

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70730 of 2018

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-1759-1761-17-18 dated 28/02/2018 passed by Commissioner (Appeals) Central Goods & Service Tax, Noida)

M/s TSM Plastics,
(D-20, Sector-7, Noida-201301)

.....Appellant-I

VERSUS

Commissioner of Central Excise &

Service Tax, Noida

....Respondent

(C-56/42, Sector-62, Noida)

WITH

Service Tax Appeal No.70732 of 2018

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-1759-1761-17-18 dated 28/02/2018 passed by Commissioner (Appeals) Central Goods & Service Tax, Noida)

Shri S.K. Sharma,
(Partner of M/s TSM Plastics,
D-20, Sector-7, Noida-201301)

.....Appellant-II

VERSUS

Commissioner of Central Excise &

Service Tax, Noida

....Respondent

(C-56/42, Sector-62, Noida)

AND

Service Tax Appeal No.70731 of 2018

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-1759-1761-17-18 dated 28/02/2018 passed by Commissioner (Appeals) Central Goods & Service Tax, Noida)

Shri Sanjeev Sharma,
(Partner of M/s TSM Plastics,
D-20, Sector-7, Noida-201301)

.....Appellant-III

VERSUS

Commissioner of Central Excise &

Service Tax, Noida

....Respondent

(C-56/42, Sector-62, Noida)

APPEARANCE:

Shri Rajesh Kumar Yadav, Advocate for the Appellants

Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NOS.70076-70078/2024

DATE OF HEARING : 19 October, 2023
DATE OF PRONOUNCEMENT : 15 February, 2024

SANJIV SRIVASTAVA:

These three appeals are directed against Order-in-Appeal No.NOI-EXCUS-001-APP-1759-1761-17-18 dated 28/02/2018 passed by Commissioner (Appeals) Central Goods & Service Tax, Noida. By the impugned order Commissioner (Appeals) has upheld the Order-in-Original No.07/AC/D-I/N-I/2016-17 dated 14.02.2017 wherein following has been held:-

ORDER

(i) *I hereby confirm the Central Excise duty amounting to Rs. 6,17,610/- (Rupees Six) Lakh Seventeen Thousand Six Hundred Ten only) inclusive of Education Cess & SHE Cess under Section 11A(4) read with Section 11A(10) of the Central Excise Act, 1944 for the period from April 2013 to November 2014. I order that the amount of Rs 5,00,000/- (Rupees Five Lakh only) deposited by the party during investigation shall stand appropriated against this duty liability.*

(ii) *I also order that the party shall pay Interest at the appropriate rate on the duty of Rs 6,17,610 (Rupees Six Lacs Seventeen Thousand Six Hundred Ten only) determined above under Section 11AA of Central Excise Act, 1944.*

(iii) *I impose a Penalty of Rs 6,17,610/- (Rupees Six Lakh Seventeen Thousand Six Hundred Ten only) on M/s TSM Plastics under Rule 25(1) of the Central Excise Rules, 2002 read with Section 11AC (c) of the Central Excise act, 1944 for contravention of the provisions of the Central Excise*

Act and the Rules made there-under as pointed out herein above.

(iv) I impose a Personal Penalty of Rs.1,00,000 (One Lakh only) on Shri SK Sharma. Partner of M/s TSM Plastics, D-20 Sector- 7, Noida under Rule 26 of the Central Excise. Rules, 2002 for contravention of the provisions of the Rules as pointed out herein above.

(v) I impose a Personal Penalty of Rs.1,50,000 (Rs. One Lakh Fifty Thousand Only) on Shri Sanjeev Sharma, Partner of M/s TSM Plastics, D-20, Sector-7, Noida under Rule 26 off the Central Excise Rules, 2002 for contravention of the provisions of the Rules as pointed out herein above.”

2.1 Appellant-I is engaged in the manufacture of Plastic caps & Other plastic articles falling under Chapter hearing No.39 of Central Excise Tariff Act, 1985. Appellant-II and Appellant-III are partner in the partnership firm functioning under the name of Appellant-I. Appellant-II was looking after all the business affairs of Appellant-I. Specific information was received that Appellant-I was engaged in manufacture of excisable goods without having Central Excise registration and clearing them without payment of duty, though turnover of the company was approximately Rs.3.00 crores in the financial year 2012-13 and approximately Rs.6 crores in the financial year 2013-14. Thus, they had crossed the exemption limit of Rs.1.5 crores in a financial year as stipulated in the Notification No.08/2003-CE dated 01.03.2003 as amended meant for small scale industries. Accordingly, investigations were initiated and search conducted in the factory premises of Appellant-I on 01st December, 2014 in the presence of Appellant-II. During the investigation it was observed that appellants procured the raw materials namely 1-1DPE & PP Plastic granules from different suppliers such as M/s Kailashpati Polyplast Pvt. Ltd. and M/s Yashu Plastics all from Noida. Some invoices and bills issued by M/s TSM were also seen and it was observed that they had cleared the excisable goods such as Plastic Bottles with or without caps to their different

customers. One of the major customers was M/s G.D. Foods Manufacturing India Pvt. Ltd., Delhi and Neemrana.

2.2 It was observed that appellants were maintaining their financial account in a computer system loaded with Tally (software). On examination it was revealed that besides accounts of Appellant-I, account of another company by the name of M/s L.S. Plastics were also being maintained in the same computer system. Appellant-III who is one of the partner in Appellant-I was proprietor of the said unit, which was engaged in the manufacture of similar goods and they were indulging in evasion of duty by resorting to claiming exemption under Notification No.08/2003-CE dated 01.03.2003.

2.3 Searches were also conducted in the premises of M/s L.S. Plastics in presence of two independent witnesses and Appellant-III on the same date. During the search it was found that M/s L.S. Plastics started the production in August, 2014 and were manufacturing plastic bottles and clearing the same to their customer **M/s G.D. Foods manufacturing India Pvt. Ltd., Delhi and Neemrana.**

2.4 As per the information available in the computer system loaded with Tally (software) year wise sales turnover in respect of these two units is as under:-

YEAR	M/s TSM	(Rs. In Crores)
		M/s L.S. Plastics
2010-11	0.62	0
2011-12	0.86	0
2012-13	4.54	0
2013-14	6.54	0
2014-15 (upto November 14)	3.43	0.90

2.5 From the above, it was observed that appellant-I has claimed the benefit of exemption under Notification No.08/2003-CE dated 01.03.2003 even after crossing the exemption limit as provided by the said notification. Accordingly, the goods found in the premises of the appellant-I and M/s L.S. Plastics were detained/ seized by the officers vide seizer memo dated 19.05.2015. A Show cause notice dated 25.05.2015 was issued

for confiscation of the seized goods and for imposition of penalty under Central Excise Rules, 2002.

2.6 After completion of investigation a show cause notice dated 30.03.2016 was issued to the appellants asking them to show cause as to why-

- (i) *Central Excise duty amounting to Rs 6,17,610/- (Rupees Six Lacs seventeen thousand six hundred ten only) inclusive of Education Cess & SHE Cess (ca detailed in Annexure-B) should not be demanded and recovered from them under Section 1A(4) of the Central Excise Act, 1944 for the period from April 2013 to November 2014;*
- (ii) *Interest at the appropriate rate should not be demanded and recovered from them on above demand of Central Excise Duty under Section 11AA of Central Excise Act, 1944;*
- (iii) *Penalty should not be imposed on them under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise act, 1944 for contravention of the provisions of the rules as pointed out herein above;*
- (iv) *Personal Penalty on Shri SK Sharma & Shri Sanjeev Sharma, Partners of M/s TSM Plastics, D-20 Sector 7. Noida should not be imposed under Rule 26 of the Central Excise Rules, 2002 for contravention of the provisions of the rules as pointed out herein above;*
- (v) *The amount of Rs 5,00,000/- (Rs Five Lakh only) deposited by them during investigation should not be appropriated against their aforesaid duty liabilities Pa revision of the monetary limits by the CBEC, the said Show Cause Notice dated 30-3-2016 was made answerable to the Assistant Commissioner Central Excise, Division-1, Noida-1"*

2.7 This show cause notice was adjudicated as per the Order-in-Original referred in para-1 above. Aggrieved appellants have filed appeals before Commissioner (Appeals) which has been dismissed.

2.8 Aggrieved appellants have filed these appeals.

3.1 We have heard Shri Rajesh Kumar Yadav Advocate for the appellant and Shri Manish Raj learned Authorised Representative appearing for the revenue.

3.2 Learned Counsel for the appellants submits that-

- Two firms namely appellant-I and M/s L.S. Plastics are independent manufacturing units having their independent existence at separate premises allotted by Noida Authority, separate Plant and Machinery and registration under Factory Act, Commercial Tax, Income Tax and assessed by all separately. Therefore entitlement of exemption under Notification No.08/2003-CE dated 01.03.2003 cannot be denied by clubbing the clearances of two units. The documents clearly established that these two are separate independent entities as a partnership firm and proprietary firm respectively having their own land duly allotted by Noida Authority, having their own plant and machinery through which regular production was being made independently and the units were duly recognized by different departments like Noida Authority, Factory Act, Commercial Tax Department, Banks and Income Tax Department where the two units were recognised and assessed. The bank account of the firms are also enclosed which clearly show that there are no transaction or financial interactions or facilitation between the units.
- There is no dispute that anyone of the above two unit is dummy or non-existent. Therefore, exemption of manufacturing unit cannot be denied and clubbed together on the ground that one of the partners being common.
- Reliance is placed on the decision in the case of Thermotech [2013 (293) ELT 712 (T)].
- It is alleged that appellant-II was caring out entire purchase of raw materials, consumables, machinery, stationery etc. including valuation and sale of manufactured goods and accounting for both the units and the entire office work of both the units was executed from the premises of appellant-I.

