

Ceat Ltd. Vs. Assistant Collector

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Court : Andhra Pradesh

Decided On : Aug-03-1990

Reported in : 1991(1)ALT187; 1994LC661(AP); 1991(56)ELT718(AP)

Judge : A. Lakshmana Rao and ;Yogeshwar Dayal, JJ.

Acts : Central Excise Rules, 1944 - Rules 8(1), 9B, 10, 49, 173B and 173CC;
[Central Excise Act, 1944](#) - Sections 3, 11A, 35, 35A, 35E, 35EE and 37B

Appeal No. : Writ Petition No. 603 of 1989

Appellant : Ceat Ltd.

Respondent : Assistant Collector

Advocate for Def. : I. Koti Reddy, Adv. and Standing Counsel for Central Govt.

Advocate for Pet/Ap. : Ravindar Narain, Adv. for ;C. Trivikrama Rao, Adv.

Judgement :

Writ Petition No. 603 of 1989

1. The petitioner-company is a manufacturer of glass fibre products. With effect from March 16, 1976 excise duty was levied on glass fibre products for the first time under Tariff Item No. 22-F of the First Schedule to the Central Excises and Salt Act, 1944 (for short the Act).

Tariff Item 22-F :

'Mineral Fibres and yarn and manufacturers therefrom in or in relation to the manufacture of which any process is ordinarily carried on with the aid of power, the following, namely (1) glass fibre and yarn including glass tissues and glass wool 15% ad valorem.'

Under Notification No. 87/76-C.E., dated March 16, 1976 the Central Government had exempted mineral fibres and yarn and manufacturers therefrom, falling under Tariff Item No. 22-F from the whole of the duty of excise leviable thereon.

'Notification No. 87/76 dated 16-3-1976 :

In exercise of the powers conferred by sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts mineral fibres and yarn and manufactures therefrom, falling under Item No. 22-F of the First Schedule to the Central Excise and Salt Act, 1944 (1 of 1944), specified in column (2) of the Table hereto annexed, from the whole of the duty of excise leviable thereon.

TABLE-----Sl.	No.
Description-----	(1)
(2)-----	1. Rock wool2. Yarn spun
wholly out of glass fibres3.	Glass
fabrics.'-----	By the Notification
No. 206/81-C.E. dated December 30, 1981 an explanation was added.	

'Explanation :

In the notification 'Yarn spun wholly to of glass fibres shall not include continuous filament yarn.'

When the Central Excise Tariff Act, 1985 came into force on February 28, 1986, glass fibre products were categorised under Item 7014.00 which reads as follows :

TABLE-----Heading	Sub-Heading
Description	Rate of DutyNo.
No.-----	(1) (2) (3)

(4)-----70.14 7014.00 Glass fibres (including glass 30%wool and Glass filaments)and article thereof (forexample, yarn woven fabrics),whether or not impregnated,coated, covered or laminatedwith plastics or vanish.-----

2. The concession by way exemption in respect of yarn spun wholly out of glass fibres was extended by Notification No. 52/86-C.E., dated February 10, 1986 which is as follows :

TABLE-----						Sl. Heading or Sub-			
Description	of	Goods	Rate	of	duty	Condition	No.	heading	
No.	-----					(1)	(2)	(3)	(4)
(5)-----	-----					9.	7014.00	Yarn spun	
wholly	out	of	Nilglass	fibres	(excluding	continuous		filament	
yarn)	-----								

3. On April 6, 1981 the petitioner-company had filed a classification list with the proper officer for approval under Rule 173-B of the Central Excise Rules, 1974 (hereinafter referred to as the rules) claiming exemption in respect of what it called spun yarn made wholly out of glass fibre.

4. The Assistant Collector had passed an order dated June 15, 1981 denying exemption and treating the product as filament yarn. Aggrieved by that order, the petitioner-company preferred an appeal to the Appellate Collector, Madras. He set aside the order of the Assistant Collector by an order dated October 31, 1981 and remanded the case for fresh consideration. on remand, the Assistant Collector passed an order dated June 15, 1982 again denying exemption on the basis of the report of the Chief Chemist. That order was again challenged by the petitioner-company before the Appellate Collector. He again set aside the order of the Assistant Collector by his order dated October 23, 1982 and remanded the case for re-consideration. The relevant portion of the order of remand reads as follows :

'In the circumstances, I am left with no other alternative except to remand the case once more to the lower authority so that he may again make appropriate reference to the Chief Chemist on the particular aspect referred in his examination and

considered opinion. On the basis of such re-examination and report of the Chief Chemist, the case may be finally decided.'

