ASSISTANT COLLECTOR OF CENTRAL EXCISE, CALCUTTA DIVISION

v.

NATIONAL TOBACCO CO. OF INDIA LTD.

August 9, 1972

[A. N. RAY, I. D. DUA AND M. H. BEG, JJ.]

Central Excise Rules—Rule 10 *and* 10*A, Whether the impugned notice fell under Rule* 10 *to be ineffective and barred by limitation.*

The respondent manufactures cigarettes at its factory upon which Excise Duty is levied by the Assistant Collector of Central Excise, Calcutta Division. The rates varied according to the provisions of Finance Act, 1951, and 1956 and the Additional Duty of Excise (Goods of Special Importance) Act, 1957. The Company was required to furnish quarterly consolidated price lists and the particulars of cigarettes to be cleared were furnished by the Company as required by Rule 9 of the Central Excise Rules. For facilitating collection of duty, the Company maintained a large sum of money in a Current Account with the Central Excise authorities, who used to debit this account for the duty leviable on each stock of cigarettes allowed to be removed.

The Company used to furnish its quarterly price lists to the Collector on forms containing nine columns and until July 1957, so long as this form was used by the Company, no difficulty was experienced in checking prices. But after this column was dropped from the new form of six columns, the Excise authorities encountered some difficulty in valuing the cigarettes for levying Excise Duty. They therefore, changed the basis of assessment from the Distributors selling price to the wholesale cash selling price at which stockists or agents were selling the same in the open market.

The authorities informed the Company of this change of basis on 5-11-58 by letter, which also asked the Company to furnish its price lists immediately for determining the correct assessable value of its cigarettes. Two days thereafter, the authorities served a notice upon the Company demanding payment of Rs. 1,67,072,40 P. as Basic Central Excise Duty and Rs. 74,574,85 P. as Additional Central Excise Duty on ground of short levy for a certain brand of cigarettes cleared from Company's Factory between 10th August 1958. After another five days, the authorities sent another notice demanding more than Rs. 6 lakhs as Basic Central Excise Duty and more than Rs. 2 lakhs as Additional Central Excise Duty. On the following day, the authorities sent a third notice under Rule 10-A of the Central Excise Rules, demanding more than Rs. 40,000/- as Central Excise Duty and more than Rs. 16,000/- as Additional Duty.

The Company challenged these notices by a writ before the High Court. The High Court quashed the notices on the ground that the Company had not been given an opportunity of being heard. No appeal was filed by the other side against this decision, but when the case went back to the Collector, he issued a fresh notice on 24-4-1960. By this notice, for certain periods, a sum of more than Rs. 10 lakhs was levied as Basic Central Excise Duty and a total sum of more than Rs. 3 lakhs as Additional Duty, and this amount had been provisionally debited in the Company's Account on the basis of the price list supplied by the Company and the Company was informed that if it desired a personal hearing, it

A can appear before the authorities to make the final assessment in accordance with law.

The Company challenged the validity of this notice dated 24-4-60 on the ground that the notice was barred by limitation and was issued without jurisdiction, so that no proceedings could be taken. The learned single Judge, as well as the Divisional Bench of the High Court allowed the B petition on the ground that the notice was barred by time under Rule 10 of the Central Excise Rules because the notice was held to be fully covered by Rule 10 and by no other rule. The case was certified under Art. 33(a), (b) and (c) for an appeal to this Court. Rule 10 of the Central Excise Rules provides that when duties or charges have been short levied through inadvertence or misconstruction etc., the person chargeable with the duty so short levied, shall pay the deficiency or pay the amount paid to him in excess on written demand by the proper officer C within three months from the date on which the duty or charge is paid or adjusted in the owner's account, if any, or from the date of making the refund. It was contended that this was substantially a provisional assessment covered by Rule 10-B. The Division Bench of the High Court, however, refused to agree that the impugned notice of 24-4-60 fell under Rule 10-A. The reason given for this refusal was that such a case was neither taken before the learned single Judge, nor could be found in the grounds of the appeal despite the fact that the appellant D had ample opportunity of amending its Memorandum of Appeal. Allowing the appeal.

HELD : (i) That the High Court erroneously refused to consider whether the impugned notice fell under Rule 10-A. The applicability of Rule 10-A was very much in issue because the Collector in his affidavit denied that Rule 10-A of the said rules had any application to the facts E of the case.

