(1976) 07 CAL CK 0023

Calcutta High Court

Case No: Appeal from Original Order No. 167 of 1972

Assistant Collector of Customs	APPELLANT
Vs	
Shiva Glass Works Co. Ltd.	RESPONDENT

Date of Decision: July 30, 1976

Acts Referred:

- Central Excise Rules, 1944 - Rule 10, 10A, 12, 52, 93
- Central Excises and Salt Act, 1944 - Section 12, 3, 37, 4, 40
- Companies Act, 1913 - Section 171
- Companies Act, 1953 - Section 446, 446(1), 446(2)
- Constitution of India, 1950 - Article 220, 226(1)

Citation: 80 CWN 1057 : (1976) 2 ILR (Cal) 218

Hon'ble Judges: Sankar Prasad Mitra, C.J; S.K. Datta, J

Bench: Division Bench

Advocate: D.K. Sen and N.C. Ray Choudhury, for the Appellant;R.N. Bajoria and D.K. Dhar, for the Respondent

Final Decision: Allowed

Judgement

S.K. Datta, J.
This is an appeal from the judgment and order of Sabyasachi Mukharji J. dated November 17, 1971, whereby the connected rule was made absolute.

2. The relevant facts are as follows:

The Respondent company has been a manufacturer of glassware. Glass and glassware are assessable to duty ad valorem at different rates under the Central Excises and Salt Act, 1944. For the purpose of clearance of goods the manufacturers have to submit application in form A.R.I.., giving therein the necessary particulars, namely, description of the goods, assessable value, rate of duty and amount of duty etc. Thereafter, duty is assessed by the proper Central Excise Officer on the said

A.R.I.., application and after payment of the duty so assessed the goods are allowed to be cleared.

3. Section 4 of the said Act provides that the duty of excise on any excisable goods will be chargeable with reference to its value to be determined at the normal price thereof, that is, the price at which such goods are ordinarily sold by the Assessee to a buyer in course of wholesale trade. The determination of such value is a lengthy procedure involving scrutiny of Assessee''s vouchers and market affecting day to day clearances of goods. For obviating these difficulties there has been a practice that the manufacturers submit in advance price-list of their products for each quarter of the year showing rates of sales to different parties before the appropriate authority and also may make changes therein. A provisional approval is given by the authority concerned to the said price-list declared by the Assessee in the A.R.I., application which is subject to final approval after verification of price-list leading to final assessment.

4. Under Rule 98 of the Central Excise Rules, 1944, made by the Central Government in exercise of powers conferred by Sections 6, 12 and 37 of the said Act, the proper officer may direct that the duty may be assessed provisionally if the Assessee executes a bond in proper form with surety of sufficient security as may be required binding himself for payment of difference in duty as provisionally assessed and finally assessed.

5. The Respondent submitted price-lists from time to time for provisional assessment of goods showing documents to different parties at different rates in respect of different articles and lists were provisionally approved by the proper officer. On July 24, 1961, the Respondent executed a bond in Form B-13 (General Security) in the sum of Rs. 4,500. In that bond it was recited that as final assessment of excise duty on goods manufactured at its factory could not be made for want of full information and in view of the request made by the Respondent for provisional assessment pending final assessment, if all dues as would be finally ascertained be not paid, the President would be entitled to enforce his rights under the bond.

6. The Respondent filed its price-lists in vogue from time to time and they were approved provisionally by the Excise authorities. Thereafter, according to the Respondent, the list was verified and the excise duty was finally assessed and demands when raised were duly paid. In this way, it is said, during the period from September 1, 1961, to September 26, 1963, goods were duly removed from the factory on A.R.I., forms and after final assessment duties were duly paid.

7. The authorities, according to their case, had information sometime in June 1963 that the statements of discount alleged by the Respondent to have been allowed to its buyers were false and in fact, duplicate set of accounts were kept and maintained to avoid detection. The authorities on September 26, 1963, made a search at the business premises and the account books and papers were seized.

