N. B. SANJANA, ASSISTANT COLLECTOR OF CENTRAL EXCISE, BOMBAY & ORS.

v.

ELPHINSTONE SPINNING & WEAVING MILLS CO. LTD.

January 22, 1971

[J. M. SHELAT AND C. A. VAIDIALINGAM, JJ.]

Central Excise Rules, 1944, *rr.* 9, 10 *and* 10*A—Scope of.*

'Levy', 'Short Levy' 'paid' in r. 10, *meaning of.*

Under r. 8 of the Central Excise Rules, 1944, made under the Central Excise and Salt Act, 1944, the Central Government issued a notification exempting cotton fabrics from excise duty. The respondents owned a textile mill and factory. They manufactured grey cloth which was removed from the mill and kept in a godown and later removed to the factory for being processed into leather cloth which was stored in another godown in the factory, from where it was taken out as finished product. The removal at each stage was done after filling the prescribed forms and with the permission of the Excise Inspector Incharge. In each of the forms filled by the respondents upto July 30, 1960, the Excise Inspector had made an assessment showing the rate of duty and the amount of total duty payable as 'nil'. Later, the excise authorities thought the goods were not of the description exempted under the notification and on November 3, 1961, two notices were issued, calling upon the respondents to make certain payments, one under r. 10A and the other under r. 9 of the Rules. The respondents protested and filed a writ petition in the High Court. The High Court held that the proper rule applicable was r. 10 but that as the demand notices were not issued within 3 months as required by that rule, the notices were illegal and void.

In appeal to this Court,

HELD: (1) Rule 10A cannot apply when a short levy is made through error or misconstruction on the part of an officer as such a case is specifically provided for by r. 10, because, r. 10A deals with residuary powers and does not apply when specific provision for collection of duty is provided for by other rules. [516 H; 517 A; 521 D]

(2) The proper provision under which action should have been taken, if at all, is r. 10. Under r. 10, when duties or charges have been *short-levied* through inadvertence, error, collusion or misconstruction on the part of an officer, the person chargeable with the duty or charge shall pay the deficiency on written demand being made within three months from the date on which the duty or charge was *paid*. Though the words used are 'short-levied' and 'paid', in order to attract r. 10 it is not necessary that some amount of duty should have been assessed and that the said amount should also have been actually paid. It will apply even to cases where there has been a nil assessment, in which case, the entire duty later on assessed must be considered to be the duty originally short-levied. [519 F-G; 520 E-F; 521 D-E]

(a) The expression 'levy' is not used in the Act or the Rules as meaning actual collection, because, s. 3(1) of the Act uses both the expressions 'levied' and 'collected'. [514 G-H]

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(b) The expression 'paid' in r. 10 should not be read in a vacuum and it will not be right to construe it literally as 'actually paid'. The word will have to be understood and interpreted in the context in which it appears. If the literal construction is accepted, then in a case where an assessee, in collusion, manages to have a very petty amount of duty assessed, he can, if he paid the amount, effectively plead limitation of three months, but, when no duty has been levied there would be no period of limitation, a result which would be anomalous. Therefore, the proper interpretation to be placed on the expression 'paid' is 'sought to have been paid.'

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(c) This interpretation will not cause any difficulty in calculating the period of three months. The Act and the Rules provide very elaborately the stage and the time when the duty is to be *paid* and that must be considered to be the stage or time when the duty 'ought to have been paid', and the period of three months will be counted from that time. [519 G-H]

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Gursahai Saigal v. *C.I.T. Punjab*, [1963] 3 S.C.R. 893 followed,
Allen v. *Thorn Electrical Industries Ltd.* (1968) 1 Q.B. 487, referred to.

