

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 03

Excise Appeal No. 615 of 2010

[Arising out of OIO-2-COMMR-2010 passed by Commissioner of Central Excise-RAJKOT]

M/s. Sanghi Industries Ltd.

Sanghi Puram, P.O.-Motiber, Taluka-Abdasa,
Kutch,Gujarat-370655.

.....Appellant

VERSUS

C.C.E. & S.T.-Rajkot

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat-360001

.....Respondent

WITH

Excise Appeal No. 616 of 2010

[Arising out of OIO-2-COMMR-2010 passed by Commissioner of Central Excise-RAJKOT]

Ravi Sanghi Md

Village-akri, Tal-abdasa,
Kutch-Gujarat

..... Appellant

VERSUS

C.C.E. & S.T.-Rajkot

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat-360001

.....Respondent

APPEARANCE:

Shri V. Sridharan, Learned Senior Advocate along with Shri Anand Nainawati,
Shri Jigar Shah, Miss Priyanka Kalwani, Advocates for the Appellant
Shri PRV Ramanan, Special Counsel & Shri T.K. Sikdar, Authorized
Representative (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

FINAL ORDER NO. A/ 12225-12226 /2019

DATE OF HEARING: 14.11.2019

DATE OF DECISION:20.11.2019

RAMESH NAIR

The brief facts of the case are that the appellant are inter alia engaged in the manufacture of Cement clinker and OPC/PPC Cement falling under Chapter 25 of the First Schedule to the Central Excise Tariff Act. On 31.07.2001 the Central Government issued Notification No.39/2001-CE Dated 31.7.2001 granting exemption to all new units set up on or after 31.07.2001. The said notification provided that the expression 'set up' shall mean that any Civil Construction Work on its

factory premises and any installation of plant and machinery therein commences on or after 31.07.2001. The appellant's claim is that pursuant to the order of the Hon'ble Gujarat High Court and the clearances from the Forest department started the civil construction work at the clinker unit and also in grinding unit in August 2001. The appellant vide letter dated 21.12.2001 wrote a letter to the Superintendent of Central Excise-Gandhidham intimating the fact that they have commenced civil construction work on factory premises on 31.08.2001 after performing pooja on 25.08.2001. Subsequent to the issue of No.39/2001-CE Dated 31.7.2001 the appellant made an application dated 31.07.2001 to the Committee comprising of Chief Commissioner of Central Excise and Principal Secretary Industries and Mines Department, Government of Gujarat (hereinafter referred to as Committee) for issuance of eligibility certificate to clinker unit under No.39/2001-CE Dated 31.7.2001. The appellant in the declaration declared clinker unit as a new unit. The said application was rejected by Committee on the ground that exemption will not be granted to any unit which has started its work before the earthquake. It was held by the committee that the clinker unit was not the new unit within the definition under Notification No.39/2001-CE Dated 31.7.2001. Thereafter the appellant vide letter dated 03.02.2003 requested the Committee to issue requisite certificate to their grinding unit in terms of Notification No.39/2001-CE Dated 31.7.2001. The appellant along with the letter dated 03.02.2003 submitted to the department evidences as regard to possession of land by the appellant, bhoomi poojan, foundation stone laying down ceremony and also certificates from various persons. The department vide letter dated 25.02.2003 asked the appellants to submit various documents including Memorandum & Article of Association, List of Directors, Project Report, Factory Plan, Resolution, NOC from GPCB, Copy of IEM, Certificate from CA as required under Notification No.39/2001-CE dated 31.7.2001, Declarations as per Notification and Trade Notices issued from time to time. The appellant vide letter dated 25.03.2003 filed declaration in terms of Notification No.39/2001-CE and intimated that commercial production of the new grinding unit will commence from 28.03.2003. The appellant vide letter dated 28.03.2003 submitted to the Chief Commissioner of Central Excise all the details and documents sought by them vide letter dated 25.02.2003. The documents furnished by the appellant vide letter dated 28.03.2003 were

forwarded by the Additional Commissioner (CCO) along with application dated 03.02.2003 to the Commissioner of Central Excise Rajkot, vide letter dated 03.04.2003 for comments and views. Learned Commissioner of Central Excise Shri D.D. Rishi in his letter stated that the construction work and procurement of plant and machinery was done in year 1995 itself and therefore, the exemption under Notification No.39/2001-CE Dated 31.7.2001 cannot be granted to the grinding unit which is not the new industrial unit within the meaning of the notification. Original application of the appellant was returned along with enclosures. The Assistant Commissioner (CCO) vide letter dated 28.05.2003 requested Learned Commissioner of Central Excise, Rajkot to furnish his factual comments on the documents submitted by the Appellants vide letter dated 03.02.2003 and 28.03.2003. The application was once again along with enclosures was forwarded to Learned Commissioner of Central Excise. The Additional Commissioner (CCO) vide letter dated 09.06.2003 requested the Commissioner of Central Excise to send his factual comments and more specifically on the following:

- a) The physical availability and the installation/ erection of the plant machinery shown by the appellants in their application and their relevant date.
- b) The date/ period of installation/ erection of the machinery by the Appellants at the site.
- c) The date of commencement of production in said cement grinding unit at village Akri.

1.1 The Commissioner of Central Excise, Sh. Rishi vide his letter dated June 2003 submitted to the Chief Commissioner about his factual comments on the documents submitted by the appellant as well as comments sought vide letter dated 09.06.2003. The Commissioner Shri Rishi submitted that the appellant have declared the value of machinery to be Rs. 103,51,37,948/-. It was also stated that the machinery worth Rs. 68,89,55,496/- was imported prior to issue of Notification. It was also stated that on verification it was found that certain machines declared installed was not installed and same has to be deducted from total value declared. It was also stated that construction work started in 1995 and the plant and machineries were purchased in 1995 itself therefore grinding unit is not a new industrial unit. According to the

Commissioner grinding unit was set up after 31.07.2001 is of no relevance as it is mere addition to the old unit and cannot be termed to be new unit. These facts were duly communicated to the issuing authorities much before the date and certificate was issued. Vide letter dated 13.06.2003 Additional Commissioner of Central Excise (CCO) called for all the records lying in Range and Division related to the appellants application for exemption certificate from the Commissionerate of Central Excise, Rajkot. Assistant Commissioner of Central Excise, Division Bhuj vide letter dated 20.06.2003 informed the Additional Commissioner (CCO) that the machinery bought for cement was kept idle by the Appellant in their clinker unit. Further vide letter dated 27.06.2003, it was informed that the machineries were not erected or installed at clinker unit but were shifted at grinding unit by M/s Jay Kumar Erector and Fabricator on contract basis after getting clearance for acquisition of land from State Government. The chief Commissioner of Central Excise vide letter dated 26.03.2003 exchanged his comments on application with Principal Secretary, Industries and Mines Department. It was informed that original clinker project was started in 1995 itself and part of the machinery of grinding unit was also imported. It was informed that grinding unit got delayed due to land dispute with State Authorities. Ld. Chief Commissioner in his letter stated that a new view has arisen in the matter as to whether the grinding unit can be considered as separate new unit and accordingly requested the principle secretary to share his comments on the same. Meantime, the appellants kept on pursuing with the Chief Commissioner of Central Excise to issue the certificate in terms of Notification No.39/2001-CE Dated 31.7.2001. There was a repeated request by Chief Commissioner of Central Excise to the Principal Secretary to fix the meeting were sent. The meeting got postponed for one or more reasons. Vide letter dated 31.12.2003 Chief Commissioner of Central Excise sent four copies of the Certificate to be issued in terms of Notification No. 39/2001-CE dated 31.07.2001 for the signature of Principal Secretary. The Certificate was issued by the Chief Commissioner of Central Excise on the ground that grinding unit of appellant is eligible for exemption on the following grounds:

- a) The Grinding Unit is 14 KM away from the Clinker unit.
- b) Grinding Unit has got separate central excise registration.
- c) Cement is different product form clinker.