- As construction was going on in the premises of M/s LS Plastics, their part time accountant namely Shri Binod Kumar Bharti took CPU of M/s LS Plastics into the premises of appellant-I where he maintained the records.
- Shri Binod Kumar Bharti was part time accountant for both the units and providing part time services to them on regular basis.
- Appellant-III was involved in both firms even have made the sale and purchase of both independently, there cannot be faulted in it as such he was partner in appellant-I and was proprietor of M/s LS Plastics. Therefore, he was engaged in maintain both the units independently.
- Impugned order has been passed without any basis and decent findings to hold that both the firms were in the separate business of plastic machinery. No mutuality of interest has been shown or establish in the impugned order. Demand against the appellant has been confirmed on sustainable grounds namely maintenance of account of M/s LS Plastics in the premises of appellant-I.
- It is settled position that two firms or company cannot be shown to be single entity unless it is shown that mutuality of interest and commercial flow back exist between the two. Merely on the basis of the fact that the raw materials being used by two firm are same and their supplier/buyers are common and that some physical occasional help given by one of the partner of the one firm in his capacity as real brother of the proprietary firm without any commercial consideration. Reliance is placed on following decisions:-
 - Sharad Industries [2013 (294) ELT 0561 (Tri.-Del.)];
 - Plasto Containers (India) P. Ltd. [2011 (268) ELT 0509 (Tri.-Mumbai)];
 - Poona Radiators and Oil Coolers [2017 (347) ELT 0320 (Tri.-Mumbai)];
 - Jindal Steel Fabricators [2005 (108) ELT 238 (Tri.-Kolkata)]

- Unity Industries [2006 (193) ELT 0314 (Tri.-Mumbai)];
- Superior Products [2002 (144) ELT 187 (Tri.-Del)] &
- Superior Products & Ors. [2008 (230) ELT 0003 (SC)];
- Demand of duty raised on account of clubbing pertains to the year 2014-15 only and the demand pertaining to 2013-14 was confirmed on account of wrong computation of value of clearance relating to export of goods with value of domestic clearance. The impugned order has not taken into account the submission of Appellants and confirmed the demand without recording any findings thereon.
- M/s L.S. Plastics production commenced production in the financial year 2014-15 therefore there cannot be clubbing of clearance in financial year 2013-14.
- As the demands cannot be sustained, there cannot be any penalty imposed on the appellant-II and appellant-III. Appeals be allowed.

3.3 Arguing for revenue learned Authorized Representative reiterates the findings recorded in the impugned order and in order of the Original Adjudicated Authority. He submits that both the authorities have taken into consideration all the submissions made.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 We find that the impugned order records the following findings for upholding the Order-in-Original:-

5. I have considered the material available on record, relevant statutory provisions and the respondent's submissions at length. The issue involved in the case is whether in the facts and circumstances of the case, the units, allegedly floated by the appellant in order to fragment the clearances of M/s T S M Plastics so as to enable each of the unit to avail exemption under SSI scheme and thus avoid payment of duty can be clubbed

together with so as to deny the SSI benefit by the said units.

6. I find that considering the facts of the case discussed in the impugned order, it is beyond doubt that both units were working as part and parcel under the unified command and ownership of the Appellant. These units were engaged in the manufacturing of plastic caps and other article of plastic of complementing nature. The units were controlled by Shri S.K Sharma with tacit support of Shri Sanjeev Sharma Raw material for both the units were purchased by Shri S.K Sharma as a partner of the appellant and detail of raw material available in each of the unit was maintained only at the premises of the appellant. The authorized person of both the units was on the payroll of the appellant. Scrutiny of evidence and through statements recorded it become apparent that entire manufacturing activity was divided over two manufacturing premises under the supervision of same set of persons belonging to same family. The entire manufactured goods were meant for common customers and marketing was also controlled by the directors of the appellant. The separate banking and commercial identities were in fact created as a facade to show their separate and independent existence / entity with intent to keep the value of clearances of their units within the prescribed SSI exemption limit individually. Further, assistance to unit located at E-87, Sector 7, Noida without any commercial consideration and without any interest was not normal business dealings but firm proof that both the units were operating under same management. Therefore I find no infirmity in the impugned order and held it sustainable.

9. I find that the appellant cited many case laws in their support. However, on perusal of these cases, I find that in all the cases facts and issues involved are different to the facts of the impugned case. None of the above case relates to issue pertaining to the impugned se. Since the facts and

circumstances of the present case are different hence jurisprudence emanating from ratio of these cases cannot be applied in the present case. I place reliance on the Hon'ble Supreme Court in the matter of ALNOORI TOBACCO PRODUCTS [2004 (170) E.L.T. 135 (S.C.)], where in para 11 to 14 it was held that Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes.

10. In the result, as discussed, as there exist liability on them in terms of the Impugned Orders, its attendant consequences follow as a matter of course. Interest under Section 11AA of the Central Excise Act, 1944 would be payable by them as ordered therein. I further observe that in the present system of self- assessment documents like invoices and other transaction details are not supplied to the Department, the intention will have to be believed as that of evasion by way of suppression or mis-declaration. Once the details are not submitted to the Department, it amounts to mis-declaration or suppression which is rightly invoked in the case before me. I, therefore, conclude that the element of suppression with intent to evade payment of service tax is conspicuous by the peculiar facts and circumstances of the case as discussed above. Therefore penalty is correctly imposed under section 11AC of the Central Excise Act, 1944. Further, both the directors were actively involved in committing above discussed suppression & concealment avoid payment of appropriate duty. Therefore they have been correctly penalized for the offence committed by the adjudicating authority."

4.3 Original Authority in his order has recorded as follows:-

"33.1 Scrutiny of the documents and enquiry conducted by this office revealed that there were three partners in M/s TSM, namely Shri S. K. Sharma Shri Sanjeev Sharma and Shri H C Sharma who are in blood relationship. Shri Binod Kumar Bharti was Accountant of M/s TSM since 2003 During search of the premises of M/s TSM, it was also observed that the invoices, entire books of accounts including ledgers etc of M/s LS Plastics as well as M/s TSM Plastics were prepared and maintained in the computers installed at the premises of M/s TSM Plastics where the required software Tally was also available Further the staff for both the firms was deployed commonly at the factory premises of M/s TSM Plastics who maintained all the records and exercised control over the activities of both the units. During search, no statutory records regarding inputs and finished stock were found in the premises of M/s LS Plastics at 'E-87, Sector- 7. Noida and also no office was found maintained in the said premises till 01.12.2014 upto the date of search whereas the manufacturing activities were started from the month of Aug 2014.

33.2 I find that from the evidences collected during the investigation, it appeared that initially M/s TSM was in existence and later on M/s L S Plastics was floated but the entire entity was one only Irrespective of the activities undertaken by bath the units, the work was allocated among the family members and accordingly, the entire sale, purchase and marketing in respect of both the firms was controlled and looked after by Shri S K. Sharma and the work related to administration etc was looked after by Shri Sanjeev Sharma Further it also came to light that the entire purchase of raw materials was done by Shri S K Sharma as partner of M/s TSM and the same was delivered to both the manufacturing premises of M/s TSM and M/s LS Plastics. The details of raw materials available at any particular premises at any given time was maintained only at the factory premises of M/s TSM and even at the time of

visit of the Central Excise Noida Anti Evasion officers, each and every detail and records pertaining to both the units were available at the office of M/s TSM only. The finished goods of both the units were similar and for the same class of customers which also indicated that they were not independent entities, but a well thought out creation for bifurcation and suppression of clearance value in order to avail duty exemption through SSI benefit as per notification. The authorized person of both the related units for maintaining accounts was on the payroll of M/s TSM, but was functioning as the key person in both the units and signing all the documents as, authorized signatory of both the said units on closer scrutiny of records, evidences gathered and on the basis of statements given by the key persons, it appeared that the entire manufacturing activity was not done in single premises but was bifurcated in two manufacturing premises under the supervision and control of same set of persons belonging to one family. The entire goods so manufactured by these two firms were meant for same customer. The whole set of affairs related to manufacturing and marketing of the goods was controlled by the same set of persons at the common premises of M/s TSM only and this unit had total control over the activities and operation of M/s L.S Plastics. The entire purchase of raw materials, consumables, machinery, stationery etc for both the units was carried out at the instance of Shri S K Sharma, partner of M/s TSM. The valuation & sale of the manufactured goods and their accounting in respect of both the units were determined and controlled by Shri SK Sharma at the behest of M/s TSM.

34. I further observe that there was common infrastructure between the two units in as much as the entire office work of both the units was executed from the premises of M/s TSM. The records regarding stock of raw

materials and finished goods of both the units lying in the respective premises was maintained at the premises of M/s TSM only and M/s L. S Plastics were not maintaining any statutory records at their premises.

35. *From the facts narrated supra it becomes obvious that the value of clearances made by M/s L S Plastics during Aug 2014 to Nov 2014 were liable to be clubbed with the value of clearances effected by M/s TSM for the said period for the purpose of computation of value of clearances under Notification No 8/2003-CE dated 01.03.2003 as amended due to the fact that it has been clearly stipulated in Para 2(v) of the said exemption Notification that -*

'where a manufacturer clears the specified goods from one or more factories, the exemption in his case shall apply to aggregate value of clearances mentioned against each of the serial numbers in the said table and not separately for each factory.'