(ii) It cannot be accepted that merely because the current account kept under Rule 9 indicated that an accounting had taken place, there was necessarily a legally valid or complete levy. The making of debit entries was only on ground of collection of the tax. Even if payment or actual collection of tax could be spoken of as a defective levy, it was only provisional and not final. It could only be closed or invested with validity F after carrying out the obligation to make an assessment that really determines whether the levy is short or complete. It is not a factual or presumed levy which could prove an assessment. This has to be done by proof of the actual steps taken which constitute assessment. [836D]

A mechanical adjustment, or settlement of accounts by making debit entries was gone through in the present case, but it cannot be said that G any such adjustment is assessment which is a quasi-judicial process and involves due application of mind to the facts, as well as to the requirements of law. Rule 10 and 10-A seems to be so widely worded as to cover any inadvertance error etc.; whereas 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 or by any rule. Both the rules as they stood at the relevant time, deal with collection, and not with assess- H ment. In *N. B. Sanjana's* case (A.I.R. 1971 S.C. 2039) this Court indicated that Rule 10-A which was residual 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's* case that the reason for the addition

of the new rule 10-A was a decision of the Nagpur (*Chotabhai Jethabhai's* case; A.I.R. 1952 Nagpur 139), so that a fresh demand may be made on a basis altered by law. The excise authorities had made a fresh demand under Rule 10-A, the validity of which was challenged, but it was upheld by a Full Bench decision of the High Court of Nagpur. This Court, in *Chotabhai Jethabhai's case* also rejected the assessee's claim that Rule 10-A was inapplicable after pointing out that the new rule was specifically designed for the enforcement of the demand like the present one. [836F-837E]

(iii) The present case, therefore, falls within the residuary clause of unforeseen cases from the provisions of S. 4 of the Act, read wih Rule 10-A, an implied power to carry out or complete an assessment, not specifically provided for by the rules, can be inferred. Therefore, it is wrong to hold that the case falls under Rule 10 and not under Rule 10-A.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1101 of 1967.

Appeal by certificate from the judgment and order dated September 28, 1966 of the Calcutta High Court in Appeal No. 7 of 1965.

G. L. Sanghi, B. D. Sharma and *S. P. Nayar,* for the appellant.

A. K. Sen, B. P. Maheshwari and *Shambhu Nath Chunder,* for the respondent.

The Judgment of the Court was delivered by

Beg, J. The National Tobacco Co. of India Limited (hereinafter referred to as "the Company"), the Respondent in the appeal before us, manufactures Cigarettes, at its Factory in Agrapara, upon which Excise duty is levied by the appellant, the Assistant Collector of Central Excise, Calcutta Division (hereinafter referred to as "the Collector"). The rates at which the Excise duty was imposed upon the cigarettes of the Company under the provisions of the Central Excise and Salt Act of 1944 (hereinafter referred to as "the Act") were varied, from time to time, by the provisions of Finance Acts of 1951 and 1956 and the Additional Duties of Excise (Goods of Special Importance) Act of 1957. The Collector maintained an office at the factory itself for the levy and collection of tax. The Company was required to furnish quarterly consolidated price-lists which used to be accepted for purposes of enabling the Company to clear its goods, but, according to the Collector, these used to be verified afterwards by obtaining evidence of actual sales in the market before issuing final certificates that the duty had been fully paid up. The particulars of the cigarettes to be cleared were furnished by the Company on forms known as A.R.I forms required by Rule 9 of the Central Excise Rules. For facilitating collection of duty, the Company maintained a large sum of money in a current account with the

A Central Excise authorities who used to debit in this account the duty leviable on each stock of cigarettes allowed to be removed. This current account, known as "personal ledger account", was maintained under the third proviso to Rule 9 which lays down :

9(1) " * * * * * *

B Provided also that the Collector may, if he thinks fit, instead of requiring payment of duty in respect of each separate consignment of goods removed from the place or premises specified in this behalf, or from a store room or warehouse duly approved, appointed or licensed by him keep with any person dealing in such goods an account-current of the duties payable thereon
C and such account shall be settled at intervals not exceeding one month and the account-holder shall periodically make deposit therein sufficient in the opinion of the Collector to cover the duty due on the goods intended to be removed from the place of production, curing, manufacture or storage",

