Org Systems Vs. Collector of Central Excise

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SooperKanoon Citation : sooperkanoon.com/4812

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-24-1989

Reported in : (1989)(23)LC100Tri(Delhi)

Appellant : Org Systems

Respondent : Collector of Central Excise

Judgement :
1. M/s. ORG Systems, Wadiwadi, Dr. V.S. Marg, Baroda, have filed an appeal being aggrieved from the order-in-original No. 20/MP/85, dated 29th June, 1985 passed by the Collector of Central Excise, Baroda.

Briefly the facts of the case as per revenue's version are that Messers ORG Systems (a Division of Ambalal Sarabhai Enterprises Ltd.), Baroda, were engaged in the manufacture of "Computers" falling under Tariff Item 33 DD of the First Schedule to the Central Excises and Salt Act, 1944, under a Central Excise licence in form L-4 dated 14th May, 1984 held by them for the purpose and were getting the computers manufactured by supplying raw materials from two independent manufacturers, namely, (i) Messrs Digital Systems International, Baroda and (ii) Messrs Orbit Electronics, Baroda and were sold through Messrs Adprint Services Ltd., Baroda and the assessable value on which the duty was paid by these manufacturers of computers was considerably low in comparison to the value ultimately collected from the customers to whom these computers were sold by ORG through Adprint.

2. On 22nd March, 1984, the officers visited the factory premises of "Orbit" and obtained records of the unit for scrutiny examination and the preliminary scrutiny of the records revealed that "Orbit" was manufacturing computers exclusively for and on behalf of "ADPRINT" on job work basis. On 26th March, 1984, the officers also visited the factory and office premises of Messrs Digital Systems International, Baroda, and collected records from the unit for further scrutiny and examination. It was found that Messrs Digital Systems International, Baroda, were also manufacturing the computers for and on behalf of "Adprint" on job work basis, besides manufacturing the computers of their own. Thereafter, the officers visited the office premises of "Adprint" situated at Chhani, Distt. Baroda on 20th June, 1984 and found that "Adprint" was not carrying out any manufacturing activity but was only located in one of the rooms of the building belonging to ORG Systems wherein one unit in the name and style of Research and Development Centre of ORG was situated and was engaged in the preparation of softwares as well as specifications and design of computers. It was further found that the computers manufactured by "DSI" and "Orbit" for and on behalf of "Adprint" were manufactured as per designs and specifications developed by Research and Development Centre from May, 1982. The officers during the course of their enquiry also visited the factory of ORG situated at Wadi Wadi, Baroda. On scrutiny of further records it was found that "Adprint" had supplied components/materials to "DSI" and "Orbit" of the value as mentioned below during the period from 1979 to May, 1984.

Out of the above materials "DSI" and "Orbit" had manufactured and removed computers on payment of duty to "Adprint" of the values as detailed below from 1979 to May, 1984: It was also observed that after having received the computers data-entry systems and data-processing systems of the models as aforementioned from "DSI" and "Orbit", "Adprint" was affixing the name plate of 'ORG" by removing the trade mark "DSI", "DBS" and "DPS" and the name plate of "ORG" was got manufactured by "Adprint" from Messrs Excel Graphics Pvt. Ltd., Bombay. It was further noticed that after adding certain peripherals in the computers and after converting the trade mark as above, "Adprint" had sold computers to different independent customers from the years 1979 to May, 1984 of the value of Rs. 10,71,58,210.00. It was further found that service charges for the installation of

computers and also supply of softwares by "ORG" were collected by "ORG" as an approved party of "Adprint" in respect of the computers got manufactured from "DSI" and "Orbit" and supplied through "Adprint" to various customers during the years 1979 to May 1984 at Rs. 8,80,49,778.28.

3. In the light of the aforesaid facts, a show cause notice dated 22nd October, 1984 was issued to Messrs ORG Systems, Wadi Wadi, Baroda charging them for the contravention of the provisions of Rule 174 read with Section 6 of the Central Excises and Salt Act, 1944, Rule 173-F read with Rule 9(1), Rule 173-B, Rule 173-C, Rule 173-G(2) read with Rule 52-A and Rule 173-C (4) read with Rule 53 of the Central Excise Rules, 1944 and calling upon them to show cause against recovery of duty on the goods i.e. Computers, falling under Tariff Item 33-DD at Rs. 19,50,07,989.08 manufactured and removed by them during the period from 1979 to May, 1984 less duty already paid on the said goods by (i) M/s Digital Systems International, Baroda and (ii) M/s. Orbit Electronics, Baroda and by themselves under the proviso to Sub-section (1) of Section 11-A of the Central Excises and Salt Act, 1944 (corresponding to provisos (a) and (b) of Sub-rule (1) of Rule 10 of the Central Excise Rules, 1944, as it stood before being omitted vide Notification No. 177/80, dated 12.11.80) read with Rule 9(2) of the Central Excise Rules, 1944, and against imposition of penalty under Sub-rule (1) of Rule 173-Q of the Central Excise Rules, 1944.

