

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad**

REGIONAL BENCH-COURT NO. 3

Excise Appeal No. 10008 of 2014 - DB

(Arising out of OIO-VAD-EXCUS-001-COM-06-07-13-14 dated 18/09/2013 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

C.C.E. & S.T.-Vadodara-I

.....Appellant

1st Floor...Central Excise Building,
Race Course Circle,
Vadodara, Gujarat- 390007

VERSUS

Vulcan Industrial Engineering Co Ltd

.....Respondent

Unit-iii, Survey No. 1091, Sunav-kasor Road,
At & Post- Piplav, Tal.-sojitra,
Anand, Gujarat

With

Excise Appeal No. 14138 of 2013 - DB

(Arising out of OIO-VAD-EXCUS-001-COM-06-07-13-14 dated 18/09/2013 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

Sanjay Jayantilal Gandhi

.....Appellant

Director (commercial) Vulcan Industrial Engineering Co. Ltd.,
Unit-iii, Survey No. 1091, Sunav-kasor Road,
Post-piplav, Taluka-sojitra,
Anand, Gujarat

VERSUS

C.C.E. & S.T.-Vadodara-i

.....Respondent

1st Floor...Central Excise Building,
Race Course Circle,
Vadodara, Gujarat- 390007

APPEARANCE:

Shri S Bissa & Shri Amal Dave, Advocate for the Appellant - Assessee
Shri Rajesh Nathan, Assistant Commissioner (AR) for the Respondent - Revenue

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

Final Order No. 12698-12699/2023

DATE OF HEARING: 05.07.2023
DATE OF DECISION: 04.12.2023

RAMESH NAIR

These appeals are filed against the Order-In-Original No. VAD-EXCUS-001-COM-06-07-13-14 dated 18.09.2013 passed by the Commissioner of Central Excise & Service tax, Vadodara by the Appellants and also by Revenue.

1.1 The brief fact of the case is that intelligence gathered by the officers of DGCEI that M/s. Vulcan Industrial Engineering Co. Ltd. (Appellant)

engaged in manufacture of Transmission Spares, Shovel spares/ drill accessories falling under Chapter sub-heading 84839000 and 84314100 respectively of the first schedule to CETA, 1985. They were also involved in the manufacture of excisable goods 'Drill Rods/Pipes' falling under chapter sub-heading 73042200 of CETA, but were not paying the Central Excise duties leviable on the said product. Accordingly investigation was initiated against the Appellants. It appeared from the evidences collected during the investigation that Drill rods and Drill Pipes are the term used interchangeably for the same commodity in the common parlance of trade; that 'Drill Rods/Drill Pipes' are used for the purpose of drilling by way of fitting it to the various Drilling machineries and drill bits. The said product known to the market having specific character and technical use; the products had specific demand in the market. The products were manufactured by a series of processes performed on the various raw material viz. Round Bars and Seamless Steel Tube/ Pipes. The process performed by the Appellant to make 'Drill Rods/Drill Pipes' were incidental and ancillary to completion of a manufactured product having distinct name, character and use and hence appeared as amounting to 'manufacture' within the ambit of definition as provided under Section 2(f) of the Central Excise Act, 1944. The Products 'Drill Pipes' were the goods specified at chapter sub-heading 730422, 730423, 730424 and 730429, of First Schedule to the CETA, depending upon the materials used for their manufacture, hence they appeared to be 'excisable goods' as defined under Section 2(d) of the Act. The Appellant although engaged in manufacture and clearance of 'Drill Rods / Drill Pipes' but not applied for central excise registration for manufacture of said products; that they had not maintained the 'daily stock account' for the said product. Revenue seized the disputed goods under panchanam dated 16.04.2011 which were manufactured by the Appellant with intention to clear them without payment of Central Excise Duty. Accordingly, SCN dated 07.10.2011 was issued proposing confiscation of goods seized under Panchanama dated 16.04.2011. On completion of the investigation, another SCN dated 01.11.2011 was separately issued to the Appellants proposing classifying the Drill Pipes/ Drill Rods manufactured and cleared by them as 'excisable goods' under tariff entry 73042390 and demanding central excise duty amounting to Rs. 3,46,59,960/- alongwith interest and penalty. In adjudication, Learned Commissioner vide impugned Order dropped the demand of Rs. 2,82,95,429/- on limitation and confirmed the demand of central excise duty of Rs. 63,64,531/- alongwith interest and penalty.

Further demand of central excise duty of Rs. 9,89,159/- for the subsequent period covered in the SCN dtd. 07.10.2011 and 1.11.2011 is also confirmed with penalties. He also orders for confiscation of the goods. Personal penalties were also imposed on Shri Sanjay Jayantilal Gandhi under Rule 26 of the Central Excise Rules. Hence, the present appeals.

2. Shri S. Bissa with Shri Amal Dave Learned Advocates Appearing on behalf of the Appellants submits that the controversy raised by the revenue in this case is an action without jurisdiction because it is a settled legal position that cutting, boring, beveling, threading and such other processes undertakes on seamless pipes of steel does not constitute 'manufacture' and no excisable goods were manufactured as a result of such operation on seamless pipes. He placed reliance on the decision in the case of Collector, Pune Vs. Vulcan Leval Ltd., Pune 1985(22)ELT 123.

