PETITIONER:
UNION OF INDIA & ORS.

Vs.

RESPONDENT:
MADHUMILAN SYNTEX PVT. LTD. & ANR.

DATE OF JUDGMENT03/05/1988

BENCH:
KANIA, M.H.
BENCH:
KANIA, M.H.
PATHAK, R.S. (CJ)

CITATION:
1988 AIR 1236 1988 SCR (3) 838
1988 SCC (3) 348 JT 1988 (2) 255
1988 SCALE (1)979

ACT:
Central Excises and Salt Act, 1944-Challenging demand of short payment of excise duty being violative of provisions of section 11-A of.

HEADNOTE:
The respondent No. 1 in this appeal was manufacturing Spun yarn. In the manufacture of the said product, the respondents used as raw material cellulosic fibres and non-cellulosic fibres. Prior to 7th July, 1983, the respondents had filed a classification list in respect of the spun yarn manufactured by them showing the same as covered by Item No. 18 (III) (i) in the first schedule to the Central Excises and Salts Act, 1944 ("Central Excises Act"). This classification was on the basis that the spun yarn was manufactured by them out of non-collulosic synthetic waste. The said classification list was approved by the excise authorities on 7th July, 1983. A supplementary classification list was approved on 15th October, 1983.

Samples were drawn out of the spun yarn manufactured by the respondents and sent for chemical analysis. Reports were submitted by the Chemical Analyser. On 7th February, 1984, the Superintendent of Central Excises issued a demand notice against the respondent No. 1 on the footing that there was short payment of excise duty as the goods manufactured by the respondents were liable to be classified under Central Excises Tariff Item No. 18(III) (ii). The respondents filed a writ petition in the High Court, challenging the notice of demand. On 9th February, 1984, the Assistant Collector of Central Excises passed an order modifying the approval granted to the classification lists submitted by the respondents and classifying the aforesaid product of the respondents under Item No. 18(III) (ii) of Schedule I of the Central Excises Act, on the basis of which the Superintendent, Central Excises, issued on the 10th February, 1984, a notice to the respondent No. 1, calling upon them to show cause why duty short-levied should not be recovered from them under the provisions of section 11-A of the Central Excises Act. A second similar show-cause notice was also issued.

The Assistant Collector passed orders of adjudication

dated 5th
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March, 1984, modifying the classification lists and confirming the demand made under the aforesaid notice of demand. The respondents-petitioners thereupon amended their aforesaid writ petition to challenge the two show-cause notices and the orders of adjudication. The petitioners also filed an appeal before the Collector of Central Excises against the said orders of adjudication.

The High Court allowed the writ petition in part, quashing the notice of demand for the period 15th August, 1983 to 6th February, 1984, and the orders modifying the classification lists, and directing the Collector, Central Excises to hear the appeal of the petitioners on merits considering their evidence in respect of the period from 7th February, 1984 onwards. The High Court took the view that the show-cause notice served on the petitioner could be treated as valid only in respect of the period from 7th February, 1984, onwards and not retrospectively from 15th August, 1983 to 6th February, 1984. The Union of India, the Collector of Central Excises and other Excise officers then moved this Court by this appeal against the decision of the High Court.

Dismissing the appeal, the Court,
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HELD: If the Cellulosic spun yarn made by a manufacturer with the aid of power contains man-made fibre of non-cellulosic origin, it will fall under Item No, 18(III) (ii), but if it does not contain any man-made fibre of non-cellulosic origin, it will fall under Item No. 18(III) (i) and duty would be leviable there at a lower rate. [843B-C]

Under the provisions of Section 11-A of the Central Excises Act, before any demand is made on any person chargeable in respect of non-levy or short levy or under-payment of duty, a notice requiring him to show cause why he should not pay the amounts specified in the notice must be served on him. In this case, no such notice was served. The aforesaid notice of demand dated 7th February, 1984, was in violation of the provisions of Section 11-A and is bad in law, and the High Court was fully justified in quashing the same. [843G-H;844G-H]

