PETITIONER:
COLLECTOR OF CENTRAL EXCISE, BARODA

Vs.

RESPONDENT:
M/S COTSPUN LTD.

DATE OF JUDGMENT: 23/09/1999

BENCH:
S.S.Mohammed Quadri, V.N.Khare, S.P.Bharucha, B.N.Kirpal

JUDGMENT:

Bharucha, J.

This appeal has been referred to a Constitution Bench for the reason that there are two conflicting three Judge Bench decisions of this Court on the point at issue.

Briefly stated, the facts are : The assessee-respondent manufactures NES yarn. It had filed classification lists with the Excise authorities, the appellants, which had been approved under the provisions of Rule 173B of the Central Excise Rules, 1944. The approval classified the NES yarn under old Tariff Item 19-I(2)(a)(2)(e). On 28th September, 1977, a notice was issued by the Excise authorities to the assessee to re-open the assessment for the period February, 1977 to May, 1977. The reason for so doing was that the NES yarn ought to have been correctly classified under old Tariff Item 19- I(2)(F). A demand for differential duty was made. A second show cause notice was issued by the Excise authorities to the assessee on 18th November, 1977 for the period 1st June, 1977 to 17th June, 1977. The assessment for this period was sought to be re-opened for the same reason. Again, a demand for differential duty was made. These show cause notices were amended by corrigenda dated 28th February, 1978 and 1st April, 1978. The assessee replied to the show cause notices on 24th May, 1978. It contended that the count of the NES yarn was determinable and it had been correctly classified. It also contended that the approved classification lists could not be re-opened and, therefore, the demands for differential duty could not be enforced. The Assistant Collector upheld the assessees contention that the duty liability having been ascertained on the basis of an approved classification list, the question of short levy of duty did not arise. The Appellate Collector allowed the appeal of the Excise authorities, reclassified the NES yarn and confirmed the demands for differential duty. The assessee approached the Tribunal in appeal. The Tribunal held that the revised assessment could be made effective only prospectively from the date of the show cause notices and not with reference to earlier removals made under approved classification lists. Accordingly, the demands were quashed.

The Excise authorities are in appeal against the order

of the Tribunal. The assessee had not appeared at the stage when the matter was before a two and then a three Judge Bench. Amicus Curiae were appointed, and we are beholden to them for assisting us.

Rule 10 of the Central Excise Rules, as it read at the relevant time and so far as it is relevant for our purposes, is set out :

10. Recovery of duties not levied or not paid, or short levied or not paid in full or erroneously refunded. --- (1) Where any duty has not been levied or paid or has been short-levied or erroneously refunded or any duty assessed has not been paid in full, the proper 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 to whom the refund has erroneously been made, or which has not been paid in full, requiring him to show cause why he should not pay the amount specified in the notice.

A proviso to the above increases the period of six months to five years where there has been fraud or the like on the part of the assessee.

Rule 173B falls in the Chapter of the Central Excise Rules that deals with the self- removal procedure. It requires an assessee to file before the proper Excise Officer for approval a list of the goods that he proposes to clear. The list is required to contain a description of the goods produced or manufactured by him, the goods that he intends to remove and of excisable goods already deposited or likely to be deposited without payment of duty in his warehouse, and to indicate the tariff entry under which the goods that he intends to remove fall, the rate of duty leviable thereon and such other particulars as may be required. Sub-rule (2) reads thus:

(2) The proper Officer shall, after such inquiry as he deems fit, approve the list with such modification 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.

Provision for a dispute as to the approved rate of duty is made in Clause (3). Clause (4) deals with any alterations that may become necessary in the approved list. Sub-rule (5) needs to be set out in extenso. (5) When the dispute about the rate of duty has been finalised or for any other reasons affecting rate or rates of duty a modification of the rate or rates of duty is necessitated, the proper Officer shall make such modification and inform the assessee accordingly.

It is the submission of the learned Additional Solicitor General that the Tribunal was in error in the view that it took; that, by reason of Rule 10, the reclassification of the NES yarn would operate retrospectively and that, therefore, the assessee was liable to pay excise duty on the basis of the modified classification list for the period that commenced six months before the date on which the reclassification was made.

In support of the case of the Excise authorities is

the judgment of this Court in Ballarpur Industries Ltd. vs. Asstt. Collector of Customs & Central Excise and Ors. (1995 Suppl (3) SCC 429). Since it makes reference to a judgment of a Bench of two learned Judges that took a contrary view, we think it appropriate to refer first thereto.