D It appears that the company used to furnish its quarterly price-lists to the Collector on forms containing nine columns including one to show the "distributors' selling price". Until July 1957, so long as this form was used by the Company, no difficulty seems to have been experienced in checking the prices. But, after this column was dropped from the new form of six columns,
E the excise authorities seem to have encountered some difficulty in valuing the cigarettes for levying excise duty. They, therefore, changed the basis of assessment itself from "the Distributors' Selling Price" to "the wholesale cash selling price at which stockists or agents are selling the same to an independent buyer in the open market". They held the view that such a charge could be
F made having regard to the provisions of Section 4 of the Act. The Deputy Superintendent of Central Excise informed the Company of this change of basis on 5-11-1958 by a letter which also asked the Company to furnish its price lists immediately "for determining the correct assessable value" of its cigarettes. On 7th November, 1958, the Deputy Superintendent served a notice upon the Company demanding payment of a sum of
G Rs. 1,67,072,40 as basic Central Excise duty and Rs. 74,574,85 as additional Central Excise duty on account of short levy for a certain brand of cigarettes cleared from the Company's factory from 10th August, 1958 to 5th November, 1958. On 12-11-1958, the Deputy Superintendent sent another notice demanding payment of a sum of Rs. 6,16,467,49 as basic
H Central Excise duty and Rs. 2,10,492,15 as additional central excise duty for short levy in respect of some brands of cigarettes cleared from the factory between 1-11-1957 to 9-8-1958. On 13-11-1959, the Deputy Superintendent sent a

third notice to the Company under Rule 10-A of the Central Excise Rules 1944, demanding payment of Rs. 40,726,48 as basic Central Excise duty and Rs. 16,958.50 as additional duty for short levy in respect of various brands.

The Company applied to the Calcutta High Court under Article 226 of the Constitution against the three notices mentioned above, one of which specifically under Rule 10-A and the other two under Rule 10 of the Central Excise Rules. A learned single Judge of that Court quashed the notices by his order of 15-2-1960 on the ground that the Company had not been given any opportunity of being heard so as to be able to meet the material collected behind its back which formed the basis of the demands under the aforesaid three notices. On a joint request of both sides, the High Court did not decide the question whether notices of demand were time barred. But, the learned Judge said :

> "Nothing in this order will prevent the respondent from proceeding to take any step that may be necessary for such assessment or for the realisation of the revenue in accordance with the law".

The learned Judge had also held that neither the basis adopted by the company nor that put forward by the Collector was correct. The learned Judge pointed out the correct basis which was considered by him to be in consonance with the provisions of Section 4, sub.s(a) of the Act. He indicated the various factors required bv Section 4 of the Act which had to be taken into account and held :

> "The determination as to whether a wholesale market exists at the site of the factory or the premises of manufacture or production etc. or which is the nearest wholesale market, or the price at which the goods or goods of like kind and quality are capable of being sold must necessarily be a complicated question and must be determined carefully upon evidence and not arbitrarily. Such determination cannot wholly be made ex-parte, that is to say, behind the back of the assessee. A satisfactory determination can only be made by giving all information to the assessee and after giving the assessee an opportunity of establishing his own point of view, or checking and/or challenging any material or evidence upon which the Excise Authorities wish to depend".

As no appeal was filed by either side against this decision, it became final and binding between parties before us so that the question wether the High Court has correctly interpreted Section 4 of the Act in determining the basis on which the excise duty leviable could be assessed is not under consideration here.

When the case went back to the Collector, he issued a fresh notice on 24-4-1960. As the validity of this notice is the real question now in issue in the appeal before us, it may be reproduced *in toto* here. It turns as follows :

Registered A/D

GOVERNMENT OF INDIA

Collectorate of Central Excise

Office of the Assistant Collector of Central Excise,
Calcutta I Division (5, Clive Row), Calcutta

NOTICE

C. No. VI(b)14/3/58/3886
Dated 21st April, 1960

To

M/s. National Tobacco Co. (India) Ltd.,

Agarpara,

24 Parganas.

In connection with the assessment of Central Excise duties for the periods :

I. from 1st October, 1957 to 5th November, 1958 in respect of 316,885,000 of "No. Ten" brand Cigarettes.

II. from 1st January, 1958 to 28th January , 1958 in respect of 6,600,000 of "D.L.T. Mag" Cigarettes.

III. from 1st January, 1958 to 5th February, 1958 in respect of 9594,000 of "May Pole" Cigarettes.

IV. from 1st January, 1958 to 7th February, 1958 in respect of 3143,500 "Carltons Gold Seal" Cigarettes.

V. from 1st January 1958 to 31st January, 1958 in respect of 1471,250 of "John Peel" Cigarettes.

VI. from 1st January, 1958 to 16th January, 1958 in respect of 8200,000 of "Light House" Cigarettes.

VII. from 1st January, 1958 to 16th January, 1958 in respect of 9070,000 of "Gold Link" Cigarettes.

Please note that a sum of Rs. 10,05,133.25 np. (Rupees 10 lacs five thousand one hundred thirty three and twenty-five naya paise only) as basic Central Excise duty and a total sum of Rs. 3,43,208.25 np. (Rupees three lacs forty-three thousand two hundred eight and twenty-five naya paise only) as additional duty had been provisionally debited in your account on the basis of the price list supplied to us by you for the quarters :

(i) beginning October, 1957 dated 17th October, 1957. A

(ii) beginning January, 1958 dated nil.

