PETITIONER:
ASSISTANT COLLECTOR OF CENTRAL EXCISE

Vs.

RESPONDENT:
RAMAKRISHNAN KULWANT RAI

DATE OF JUDGMENT12/04/1989

BENCH:
SAIKIA, K.N. (J)
BENCH:
SAIKIA, K.N. (J)
SINGH, K.N. (J)

CITATION:
1989 AIR 1829 1989 SCR (2) 444
1989 SCC Supl. (1) 541 JT 1989 Supl. 99
1989 SCALE (1)968

ACT:
Central Excises and Salt Act, 1944/Central Excise and Salt Rules, 1944--Section 3/Rules 10 and 10A--Rules whether ultra vires rule making power--Whether applicable to cases where there has been no prior levy of Excise duty in respect of article manufactured.

HEADNOTE:
Respondent firm owned a Steel Rolling Mill situate at Madras. The said mill was leased out to a partnership firm viz., M/s. Steel Industries and after the expiry of the lease period, the Respondent took back the possession of the Mill on 1.8.1962 and informed the Central Excise Authorities, who advised the Respondent to take out a licence for which it applied on 30.11.1962 Respondent sold away the Rolling Mill on 8.4.1963. The Superintendent of Central Excise by his letter dated 13.10.1965 raised a demand of Rs.31,018.20 p. on the respondent on account of excise duty. The Respondent having informed the Department that the firm had manufactured only 775.455 metric tonnes of steel, the demand of excise duty was reduced to Rs.6,419.38 p. only. The Respondent, though pleaded that it was not liable to pay excise duty demanded, yet the Assistant Collector of Customs by his order dated 14.6.1967 confirmed the demand.

The Respondent-firm challenged the validity of the demand by filing a Writ Petition in the High Court. Respondent contended before the High Court that (i) it was entitled to exemption of duty; (ii) that the demand for payment of excise duty was time-barred and (iii) that Rules 10A under which the demand has been made are ultra rites as there was

provision in the Act to enable the Government to frame rules for the recovery of duty short-levied.

The High Court allowed the Writ Petition and upheld the contention advanced by the Respondent holding that Rule 10A did not apply to cases where there has been no prior levy of excise duty in respect of the articles manufactured during the relevant period.
Hence this appeal by the Department.
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The question that arose for determination by this Court was whether Rule 10A of the Rules, as it stood at the rele-

vant time, was valid? Counsel for the appellant wile pleading that the Rule was valid submitted that it was necessary to decide this question in view of the conflicting decisions creating difficulty for the Department in collecting short-levies or escaped excise duty. Counsel referred to decisions reported in 1972(2) MLJ 476; A.I.R. 1972 SC 2563; 1973 (1) MLJ 99; and 1977(2) Tax L.R. 1680.

Counsel for the Respondent urged that the Standing Counsel for the Central Government had conceded the rationale of the decision in Haji J.A. Kateera sait v. Dy. Commercial Tax Officer, Mettupalayam;, 18 STC 370 which held that Sub-Rule (7) of Rule S of the Central Sales Tax (Madras) Rules 1957 was in excess of the rule making power and as such the Sub-rule as a whole was invalid. In view of the said decision, the appellant would not be able to sustain the demand under Rule 10A; and it is no longer open to the appellant to challenge the validity of Rule 10A in the appeal.

Allowing the appeal and remanding the matter to the High Court, Court,

HELD: Chapter II of the Act deals with levy and collection of duty. Under Section 3 of the Act, duties specified in First Schedule to the Act were to be levied. Rule 10A provided the machinery for collection of tax from assessee after the goods had left the factory premises. This rule contemplated that the duty or deficiency in duty was payable on a written demand made by the proper officer in cases where either the rules did not make any specific provision for the collection of any duty or of any deficiency in duty, if the duty had for any reason been short levied. It was a residuary provision and it applied only when there was no other specific provision in the Rules. Where there had been no assessment at all there was no reason why claim and demand of the Respondent could not be said to be recoverable under Rule 10A. [449E; 448H; 449B-C]

The validity of the delegated legislation is generally a question of vires, that is, whether or not the enabling power has been exceeded or not. Rule 10A as it existed at the relevant time, was valid and not ultra vires the rule making power. Demand notice lawfully issued under the rule by the competent authority could not, therefore, be challenged on the ground of the Rule 10A itself being ultra vires. Whether these could be challenged on any other ground must necessarily depend on the facts
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and circumstances of each case. [453E-F]

Kerala Polythene v. Superintendent Central & Excise, [1977] 2, Tax L.R. 1680.