4. On 20th December, 1984 interim reply was filed by the appellant.

Thereafter, a detailed reply vide letter dated 19th April, 1985 was also filed.

5. The learned Collector of Central Excise did not accept the contentions of the appellant and held that the charge levelled against Messrs ORG Systems in the show cause notice dated 22nd October, 1984 was conclusion proved and he ordered the payment of the duty of excise at the appropriate leviable rate amounting to Rs. 3,32,96,010.58 (Rs. 3,20,56,260.43 basic duty + Rs. 12,39,750.15 special excise duty) on the goods i.e. computers falling under Tariff Item 33-DD manufactured and removed by them during the period from 1979 to May, 1984 under the the proviso to Sub-section (1) of Section 11-A of the Central Excises and Salt Act, 1944 (corresponding to provisos (a) and (b) of Sub-rule (1)

of Rule 10 of the Central Excise Rules, 1944, as it stood before being omitted vide Notification No. 177/80, dated 12.11.80) read with Rule 9(2) of the Central Excise Rules, 1944. He had also imposed a penalty of Rs. 25,00,000/- on Messrs ORG Systems (a division of Ambalal Sarabhai Enterprises Ltd.) Baroda under Sub-rule (1) of Rule 173-Q of the Central Excise Rules, 1944.

6. Being aggrieved from the aforesaid order, the appellant has come in appeal before the Tribunal.

7. Vide miscellaneous application No. 856/86-A the appellant had made a prayer for the amendment of the grounds of appeal in the appeal before the Tribunal by inclusion of a ground in relation to the jurisdiction arid competence of the adjudicating officer in the context of Section 11-A of the Central Excises and Salt Act, 1944 and the revenue had no objection for the inclusion of the ground by way of amendment of the grounds of appeal and the application for the amendment of grounds of appeal was allowed by the Bench vide order dated 26th December, 1986.

8. Shri Soli J. Sorabjee, the learned Senior Advocate with Shri K.S.Nanavati, Shri Kamal M. Mehta, Mrs. Nisha Bagchi, Mr. S. Ganesh and Mr.

Rajan Mahapatra, Advocates have appeared on behalf of the appellant.

Shri Soli J. Sorabjee, learned senior advocate, argued on the preliminary point of jurisdiction. Shri Sorabjee, the learned senior advocate, has argued that in terms of the provisions of Sub-section

(1) of Section 11-A of the Central Excises and Salt Act, 1944, as it stood at that time, a show cause notice could be served by a central excise officer. In the instant case, the show cause notice was issued by the Superintendent of Central Excise and the appellant was to show cause to the Collector of Central Excise and Customs, Baroda in terms of para 17 of the show cause notice dated 22nd October, 1984 which appears on pages 174 to 188 of the paper book. Shri Sorabjee stated that as per Sub-section

(2) of Section 11-A of the Central Excises and Salt Act, 1944 as it stood at that time, after considering the representation made by the appellant in response to the show cause notice issued under Sub-section (1), the Assistant Collector was to determine the amount of duty of excise due from the appellant and thereupon the appellant shall pay the duty so determined. In the present matter, the appellant was to show cause to the Collector of Central Excise and Customs, Baroda and not to the Asstt. Collector and as such the adjudication proceedings were ab initio void, illegal and bad in the eyes of law. Shri Sorabjee had further argued that the show cause notice was dated 22nd October, 1984 and the adjudication order is dated 29th June, 1985 i.e. much before the vesting of the jurisdiction for the adjudication of the matters where extended period of limitation was invoked. Section 11-A was amended by Act No. 79 of 1985 and amended provisions came into operation from the 27th day of December, 1985 and before the amendment of the section, Asstt. Collector was the only authority who could adjudicate the matter. He has referred to Clause