2.1. He also submits that Learned Commissioner has held that drill rods/pipes were a distinct product known in the market having specific character and technical use, but mere marketability or saleability of product is not enough for fastening Central Excise Duty liability inasmuch as the process undertaken must first amount to manufacture and only then central excise duty could be recovered by the revenue. He placed reliance on the following decisions:

- Collector Vs. Technoweld Industries 2003(155)ELT 209
- (ii) Indian Aluminium Company Ltd. – 1995(77)ELT 268 (SC)

2.2 He further submits that the fact that Range, Divisional and audit officers have accepted for a long time that the processes undertaken by the appellant company had not been manufacturing excisable goods in the nature of drill pipes/rods/tube is established on record of this case, and therefore the order of the Commissioner taking a different view in the present matter is wholly illegal and without jurisdiction. The Commissioner's order holding that the appellant company had manufactured drill pipes/rods/tube and that the process undertaken by the appellant company on seamless pipes/tubes of steel amount to manufacture is therefore ex-facie illegal and liable to be set aside.

2.3. He also submits that finding recorded by the Learned Commissioner in impugned order shows that the process resulting in Connectors are mixed up with the activities undertaken by the appellant on seamless pipes/ tubes. The process undertaken on round bars result in manufacture of Connectors and therefore there was no dispute about process undertaken by the appellant company for manufacturing Connectors ; but the only dispute was about cutting, boring, beveling, threading operations undertaken by the appellant company on other materials, namely seamless pipes/tubes. There is no dispute on the fact that the only operations undertaken by appellant company on seamless pipes/ tubes were cutting, boring, beveling, threading and that such operations were carried out at both ends of seamless pipes so that connectors could be fitted at both ends. The above process did not result in manufacture of new identifiable product having a distinct name, character and use. The only operation undertaken by the appellant company on seamless pipes/ tube of steel are cutting, boring, beveling and threading, and these operations are undertaken so that two pipes/ tubes could be joined by connectors. But activity of joining two pipes/ tubes by connector, or supply pipe/ tube with connectors so that the pipes/tubes could be easily joined, would not constitute 'manufacture' by any stretch of imagination.

2.4. He also argued that the Order of the Commissioner is against the the evidence brought on record by the appellant company, and this order is also discriminatory in nature inasmuch the fact that other similarly situated persons have not been subjected to any rigors of Central Excise levy. There is no manufacture undertaken by the appellant and operations undertaken by the appellant company on seamless pipes/ tubes of steel did not constitute 'manufacture' and consequently liability of excise duty, interest and penalty are wholly illegal and liable to be set aside.

2.5. He further submits that there is a further grave error committed by the Commissioner in classifying the product in question under CETH 73042390 because this classification is apparently for casing and tubing, and not for pipes/tubes. The Commissioner has held that drill rods/pipes are excisable goods falling under specific classification of Tariff heading 73042390 which covers other drill pipes of materials other than Iron and Steel, but there is a clear error in this regard inasmuch as sub-heading 73042390 covers casing and tubing, and not drill pipes. The confirmation of demand under a tariff classification not having different products like casing

and tubing is also a clear error of jurisdiction, and the impugned order fastening liabilities on the appellant company under an apparently inapplicable classification is incorrect and without jurisdiction.

2.6. He also submits that the Commissioner has committed a further grave error in holding that seamless pipes received by the appellant company were converted into drill pipes and that these were two different products though Note No.1 (p) of Chapter 72 of the Tariff makes it very clear that any hollow drill bars and rods suitable for drills were to be classified in Heading No. 7304 and therefore the goods procured by the appellant company were drill pipes which remained pipes even after cutting/threading operations. In adjudication, the appellant has referred to this statutory note and also to purchase orders issued by the customer thereby establishing that it was an established trade practice of supplying drill rods by manufacturers of accessories after undertaking the above types of operations on seamless pipes/ tubes and no one was discharging any excise duty on such operations; and it was thus established by the appellant that the pipes/ rods/tubes supplied by them with connectors were not in the nature of a different product.

2.7. He also submits that the demand of Rs. 9,89,159/- confirmed for Spindle Subs/Bit Subs/Connectors allegedly cleared in clandestine manner is also wholly illegal and totally unjustified action inasmuch as the goods for which this demand of duty is confirmed were duly accounted for in statutory records of the appellant company and appropriate excise duty paid on these goods while their clearance from the factory, and such clearances were also recorded in ER-1 Returns of the Appellant company. In adjudication, the appellant company has submitted all relevant documentary evidence of accounting for the above goods on which demand of Rs. 9,89,159/- was raised, but the Commissioner has turned a blind eyes to the documents submitted by the appellant company for these goods. There being no justification in the case of clandestine removal of these goods, duty demand of Rs. 9,89,159/- is wholly illegal and unsubstantiated.