- d) Grinding unit commenced its commercial production on 28.03.2003.
- e) IEM from Commerce and Industries, New Delhi for cement and clinker is different.

1.2 The copies of certificate date 31.12.2003 duly signed and then crossed by Principal Secretary were communicated to the Chief Commissioner of Central Excise by Office of the Principal Secretary. Vide letter dated 16.03.2004 reasons for not signing the certificate was called from the Principal Secretary by the Office of Chief Commissioner vide letter dated 29.03.2004 and once again made request for the comments of Principal Secretary. Vide letter dated 31.03.2004, Principal Secretary communicated to the Chief Commissioner reasons for delay. As regard to the Certificate to the appellants the Principal Secretary vide letter dated 02.04.2004 informed that the whole cement project was conceived by the appellants as back as in 1994 for capacity of 2.6 million tonnes of cement. The Principal Secretary raised a doubt as to whether the machineries purchased prior to 31.07.2001 can be considered as eligible machineries for the purpose of excise exemption for grinding unit. In reply to the said letter dated 31.03.2004, the Additional Commissioner (CCO) vide letter dated 20.05.2004 intimated that the Chief Commissioner (CCO) proposed to issue certificate for eligible machinery valued at Rs. 28,06,91,571/- and that the issue of inclusion for machinery purchased prior to 31.07.2001 may be referred to Government of India. Pursuant to the above letter dated 20.05.2004, the Principal Secretary agreed to sign the certificate. On 22.06.2004 the appellant received certificates dated 21.06.2004 issued in terms of para 3(ii) and 3(iv) of Notification No.39/2001-CE Dated 31.7.2004 for both clinker unit and grinding unit. On the strength of aforesaid certificate, the appellant were allowed refund in terms of Notification No.39/2001-CE Dated 31.7.2001 for the period 2003-2004 to 2007-2008. Subsequently on 24.01.2006, the factory premises of the grinding unit was searched by officers of DGCEI. Simultaneous search was also carried at the premises of clinker unit. During the course of investigations the statements of various persons were recorded by the officers of DGCEI. The officers also seized various documents in the course of investigation. On the basis of investigation following conclusion were drawn by the officers of the DGCEI.

- a) Grinding unit is not a new industrial unit as defined under Notification No.39/2001-CE Dated 31.7.2001
- b) Civil construction work commenced prior to 31.07.2001 inasmuch as piling work for silos was done in the year 1995 itself.
- c) The Appellant always conceived cement plant as one integrated cement plant.
- d) The Appellant obtained certificate from the Committee by submitted false certificates from the local people to the effect that no civil construction work commenced prior to 31.07.2001.

1.3 On the basis of detailed investigation carried out by the officers of DGCEI the appellants were issued with a show cause notice dated 14.11.2007 asking the appellant to show cause as to why:

- a) An amount of Rs. 40,00,11,585/- erroneously refunded to them during the period November 2003 to March 2007 shall not be recovered from them under Section 11A of the Central Excise Act, 1944 by invoking extended period of limitation as per proviso to sub-section (1) of the said Section 11A.
- b) Excise duty amount deposited during investigation amount to Rs. 40,00,11,585/- deposited during the investigation should not be appropriated against the demand.
- c) Penalty should not be imposed upon them under Section 11AC of the Central Excise Act, 1944 and Rule 25 of the Central Excise Rules, 2002.
- d) Interest at the prescribed rate should not be recovered from them under the provisions of Section 11AB of the Central Excise Act, 1944.

1.4 The case of the department in the SCN was that the appellant have wrongly claimed the benefit of Notification No.39/2001-CE Dated 31.7.2001 in respect of cement cleared from grinding unit. According to the department grinding unit do not satisfy the conditions of the said notification on the following grounds:

- a) Grinding unit is a part of cement plant and not a separate unit and civil construction work started at Grinding Unit prior to 31.07.2001.
- b) Clinker Unit and Grinding Unit are not separate units.
- c) Preparatory work for whole cement plant was done by treating both clinker and grinding unit as one.
- d) Civil construction work at grinding unit commenced in 1996 itself.
- e) During the litigation period itself the construction work started.

- f) Various status reports conclusively proves that the construction work at grinding unit was on going prior to 31.07.2001 and that civil construction work re-started in November 2000.
- g) Manipulated certificates were presented before the authorities for obtaining the certificate for exemption under Notification No. 39/2001-CE.

1.5 The appellant filed detailed reply to SCN dated 14.11.2007. Additional Submissions were made by the appellant vide letter dated 25.09.2009. The Additional Commissioner of Central Excise vide impugned order dated 12.01.2010 confirmed the demand raised in the show cause notice and also imposed penalty for an equivalent amount under Section 11AC of the Central Excise Act 1944. Being aggrieved by the impugned order, the appellant filed the present appeal.

2. Shri V. Sridharan, Learned Senior Advocate along with Shri Anand Nainawati, Shri Jigar Shah, Miss Priyanka Kalwani (Advocates) appeared on behalf the appellant. He, at the outset, submits that appellant is not contesting the duty demand as the same has been paid back before issuance of Show Cause Notice. He also submits that since the appellant have taken the benefit of sales tax exemption on the condition of surrendering the excise benefit availed under Notification No. 39/01-CE, the appellant is not contesting the duty demand. As regard, imposition of penalty under Section 11AC and demand of interest, he made following submissions.

2.1 The Appellants submit that impugned notification is self-contained notification which specifies procedure to avail the exemption and also provides for recovery mechanism in case the assessee is found not to be eligible for the benefit under the scheme. Therefore, the proceedings initiated to recover the refund amount by the issuances of show cause notice is not sustainable.

2.2 The conditions stipulated in the notification to avail the benefit for ease of reference are reproduced below:

"3. The exemption contained in this notification shall be subject to the following conditions, namely :-

*(i) It **shall apply only to new industrial units**, that is to say, units which are set up on or after the date of publication of this notification in the Official Gazette but not later than the 31st day of July, 2003;*

*(ii) In order to avail of this exemption, **the manufacturer shall produce a certificate from a Committee consisting of the Chief Commissioner of Central Excise, Vadodara and the Principal Secretary to the Government of Gujarat, Department of Industry,***

to the jurisdictional Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be, that the unit in respect of which exemption is claimed is a new unit and has been set up during the time period specified in condition (i) above.