(iii) beginning April, 1958 dated 14th April, 1958, and

(iv) beginning July, 1958 dated 14-7-58, and B

(v) beginning October, 1958, dated nil.

2. We now propose to complete the assessments for the said periods from the evidence in our possession from which it appears :—

C

(i) that there is no wholesale market for the goods covered by your price lists in or near the factory or the place of manufacture and that the nearest wholesale market for the sale is the Calcutta market.

(ii) the wholesale cash price of the articles in question at the time of sale and/or removal of the goods at the Calcutta market at which goods of like kind or quality are sold or are capable of being sold have been ascertained by us and the evidence at our disposal reveals that the prices quoted by you in your price-list are not correct. D E

3. The prices are as per chart annexed hereto which has been prepared on the basis of available evidence in terms of section 4(a) of the Central Excise and Sale Act, 1955. The vouchers mentioned in the chart are available for your inspection at any time next week during office hours. After obtaining inspection of the vouchers please attend at our office at 5 Clive Row, Calcutta on 2nd May 1960 at 10.30 a.m. for the purpose of discussing the points mentioned above.

4. We are prepared to give you a personal hearing with regard to all the points indicated above. If you have any evidence in support of your contention you are at liberty to produce the same at the time of hearing. Thereafter please note that we propose G to make the final assessment in accordance with law.

Sd./- (N. D. MUKHERJEE)
Assistant Collector of Central Excise,
Calcutta I Division, Calcutta"

The Company challenged the validity of this notice by means of a second petition for Writs of Prohibition and *Mandamus* against the Collector on the ground that the notice was barred by time

A and was issued without jurisdiction so that no proceedings founded on it could be taken. It was prayed that the Collector may be ordered to cancel the notice. The petition was allowed by a learned Single Judge of the Calcutta High Court on 3-1-1964 on the ground that such a notice was barred by the provisions of Rule 10 of the Central Excise Rules because the notice was held B to be fully covered by Rule 10 and by no other rule. A Division Bench of the High Court confirmed this view on 8-9-1966 and dismissed the Collector's appeal. The case having been certified, under Article 133(a), (b) and (c) for an appeal to this Court, this question is before us now.

The learned Single Judge as well as the Division Bench of C the Calcutta High Court said that there was not enough material on record to conclude that there was any "provisional assessment" under Rule 10-B (deleted on 1-8-1959 and substituted by Rule 9-B) which laid down :

"10B. PROVISIONAL ASSESSMENT OF DUTY :—

(1) Notwithstanding anything contained in these rules D

(a) There the owner of any excisable goods makes and subscribed a declaration before the proper Officer to the effect that he is unable for want of full information to state precisely the real value or description of such goods in the proper Form : or E

(b) Where the owner of any goods has furnished full information in regard to the real value or description of the goods, but the proper Officer requires further proof in respect thereof; or

(c) Where the proper Officer deems it expedient to subject any excisable goods to any chemical F or other test,

The proper Officer may direct that the duty leviable on such goods may, pending the production of such information or proof or pending the completion of any such test, be assessed provisionally.

G

(2) When the owner of any goods in respect of which the duty has been assessed provisionally under sub-rule(1) has paid such duty, the proper Officer may make an order allowing the goods to be cleared for home consumption or for exportation, as case may be and such order shall be sufficient authority for the removal of the goods by the owner :— H

Provided that before making any such order the proper officer shall require the owner to furnish a bond in the proper form binding the owner to pay the differen-

tial duty when the final assessment is made. (3) When the duty leviable on such goods is assessed finally in accordance with the provisions of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed, falls short of, or is in excess of, the duty finally assessed. the owner of the goods shall pay the deficiency or be entitled to a refund, as the case may be."

No order directing provisional assessment, contemplated by Rule 10-B, (applicable at the relevant time) has been placed before us. Nor was the Company asked by the Collector to furnish a bond to pay up the difference after making a final assessment as was required under Rule 10-B. It was, however, contended for the Collector that the execution of a bond, for the satisfaction of the Collector, could be dispensed with in a case where the Company kept a large sum of money in deposit in the "personal ledger account" to guarantee its ability to meet its liabilities. It was also pointed out that the learned Single Judge as well as the Division Bench had found that the practice of provisionally approving the price-lists supplied by the Company, pending acceptance of their correctness after due verification, had been established as a mater of fact. It was submitted that this was substantially a "provisional assessment" covered by Rule 10-B, although it may not conform to the technical procedural requirements of such an asessment.