2.8. He also submits that the seizure of the goods valued of Rs.15,26,500/- and the impugned order now passed for confiscation of these goods are unjustified and invalid in the facts of the present case. There being a genuinely bonafide impression on part of the appellant that the materials in

question were not excisable goods and this impression having been based on the decisions of Tribunal in case of Vulcan Level Ltd. (Supra), the goods seized at the appellant's factory were not in the nature of any offending goods. When these goods were very much lying in the factory, they were not liable for any seizure or confiscation in view of the settled legal position that goods lying in a manufacturer's factory were not offending and hence not liable for seizure. In the facts of this case, penalty of Rs. 3,00,000/- in lieu of confiscation of these goods is also unreasonable, harsh and disproportionate to the lapse, if any, on parts of the appellants. The order about confiscation of the goods and fixation of substantial amount of Rs, 3,00,000/- in lieu of confiscation are therefore liable to be set aside. He placed reliance on the following judgments:

- Commissioner Vs. Moon Beverages – 1999(33)RLT 153(CEGAT)
- M/s 3-F-Intenrational -1997(93)ELT 509(Tri.)
- M/s Kanthal India Ltd. – 1999(31)RLT 547 (Tri.)
- M/s Kartar Steels Pvt. Ltd. – 1997(93)ELT 443 (Tri.)

2.9. He further submits that the imposition of penalty on the appellant company as well as its director is also illegal and without any jurisdiction because there has not been any reason whatsoever for which even a taoken penalty could have been imposed on the appellants herein. While holding that there was no suppression of facts on part of the appellant company, the Commissioner has referred to various documents like audit reports, orders granting rebate, declarations in Annexure -24, verification reports of Range and Division Assistant Commissioner and also to the bonafide belief held by the appellants that the goods were not excisable. Shri Sanjay Jayantibhai Gandhi was working as a Director and had not dealt with any excisable goods in his capacity as a Director of the said Company. Under these circumstance Rule 26 of Central Excise Rule, 2002 does not attract against him. Hence penalty imposed on him under Rule 26 of the Rules deserve to be set aside in the interest of justice.

2.10. As regard the revenue appeal, he submits that the appeal is unsustainable and liable to be dismissed. The respondent was under the bonafide impression that the activity of threading, cutting, beveling done on the seamless steel pipes was not manufacture in view of the decision of Vulcan Leval Ltd. (Supra). Therefore, the extended period of limitation was rightly held to be not invocable by the Commissioner in the Order dated

18.09.2013. Various audits were conducted by department during the relevant time and no objection of any nature was raised by the audit officers during the relevant time. It is also a fact on record that the appellant is manufacturing 'connectors' and also clearing the same connectors welded with seamless pipes which are the only activities undertaken by the appellant. Therefore, it is inconceivable to even assume that the department was not aware of the activities undertaken by the respondent. It is a settled law that where several audits have been conducted by the department and no objection is raised at any point of time, the revenue cannot issue show cause notice invoking extended period of limitation. He placed reliance on following decision:

- Vedanta Ltd. Vs. Commissioner of Central Excise Triunelveli - 2019(28)GSTL 258 (Tri. Chennai)
- Pr. Commr. Of C.Ex. Kolkata-IV Vs. Himadri Speciality Chemical Ltd. - 2022(66)GSTL 264 (Cal)
- Super Shiv Shakti Chemical Pvt. Ltd. Vs. Commission of C.Ex. Udaipur -2019(369)ELT 1279 (Tri. Del)

2.11. He also submits that revenue has not disputed certain facts which were recorded by the adjudicating authority in the order dated 18.09.2013 which clearly shows that there was no suppression of facts on the part of the respondent with intention to evade the payment of duty.

2.12. He further submits that the adjudicating authority has rightly held that the respondent was also under bonafide belief that the process undertaken by the respondent on the seamless steel pipes were not amounting to manufacture. The Ld. Commissioner has rightly held that no malafide intention can be attributed to the respondent because there was hardly any value addition in the process which is carried out by the respondent on the seamless pipes and round bars which are the major raw material for making drill rods/ pipes. Seamless pipes and round bars are both duty paid inputs and raw materials. The Ld. Commissioner has rightly held that if had the department raised the objection earlier, the respondent would have paid duty on the finished goods and taken Cenvat credit on the central excise duty paid inputs and raw materials. Thus, the situation would be revenue neutral as the Cenvat Credit would have been admissible to the respondent itself. He placed reliance on the following judgments:

- CCE –Ahmedabad-II Vs. Quippo Energy Pvt. Ltd. – 2023(5)TMI 135 – CESTAT AHMEDABAD.
- M/s Nabros Pharma Pvt. Ltd. Vs. CCE & ST –Ahmedabad –III- 2022(9)TMI 272-CESTAT Ahmedabad.
- M/s. John Energy Ltd. Vs. CCE & ST – Ahmedabad-III 2018(11)TMI 1389 –CESTAT Ahmedabad.
- M/s Jay Yusin Ltd. – 2000(119)ELT 718 (T-LB)

3. Shri Rajesh Nathan, Learned Assistant Commissioner (AR) appearing on behalf of the Revenue, as regard the assessee's appeal are concerned reiterates the findings of the impugned order.