On remand, the Assistant Collector, Hyderabad-II Division re-considered the matter and granted exemption by his order dated May 17, 1985. The relevant portion of the order reads as follows :

'23. Therefore, it is clear that the assessee manufactures glass yarn which is spun wholly out of glass fibre and this process fully meets the conditions laid down in the Notification No. 87/76 which entitles the assessee to the benefit of the notification

Referring to the order of remand passed by the Appellate Collector, the Assistant Collector pointed out in his order granting exemption in favour of the petitioner-company as follows :

'The Appellate Collector in his order-in-appeal No. 376/82(H) dt. 23-10-1982 had advised that the matter was to be re-examined after making a fresh reference to the Chief Chemist giving all the details. With due respects to the order of the Appellate Collector, it is felt that a further reference to the Chief Chemist is not necessary because the issue is to be examined on two points, that whether the yarn is made wholly out of glass fibre and whether the yarn is spun. Both these points can be dealt with after a thorough observation and examination of the manufacturing process of the assessee. Observations and examination of the manufacturing process in any other spinning mill as well as references contained in books on the subject, as well as dictionaries can also prove helpful.'

Consequent to that order, the Assistant Collector granted refund to the petitioner-company for the entire period up to May 16, 1985.

5. In view of the levy of special excise duty, the petitioner-company had filed a fresh classification list dated March 3, 1988 with the proper officer for approval under Rule 173-B of the rules. In that list, spun yarn which was exempted from the whole of the duty of excise was shown as one of the items. The list was approved on July 19, 1988 with effect from March 1, 1988 by the Assistant Collector, Central

Excise, Hyderabad-II Division.

6. While the matters stood thus, the impugned show cause notice dated November 7, 1988, issued by the Superintendent of the Central Excise was served on the petitioner-company. It was mentioned therein that the assessee manufacturing the yarn out of continuous filament of glass fibres was not eligible for exemption of nil rate of duty under Notification No. 52/86 dated February 10, 1986. Therefore, the petitioner-company was required to show cause to the Assistant Collector, Central Excise, Hyderabad-II Division within thirty days of receipt of notice why the approval given for the classification of the aforesaid product should not be revoked and why the aforesaid product should not be classified under Chapter Heading No. 7014.00 attracting 20% ad valorem of duty. They were also directed to indicate whether they wished to be heard in person.

7. Aggrieved by that show cause notice, this writ petition had been filed.

8. During the pendency of the writ petition, the petitioner-company had filed W.P. M.P. No. 10228 of 1989 seeking amendment of the cause title by substituting the name of 'CEAT Limited' in place of 'CEAT Tyres of India Limited'. That petition was ordered on June 13, 1989. They also filed W.P. M.P. No. 11104 of 1980 for impleading (1) the Union of Indian, Secretary, Ministry of Finance, South Block, New Delhi and (2) Secretary, Board of Central Excise and Customs, New Delhi (hereinafter referred to as the Board) as party respondents in the writ petition. That petition was ordered on July 13, 1989. They further filed W.P. M.P. No. 11105 of 1989 seeking amendment of the writ petition to the effect that the Board's letter F. No. 132/11/187/CX-4, dated May 31, 1988 was illegal, arbitrary and capricious and the proceedings issued thereto were a nullity.

9. It is stated that the Board of Central Excise and Customs issued letter F.No. 132/11/187/CX-4, dated May 31, 1988 with reference to the benefit of exemption under Notification No. 52/86-C.E., dated February 10, 1986 holding that the exemption under the said notification 'would not be available to glass fibre yarn'. It is further stated that the impugned show cause notice had been issued pursuant to the letter of the Board. In the Board's letter dated May 31, 1988 it was mentioned that while both the filament yarn and spun yarn were covered by the description

'yarn spun wholly out of glass fibre' the specific exclusion of continuous filament yarn of glass fibre would obviously leave only the spun yarn of glass fibres for enjoying the benefit of exemption specified against the relevant entry in Notification No. 52/86-C.E., dated February 1, 1986.

10. It is submitted by the learned counsel for the petitioner-company :

(1) The impugned action of the respondents in issuing the show cause notice is an attempt to review the order of the Assistant Collector, Central Excise, Hyderabad-II Division dated May 17, 1985 approving the classification list which had become final and thereby take away the exemption granted under that order.

(2) The classification list approved on July 19, 1988 by the Assistant Collector related to the goods in respect of which, special excise duty was leviable and it had nothing to do with yarn spun wholly out of glass fibre which was wholly exempted from payment of duty by an order dated May 17, 1985 of the Assistant Collector and was thus specified in the approved classification list. Therefore, question of modification of the approved classification list in respect of yarn spun wholly out of glass fibre pursuant to the classification list relating to special excise duty, submitted by the petitioner-company, does not arise under sub-rule (5) of Rule 173-B.

(3) At any rate, classification list once approved cannot be revoked or modified either under Section 11-A of the Act or under Rule 173-B of the rules.

(4) Assuming without conceding that an approved classification list can be revoked under Section 11-A of the Act, in the absence of a notice specifying the amount of excise duty payable by the petitioner having been served on it, the power under Section 11-A cannot be invoked.

(5) In any event, revocation or modification of an approved classification list can be only prospective but not retrospective.

(6) The Board's letter F.No. 132/11/187/CX-4, dated May 31, 1988 is illegal, arbitrary and capricious and the proceedings initiated by the respondents 1 and 2 pursuant to the instructions of the Board are a nullity; and

(7) By his order dated May 17, 1985, the Assistant Collector found as a fact that the yarn manufactured by the petitioner-company was not continuous filament yarn and it was spun wholly out of glass fibre. That finding of fact recorded in a quasi-judicial proceeding which had become final cannot be disturbed by invoking power either under Section 11-A or Rule 173-B.