The appellants contended that although the notice of demand might be set aside, the notice to show cause dated 9th/10th February, 1984, should be treated as a valid notice in respect of the period from 15th August, 1983 to 6th February, 1984 and the period from 7th February, 1984, onwards. The notice referred to the service of notice of demand dated 7th February, 1984 on the respondent No. 1. The notice set out as an established fact that the classification lists submitted by the
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respondents had been modified by the Assistant Collector, and the only matter with respect to which the respondents were asked to show cause was with regard to the quantification of the amount of short levy which was liable to be recovered from the respondent No. 1. The Notice could not be regarded as a show-cause notice against the modification of the classification lists in respect of the aforesaid period. The show cause notice was bad in law and of no legal effect as far as the earlier period was concerned. Under Section 11-A of the Central Excises Act, the notice can relate only to a period of six months period to the issue of that notice except in cases where it is alleged that the short levy or payment has occurred by

reason of fraud, collusion or wilful misrepresentation or suppression of facts or contravention of the provisions of the said Act or rules, as contemplated in the proviso to sub-section (1) of Section 11-A. No such case was made out in the said show-cause notice. The said show-cause notice must be struck down in so far as the period upto 6th February, 1984, was concerned and could be regarded as a proper show-cause notice only in respect of the subsequent period from 7th February, 1984 onwards. Under the said show-cause notice, the question of short levy or non-levy of excise duty prior to 6th February, 1984, could not be gone into by the Collector and the High Court was right in the view it took. [845B-C;846A-E]

Gokak Patel Vokkart Ltd. v. Collector of Central Excise, Belgaum, A.I.R. 1987 S.C. 1161, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1110 (NT) of 1986

From the Judgment and Order dated 24.11.1984 of the High Court of Madhya Pradesh, Indore Bench, passed in M.P. NO. 104 of 1984.

Gobind Das, Mrs. Sushma Suri, Mrs. Indra Sawhney and C.V.S. Rao for the Appellants.

Dr. Y.S. Chitale, Sanjay Sarin, Abdul Chitale and S.K. Gambhir, for the Respondents.

The Judgment of the Court was delivered by

KANIA, J. This is an appeal against the judgment of a Division Bench of the Madhya Pradesh High Court, Jabalpur (Indore Bench) in M. Petition No. 104 of 1984. The appeal is filed at the instance of the

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Union of India, Collector of Central Excise, Indore and two other excise officers. The respondents are the original petitioners in the aforesaid petition. We propose to refer to the parties by the description in the petition.

The facts necessary for the disposal of this appeal can be shortly stated.

The petitioner No. 1 is a Company manufacturing spun yarn. According to the petitioners, in the manufacture of the said product they use as raw material cellulosic fibres and non-cellulosic fibres. Some time prior to 7th July, 1983, the petitioners filed a classification list in respect of the spun yarn manufactured by them showing the same as covered by Item No. 18(III) (i) in the First Schedule to the Central Excises and Salt Act, 1944 (referred to hereinafter as the "Central Excise Act"). The said schedule is generally referred to as the "Central Excises Tariff". This classification was on the basis that the spun yarn was manufactured by them out of non-cellulosic synthetic waste. The said classification list was approved by the excise authorities on 7th July, 1983. A supplementary classification list was approved on 15th October, 1983. The petitioners were clearing the goods on the basis of aforesaid classification lists. It appears that samples were drawn out of the spun yarn manufactured by the petitioners and sent for chemical examination. There are some reports submitted by the Chemical Analyser, with the details of which we are not concerned. Without giving any show cause notice or affording any opportunity to the petitioners to be heard, on 7th February, 1984, the Superintendent of Central Excise issued a notice of demand for a total sum of Rs.26,47,749.39 against the petitioner No. 1 on the footing