*(iii) Before effecting clearances under this notification, the manufacturer shall also **furnish a declaration regarding the original value of investment in plant and machinery installed in the factory** as on the date of commencement of commercial production, to the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be.*

*(iv) The **manufacturer shall also produce a certificate from the said Committee confirming the original value of investment and such a certificate** shall be produced within a period of one month from the date of commencement of commercial production, or such extended period as the said Assistant Commissioner or Deputy Commissioner may allow.*

(v) In case on the basis of such certification, or otherwise, the original value of investment in plant and machinery,

(a) is found to be less than rupees twenty crore but was declared to be rupees twenty crore or more, the manufacturer shall be liable to pay back the entire amount of duty exemption availed under the notification along with interest at the rate of twenty four per cent. per annum as if no exemption were available; or

(b) is found to be less than the declared value and was declared to be below rupees twenty crore, the manufacturer shall be liable to pay duty on the goods cleared, if any, in excess of twice the actual value of original investment in each of the years during which exemption has been claimed under this notification along with interest at the rate of twenty four per cent. per annum, as if no exemption were available to those clearances under this notification.

*(vi) **The exemption shall apply for a period not exceeding five years from the date of commencement of commercial production by the unit.***

2.3 Thus, it can be seen from the aforesaid that exemption is available to new industrial unit and same is also defined under the notification. Further, notification provided that the assessee shall produce eligibility certificate from the Committee consisting of Chief Commissioner and Principal Secretary Industry & Mines Department who shall issue certificate as to (a) Original value of investment in plant & machinery (b) As to date commencement of commercial production by the unit.

2.4 Notification further provides that in event such declaration as regards to Original investment in plant & machinery is found to be incorrect or is less than rupees 20 crore then recovery mechanism along with interest is also provided under clause 3(v)(a) & (b).

2.5 It is an admitted fact that two certificates in terms of para 3(ii) and 3(iv) dated 22.6.2004 were issued after proper deliberation and verification and after obtaining full report from the jurisdictional Commissioner office. Thus, the Appellants cleared the goods under valid

certificate. The Appellants submit that the decision of the Committee is final and binding and same cannot be questioned. In **Dhar Cement Ltd. Vs. CCE- 2005 (191) ELT 347 (T) [Copy of decision from page no. 6 to 7 in Volume-II of compilation]** the assessee was denied benefit of exemption under Notification No.24/91-CE Dated 25.7.1991 and Notification No.5/93-CE Dated 28.2.1993 on the ground that capacity of plant is more than 1,98,000 tonnes per annum. Capacity was required to be certified by director of industries who in the facts certified that capacity is more than 1,98,000 tonnes. Ld. Tribunal held that once competent authority has certified the capacity same has to be accepted and accordingly granted the benefit of the notification. Therefore, in the present case once the Committee after due verification has issued the eligibility certificate, Commissioner of Central Excise, Rajkot has no jurisdiction whatsoever to deny exemption.

2.6 Once, an admitted fact is that the Appellants were holding eligibility certificate issued by the Committee as per the notifications, proceedings initiated to deny exemption are bad in law and same is liable to be set aside. In the land mark judgment of the Hon'ble Supreme Court in the case of **East India Commercial Company Ltd. vs. Collector of Customs, Calcutta**, reported in **1983 ELT 1342 (SC)**, [**copy of decision from Page no.8 to 23 in Volume-II of compilation**] Supreme Court had occasion to deal with a situation where the person had obtained a licence on misrepresentation of the facts before the licensing authority. In this case, licence was issued for import of certain electrical instruments based on the representation made by the importer. On the basis of licence so obtained, importer made the imports. Subsequently, after the goods were imported, it was noted that the importer had imported the goods on the basis of licence which was obtained from the licensing authority on the basis of misrepresentation of facts. Hon'ble Supreme Court held in the matter that there is no legal basis for the contention that the licence obtained by misrepresentation makes the licence non est. It was further clarified that assuming the principles of law of contract apply to the issue of licence under the Act, licence obtained by fraud is only voidable and it remains good till it is voided in the manner prescribed by law. Relevant portion of the judgment of the Supreme Court is extracted below:-

"35. Nor is there any legal basis for the contention that licence obtained by misrepresentation makes the licence non est, with

the result that the goods should be deemed to have been imported without licence in contravention of the order issued under Section 3 of the Act so as to bring the case within Clause. (8) of Section 167 of the Sea Customs Act. Assuming that the principles of law of contract apply to the issue of a licence under the Act, a licence obtained by fraud is only voidable : it is good till avoided in the manner prescribed by law”

2.7 Decision of the Hon’ble Supreme Court in the case of **Vadilal Chemicals Ltd. Vs. State of AP & Ors. – (2005) 6 SCC 292** may also be referred in this regard [*copy enclosed from page no.39 to 47 of Volume-II of the compilation*]. In the said decision, as per the sales tax scheme assessee was eligible for tax holiday. For this purpose State Level Committee was constituted who shall decide the eligible investment and sanctioning of incentives. The assessee was issued such certificate and benefit was being claimed by the assessee. However, the exemption was sought to be denied by the sales tax department. After considering arguments from both side, the Hon’ble Apex Court held as under. Relevant para 22 & 23 reproduced below:

“22. Furthermore, under the incentive scheme in question, there was only one method of verifying the eligibility for the various incentives granted including sales tax exemption. The procedure was for the matter to be scrutinized and recommended by the State Level Committee and District Level Committee and the certification by the Department of Industries & Commerce by issuing an Eligibility Certificate. There was no other method prescribed under the scheme for determining an industrial unit's eligibility for the benefits granted. The Department of Industries & Commerce having exercised its mind, and having granted the final eligibility certificate (which was valid at all material times), the Commercial Taxes Department could not go beyond the same. More so when the Commissioner, Sales Tax had accepted the Eligibility Certificate issued to the appellant and had separately notified the appellants eligibility for exemption under the 1993 G.O. In these circumstances the DCCT certainly could not assume that the exemption was wrongly granted nor did he have the jurisdiction under Section 20 of the State Act to go behind the eligibility certificate and embark upon a fresh enquiry with regard to the appellant's eligibility for the grant of the benefits. The counter affidavit filed by the respondents-sales tax authorities is telling. It is said that the Sales Tax Department had decided to cancel the eligibility certificates for sales tax incentives. As we have said the eligibility certificates were issued by the Department of Industries and Commerce and could not be cancelled by the Sales Tax

Authorities. [See in this connection: [Apollo Tyres vs. CIT Kochi](#), (2002) 9 SCC 1.)

23. There is another reason why the action of the DCCT cannot be upheld. The primary facts relating to the processes undertaken by the appellant at its unit were known to the Department of Industries and Commerce and the DCCT. The only question was what was the proper conclusion to be drawn from these. The Department of Industries and Commerce which was responsible for the issuance of the 1993 G.O. accepted the appellant as an eligible industry for the benefits. Apart from the fact that it can be assumed that the Department of Industries was in the best position to construe its own order, we can also assume that in framing the scheme and granting eligibility to the appellant all the departments of the State Government involved in the process had been duly consulted. The State, which is represented by the Departments, can only speak with one voice. "

(emphasis supplied)

2.8 Therefore, in the facts of the present case where the Committee already applied its mind before issuing the certificate and nearly took one year to grant the same after seeking full verification report from the jurisdictional excise office, the jurisdictional excise office including investigating agency has no jurisdiction whatsoever to initiate fresh inquiry and deny the benefit of notification. Impugned order is thus contrary to law and is liable to be set aside.