M/s. Chhotabhai Jethabhai Patel v. Union of India, [1952] ILR Nag. 156.

Stateof Kerala v. K.M. Charie Abdullah & Co., [1965] 1 S.C.R.601.

Any rule if it could be shown to have been made 'to carry into, effect the purposes of the Act' would be within the rule making power. [452H; 453A]

Citadel Fine Pharmaceuticals v. District Revenue Officer, Chingleput, [1973] 1 M.L.J. 99; M/s. Agarwal Brothers v. Union of India, [1972] 2 MLJ 476; N.B. Sanjane v. Elphinstone Spinning and Weaving Mills Company Ltd., [1971] 1 SCC 337; Assistant Collector v. National Tobacco Co. Ltd., [1973] 1 S.C.R. 822 and D.R. Kohli v. Atul Products Ltd., [1985] 2 S.C.R. 832, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1202 of 1974.

From the Judgment and Order dated 19.7.1972 of the Madras High Court in Writ Petition No. 1064 of 1967.

Anil Dev Singh and C.V.S. Rao for the Appellant.

Ambrish Kumar and A.T.M. Sampath for the Respondent.

The Judgment of the Court was delivered by

K.N. SAIKIA, J. This appeal by Special Leave is from the Judgment and Order of the High Court of Judicature at Madras, dated 19th July, 1972 in Writ Petition No. 1864 of 1967, allowing the petition and quashing the demand made by the appellant under Rule 10-A of the Central Excise Rules, hereinafter referred to as 'the Rules', payable by the respondent under the Central Excise and Salt Act, 1944, hereinafter referred to as 'the Act'.

M/s. Ramakrishnan Kulwant Rai, the respondent firm, owned the Steel Rolling Mill, located at No. 4-B, 4-C, North Railway

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Terminus Road, Royapuram, Madras-13. The said Mill was leased out to a partnership firm known as M/s. Steel Industries. After termination of the lease the respondent firm took back possession of the said Mill on 1-8-1962 and informed the Central Excise Authorities about this by their letter dated 16-11-1962 and resumed manufacture of Steel from scraps and was advised to take out a licence for which it applied on 30-11-1962. Though the respondent firm had ultimately sold away the Rolling Mill on 8-4-1963, the Superintendent of Central Excise, by his letter dated 13-10-1965 demanded a sum of Rs. 31,0 18.2013 as excise duty. On information furnished by the firm about its manufacture of only 775.455 metric tonnes of Steel, the Deputy Superintendent of Central Excise reduced the demand to a sum of Rs. 6,4 19.38p only, and the demand was reiterated by notice dated 13-4-1967, pursuant whereto the respondent firm showed cause on 15th May, 1967 but the Assistant Collector of Customs, by his order dated 14th June, 1967, confirmed the demand.

The respondent firm challenged the demand by moving writ petition No. 1864 of 1967 in the High Court of Judicature at Madras contending, inter alia, that it was manufacturing steel products prior to 13-6-1962, only suspending manufacture during the period of lease and resuming thereafter, and as such, was entitled to exemption from payment of duty; that the demand for payment of duty was time barred; that rules 10 & 10A invoked in support of the demand were ultra vires inasmuch as there was no provision in the Act to enable the Government to frame rules for the recovery of duty short-levied.

The High Court by the impugned order following its earlier judgment in writ petition Nos. 265 & 266 of 1967, which relied upon its earlier decision in writ petition No. 1055 of 1968, upheld the contention of the respondent firm holding that Rule 10-A did not apply to cases where there had been no prior levy of excise duty in respect of the articles manufactured during the relevant period and that the duty was sought to be recovered only by the issue of demand under Rule 10-A of the Rules. The High Court having rejected leave to appeal, the. appellant obtained special leave on 23-7-1974.