that there was short payment of excise duty. This was done on the ground that the yarn manufactured by the petitioners had been manufactured out of waste of synthetic fibres in blend of viscose fibres (of noncellulosic origin) and hence the said goods manufactured by them were liable to be classified under Central Excises Tariff Item No. 18(III)(ii). It is an admitted position that the yarn manufacturing process used by the petitioners was with the aid of power. The petitioners filed the aforesaid writ petition in the High Court of Madhya Pradesh challenging the validity of the said notice of demand dated 7th February, 1984. The High Court granted an interim stay of the operation of the demand notice on 9th February, 1984. On the same day, namely, 9th February, 1984, an order was passed by the Assistant Collector of Central Excise modifying the approval granted to the aforesaid classification lists submitted by the petitioners which had been approved
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as aforesaid and classifying the aforesaid product under Item No. 18(III) (ii) of Schedule 1 of the Central Excises Act. On 10th February, 1984 a notice was issued by the Superintendent, Central Excise on the petitioner No. 1 reciting inter alia that the Assistant Collector had modified the approval of the classification lists on 9th February, 1984 and calling upon the petitioner No. 1 to show cause why the duty short levied should not be recovered from them under the provisions of Section 11-A of the Central Excises Act. A second similar show cause notice was also issued. The petitioner No. 1 wrote to the excise authorities pointing out that in view of the aforesaid writ petition filed by the appellant, the adjudication proceedings should be stayed till writ petition was disposed of. This request was turned down on 5th March, 1984 and orders of adjudication were passed by the Assistant Collector modifying the classification lists and confirming the demand made under the aforesaid notice of demand. The petitioners thereupon amended the aforesaid writ petition filed by them and challenged the two show cause notices as well as the said orders of adjudication dated 5th March, 1984. The petitioners also filed an appeal before the Collector of Central Excises (Appeal) against the orders of adjudication dated 5th March, 1984. On 24th November, 1984 by the impugned judgment, the Madhya Pradesh High Court allowed the aforesaid writ petition in part. Mulye, J. held by his judgment that the writ petition was allowed to the extent that the demand for recovery of Rs.26,47,749.39 for the period 15th August, 1983 to 6th February, 1984, which was the period referred to in the demand notice was quashed. However, the learned Judge directed the Collector, Central Excise before whom the appeal filed by the petitioners was pending to decide the appeal in respect of the demand made by the excise authorities for the subsequent period. Giani, J., the other learned judge, in his concurring judgment set aside the two roders issued by the Assistant Collector, Central Excise, Ujjain Division both dated 5th March, 1984 as set out earlier. Copies of these adjudication orders are at Annexure R/10 and R/11 respectively to the writ petition. Very shortly put, both the Judges held that the notice of demand and the orders modifying the classification list served on the petitioners were bad in law and ordered that the same be quashed. A perusal of the judgment also clearly indicates that the Division Bench directed that the Collector, Central Excise (Appeal) should hear the appeal of the petitioners on merits after giving the petitioners an adequate opportunity to put their case and their evidence

before him in respect of the period from 7th February, 1984 onwards. Thus, the Division Bench took the view that the show cause notice served on the petitioners could be treated as valid and effective only in respect of the period
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from 7th February, 1984 onwards and not retrospectively from 15th August, 1983 to 6th February, 1984 being the period for which the demand has already been made in the demand notice dated 9th February, 1984.

As far as the relevant items in the First Schedule of the Central Excises Act are concerned, it is not necessary to set out the same in detail. It will be enough to point out that if the cellulosic spun yarn made by a manufacturer with the aid of power contains man made fibre of non-cellulosic origin, it will fall under Item No. 18(III) (ii), but if it does not contain any man-made fibre of non-cellulosic origin, it will fall under Item No. 18(III) (i) and duty would be leviable there at a lower rate. The relevant portion of Section 11-A of the Central Excises Act runs as follows:

> "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 mis-statement or suppression of fact, 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 "Central Excise Officer", the words "Collector of Central Excise" and for the words "six months", the words "five years" were substituted."

A perusal of the aforesaid provisions shows that before any demand is made on any person chargeable in respect of non-levy or short levy or under payment of duty, a notice requiring him to show cause why he should not pay the amounts specified in the notice must be served on him. It is the admitted position in the present case that no such notice was served. It would thus appear that the aforesaid demand notice dated 7th February, 1984 was in violation of the provisions of Section 11-A and is bad in law. Mr. Govind Das, learned
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counsel for the appellant, however, contended that although the aforesaid Section provides that no demand could be made against a person thereunder without affording that person an adequate opportunity to show cause against the same, in the present case, though no prior show cause notice was given and the petitioners were not given an opportunity to be heard before the notice of demand was issued, such a notice was issued and an opportunity to show cause was given after the demand was made and the demand confirmed after hearing and hence it must be regarded as valid. It was submitted by him that a post facto show cause notice should be regarded