2.9 Also, it can be seen that even eligibility certificate issue came to be cancelled legality of which is discussed in para following infra. However, suffice to say at this stage even such cancellation was prospective and not retrospective. Therefore, clearances of finished goods and availing benefit of notification no.39/2001-CE under valid certificate cannot be questioned and therefore order of recovery of refund already granted is not sustainable.

It is well settled that no court or authority has inherent power of review. The power of review has to be specifically conferred on the authority. There is no such power conferred on committee under the notification to review such certificate. Cancellation of certificate is thus bad in law. In any case, Ld. Chief Commissioner of Central Excise had no power to cancel such certificate as same was required to be cancelled by Committee alone.

2.10 Ld. Commissioner in the impugned order has held that certificate issued by the Committee has been cancelled by the Ld. Chief

Commissioner vide letter dated 11.7.2007 and therefore exemption cannot be availed by the Appellants.

2.11 The aforesaid contention of the Ld. Commissioner is wholly misplaced. Even assuming for the sake of argument that such cancellation is valid in law, even then as per letter dated 11.7.2007 such cancellation is prospective and not retrospective. Therefore, on this ground alone the eligibility of the Appellants to avail exemption cannot be questioned.

2.12 In any case, Notification No.39/2001-CE does not provide for cancellation of certificate once issued. In other words there is no power of review conferred on the Committee to revoke certificate subsequently.

2.13 It is well settled proposition of law that power to review has to be specifically conferred on the authority. Authority cannot presume such power. In other words, merely because Committee has power to issue certificate does not confer automatic power to them for cancelling such certificate. Such power has to be conferred by law upon them. The reliance is placed on the following decision in support of the aforesaid submissions:

- a) Madras Rubber Factory Ltd. Vs. ACCE 1981 (8) ELT 565 (Mad)
- b) Hanil Era Textiles Ltd. Vs. UOI-Hon'ble Bombay High Court Order Dated 23.2.2011 in W.P NO. 1718 of 2013
- c) Arvind Cotspin Vs. UOI-Hon'ble Bombay High Court Order Dated 10.3.2011 in W.P. No.9378 of 2010

2.14 Section 21 of General Clauses Act which provides that power to issue include power to add, to amend, vary or rescind, notifications, orders, rules or bye-laws has to be relied upon. However, even if power under Section 21 has to be exercised and revocation has to be done, such revocation can only be prospective as held by the Hon'ble Supreme Court in **Kazi Lhendup Dorji Vs. CBI- 1994 Supp (2) SCC 116** – refer conclusion at para 21 of the said decision.

2.15 In view of the above, the Appellants submit that the exemption cannot be denied.

Entire basis of investigation is mis-placed. Civil construction work started in grinding unit only after 31.7.2001. In any case, notification does not impose any condition of any kind of civil construction work to start only after 31.7.2001

2.16 Entire genus of case made out against the Appellants is that the civil construction work at grinding unit started much prior to 31.7.2001 i.e. before the date of publication of Notification No.39/2001-CE Dated 31.7.2001 in official gazette and therefore the appellants are not eligible for benefit of the said notification.

2.17 The said contention of the department is not acceptable and is wholly mis-placed. Notification No.39/2001-CE Dated 31.7.2001 provides that the benefit of this notification shall apply only to new industrial units. Explanation to the notification further provides that the expression "set up on or after the date of publication of this notification in the Official Gazette" shall mean that any civil construction work on its factory premises and any installation of plant and machinery therein commences only on or after the date of publication of this notification in the Official Gazette.

2.18 It is submitted that the notification uses the phrase "any civil construction work on its factory premises". Suppose a manufacturing unit was already functioning prior to earthquake in Kutch having vacate land which is in the approved ground plan. After the aforesaid notification is published on 31.7.2001 the said unit thinks of establishing a new unit making altogether different product on the vacate land. The notification does not debar such existing units to set up a new unit. Further the phrase "any civil construction" appearing in the aforesaid explanation of the notification contemplates any civil construction major or minor which give rise to a new unit having installed plant & machinery after 31.7.2001. Therefore, even if some minor construction work is already being done it will not debar the assessee from claiming exemption.

2.19 In any case, the Appellants have produced on record the certificate of chartered engineer to the effect that all old piling work done has been abandoned and has not been used in new construction. Further, there does not seem to be any gap in chronology of event as pointed out by Ld. Counsel for the revenue. Reliance placed on civil construction details as extracted in OIO clearly demonstrates that the said work was done for clinker unit only.

2.20 The Appellants crave leave to refer and rely upon detailed grounds set out in appeal to rebut the findings of the Ld. Commissioner on this aspect of the submission.

There is no suppression of facts by the Appellants. Certificate was issued by Committee after due deliberation and verification. Further, all the facts were within the knowledge of the department. Extended period cannot be invoked.

2.21 Show cause notice dated 14.11.2007 issued to the Appellants seek to recover the refund already sanctioned to the Appellants for the period November 2003 to March 2007 by invoking extended period of limitation under first proviso to Section 11A(1) of the Central Excise Act, 1944.

2.22 The Appellants submit that the demand beyond normal period is barred by limitation. Ingredients to proviso to Section 11A(1) of the Central Excise Act, 1944 cannot be invoked in the present case. The eligibility certificates were issued by the Committee only after thorough investigation to the facts and not merely based on the application made by the Appellants. Chronological events leading to the issue of eligibility certificate as discussed above clearly demonstrates that not only Committee but jurisdictional excise office of Commissioner also applied its mind and in fact never agreed on the eligibility of the Appellants for exemption.

2.23 It can be seen that the department was aware of all relevant facts and that all facts were in the knowledge of the department. On request of the department, the Appellants provided documents including Memorandum & Article of Association, List of Directors, Project Report, Factory plan, Resolution, NOC from GPCB, Copy of IEM, Certificate from CA as required under Notification No.39/2001, Declarations as per notification and trade notices issued from time to time which was submitted by the Appellants. The project report clearly indicated the fact that since early 90's the Appellants have conceived the entire plant as one integrated cement plant comprising of Clinker unit and Grinding unit. Ld. Commissioner of Central Excise Sh. D.D. Rishi (name reproduced for ease of reference) vide letter dated 8.4.2003 submitted his comments to the Chief Commissioner of Central Excise. Sh. Rishi in his letter stated that the construction work and procurement of plant and machinery was done in year 1995 itself and therefore the exemption under Notification No.39/2001-CE cannot be granted as the Grinding Unit is not the new industrial unit within the meaning of the notification. Original application of the Appellants was returned along with enclosures. Committee however considered grinding unit to be separate unit.

2.24 Ld. Commissioner of Central Excise Shri. D.D. Rishi vide his letter dated Nil June 2003 submitted to the Chief Commissioner of Central Excise about his factual comments on the documents submitted by the Appellants as well as the comments sought vide letter dated 9.6.2003. Shri. Rishi, inter alia submitted that the Appellants have declared the value of machinery to be Rs.103,51,37,948/-. It was also stated that the machinery worth Rs.68,89,55,496/- was imported prior to issue of notification. It was also stated that on verification it was found that certain machine declared installed was not installed and same has to be deducted from total value declared. It was also clarified that since the construction work started in 1995 and the plant and machineries were purchased in 1995 itself therefore the grinding unit is not a new industrial unit. According to Sh. Rishi the fact that grinding unit was set up after 31.7.2001 is of no relevance as it is mere addition to the old unit and cannot be termed to be new unit. Ld. Counsel for the revenue has argued that the said letter by the Ld. Commissioner nowhere reflects that he was aware of the civil construction at grinding unit before 31.7.2001. The Appellants submit that Ld. Commissioner of Central Excise in his letter very categorically admitted that unit is set up only after 31.7.2001 as per the notification. Thus, civil construction work started after 31.7.2001 was never disputed by him. His only reservation was that grinding unit which was part of clinker unit from beginning cannot be considered as new unit.