Mr. Anil Dev Singh, learned counsel for the appellant submits that it is necessary to decide the substantial question of law of general importance, namely, whether Rule 10-A of the Rules, as it stood at the relevant time, was

valid or not as conflicting decisions have been creating difficulties for the department in collecting short-levies or escaped excise duties. Counsel refers us to 1972 (2) M.L.J. 476, AIR 1972 S.C.
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2563, 1973 (1) M.L.J. 99 and 1977 (2) Tax L.R. 1680. The learned counsel states that Rule 10-A was in force upto 6-8-1977 whereafter it was amended with effect from that date and the amended rule continued till 16-11-1980 where after it was enacted as Section 11-A of the Act by the Amendment Act 25 of 1978 and that Section came into force with effect from 1.7-11-1980.

Mr. Ambrish Kumar, the learned counsel for the respondent submits that the learned standing counsel for the Central Government having conceded that the rationale of the decision in Haji J.A. Kareem Sait v. Dy. Commercial Tax Officer, Mettupalayam, 18 STC .370, which held that sub-Rule (7) of Rule 5 of the Central Sales Tax (Madras) Rules 1957, providing for limitation and determination of escaped turnover by best judgment was in excess of the rule-making power and the sub-Rule as a whole, was therefore, invalid, would apply with equal force to Rule 10-A as well and that in view of the same decision he would not be able to sustain the demands under Rule 10-A and yet he could sustain the demand under Rule 9(2) of the Rules, it is no longer open to the appellant to challenge the validity of Rule 10-A in this appeal, and that too after so many years.

Counsel for the appellant answers that the learned standing counsel thereby cannot be said to have conceded that Rule 10-A was invalid. He had only said that in view of the decision in 18 STC 370, he would not be able to sustain the demands under Rule 10-A; and that even if it could be taken as a concession, the appellant could not be estopped from showing that the rule is valid so that Central Excise revenue is not allowed to escape. We agree with the learned counsel for the appellant and proceed to examine the validity of Rule 10-A as it stood at the relevant time. Rule 10-A of the Rules read as under:

> "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 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 officer may specify."

Rule 10-A provided the machinery for collection of tax from the assessee after the goods had left the factory premises. This rule con-
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templated that the duty or deficiency in duty was payable on a written demand made by the proper officer in cases where either the Rules did not make any specific provision for the collection of any duty or of any deficiency in duty if the duty had for any reason been short levied. Therefore, before Rule 10-A could be resorted to, it had to be found that either the Central Excise Rules did not make any specific provision for the collection of duty in respect whereof a demand was being made by the proper officer, or that there was no specific provision therein for the collection of the deficiency in duty which had been short levied for any reason. It was a residuary provision and it applied only

when there was no other specific provision in the Rules. Where there had been no assessment at all there was no reason why claim and demand of the respondent could not be said to be recoverable under Rule 10-A.

The learned counsel for the appellant submits that this Rule is perfectly valid being covered by the rule-making powers under the Act while the learned counsel for the respondent, submits that it is ultra vires the Act being not covered by its rule-making powers. The question, therefore, is whether the Rule is valid.

Chapter II of the Act deals with levy and collection of duty. Under Section 3 of the Act duties specified in First Schedule to the Act were to be levied. Sub-section (1) of Section 3, at the relevant time, read as follows:

> "(1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India, and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the First Schedule."
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> In Citadel Fine Pharmaceuticals v. District Revenue Officer, Chingleput, [1973] 1 M.L.J. 99, where the enactment, namely, the Medicinal and Toilet Preparations (Excise Duties) Act (XVI of 1955) was silent on the question of levies of escaped assessment, it was held that the Rules made under that Act could not extend the charging power and Rule 12, in so far as it sought to extend the charging power under Section 3 of that Act, was held to be invalid and without jurisdiction. Rule 12 of those Rules read as follows:
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> "12. Residuary powers for recovery of sums due to
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> 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 collecting Government under the Act or these rules, such duty, deficiency in duty or sum shall on written demand made by the proper officer, be paid to such person and at such time and place, as the proper officer may specify."