(2) (a) of the Statement of Objects and Reasons which clearly shows that "show cause notice in regard to duty of excise short levied or short paid, etc; by reasons of fraud, collusion or any wilful misstatement or suppression of facts should be issued, and such cases decided, by the Collector of Central Excise instead of by the Asstt. Collector of Central Excise as at present". In support of his argument, Shri Sorabjee has referred to a judgment of the Hon'ble Supreme Court in the case of S. Kannan and Ors. v. Secretary, Karnataka State Road Transport Authority reported in (1984) 1 Supreme Court Cases 375 where the Supreme Court had held in para No. 15: "It is equally not possible to accept the submission that when a power is conferred on a lower authority that power can always be enjoyed by the authority higher in the hierarchy in relation to the lower authority." He has referred to another judgment of the Tribunal in the case of Kwality Containers Pvt. Ltd. v. Collector of Central Excise, Bombay, where in paras 13 and 14 of the order the Tribunal had held that before amendment of Section 11-A, the Collector had no power to adjudicate the matter. Shri Sorabjee states that Section 11-A which came into force with effect from 17th November, 1980 lays down the provisions of law, and Section 2(b) of the Central Excises and Salt Act, 1944 defines "Central Excise Officer" "means any officer of the Central Excise

Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963" and Rule 2(xi) of the Central Excise Rules, 1944 defines "proper officer" "means the officer in whose jurisdiction the land or premises of the producer of any excisable goods, or of any person engaged in any process of production of, or trade in, such goods or containers thereof whether as a grower, curer, wholesale dealer, broker or commission agent or manufacturer, or intended grower, curer, wholesale dealer, broker, commission agent or manufacturer, are situate". Sub-rule

(1) of Rule 6 of the Central Excise Rules, 1944 further provides that "Collector may perform all or any of the duties, or exercise all or any of the powers, assigned to an officer under these rules". Shri Sorabjee has argued that the Central Excise Rules, 1944 which are very important in terms of the provisions of Section 37 of the Central Excises and Salt Act, 1944 cannot override the provisions of the Central Excises and Salt Act, 1944. He has also referred to Sub-rules

(1) and

(2) of Rule 9 of the Central Excise Rules. He has argued that the scheme will not apply to Chapter VII-A (Self-removal Procedure). Rule 9(2) is a general rule.

Under Section 11-A, as it stood at the relevant time, Asstt. Collector was the proper officer. Rule 9(2) has to be harmonious with Section 11-A of the Central Excises and Salt Act, 1944. In the present matter, there is no clandestine removal and as such Rule 9(2) is not applicable. In support of his argument, he has referred to a judgment of the Supreme Court in the case of N.B. Sanjana, Assistant Collector of Central Excise, Bombav and Ors. v. The Elphinstone Spinning and Weaving Mills Co. Ltd. reported in AIR 1971 S.C. 2039 at 2048. The Supreme Court had held that "To attract Sub-rule (2) to Rule 9, the goods should have been removed in contravention of Sub-rule (1). It is not the case of the appellants that the respondents have not complied with the provisions of Sub-rule 1. We are of the opinion that in order to attract Sub-rule 2, the goods should have been removed clandestinely and without assessment. In this case there is no such clandestine removal without assessment. On the other hand, goods had been

removed with the express permission of the excise authorities and after order of assessment was made." He has referred to para No. 17 of the show cause notice which appears on page 187 of the paper book. The appellant was following Chapter VII-A SRP and as such Rule 9(2) was not applicable. He has argued that for the sake of argument even if it is assumed that Rule 9(2) was not applicable, proper officer was the Asstt. Collector. Rule 173-A of Chapter VII-A clearly lays down that when there is a conflict between the provisions of Chapter VII-A and provisions contained in any chapter in relation to such excisable goods the provisions of Chapter VII-A shall prevail. Shri Sorabjee has referred to Administrative Law by Professor Wade's Book page 216, 5th edition where he has opined that "A statutory authority endowed with statutory powers has, as already mentioned no common law powers at all: it can legally do only what the statute permits, and what is not permitted is forbidden." A.G. v. Great Eastern Railway (1880) 5 App.

Cas. 473. Shri Sorabjee argued that in para No. 17 of the show cause notice a direction has been given to the assessee to show cause to the Collector of Central Excise. He has argued that under Section 11-A only the Asstt. Collector has got the jurisdiction to whom the cause has to be shown. He is the adjudicating authority. The show cause notice dated 22nd October, 1984 which appears on page 174 of the paper book is ab initio void, illegal and bad in the eyes of law. In support of his argument, he has referred to another judgment of the Kerala High Court in the case of V Ramananda Prabhu v. Collector of Central Excise and Customs, Cochin, reported in AIR 1965 Kerala 286 where the High Court had held that "the show cause notice issued in that case was improper.