2.25 The Appellants submit that the aforesaid letter dated NIL June 2003 proves beyond doubt that the fact now brought in the show cause notice are not new facts but the facts known to the department as long as in Year 2003 itself. The fact that some construction had taken place in grinding unit in the year 1995 itself was the fact known to the department. This was much prior to the date of issue of eligibility certificate to the Appellants and also known to the Committee issuing such certificates. The Appellants therefore submit that if it was found that the certificates of authorities attached to the application are contrary to facts then objection could have been raised then and there. The department could also have objected for the issuance of certificate. However, no action was taken by the department because it was thereon understanding that grinding unit is a new unit within the notification. In view of the above, the Appellants submit that extended period cannot be invoked in the present case.

2.26 Thereafter, Ld. Chief Commissioner and Principal Secretary also exchanged numerous correspondences before agreeing to issue the certificate. The Appellants therefore submit that it is not the case where the Appellants deliberately suppressed any fact. In the given facts which were known to the department whether certificate can be issued or not was a legal dispute and it was held that legally the Appellants are eligible for exemption. Change in opinion now by the department cannot be the ground for alleging suppression against the Appellants.

2.27 The above submission also finds support from the letter dated 27.1.2004 wherein it was requested by the Principal Secretary that "...in doubtful cases, where interpretations of Govt. of India's Notification is involved, guidance from the concerned Ministry/Department of Govt. of India may please be sought". The above letter admittedly suggests that lot of thinking process has gone before issuing the certificate to the Appellants. This supports the submission of the Appellants that certificate was not issued merely on the basis of documents furnished by the Appellants and therefore allegation of fraud and mis-statement are incorrect.

2.28 Also, the Appellants paid back the amount of refund not because they accepted the contention of the department but they surrendered it voluntarily to avail sales tax exemption without any dispute. Though in law, the Appellants are eligible for benefit under both the scheme i.e. excise exemption under Kutch Notification and Sales Tax incentive under policy framed by the Government of Gujarat. The Appellants therefore submit that their voluntary act should not be treated as an acceptance of the contention of the department in the show cause notice. The Appellants submit that in law they are entitled for refund of amount already paid back as they are eligible for exemption by way of refund under Notification No.39/2001-CE Dated 31.7.2001.

2.29 In view of the above extended period cannot be invoked in the facts of the present case.

2.30 The Appellants submit that present proceedings initiated against the appellants as recovery of erroneous refund under Section 11A are bad in law.

2.31 The Appellants submit that Notification No.39/2001-CE Dated 31.7.2001 creates a special provision for granting exemption by way of

refund. It has its own self-contained procedure to claim such refund and also has its own machinery to recover any refund granted erroneously under the notification. Thus, refund under this notification are not refund which are otherwise admissible under the provisions of Central Excise Act, 1944 i.e. refund under Section 11B.

2.32 Section 11B of the Central Excise Act, 1944 provides for grant of refund of any duty of excise paid. Section 11A of the Central Excise Act, 1944 provides for recovery of erroneous refund. Though Section 11A does not refer to Section 11B but the phrase "erroneous refund" suggests refund granted under Section 11B. Therefore, provision of Section 11A provides recovery of refund erroneously granted under Section 11B of the Act and not otherwise. This submission is supported by the decision of the Hon'ble Supreme Court in the case of **R.C. Tobacco Pvt. Ltd Vs. UOI- 2005 (188) ELT 129 (S.C)** [*copy enclosed at page from 51-62 of Volume-II of the compilation*]. Refer para 39 to 42 of the said decision. Relevant portion of Para 40 is reproduced below:

"40. Although Section 11A does not refer to Section 11B, it speaks of duties "erroneously refunded". It cannot therefore refer to the refunds made to the petitioners under the notifications"

2.33 CBEC vide Circular No.842/19/2006-CX Dated 8.12.2006 had clarified Section 11B of the Central Excise Act, 1944 would not apply to refund granted under Notification No.39/2001-CE Dated 31.7.2001.

2.34 Thus, entire proceedings to recover erroneous refund by invoking Section 11A of the Central Excise Act, 1944 is incorrect. The recovery if any has to be strictly in accordance with the machinery provided under Notification.

2.35 Further, the Hon'ble Supreme Court also held in the case of **Geep Flashlight Industries Ltd. Vs. UOI- 1983 (13) ELT 1596 (S.C)** in context of provisions of Section 28 of the Customs Act, 1962 that Section 28 speaks of only three kinds of errors in regard to duties firstly non-levy, secondly short-levy and thirdly erroneous refund i.e., refund under an order erroneously made while refund is made under Section 27 of the Customs Act, 1962. Same analogy would apply under Section 11A i.e. erroneous refund would mean refund ordered under Section 11B of the Central Excise Act. It was also held that refund can never be the case of short levy.

2.36 In view of the above, the Appellants submit that proceedings are bad in law and are liable to be set aside.

2.37 In view of the various submissions made above no penalty can be imposed on the Appellants under Section 11AC of the Central Excise Act. There is no suppression of facts by the Appellants, further refund sought to be recovered is not erroneous refund as per Section 11AC of the Central Excise Act. The Appellants further submit that they of their own voluntarily paid back the amount of refund which is available to them in law. Since, issue involved is pure question of interpretation of law penalty under Section 11AC is not imposable.

2.38 Without prejudice to above, the Appellants voluntarily surrendered the refund amount before issuance of Show Cause Notice despite being eligible for the scheme. On this ground alone the penalty should not be imposed on the Appellants.

2.39 The Appellants submit that in law they have rightly claimed the refund and same is not required to be paid back to the government and therefore question of paying any interest does not arise. The proceedings are bad in law and no duty is payable. Section 11AB itself is not applicable to the facts of the present case to demand interest and same is required to be set aside.

3. Per contra Shri P.R.V. Ramanan, Special Counsel appearing on behalf of the Revenue reiterates the findings of the impugned order. He made the following submissions:-

3.1 On the issue of Certificate by the Committee was after raising objection on civil construction having commenced in 1996. Department had prior knowledge:

CCE, Rajkot's letter dated 08.04.2003 and 13.06.2003 were cited in support of the argument. These letters clearly indicate that the Commissioner had held the view that the grinding unit constituted mere addition of new plant or machinery within the old industrial unit for which construction had commenced prior to 31.07.2001. There is no specific observation relating to commencement of construction at the Grinding Unit site prior to 31.07.2001. It is denied that the Department had any prior knowledge of commencement of civil construction at the site of grinding unit, particularly the work undertaken in the year 2000 at the same site. Nevertheless, assuming without admitting that the

Department had prior knowledge of commencement of civil construction at the site of grinding unit, SIL was in any case bound to make a true declaration about the status of aspect of civil construction to the Committee, which they failed to do.