36. *On the basis of above facts and findings it became clear that the factory premises of Mis LS Plastics was nothing other than a factory created in a different name by the owners of M/s TSM Plastics for the purpose of production of plastic bottles so that products of both the factories could be supplied to their common buyers Factory in a different name of M/s L.S. Plastics was opened merely to bifurcate the value of clearances of excisable goods manufactured in the concerns so as to avail the benefit of Notification No. 8/2002 CE dated 01.03.2003 for SSI duty exemption. TSM, after availing the benefit of exemption Notification No.8/2003-CE dated 01.03.2003 as amended, cleared the excisable goods without payment of Central Excise duty On the basis of the above facts and computation of value of clearances for the period 2012-13, 2013-14 & 2014-15(upto Nov, 2014), a quantification Chart (Consolidated duty calculation worksheet) enclosed as Annexure B to the Show Cause Notice was prepared and*

was also shown to Shri S K Sharma, Partner of M/s TSM, on 31.12.2015. Admittedly, M/s TSM have cleared finished goods without payment of duty during the aforesaid period, therefore M/s TSM appeared to be liable to pay duty amounting to Rs. 6,17,610/- on the goods valued at Rs 49,66,618/-.

37. I find that though both the units were registered separately with Central Excise Income Tax. Sales Tax, Industries Deptt and are located in separate premises and both maintain Independent bank Account however, no accounts or records were being maintained at the premises of M/s L S Plastics and all this activity was being controlled centrally in the premises of M/s TSM Plastics. Moreover, Shri Sanjeev Sharma was a partner in M/s TSM Plastics and proprietor in M/s LS Plastics Further Shri Binod Bharti was the common accountant for maintaining all the records of M/s LS Plastics and M/s TSM Plastics. Therefore no statutory record keeping of inputs, production and clearances was being done at the premises of M/s LS Plastics and all records were kept at the factory premises of M/s TSM Plastics Therefore I arrive at the conclusion that M/s LS Plastics is just another factory premises of M/s TSM Plastics created to bifurcate the value of goods produced in the two factories so as to separately avail the benefit of SSI Exemption for both the units under the said notification. Therefore, I find that the value of goods manufactured by M/s LS Plastics during the period August 2014 to November 2014 needs to be clubbed with the value of goods produce by M/s TSM Plastics for arriving at the value limit for SSI exemption under notification No.8/2003 CE After excluding the value of export and value of Plastic Bottles (as trading), the values of the manufactured goods cleared by the M/s TSM & M/s L S Plastics during the period 2012- 13, 2013-14 & 2014-15(upto 11/2014) came to Rs.1,41,53,579/- Rs.1,72.98.582/- and Rs1,76,68,036/-respectively. Thus I

find that M/s TSM, in the financial year 2013-14 and 2014-15 (upto Nov., 2014) had crossed the SSI exemption limit of Rs 15 crores, as specified under Notification No.08/2003-CE dated 01.03.2003 as amended and are liable to pay duty of Rs.6.17,610 on the total value of Rs.49,66,618 which is over and above the SSI exemption of Rs 1.5 crores for the financial years 2013-14 and 2014-15 (upto Nov. 2014) under the provisions of Section 11A(4) of the Central Excise Act 1944 Further, the party is also, liable to pay interest at the appropriate rate on this duty liability under Section 11AA of the Central Excise Act, 1944.

38. I find that M/s TSM Plastics had voluntarily deposited the duty of Rs 5 l towards the total duty liability vide Challan No.90009 dated 3 12.2014 during the course of investigation which needs to be appropriated towards the total duty liability of Rs 6,17 610/-.

39. I observe that the case laws cited by the party in their written reply dated 18.1.2017 are having different circumstances as compared to the present case and are therefore not relevant in this matter In the present case it has been established beyond doubt that that M/s L S Plastics and M/s T.S. M plastics have members of the same family as owners/directors and all the records and operations of both the units are maintained and controlled at the single premises of M/s TSM plastics. Both have a common accountant and the accounts of both units are being maintained through a tally Software installed at the premises of M/s TSM Plastics There is no operational office at the premises of M/s LS Plastics and no records regarding inputs/services received and stock keeping of finished goods is being maintained at their factory Purchase of raw materials is also centralized at the premises of M/s TSM Plastics and done by Sh Sanjeev Sharma Therefore it is very much clear that M/s L.S Plastics was created solely for the purpose of diversifying

into the manufacture of plastic bottles for supply to a common buyer with the sole intention of circumventing the provisions of Notfn No 8/2003 so as to separately avail the benefit of the notification by qualifying as SSI Unit having annual turnover of less than 15 crores In reality both the firms produce similar goods for the same buyer and are under the control of the same family. Thus they are actually two factory units under the same management and their value of clearances is required to be clubbed together for the purpose of arriving at the value limit of Rs 15 crore to avail SSI Notfn benefit for duty exemption.

40. I further observe that M/s TSM Plastics, D-20, Sector-7, Noida have also made themselves liable for penal action under the provisions of Rule 25(1) of the Central Excise Rules, 2002 read with Section 11AC (c) of the Central Excise Act 1944 by suppressing the relevant information from the Department with respect to the manufacture of excisable goods in their two units which resulted in the short payment of central excise duty due to wrongful claim of duty exemption under notification No.8/2003 C.E. dated 1-3-2003."

4.4 From the facts available on record, we find that appellant-I is engaged in the manufacture and clearance of plastics caps & closures for bottles falling under Chapter No.39235010 and trading of plastic bottles falling under Chapter sub-heading 39233090 of first schedule to the Central Excise Tariff Act, 1985. Undisputedly the issue involved in the matter is for the financial year 2013-14 and 2014-15 (upto November 2014). It is also not in dispute that the M/s L S Plastics started the production in the year 2014-15 only and hence the issue of the clubbing of clearances of the Appellant – I with the clearances of M/s L S Plastics is only relevant for that period.

Value of Clearances

4.5 On the basis of the analysis of the various documents recovered during the search and investigation, the show cause

notice in para 14.1 records the total sale value from the two units in following manner:

Amounts in Rs `000							
S No	Sales Sub Head	2012-13		2013-14		2014-15	
		M/s TSM	M/s LS Plastics	M/s TSM	M/s LS Plastics	M/s TSM	M/s LS Plastics
1	Central sale (10% or 5%)	187	0	50	0	419	325
2	Central Sale 2%	9870	0	13494	0	12825	3651
3	Job Work	294	0	37	0	93	0
4	Sale Form E	2367	0	2335	0	50	0
5	Sale of finished goods within state	12445	0	0	0	0	0
6	Sales A/c 4% or 5%	2716	0	612	0	194	160
7	Sale of finished goods CST	17547	0	48901	0	20759	4866
	Total	45426	0	65429	0	34340	9002

After noting the value of clearances and the explanations given by the Shri Bharti the Accountant of the Appellant, analysis of the trading of the goods received and sold was undertaken in show cause notice. Thereafter in para 14.4 records the value of clearances from the two units, on the basis of sales invoices issued by the appellant and after excluding the value export clearances and Plastic bottles (traded) as follows:

SI No	Financial Year	Value of Clearances	Value for Demand
1	2012-13	1,41,53,579/-	0
2	2013-14	1,72,98,582/-	22,98,582/-
3	2014-15 (upto Nov 14)	1,76,68,036/-	26,68,036/-

As the value of clearances for the year 2012-13 was less than Rs 1.5 crores well within the exemption limit as per notification No 8/2003-CE dated 01.03.2003, no demand has been made for the said year. In respect of the year 2013-14 taking the value of clearances of the Appellant-I only, the demand has been made on the value of clearance as indicated in table above and for the year 2014-15 the demand has been made by clubbing the clearances.

4.6 Appellant has challenged the demand for the year 2013-14 by stating that there is error in calculation, by referring to table in para 14.1 of the show cause notice. It is their submission that as per this table the after excluding the value of clearances for export and the value of traded goods the value of clearances will be only Rs 1.41 crores which is well within the exemption limit as provided by the notification No 8/2003-CE. No other submission has been made by the appellant to challenge this

demand except for the sole reliance on this table. However we find that the demand has not been made by computing the value of clearances from this table. But value of clearances has been computed on the basis of actual sale invoices and after deducting the value of traded goods and exports. Para 14.4 of the Show cause Notice is reproduced below:

"14.4 Further, the value of clearances made by M/s TSM & M/s L S plastics during the aforesaid period has been computed on the basis of sales invoice issued by them to different buyers. The sale invoices of M/s TSM and M/s L S Plastics resumed during the search conducted on the relevant premises on 01.11.2014 have been found issued with description of goods as plastic Cap, Plastic bottles with or without caps, core, handle, holder, plugs etc. Since the total sales turnover for the period 2010-11 & 2011-12 were much below the exemption limit specified in the SSI exemption Notification No 08/2003-CE dated 01.03.2003 as amended, therefore a detailed computation sheet (invoice wise) have been prepared for the year 2012-13, 2013-14 & 2014-15 (upto November, 2014) as per Annexure A1, Annexure A2 & Annexure A3. In the case of clearances of Plastic bottles with cap where the value of caps were not shown separately the value have been calculated proportionately on the basis of their weight. After excluding the value of export and value of Plastic Bottles (as trading), the value of the manufactured goods cleared by M/s TSM & M/s L S Plastics during the period 2012-13, 2013-14 and 2014-15 (upto 11/2014) comes to rs 1,41,53,579/-, Rs 1,72,98,582/- and Rs 1,76,68,036/- respectively. Therefore it appears that M/s TSM in the financial year 2013-14 and 2014-15 9upto Nov., 2014) had crossed the SSI exemption limit of Rs 1.5 crore as specified under Notification No 08/2003-CE dated 01.03.2003."