11. In order to appreciate the various contentions advanced on behalf of the petitioner, it is necessary to refer to the relevant provisions of the Act and the Rules. Section 3 is the charging section providing for the levy of excise duty on all excisable goods. The excise duty is payable only on the removal of the goods either from the factory premises or from an approved place of storage as the case may be as provided in Rule 49. Under Chapter VII-A of the Central Excise Rules, procedure that has to be followed by the producers or manufacturers of the categories of excisable goods mentioned therein, for the purpose of removal of the goods either from the factory premises or from an approved place of storage, is prescribed. That chapter is applicable in the instant case.

Rule 173-B to the extent relevant is as follows :

'(1) Every assessee shall file with the proper officer for approval a list in such form as the Collector may direct (in quintuplicate), showing -

(a) the full description of (i) all excisable goods produced or manufactured by him, (ii) all other goods produced or manufactured by him and intended to be removed from his factory, and (iii) all the excisable goods already deposited or likely to be deposited from time to time without payment of duty in his warehouse;

(b) the item number and sub-item if any, of the First Schedule to the Act under which such goods fall;

(c) the rate of duty leviable on each such goods; and

(d) such other particulars as the Collector may direct.

(2) The proper officer shall, after such inquiry as he deems fit, approve the list with such modifications as are considered necessary and return one copy of the

approved list to the assessee who shall, unless otherwise directed by the proper officer, determine the duty payable on the goods intended to be removed in accordance with such list.

(2A) All clearance shall, subject to the provisions of Rule 173CC, be made only after the approval of the list by the proper officer. If the proper officer is of the opinion that on account of any inquiry to be made in the matter or for any other reason to be recorded in writing there is likely to be delay in according the approval, he shall, either on a written request made by the assessee or on his own accord, allow such assessee to avail himself of the procedure prescribed under Rule 9B for provisional assessment of the goods.

(3) Where the assessee disputes the rate of duty approved by the proper officer in a respect of any goods, he may, after giving an intimation to that effect to such officer, pay duty under protest at the rate approved by such officer.

(4) If in the list approved by the proper officer under sub-rule (2), any alteration becomes necessary because of -

(a) the assessee commencing production, manufacture or warehousing of goods not mentioned in that list, or

(b) the assessee intending to remove from the factory any non-excisable goods not mentioned in that list, or

(c) a change in the rate or rates of duty in respect of the goods mentioned in that list or, by reason of any amendment, to the First Schedule to the Act a change in the item number and sub-item, the assessee shall likewise file a fresh list or an amendment of the list already filed for the approval of such officer in the same manner as is provided in sub-rule (1).

(5) When the dispute about the rate of duty has been finalised or for any other reasons affecting rate or rates of duty, a notification of the rate or rates of duty is necessitated, the proper officer shall make such modification and inform the assessee accordingly.'

12. Rule 173-B to the extent it is relevant for the purpose of this case consists of six parts. The first part relates to the filing of a list by every assessee for approval showing the particulars mentioned in sub-rule (1). The second part deals with the power of the proper officer to approve the list. The third part pertains to the power of the proper officer to allow an assessee to avail the procedure relating to provisional assessment of the goods in case the approval of the classification list is likely to be delayed. Where the assessee disputes the approved rate of duty, right is given to him to pay the duty under protest until the dispute about the rate of duty has been finalised and this constitutes the fourth part. If any alteration of the approved classification list becomes necessary because of one or other of the circumstances mentioned in sub-rule (4), the assessee is required to file a fresh list or an amendment of the list already filed, and that is the fifth part. The sixth part relates to the power of the proper officer to modify the approved classification list for any reason affecting the rate or rates of duty.

'Section 11-A. RECOVERY OF DUTIES NOT LEVIED OR NOT PAID OR SHORT-LEVIED OR SHORT-PAID OR ERRONEOUSLY REFUNDED. - (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

Proviso

Explanation

(2) The Assistant Collector of Central Excise or, as the case may, be, the Collector of Central Excise shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of duty of excise due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined'

13. Before Section 11-A was inserted in the Act with effect from November 17, 1980, Rules 10 and 10-A of the Central Excise Rules were in force and they were deleted after Section 11-A had been incorporated in the Act.

'Rule 10. Recovery of duties or charge short-levied, or erroneously refunded. - When duties or charges have been short-levied through inadvertance, error, collusion or misconstruction on the part of an officer, or through mis-statement as to the quantity, description of 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 show such refund has been erroneously made, shall pay the deficiency or pay the amount paid to him in excess, as the case may be, on written demand by the proper officer being made within three months from the date on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund.

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

14. Section 11-A of the Act confers power on the authorities mentioned therein, when any excise duty had not been levied or paid or short-levied or short paid, to determine the amount of excise duty due from a person and recover the same after following the procedure prescribed therein. The duty of excise recoverable under this section for the past period is limited to six months prior to issuance of notice contemplated under sub-section (1) and in case of collusion or mis-statement or suppression of facts on the part of the assessee, the period is extended to five years instead of six months.