3.1. As regard the Revenue's appeal he submits that Learned Commissioner has erred in passing the impugned order to the extent of dropping demand of Rs. 2,82,95,429/- on limitation.

3.2. He further submits that reliance placed on various Audit reports conducted over period of time, is misplaced, in as much as, the audit carried out by the department was on a selective basis and on selected records only. However, this in no way would mean that department was aware of the activities carried out by the assessee. Learned Adjudicating authority also erred in holding that the demand is time barred on account of the fact that the manufacturing process and input/output ratio remained verified by the Jurisdictional departmental officers for claiming rebate under Rule 18 of the Central Excise Rules, 2002. However, from the records, it is evident to be a case of misstatement of facts by the assessee at the time of declaration itself, in as much as, the Annexure -24 filed by the assessee was to "seek permission to export material used in the processing and packing of finished goods"; that in Annexure-A appended thereto which describes the manufacturing process of Drill rods and specifically in para 3(c) thereof, the assessee has deliberately quoted that "M/s Vulcan are the manufactures of 'Connectors' on which central excise duty is being paid and they are welded with above mentioned "duty paid thread and champhered pipes." Thus, this declaration of the assessee gives an impression that the connectors were welded to duty –paid drill rods/pipes , even though no duty was being paid by the assessee on drill rods/ pipes. Thus, such declaration made by the assessee was for obtaining export permission to manufacture duty-paid goods and later not adhering to the same while actually manufacturing and

clearing the goods for sale. In other words, it was a case where under the garb of permission to export obtained by Assessee by making false statement to the effect of welding connectors with 'duty-paid threaded and champhered pipes". In other words, drill rods/pipes they were selling the dutiable/excisable products without payment of duty.

3.3. He also argued that Learned

Adjudicating authority has also erred in placing reliance on the ER-1 filed during material time, wherein the assessee had admittedly shown clearance and also exports details of 'showel spares/drill accessories (tail joint)'. However, it is clear from such findings of the adjudicating authority recorded in para 80 of the OIO that, nowhere in the ER-1 the assessee had mentioned anything regarding manufacture and clearance of 'Drill Rods/Pipes" which is the subject matter of dispute. The adjudicating authority has also erred in holding that the assessee were under bonafide belief on account of M/s Vulcan Lavals Ltd. decisions reported at 1985(22) ELT 123, that the processes carried out by them were not a process of 'manufacture' under Section 2(f) of the Act attracting levy of Central Excise Duty. The assessee is duty paying unit and have been paying central excise duty on "Connectors", and therefore being a Central Excise assessee for so long, they were very much aware that the Central Excise Tariff has undergone change in 1985, and also further amendments from time to time. Thus it cannot be held that the assessee were under bonafide belief on account of the decision in the case of M/s Vulcan Levals Ltd., Pune rendered in the context of earlier tariff classification. The adjudicating authority has also erred in holding that there is hardly any value addition in the process being carried out by them; and that the assessee could have taken CENVAT Credit on the raw materials, in which case, it would have been a revenue neutral situation. In order to record such findings by the adjudicating authority, efforts should have been made to identify the cost of manufacture, other over heads, and then to compare the same with transaction value at which these goods were sold to customers, and such efforts made should also reflect from/recorded in the discussions and findings. Moreover, admissibility of Cenvat Credit on raw materials is also a matter of verification as to the duty-paid nature of the raw materials, and other requirement as prescribed under the Cenvat Credit Rules, 2004. However, no such investigation/verification appears to have been made either during investigation, or during adjudication in order to arrive at such conclusion. Therefore, such finding recorded by the

adjudicating authority is erroneous, being recorded without the support of facts.

3.4. He also submits that the Learned Adjudicating authority has also erred in holding that since the seized goods were provisionally released and hence removed long back under bond/bank guarantee and not physically available, these goods cannot be confiscated. It is settled law that confiscation could be ordered and redemption fine is imposable even after release of goods on execution of bond; and that mere fact that the goods were released on the bond would not take away the power of the authorities to confiscate or levy redemption fine, if subsequent to release of goods the same were held illicit or that there was any other irregularity which would entitle the authorities to confiscate the said goods.

3.5. He further argued that the adjudicating authority has also erred in reducing the penalty under Rule 26 of the Central Excise Rules, 2002 imposed on Shri Sanjay Jayantilal Gndhi, Director (Commercial) of the unit, in as much as, in the earlier adjudication order passed vide OIO dated 31.01.2013, the adjudicating authority had imposed a personal penalty of Rs. 50 Lacs on Shir Sanjay J. Gandhi. However, in the present OIO the penalty imposed on him stands reduced to Rs. 5 Lacs without assigning any specific findings as to the reasons for such reduction.