Rule 12 was somewhat similar to RUle 10-A of the Rules and had been held to be ultra vires on the ground that it did not have the required statutory backing. In M/s. Agarwal Brothers v. The Union of India, [1972] 2 M.L.J. 476, it was held that a licence issued under the Central Excise Rules was personal to the licensee and therefore, a transferee of factory licensed to manufacture iron and steel products from the former licensee could only be treated as a new licensee after the relevant date mentioned in the Notification No. 13 1 of 1962, dated 13th June, 1962, and as the petitioner applied for a licence much later, the exemption under the Notification was not available to the petitioner who could not be applying for renewal of the earlier licence held by the transferors and hence the exemption under the Notification was not available to the petitioner. Demand, therefore, could only be made under Rule 10-A which, it was held, could not be invoked in view of the decisions in W.P. No. 1053/68, namely the Citadel Fine (supra).

A Division Bench of Kerala High Court in Kerala Polythene v. Superintendent, Central Excise, since reported in 1977 2 Tax L.R. 1680, held that Rule 10-A of the rules was not ultra vires the rule making power conferred by the Act on the Central Government. Balakrishna Eradi, J., as he then was, observed that the scope of the rule making power conferred by Section 3(1) of the Act was wide enough to embrace all matters relating to the manner in which both the levy and the collection of duties of excise on all excisable goods other than salt were to be made. The provision contained in Rule 10-A was thus fully within the scope of the said power and hence it was not correct to say that Rule 10-A was ultra vires the rule making power conferred by the Act on the Central Government. The cases of Agarwal Brothers (supra) and Citadel Fine Pharmaceuticals (supra) were distinguished pointing out that there was much difference in scopes of Section 3 of the Medicinal and Toilet Preparations (Excise Duties) Act (XVI of 1955) and of Section 3 of the Act. Comparing the provisions of the two Sections it was observed that there was funda-
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mental difference in their policy and scheme. Under Section 3 of the Medicinal and Toilet Preparations Act only the manner of collection of the duties was left to be prescribed by the rules and levy of the duty was to be made at the rates specified in the Schedule to the Act. In enacting Section 3 of the Act i.e. Central Excise and Salt Act, the Parliament had empowered the rule making authority to prescribe by rules the manner of levy of duties and also the manner of collection of duties of excise on all excisable goods other than salt. Manifestly the rule making power conferred by this Section is very much wider in its ambit than the power conferred on the rule making authority under Section 3 of the Medicinal and Toilet Preparations (Excise Duties) Act whereunder only the manner of collection of duties could be laid down by rules. We respectfully agree with this view. We also find that in Agarwal Brothers (supra) though one of the questions raised was the validity of Rule 10-A of the Rules, the Court did not consider the said question on merits in view of the submission made by the standing counsel for the State Government on the basis of Rule 10-A in the light of the earlier decisions of the same High Court, striking down Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules. That decision can not obviously be regarded as authority supporting the contention that Rule 10-A was ultra vires the rule-making power.

We find that Rule 10-A, was incorporated because of the decision of the Nagpur High Court in Messrs Chhotabhai Jethabhai Patel v. Union of India, [1952] I.L.R. Nag. 156. After that decision the Central Government by a notification, dated December 8, 195 1, amended the Rules by addition of the new Rule 10-A. The assessee challenged the validity of the Rule but a full bench of the Nagpur High Court rejected the assessee's contention and held that Rule 10-A covered a case for increased levy on the basis of a change of law. That decision was challenged before this Court unsuccessfully. This Court in Chhotabhai Jethabhai Patel and Co. v. The Union of India, [1962] 2 Suppl. S.C.R. 1, rejected the assessee's claim regarding non-applicability of Rule 10-A stating that it had been specifically designed for the enforcement of a demand like the one in that case.