In Rainbow Industries (P) Ltd. vs. Collector of Central Excise, Vadodara (1994 (6) SCC 563) the appellant was a manufacturer of dyestuff. He had filed a price list as required by Rule 173 C of the Central Excise Rules which was approved by the Excise authorities with effect from 1st October, 1975. About a year thereafter, the Assistant Collector issued a notice requiring the appellant to show cause why the net assessable value should not be revised and differential duty recovered. The appellant replied to the show cause notice but his contentions were not accepted upto the stage of the Tribunal. In the challenge before this Court to the order of the Tribunal it was contended that the price list submitted by the appellant having been accepted and acted upon, the Excise authorities were precluded from challenging the same and, therefore, from claiming that the appellant was liable to pay the differential duty. A bench of two learned Judges of this Court said:

(O)nce the Department accepted the price list, acted upon it and the goods were cleared with the knowledge of the Department, then, in absence of any amendment in law or judicial pronouncement, the reclassification should be effective from the date the Department issued the show-cause notice. The reason for it is clearance with the knowledge of the Department and no intention to evade payment of duty.

In the case of Ballarpur Industries (supra) decided by a Bench of three learned Judges, the observations in the judgment in Rainbow Industries were confined to the facts of that case. The Bench placed reliance upon Rule 10 and held that, on a plain reading of that provision as also of Section 11A, the show cause notice which could be issued within the time limit prescribed under the relevant provision could only be in relation to the duty of excise for a period prior to the issuance of show cause notice. There could be no reason for the issuance of a show cause notice for the period subsequent to the notice as in that case the necessary corrective action could always be taken. But Rule 10 with which we are concerned as well as Section 11-A to which a reference is made in the case of Rainbow Industries, the show cause notice which must be issued within the time-frame prescribed in the said provisions must relate to a period prior thereto as the purpose of the show cause notice is recovery of duties or charges short-levied, etc. We, therefore, find it difficult to accept the contention that the ratio of the decision in Rainbow Industries is that under Section 11-A past dues cannot be demanded. We must, therefore, reject that contention.

The order of reference cites the decision of a Bench of three learned Judges in Collector of Central Excise vs. Indian Oxygen Ltd. (1991 (51) ELT A36). By that brief order the appeal of the Excise authorities against a decision of the Tribunal was dismissed because the Bench was of the opinion that the decision of the Tribunal was correct in the facts and circumstances set out in that judgment. That judgment (1990 (47) ELT 449) says, that a

reclassification could take effect only from the date of the show cause notice seeking to re-classify the product. It cites with approval an earlier decision of the Tribunal (1985 (22) ELT 487) to the same effect.

Reference, for the purposes of completeness, should also be made to the decision of a Bench of two Judges of this Court (to which one of us, S.P. Bharucha, J. was a party). This is the decision in Collector of Central Excise, New Delhi vs. Bhiwani Textile Mills (1996 (88) ELT 639). This Court held that until the proposal for the proper officer of Excise of the classification was mooted, the earlier classification would operate.

Rule 173 B deals with classification lists. It entitles the proper officer of Excise to make such inquiry thereon as he deems fit and requires him to approve the list only thereafter, and that with such modifications as are considered necessary. The assessee must determine the excise duty that is payable by him on the goods he intends to remove in accordance with the approved classification list. Sub-rule (5) provides for modification of an approved classification list.

Rule 10 is a provision for recovery of duties that have not been levied or paid in full or part. So far as is relevant for our purposes, it provides that where any duty has been short-levied, the Excise officer may, within six months from the relevant date, serve notice on the assessee requiring him to show cause why he should not pay the amount that had been short-levied. Rule10 does not deal with classification lists or relate to the re-opening of approved classification lists. That is exclusively provided for by Rule173 B.

The levy of excise duty on the basis of an approved classification list is the correct levy, at least until such time as to the correctness of the approval is questioned by the issuance to the assessee of a show cause notice. It is only when the correctness of the approval is challenged that an approved classification list ceases to be such.

The levy of excise duty on the basis of an approved classification list is not a short levy. Differential duty cannot be recovered on the ground that it is a short levy. Rule 10 has then no application.

We are, therefore, of the opinion that the judgment in Ballarpur Industries, which did not advert to Rule 173B, does not lay down the law correctly and it is over-ruled. The decision in Rainbow Industries, on the other hand, correctly lays down the law. It was delivered in the context of Rule 173C dealing with approved price lists and the provisions of Rule 173C and 173B are analogous.

We are informed that the position in law has changed since the year 1995 or thereabout. We have not considered these altered provisions. Nothing that we have said in this judgment shall ipso facto apply thereto.

The appeal is dismissed. Having regard to the fact

that the assessee does not appear, there shall be no order as to costs.