4. We have heard both the sides and perused the appeal records and considered the submission of both the parties. The first point for decision is whether the appellant have undertaken processes amounting to manufacture, in respect of 'Drill Pipes/ Drill Rods as per Section 2(f) of the Central Excise Act, 1944 and leviable to central excise duty. We observed from the records that entire process of manufacturing of 'Drill Rods/ Drill Pipes from raw material stage to the finished goods stage has been very well described under Panchanam dated 15.04.2011. We find that the process of manufacturing of drill rods/ drill pipes from raw material stage to final product stage is that the Round Bars and Semaless pipe are their main raw materials. The Round Bar are used to manufacture connectors (Male and Female). The Round bar is cut into required size on the bandsaw machine before subjecting it to machining operations (on the lathe machine) that is, drilling to make solid round bars into hollow state, turning to make the outer diameter of appropriate size, threading and slotting. The product namely,

Connector, is thus manufactured. In Drill Pipe Section, Seamless pipes of different diameters which are another major raw material for Drill Rods were stored. In the said section, on Lathe Machines the seamless pipes are cut into required size and then boring and beveling operations to make the pipe suitable for further welding with connectors are carried out at both the ends of the said pipes so that the connectors (Male and Female) can be fitted at both ends of the seamless pipes and thereafter are welded together. The welding of the connector with the seamless is carried out manually. The seamless pipe so fitted and welded with the male and female connectors at the end is final product called the 'Drill Rods'. Then the painting was carried out by the workers on the said 'Drill Rods'.

4.1. We also find that the impugned order categorically recorded that the resultant goods have different characteristics, marketable under different names and classifiable under different Chapter Heading. Accordingly, it was concluded that the processes carried out on the raw materials are covered by the scope of Section 2(f) of Central Excise Act, 1944. We find that product drill rod is a complete product having a specific and distinct use. The two components of drill rods viz. connectors and steel pipes have no independent use or function other than being the part of the drill rod. They are also not separately known in the market for any given functions.

4.2. We have also seen the Tribunal Judgment in the case of *CCE, Pune v. Vulcan Leval Ltd.* [[1985 \(22\) E.L.T. 123](#) (Tribunal)] relied upon by the Ld. Counsel which is in favour of the assessee, wherein it was held that activities of cutting, welding etc. done on tubes or pipes to affixing connectors does not amount to manufacture. We find that it is hazardous to apply the ratio of any judgment pertaining to the old tariff when the entire system of nomenclature has undergone a sea change and when new Central Excise Tariff came into the force from 1985.

4.3. We also noticed that during investigation the revenue also recorded the statements of Shri Sanjay Gandhi, Director, Shri Pankaj Patel, Manager (Production), Shri Rajesh Mehta, General Manager (Engineering), Shri Bhavik Patel, Shri Batuk Dave, Shri Nitin Dinkarbai Shah (GM –Marketing) and revenue also conducted the enquiries related to the disputed products at the end of customers of 'Drill Rods/Drill Pipes supplied by Appellant. However the said statements nowhere disputed by the appellant in the

present matter. The result of the said investigation also clearly reveal that the raw material used for making 'Drill Pipes'/ drill rods' cannot be used as such in place of 'Drill Pipes/ Drill Rods. The process performed by appellant to make 'Drill Rods/ Drill Pipes are incidental and ancillary to completion of a manufactured product having distinct name, character and used and hence it amounts to manufacture within the ambit of definition as provided under Section 2(f) of the Central Excise Act, 1944. We also find the raw materials used for manufacture of 'Drill Pipes /Drill Rods are distinct product specified in the First Schedule to Central Excise Tariff Act, 1985.

4.4. As discussed above the process undertaken by the appellant satisfies the test 'manufacture' as above and consequently we conclude that the resultant products of the appellant are liable to payment of Excise duty.

4.5. As regard the demand of duty of Rs. 9,89,159/- confirmed by the Ld. Commissioner for Spindle Subs/Bits Subs/Connectors, we find that the same is confirmed on the ground that the said goods had been cleared by the appellant for home consumption on the commercial invoices were over and above of those mentioned in the ER-1 returns of the corresponding months and therefore no Central Excise duty has been paid on such goods. Whereas Appellant argued that goods for which this demand of duty is confirmed were duly accounted for in statutory records of the appellant company and appropriate duty was paid on these goods while their clearance from the factory, and such clearances were also recorded in ER-1 returns. Since the said facts cannot be verified at this stage, we are of the opinion that for verification of these facts viz. whether appellant has paid the appropriate duty or not on impugned goods, the case needs to be remanded back to the Adjudicating authority and the Ld. Adjudicating authority will examine the evidences which may be submitted by the appellant relating to payment of duty on disputed goods and thereafter will pass a fresh decision relating to the demand of duty of Rs. 9,89,159/-.

4.6. As regard the confiscation of goods we agree with finding of impugned order that when the goods have already been removed and are not available for confiscation, the goods cannot be confiscated.