(3) Rule 9 does not also apply to the facts of the case. Rule 9(1) provides for the time and manner of payment of duty. To attract r. 9(2) the goods should have been removed in contravention of sub-r. (1), that is, clandestinely and without assessment; but in this case there is no such clandestine removal without assessment. Moreover, sub-r. (2) is a penal provision applicable where there is evasion of payment of duty, since the party is also made liable to a penalty and confiscation. [520 G-H; 521 A-C]
J. K. Steel v. *Union*. [1969] 2 S.C.R. 481, followed.

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Therefore, the demands having been made long after the expiry of the period of three months referred to in r. 10, the demands are not valid.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1467 of 1967.

Appeal from the judgment and order dated July 1, 2, 1965 of the Bombay High Court in Appeal No. 69 of 1963.

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V. A. Seyid Muhammad and *S. P. Nayar*, for the appellants.

C. K. Daphtary, Anil B. Diwan, Suresh A. Shroff, Ravinder Narain and *O. C. Mathur*, for the respondent.

S. J. Sorabjee and *O. C. Mathur*, for the intervener.

The Judgment of the Court was delivered by

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Vaidialingam, J. This appeal by certificate is directed against the judgment and order of the Division Bench of the Bombay High Court dated July 1/2, 1965 confirming the decision dated August 6/7, 1963 of the learned Single Judge in Miscellaneous petition No. 20 of 1962 quashing the two notices of demand dated November 3, 1961 issued by the second appellant as also the notice dated December 2, 1961 issued by the first appellant for payment of the amount covered by the said two notices.

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The circumstances leading up to the filing of the writ petition may be mentioned. The respondents own a textile mill at

Elphinstone Road, Parel, Bombay where they manufacture, *inter alia*, grey cloth. They also have a factory situated at Tulsi Pipe Lane Road, Bombay for processing grey cloth into various other goods like leather cloth, book binding cloth and other coated fabrics. Under s. 3 of the Central Excise and Salt Act, 1944 (hereinafter to be referred as the Act) duty is imposed on all excisable goods produced or manufactured in India at the rates set forth in the First Schedule to the Act. Item 19 of the First Schedule includes cotton fabrics. Section 3 of the Act provides that excise duty 's to be collected in such manner as may be prescribed by rules made under the Act. On cotton fabrics additional excise duty called handloom cess is also imposed under the additional Duties of Excise (Goods of Special Importance) Act, 1957 and Khadi and other Handloom Industries Development (Additional Excise Duty on Cloth) Act, 1953, respectively. Under s. 37 of the Act, the Central Government has made rules called the Central Excise Rules, 1944 (hereinafter to be referred as the Rules). Rule 8 gives power to the Central Government to exempt by notification subject to such conditions as may be specified therein any excisable goods from whole or any part of duty leviable on such goods. Accordingly the Central Government issued a notification Ex. A dated January 5, 1957 exmpting cotton fabrics mentioned therein wholly from excise duty. Item No. 2, related to 'leather cloth and inferior or imitation leather cloth ordinarily used in book binding'. The exemption granted in respect of this item and another item was withdrawn by the Central Government with effect from July 30, 1960 by notification Ex. D dated July 29, 1960.

There does not appear to have been any controversy before the High Court that the two notices dated November 3, 1961 and the notice dated December 2, 1961 related only to goods falling under item No. 2. of the notification Ex. A. The respondents between July 4, 1958 and July 30, 1960 manufactured grey cloth in the textile mill and sent some of those items to their factory for being processed and manufactured into leather cloth and imitation leather cloth. During the material period the company used to manufacture grey cloth and used to store them in a bonded godown. Periodically they used to send to the factory such quantities of grey cloth as were required after filling in the necessary forms prescribed by the rules and after obtaining the necessary permission in the manner prescribed by the rules from the Excise Inspector Incharge of the textile mill. The respondents had, however, not obtained the requisite licence and so they paid excise duty on grey-cloth manufactured in their mill during the period July 4, 1958 and July 30, 1960 manufactured grey cloth in the manufacturing leather cloth and imitation cloth. The respondents later on obtained the necessary licence with the result that