Under Section 124 of the Customs Act, the show cause notice should have been given by the Collector or a person acting under his authority and should have directed the petitioner to submit his representation before the Collector and to appear before him, if the petitioner wanted personal hearing. The representation has to be made before the adjudicating authority and the personal hearing must also be before him. Exhibit P6 notice was defective in this respect namely that it only indicated that the petitioner should appear with his evidence before the Assistant Collector of Customs. The petitioner's counsel relied on the ruling of the

Supreme Court in G. Nageswara Rao v. A.P.S.R.T. Corporation, AIR 1959 S.C. 308 at p. 327 for the proposition that the hearing must be before the person who is to adjudicate on the controversy. By Ex. P-7 the petitioner had waived the right of personal hearing before the Asstt. Collector of Customs. That does not mean that he had waived his right of being heard by the adjudicating authority, namely the Collector. I think the principles of natural justice required that the petitioner should have been given an opportunity of being heard before the authority making the adjudication. At any rate, I am of opinion that Section 124 of the Act required that the petitioner should have been given an opportunity of being heard before the Collector, who has made the adjudication. As no such opportunity was given, I am inclined to think that there has been a miscarriage of justice". Shri Sorabjee has argued that the period involved in the present matter is from 1979 to 1984. He has pleaded for the acceptance of the appeal on the preliminary point of jurisdiction.

9. Shri V.M. Doiphode, the learned senior departmental representative, has pleaded that under Chapter VII-A of the Central Excise Rules when there are no provisions on a particular issue, the provisions of Central Excise Rules will apply. Under Chapter VII-A, there are no contrary provisions and as such Rule 9 of the Central Excise Rules, 1944 will apply. He has referred to Rule 52-A, Rules 173-G, 173-F and 173-1. He has argued that under Rule 6 of the Central Excise Rules, any power which is to be exercised by the Assistant Collector can always be exercised by the Collector. In support of his argument, he has referred to the following judgments: 1982 ELT 844 (M.P.) Gwalior Rayon Mfg.

(Wvg.) Co. v. Union of India and Ors. where it was held that "a rule framed under the Act is a part thereof and has to be construed as such for all purposes. Therefore, rules made under a statute must be treated as if they were in the Act itself both for the purpose of construction and also for the purpose of obligation". He has also referred to another judgment of the Supreme Court reported in AIR 1981 S.C. 77 State of Tamil Nadu v. Hind Stone, etc. etc. He has laid special emphasis on para 11 of the said judgment where the Supreme Court had held that: "A statutory rule, while ever subordinate to the parent statute, is, otherwise, to be treated as part of the statute and as effective. Rules made under the Statute must be treated for all purposes of construction or obligation exactly as if they

were in the Act and are to be of the same effect as if contained in the Act and are to be judicially noticed for all purposes of construction or obligation. So, statutory rules made pursuant to the power entrusted by Parliament are law made by Parliament within the meaning of Article 302 of the Constitution." Shri Doiphode has argued that in terms of provisions of Section 2(b) of the Central Excises and Salt Act, any officer of the Central Excise Department is a Central Excise officer and that the Collector could always exercise the powers of the Asstt. Collector. He has referred to Rule 4 of the Central Excise Rules, 1944 which relates to the appointment of officers and the powers are assigned by the Collector to the Assistant Collector and the assigning of the power is being done under Rule 4 of the Central Excise Rules, 1944. He has referred to the meaning of the word "assign" as given in Black's Law Dictionary, fifth edition page 108. "Assign" "means to transfer, make over, or set over to another. To appoint, allot, select, or designate for a particular purpose, or duty. To point at, or point out; to set forth, or specify; to mark out or designate; to particularize, as to assign errors on a writ of error; to assign breaches of a covenant". He has argued that provisions of Sub-section (2) of Section 5 of the Customs Act, 1962 are similar to the provisions of Central Excise Act. He has further argued that words "assign" and "confer" are not synonymous and under the rules all the powers are with the Collector and up to 6th August, 1987 no specific power was given to the Asstt. Collector. In old Rule 10 the word "Assistant Collector" was there but no rule gives any specific power to the Asstt. Collector. Same officer can be posted under the Customs Act. He further states that Rule 5 relates to delegation of powers. In support of his argument, he has referred to a judgment reported in 1983 ELT 1501 (SC) in the case of Durga Prasad, etc. v.H.R. Gomes, Superintendent (Prevention), Central Excise, Nagpur and Anr. where the Supreme Court had held that so long as Rule 9(2) stays, the presumption goes that the jurisdiction vests with the Collector. He has referred to the provisions of Sub-section (1) and Sub-section (2) of Section 11-A. He has stated that there is no amendment of Rule 9(2) which still continues and the Collector has got jurisdiction under Rule 9(2). In support of his argument he has referred to a judgment in the case of Seth Bansi Lal v. CIT reported in 83 ITR 750 at page 757. He has referred to Section 33 of the Central Excises and Salt Act, 1944.