Appellant has at no point of time disputed the computation of the value of clearances as per para 14.4 which is the basis of demand.

4.7 No contention with regards to the error in computation of duty has been raised before the adjudicating authority or Appellate Authority. On the contrary appellants have admitted that duty was not paid on the excess value due to clerical mistake of the Order-in-Original, which is reproduced bellow:-

"30. As regards payment of interest amount has not been calculated in the SC Noticee. The Noticee has already paid Rs. Five Lacs and amount can be adjusted/ deducted from that value of clearances due to calculation mistake and ignorance of legal provisionally the dealing hand. There was no malafide intention to evade payment of duty. As soon as the mistake was detected, Noticee paid the amount of Rs. Five lacs at the investigation stage. In view of the fact imposition of penalty under rule 25 of C.E. Rules 02 is not justified and legal."

Appellants have before Commissioner (Appeals), not challenged the basis of demand as per para 14.4 of the Show Cause Notice they have only stated that they have submitted the copy the ledgers duly certified by the Chartered Accountant. Appellant could have pointed out from sale invoice wise chart, made in Annexure A1, Annexure A2 & Annexure A3 as to which were the export sales included in the value of clearances for making this demand. Even before us, except for referring to the table in para 14.1, there is no other submission made by the appellant. As we find that the basis of demand is para 14.4 read with Annexure A1, Annexure A2 & Annexure A3, which has not been challenged we do not find any merits in the submissions made by the appellant in this regards.

Clubbing of Clearances

4.8 Appellant-I is a partnership firm in which following are the partners as per the Supplementary Deed of Partnership:-



उत्तर प्रदेश UTTAR PRADESH

AE 481620

SUPPLEMENTARY DEED OF PARTNERSHIP

Whereas as the Partnership deed was made on 14th day of September 1999 . and now the supplementary deed of Partnership Act is made and executed on 1st April 2012 between :

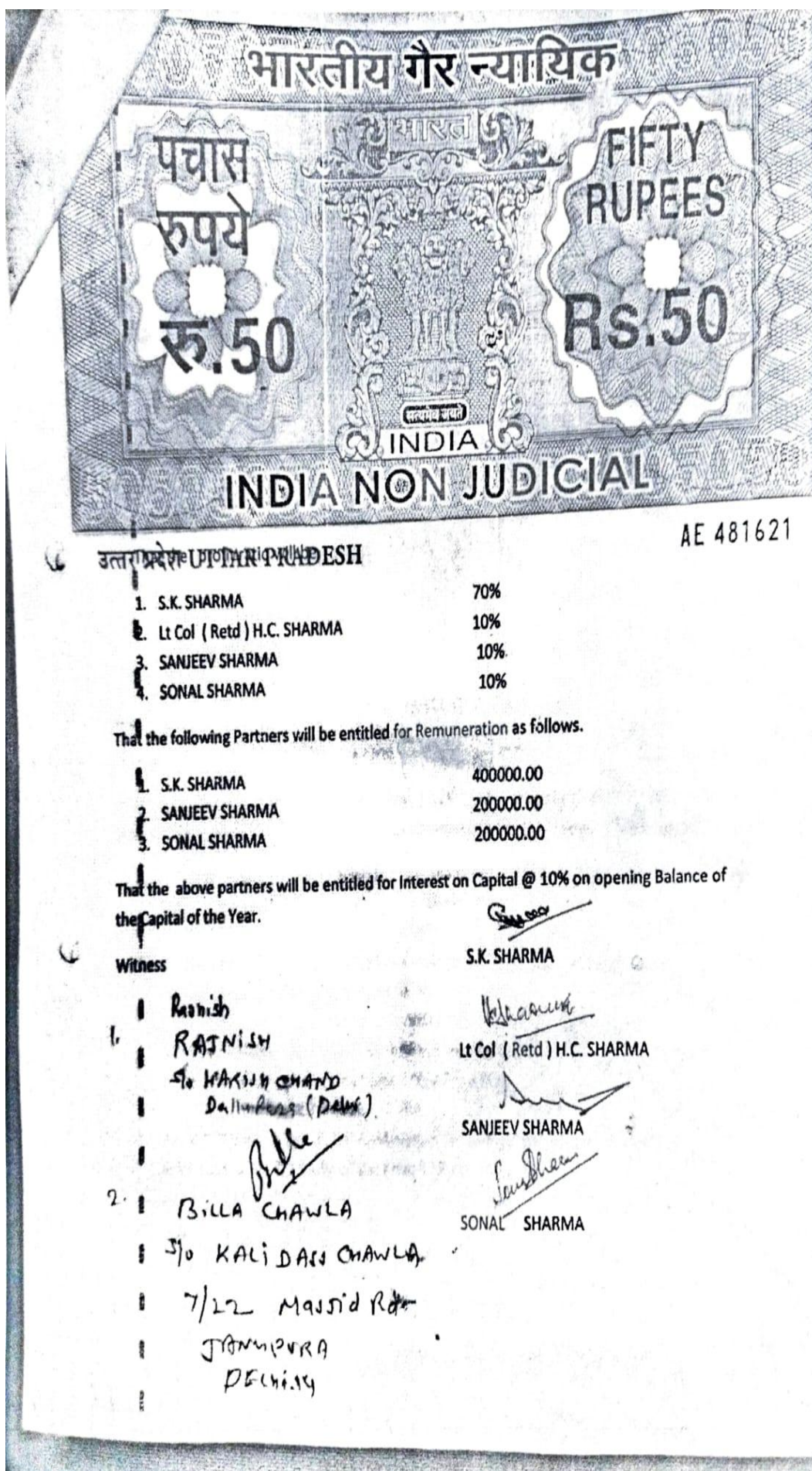
1. Lt Col H.C. Sharma S/o Late Shri H.S. Sharma resident of Flat No 286, Sector 29, Noida (U.P.) hereinafter called the Party of the First Part.
AND
2. S.K. SHARMA S/o Lt Col H.C. SHARMA resident of Flat No 286, Sector 29, Noida (U.P.) hereinafter called the Party of the Second Part.
AND
3. SANJEEV SHARMA S/o Lt Col H.C. SHARMA resident of Flat No 286, Sector 29, Noida (U.P.) hereinafter called the Party of the Third Part.
AND
4. SONAL SHARMA D/o S.K. SHARMA resident of Flat No 286, Sector 29, Noida (U.P.) hereinafter called the Party of the Fourth Part.

[Signature]

[Signature]

[Signature]

[Signature]



M/s LS Plastics is engaged in the manufacture of plastic bottles and this unit is said to be the partnership concern to the name of appellants.

4.9 From perusal of the Partnership Deed, we observe that there were four persons who have blood relations namely S.K. Sharma, LT Col (Retd) H.C. Sharma, Sanjeev Sharma & Sonal Sharma. It is also evident that the associates in the said partnership are partners in ratio of 70% appellant-II, 10% for the father, appellant-III and the sister. There is remuneration shown between the partners which is Rs.4 lakhs for the appellant-II and Rs. 2 lakhs for appellant-III and sister. On perusal of partnership it is evident that the partnership firm is comprised of partners belongs to the same family. Appellant III is the proprietor of M/s L S Plastics. Further the issue of

- (a) Control of Appellant-I and Appellant-II over the activities and operation of M/s L S Plastics;
- (b) Commonality of infrastructure;
- (c) Use of office premises and the common employees/accountants maintaining the records of both the units on same computer system;
- (d) The valuation of sale of the manufactured goods of M/s L S plastics being done by Appellant-II,

Have been discussed and brought out in the show cause notice, order in original and the impugned order. From the facts as narrated above there is no dispute that the beneficiary of all the activities undertaken by Appellant-I and M/s L S plastic is same family. Appellant 3 who is proprietor of M/s L S plastics is drawing remuneration of Rs 2,00,000/- and partnership interest to the extent of 10% in the partnership firm. It is also well established and not disputed appellant-II who enjoys partnership interest of 70% in the partnership firm and remuneration of Rs 4,00,000/- actually controls all the operation of M/s L S Plastic.

4.10 Appellant have heavily relied upon the decision in case of Thermotech, to argue that in absence of mutuality of interest the clearance of both the units though owned by the members of same family cannot be clubbed. The relevant excerpts from the said decision are reproduced below:

"15. We find no merits in the above reasoning of the adjudicating authority. Admittedly he has nowhere referred to any mutuality of interest between the units of husband and units owned by wife. He has observed that lack of mutuality of interest or financial flow back can be only one of the important consideration but cannot be made sole basis for arriving at the decision. Merely because the two owners of the units were husband and wife and the profits earned by them came into same household, does not mean that clearances of all the units is required to be clubbed. We really fail to understand the above reasoning of the adjudicating authority. If the husband is helping his wife in running of any business activity and rendered assistance, the same cannot be made the basis for clubbing the clearances of all the units. For doing so, Revenue is expected to produce evidence to show that all the units were facad and were not complete units independently manufacturing the goods in question. If the reasoning adopted by Commissioner is accepted, the same would result in legal chaos in as much as the clearance of units being run by wife's, independent of their husbands units would lead to clubbing issues, irrespective of the fact that finances of wife and husband are being separately managed by them.