15. In the instant case, the impugned notice had been issued to the petitioner-company calling upon it to show cause why the approval given for a classification

exempting yarn produced by it from payment of excise duty should not be revoked and why the product should not be classified under Tariff Item No. 7014.00 attracting 20% ad valorem duty. This notice does not specify the amount of excise duty payable by the petitioner-company. Therefore, it is evident that the impugned notice had been issued only for revocation of the approved classification list and re-classification of the product.

16. One of the main contentions advanced on behalf of the petitioner-company is that when the classification list had been approved by the Assistant Collector under Rule 173-B granting exemption as long back as on May 17, 1985 and that order had become final, such an order cannot be modified or revoked by the very same authority which had granted approval. Under Section 35 of the Act, a right of appeal to the Collector (Appeals) is provided against any decision or order passed by a Central Excise Officer lower in rank than a Collector of Central Excise. Therefore, the order passed by the Assistant Collector approving a classification list is appealable under Section 35. Apart from the appellate power, revisional jurisdiction also is conferred on the Collector of Central Excise under Section 35-E of the Act against any decision or order passed by a Central Excise Officer who is lower in rank than that of the Collector of Central Excise. Under that provisions, power is conferred upon the Collector of Central Excise to direct the subordinate authority to apply to the Collector (Appeal) for the determination of any point arising out of the decision or order passed by it. There is no dispute that no appeal or revision was filed against the order date May 17, 1985 passed by the Assistant Collector approving the classification list submitted by the petitioner. On the basis of those provisions, it is submitted that the order passed by the Assistant Collector approving a classification list is quasi-judicial in nature and when that order had become final, a show cause notice cannot be issued by the very same authority which had granted approval for the purpose of either modification or revocation of the approved classification list.

17. The scheme of the Act and the rules made thereunder clearly indicate that the manufacturer/assessee who desires to remove the excisable goods from the factory or a store room or a place of storage as the case may be shall first pay the duty of excise before removal of the goods. For the purpose of determination and

payment of duty, a manufacturer/assessee is required to file a classification list for approval giving the particulars of the goods, the tariff number the rate of duty leviable on the goods and such other relevant particulars. Thus, the requirement of filing of a classification list and approval of the same by the competent officer had been prescribed under Rule 173-B for the purpose of regulating the determination of the excise duty payable on the goods and clearance of those goods from the factory premises on payment of such duty.

18. The question that immediately arises for consideration is whether the proper officer can modify an approved classification list suo motu if the goods have been erroneously classified due to either mistake of fact or law. As it had been mentioned earlier, once there is an approved classification list, the assessee is entitled to determine the excise duty in accordance with the classification and clear the goods on the payment of such duty unless the proper officer directs otherwise. Thus, the classification list once approved continues to be effective till it is modified or revoked under sub-rule (5) of Rule 173-B. Thus, the determination and payment of excise duty in accordance with the approved classification list is a continuing process. If, at any stage, the proper officer notices that the goods had been wrongly classified either due to mistake of fact or law, it is difficult to understand as to why the proper officer cannot issue notice to the assessee pointing out the mistake committed in the classification of the goods and asking him to show cause why the mistake committed in that regard shall not be rectified. It cannot reasonably be urged by any assessee that though the goods have been wrongly classified, the mistake cannot be corrected even after its detection. In this context, it would be useful to recapitulate the provisions of Section 11-A referred to above. Wrong classification of the goods either due to a mistake of fact or law will result in non-levy or non-payment or short levy or short payment of excise duty on the goods. If due to wrong classification of the goods under Rule 173-B, there has been either non-levy or non-payment or short levy or short payment of excise duty, the concerned officer can initiate proceedings under Section 11-A for recovery of the duties not levied or not paid or short levied or short paid. For initiation of action under Section 11-A, it is necessary that the concerned authority must first establish that the classification of the goods as approved under Rule 173-B was not correct. Otherwise, so long as the classification list approved under Rule 173-B

stands, it is open to the assessee to plead, in our view rightly that no action can be initiated under Section 11-A. Thus, the initiation of proceedings for the modification or revocation of the approved classification list is inextricably interlinked with the recovery proceedings under Section 11-A of the Act.

19. In the instant case, the impugned notice dated November 7, 1988, had been issued to the petitioner requiring him to show cause why the classification of the specified product should not be revoked and why the product should not be classified under Tariff Item No. 7014.00 attracting 20% ad valorem duty. Thus, the show cause notice has been issued only for the purpose of revocation of the approved classification list and for proper reclassification of the goods. There is no legal bar in our view against issuing a show cause notice for revocation of an approved classification list in the first instance and after reclassification, issuing a show cause notice separately under Section 11-A for the recovery of the excise duty.