He has argued that the primary object of the Act is to levy and collect central excise duty. Collector is the Central Excise Officer.

Everything is done by the Collector. He has referred to another judgment of the Supreme Court in the case of Assistant Collector of Central Excise, Calcutta v. National Tobacco Co. of India reported in 1978 ELT J-416 where the Supreme Court had held that: "Rule 10-A seems to deal with collection and not with the ascertainment of any deficiency in duty or its cause by a quasi-judicial procedure. If, however, it is 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." He has referred to para 17 of the show cause notice. Shri Doiphode has brought it to the notice of the Bench that there is nothing on record to show that RT-12 returns were assessed or not. He has referred to a judgment of the Supreme Court in the case of N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Ors. v. The Elphinstone Spinning and Weaving Mills Co. Ltd. reported in 1978 ELT J-399. In the present matter there is a large scale evasion of tax and under Rule 6 the power can be well exercised by the Collector and the purpose of the issue of show cause notice is to put on alert the assessee against whom action is to be taken. In support of his argument, he has referred to a judgment of the Delhi High Court in the case of Hindustan Aluminium Corporation Ltd. v.Superintendent, Central Excise, Mirzapur and Ors. reported in 1981 ELT 642 (Delhi) where the Delhi High court had held that show cause notice not void, if amount of duty is not specified and also there is no mention as to the procedure for reply. He has laid special emphasis on paras 19 and 20 of the said judgment. It was further held by the Delhi High Court at page 643 as under: "The broad maxim that a fiscal provision has to be construed against the Department and in favour of a citizen on any supposed reason of technicality and strict construction is not a sound law. It is only when there is some equivocation or ambiguity about a word or a provision that a rule of strict construction or narrow construction in favour of a subject is to be applied but; if there is no ambiguity and the act or omission clearly falls within the mischief of statute, then the construction of penal statute will not differ from that of any other

enactment." In support of his argument he has also referred to the following judgments : (1) AIR 1957 S.C. 397 para 45 Pannalal Binjraj and Ors. v. Union of India and Ors.

Where the Hon'ble Supreme Court had held that "where none of the petitioners raised any objection to their cases being transferred under Section 5(7A) of the Income-tax Act and in fact submitted to the jurisdiction of the Income-tax Officers to whom their cases had been transferred". The Supreme Court had held "that the petitioners were not entitled to invoke the jurisdiction of the Supreme Court under Article 32. It is well settled that such conduct of the petitioners would disentitle them to any relief at the hands of the Supreme Court." He has referred to a judgment of the Calcutta High Court in the case of Ram Kumar Sitaram v. Certificate Officer and Anr. reported in 49 ITR 797 where the Hon'ble Calcutta High Court had held that: "Where the assessees themselves invite a particular Income-tax Officer to make an assessment on them they cannot thereafter turn round and say that he had no jurisdiction to make the assessment." Shri Doiphode has also referred to a judgment of the Delhi high Court in the case of Hindustan Aluminium Corporation Ltd. v. Superintendent, Central Excise, Mirzapur and Ors. reported in 1981 ELT 642 (Delhi) where the Delhi High Court in paras 19 and 20 had held that: "The purpose of the show cause notice is to indicate the amount of duty payable by the petitioner and, therefore, if the show cause notice indicates the difference between the duty demanded and the duty not paid that would be sufficient compliance of Rule 10." Shri Doiphode has also referred to the following cases :- (1) Where the Hon'ble Supreme Court had held that: "Whenever an adjudication order is struck down as invalid being in violation of the principles of natural justice, there is no final decision of the case and fresh proceedings are left open. All that is done is that an order assailed by virtue of its inherent defect is vacated but the proceedings are not terminated." (2) 1983 ELT 2051 National Fertilizers Ltd. v. Collector of Central Excise, Chandigarh Where the Tribunal had held that "the Collector, after having recorded a finding that the Asstt. Collector, Ludhiana did not have jurisdiction to pass the order-in-original on 27-2-1979, could and should not have proceeded to modify the very same order. The only course open to him was to quash the order passed without jurisdiction which was a nullity in the eyes of law. He could have remitted the matter to the Asstt. Collector having

jurisdiction for a de novo adjudication".

The Collector's order was, therefore, neither legal nor proper. The Tribunal had remanded the matter to the Asstt. Collector having jurisdiction for readjudication.

(3) AIR 1975 SC 67 The Director of Inspection of Income-tax v. Puranmal & Sons The matter was remanded to officer having jurisdiction.