8. Upon scrutiny, it was found that the Respondent maintained two sets of bills. One set of bills never shown to the authorities contained trade discount as 12�% and the amount was actually collected from wholesalers on the basis of those bills. The other set of bills containing discount at the rate of 21.87% or thereabout conforming to the declaration made by the Respondent to the authorities were never issued to buyers nor were ever acted upon. In respect of some bills, supplementary bills were sent and additional amounts in excess of declared prices were collected from the buyers. Sometime large quantities of goods were purported to be sold to a non-existent firm but were actually sold to dealers at lesser trade discount than declared. By these processes total amount of excise duties avoided by the Respondent was to the extent about of Rs. 1.43 lakhs.

9. The Assistant Collector of Central Excise, Calcutta II Division, S.P. Asthana issued a notice on July 20, 1964, calling upon the Respondent to explain why differential duty for the said amount should not be recovered from it in respect of the products of glassware moved from its factory during the period from September 1, 1961, to September 26, 1963. The Respondent submitted his reply on November 14, 1954, denying the allegations. The successor-in-office N.D. Khosla in his office note was of the view that as the Respondent in the show-cause notice was not charged with any breach of the rules and as there is no provision in the Excise Rules and Regulations to issue notice for recovery of differential duty in terms of the Bond, the proper course was to issue demand for differential duty straightway. The case was, accordingly, dropped in its present form on December 29, 1964 and the Superintendent was directed to expedite finalisation of the demand for differential duty. This order was communicated to the Respondent on February 15, 1965.

10. On January 7, 1965, a judgment was delivered by B.N. Banerjee J. in Matter 93 of 1963 in which it was held that there could not be any provisional assessment under Rule 9B where assessment of goods did not involve two or more alternative basis. This view was affirmed in appeal on February 23, 1967, in the case Assistant Collector of Central Excise and Others Vs. Sree Gobinda Glass Works Limited, . After considering the implications of the said decision the authorities were advised that while Rule 9B had no application, the instant case was fully covered by Rule 10A of the Central Excise Rules, Accordingly, a fresh show-cause notice was issued on November 2, 1967, on the Respondent under Rule 10A. The Respondent was thereby called upon to show cause why with reference to the price-lists from April 2, 1963, to September 25, 1963, the prices found on verification should not be approved and differential duties arising therefrom should not be charged. The Respondent by its letter of February 24, 1968, pointed out that the demand was time-barred and otherwise untenable in law.

11. Thereafter, the authorities discovered that the show-cause notice of November 2, 1967, covered only a part of the total period and also of the total goods involved in the impugned assessment. Accordingly, in cancellation of the said show-cause

notice a fresh notice was issued on March 26, 1968, stating that the Respondent paid Central excise duty on glasswares during the period from September 1, 1961, to September 26, 1963, not at rates sold by it but at lower rates declared by it. The Respondent was asked to show cause why the excise duty amounting to Rs. 1,43,633-84 on the difference of assessable value as per statement annexed for sales during the aforesaid period should not be recovered under Rule 10A of the Central Excise Rules, 1944.

12. The Respondent submitted its reply to the show-cause notice on April 29, 1968, contending, inter alia, that the provisional assessments were finalised by the Superintendent after due enquiry and approval of the price-lists in each individual case and the demand made after three months of the final approval of the price-lists was barred by limitation under Rule 10, which being applicable Rule 10A had no application.

13. After a personal hearing the Assistant Collector, Central Excise Calcutta 11 Division, Calcutta, by his order dated August 26, 1966, by an elaborate order of sixty pages held that the Respondent had removed glassware from their factory without payment of the excise duty leviable in full. The duty was ascertained on the basis of scrutiny and examination of the records seized at Rs. 1,41,829-11 during the aforesaid period after deducting Rs. 1,834-53 from the original demand as the differential duty in respect thereof being already realised.

14. The Respondent being aggrieved by the aforesaid order and the demand notice moved this Court by an application under Article 226(1) of the Constitution. It was contended that no demand could be raised as sought to be done under Rule 10, while Rule 10A had no application to the facts of the case. Further, no provisional assessment under Rule 93 was contemplated in law and assessments which were in fact finally made could not be reopened in 1968 and the proposed assessments were barred by res judicata or principles analogous thereto and also by limitation. A rule nisi was issued on the said application on March 10, 1969.