Even if the making of debit entries could, on the facts of the case, be held to be merely provisional we think that what took place could not be held to be a "provisional assessment" within the provisions of Rule 10-B which contemplated the making of an order directing such an "assessment" after applying the mind to the need for it.

Before proceeding further we will deal with the question whether the Division Bench correctly refused to permit an argument that the impugned notice of 24-4-1960 fell under Rule 10-A. The ground given for this refusal was that such a case was neither taken before the learned Single Judge nor could be found in the grounds of appeal despite the fact that the appellant had ample opportunity of amending its Memorandum of appeal. The appellant has, however, relied on a previous intimation given to the counsel for the respondent that such a contention would be advanced at the hearing of the appeal and also on an application dated 21-3-1966 praying for permission to add the alternative ground that the impugned notice fell under Rule 10-A. We think that this refusal was erroneous for several reasons. Firstly the Company having come to Court for a Writ of Prohibition on the ground that the impugned notice was issued with-

A out jurisdiction had necessarily to establish the case which it sets up in paragraph 25 of its Writ Petition, that the notice was not authorised by the rules including Rule 10-A. As the notice of 21-4-1960 was followed on 4-5-1960 by a correction by another notice of certain statements both the notices were assailed in paragraph 25(ii) in the following words :

B

> "The respondent has mala fide and without jurisdiction issued the said impugned notices pretending to falsely state that the aggregate sum therein mentioned has been provisionally debited in your petitioner's account and pretending to intimate to your petitioner
> C that the respondent proposed to complete the assessment, and thereby, he is seeking, under the guise of completing an alleged assessment which had already been completed and duty in respect whereof had already been paid, to do indirectly what he could not do directly inasmuch as Rule 10A of the said Rules has
> D no application to the facts of the case and inasmuch as recovery of any duty which might have been short levied under Rule 10 of the Rules is barred by limitation".

This assertion was met by a categorical denial by the Collector
E in paragraph 26(ii) of the Collector's affidavit in reply where it was stated that it was denied "that Rule 10-A of the said Rules had no application to the facts of the case as alleged or that the recovery of any duty which had been short levied was barred by limitation under Rule 10 of the said Rules as alleged or at all". Thus, the applicability of Rule 10-A was very much in issue. Secondly, we find, from the Judgment of the learned Single
F Judge that, as the burden lay upon the petitioning Company to demonstrate, for obtaining a Writ of Prohibition, that the impugned notice was not authorised by any rule, its counsel had contended, *inter-alia*, that the notice did not fall under Rule 10-A. The question was thus considered by the learned Single Judge. Thirdly, the question whether the Collector did or did
G not have the power to issue the impugned notice under or with the aid of Rule 10-A was a question of law and of jurisdiction, going to the root of the case, which could be decided without taking further evidence. Indeed, as the burden was upon the petitioning Company to show that the impugned notice was issued without jurisdiction, a finding that the notice did not fall
H even within Rule 10-A was necessary before a Writ of Prohibition could issue at all. We think that the Division Bench ought to have permitted the question to be argued, subject to giving due opportunity to the petitioning Company to meet it on such

terms as the Court thought fit, even if the point was not taken in the grounds of appeal. Therefore, we will consider this question also.

Rule 10 of the Central Excise Rules, 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 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".

Rule 10-A reads as follows:

"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."

The two rules set out above occur in Chapter III of the Central Excise Rules 1944 headed "Levy and Refund of, and Exemption from Duty". Rule 7 merely provides that the duty leviable on the goods will be paid at such time and place and to such person as may be required by the rules. Rule 8 deals with power to authorise exemptions in special cases. Rule 9(1) provides for the time and manner of payment of duty. This rule indicates that ordinarily the duty leviable must be paid before excisable goods are removed from the place where they are manufactured or stocked, and only after obtaining the permission of the officer concerned. The third proviso

A to Rule 9 has already been set out above. Rule 9(2) provides for the recovery of duty and imposition of penalty in cases where Rule 9 sub. r (1) is violated. Rule 9A specifies the date with reference to which the duty payable is to be determined. We are not concerned here with Rules 11 to 14 dealing with refunds, rebates, exports under bonds and certain penalties for breaches B of Rules.