20. It is, however, submitted by the learned counsel for the petitioner that when no appeal or revision had been preferred against the approved classification list dated May 17, 1985 that list had become final and so long as the petitioner pays excise duty in accordance with the approved classification list, proceedings under Section 11-A which is in the nature of a machinery provision, for the recovery of any excise duty in respect of the goods covered by the classification list, cannot be initiated. In this connection we may refer to the second proviso to Section 35-A dealing with the procedure in appeal, which reads as follows :

'Provided further that where the Collector (Appeals) is of opinion that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, no order requiring the appellant to pay any duty not levied or paid, short-levied or short-paid or erroneously refunded shall be passed unless the appellant is given notice within the time limit specified in Section 11A to show cause against the proposed order.'

To the same effect is sub-section (6) of Section 35EE which confers revisional jurisdiction on the Central Government.

21. We are unable to accept the contention of the learned counsel for the petitioner that Section 11-A is merely a machinery provision and it can be invoked only when an approved classification list has been set aside either in appeal or revision. The same period of limitation has been prescribed under Sections 11-A, 35-A and 35-EE for the recovery of the excise duty not levied or not paid or short-levied or short-paid. But the powers under those three different provisions have been conferred on three different authorities viz., the original authority, the appellate authority and the revisional authority. Prescription of the same period of limitation under those three provisions and conferment of power on those three authorities to recover the excise duty not levied or not paid or short-levied or short-paid, in our view give a clear indication that Section 11-A is not merely a machinery provision and the original authority as well can recover the excise duties not levied or not paid or short-levied or short-paid under Section 11-A by modifying or revoking the approved classification list if there is justification for such modification or revocation.

22. However, it is vehemently urged by the learned counsel for the petitioner that the power conferred under Rule 173-B either to approve or not to approve a classification list is quasi-judicial in nature and once an order has been passed granting approval, such order cannot be reviewed by the same authority as no such power has been conferred either under the provisions of the Act or the rules made thereunder. Referring to sub-rule (5) of Rule 173-B, under which power has been conferred on the proper officer to modify an approved classification list, it is pointed out by the learned counsel that such power can be exercised by the proper officer only when the assessee has submitted a fresh classification list seeking amendment of the approved classification list and it does not confer any independent power of review on him. As we have pointed out earlier, wherever there is an approved classification list, the exercise of power under Section 11-A for recovery of excise duty for non-levy or non-payment or short-levy or short-payment is dependent upon the modification or revocation of the approved classification list. Thus, the power to review the approved classification list is inherent in the very nature of power conferred on the original authority under Section 11-A for recovery of excise duty not levied or not paid or short-levied or short paid during the past period. Apart from that, sub-rule (2) of Rule 173-B gives

an indication that even after approval of the classification list, the proper officer can direct the assessee not to determine the duty payable on the goods in accordance with the approved list. This provision read with sub-rule (5) which confers power on the proper officer to modify an approved classification list, and in the light of the provisions of Section 11-A makes it abundantly clear that the proper officer may at any stage after the classification list had been approved, initiate proceedings for modification or revocation of the approved list subject to the condition that reasonable opportunity shall be given to the affected party before such modification or revocation. To hold otherwise would lead to an anomalous situation which would result in perpetuation of non-levy or non-payment or short-levy or short payment of excise duty even in such cases where the classification of goods had been made under an obvious mistake of fact or law. As the determination of duty and clearance of the goods is a continuing process, the proper officer can correct the mistake committed either by him or his predecessor in office, in classifying the goods, at any time. Therefore, reference made to the approved classification list dated July 19, 1988 relating to special excise duty is not relevant.

23. In this case, it is not necessary to go into the question whether the recovery proceedings under Section 11A shall be prospective or limited for the past period of only six months or five years, as no notice has yet been issued under that section for the recovery of the excise duty. So far as the impugned notice is concerned, the petitioner company has been called upon to show cause why the product should not be classified under Chapter Heading No. 7014.00 attracting 20% ad valorem of duty with immediate effect.

We do not want to express any opinion at the show cause notice stage whether the revocation of the approved classification list shall be prospective or retrospective.

24. The learned counsel for the petitioner has referred us to the following decisions of the High Courts of Allahabad, Madras, Bombay and Delhi in support of his plea that an approved classification list cannot be reviewed by the same authority or his successor in office. *Khazanchi Paper and Board Mill v.*

Superintendent of Central Excise, Kanpur - 1977 (1) ELT (J 144), Madras Rubber Factory Limited v. Assistant Collector of Central Excise, Madras - 1981 (8) ELT 565, Indian Organic Chemicals Limited v. Union of India - 1983 (12) ELT 34, Godrej and Boyce Manufacturing Company Private Limited, Bombay v. Union of India 1984 (18) ELT 172 and Ajanta Iron and Steel Company Private Limited v. Union of India - 1986 (23) ELT 318. In all those cases, it was held that once a classification list had been approved, it cannot be reviewed by the officer who approved it or his successor in office.