16. Apart from above, we note that all the units were separately registered with income tax as also sales tax authorities. Their locations of business were at separate places. In fact one of the unit was located in Delhi itself. There was no financial inter-twining and all the units were working with their own independent financial resources. There is no evidence on record to show that there was any mutuality of interest between the units except for the fact that Shri Pradeep Khanna was sometimes looking after the affairs of the units belonging to his wife which, as already discussed by us, cannot be made the basis for clubbing the clearances of the units owned by husband and wife.

17. We further note that identical case was made out against M/s Jass Kann International proposing the clubbing of clearances of M/s Thermoking with their clearances. Such charges were dropped by Commissioner vide his order dtd. 30.09.02, who held that clearances of M/s Thermoking under the proprietorship of Shri Pradeep Khanna cannot be clubbed with the clearances of M/s Jass Kann, a unit owned by his wife. In such a scenario to restart the identical proceedings in respect of another unit of Ms. Neera Khanna, i.e., M/s Thermotech, proposing clubbing the clearance of M/s Thermoking cannot be appreciated.

18. We further note that the appellants have taken a strong objection to the fact that while show cause notice (SCN) proposed clubbing of clearances of M/s Thermoking, M/s Flevel International and M/s Jass Kann International with the clearances of M/s Thermotech, no SCN stands issued to the other units. The said objection of the appellants stands not accepted by the Commissioner by observing that as all the units are owned either by wife of Shri Pradeep Khanna or by Ms. Neera Khanna, issuance of separate notice to the other units was not required.

We find no merits in the above arguments. Admittedly all the units were working separately and the Revenue is proposing the clubbing of clearances with the clearances of M/s Thermotech. The minimum legal requirement is to put the other units on notice. Mere fact that the said other units were under the proprietorship of Ms. Neera Khanna or under the ownership of husband of Ms. Neera Khanna cannot absolve the Revenue from putting the other units to notice. It is well settled law that in case of clubbing of clearances of various units, the notices are required to be issued to all, in as much as the clearances of other units is sought to be clubbed with clearances of a particular unit. To club the clearances of other units with M/s. Thermotech

without even putting the other units on notice and without even letting them know about the same is against the settled principle of law."

From the perusal of the above it is quite evident that the matter has been decided in favour of the appellant, as no show cause notice was issued to the units whose clearance was sought to be clubbed with the clearance of M/s Thermotech. In the present case the facts are not the same notice has been issued to Appellant-III who is proprietor of M/s L S Plastics and also partner in partnership firm (Appellant-I).

4.11 Appellant has also relied upon the following decisions:

- Sharad Industries [2013 (294) ELT 0561 (Tri.-Del.)];

Tribunal has held as follows:

*"6. We, after appreciating the submissions of both the sides find that there is not much dispute on factual position. It is not the Revenues case that two unit owned by Smt Kamlesh Gupta and her husband Shri Avdesh Kumar Gupta not complete units having all the necessary machines and infrastructure for manufacture of their final product. Both the units have separate Sale Tax Registration, Industries Registration, Income Tax Registration, Electricity Connection, Telephone Connection & ESI Registration etc. Merely because there is a door between the two units and power of attorney stand given to her husband to look after the job of her unit, by itself cannot be held to be a ground for holding both the units as one. Admittedly, husband and wife are entitled do their own business and if the husband is looking after the business of the wife that will not make the unit owned by the wife as a dummy unit. **The prime requirement, for clubbing the clearance of two units is not having complete independent machinery and infrastructure to manufacture the goods. If both the units are complete by itself, capable of manufacturing the goods without any help from the other unit, it has to***

be held that both the units are independent units.

The various decision of the Tribunal referred to and relied upon by Commissioner (Appeals) in his impugned order are applicable to the facts of the present case. It stands held in precedent decision that financial flow back and financial intertwining between the two units is the main reason for reflecting upon the fact of their being independent or not. One such reference can be made to in decision of the Hon'ble High Court in the case M/s. Renu Tandon Vs. Union of India, 1993(66)ELT 375 (Raj.). Similarly in the case of M/s. Electro Mechanical Engg. Corporation Vs.CCE, Jaipur 2003(152) ELT 194(Tri.), Giresh Electrical Industries Vs. CCE, Mumbai, 2004(167) ELT 209(Tri.) it was held evidence of common office premises, common staff and common maintenance of records etc. cannot be held to be sufficient to club the clearances of the units, who have different registration in all the department and in the absence of any financial flow back."

From the perusal of the above, it is quite evident that clearance cannot be clubbed in situation where the units are functioning as independent units with different sets of machinery and infrastructure to manufacture goods. However in the case in hand both the authorities have concluded with regards to commonality of infrastructure facilities and management and control, hence this decision is distinguishable.

- Plasto Containers (India) P. Ltd. [2011 (268) ELT 0509 (Tri.-Mumbai)];

Tribunal has concluded stating as follows:

"35. From the above discussion, we hold that both the units are having separate directors, separately registered with the registrar of companies, separate sales tax registration, income tax, bank account and separate lease deed with MIDC and are having separate premises also. In

that event the clearance of both the units cannot be clubbed...”

From the above it is evident that tribunal has recorded a finding of fact holding that clearance of both the units cannot be clubbed. In the facts of the case which are before us there is clear finding of fact recorded by both the authorities vis a vis the commonality of infrastructure, management and control of the unit. This decision is clearly distinguishable.

- Poona Radiators and Oil Coolers [2017 (347) ELT 0320 (Tri.-Mumbai)];

In this case tribunal has held as follows:

"It is the case of the Revenue that eight units indicated hereinabove are of the same family group; hence in effect all the units need to be clubbed together. The adjudicating authority has specifically recorded that the eight units are separately registered as small scale unit, whether as partnership concerns and each unit is registered under the Central Excise Act as well as with the various Government Department like Sales Tax Act, Income Tax Act, Factories Act, etc. As per the adjudicating authority each unit has acquired their own manufacturing raw materials and finished goods were sold directly to their respective customers. He has recorded that all the goods are as per order placed by the customers of each unit. The adjudicating authority has recorded a clear findings that the units are independent and hence clubbing of clearance of the units physically manufacturing cannot be accepted. These factual positions not controverted by department. We also find that there is nothing on record to show that manufacturing activity was distributed amongst of the manufacturing units to create a façade for evasion of duty. There is nothing on record that this unit were created for benefit of individuals. There is no effective counter to such a finding of the adjudicating authority."

This decision is also upholding the finding of fact recorded by the adjudicating authority, to the effect that all the units were separately registered with Central Excise and other departments. It has upheld the finding recorded by the adjudicating authority in regards to control and management of the units which has not be controverted by the revenue in its appeal. This decision is clearly distinguishable.

- Jindal Steel Fabricators [2005 (108) ELT 238 (Tri.-Kolkata)]

Tribunal has held as follows:

"4. In the present case, Mr. Mahesh Kr. Jindal is a proprietor of M/s. Jindal Steel Fabricator and also a partner of the partnership firm, namely, M/s. Jindal Steel Products. As per the Company's Law/Partnership Act, there is a distinct identity of a proprietary firm and a partnership firm. the clearance made by a partner in his individual capacity from he proprietary unit cannot be clubbed with the clearance of a firm to which he is a partner. In the present case, Mr. Mahesh Kr. Jindal is a proprietor of M/s. Jindal Steel Fabricator and also a partner in another firm, namely, M/s. Jindal Steel Products. Both the firms, namely M/s. Jindal Steel Fabricators proprietary concern and M/s. Jindal Steel Products, Partnership concern, having separate identity are two separate manufactures. The two firms have Income Tax Files, Sales Tax Registration, separate Bank Accounts etc... Accordingly, they cannot be treated to be one manufacturers and consequently, the value of the clearances of the two firms cannot be clubbed together.

5. In order to club the turnover of two concerns, it has to be provided by adducing evidences that on firm is dummy or camouflaging the others. In the present case, there is no such allegation in the show-cause notice and there is no iota of evidence in this regard. The same view was expressed in the case of Probhat Dyes & Chemicals Vs. Collector of Central Excise reported in 1992 (62) ELT

469. *The same view has been expressed by the Hon'ble Supreme Court in the case of Assistant Collector of Central Excise & Customs, Surat & Others Vs. Shri J.C. Shah, M/s. Yayantilal Babubhai & Others reported in 1978 ELT J-317 (SC) = . The decisions submitted by the Id. JDR are not applicable in the present circumstances. In the case of Supreme Engineering Works Vs. Collector of Central Excise, Pune, the Tribunal held that the Collector's conclusion, based on ample evidence regarding common control of production and sales among the units, having special financial relations shown to be not on a principal to principal basis. In the case of Collector of Central Excise, Chandigarh Vs. Densons Pultrrotechnik, the Tribunal held that one or more factories were controlled by the same manufacturer and it was held that the value of clearances of the two units clubbed together. the facts of the present cases are distinguishable and the ratio of the aforesaid cases are not applicable in the present case. In view of the above discussions, appeal deserves to be allowed. Cross Objection (CO) also gets disposed of."*

From the perusal of the above it is quite evident that in this case issue was with regards to clubbing of clearance of the two units wherein one unit was proprietorship concern with the other unit in which the said proprietor was partner. However the above decision itself lays down that the clubbing can be done in case where one unit is dummy or camouflaging the others. The present case is squarely the case where the authorities have concluded that one unit was dummy unit.