A they became entitled to remove the grey-cloth manufactured at their textile mill to their factory without paying excise duty on the grey-cloth at the time when the goods were removed. The grey-cloth so removed after September 30, 1959 and before July 30, 1960 used to be kept in the bonded godown. Those goods were removed to the factory after filling up the necessary forms B and obtaining the permission of the Excise Inspector Incharge of the factory. The grey-cloth after it was processed and made into leather cloth or imitation leather cloth was again stored in another bonded godown in the factory and they were removed by the company as finished products after filling in form A.R.I. prescribed by the rules. There is again no dispute that in each of C these A.R.I. forms the company had shown and made a declaration that the excise duty payable on the goods governed by the forms was 'nil'. Under the heading 'Assessment Memorandum' in the said form the particulars regarding rate of duty and amount of total duty payable on the goods referred to in the form had to be filled up and signed by the Excise Inspector. There is no D controversy that in each of the A.O.I. forms filed by the respondents during the period July 4, 1958 and July 30, 1960, the Excise Inspector Incharge, Leather Cloth Division has made an assessment in the appropriate portion of those forms showing the rate of duty and the amount of total duty payable as 'nil' and has affixed his signature under such 'Assessment Memorandum'. Therefore, it will be seen that all the goods removed by the res- E pondents during the said period were shown by them as not liable to pay any excise duty and were also assessed by the Excise Inspector as not liable to pay any duty.

Later on, the excise authorities appear to have entertained some doubt whether the goods covered by these A.R.I. forms were of the description exempted under item No. 2 of the notifi- F cation Ex. A. Some correspondence took place between the department and the respondents. On November 3, 1961, the second appellant issued two notices marked Ex. G. The first notice issued under rule 10A required the respondents to pay a sum of Rs. 1,07,146,39. In the particulars of demand it was stated that the amount represented duty on leather cloth manufac- G tured out of (i) non-duty paid cloth and (ii) duty paid cloth cleared without payment of duty from October 1, 1959 to March 31, 1960.

The second notice of the same day issued under rule 9 called upon the respondents to pay a sum of Rs. 1,502,24 representing the extra processing duty on leather cloth manufactured out of H duty paid cloth from July 4, 1958 to September 30, 1959.

These two notices were followed by the first appellant by issuing a letter of demand dated December 2, 1961, Ex. H, calling

upon the respondents to pay up the amount as per the notice issued by the second appellant. The respondents were advised that if they are aggrieved with the decision they may go up in appeal to the Collector of Central Excise, Bombay. The respondents sent a reply dated December 28, 1961 Ex. I, contesting validity of the notices dated November 3, 1961 and December 2, 1961. They objected to the demand on the ground that the notices were illegal and neither rule 9 nor rule 10A gave power to the authorities to issue such notices. They further contended that the demands were barred by time. The respondents also addressed a letter on the same lines to the Central Board of Revenue.

As there was no favourable response from the appellants they filed the writ petition, out of which these proceedings arise, in the High Court to quash Exhibits G and H.

The respondents contended before the High Court that neither rule 9 nor rule 10A gave power to the appellants to issue the demand notices. Their stand was that if at all it was rule 10 that applied and as the demands have been made long after the period of three months prescribed in the said rule, the notices were illegal and void.

On behalf of the appellants it was urged that rule 10 has no application as that rule will apply only when duties and charges have been 'short-levied'. As initially no amount has been levied in this case, rule 10 has no application. According to the appellants the rule applicable was rule 10A. Alternatively it was contended that if rule 10A did not apply, the demands made by them were amply covered by rule 9(2).

The learned Single Judge accepted the contention of the respondents and held that rule 10 applied and as the demand notices had been issued long after the expiry of three months, Ex. G and H, the notices, were illegal and void. In this view the learned Single Judge quashed the said notices. On appeal the Division Bench confirmed the order of the learned Single Judge.