25. On the other hand, the Karnataka High Court held in Shyam Sunder U. Nichani v. Assistant Collector of Central Excise, Bangalore - 1985 (22) ELT 751 that an approved classification list can be corrected by invoking powers under the then existing Rule 10-A. the learned Judge relied on the decision of the Supreme Court in D. R. Kohli v. Atul Products Limited : 1985(20)ELT212(SC) . In this case, he assessee had been carrying on the business of manufacturing dyes, chemicals and pharmaceuticals. Under Tariff Item No. 14-D excise duty at 30% ad valorem was leviable on synthetic organic dyestuffs and synthetic organic used in any dyeing process. On November 23, 1961, the Central Government issued a notification exempting the dyes specified in the schedule annexed thereto from the whole of the excise duty leviable thereon if and only if, such dyes were manufactured from any other dye on which excise duty or countervailing customs duty had already been paid. The assessee had been manufacturing cibagenes and cibanogenes, which belong to the class of dyes referred to in the schedule annexed to the notification. The assessee wrote a letter dated December 22, 1961 to the Superintendent of Excise, Bulsar, the relevant portion of which reads as follows :

'During the course of discussions we had on the 20th December, 61 with the Collector of Central Excise and yourself, we pointed that we purchase Fast Colour Bases, required in production of Rapidogenes/Rapid fasts either from the manufacturer in Bombay or from the open market. The material which the local manufacturer has offered us was produced before the imposition of excise duty on dyes. He is, therefore, willing to sell us the material without the recovery of excise duty. We now propose to pay the excise duty on the fact colour bases which we

will purchase from the local manufacturer so that we do not have to pay excise duty on the final products produced viz., Rapidogenes/Rapid fasts.

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

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

The Superintendent of Central Excise, Bulsar sent a reply to the above letter stating that there was no objection to the payment of excise duty on fast colour bases purchased by the assessee. The assessee accordingly paid the duty and was exempted from payment of duty on cibagenes and cibanogenes manufactured by it. It was later found by the Excise Department that the concession shown to the assessee was not in accordance with the notification granting exemption. Therefore, a notice was issued to the assessee to show cause why the deficit amount of excise duty should not be recovered in respect of the excisable goods manufactured by it, under the then existing Rule 10-A of the Excise Rules. Two principal contentions advanced on behalf of the assessee were considered. One of those contentions was whether the demands made in the case fell within the scope of Rule 10-A or Rule 10 of the Excise Rules. The learned Judges repelled the contention that principle of promissory estoppel was applicable as the department had collected the excise duty. It was held that the Excise Department had to act on the basis of the exemption notification. Referring to the provisions of Rules 10 and 10-A, it was pointed out that Rule 10 should be confined to the cases where the demand was made for the short-levy caused wholly by one of the reasons given in the rule and that Rule 10-A conferred residuary power of making a demand in special circumstances not foreseen by the framers of the Act and the Rules. Having regard to the facts of the case, it was held that no assessment of the manufactured goods had taken place and that no error had occurred at the time of assessment. Accordingly, it was held that the Excise Department was entitled to initiate proceedings for the recovery of amount

under Rule 10-A.

26. In *I.T.C. Limited v. Union of India* - 1988 (34) ELT 473, the learned single Judge of the Calcutta High Court held that the power under Section 11-A of the Act could be invoked even in a case where payments had already been made on the basis of an approved price list which had not been questioned either in appeal or revision.

27. In *Shri Madhav Mills Private Limited v. Union of India* - 1985 (22) ELT 747 a Division Bench of the Patna High Court held that an approved classification list can be modified by issuing notice to the affected party.

28. In *Nat Steel Equipment Private Limited v. Collector of Central Excise* - 1988 (34) ELT 8, a case decided by the Supreme Court, the appellant was a manufacturer of hospital and pharmaceutical appliances and heavy duty industrial canteen equipment. 14 items were classified by him under Tariff Item No. 68 of the Act in the classification list dated March 27, 1979. The Assistant Collector held that the products 2 to 14 were classifiable under Tariff Item No. 33-C. After giving the notice, the Assistant Collector demanded differential duty. On appeal, the Collector accepted the appellant's contention that the goods were classifiable under Tariff Item No. 68 and not under Tariff Item No. 33-C. However, on further appeal, the Tribunal reversed the decision of the Collector and held that the items could only be classified under Tariff Item No. 33-C. Further, the Tribunal held that the modification of the classification list could only be prospective and not retrospective. On appeal, the Supreme Court confirmed the judgment of the Tribunal, holding that the modification of the classification list could only be prospective and not retrospective.

29. The scope of Section 11-A of the Act was considered by the Supreme Court in *Tata Iron & Steel Company Limited v. Union of India* [1988 (35) ELT 605]. In that case, the manufacturer was following the approved classification list from the year 1962, for determination and payment of the excise duty under Tariff Item No. 26AA(ia). On May 16, 1981, a show cause notice was issued to the manufacturer why he should not be proceeded against for contravention of Rule 173-B apart from other rules. In that show cause notice, it was mentioned that the goods