Shri Doiphode has argued that Section 11-A was amended and came into force with effect from 27th December, 1985 vide Act No. 79 of 1985 and it was provided that the proceedings were to be transferred to the Collector which were pending before the Asstt. Collector. Shri Doiphode has further argued that the procedural amendment of law can be retrospective and in support of this proposition he has referred to the judgment of the Supreme Court in the case of Smt. Dayawati and Anr. v.Inderjit and Ors. reported in AIR 1966 SC 1423. Shri Doiphode has pleaded for the dismissal of the appeal.

10. Shri Soli J. Sorabjee, the learned senior advocate, has argued that the judgments cited by the learned senior departmental representative do not help him. Shri Sorabjee, the learned senior advocate, states that objection regarding jurisdiction goes to the root of the matter.

In support of his argument he has referred to the following judgments: - (2) 37 STC 533 Commissioner of Sales Tax, U.P. v. Sarjoo Prasad Ram Kumar (3) AIR 1954 Bombay 202 Gandhinagar Motor Transport Society v. State of Bombay Shri Sorabjee has argued that the judgments cited by the learned senior departmental representative are in respect of irregular exercise of jurisdiction by an authority. In the present case, there was no jurisdiction with the adjudicating authority and as such the order passed is without jurisdiction and void. Shri Sorabjee has further argued that the point of jurisdiction can be raised at any stage. In the case of Chandrika Misir and Anr. v. Bhaiyalal (supra) the Hon'ble Supreme Court had held that where the contention of jurisdiction had not been raised by the defendant in the trial court, but where the trial court was lacking in jurisdiction the plea could have been raised at any stage and even in the execution proceedings on the ground that the decree was a nullity. Shri Sorabjee has further argued that if two

sections are repugnant, the known rule is that the last must prevail.

In support of his argument he has referred to the following judgments:- (1) AIR 1947 Privy Council 94 The King v. Dominion Engineering Co.

Ltd. Shri Sorabjee further states that where the power has been given to act in a particular mode, the power has to be exercised according to that mode. In support of his argument he has referred to the judgment of he Hon'ble Supreme Court in the case of State of Uttar Pradesh v. Singhara Singh and Ors. reported in AIR 1964 SC 358. This rule was also adopted in Taylor v. Taylor (1876) 1 Ch D 426. He has again referred to the show cause notice and stated that there is lack of jurisdiction. He has also argued that amending section is not applicable. There was no clandestine removal and Rule 9(2) is not applicable and the base is the under valuation. Rule 9(2) cannot over-ride the provisions of Section 11-A and if there is a conflict in the provisions of Rule 9(2) and Section 11-A, Section 11-A will prevail. The base of the show cause notice is under valuation and the penalty is under Rule 173-Q and penalty is always consequential. Shri Sorabjee, the learned senior advocate, has pleaded for the acceptance of the appeal.

11. We have heard both the sides and have gone through the facts and circumstances of the case. For the proper appreciation of the facts para No. 17 of the show cause notice which appears on page 187 of the paper book is reproduced below :- "17. Now, therefore, M/s. ORG Systems, Wadi Wadi, Baroda, are hereby called upon to show cause to the Collector of Central Excise & Customs, Baroda, Opp: Maganwadi, Sayajigunj, Baroda, as to :- (i) Why the duty of excise at the appropriate leviable rate should not be recovered from them on the value of goods i.e. Computers, falling under Tariff Item 33DD amounting to Rs. 19,50,07,989.08 Ps.

manufactured and removed by them during the period from 1979 to May, 1984 less duty already paid on the said goods by (1) M/s. Digital Systems International Baroda (2) M/s. Orbit Electronics Baroda and by themselves as per chart enclosed, under the proviso to Sub-section (1) of Section 11A of the Central Excises and Salt Act, 1944, (corresponding to provisos (a) and (b) of Sub-rule (1) of Rule 10 of the Central Excise Rule, 1944, as it stood before being omitted vide

Notification No. 177/80, dated 12.11.80 read with Rule 9(2) of the Central Excise Rules, 1944.

(ii) Why penalty should not be imposed on them under Sub-rule (1) of Rule 173 Q of the Central Excise Rules, 1944." Both the sides have argued the matter on the preliminary issue of jurisdiction. For the correct appreciation of the legal position, Section 11-A of the Central Excises and Salt Act, 1944, Rule 6 and Rule 9(2) of Central Excise Rules, 1944 are reproduced below: "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: Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if for the words "six months", the words "five years" were substituted.

Explanation :- Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of six months or five years, as the case may be.

(2) The Assistant 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." "Rule 6. Collector or Deputy Collector to exercise the powers of any officer:- (1) The Collector may perform all or any of the duties, or exercises all or any of the powers, assigned to an officer under these rules.