This is a convenient stage to refer to the relevant rules. They are rules 7, 9, 10, 10A, 52 and 52A(1). We have already referred to the fact that the rules have been made by the Central Government under s. 37 of the Act. Those rules, referred to above, are as follows :

> "(7) Recovery of Duty :—Every person who produces, cures, or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty or duties leviable on such goods, at such time and place and to such person as may be designated, in or

A under the authority of these Rules, whether the payment of such duty or duties is secured by bond or otherwise.

(9) Time and manner of payment of duty :—

(1) No excisable goods shall be removed from any B 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 C manner as is prescribed in these Rules or as the Collector may require and except on presentation of an 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 stor- D age 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 in rule 13;

Provided further that such goods may be removed on part-payment of duty leviable thereon if the Central Government, by notification in the Official Gazette, E 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 F 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 internal, 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 G to be removed from the place of production, curing, manufacture or storage.

(2) If any excisable goods are, in contravention of sub-rule (i) deposited in, or removed from, any place specified therein, the producer or manufacturer thereof H shall pay the duty leviable on such goods upon written demand made 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.

(10) Recovery of duties or charges short-levied, or erroneously refunded—

When duties or charges have been short-levied through inadvertance, error, collusion or mis-construction on the part of an officer, or through mis-statement 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 owners 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.

(52) Clearance on payment duty—

When the manufacturer desires to remove goods on payment of duty, either from the place or a premise 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

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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 despatched to the Treasury by money-order shall allow the goods to be cleared.

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52A-(1) Goods to be delivered on a Gatepass—

No excisable goods shall be delivered from a factory except under a gatepass in the proper Form 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."

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Dr. Syed Mohammad, learned counsel for the appellants urged that going by a plain reading of rule 10, it is clear that the said rule will apply only to cases : (1) when an assessment has been made that same amount is due as duty and (2) when the said amount so assessed has been paid by the party concerned. In this case, he pointed

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out, there has been, no doubt, an order of assessment passed when the goods were cleared by the party, but that order of assessment was not one making the party liable to pay any duty, on the other hand, it was an order of 'nil-assessment' under which the party was to pay no duty whatsoever. In consequence of such assessment, no duty having been paid, it cannot be stated that there

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has been a short levy for any of the reasons mentioned in rule 10. According to the learned counsel rule 10 will apply only when there has been an assessment making the party liable to pay some duty and that amount so assessed has also been actually paid or adjusted by the party, as the case may be. When later on it is found that the amount so levied and paid falls short of the correct amount that ought to have been levied and paid by the

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party, rule 10 will stand attracted. In this connection he placed very great reliance on the concluding part of rule 10 where a period of three months by way of limitation has been provided for calling upon the party to pay the deficiency and the period of three months is to be calculated "from the date on which the duty or charge was paid . . . ." He stressed that the use of the expres-

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sion "paid" clearly indicates that some duty must have been actually paid by a party on a particular date and if that were not so, it would be difficult to calculate the period of three months within which a party can be called upon to make good the deficiency. The counsel also urged that the word 'levy' in rule 10 means actual collection and that short levy, therefore, denotes that full duty

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has not been collected. He also urged that rule 10A covers all cases of short levy or non-levy for any reason whatsoever and the notices issued by the appellants in this case are legal and valid. He finally urged that even if it is held that rule 10A does not

apply, the notices could be sustained under rule 9(2) inasmuch as the respondents have removed the goods without payment of duty in contravention of rule 9(1). The mere fact that one of the notices issued on November 3, 1961 refers to rule 10A is not on that ground invalid when the authorities have ample power to issue such notices under rule 9(2).