Rule 52 and 52-A, found in Chapter V, dealing with a number of matters relating to "Manufactured Goods", may also be cited here :

> "52. Clearance on payment of duty—When the manufacturer desires to remove goods on payment of C 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 D 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 to the account of the Collec- E tor 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".
>
> "52A. Goods to be delivered on a Gatepass—(1) No excisable goods shall be delivered from a factory F 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."

It will be noticed that in Chapter III, the term "assessment" was used only in the former rule 10-B, corresponding to the G present rule 9-B, while dealing with provisional assessment of duty. But, Rule 52 shows that an "assessment" is obligatory before every removal of manufactured goods.. The rules, however, neither specify the kind of notice which should precede assessment nor lay down the need to pass an assessment order. All we can say in that rules of natural justice have to be observed for, as was held by this Court in *K. T. M. Nair* v. *State of* H *Kerala*(1), "the assessment of a tax on person or property is atleast of a quasi-judicial character".

(1) [1961] 3 S.C.R. 77 @ 94.

Section 4 of the Act lays down what would determine the value of excisable goods. But, the Act itself does not specify a procedure for assessment presumably because this was meant to be provided for by the rules. Section 37(1) of the Act lays down that "the Central Government may make rules to carry into effect the purposes of this Act". Section 37, sub. s (2), particularises "without prejudice to the generality of the foregoing power" that "such rules may provide for the assessment and collection of duties of excise, the authorities by whom functions under this Act are to be discharged, the issue of notice requiring payment, the manner in which the duty shall be payable, and the recovery of duty not paid". It is clear from Section 37 that "assessment and collection of duties of excise" is part of the purposes of the Act, and Section 4, dealing with the determination of value for the purposes of the duty, also seems to us to imply the existence of a quasi-judicial power to assess the duty payable in cases of dispute. "Collection", seems to be a term used for a stage subsequent to "assessment". In a case where the basis of a proposed assessment is disputed or where contested questions of fact arise, a quasi-judicial procedure has to be adopted so as to correctly assess the tax payable. Rule 52 certainly makes an "assessment" obligatory before removal of goods unless the procedure for a "provisional assessment" under Rule 10-B (now rule 9-B) is adopted. But, if no quasi-judicial proceeding, which could be described as an "assessment" either under Rule 52 or "provisional assessment" under Rule 10-B (now Rule 9-B) takes place at the proper time and in accordance with the rules, is the Collector debarred completely afterwards from assessing or completing assessment of duty payable? That seems to us to be the real question to be decided here.

One of the arguments on behalf of the Collector was that no "assessment", for the purpose of determining the value of excisable goods, having taken place in the case before us, there could be no "levy" in the eye of law. It was urged that, even if there was no "provisional assessment", as contemplated by Rule 10-B, whatever took place could, at the most, be characterised as an "incomplete assessment", which the Collector could proceed to complete even after the removal of the goals. It was contended that such a case would be outside the purview of Rule 10 as it was not determined whether there actually was a short levy. Hence, it was submitted there was no question of a proceeding barred by the limitation prescribed for making a demand for a short levy in certain specified circumstances. The Division Bench, while repelling this contention, held :

> "In the present case, it appears that the procedure adopted was that the respondents issued a price list

A quarterly. In that price list, they gave their own estimate as to the value of the goods. For the time being the excise authorities accepted the value so given, and gave a provisional certificate to that effect, intending to check the market value and then finally determine the value later on. The procedure for issuing price list of
B approving the same provisionally and accepting payment therefore according to the estimate of the manufacturer, is a procedure which is not to be found either in the Act or the Rules".

It may be observed that this finding, that the procedure of a provisional acceptance of the Company's estimates was adopt-
C ed, seems inconsistent with another finding that what took place was a final adjustment of accounts within the purview of the 3rd proviso to Rule 9, set out above, constituting a "levy" accord to law. The Division Bench appears to have regarded this procedure of an almost mechanical levy as equivalent to a complete assessment followed by the payment of the tax which
D constituted a valid "levy". Hence, it concluded that, there being a legally recognised levy, the only procedure open to the Collector for questioning its correctness was one contemplated by Rule 10 so that a demand for a short levy had to be made within 3 months of the final "settlement of accounts" as provided specifically by Rule 10. The Division Bench considered this pro-
E cedure to be an alternative to an assessment under Rule 52 at the proper time and also to a provisional assessment in accordance with the procedure laid down in Rule 10-B. But, to regard the procedure under Rule 10 as an alternative to an assessment would be to overlook that it presupposes an assessment which could be reopened on specified grounds only within the
F period given there.