(2) Subject to the provisions of Sub-rule (1), the Deputy Collector of Central Excise appointed by the Central Board of Excise and Customs, may, within his territorial jurisdiction, perform all or any of the duties, or exercise all or any of the powers, assigned under these rules to an officer subordinate to him." "Rule 9(2). If any excisable goods are, in contravention of Sub-rule (1) deposited in, or removed from, any place specified therein, the producer or manufacturer, thereof shall pay the duty leviable on such goods upon written demand made within the period specified in Section 11A of the Act by the proper officer, whether such demand is delivered personally to him, or is left at his dwelling house, and shall also be liable to penalty which may extend to two thousand rupees, and such goods shall be liable to confiscation.

Explanation: For the purposes of this rule, excisable goods produced, cured or manufactured in any place and consumed or utilised -- (ii) for the manufacture of any other commodity, whether in a continuous process or otherwise, in such place or any premises appurtenant thereto, specified by the Collector under Sub-rule (1), shall be deemed to have been removed from such place or premises immediately, before such consumption or utilisation." A simple reading of Sub-section (2) of Section 11A will clearly show that the adjudication is to be done by the Asstt. Collector of Central Excise. Section 2(b) of the Central Excises and Salt Act, 1944 defines "Central Excise Officer" "means any officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) with any of the powers of a Central Excise Officer under this Act". A simple reading of Rule 9(2) will clearly show that the applicability of Section 11A in Rule 9(2) is only in respect of the limitation period and the demand is to be made by a proper officer and Rule 6 of the Central Excise Rules clearly lays down that the Collector may perform all or any of the duties, or, exercise all or any of the powers, assigned to an officer under these rules. Similar pleas were taken before the Tribunal in the case of Piya Pharmaceuticals Works v.Collector of Central Excise, Meerut reported in 1985 (19) ELT 272. Para No. 22 from the said judgment is reproduced below: "22. The learned Counsel for the appellants submitted that the proper course for the Collector was to exercise his powers under Section 35A of the Central Excise and review the decision taken by

the Asstt. Collator who approved the classification lists. He also argued that Rule 9(2) would not permit the Collector to do what had because by reason of Section 11A only the Asstt. Collector could determine me duty due. What the learned Counsel appears to have over-looked is that the incorporation of Section 11A in Rule 9 was not to make Section HA the operative procedure but merely to put (sic) on the issue of demands. In the past, before the incorporation, demands under Rule 9(2) were governed by no time limit; with incorporation of Section 11 A. such demands are required to be "made within the period specified in Section 11A of the Act" by the proper officer. It is that the demand should be made within the time limit prescribed by 11A - not the process developed in Section 11A that should be followed. As we have observed this was to curb the tendency of the officers frequently to resort to the demands under Rule 9(2) without regard to the time when the short levy occurred. The timeless limit of Rule 9(2) was a weapon that had been frequently misused; we think that the Govt. did right in cutting down such unlimited power. We think that the learned counsellor M/s. Piya Pharmaceuticals was mistaken when he argued that only the Asstt. Collector could have issued an order of the kind the Collector did in this case."U.P. Laminations v. Collector of Central Excise, Kanpur reported in 1988 (35) ELT 398, the Tribunal had held that the Collector was competent to exercise the powers of the Asstt. Collector and to adjudicate. Para No. 13 from the said judgment is reproduced below:- "13. As to the next ground that the Collector of Central Excise had not jurisdiction to adjudicate in the proceedings and jurisdiction under Section 11A (2) of the Act was only with the Assistant Collector of Central Excise and reliance for the argument on the Tribunal decision in Kwality Containers case 1987 (29) ELT 304, on going through the decision that the observation as to Collector not having jurisdiction under Section 11A was that of V.T. Raghavachari, Learned Member with which the other two learned Members had not associated themselves (para 19 of Shri Sankaran's order). Shri Raghavachari's observation in para 14 of the order cannot be said to be the decision of the Bench. On going through T.P. Mukherjee's Law Lexicon for the meaning of the word "Collector" it is seen that there are several decisions as to this expression but given in different context and they would not help in the present case. It is significant that Central Excises and Salt Act, 1944 itself has no definition of "Collector" though it has definition of adjudicating

authority' and 'Central Excise Officers' [Sections 2(a) and (b)].