Mr. Daphtary, learned counsel for the respondents and Mr. Sorabjee, learned counsel for an intervener, have both contended that the notices issued by the appellants squarely come under rule 10 and as they have been issued beyond the period of three months, they have been rightly held to be invalid and illegal. Though the words used in rule 10 "duty or charge so paid", reading the rule as a whole it is clear that the rule does not contemplate that any amount should have been levied as a duty and that the said amount should have been paid. The word "paid" has only been used to provide a starting point of limitation of three months, Though the ordinary meaning of the expression "paid" is that some amount should have been actually paid as such, both the counsel pointed out, that the said word should be construed in the context in which it appears. So read, it is pointed out that the proper interpretation to be placed on the word "paid" is that it has been used to denote the stage or time when the duty or charge ought to have been paid. Such a reading will not do any violence to the language of rule 10. It is further pointed out that the expression "short levied" in rule 10 will cover cases not only levy of smaller amount that what is due but also of making the party not liable to pay any duty. In one case the short-levy will be the difference of the amount actually levied and the correct amount due; and in the other case the short levy will be the entire amount of duty that is found to be actually due by a party. The counsel further pointed out that rule 10A will apply only to those cases where no specific provision for collection of duty or any deficiency in duty has been made by the rules and that will apply also to any other sum of any other kind payable to the Central Government under the Act or the Rules. In this case, as the party admittedly has been assessed to 'nil duty' by the officers concerned and allowed to remove the goods, the specific provision for recovery of any short-levy is specifically provided for by rule 10, which will exclude rule 10A. On these grounds, both the counsel urged, that the High Court was right in holding that rule 10 applies and that the notices having been issued beyond the period of three months are illegal and invalid.

We are not inclined to accept the contention of Dr. Syed Mohammad that the expression 'levy' in rule 10 means actual collection of some amount. The charging provision section 3(i) specifically says "There shall be levied and collected in such a

A manner as may be prescribed the duty of excise...." It is to be noted that sub-section (i) uses both the expressions "levied and collected" and that clearly shows that the expression "levy" has not been used in the Act or the Rules as meaning actual collection. Dr. Syed Mohammad is, no doubt, well founded in his contention that if the appellants have power to issue notice either B under rule 10A or rule 9(2), the fact that the notice refers specifically to a particular rule, which may not be applicable, will not make the notice invalid on that ground as has been held by this Court in *J. K. Steel Ltd.* v. *Union of India*(1) :

> If the exercise of a power can be traced to a legitimate source, the fact that the same was purported to C have been exercised under a different power does not vitiate the exercise of the power in question. This is a well settled proposition of law. In this connection reference may usefully be made to the decisions of this Court in *B. Balakotaiah* v. *The Union of India and ors*(2) and *Afzal Ullah* v. *State of U.P.*(3).

D In this case, the officer who issued the two notices is competent to make demands under both rules 9(2) and rule 10-A. But in order to sustain the validity of the demand either under rule 9(2) or rule 10-A, the appellants will have to go further and establish that the demands can be justified under either of the rules.

E Before we deal with the contentions of the learned counsel we may state that rule 10-A was incorporated because of the decision of the Nagpur High Court in *Messrs Chhotabhai Jethabhai Patel* v. *Union of India*(4). The assessees in that case were a firm of tobacco merchants and manufacturers of bidis holding licence under the Central Excise Rules. On the introduction in F Parliament of Bill No. 13 of 1951 on February 28, 1951, the assessees paid the requisite duty on tobacco stored by them under the declared provision read with sections 3 and 4 of the Provincial Collection of Taxes Act, 1931. The assessees cleared tobacco from the warehouse between March 1, 1951 and April 28, 1951, after obtaining clearance certificates from the Range Officer, G Central Excise. The rate of duty payable on un-manufactured tobacco was increased by the Finance Act of 1951. On June 4, 1951 a demand was made by the Range Officer, Central Excise at the increased rate and the assessees therein were asked to pay the said increase. The assessees challenged the demand before the High Court under Art. 226 of the Constitution on various grounds. H The Nagpur High Court held that rule 10 did not apply and that the demand was invalid.