3.2 Cancellation of Certificate by the Chief Commissioner was preceded by three events:

First, investigations by DEGEI revealed that SIL had suppressed the fact of commencement of civil construction at the Grinding Unit site prior to 31.07.2001. SIL had, thus, failed to meet the conditions stipulated under para 3(i) of the Notification. Declarations dated 3/2/2003 filed by SIL were clearly false. Supporting documents produced by them were also found to be not reflecting the true position. As per the depositions of officials of GOG, Certificates were issued by them based on the statements of SIL not verification by them. The Industries Commissioner of GOG had by his letter dated 15.05.2007 informed the Department that benefit of Sales tax exemption under 1995-2000 scheme of the State Government was granted to SIL as one entity and the benefit was given for the entire unit i.e. Clinker and Cement Plant. As per the Industries Department of GOG, SIL cannot be considered as a separate new unit under the Kutch package and it would not be eligible for the benefit of Kutch package as a new unit. In fact details received from the said department showed that the High Power Committee of GOG had, in its meeting held on 12.04.2007, unequivocally informed SIL that grinding unit cannot be considered as a separate unit under the Scheme of 1995-2000 and they cannot avail of the benefit of the said scheme as well as the benefit of exemption under Notification 39/2001. By its letter dated 12.06.2007, SIL had informed the CC that they would not like to avail of the benefit of the notification no. 39/2001 as they were informed by the Industries of GOG that they do not qualify for the benefit of excise exemption under the Kutch package. It is clear from the above, that the Industries Department of GOG had taken a decision that SIL cannot be considered as a separate new unit under the Kutch package and it would not be eligible for the benefit of excise exemption as a new unit. This decision was conveyed also to the CC. In the light of above sequence of events the cancellation of the certificate vide the letter from CC dated 11.07.2007 cannot be faulted. It is a valid order inasmuch as it reflects the decision of both the CC and the Industries department of GOG.

3.3 This is not a case of erroneous refund. Hence, section 11A and 11AC of CEA, 1944 cannot be invoked:

In support of the above argument, reliance is placed on the Apex Court's judgment in the case of RC Tobacco Pvt. Ltd. VS UOI and the Circular dated 8/12/2006 issued by the CBEC. It is settled law that a judicial pronouncement lays down the law in the context of the facts of each case. In the case of R.C. Tobacco, the Apex Court has observed thus:

"40. Although Section 11A does not refer to Section 11B, it speaks of duties " erroneously refunded". It cannot therefore refer to the refunds made to the petitioners under the notifications as there was no error in the provisional refunds made under the notifications to the appellants. What was sought to be recovered under Section 154 was not an erroneous refund but a benefit provisionally granted."

Section 154 (1) had provided that notwithstanding the decision of the High Court, the orders of the Assistant Collector, which were purported to have been taken under the notifications, were validated as if the notifications as amended had been in force when the orders were passed. In the case of RC Tobacco though they had satisfied the basic requirement of commencement of commercial production, they had done so without obtaining the permanent registration of the State government, which was a legal requirement before commencement of commercial production. The Department had for that reason disentitled them from getting the refund. The Hon'ble High court, however, set aside the Order. Soon thereafter retrospective legislation was brought in to validate the decision of the Department. It was the retrospective legislation that rendered the denial of refund legal. He submits that in the present case, SIL had taken refund of duty paid by them by way of self-credit, which action was later approved by the Department after verification of the correctness of the amount claimed as refund. Thus, the refund taken by the appellant had become final at the relevant point of time. Secondly, in the present case, there was a clear allegation in the SCN that the refund was taken by way of fraud, suppression of facts, willful mis-statement and contravention of the provisions of CEA, 1944 and the Rules made thereunder with intent to avail refund erroneously by claiming exemption. [Vide para 21.2 and 21.3 of OIO]. Further, as per the findings recorded by the adjudicating authority in Para 63.5 of the OIO, that the refunds taken by them u/n 39/ 2001 was obtained by way of fraud, suppression of facts, willfull mis-statement and contravention of

the provisions of CEA, 1944 and the Rules made thereunder inasmuch as the certificate was obtained by them by making false declarations and suppression of facts with intent to evade duty. Since SIL had been availing of refunds as laid down in the subject notification by way of fraud, suppression of facts, willful mis-statement there was deliberate default on the part of SIL by way of fraud, suppression of facts, willfull mis-statement. The facts leading to and the circumstances of recovery initiated in the present case are, thus, totally different from the one incident in the case of R.C. Tobbacco. Even if the expression, 'erroneous refund' is not applicable to the refunds incident in the present case, it is certainly a case of irregular availment of duty exemption by way of fraud, suppression of facts, wilful mis-statement and Contravention of the provisions of CEA, 1944 and the Rules made thereunder. In other words, SIL were not eligible to avail of the benefit under the subject notification. This attracts the provisions of Section 11A(1). Naming such irregular availment as 'erroneous refund' does not vitiate the proceedings initiated under the SCN.

3.4 In support of the above submission, the following excerpt from the Larger Bench decision of the Hon'ble Tribunal in the case of Agauta Sugar [2010 019 STR 849] is cited and relied upon.

"16. As regards issue of the demand notice, the Hon'ble Supreme Court has also time and again held that citing a wrong provision of law in the demand notice will not vitiate a demand. For example, in the case of *J.K. Steel Ltd. v. Union of India* [1978 (2) E.L.T. J355 (S.C.) = (1969) 2 SCR 418 = (AIR 1970 SC 1173)] it was held as follows :-

"If the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been exercised under different power does not vitiate the exercise of the power in question. This is a well settled proposition of law. In this connection, reference may usefully be made to the decisions of this court in *B. Balakotaiah v. Union of India*, (1958) SCR 1052 = (AIR 1958 SC 232); and *Afzal Ullah v. State of U.P.*, (1964) 4 SCR 1991 = (AIR 1964 SC 264)."

The same principle was reiterated in the case of *N.B. Sanjana, ACCE, Bombay v. The Elphinstone Spinning and Weaving Mills Co. Ltd.* - 1978 (2) E.L.T. (J 399) (S.C.). Several High Courts and the Tribunal have followed this principle without exception and in the case of *CCE, Calcutta v. Pradyumna Steel Ltd.* - [1996 \(82\) E.L.T. 441](#) (S.C.) it has been reiterated,

"It is settled that mere mention of a wrong provision of law when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power".

This decision was rendered while overruling the Tribunal's order which had held that since the provision mentioned in the show-cause notice was inapplicable, the show-cause notice was invalid."

The abovementioned decision of the LB has relied on two landmark decisions of the Hon'ble SC. Hence, mention of "erroneous refund" in the SCN does not make the SCN invalid.

3.5 No defence was offered with reference to the allegations and findings on 'fraud'. As observed by the Hon'ble SC in the case of Commissioner of Customs vs. Essar Oil Ltd. [2004 ELT 172 433 (SC) viz. paras 29 to 44], "Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence." In the instant case, SIL's act of obtaining the Certificate as prescribed u/n 39/2001 by way of fraud, suppression of facts, and wilful mis-statement has clearly vitiated their availing of the refund by self-credit. Accordingly, its recovery, invoking the proviso to section 11A (1) is not only justified but also legal and proper.