15. The rule was opposed by the Excise Authorities and the Union of India who filed an affidavit-in-opposition affirmed by the Assistant Collector of Customs, who passed the impugned order, verified on August 4, 1963. The relevant circumstances and reasons for the various steps taken therein were disclosed. It was further contended that all steps taken were in accordance with law and short levy was due to the untrue declaration made by the Respondent resulting in the provisional assessment pending ascertainment of the real value. Such provisional assessments were made at the request of the Respondent who promised to pay the differential value, if any, payable on ascertainment of real value. Rule 10 had thus no application in the instant case which is fully covered by Rule 10A of the Rules.

16. The Respondent filed an affidavit-in-reply affirmed by its Director H.P. Nathani verified on June 17, 1971, reiterating the allegations and contentions made in the

petition. It was said that there was no scope for provisional assessment. Further, the assessments were in fact finalised by several notices of demand and copies of some of such demands were annexed thereto. The case further was covered by Rule 10 and not by Rule 10A which had no application.

17. The learned Judge on hearing the parties came to the following conclusions:

(1) Merits of the contentions raised by the Respondent were not adjudicated when the first proceeding was dropped. The plea of res judicata was not accordingly tenable in law.

(2) Rule 9B providing for provisional assessment where there are alternative basis of valuation, had no application to the facts and circumstances of the case.

(3) Assessment though treated by parties as provisional must continue to be final until it is reopened in accordance with the rules and provisions of the Act since provisional assessment is not contemplated by the statute.

(4) Rule 10 covers all misstatements, innocent or intentional. The provisional assessment at the highest was based on an understanding as it appears from the Bond. But, there is no scope for such assessment under the rules and in the eye of law the said assessment must be deemed final and can only be reopened under Rule 10 and not Rule 10A. The short levy was clearly due to misstatement by the Respondent within the ambit of Rule 10.

(5) Rule 10 being applicable, the order of assessment must be held as barred by time.

The rule, accordingly, was made absolute and a writ in the nature of certiorari was issued quashing the impugned assessment order. This appeal is against this decision by the Union of India and the Customs officials.

18. There is no dispute that apart from Rule 9B there is no scope of provisional assessment, as was held in Assistant Collector of Central Excise and Others Vs. Sree Gobinda Glass Works Limited, referred to earlier. There is also no dispute that in the facts of the case the assessment did not involve ''two or more alternative basis''. It must be, it was held, that the Government was accepting the value put forward on behalf of the Assessee taking from it a bond or undertaking to pay the deficiency, but that did not make the assessment a provisional assessment under Rule 9B. Strong reliance was placed by Mr. Bajoria, learned Counsel for the Respondent, on the above decision in support of his contention that the assessment made by the Excise authority on the basis of price-lists supplied by the said Respondent could not be a provisional assessment in law, but it was a final assessment under the relevant Act and its rules.

19. Mr. D.K. Sen, the learned Counsel for the Appellants, contended, on the other hand, that the assessment or payment of duty on the basis of the price-list supplied

by the Respondent was only an incomplete assessment. The impugned notice of March 26, 1968, was one for final assessment on the basis of goods at prices actually found on scrutiny. The assessment was under Rule 10A and there was no illegality about the notice and the final and completed assessment was made on hearing the Respondent''s lawyer. It may be mentioned here that if the decision in Shree Gobinda Glass Works Ltd.''s case Supra, referred to earlier, ruled the field, there could be no other assessment except once, whether it is provisional or final under the rules and as such, the assessment once made must necessarily be the final assessment Mr. Sen, however, drew our attention to the decision of the Supreme Court in the Assistant Collector of Central Excise, Calcutta v. National Tobacco Co. of India Ltd. AIR 1972 S.C. 2363 where the Court set aside the decision of this Court directing the Collector to proceed to complete the assessment in a similar case. In this case, the cigarette company maintained an ''account current'' and manufactured goods were removed by it by ostensible settlement, of accounts by making therein debit entries on the basis of its price-list. The Court observed:

We are, therefore, unable to accept the view that merely because the ''account current'', kept under the third proviso to Rule 9, indicated that as accounting had taken place, there was necessarily a legal or valid or complete levy. The making of debit entries was only a mode of collection of tax. Even if payment or actual collection of tax could be spoken of a de facto ''levy'' it was only provisional and not final. It could only be clothed or invested with the validity after carrying out the obligation to make an assessment to justify it. Moreover, it is the process of assessment that really determines whether 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.