Again the definition of Collector in General Clauses Act, 1897, Section 3 (11) would also not be applicable in the present case. The definition of 'Collector' is to be had in Rule 2(ii) of Central Excise Rules, 1944 and with reference to State of U.P., the material clauses would be Q and QQ. Rule 6 of the Rules empowers the Collector to perform all or any of the duties or exercise all or any of the powers assigned to an officer under the rules. Such a provision, however, is understandably not there in the Act because it does not have even a definition of 'Collector'. The word 'assistant' according to the Concise Oxford Dictionary New Seventh Edition means, inter alia, helping; subordinate. The Assistant Collector who is not defined in the Act is thus only a subordinate of the Collector. There is no prohibition in the Section from Collector himself exercising the powers of the Assistant Collector.

Even otherwise it is unimaginable that a superior cannot exercise the power exercisable by his subordinates. Except the Tribunal decision (supra) which is not found applicable in the case no other authority has been cited before us which may persuade us into holding that Collector cannot exercise the powers of the Assistant Collector under Section 11A(2) of the Act. We reject the second ground urged by Shri Shridharan that Collector had no power to confirm the demand raised against the appellants." Hon'ble Delhi High Court in the case of Duncan Agro Industries Ltd. v.Union of India and Ors. reported in 1989 (39) - ELT 211 (Del.) had held that "a person invested with the powers of a Central Excise Officer is entitled to exercise any of the powers given in the statute, including adjudicatory functions. The investing of the powers means the totality of the powers, administrative, territorial and pecuniary. This interpretation would effectuate the power under Section 2(b)." Para No.24 from the said judgment is reproduced below:- "24. The definition contained in Section 2(b) of the Act says in addition that Central Excise Officer means any person (including an officer of the State Government) invested by Central Board of Excise and Customs constituted under the Central Board and Revenue Act, 1963 (54 of 1963) with any of the powers of the Central Excise Officer under this Act. By the impugned notification dated May 29,1986 in exercise of the powers conferred by Clause (b) of Section 2 of the Act,

and Rule 4 of the Rules, the Central Board of Excise and Customs thereby appointed a Director (Audit) in the Directorate General of Inspection and Audit (Customs and Central Excise), New Delhi, as Central Excise Officer and invested him with the powers of Collector of Central Excise, to be exercised by him throughout the territory of India. The powers, however, were restricted for the purposes of investigation and adjudication of such cases, as may, from time to time be assigned to him by the said Central Board of Excise and Customs. Under the second part of the definition contained in Section 2(b) any person including an officer of the State Government, could be invested by the Central Board of Excise and Customs with any of the powers of a Central Excise Officer under the Act and this has exactly what has been done by the impugned notification dated May 29, 1986. It is not necessary in this case to determine whether "any person" would include an existing officer of the Central Excise Department as in fact the Director (Audit) is not already an officer of the Central Excise Department. The Board has been conferred with the jurisdiction to invest a person with any of the powers of a Central Excise Officer under the Act. The Legislature has authorised the Board to confer on such person all or any one or more powers and that would necessarily include the powers of a Collector exercisable under Section 11-A of the Act. There is no warrant to give a limited or a narrow meaning to the language employed by the legislature in the second part of Section 2(b) so as to restrict to the investing of powers under Section 19, 21, 25 or 26 as is suggested and not Section 11-A. The investing of the powers means the totality of the powers, administrative, territorial and pecuniary. This interpretation would effectuate the power under Section 2(b)."

12. Rule 2(xi) of the Central Excise Rules, 1944 defines "proper officer" "means the officer in whose jurisdiction the land or premises of the producer of any excisable goods, or of any person engaged in any process of production of, or trade in, such goods or containers thereof whether as a grower, curer, wholesale dealer, broker or commission agent or manufacturer, or intended grower, curer, wholesale dealer, broker, commission agent, or manufacturer, are situated". The Tribunal in the case of Cheran Engineering Corporation Ltd. v. Collector of Central Excise, Coimbatore reported hi 1986 (26) ELT 611 (SR) had held that the definition of proper officer "is large enough to include all Central Excise Officers having jurisdiction over the factory.

Accordingly, it would include the 'Collector' himself. Besides, Rule 6 specifically provides that Collector may perform all or any of the duties or exercise all or any of the powers assigned to an officer under the Rules". Hence, there was no impropriety or lack of jurisdiction in the Collector passing the impugned order. Shri Sorabjee, the learned senior advocate, had argued that the rules cannot go over and above the provisions of the Act. This argument is not acceptable as the incorporation of Section 11A in Rule 9(2) only curbs the limitation.

13. In view of the earlier judgments of the Tribunal cited above, we do not find any merit in the preliminary objection of Shri Sorabjee, the learned Senior Advocate. Accordingly, we hold that the Collector had the jurisdiction to decide the matter. Since arguments were advanced by both the sides on this preliminary point, we order the Registry to list the appeal for hearing on merits in the last week of March, 1989.