The term "levy" appears to us to be wider in its import than the term "assessment". It may include both "imposition" of a tax as well as assessment. Th term "imposition" is generally used for the levy of a tax or duty by legislative provision indicating the subject matter of the tax and the rates at
G which it has to be taxed. The term "assessment", on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods or property or whatever may be the object of the tax in a particular case and determining its amount. The Division Bench appeared to equate "levy" with an "assessment" as well as with the collection of a tax when it held that "when
H the payment of tax is enforced, there is a levy". We think that, although the connotation of the term "levy" seems wider than that of "assessment", which it includes, yet, it does not seem to

us to extend to "collection". Article 265 of the Constitution makes a distinction between "levy" and "collection". We also find that in *N. B. Sanjana Assistant Collector of Central Excise, Bombay & Ors.* v. *The Elphinstone Spinning & Weaving Mills Co. Ltd.*,A(1), this Court made a distinction between "levy" and "collection" as used in the Act and the Rules before us. It said there with reference to Rule 10 :

> "We are not inclined to accept the contention of of Dr. Syed Mohammad that the expression 'levy' in Rule 10 means actual collection of some amount. The charging provision Section 3(1) specifically says. 'There shall be levied and collected in such 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".

We are, therefore, unable to accept the view that, merely because the "account current", kept under the third proviso (erroneously mentioned as second proviso by the Division Bench) to Rule 9, indicated that an accounting had taken place, there was necessarily a legally valid or complete levy. The making of debit entries was only a mode of collection of the tax. Even if payment or actual collection of tax could be spoken of as a *de facto* "levy" it was only provisional and not final. It could only be clothed or invested with validity after carrying out the obligation to make an assessment to justify it. Moreover, it is the process of assessment that really determines whether the levy is short or complete. It is not a factual or presumed levy which could, in a disputed case, prove an "assessment". This has to be done by proof of the actual steps taken which constitute "assessment".

Undoubtedly, a mechanical adjustment and ostensible settlement of accounts, by making debit entries, was gone through in the case before us. But, we could not equate such an adjustment with an assessment, a quasi-judicial process which involves due application of mind to the facts as well as to the requirements of law, unless we were bound by law to give an unusual interpretation to the term "assessment". Here, we do not find any such definition of assessment or any compelling reason to hold that what could at most be a mechanical provisional collection, which would become a "levy" in the eye of law only after an "assessment", was itself a levy or an assessment.

Rules 10 and 10A, placed side by side, do raise difficulties of interpretation. Rule 10 seems to be so widely worded as to

(1) A.I.R. 1971 S.C. 2039 @ 2045

A cover any "inadvertence, error, cullusion or mis-construction on the part of an officer", as well as any "mis-statement 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 B Rule 10A 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's* case (Supra), this Court harmonised them by indicating that Rule 10A, which was residuary in character, would be inapplicable if a case fell within a specified category C of cases mentioned in Rule 10.

It was pointed out in *Sanjana's* case (Supra) that the reason for the addition of the new Rule 10A was a decision of the Nagpur High Court in *Chhotabhai Jethabhai Patel* v. *Union of India*(1), so that a fresh demand may be made on a basis altered by law. The Excise authorities had then made a fresh de- D mand, 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 & Co.*, v. *Union of India*(2) 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 E 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 rule so that an assessment has to be reopened. The findings given by the Calcutta High Court do not F show that, in the case before us, there was either a short levy or that one of the grounds for a short levy given in Rule 10 really and definitely existed. No doubt the Division Bench gave a reason for the way in which the claims became time barred, in the following words :

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> "It is *quite possible*, that the Excise authorities, in an attempt to help the appellants, by facilitating the movements of goods, *inadvertently allowed the claims to be barred by limitation.* That, however, is not a matter which can affect the question of limitation. The bar of limitation has been imposed by Statute. The morality of the case or the conduct of the parties H is therefore irrelevant unless the law provides that the court on that ground can afford relief".

(1) A.I.R. 1952 Nag. 139. (2) [1962] Supp. 2 S.C.R. 1

This finding was presumably given to show that the impugned notice fell within the purview of Rule 10 because the demand was due to a short-levy caused by "inadvertence" of the officer concerned. It will be noticed that the Division Bench did not go beyond finding a "possibility" of such inadvertence. This is not a finding that it was definitely due to it. No finding which could clearly relate the case to any cause for short levy found in Rule 10 was given. Moreover, we find that there was no case taken up by the Company in its petition before the High Court that any short levy resulted from an inadvertence of the officer concerned in the process of assessment. The case set up was that of a levy after a completed assessment, in accordance with law, which could not, according to the Company, be reopened. If, therefore, as we find from the conclusions recorded by the High Court itself what took place was not an "assessment" at all in the eye of law, which could not be reopened outside the provisions of Rule 10, we think that the case will fall beyond Rule 10 as it stood at the relevant time.

