary provision is, therefore, necessarily attracted. Hence the plea of limitation raised on the basis of Rule 10 of the Rules does not survive.

19. In the result we set aside the judgment of the High Court and dismiss the writ petition filed by the respondent. The Department may now proceed to recover the sums demanded under the impugned notice issued to the respondent.

20. For the foregoing reasons, the appeal is accordingly allowed with costs.

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