20. The Court found that a mechanical adjustment and ostensible settlement by debit entries were gone through, but such adjustment could not be equated with "an assessment, a quasi-judicial process which involves due application of mind to the facts as well as to the requirements of law." The Court further held an ''assessment'' in the eye of law could only be reopened by Rule 10 and if what took place was not an ''assessment'' the case fell beyond Rule 10 as it stood at the relevant time.

21. The facts here are similar to those in the above case. Here also there was no ''assessment'' as is understood in the eye of law but only a mechanical settlement or adjustment of duties on the basis of the sale prices held by the Respondent. At best, it was an incomplete assessment which on the above authority the proper Excise Officer was entitled to complete under Rule 10A. The impugned notice, accordingly, is not amenable to challenge on the ground that such assessment was as should be deemed final.

22. At one stage of hearing it seems to us that Rule 10 may not include within its ambit fraudulent statement as opposed to misstatement by the owner. Mr. Bajoria

contended that misstatement included fraudulent statement and if cases of collusion between the officer and the owner could be included in Rule 10 there is no reason to exclude fraudulent statement from the ambit of the said Rule. This was so held in N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., by a Division Bench of the Bombay nigh Court-which later on went up to the Supreme Court, but these aspects of the decision were not disturbed. In the view we have taken it is not necessary to probe the point further.

23. Mr. Bajoria next submitted that the assessments were finalised as pleaded in the petition of motion and the approval of the price-list by the department on verification became finial and in tact differential duty was realised. These contentious about finalisation have been denied in the affidavit-in-opposition filed on behalf of the Appellant. Assuming the prices were approved by the price verification officer and some demands were raised and learned, such demands were on the basis of the price-list submitted by the Respondent or may be on verification, but there is no evidence or pleading that there was thereafter a completed ''assessment'' as contemplated in law by the proper officer as the competent authority in respect thereof, Further, these are disputed questions of facts not considered by the learned trial Judge and we do not feel inclined to enter into the question for the first time in appeal particularly in a proceeding arising out of Article 220(f) of the Constitution.

24. The Supreme Court in the National Tobacco Company case Supra held that the proposed action in completion of the assessment following provisional adjustment or settlement was under Rule 10A and not Rule 10. Rule 10 is confined to a case where the demand is made for short levy caused wholly by one of the reasons given in the rule so that an assessment has to be reopened, ft was held that there was no assessment in the eye of law which could be reopened under Rule 10 in that case.

25. The case was thus beyond Rule 10 as it stood then. Following the above authority we hold that Rule 10 which provides for three months'' limitation from the date of payment or adjustment of account current has no application. The residuary Rule 10A in the circumstances becomes applicable to the case and this rule in terms does not provide for any limitation for completion of the assessment.

26. Even so, Mr. Bajoria contends that u/s 40(2) of the Act no proceedings can be initiated after six months from the accrual of the cause of action. This provision, it is contended, applies to all legal proceedings which obviously include departmental proceedings as in the instant case. Such departmental proceeding initiated by the impugned notice of March 26, 1968, after five years of the alleged cause or from the date of the act or order is hopelessly barred by limitation. Reliance was placed on an unreported decision of the single Judge of the Madras High Court in A. Longanathan v. Secretary to the Government of India and Ors. Writ Petition No. 600 of 1971 in Madras High Court dated November 15, 1972 and also Writ Appeal No. 134 of 1974,

judgment being on July 16, 1975 in which Ramaprasad Rao J. held that the departmental proceeding being taken long after six months from the alleged evasion of duty brought to the knowledge of the authority was barred u/s 40(2) and was accordingly quashed. It was further contended that it would be inconceivable to confine legal proceedings to proceeding in Court, as such interpretation would imply that while proceedings in Court even criminal proceedings would be barred after six months from the impugned act or cause of action, the department would be free from any bar of limitation to proceed any time it elected to do so.