The notice set out above does not purport to be issued under any particular rule probably because the Collector, in the circumstances of the case, was not certain about the rule under which the notice could fall. But, as was pointed out by this Court in *Sanjana's* case (Supra), the failure to specify the provision under which a notice is sent would not invalidate it if the power to issue such a notice was there.

The notice alleges that it is a case of "incomplete assessment". The allegations contained in it have been characterised by the learned counsel for the Company as a change of front intended to cover up the neglet of the Collector in failing to comply with the correct procedure of making either an assessment before delievery contemplated by Rule 52 or a provisional assessment under Rule 10-B. We are unable to hold, either upon the findings given by the High Court or upon facts transpiring from the affidavits filed by the parties that the notice was a mere cloak for some omission or error or inadvertance of the Collector in making a levy or an assessment.

We may point out that Rule 10 itself has been amended and made more reasonable in 1969 so as to require a quasi-judicial procedure by serving a show cause notice "within 3 months from the date on which the duty or charge was paid or adjusted in the owner's account current, if any". This amendment, made on 11-10-1969, indicates that the quasi-judicial procedure, for a finding on an alleged inadvertence, error, collusion, or misconstruction by an officer, or mis-statement by the assessee, as the cause of an alleged short levy resulting from an assessment, can now be embarked upon and not necessarily completed

A within the prescribed period. We are, however, concerned with the procedure before this amendment took place. At that time, it was certainly not clear whether a case would fall under Rule 10 even before the short levy or its cause was established. Furthermore, in the present case, the reason for an alleged short-levy could be a change of basis of proposed assessment under B instructions from higher authorities mentioned above. Even that change of basis was held by the High Court to be erroneous. Until the High Court indicated the correct basis there was an uncertainty about it. Such a ground for an alleged short levy would be analogous to the reason for the introduction of Rule 10-A itself which, as pointed out in *N. B. Sanjana*'s case C (Supra), was a change in the law. One could go back still further and come to the conclusion that the real reason for the alleged short levy was a failure of the Company to supply the fuller information it used to supply previously and not just a mis-statement. If the case does not clearly come within the classes specified in Rule 10, this rule should not be invoked because, as was rightly contended for the appellant, a too wide D construction put on Rule 10 would make Rule 10A useless. The two rules have to be read together.

It is true that Rule 10-A seems to deal only with collection and not with the ascertainment of any deficiency in duty or its cause by a quasi-judicial procedure. If, however, it is E read in conjunction with Section 4 of the Act, we think that a quasi-judicial proceeding, in the circumstances of such a case, could take place under an implied power. It is well established rule of construction that a power to do something essential for the proper and effectual performance of the work which the statute has in contemplation may be implied [See Craies on *Statute Law* (Fifth Edition) p. 105]

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The question whether there was or was not an implied power to hold an enquiry in the circumstances of the case before us, in view of the provisions of Section 4 of the Act read with Rule 10-A of the Central Excise Rule, was not examined by the Calcutta High Court because it erroneously shut out consideration G of the meaning and applicability of Rule 10A. The High Court's view was based on an application of the rule of construction that where a mode of performing a duty is laid down by law it must be performed in that mode or not at all. This rule flows from the maxim : "*Expressio unius act exclusio alterius.*" But, as we pointed out by Wills, J., in *Colquohoun* v. *Brooks*(1) this maxim "is often a valuable servant, but a dangerous master H ....". The rule is subservient to the basic principle that Courts must endeavour to ascertain the legislative intent and

(1) (1888) 2 L.Q. B. D. 52,62.

purpose, and then adopt a rule of construction which effectuates rather than one that may defeat these. Moreover the rule of prohibition by necessary implication could be applied only where a specified procedure is laid down for the performance of a duty. 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 10A 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, an implied power to carry out or complete an assessment, not specifically provided for by the rules, can be inferred. No writs of prohibition or *mandamus* were, therefore, called for in the circumstances of the case.

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Consequently, we allow this appeal and set aside the orders of the Calcutta High Court. The Collector may now proceed to complete the assessment. In the circumstances of the case, the parties will bear their own costs throughout.

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Appeal allowed

S.C.