3.6 Payment of duty initially and claiming of the same as refund, as prescribed under the notification is nothing but availment of full duty exemption under the relevant notification. If taking of refund is found to be illegal on account of non-fulfilment of basic condition specified in the notification and is tainted by fraud, suppression of facts, and willful mis-statement, then it amounts to illegal availment of exemption resulting in non-payment of duty, attracting the provision of the proviso to section 11A(1). Accordingly, invoking of section 11A (1) and section 11AC in the present case is justified, legal and proper.

3.7 He further submits that, this is a case where the appellant had availed of the benefit of exemption Notification no. 39/2001 without fulfilling the basic condition of non-commencement of civil construction before 31/7/2001. But while obtaining the Certificate required under the notification they made false declarations and availed of the exemption by paying duty upfront and claiming self-credit of duty so paid as refund the appellant was found to have indulged in irregular availment of duty exemption by way of fraud, suppression of facts, wilful mis-statement and contravention of the provisions of CEA, 1944 and the Rules made thereunder. The refund obtained by the appellant was erroneous as fraud vitiates everything and the facts and circumstances incident in the case of R.C. Tobbacco are different from that of the present case. In any case, whether the expression 'erroneous refund' is appropriate or not, the proper officer is vested with the power to recover such amount taken as self-credit by the appellant and invoking of the proviso to section 11A (1)

is fully justified. The mention of "erroneous refund" in the SCN does not make it invalid. The SCN is perfectly valid and the OIO is just, legal and proper. It is, therefore, submitted that the Appeal filed in this case by SIL is devoid of merit.

4. We have heard both the sides, perused the records and considered the oral and written submissions made by both the sides, we find that as per the categorical statement made by Learned Senior Advocate, Shri V. Sridharan that the appellant is not contesting the demand which was admittedly paid by them before issuance of Show Cause Notice. The appellant through their advocate vide letter dated 24.10.2019 also submitted that appeal is contested only for setting aside the penalty and interest and that they are not seeking refund of amount already surrendered even if the appellant succeeds in appeal. It was also stated that affidavit to such an effect that no refund will be claimed back of amount already paid even if the appellant succeed was given in another proceeding in appeal No. E/464/2009, E/844/2010 and E/1196/2012 and they prayed for setting aside the penalty and interest on the company and penalty imposed on the Managing Director. The appeal was again relisted for a clarification as the affidavit mentioning in their letter dated 24.10.2019 was not available on record. The matter was heard again only on the limited point of affidavit. Learned counsel Shri Anand Nainawati submitted a copy of the affidavit as a disclaimer of refund of the amount already deposited by the appellant which was taken on record.

4.1 The appellant made various submission on merit as well as on time bar in support of their claim that since the demand is not sustainable the penalty imposed under Section 11AC and demand of interest under Section 11AB will also not sustain. Therefore, first we are taking up the matter on the ground of limitation. We find that the Show Cause Notice for recovery of the refund for the period November 2003 to March 2007 was issued on 14.11.2007 therefore, extended period was invoked. It is the appellant's submission that, the demand itself is not sustainable on the ground of the time bar as there was no suppression of fact, misdeclaration etc. We find that in order to avail the exemption under Notification 39/2001-CE the appellants were issued eligibility certificates by the Committee only after thorough investigation to the facts. On observation of the chronological events leading to the issue of eligibility

certificate it is found that it is not only on the satisfaction of the Committee of the records but thorough verification was done by Jurisdictional Excise Officer of Commissionerate and after proper application of mind, the Certificate was issued. The appellant filed application dated 31.07.2001 to the Committee comprising of Chief Commissioner Central Excise and Principal Secretary, Industries and Mines Department, Government of Gujarat for issuance of eligibility certificate in respect of their Clinker Unit under Notification No. 39/2001-CE however the said application was rejected on the ground that the clinker unit is not the new unit within the definition under Notification No. 39/2001-CE. Subsequently, they made a request vide their letter dated 03.02.2003 requesting to issue requisite certificates to their grinding unit and thereafter the appellant submitted various documents from time to time on the queries made by the Department. The documents submitted by the appellant were forwarded by Additional Commissioner (CCO) along with application dated 03.02.2003 to the Commissioner of Central Excise Rajkot, vide letter dated 03.04.2003 for comments and views. The Ld. Commissioner of Central Excise Sh. D.D. Rishi in his letter stated that the construction work and procurement of plant and machinery was done in year 1995 itself and therefore, the exemption under Notification No. 39/2001-CE cannot be granted to Grinding Unit as the same is not a new industrial unit within the meaning of the Notification. The original application of the appellant was returned along with the enclosures. Thereafter The Assistant Commissioner (CCO) vide letter dated 28.05.2003 requested Learned Commissioner of Central Excise, Rajkot to furnish his factual comments on the documents submitted by the Appellants vide letter dated 03.02.2003 and 28.03.2003. The application was once again along with enclosures was forwarded to Learned Commissioner of Central Excise. The Additional Commissioner (CCO) vide letter dated 09.06.2003 requested the Commissioner of Central Excise to send his factual comments, the Commissioner vide his letter dated June 2003 submitted to the Chief Commissioner about his factual comments on the documents submitted by the appellants as well as comments sought vide letter dated 09.06.2003.

4.2 It was also stated that construction work started in 1995 and plant and machineries were purchased in 1995 itself, therefore, the Grinding Unit is not a new industrial unit. According to the Commissioner, Grinding Unit was set up after 31.07.2001 is of no relevance as it is mere

addition to the old unit and cannot be termed as new unit. The facts were communicated to the issuing authorities much before the date and certificate was issued. After so much deliberation and recording the facts even the contention of the department that in Grinding Unit some work was started before 31.07.2001, considering all these facts the Committee consisting of Chief Commissioner of Central Excise and Principal Secretary of State Government issued the Certificate. Subsequently, the Principal Secretary crossed the certificate and communicated to the Commissioner of Central Excise vide letter dated 16.03.2004 the reasons for not signing the certificate. The Principal Secretary vide letter dated 02.04.2004 informed that whole cement project was conceived by the appellant as back as in 1994. The Principal Secretary also raised doubt as to whether the machineries purchased prior to 31.07.2001 can be considered as eligible machineries for the purpose of excise exemption for grinding unit. In reply to the said letter dated 31.03.2004, the Additional Commissioner, vide letter dated 20.05.2004 intimated that the Chief Commissioner (CCO) proposed to issue of inclusion that the machineries prior to 31.07.2001 may be referred to Government of India. Pursuant to the above letter dated 20.05.2004, the Principal Secretary agreed to sign the certificate. On 22.06.2004 the appellant received a certificate dated 21.06.2004 issued in terms of para 3(ii) and (3(iv)) of the Notification No. 39/01-CE for both clinker unit and grinding unit. On the strength of the aforesaid certificate the appellant were allowed refund in terms of Notification No-39/01-CE for the period 2003-2004 to 2007-2008. Subsequently after carrying out search and investigation by the DGCEI Officers from the 24.01.2006 onwards the investigation came to the conclusion that appellant have wrongly availed Exemption Notification No. 39/01-CE as condition of the Notification were not fulfilled. As per the above chronological events, it is clear that from the date of application i.e. 03.02.2003 till the issuance of the certificate dated 22.06.2004 during almost more than one year thorough investigation, verification and due deliberation was made and only thereafter, the certificate was issued. Therefore, we find that all the facts regarding claim of the Notification was available with the department. During a long period of more than one year and after going through the entire facts and documents the certificate was issued, therefore, we do not find anything which was newly unearthed by the DGCEI Officer in their investigation. In our view it is only on the interpretation of the

terms and conditions of the Notification No. 39/01-CE subsequently the certificates were cancelled, therefore, we do not find any suppression of facts or mis-declaration on the part of the appellant in claiming the Exemption Notification No. 39/01-CE. The entire investigation of the DGCEI was boiled down to only on one point that the appellant have mis-declared the commencement of the work i.e. after 31.07.2001, however in the entire verification as discussed above there was recorded fact before the Chief Commissioner as well as principle Secretary of State that some construction was started before 31.07.2001 and some of the plant and machineries were also received prior to that date, therefore, there is no substantial new facts was brought on record in the investigation of the DGCEI Officer. In this position, there is absolutely no suppression of facts or mis-declaration on the part of the appellant hence the extended period was illegally invoked for issuance of the SCN. Since, the demand is not sustainable on the ground of the time bar itself, there is no question of imposition of penalty under Section 11AC and the demand of interest under Section 11AB of the Central Excise Act, 1944.