4.7. Coming to the demand dropped by the Ld. Commissioner on limitation. We find that by relying the letters of Assistant Commissioner and declaration and application filed by the appellant for claiming rebate claim under Rule 18

of the Central Excise Rules, 2002 and ER-1 returns, learned Commissioner concluded that the manufacturing activity was within the knowledge of the department and, therefore, the extended period of limitation under the proviso to Section 11A(1) of the Central Excise Act could not have been invoked on the ground of suppression of facts. We find, in the present case, Learned Commissioner has not examined the documents and applications of the appellant properly. Revenue in this matter strongly argued that the appellant during the filing of their application and declaration mis-declared the facts related to the disputed goods. As per the revenue, appellant has obtained illegal benefits on the strength of solemn declaration. We also noticed that the purpose of this declaration is not to examine the classification or dutiability but to examine the rebate claim of the goods used in export goods. Further the Annexure -24 filed by the appellant was to seek permission to export material used in the processing and packing of finished goods. The mis-declaration of goods by the appellant itself clear from the finding of the Learned Commissioner in impugned order. In para 80 Ld. Commissioner lastly held that *"I have also seen the copies of ER-1 returns filed by them during the material time wherein they were showing showel spares/drill accessories(tail joint) clearance and also export details."* This fact clearly established that nowhere in ER-1 returns appellant had mentioned anything regarding manufacture and clearances of the disputed goods i.e 'Drill Rods/Pipes'. Further, on perusal of the statements recorded by the investigating officers we find that the appellant was having full knowledge as to what is to meant by 'manufacture' but still they mis-stated that the processes under taken by them do not amount to manufacture. Further intention to evade payment of duty on disputed goods is further established by the revenue that Appellant not maintaining any 'Daily Stock Accounts as prescribed under Rule 10 of the Central Excise Rules 2002.

4.8. We also note that the appellants have not taken registration or filed any returns related to the disputed goods. From the show cause notice, it is clear that the DGCEI started investigation only due to a receipt of information that Appellant are manufacturing disputed goods but they are not paying duty. Keeping in view these facts, we are of the considered view that this is a case of fraud, mis-statement and there was suppression of facts with intent of evade payment of duty and extended period of limitation under proviso to Section 11A is invokable and, therefore, the demand raised for the five years is correct. We also note that the Hon'ble Supreme Court in some what

similar situation in the case of *Mercantile Company v. CCE, Calcutta* reported in [2007 \(217\) E.L.T. 330](#) (S.C.), has observed as under :-

“9. On the question of limitation, it was held that the letter dated 8th March, 1994 relied upon by the appellant did not disclose the entire facts and did not reflect the situation in its proper perspective. The Department was not informed about the actual activity undertaken by the appellant. It was not disclosed as to whether a new name has been given and the applicability and functions of the products were not clearly stated. That new and distinctive product came into existence which was sold and known in the commercial world under a separate name having different and distinct qualities. Commissioner of Central Excise, Calcutta-1, confirmed the demand of duty Rs. 42,62,862/- proposed in the show cause notice and also levied a penalty of Rs. 10 lakhs on the appellant under Section 11AC and the interest under Section 11AB. A redemption fine of Rs. 20,000/- was also imposed.

13. On the point of limitation, it was submitted by him that the demand has been confirmed from 1st March, 1994 to 5th September, 1997 whereas the show cause notice was issued on 18th February, 1998, well beyond the period of limitation. It was admitted by him that no classification list was filed by the appellant. He has drawn our attention to a letter dated 8th March, 1994 written by the appellant to the Assistant Collector of Central Excise, Calcutta disclosing the activity undertaken by the appellant and requesting the Revenue to let the appellant know about the Central Excise formalities required to be observed. That the writing of the letter well in advance shows the bona fides of the appellant and that there was no suppression, misstatement, etc., on the part of the appellant with an intent to evade payment of duty and the authorities below erred in holding to the contrary.

14. As against this, learned Counsel for the Revenue, Shri M.M. Paikadey, supported the Commissioner's findings recorded in the order-in-original. It was submitted by him that the process undertaken by the appellant was not as simple as has been projected by him. That the items in question have been given specific names and the same were used for specific purpose for which the raw material cannot be used. The impugned goods were specially packed in the cardboard packages and are known differently in the commercial as well as common circles. That the appellant's products are cleansing products and deserved to be classified under Chapter 34 and the adjudicating authority has rightly classified them under Heading 3402.90.

15. As regards limitation, it was submitted on behalf of the Revenue that the letter dated 8th March, 1994 written by the appellant did not state the entire facts. The same was vague and lacking in particulars. In the letter, it was not disclosed by the appellant

that the products were being marketed as “cleanser” and gave the impression as if they are only re-packing the raw material into smaller packs. It was not disclosed that a new name has been given to the products. That the appellant did not disclose the applicability and functions of the products. The correspondence between T. Paul & Sons and M/s. Philips India Ltd. clearly indicates that there was a doubt as to whether the products would invite the Central Excise duty. To overcome this, they obtained the opinion of an Advocate and the Advocate advised them that instead of solvent, the word ‘thinner’ should be printed on the carton to avoid the Central Excise Rules.