- Unity Industries [2006 (193) ELT 0314 (Tri.-Mumbai)];
Tribunal has observed as follows:

"(a) It is an admitted position that the show cause notice has a reference to all the four units required to be termed as one unit and their values of clearances were required to be clubbed together and eligibility to SSI exemption notification was to be determined afresh, yet the notice

demands duty separately from each of the units. The demands in the notice are in conflict with the charge. Such notices are required to be set aside. The order impugned is demanding duty of Rs. 1,45,29,754/- from M/s Sotex, the proprietary firm of Shri M M Majithia. The demand cannot be upheld, since the demand in the show Cause Notice proposed to be recovered from M/s Sotex was not a figure of Rs. 1,45,29,754/- but much less, the present proposal to confirm the duty demand beyond which was proposed in the Show Cause Notice at Rs. 35,806/- & Rs. 2884/- cannot be upheld.

(b) The finding that the three units are just dummy units cannot be upheld when the department is recognizing separate clearances and duty demands on these other units.

(c) Except for M/s Sotex, the independent existence of the other partnership concerns and proprietary concern cannot be doubted. It is another matter that they may be under the total control of Shri M M Majithia, that ipso facto cannot label them as dummy non existent units. They have independent SSI registration and Central Excise registration and declaration filed and have separate audited Balance Sheets & located geographically apart.

(d) The duty demands, as per annexure C are found to be based on:

i. value of clearances as declared by the units;

ii. value of clandestine clearances as per seized records;

iii. Value of clearances as per estimation on the basis of production capacity per day as per company and statements of supervisors.

The appellants submit that for the year 1994-95, value of clearances declared by the unit is Rs. 66,77,052/- and the value of clandestine clearances is shown as Rs

2,40,61,738/- . These figures when added should result in Rs. 3,07,39,590/-. However, the value taken for calculation of duty is Rs. 3,73,08,790/-. Such misapplication of mind, and upholding of demand thereafter, and reliance on assumed/presumed production on estimation of machines cannot be upheld per se.

(e) The matter of existence of these units and the activity were within the knowledge of the department vide proceedings initiated by Preventive Officers by Show Cause Notice dt 8.3.94 issued to each unit and which culminated in order in appeal by Commissioner dated 3.7.96. The Commissioner's finding in present order impugned on this issue in para 8 is:

"8... Moreover the statement of Shri Subhash Karia recorded at that time in connection with adjudicated by the then Assistant Commissioner of Central Excise & Customs, Bharuch vide Order-in-Original dated 24.10.94 confirms my findings in this order that it is only the sotex owned by Shri Mahendra M Majithia, which is the unit and all other units i.e. Sonic, Stelex and Unity are just dummy units fully under the control of Shri Mahendra M Majithia and transactions between them are not at all on principal to principal basis."

Which would lead to the only conclusion that the department was fully aware of the charges as found by the Ld Commissioner. There is nothing new in the findings, enquiries and the proceedings now initiated that was not before the departmental officers in 1993-94 when the first case was detected & notice was issued. However, no notice to propose clubbing was issued at that time. If nothing new is coming forth in 1998, to issue the present notice, demanding duties on issues well known in 1993, then the demand is to be held to be barred by limitation. The bar of limitation by alleging suppression should be held to be in favour of the appellants in the facts of this case. Facts

were known to both sides, the allegation of suppression is untenable and reliance on the case of Prabhu Steel Industries Ltd 1997 (95) ELT 164 (SC) by the appellants is well founded. The reliance on the case of Nizam sugar Mills case by the Ld. Commissioner will not help the revenue in the facts herein. The entire proceedings of demands are therefore required to be quashed on ground of time bar."

From the perusal of the above it is evident that the department itself was recognizing the units whose clearance was sought to be clubbed as separate units and the demand was set aside on the grounds of limitation and not merits. We do not find this decision to be applicable in the facts of this case.

- Superior Products & Ors. [2008 (230) ELT 0003 (SC)]; Hon'ble Supreme Court has refused to interfere with the finding of fact recorded by the tribunal. The finding of the fact in the case of Superior Products, is limited to the said decision and cannot be considered as binding precedent. Relevant para of the Hon'ble Apex Court decision is reproduced below:

"5. Tribunal in its order has recorded a finding that accounts of both the units are managed separately. That they have separate capital, premises, machinery and labour and carrying out separate operations. That they are separate units. These findings are findings of fact which cannot be interfered with and, therefore, the same are confirmed."

4.12 In the case of M/s CALCUTTA CHROMOTYPE LTD. 1998 (99) ELT 202 (SC) wherein Hon'ble Supreme Court has observed as follows:-

3. *The Assistant Collector, Central Excise found that both the appellant and its sole distributor were limited companies registered under the Companies Act, 1960. He found that the Board of Directors of both these companies were constituted :*

"Appellant

1. *Shri Narendra Sharma, Managing Director*
2. *Smt. Brahma Devi, Director*
3. *Smt. Indu Sharma, Director*

M/s. Ganga Saran & Sons Co.

1. *Shri Narendra Sharma, Managing Director*
2. *Smt. Brahma Devi, Director*
3. *Shri Brajendra Sharma, Director*
4. *Shri Rajendra Sharma, Director".*

4. *Assistant Collector also found that shares of the appellant and its sole distributor were held by the members of the Sharma family, i.e., persons who were related to each other and that both the companies were having the common Managing Director and further that the appellant was selling the goods with the brand name of its distributor, namely, M/s. Ganga Saran & Sons Pvt. Ltd. It was contended before the Tribunal that both the companies were registered under the Companies Act and were separate legal entities and therefore, could not be considered as related persons. It was submitted that having the common Director was not the determining factor to hold that M/s. Ganga Saran & Sons Pvt. Ltd. was a related person and further that the fact that the manufacturer was printing the name of the buyer and was selling the entire product to the buyer also did not make the buyer a related person. It was also submitted that the authorities below had failed to establish that M/s. Ganga Saran & Sons Pvt. Ltd. had been accorded a favourable treatment and that, in fact, low price had been charged on that account. The appellant said that in the absence of any such evidence it was not correct to hold that the price at which M/s. Ganga Saran & Sons Pvt. Ltd. sold the product was the price for the purpose of determining the assessable value.*

5. *The Appellate Tribunal was also of the view with reference to Section 4(4)(c) of the Act that if a person is so associated with the assessee that they have interest in the business of each other then the person was a related person of the other*

within the meaning of the Section. Appellate Tribunal noted that Collector (Appeals) had held that the appellant as well as M/s. Ganga Saran & Sons Pvt. Ltd. were started and established by G.S. Sharma and his family members and further that Assistant Collector had found that the shares of the appellant and the shares of the buyer company were held by the members of the same Sharma family and, thus, by the persons that who were related to each other. The Appellate Tribunal referred to the decision of this Court in Mohanlal Magan Lal Bhavsar (Deceased) through LRs. and Ors. v. Union of India and Ors. [1986 (23) E.L.T. 3] and also to its own decision in Diamond Clock Manufacturing Co. Ltd. v. C.C.E., Pune [1988 (34) E.L.T. 662] where it interpreted the definition of related person. Relying on these two decisions as applicable to the facts of this case, the Appellate Tribunal was of the view that there was identity of Interest and M/s. Ganga Saran & Sons Pvt. Ltd. was related person within the meaning of Section 4(4)(c) of the Act. The Appellate Tribunal disposed of the appeal with the directions aforesaid.

6. *Mr. Dave, learned Counsel for the appellant, contended that the Appellate Tribunal erred in holding that the appellant and M/s. Ganga Saran & Sons Pvt. Ltd. were related persons or that there was an identity of interest between the two. He said the two judgments, one of Supreme Court and other of the Appellate Tribunal itself on which the Appellate Tribunal relied were not applicable inasmuch as facts in the said two cases were entirely different and decisions were clearly distinguishable. He said that in order to be a related person within the meaning of Section 4(4)(c) of the Act the person alleged to be related must have interest, direct or indirect, in the business of the assessee and that in the present case both the appellant and its buyer were private limited companies established much before the imposition of the excise duty on playing cards and had been dealing with each other at arm's length. He said there was no evidence before the Appellate Tribunal as to the shareholding in each of the two companies and to say that shareholdings were held by Sharma family was a misnomer and that such a fragile test could not be applied to test the identity or mutuality of interest. Mr. Dave said that the*

Appellate Tribunal came to a wrong conclusion on prima facie holding that Sharma family controlled both the companies. Sharma family is a vague term and did not reflect as to what was the exact shareholding of the members in both the companies and how they were related to each other. Lastly, Mr. Dave submitted that there was no allegation and no finding ever recorded that the dealings between the appellant and its distributor were not at arm's length or that prices at which the goods were sold to the distributor were exceptionally low, having been influenced by some extra commercial consideration. Mr. Dave said that the Appellate Tribunal did not examine the whole facts of the case and law applicable thereto in proper perspective and that led it to give directions which are incorrect and these were now being impugned.

7.

12. *The principle that a company under the Companies Act, 1956 is a separate entity and, therefore, where the manufacturer and the buyer are two separate companies, they cannot, than anything more, be 'related persons' within the meaning of clause (c) of sub-section (4) of Section 4 of the Act is not of universal application. Law has traveled quite a bit after decision of the House of Lords in the case of Salomon v. Salomon [1897 AC 22]. This is how this Court noticed in Tata Engineering and Locomotive Company Ltd. v. State of Bihar & Ors. [(1964) 6 SCR 885] :*

"The true legal position in regard to the character of a corporation or a company which owes its incorporation to a statutory authority, is not in doubt or dispute. The corporation in law is equal to a natural person and has a legal entity of its own. The entity of the corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purposes; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to the capital invested by them; similarly, the creditors of the members have no right to the assets of the corporation. This position has been well-established

ever since the decision in the of Salomon v. Salomon & Co. [(1897) A.C. 22 H.L.] was pronounced in 1897; and indeed, it has always been the well recognised principle of common law. However, in the course of time, the doctrine that the corporation or a company has a legal and separate entity of its own has been subjected to certain exceptions by the application of the fiction that the veil of the corporation can be lifted and its face examined in substance. The doctrine of the lifting of the veil thus marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the corporation. As a result of the impact of the complexity of economic factors, judicial decisions have sometimes recognised exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems, the theory about the personality of the corporation may be confined more and more."