(1) [1969] 2 S.C.R. 481.
(2) [1958] S.C.R 1052.
(3) [1964] 4 S.C.R. 991.
(4) I.L.R. [1952] Nag., 156.

After the decision of the Nagpur High Court, the Central Government by a notification dated December 8, 1951 amended the Central Excise Rules, 1944 by the addition of a new rule 10-A. On the basis of this rule in respect of the same assessees a further and fresh demand was made for payment of duty as per the Finance Act, 1951. The assessees challenged the validity of the demand on the same ground as before. The Full Bench of the Nagpur High Court rejected the assessees' contention and held that rule 10A covers a case for increased levy on the basis of a change of law. This decision was sought to be challenged before this Court but without any success. In fact this Court in *Chhotabhai Jethabhai Patel and Co.* v. *The Union of India and another*(1) specifically rejected the assessees' claim regarding non-applicability of rule 10A stating that it had been specifically designed "for the enforcement of a demand like the one arising in the circumstances of the case". The decision of this Court is an illustration of certain types of cases to which rule 10-A will apply.

This now takes us to the question of proper interpretation to be placed on the expression "short-levied" and "paid" in rule 10. Does the expression "short-levied" mean that some amount should have been levied as duty as contended by Dr. Syed Mohammad or will that expression cover even cases where the assessment is of 'nil duty', as contended by Mr. Daphtary. What is the meaning of the word "paid" in rule 10? It is contended on behalf of the appellants that it means "actually paid", whereas, according to the respondents, it means "ought to have been paid". Taken literally, the word "paid" does mean actually paid in cash. That means that a party or an assessee must have paid some amount of duty whatever may be the quantum. If this literal interpretation is placed on the expression "paid" in rule it is needless to state that it will support in a large measure the contention of Dr. Syed Mohammad that rule 10 contemplates a short-levy in the sense that the amount which falls short of the correct amount has been assessed and actually paid. In our opinion, the expression "paid" should not be read in a vacuum and it will not be right to construe the said word literally, which means actually paid. That word will have to be understood and interpretted in the context in which it appears in order to discover its appropriate meaning. If this is appreciated and the context is considered it is apparent that there is an ambiguity in the meaning of the word "paid". It must be remembered that rule 10 deals with recovery of duties or charges short levied or erroneously refunded. The expression "paid" has been used to denote the starting point of limitation of three months for the issue of a written demand. The Act and the

(1) [1962] Supp. [2] S.C.R. 1.

A Rules provide in great detail the stage at which and the time when the excise duty is to be paid by a party. If the literal construction that the amount should have been actually paid is accepted, then in case like the present one on hand, when no duty has been levied, the Department will not be able to take any action under rule 10. Rule 10-A cannot apply when a short-levy is made B through error or mis-construction on the part of an officer, as such a case is specifically provided by rule 10. Therefore, in our opinion, the proper interpretation to be placed on the expression "paid" is "ought to have been paid". Such an interpretation has been placed on the expression "paid" occuring in certain other enactments as in *Gursahai Saigal* v. *Commissioner of Income-tax, Punjab*(1) and in *Allen* v. *Thorn Electrical Industries Ltd.*(2). C In *Gursahai Saigal* v. *The Commissioner of Income-tax, Punjab*(1), the question arose as follows : In certain assessment proceedings under the Indian Income-tax Act, 1922, an assessee was charged with interest under sub-section (8) of s. 18A of that Act. Under that sub-section interest calculated in the manner D laid down in sub-section (6) of s. 18A was to be added to the tax assessed. Sub-section 3 of s. 18A dealt with cases of a person who has not been assessed before and he was required to make his own estimate of the tax payable by him and pay accordingly. Sub-section (3) of s. 18A was applicable to the assessee in that case. However, he neither submitted any estimate nor did he pay any advance tax. Under sub-section (6) of s. 18A it was E provided :

> "Where in any year an assessee has paid tax under sub-section (2) or sub-section (3) on the basis of his own estimate, and the tax so paid is less than eighty per cent of the tax determined on the basis of regular assess- F ment simple interest at the rate of six per cent per annum from the 1st day of January in the financial year in which the tax was paid up to the date of the said regular assessment shall be payable by the assessee upon the amount by which the tax so paid falls short of the said eighty per cent."