30. On the question of limitation, the submission made by the counsel for the appellant that the letter dated 8th March, 1994 disclosed the entire facts to the authorities regarding the items manufactured by the appellant cannot be accepted. The letter dated 8th March, 1994 did not disclose the entire facts. The letter did not disclose the situation in its proper perspective. The authorities were not informed about the actual activity undertaken by the appellant. The authorities were also not informed that a new name has been given to the products. The applicability and functions of the new products was also not clearly stated. The new and distinct product which had come into existence was sold and known in the commercial world under a separate name having different and distinct qualities. The appellant had not produced sample of the subject goods along with the letter. For the aforesaid reasons, it cannot be held that the authorities had full knowledge about the activities undertaken by the appellant.

31. It appears that duty liability under the Central Excise Act & Rules was well known to the appellant as is evident from the correspondences made by Shri Arun Kanti Paul (who is the common partner of M/s. T. Paul & Sons and the appellant) on 23rd August, 1995 with M/s. Philips India Ltd. Shri Arun Kanti Paul, in his letter has stated that they could avoid Central Excise liability by printing ‘thinner’ instead of ‘solvent’, on the packs of bottles. M/s. Philips India Ltd., by its Letter No. HD/CE/ACCY, dated 6th September, 1995, endorsed the same and permitted M/s. Paul & Sons to print ‘thinner instead of ‘solvent’ on the outer pack. The direction of M/s. Philips India Ltd. was actually executed by the appellant by printing ‘thinner’ instead of ‘solvent’ on the cartons. Shri Arun Kanti Paul during examination, when asked to throw some light on the correspondence with M/s. Philips India Ltd. stated that he had some doubt about the excise liability of these products and accordingly he obtained legal opinion regarding the same and persuaded M/s. Philips India Ltd. to allow them to print ‘thinner’ against ‘solvent’ on the cartons. It clearly shows that the appellant although was conscious of the fact that the products manufactured by them could attract the Excise Duty, made a deliberate attempt to evade the same by printing ‘thinner’ instead of ‘solvent’ on the cartons.”

4.9. The appellants have also pleaded that they had a *bona fide* belief that their goods are not chargeable to duty. We fail to understand this plea. Evidences on record clearly indicate that they were aware that the goods are chargeable to duty and their process is amount to manufacture. Statement recorded during the investigation indicates that they were fully aware about their duty liability and manufacture of the disputed goods. We also note that in somewhat similar situation in the case of *Tamilnadu Petroproducts Ltd. v. CCE, Chennai* reported in [2004 \(176\) E.L.T. 116](#), the Tribunal has observed as under : -

“28. As regards the invocation of the proviso to Section 11A of the C.E. Act, 1944, I find that suppression of facts from the department is very clear from the evidence available on record as the appellants, to suit the requirement of their customers, and to derive the consequential benefit by them, cleared the goods under a different name, without bringing it to the notice of the department. The appellants have suppressed the fact is supported by evidence on record in the form a letter signed by Shri S. Karthikeyan of the appellants to Shri Ramamurthy/Mr. Venkatesh of their Excise department. Copy of the letter is filed in page 115 of the paper book which reads as under : -

“EXCISE CLASSIFICATION OF TRANSFORMER (TO) GRADE II

Madras Petroleum have placed order for 100 MT of Transformer oil Grade II. Copy of the same is enclosed for ready reference.

They want to know whether we can invoice the product as Transformer Oil Base Stock (TOBS) under Tariff Heading 27.10 attracting 10% Excise duty.

Presently Transformer oil Grade II comes under Tariff Heading 3817, attracting 20% Excise duty. If Reclassification of the product as Transformer Oil base Stock under Tariff Heading 2710 with 10% Excise Duty is not possible, they wanted to know whether we can supply to Grade II in the name of Spindle Oil (VG 22).

You may please note that our Spindle Oil has already been registered under Tariff 2710 with Excise duty @ 10%. Technically there is not much difference between our Transformer oil Grade II and Spindle Oil (VG 22). Kindly let us know the excise implication involved in this case. Please treat the matter VERY URGENT.”

Sd/-

(S.

Karthikeyan)

DM (Mktg.

Devt.)

Further, the message sent by Shri S. Ramamurthy, DM (Excise) TPL Site to Shri S. Karthikeyan, DM (Mktg., Devt.) TPL HQ a copy of which is filed on page 116 of the paper book is reproduced below : -

URGENT

Dated 16-11-1995

FAX = MESSAGE

S. RAMAMOORTHY, DM FROM : (EXCISE) TPL-SITE.

MR. S. KARTHIKEYAN, TO : DM (MKTG. DEVT.) TPL-H.O.

PLEASE REF. YOUR FAX MSG. DATED 15-11-1995. IN THIS REGARD WE HAVE ALREADY EXPLAINED OUR DIFFICULTY IN REGISTERING TOBS UNDER TARIFF 2710. THIS IS MAINLY DUE TO THE REASON THAT OUR MFG. PROCESS OF TOBS IS ENTIRELY DIFFERING FROM THE OTHER TOBS AVAILABLE IN THE MARKET.