13. *In Life Insurance Corporation of India v. Escorts Ltd. & Ors. [(1986) 1 SCC 264], this Court again considered this question and said :*

"While it is firmly established ever since Salomon v. A. Salomon & Co. Ltd. [(1897) AC 22 HL] was decided that a company has an independent and legal personality distinct from the individuals who are its members, it has since been held that the corporate veil may be lifted, the corporate personality may be ignored and the individual members recognised for who they are in certain exceptional circumstances. Pennington in his Company Law (4th Ed.) states :

Four inroads have been made by the law on the principle of separate legal personality of companies. By far the most extensive of these has been made by legislation imposing taxation. The Government, naturally enough, does not willingly suffer schemes for the avoidance of taxation which depend for their success on the

employment of the principle of separate legal personality, and in fact legislation has gone so far that in certain circumstances taxation can be heavier if companies are employed by the taxpayer in an attempt to minimise his tax liability than if he uses other means to give effect to his wishes. Taxation of companies is a complex subject, and is outside the scope of this book. The reader who wishes to pursue the subject is referred to the many standard text books on Corporation Tax, Income Tax, Capital Gains Tax and Capital Transfer Tax.

The other inroads on the principle of separate corporate personality have been made by two sections of the Companies Act, 1948, by judicial disregard of the principle where the protection of public interests is of paramount importance, or where the company has been formed to evade obligations imposed by the law, and by the Courts implying in certain cases that a company is an agent or trustee for its members.

In Palmer's Company Law (23rd Ed.), the present position in England is stated and the occasions when the corporate veil may be lifted have been enumerated and classified into fourteen categories. Similarly in Gower's Company Law (4th Ed.), a chapter is devoted to 'lifting the veil' and the various occasions when that may be done are discussed. In Tata Engineering and Locomotive Co. Ltd. [(1964) 6 SCR 885], the company wanted the corporate veil to be lifted so as to sustain the maintainability of the petition, filed by the company under Article 32 of the Constitution, by treating it as one filed by the shareholders of the company. The request of the company was turned down on the ground that it was not possible to treat the company as a citizen for the purposes of Article 19. In CIT v. Sri Meenakshi Mills Ltd. [AIR 1967 SC 819], the corporate veil was lifted and evasion of income tax prevented by paying regard to the economic realities behind the legal facade. In Workmen v. Associated Rubber Industry Ltd. [(1985) 4 SCC 114], resort was had to the principle of lifting the veil to

prevent devices to avoid welfare legislation. It was emphasised that regard must be had to substance and not the form of a transaction. Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficial statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc."

14. *In M/s. McDowell and Company Ltd. v. Commercial Tax Officer [(1985) 3 SCC 230 = (1985) 154 ITR 148], this Court examined the concept of tax avoidance or rather the legitimacy of the art of dodging tax without breaking the law. This Court stressed upon the need to make a departure from the Westminster principle based upon the observations of Lord Tomlin in the case of IRC v. Duke of Westminster [(1936) AC 1] that every assessee is entitled to arrange his affairs as to not attract taxes. The Court said that tax planning may be legitimate provided it is within the framework of law. Colourable devices, however, cannot be part of tax planning. Dubious methods resorting to artifice or subterfuge to avoid payment of taxes on what really is income can today no longer be applauded and legitimised as a splendid work by a wise man but has to be condemned and punished with severest of penalties. If we examine the thrust of all the decisions, there is no bar on the authorities to lift the veil of a company, whether a manufacturer or a buyer, to see it was not wearing that mask of not being treated as related person when, in fact, both, the manufacturer and the buyer, are in fact the same persons. Under sub-section (1) of Section 4 of the Act, value of the excisable goods shall not be deemed to be normal price thereof, i.e., the price at which such goods are ordinarily sold by the*

assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, if the buyer is a related person and price is not the sole consideration for sale. As to who is a related person, we have to see its definition of Section 4(4)(c) of the Act. It is not only that both, the manufacturer and the buyer, are associated with each other for which corporate veil may be lifted to see who is behind it but also that they should have interest, directly or indirectly, in the business of each other. But once it is found that persons behind the manufacturer and the buyer are same, it is apparent that buyer is associated with the manufacturer, i.e., the assessee and then regard being had to the common course of natural events, human conduct and public and private business it can be presumed that they have interest, directly or indirectly, in the business of each other (refer Section 114 of the Evidence Act). It is, however, difficult to lay down any broad principle to hold as to when corporate veil should be lifted or if on doing that, could it be said that the assessee and the buyer are related persons. That will depend upon the facts and circumstances of each case and it will have to be seen who is calling the shots in both the assessee and the buyer. When it is the same person the authorities can certainly fall back on the third proviso to clause (a) of Section 4(1) of the Act, to arrive at the value of the excisable goods. It cannot be that when the same person incorporates two companies of which one is the manufacturer of excisable goods and other is the buyer of those goods, the two companies being separate legal entities, the Excise authorities are barred from probing anything further to find out who is the person behind these two companies. It is difficult to accept such a narrow interpretation. True that shareholdings in a company can change but that is the very purpose to lift the veil to find out if the two companies are associated with each other. Law is specific that when duty of excise is chargeable on the goods with reference to its value than the normal price on which the goods are sold shall be deemed to be the value provided (1) the buyer is not a related person and (2) the price is the sole consideration. It is a deeming provision and the two conditions have to be satisfied for the case is to fall under clause (a) of Section 4(1) keeping in view as to who is the related person within the meaning of

clause (c) of Section 4(4) of the Act. Again if the price is not the sole consideration, then again clause (a) of Section 4(1) will not be applicable to arrive at the value of the excisable goods for the purpose of levy of duty of excise."

4.13 By following the above decision Delhi Bench has in the case of M/s Amar Enterprises [2017 (347) ELT 548 (Tri.-Del)] held as follows:-

11.1.1 *In respect of this issue, the Commissioner (Adjudication) in the impugned order inter alia observes as under :*

96. It is observed that all the firms, namely, (i)) M/s. Atlantic Chemicals, (ii) M/s. Foamsil Chemicals and (iii) M/s. Arun Chemicals, (iv) Amar Enterprises and (v) Arvind Rubber Mills were operating from A 1/11-B, Pahwa Mansion, Asaf Ali Road, New Delhi (hereinafter referred as Pahwa Mansion Office) which was declared registered office of Atlantic Chemicals. Shri J.S. Jain in his statement dated 20-4-93 admitted that the sale and purchase work of Atlantic Chemicals, Amar Enterprises and Arvind Rubber Mills was being carried on from the said premises; that the rent of the said office and electricity bills were paid by Amar Enterprises; that payment of bills & telephone installed in the said office was made by Atlantic Chemicals and sometimes by Arvind Rubber Mills. The correspondence in File No. 4 of Foamsil Chemicals pertaining to sundry debtors for the year 1992-93 recovered from their Pahwa Mansion Office, contained several letters addressed by different customers to Foamsil Chemicals in which the address of Foamsil Chemicals is of their Pahwa Mansion office. SCN fists out names of a few of the firms who had mailed their letters on the said address for Foamsil Chemicals, also recovered file containing vouchers in course of the search of the office premises on 20-4-93 which pertained to Arun Chemicals and which showed the Pahwa Mansion office as the address of Regd. Office of the firm. Further, in course of search of the residential premises of Shri J.S. Jain, situated at E-10, Preet Vihar, Delhi on 20-4-93, the

records of Atlantic Chemicals and Foamsil Chemical and Arvind Rubber Mills Pvt. Ltd. were also recovered from the ground floor of the said house. The Central Excise records and also other records pertaining to Atlantic Chemicals and Foamsil Chemicals were recovered from the room at 1st Floor of the said house. All the records were kept together and there was no segregation of records pertaining to different units.

From the records, it appears that "SCN states that records of all the units i.e. Atlantic Chemicals, Amar Enterprises and Arvind Rubber Mills as well as that of Arun Chemicals and Foamsil Chemicals were recovered from the same premises. Further, a cheque book of Foamsil Chemicals signed by Shri Naveen Kumar was also found in the in the Almirah kept in Shri J.S. Jain's room. Besides above, a file containing trade mark registration papers of 'Foamsil' and accident claim papers pertaining to truck, which was in the ownership of Foamsil Chemicals, were also recovered from the said office premises. A common letterbox showing the name of Foamsil Chemicals was also found affixed in the Pahwa Mansion office building. The above facts are not disputed by the Noticees. Their contention, however is that sharing of office premises & telephoney the noticees firms and no-demand of rent does not constitute evidence that Shri J.S. Jain was owner of Arun Chemicals and Foamsil Chemicals. It is observed that in the reply dated 9-1-95 of Atlantic Chemicals was admitted that Shri J.S. Jain, being MD of Arvind Rubber Mills remained stationed at this office premises and being the head of the family, he was respected by the customers who used to place orders with him which he passed on to the respective companies who executed the orders. Further, it was also stated that J.S. Jain being head of the family and by virtue of his senior position he was rendering advice to the various proprietors of the firms which obviously belong to the same group. The admitted position about the above facts and the role played by Shri J.S. Jain lend support to the

allegations made in the SCN in respect of clubbing proposition”.