27. Mr. Sen contended that nowhere in the application that the Respondent had alleged any definite date for purpose of commencement of the limitation. Mr. Sen referred to the definition of ''proceeding'' in Halsbury''s The Laws of England (3rd ed., Article 7, vol. I) which means a step in an action. ''Action'' in its turn in Article 1 is defined as a proceeding in the Court of Justice. Reliance was also placed in the decision in S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. Vs. V.M. Deshpande, Income Tax Officer, Companies Circle I(8), Bombay and Another, which interpreters the words ''other legal proceeding'' and ''legal proceeding'' in Sub-sections (1) and (2) respectively of Section 446 of the Companies Act. It was held that ''legal proceeding'' and ''other legal proceeding'', which have the same meaning, do not include income tax assessment proceeding and the liquidation Court cannot perform the function of the income tax Officer. Further, institution of proceeding contemplates institution in a Court of law and such action is different from initiating a proceeding which the proper Excise Officer may on his own set into motion before him Section 40 is as follows:

Section 40 - Bar of suits and limitation of suits and other legal proceedings:

(2) No suit, prosecution or legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the act of order complained of.

28. The decision in A. Longanathan''s case Supra came up for consideration before the Division Bench and the said decision under appeal was set aside. The Court proceeded on the assumption that proceeding other than a suit in Sub-section (2) of Section 40 may possibly cover assessment proceedings on the basis of the decision in Governor General in AIR 1946 16 (Federal Court) and S.V. Kondaskar Official Liquidator v. V.M. Deshpande I.T.O. Supra which were decisions on Section 171 of the Indian Companies Act, 1913 and Section 446 of the Companies Act, 1953. It was held that an assessment proceeding, started with the show-cause notice is not within the purview of Section 40(2) though for prosecution for violation of any statutory provision or rule made thereunder in the taxing statute the sub-section will be attracted as was held in Public Prosecutor, Madras Vs. R. Raju and Another, etc., . An assessment, it was held, is not based on violation by the Assessee of any provisions of law but is founded on the charging provision. The starting point of limitation will be from the date of the cause of action or of an act or order made

under the Act which is either the proceedings started by the show-cause notice or the assessment order and before that there is no room for applying Section 40(2).

29. The Supreme Court in S.V. Kondaskar''s case Supra held that income tax payable is a debt ranking pari passu with other debts due from a company and proceeding for realisation of such debt from a company in liquidation is within the definition of other legal proceedings as defined in Section 446 of the Companies Act which cannot be commenced or continued without leave of the liquidation Court. The Court, however, rejected the contention that assessment or reassessment proceedings under the income tax Act are such other legal proceedings which can only be started or continued with leave of liquidation Court. It was held that the income tax Act was a complete code for assessment proceedings and it cannot be said that the winding-up Court will perform such functions.

30. This decision has reference to the particular statute and may have no significance to the case we are concerned with. We are, however, unable to accept that the words ''other legal proceeding'' in the Section 40(2) include assessment proceeding under the Act as assumed in the Madras case. For proper interpretation of the said Sub-section (2) of Section 40 it will be necessary to look into the section more closely which we propose to do presently. We are, however, in agreement with the appellate decision in A. Longanathan''s case Supra holding that assessment is not based on any violation by the Assessee of any provision of law but is founded on the charging provision, while a prosecution based on such violation is such ''legal proceeding'' as contemplated therein and as held in Raju''s case Supra as the Assessee did not pay the lawful dues which are acts to be done or ordered to be done under the Act with the result that Section 40(2) becomes applicable. The limitation u/s 40(2) will accordingly start, when there is no violation of the provisions of the Act, from any act or order under the Act, namely, an order of assessment under the charging; provision.