G This sub-section is to apply to cases where tax has been paid by an assessee according to his own estimate but that estimate was on regular assessment found to be deficient. Further, interest has to be calculated from 1st January of the Financial Year in which tax mentioned therein was paid and calculation has to be made on the short fall between the amount paid and eighty per cent of H the tax which was found payable on regular assessment. Sub-section (8) of s. 18A provided :

(1) [1963] 3 S.C.R. 893. (2) 1968 1.Q.B. 487.

"where, on making the regular assessment the Income-tax Officer finds that no payment of tax has been made in accordance with the foregoing provisions of this section, interest calculated in the manner laid down in sub-section (6) shall be added to the tax as determined on the basis of the regular assessment."

The assessee in that case did not dispute that sub-section(3) of s. 18A applied to him and that he should have made an estimate and paid advance tax. He also admitted that he never made an estimate nor did he pay any advance tax whatsoever. While admitting that sub-section (8) of s. 18-A applied to him, the assessee contended before this Court that since he had not paid any tax at all, it is not possible to calculate interest in the manner laid down in sub-section (6). According to the assessee there was no 1st day of January of a financial year in which the tax was paid and there was no question of a short fall between eighty per cent of the tax payable on regular assessment and the amount paid because he had paid nothing. While rejecting the said contention this Court held :

"The proper way to deal with such a provision is to give it an interpretation which, to use the words of the Privy Council in *Mahairam Kamjidas's* (case)(1) makes the machinery workable *utres valeat potius quam pereat*". We, therefore, think that we should read sub-section (6) according to the provision of which interest has to be calculated as provided in sub-section (8) in a manner which makes it workable and thereby prevent the clear intention of sub-section (8) being defeated. Now, how is that best done? As we have earlier said sub-section (6) deals with a case in which tax has been paid and therefore it says that interest would be calculated "from the 1st day of January in the financial year in which the tax was paid". This obviously cannot literally be applied to a case where no tax has been paid. If however the portion of sub-section (6) which we have quoted above is read as "from the 1st day of January in the financial year in which the tax ought to have been paid", the provision becomes workable. It would not be doing too much violence to the words used to read them in this way. The tax ought to have been paid on one or other of the dates earlier mentioned. The intention was that interest should be charged from January 1, of the financial year in which the tax ought to have been paid. Those

(1) 67 Indian Appeals 239.

A who paid the tax but a smaller amount and those who did not pay tax at all would then be put in the same position substantially which is obviously fair and was clearly intended."

Regarding the further contention that there was no short fall B as no tax has been paid it was observed :

> "With regard to the other question about there being no shortfall between eighty per cent of the amount of tax found payable on the regular assessment and the amount of tax paid in a case where no tax was paid, it seems to us the position is much simpler. If no tax is C paid, the amount of such shortfall will naturally be the entire eighty per cent. We also think that the case before us is very near to *Allen's* case.(1)"

The above decision establishes two propositions : (1) though the expression used was "paid" it is open to read it as "ought to have been paid" having regard to the context in which D it appears and to make the provision of law in which that expression appears workable; and (2) the short fall will be the entire eighty per cent referred to sub-section (6) of s. 18A.