We also find that in N.B. Sanjana v. Elphinstone Spinning and Weaving Mills Company Ltd., [2971] 1 SCC 337, while holding that Rule 10-A did not apply to the facts of that

case, this Court observed that Rule 10-A did not apply as the specific provision for collection of duty in a case like that was specially provided for by Rule 10 and, therefore, action should have been taken under that Rule.
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In Assistant Collector v. National Tobacco Co. Ltd., [1973] 1 S.C.R. 822, this Court held that the High Court erroneously refused to consider whether the impugned notice in that case fell under Rule 10-A. It was observed that Rules 10 and 10-A seemed to be so widely worded as to cover any inadvertance, error etc.; whereas Rule 10-A would appear to cover any deficiency in duty if the duty had, for any reason, been short-levied, except that it would be outside the purview of Rule 10-A if its collection was expressly provided by any Rule. It was further observed that both the Rules as they stood at the relevant time dealt with collection and not with assessment and what was said in N.B. Sanjana's case (supra) that Rule 10-A was of residual in character and would be inapplicable if a case fell within a specified category of cases mentioned in Rue 10, was reiterated.

In D.R. Kohli v. Atul Products Ltd., [1985] 2 S.C.R. 832, this Court pointed out the differences between the two Rules namely Rule 10 and Rule 10-A as: "(i) whereas Rule 10 applies to cases of short levy through inadvertence, error, collusion or misconstruction on the part of an officer, or through mis-statement as to the quantity, the description or value of the excisable goods on the part of the owner, Rule 10-A was a residuary clause applied to those cases which were not covered by Rule 10 and that; (ii) whereas under Rule 10, the deficit amount could not be collected after the expiry of three months from the date on which the duty or charge was paid or adjusted in owner's account current or from the date of making the refund, Rule 10-A did not contain any such period of limitation."

It would thus be clear that this Court interpreted Rule 10-A, distinguished it from Rule 10 and applied it to the appropriate facts and circumstances of different cases. It would be reasonable to infer that in none of the cases any doubt about the validity of the Rule 10-A was entertained.

We may now examine the contention that at the relevant time Rule 10-A was not covered by the rule making power conferred on the Central Government by Section 37. Section 37 dealt with power of Central Government to make Rules. Sub-section (1) said: "The Central Government may make rules to carry into effect the purposes of this Act." Sub-section (2) enumerated the matters the rules might provide for 'in particular' and "without prejudice to the generality of the foregoing power." Thus, the section did not require that the enumerated rules would be exhaustive. Any rule if it could be shown to have been made "to carry into effect the purposes of the Act" would
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be within the rule making power. Chapter II of the Act dealt with the levy and collection of duty. Section 3 as it stood at the relevant time provided that duties specified in the First Schedule were to be levied. We have quoted Sub-section (1).

The First Schedule contained Item Nos. description of goods and rates of duty. Section 3 has subsequently been amended by the Finance Acts of 1982 and 1984, and the Central Excise Tariff Act of 1985. This section, it would be seen, expressly empowered the levy and collection of duties of excise on all excisable goods as provided in the Act including its First Schedule. It could not, therefore, be

said that Rule 10-A was not covered by the above provision.

It is an accepted principle that delegated authority must be exercised strictly within the limits of the authority. If rule making power is conferred and the rules made are in excess of that power the rules would be void even if the Act provided that they shall have effect as though enacted in the Act as was ruled in State of Kerala v. K.M. Charia Abdullah & Co., [1965] 1 SCR 601. Therein the High Court having declared rule 14-A of the Madras General Sales Tax Rules, 1939 as ultra vires, on appeal, this Court by majority held that the validity of the rule, even though it was directed to have effect as if enacted in the Act, was always open to challenge on the ground that it was unauthorised. The validity of the delegated legislation is generally a question of vires, that is, whether or not the enabling power has been exceeded or otherwise wrongfully exercised. Scrutinising the provisions of Rule 10-A in the light of the above principles and pronouncements of this Court, we have no doubt that Rule 10-A of the Rules, as it existed at the relevant time, was valid and not ultra vires the rule making power. Demand notices lawfully issued under the rule by the competent authority could not, therefore, be challenged on the ground of the rule 10-A itself being ultra vires. Whether those could be challenged on any other ground must necessarily depend on the facts and circumstances of the case.

The High Court having proceeded on the basis that Rule 10-A was not available to support the demand notice, we set aside the impugned order of the High Court, allow the appeal, and remand the case to the High Court for disposal in accordance with law. We leave the other questions open. Under the peculiar facts and circumstance of the case, we leave the parties to bear their own costs.

Y. Lal Appeal allowed.

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