supplied by the manufacturer to the Railways were not forged items as such, but the said goods have to undergo machining and polishing after being forged and had been turned into distinct commercial commodities by the process of machining and polishing which amounted to manufacture and hence the goods were also liable to the payment of excise duty as set out in Item 68. The notice also called upon the manufacturer to show cause why duty on the forged goods under Tariff Item No. 26AA(ia) should not be payable on the basis of the weight of the goods as forged and before the removal of the excess skin by the machining. The Collector held that the manufacturer was liable to pay differential duty under Item 26AA(ia) on the difference between weight of the said goods when forged and the weight after machining to remove the excess skin as well as the duty under Tariff Item No. 68 as set out earlier. While so holding, the Collector took the view that the manufacturer was guilty of mis-statement and suppression of facts and hence upheld the demand made for a period of five years prior to the service of the show cause notice. The Delhi High Court accepted the conclusions of the Collector except the one relating to the period of limitation. It held that there was no mis-statement or suppression on the part of the appellant and therefore, the period of limitation would be six months instead of five years. On appeal by the company, the Supreme Court proceeded on the footing that the recovery proceedings initiated under Section 11-A of the Act were valid. However, regarding the period of limitation, it was held that there was no suppression of facts or giving of misleading particulars by the manufacturer and therefore, they were entitled to recover excise duty only for a period of six months prior to the issuance of show cause notice. Thus, in that case, the Supreme Court upheld the initiation of proceedings for the recovery of the excise duty under Section 11-A in a case where the classification list was already approved and the manufacturer was paying duty on the basis of the approved classification list.

30. In a subsequent case *Elson Machines Private Limited v. Collector of Central Excise* [1988 (38) ELT 571] a question had arisen before the Supreme Court whether the exemption granted in favour of the manufacturer from payment of excise duty under an exemption notification issued by the Central Government was valid or not. The appellant availed the exemption under the notification for the periods 1 April 1980 to 30 November 1980 and 1 April 1981 to 30 September 1981

claiming that the clearances were confined to the stipulated period specified in the notification. A notice was issued to the appellant by the Excise Officer to show cause why the differential duty should not be recovered as he had wrongly availed of exemption as its clearances exceeded the limit of Rs. 15 lakhs. The Tribunal held that the appellant was not entitled to the exemption as it had exceeded the limit stipulated by the notification and it was therefore disentitled to the concession. In the appeal before the Supreme Court, it was contended that the classification list had been approved earlier and therefore, the Excise authority was estopped from taking a different view. That contention was repelled by the Supreme Court and the relevant portion of the judgment reads as follows :

'The next submission on behalf of the appellant is that the classification Lists had been approved earlier and the Excise authority was estopped from taking a different view. Plainly there can be no estoppel against the law. The claim raised before us is a claim based on the legal effect of a provision of law and, therefore, this contention must be rejected.'

31. In view of the decisions of the Supreme Court referred to above wherein demands raised for the recovery of the excise duty for non-levy or short-levy either under the then existing Rule 10 and 10-A or Section 11-A of the Act as the case may be, in modification of the approved classification list were upheld, we hold that the concerned Excise authority has power to modify or revoke an approved classification list under Section 11-A of the Act read with Rule 173-B of the Rules. Therefore, the impugned show cause notice is quite valid.

32. It is, however, submitted by the learned counsel for the petitioner that the remedy under the Act is rendered nugatory in view of the instructions/directions of the Central Board of Excise and Customs as per the Board's circular dated May 31, 1988 and the trade notice issued pursuant thereto and the competent authority has no other alternative than to revoke the approved classification list. The Board's letter dated May 31, 1988 is as follows :

'The issue was discussed in West Zone Collectors' Conference held at Pune on 18-10-1987. It was explained that glass fibres are formed in continuous length when molten glass is passed through orifice. The predetermined quantity of such

glass fibres is collected on a plastic sleeve. The winding machine is stopped and the package of the fibre is removed from the winding machines. Such packages are known as glass fibre cakes. These are transferred to frame for giving twist to the glass fibre to convert into yarns.

The matter has been further examined in Board's office in consultation with the Deputy Chief Chemist, Central Revenue Control Laboratory. In the technology of man-made fibres, the process of making filament by extruding molten polymer of glass is no doubt known as spinning. The filaments can be assembled with or without twist to make 'filament yarn'. The filaments can be cut into staple fibres and then the staple fibres can be spun into a yarn known as spun yarn. While both filament yarn and spun yarn of glass are covered by the description 'yarn spun wholly out of glass fibres', the specific exclusion of continuous filament yarn of glass fibre will obviously leave only the spun yarn of glass fibres for enjoying the benefit of exemption specified against the relevant entry in notification.

The Board agrees with the above views and accordingly holds that the benefit of exemption under Notification No. 52/86-C.E., dt. 16-2-1986 as amended would not be available to glass fibre yarn.'

In that letter, it was clearly mentioned that the issue was discussed in the West Zone Collectors' Conference held at Pune on October 18, 1987. Thus, what was discussed at that conference was mentioned in the letter and the Board had expressed its agreement with the views expressed in that conference regarding the classification of the product.

33. Under Section 37-B of the Act, the Central Board of Excise and Customs is conferred power to issue such orders, instructions and directions to the Central Excise Officers as it may deem fit if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of excise on such goods. The proviso to that section incorporates an embargo prohibiting the Board from issuing any such instructions or directions to any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner or interfering with the discretion of the appellate authority in the exercise of its appellate powers.