Applying the above principles to the case on hand, the expression "paid" in rule 10 can be reasonably read as "ought to have E been paid". Similarly even in cases where there has been a nil assessment due to one or other of the circumstances mentioned in rule 10 and if subsequently it is found that duty is payable, then the entire amount of duty should be considered to have been short-levied. The literal meaning of the expression "paid" as actually paid in cash has again not been adopted by the Court of Appeal in *Allen* v. *Thorn Electrical Industries Ltd.*(2). Having F regard to the context in which the said expression appeared in the particular provision which came up for interpretation, the Court of Appeal construed the expression to mean "contracted to be paid". Therefore, the contention of Mr. Daphtary that the expression "paid" should be construed as "ought to have been paid" and even when no duty has been assessed, the entire duty when G subsequently assessed will be a short-levy, which is also supported by the decision of this Court in *Gursahai Saigal* v. *Commissioner of Income-tax, Punjab*(3) has to be accepted. It follows that in order to attract rule 10, it is not necessary that some amount of duty should have been assessed and that the said amount should have also been actually paid. That provision will apply even to H cases where there has been a nil assessment in which case the entire duty later on assessed must be considered to be the duty

(1) 22 T.C. 15, 16, 17. (2) [1968] 1 Q.B. 487.
(3) [1963] 3 S.C.R. 893.

originally short-levied. There is also no difficulty in calculating the period of three months. As pointed out above, the Act and the Rules provide very elaborately the stage and the time when the duty is to be paid and if that is so that must be considered to be the stage or time when the duty ought to have been paid and if so the period of three months will run from the time when the duty ought to have been paid.

Dr. Syed Mohammad referred us to certain decisions of the High Courts where a demand has been sustained under rule 10 or rule 10A. We have considered those decisions. In some of those decisions there has been a short-levy due to the reasons mentioned in rule 10 and the demand also has been issued within the period of three months and hence the notice had been sustained under rule 10. In other cases, it was specifically held that the demand covered by the notice issued under rule 10A has not been specifically provided for by any other rule and the demand therefore, was valid. These decisions, in our opinion, do not in any manner advance the case of the appellants and we do not think it necessary to deal with them individually.

We may point out that if the contention of Dr. Syed Mohammad that in order to constitute short-levy, some amount should have been assessed as payable by way of duty so as to make rule 10 applicable, is accented the result will be rather anamolous. For instance if due to collusion (which means collusion between a party and an officer of the Department) a sum of Rs. 2/- is managed to be assessed by way of duty when really more than thousand times that amount is payable and if the smaller amount of duty so assessed has been paid, the Department will have to take action within three months for payment of the proper amount of duty. On the other hand, if due to collusion again an order of nil assessment is passed, in which case no duty would have been paid, according to the appellants rule 10A will apply. We do not see any reason to distinguish the above two cases one from the other. Both are cases of collusion and if an assessee in collusion manages to have a petty amount of duty assessed and paid he can effectively plead limitation of three months under rule 10. Whereas in the same case of collusion where no duty has been levied there will be no period of limitation. In our opinion, that will not be a proper interpretation to be placed on rule 10A by us. By the interpretation placed by us on rule 10, the position will be that an assessee who has been assessed to a smaller amount as well as an assessee who has been assessed to nil duty will all be put on a par and that is what is intended by rule 10.

The above reasoning leads to the conclusion that rule 10A does not apply to the case on hand. Then the question is whether

A 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 B orders of assessment to nil duty. To attract sub-rule 2 of 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 C 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 D 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.* v. *Union of India*(1). Though on certain other aspects there was a difference of view amongst the learned Judges, on this aspect the decision is unanimous. There E is absolutely no material placed before us by the appellants which would justify the issue of the notice under rule 9(2).

To conclude rule 10A does not apply as the specific provision for collection of duty to cases like the one before us is specifically provided by rule 10 nor does rule 9(2) apply to the case on F hand. The proper provision under which action should have been taken if at all is rule 10. The demands having admittedly been made long after the expiry of the period of three months, referred to in the said rule, it follows that the demands were not valid. The High Court was justified in striking down the notices dated November 3, 1961 Ex. G as well as the demand dated December 2, 1961 under Ex. H.

G

The appeal fails and is dismissed with costs.

V.P.S. *Appeal dismissed.*

(1) [1969] 2 S.C.R. 481.