31. In considering the provisions of Section 40, Sub-section (2) we find here that generic words follow more specific words of same nature. As has been laid down in Maxwell on Interpretation of Statutes (11th ed. p. 326-27):

But the general word which follows particular and specific words of the same nature as itself takes its meaning from them and is presumed to be restricted to the same genus as those words. In other words, it is to be read as comprehending only things of the same kind or these designated by them unless, of course, there be something to show that a wider sense was intended, as for instance, a proviso specifically excepting certain classes clearly not within a suggested genus....Unless there is a genus or category there is no room for application of the ejusdem generis doctrine....

The Supreme Court in Amar Chandra Chakraborty Vs. The Collector of Excise, Government of Tripura and Others, served:

The ejusdem generis rule strives to reconcile the incompatibility between specific and general words. This doctrine applies when (i) the Statute contains an enumeration of specific words; (ii) the subject of the enumeration constitutes a class or category; (iii) that class or category is not exhausted by the enumeration; (iv) the general term follows the enumeration; and (v) there is no indication of a different legislative intent.

32. It appears to us that the principle of ejusdem generis applies to the provisions we are concerned with. The words ''legal proceeding'' though they otherwise include within their ambit departmental proceeding in view of the words preceding they must be circumscribed to proceedings like ''suit'' and ''prosecution''. Suit as also prosecution mean and imply proceedings instituted in a Court of law and they do not, in our opinion, include departmental proceeding which can be initiated by the proper officer before him. In this view, Section 40(2) has no application to the departmental proceeding and impugned proceedings cannot be held to be barred by limitation under the provisions of the said sub-section. It may be mentioned here that Sub-section (2) of Section 40 has since been substituted to include only claims against the Government and its officers.

33. Mr. Bajoria next contended that the proceedings impugned should be held as barred by the principles of res judicata or principles analogous to it in view of the earlier proceedings taken against the Respondent for die same case of action but abandoned and dropped as not maintainable. For application of the principle of res judicata there must be an adjudication or final decision of the matters in controversy between the parties. There has been admittedly no such adjudication, but the earlier notice dated July 18, 1974, in its present form was dropped as it was thought that the Respondent was not charged for am breach of rules. That is not an adjudication as contemplated to create an effective bar of res judicata.

34. Mr. Bajoria lastly contended that Rule 10A which purports to contain residuary powers for recovery of sums due to Government was ultra vires the act. He referred to the Bench decision in Agarwal Bros. v. Union of India (1973) T.L.R. 2213 in which decision of another single Judge of the said High Court holding Rule 10A ultra vires as accepted. The judgment of the single Judge is reported in The Citadel Fine Pharmaceuticals Private Limited Vs. The District Revenue Officer and Others, . It was field that where the enactment, the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, is silent on the question of levy of escaped assessment, Rule 12 framed under the said Act cannot extend the charging power conferred by Section 3.

35. It may be mentioned here that we are concerned in this case not with a case of escaped assessment, but a case where the assessment was sought to be completed in accordance with law following earlier settlements or adjustments which at the highest could be called incomplete assessments according to the decision in National Tobacco''s case Supra cited above. The point about vires of Rule 10A was not taken in the petition and it was only taken at the hearing before us. On objection

being taken we have not allowed Mr. Bajoria to urge the point of vires before us though we have considered the decisions cited by him. It may further be mentioned that in the National Tobacco Company''s case the Supreme Court considered Rule 10A and the following observations were made in respect thereof when disposing of the appeal:

Although Rule 52 makes an assessment obligatory before goods are removed by the 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 time in the circumstances of the 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 the 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.

36. The appeal was, accordingly, allowed and it was directed that "the Collector may now proceed to complete the assessment."

The question raised need not be considered further as there is no further scope for such consideration in view of the above decision.

37. In the premises, the appeal succeeds and is allowed. The judgment and order under appeal are set aside and the Rule is discharged. There will be no order for costs in the circumstances. All interim orders, if any, are vacated.

38. Mr. D.K. Dhar prayed for stay of operation of the judgment and order. The operation of the judgment and order is stayed for a period of four weeks.

Sankar Prasad Mitra C.J.

39. I agree.