as adequate in law. In support of this contention Mr. Govind Das tried to place reliance on certain decisions where a view has been taken that in cases where urgent and emergent action is required, an opportunity to be heard can be given after the order affecting a person adversely is passed and that where a particular Act does not provide for any such opportunity to be heard being given before an adverse order is passed, a post facto opportunity to be heard might, in certain cases, be regarded as adequate compliance with principles of natural justice. We are of the view these cases have no relevance in considering the questions before us because it is quite apparent that in the present case no urgent or emergent action was required and Section 11-A of the Central Excises Act clearly provides that prior show cause notice must be issued to the person against whom any demand on ground of short levy or non-levy of payment of excise duty is proposed to be made. In Gokak Patel Vokkart Ltd. v. Collector of Central Excise, Belgaum, A.I.R. 1987 S.C. 1161 this Court has held that the provisions of Section 11-A(1) & (2) of Central Excises and Salt Act, 1944 make it clear that the statutory scheme is that in the situations covered by sub-section (1), a notice of show cause has to be issued and sub-Section (2) requires that the cause shown by way of representation has to be considered by the prescribed authority and then only the amount has to be determined. The scheme is in consonance with the rules of natural justice. An opportunity to be heard is intended to be afforded to the person who is likely to be prejudiced when the order is made before making the order. Notice is thus a condition precedent to a demand under sub-Section (2).

In view of the aforesaid decision the submission of Mr. Govind Das must be rejected and it must be held that the aforesaid notice of demand was clearly bad in law and the High Court was fully, with respect, justified in quashing the same.

The next submission of Mr. Govind Das was that, in any event,

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as the Collector of Central Excise (Appeals) had been directed to examine the merits of the matter in respect of alleged short levy or non-levy and the modification of the classification lists after allowing adequate opportunity to the petitioners to show cause in respect of the period from 7th February, 1984, onwards, the question as to whether there was short levy or non-levy in respect of the period from 15th August, 1983 to 6th February, 1984 should even also be allowed to be decided by the Collector. It was submitted by Mr. Govind Das that although the notice of demand may be set aside the notice to show cause dated 9/10th February, 1984 should be treated as a valid and effective notice in respect of the period from 15th August, 1983 to 6th February, 1984 as well as the period from 7th February, 1984 onwards. In this connection, it is the submission of Dr. Chitale that this notice merely asked the petitioners to show cause against calculation or determination of the amount of short levy and not against the alteration in the classification lists on the basis of which short-levy was alleged and hence, in respect of the said period from 15th August, 1983 to 6th February, 1984 the show cause notice is liable to be struck down. In our view the submission of Dr. Chitale deserves to be accepted. The opening paragraph of the show cause notice refers to the service of notice of demand dated 7th February, 1984 for Rs.26,47,749.39 on the petitioner. Paragraphs 2 and 3 of the said notice run as follows:

"AND whereas the Assistant Collector Central Excise, Ujjain under his letter C.N. V(18)III/I/1/83/371-1374 dated 9th Feb., 84 has modified approval of the classification lists of the party and has directed that the short levied should be quantified by the Inspector, Central Excise, Biaora/Superintendent Central Excise, Ujjain and confirmation or otherwise of such short levied and recoveries if any would be ordered by him (Assistant Collector Central Excise, Division Ujjain) after following the prescribed procedure. THEREFORE, in accordance with the said order of the Assistant Collector, Central Excise Division, Ujjain, you are called upon to show cause to the Assistant Collector, Central Excise, Ujjain within 10 days of the receipt of this show cause notice as to why the short levies of Rs.26,47,749.39 should not be recovered from you, under Section 11-A of the Central Excise and Salt Act, 1944."

A reading of these paragraphs clearly shows that the notice set

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out as an established fact that the classification lists submitted by the petitioners had been modified by the Assistant Collector, Central Excise, Ujjain and the only matter with respect to which the petitioners were asked to show cause was with regard to the quantification of the amount of the short levy and consequently, the amount which was liable to be recovered from the petitioner No. 1. This notice, therefore, cannot be regarded as a show cause notice against the modification of the classification lists in respect of the aforesaid period. In these circumstances, the show cause notice is bad in law and of no legal effect as far as the said earlier period is concerned. Under Section 11-A of the Central Excise Act, the notice can relate only to a period of six months prior to the issue of that notice except in cases where it is alleged the short levy or short payment has occurred by reason of fraud, collusion or wilful misrepresentation or suppression of facts or contravention of the provisions of the said Act or rules made by the period concerned, as contemplated in the proviso to sub-Section (1) of Section 11-A. No such case has been sought to be made here in the said show cause notice. The result is that the said show cause notice must be struck down in so far as period upto 6th February, 1984 is concerned, and can be regarded as a proper show cause notice only in respect of the subsequent period from 7th February, 1984 onwards. We are, therefore, of the view that under the said show cause notice the question of short levy or non-levy of excise duty prior to 6th February, 1984 cannot be gone into by the Collector and the High Court was right in the view which it took.

In the result, the appeal fails and is dismissed with costs.

S.L. Appeal dismissed.

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