4.3 Without prejudice to our above finding, we also intend to deal with the issue raised by the appellant that whether the cancellation of certificate by the Chief Commissioner is legal and correct. In this regard the appellant vehemently argued and made a written submission citing various judgments that a cancellation of certificate is arbitrary without following the law hence on that basis the refund availed by the appellant cannot be denied. We find that there is no dispute in the fact that even though some discrepancies were pointed out by the investigating agency but the certificate was issued after thorough verification and considering various documents by the Committee of Chief Commissioner of Central Excise and Principal Secretary of Government of Gujarat. It is the said committee who is empowered to issue the certificate. However the certificate was cancelled by the Chief Commissioner. The two certificates were issued in the terms of para 3(II) and 3(IV) dated 22.06.2004 after proper deliberation and verification and after obtaining full report from the Jurisdictional Commissioner Office. Thus, the appellant cleared the goods under valid certificate. The decision of the Committee is final and binding and same cannot be questioned. This has been ruled in the case of Dhar Cement Ltd. 2005 (191) ELT 347 (T). In the said judgment the issue was more or less same as the exemption was availed on the ground that capacity of the plant is more than 198000 Tonnes per

annum. The capacity was required to be certified by the Director of Industries who in the fact certified that the capacity is more than 198000 Tonnes. Subsequently there was dispute about the capacity. The Tribunal held that once the competent authority has certified the capacity, the same has to be accepted and accordingly granted the benefit of Notification. Similarly in the present case, the Committee after due verification has issued the eligibility certificate thereafter the Commissioner of Central Excise-Rajkot has no jurisdiction to deny the exemption. When the appellant were holding eligibility certificate issued by the Committee under the statute as provided under Notification proceedings to deny the exemption is not legal and correct. In the case of East India Commercial Co. Ltd. (supra), Hon'ble Supreme Court has dealt with the situation where the person had obtained a licence on misrepresentation of the fact before licensing authority. In that case license was issued for import of certain electrical instrument based on representation made by the importer. On the basis of said license importer made the imports. Subsequently the goods imported, it was noted that the importer had imported the goods on the basis of license which was obtained from the licensing authority on the basis of misrepresentation of the facts. The Hon'ble Supreme Court considering the fact held that in the matter that there is no legal basis for the contention that the license obtained by misrepresentation makes the license non est. In the present case also when the eligibility certificate was issued by the competent committee, the certificate was valid and the same cannot be non est. Somewhat the identical issue was dealt by the Hon'ble Supreme Court in the case of Vadilal Chemicals Ltd. (Supra) as per the fact of the said case, the assessee was eligible for tax scheme. For this purpose state level committee was constituted who supposed to decide the eligible investment and sanctioning of incentives. The assessee was issued such certificate and benefit was being claimed by the assessee. Subsequently, the exemption was sought to be denied by the sales tax department. The Hon'ble Apex Court precisely held as under:-

"The Department of Industries & Commerce having exercised its mind, and having granted the final eligibility certificate (which was valid at all material times), the Commercial Taxes Department could not go beyond the same. More so when the Commissioner, Sales Tax had accepted the Eligibility Certificate issued

to the appellant and had separately notified the appellants eligibility for exemption under the 1993 G.O. In these circumstances the DCCT certainly could not assume that the exemption was wrongly granted nor did he have the jurisdiction under [Section 20 of the State Act to go behind the eligibility certificate and embark upon a fresh enquiry with regard to the appellant's eligibility for the grant of the benefits.](#)

In view of above settled position of law, the eligibility certificate issued by the Committee cannot be held non est and therefore, consequently benefit of Notification 39/2001_CE extended to the appellant cannot be denied. It is also observed that the only committee consist of Chief Commissioner of Central Excise and Principal Secretary of Government of Gujarat is empowered to issue the eligibility certificate under Notification No. 39/2001-CE. As per the facts of the present case the eligibility certificate was validly issued by the said competent committee thereafter if at all there is any need to cancel the certificate, the review process needs to be carried out. No such review was done. It is also observed that though the eligibility certificate was issued by the Committee of Chief Commissioner and Principal Secretary of Government of Gujarat but the very same certificate was cancelled by the Commissioner of Central Excise. If at all the eligibility certificates need to be cancelled the same can be cancelled only after due observance of principles of natural justice by the same Committee or after review of the issuance of certificate. No such exercise was carried out and the certificate was cancelled in a very casual manner by the authority who is not empowered either to issue a certificate or to cancel the same. Therefore, cancellation of certificate is not valid in law. It is also observed that Notification No. 39/2001-CE does not provide for cancellation of certificate once issued. Therefore, there was no mechanism for revocation of the certificate once it is validly issued. In this regard, the appellant has relied upon the judgment in the case of Madras Rubber Factory (supra), Hanil Era Textiles Ltd. (supra) and Arvind Cotspin (supra) in all these judgments it is settled proposition of law the power of review has to be specifically conferred on the authority without such authority, authority cannot presume that they have power to review therefore, the cancellation of certificate is not legal and proper in the facts of the present case.

4.4 Without prejudice to the above, we are of the view that even if revocation of certificate is required the same can be effective prospectively as the issuance of eligibility certificate is valid, therefore, the revocation cannot be effective retrospectively as held by the Hon'ble Supreme Court in the case of Kazi Lhendup Dorji (supra).

4.5 With our above observation, we are of the view that since the cancellation of certificate is not with the authority of law on that basis demand was not sustainable.

4.6 As per our above discussion, we are of the view that since the recovery of refund is not sustainable on both the above findings, the consequence of imposition of penalty and demand of interest will also not follow. Accordingly, though we hold that the demand of refund confirmed by the adjudicating authority is upheld on the concession made by Ld. Senior Counsel, the penalty imposed under Section 11AC and interest demanded under Section 11AB are set aside. The appeal of the company is partly allowed in above terms.

5. As regards appeal by Sh. Ravi Sanghi, Director of Appellant Company, as we found above that there is no malafide on the part of the appellant company in taking the benefit of Exemption Notification, the director for the same reasoning cannot be penalized. Hence the penalty imposed upon him under Rule 26 of Central Excise Rules, 2002 is set aside and appeal of Director is allowed.

(Pronounced in the open court on 20.11.2019)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)