34. In the instant case, the impugned show cause notice has been issued by the Superintendent of Central Excise, Shamshabad Range. In that notice, it was stated that the yarn manufactured by the petitioner-company was out of continuous filament of glass fibres and therefore, it was not eligible for exemption of nil rate of duty under Notification No. 52/86 CE dated February 10, 1986 as amended. The manufacturing process adopted by the petitioner-company for the manufacture of yarn, the particulars of which have been furnished by the petitioner-company itself, has been mentioned in the show cause notice. No reference is made in that show cause notice to the Board's letter dated May 31, 1988. In that letter, the Board has not given any instructions or directions to any Central Excise Officer to make a particular assessment or dispose of a particular case or to exercise the discretion in a particular manner nor does it contain any directions to any appellate authority to exercise its appellate powers in a specified manner. Having regard to the discussions held at the conference of West Zone Collectors, the Board had expressed its agreement with the views expressed at the conference. The impugned notice has been issued calling upon the petitioner to show cause why the approval given for the classification of the aforesaid product should not be revoked and why it should not be classified under Chapter Heading No. 7014.00 attracting excise duty at 20% ad valorem with immediate effect.

35. In *Orient Paper Mills Limited v. Union of India* - 1978 (2) ELT (J) 345, the excise authorities initially treated 'M.G. Poster paper' as printing and writing paper and levied duty under Item 17(3) at the rate of 22 paise per kilogram. Subsequently, the excise authorities treated that paper as packing and wrapping paper and insisted upon the manufacturer to pay the duty thereon under Item 17(4). The manufacturer paid duty at that rate under protest and applied to the Assistant Collector who rejected the claim. Aggrieved by that order, the manufacturer preferred appeal to the Collector. The Collector rejected the appeal mainly on the ground that the question was covered by the direction issued by the Central Board of Revenue. That order was confirmed by the Central Government in revision. In those circumstances, the Supreme Court held that the order passed by the Collector who was a quasi-judicial authority was vitiated as he merely relied on the direction issued by the Board.

36. Reliance is also placed by the learned counsel for the petitioner on a decision of the Delhi High Court in *Indian Aluminium Company Limited v. Union of India* - 1983 (12) ELT 349. In that case, a notification was issued exempting 'Aluminium in any crude form produced wholly out of girgin metal' from levy of excise duty with effect from July 1, 1976. Certain amendments were made in the main notification on August 26, 1976, November 1976, and February 8, 1977. A trade notice was issued by the Board of Central Excise and Customs laying down the procedure for fixing the base period and the base clearance. The appellant company removed and/or cleared aluminium manufactured from all its aforesaid smelting plants under the procedure laid down in Chapter VII-A of the Rules commonly referred to as the Self Removal Procedure during the period beginning from February 6, 1977 and ending with March 31, 1977. While so, on or about 19th February 1977 the Central Government issued a press note giving some clarification in regard to the scheme under which manufactures of specified commodities would be entitled to 25% reduction in the excise duty leviable on clearance of their manufactures which were in excess of the clearances in the base period. After the issue of the press note, the Central Excise authorities took the stand that the assessable value at the time of removal of the goods has to be determined by deducting the amount of duty from the whole-sale price and thus purported to levy and collect excise duty on the exempted goods for the relevant period on the basis of the said press note. In deciding the question, the learned Judge observed that it was 'not understandable why the benefit of the rebate in the duty is required to be passed on to the consumers and which could form the foundation of levy and/or collection of excise duty and/or rejection of the claim of the petitioners for the refund of the duty, when there is no specific condition to that effect laid down in the statutory notification. It is not open to the Board in its administrative capacity to issue, directives to various subordinate authorities exercising quasi-judicial functions to interpret excise notifications in a particular manner and to restrict relief thereunder.'

37. In the instant case, the Superintendent of Central Excise had referred to the manufacturing process, the particulars of which were supplied by the petitioner-company itself, in the show cause notice and asked the petitioner-company to show cause why having regard to the manufacturing process, the yarn should not

be treated as the one made out of continuous filament of glass fibre, and therefore, not eligible for exemption of nil rate of duty under Notification No. 58/86 C.E., dated February 10, 1986. It is for the proper authority to decide on the basis of the explanation submitted by the petitioner-company to the show cause notice, after taking into consideration the relevant material relating to the manufacturing process, whether the yarn manufactured by the petitioner-company is out of continuous filament or spun wholly out of glass fibre.

38. We have already held that it is open to the proper authority to modify or alter the approved classification list at any time when duty of excise has not either been levied or short-levied due to wrong classification of a product. In exercise of that power, the impugned show cause notice has been issued. Though the learned counsel for the petitioner has vehemently urged on merits that the yarn manufactured by the petitioner is yarn spun wholly out of glass fibre and it is not continuous filament yarn, it would not be proper for us to go into the merits of the cause at the show cause notice stage. It is for the concerned authority to consider the matter and render a decision. We make it clear that the Assistant Collector shall decide the matter on merits without taking into consideration the views expressed by the Central Board of Excise and Customs regarding the classification of the product.

39. For the reasons stated above, we see no ground to interfere with the impugned show cause notice. The writ petition, therefore, fails and it is accordingly dismissed with costs. Advocate's fee Rs. 500/-.