HOWEVER, WE CAN GO AHEAD WITH THE PROPOSAL AS YOU HAVE SUGGESTED VIDE PARA 4, AS THERE IS NO MUCH DIFFERENCE BETWEEN TRANSFORMER OIL & SPINDLE OIL. ALSO, WE ARE ALREADY HOLDING THE REGN. CERT. FOR MFG. SPINDLE OIL. AND ALSO, PLEASE ARRANGE TO GET A REVISED P.O. MENTIONING THE PRODUCT NAME AS SPINDLE OIL FROM THE BUYER.

REGARDS.

Sd/-

(S.

RAMAMOORTHY)

Thus the Records clearly show that M/s. TPL have been clearing the goods under 38.17 and they were prompted by the need of the customers to change the nomenclature of the item as "Spindle Oil" and they did so clearly with a view to evade payment of duty. They have intentionally changed the nomenclature of the goods and the tariff heading thereto, is established by the above correspondence exchanged between the Senior Officers of the appellants Company. Therefore, mens rea on their part is established by evidence on record. In the background of the evidence as discussed above, the charge against the appellants that they have suppressed the fact from the department is brought home by evidence on record. Therefore, the proviso to Section 11A has been correctly invoked. So far as penalty under Section 11AC is concerned, I find that the Commissioner has taken into consideration the date of introduction of the provisions of Section 11AC and has proportionately imposed the mandatory penalty and it cannot be considered to be excessive warranting any reduction and I confirm the same in entirety. I also uphold the order of the lower authority in regard to demand of interest.

39. Ld. counsel now refers to the department's allegation that the appellants had suppressed material facts rendering themselves liable to penalty under

Section 11AC of the Central Excise Act. He submits that, as far back as on 8-2-1996, the appellants had filed a fresh classification list in respect of the subject products. Had the department had any doubt in the matter, they would have called for necessary clarification from the appellants and would have made further enquiries, if necessary, to verify the correctness of the classification claimed by them. The department did not take any such steps under Rule 173B of the Central Excise Rules, 1944. They cannot allege that any material fact was suppressed atleast from the date on which the classification list was filed. Section 11AC was enacted only on 28-9-1996. In the circumstances, any action under this provision of law was not warranted in the present case, submits the counsel. These submissions are also opposed. Ld. Jt. CDR submits that the classification list dated 8-2-1996 was purportedly a "revised classification" from which it would not appear to the department that it had been filed in respect of any new product. It is also submitted that the declaration in the classification list was vague as it contained no specific details of the products or of the process of manufacture thereof. I have considered and appreciated these submissions. Having agreed, on the merits of the case, with the findings recorded by learned Member (Technical), I have got to endorse his decision in regard to penalty as well."

9.8 The Hon'ble Supreme Court in the case of DCL Polyester Ltd. (supra), in paras 25 and 26, has observed as under : -

"25. Now coming to the question of limitation, it is urged on behalf of the assessee that show cause notice dated 1-9-1994 invoking the extended period of limitation under the proviso to Section 11A(1) was erroneous as the assessee had filed their classification list and price-list on 20-11-1991 [including the purchase orders of the buyers]; that no inspection, audit or investigation was carried out before approving the classification list and the price-list and, therefore, the department was not entitled to invoke the extended period of limitation.

26. We do not find any merit in these arguments. Firstly, no such arguments were advanced before the Tribunal. The only argument advanced before the Tribunal was on excisability and nil rate of duty vide notification dated 1-3-1992. Secondly, in the reply to the show cause notice, the assessee submitted that wastes had emerged at various stages. However, in the classification list, they have not spelt out the various stages at which the so called "wastes" had emerged. In the present case, the department had alleged mis-declaration of polyester chips as wastes. According to the assessee, chips, which spilled over

during bagging were unusable and, therefore, “waste”. However, no such details have been mentioned in the classification list particularly when it urged that “wastes” had emerged at different stages of production. In the circumstances, we are not inclined to interfere with the impugned judgment of the Tribunal.”

4.10. Now coming to the penalty imposed under Rule 26 of CER, 2002 on Shri Sanjay Jayantilal Gandhi, Director (Commercial), we find that revenue disputed that earlier adjudication order passed vide OIO dated 31.01.2013, the authority had imposed a personal penalty of Rs. 50 Lacs. However in the present OIO the penalty stands reduced to Rs. 5 Lacs. Appellant also disputed that penalty of Rs. 5 Lacs not imposable. We find that the penalty imposed by the Learned Commissioner in impugned order is proper. Penalties are very much on the lower side and are not incommensurate with the acts and omissions of person concerned. The finding given by the Learned Commissioner clearly held that Shri Sanjay Jayantilal Gandhi knows and had reason to believe that goods were liable to confiscation therefore he was liable for penalty under Rule 26. We noticed that he is concerned himself in removing, selling and dealing with the excisable goods which he knew or had reason to believe were excisable goods and were required to be cleared only after payment of duty. He is the key persons of the company who took all the decisions. Therefore, we hold the personal penalty of Rs. 5 Lacs is upheld.

5. In view of above discussion, both the appeals are disposed of in the above terms.

(Pronounced in the open court on 04.12.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

C L MAHAR
MEMBER (TECHNICAL)