11.1.2 *Further, the Commissioner (Adjudication) in the impugned order, inter alia in Paras 103 and 124 observes as under :*

"103. The SCN refers to specific instances and entries in the financial accounts of Atlantic Chemicals and Foamsil Chemicals which indicate that the said firms also had a common financial management. These cases include transactions under which money was transferred through cheque by Foamsil Chemicals to Atlantic Chemicals; payment made to UPSEB on behalf of one another, etc. However, no records was found indicating payment of interest by Atlantic Chemicals to Foamsil Chemicals or Arun Chemicals for keeping and utilizing their amounts in their business. Similar instances of fund transfers from Arun Chemicals to Atlantic Chemicals, Arvind Rubber Mills (P) Ltd. to Atlantic Chemicals and by Amar Enterprises to Foamsil Chemicals have been pointed out in the SCN. These monetary transactions from one firm to another and outstanding huge sums as credit balance with no interest liability indicate amply that the firms were freely utilizing the money or other firms in their business and without payment of any interest. The above facts including use of funds of one unit by other without payment of interest is not denied by the noticees.

124. In this case, there are certain outstanding facts. The 3 units, all proprietary concerns, are owned by three members of one family i.e. Sh. Parveen Kumar Jain (brother), Sh. Naveen Kumar Jain (brother) and Ms. Babita Jain (wife of Shri Naveen Kumar Jain). The goods manufactured are the same, that is RBA. There is use of one common brand names, i.e., 'Foamsil' and 'foamtax' which are owned by Shri Amar Kumar Jain who is brother of Sh. Parveen Kumar Jain and Sh. Naveen Kumar Jain, modus operandi adopted for disposal of manufactured goods and is also same, that is, all the three units claim

to be manufacture and also dealer in RBA and soad bi carb and their customers including those of Kerala and Maharashtra States concerned in this case are common. In procuring raw materials, such as, soda bi carb for manufacture of RBA and disposal of RBA, Shri Amar Kumar Jain (brother) and Sh. J.S. Jain (father) continued to play active and decisive role. Apart from claimed manufacture and sale of goods from these units Arvind Rubber Mills (owned by father Shri J.S. Jain and another brother Shri Amar Kumar Jain) and Amar Enterprises (owned by mother Ms. Kiran Bala Jain) play active role in the disposal of the goods manufactured by the three units. These units, that is, Atlantic Chemicals, Foamsil Chemicals and Arun Chemicals were situated in a piece of land purchased from the brother of Shri J.S. Jain at a nominal price; they were under the common management and financial control of only one family living in one house, and the business of all the firms was conducted jointly from one and the same office premises. On record, the firms were under the proprietorship of different person, but the whole show was being managed by Shri J.S. Jain and Shri Amar Kumar Jain. As per the noticees submissions, Foamsil Chemicals came into existence in June, 1987, and Arun Chemicals in April, 1988 or Jan., 1989 (about inconsistency regarding precise period of Arun Chemicals being in operation refer Para 110 supra). There was no distinction in the management of the firms and these firms were artificially fragmented only for the sake of availing exemption under the Notification No. 175/86-C.E. (later 1/93-C.E.). Thus, the clearances of all the units were required to be clubbed for computing the value of clearances for the applicability of Notification No. 175/86-C.E. (later 1/93-C.E.). When this is done, the value of clearances of RBA from the said 3 units exceeded the eligibility limit in a financial year and hence the benefit of Notification No. 175/86-C.E. was not available to any the said units. They were, therefore, required to clear the RBA manufactured by them on payment of full rate of duty. This was not done. It is

therefore, held that Atlantic Chemicals and Foamsil Chemicals have contravened the provisions of Rules 9(1), 173B, 173F, 173G of CER and cleared RBA manufactured in their factories without payment of appropriate duty amounting to Rs. 38,45,363.59 and Rs. 31,39,143.16 respectively during the period from 1989-90 to 1993-94. Similarly, Arun Chemicals are also held to have manufactured and cleared RBA without payment of duty amounting to Rs. 1,21,360/- in violation of Rule 9(1), 173B, 173G of the CER. As this short/non-payment of duty was done by suppression of facts, such as, not disclosing true nature of the ownership, control and management of firms and their activities, misdeclaration of lads, such as, the brand names not owned by them in the classification lists and availment of exemption on the branded goods, etc. the same is held recoverable from them under proviso to Section 11A(1) of the Act read with Rules 9(2) of the CER. For the aforesaid violation, they are also held liable to penalty under Rule 9(2) and 173Q of the CER.

11.1.3 *After having gone through the facts on record and the submissions of both sides, we are of the considered view that manufacture and clearances made by the respective noticees/appellants - M/s. Atlantic Chemical Industries, M/s. Foamsil Chemicals (not appellant here) and M/s. Arun Chemicals for the item namely RBA availing the benefit of Notification No. 175/86-C.E. (1/93-C.E. later) have to be clubbed together as we hold that these units are one and the same, when their operations are under common management and financial control and have mutuality of financial interest with each other. When it is so, then we agree with the findings of the impugned order.*

11.1.4 *Hon'ble Supreme Court's decision in the case of Calcutta Chromotype Ltd. v. C.C.E., Calcutta - 1998 (99) E.L.T. 202 (S.C.) had observed that depending upon the facts and circumstances of the case, veil of the company has to be lifted to find the real facts. In the present case also, three units namely, M/s. Atlantic Chemical Industries, M/s. Foamsil Chemicals and M/s. Arun Chemicals, whatever is their*

constitution, (these are proprietary concerns), are under common management and closely controlled by only one person Shri J.S. Jain, who is one of the appellants here. The facts and circumstances have warranted to examine the reality of these units; and after going behind the mask of these entities, it has been revealed that activities of these units i.e. manufacture, clearance, etc. has to be clubbed together. In this regard, we take support from the Hon'ble Supreme Court's observations in the above case of Calcutta Chromotype Ltd. (supra) which are given below :

14.

(emphasis supplied)

11.1.5 *We do not agree with the appellants' contentions that impugned order has fixed liabilities of Central Excise duty separately on the noticee/ appellant, namely, M/s. Atlantic Chemical Industries, M/s. Foamsil Chemicals (who is not the appellant) here and M/s. Arun Chemicals and have held that their clearances are to be clubbed whereas the impugned order concludes that M/s. Arun Chemicals had no manufacturing facilities and if it is so, how liability could be fixed against M/s. Arun Chemicals.*

11.1.6 *In the peculiar facts and circumstances of the case, we agree with the conclusion of the impugned order that these three firms are one and the same; their clearances are to be clubbed, as discussed earlier. Regarding the submission that M/s. Arun Chemicals had got no manufacturing activity, it may be mentioned that both M/s. Foamsil Chemicals and M/s. Arun Chemicals have been actively involved in the operations of wrongly availing exemption under Notification No. 175/86-C.E. by 'artificial fragmentation when there was no distinction in management of the firms'. Therefore, M/s. Arun Chemicals (who is one of the appellants) deserves to be penalized under Rules 9(2) and 173Q of Central Excise Rules. We are giving no specific findings on M/s. Foamsil Chemicals as they are not the appellant here.*

11.1.7 *From the facts (impugned order Para 99), it is clear that noticee appellants M/s. Atlantic Chemicals played a major role in the manufacturing of the item RBA. Many of the machinery items and facilities for manufacturing are available only with M/s. Atlantic Chemicals. Therefore, after clubbing of clearances of the subject three units, liabilities for payment of duty of Central Excise is hereby fixed on M/s. Atlantic Chemicals. Consequently, the appellant M/s. Atlantic Chemicals is to pay total duty of Central Excise of Rs. 71,06,066/- (i.e. Rs. 38,45,363/- + Rs. 31,39,343/- + Rs. 1,21,360/-) for the RBA manufactured and cleared during 1989-90 to 1993-94. In this regard, corresponding penalty of Rs. 70,20,000/- is also imposed on M/s. Atlantic Chemicals under Rules 2(2) and 173Q of C. Excise Rules. Further M/s. Arun Chemicals have been involved in continuing this operation of wrongly claiming exemption Notification No. 175/86-C.E.; therefore, the penalty of Rs. 1,20,000/- imposed on them is hereby sustained."*

This decision of the Tribunal has been affirmed by the Hon'ble Supreme Court as reported at 2018 (361) ELT A70 (SC).

4.14 In case of M/s R.K. Chaddha 2016 (332) ELT 650 (All.) Hon'ble Allahabad High Court has been held as follows:-

"14. *Having heard the learned counsel for the parties, the Court finds that the submission of the learned counsel for the State appears to be attractive in the first flush but, on a closer scrutiny, the Court finds that the doctrine of lifting the corporate veil is not applicable in the present facts and circumstances of the case.*

15. *The company, in law has a separate legal entity of its own. Once incorporated, the entity of the company is entirely separate from that of its shareholders. The company has its own name, has its own seal, has its own assets and it can be sued or can sue for its own purposes. On the other hand, the liability of the shareholders is limited to the extent of its own shares, namely, to the extent of the capital invested by the shareholder. The creditors of the company cannot obtain satisfaction from*

the assets of the shareholders of the company and similarly, the shareholders have no right to the assets of the company. This position was recognized in Salomon v. Salomon & Company Ltd., 1897 A.C. 22 HL and, since then, this principle has been consistently being followed till date.

16. *In due course of time, certain exceptions were carved out in the doctrine of separate juristic personality of the company. The doctrine of lifting the corporate veil was carved out to be used whenever and wherever the situation so warranted. Lord Denning in Littlewoods Stores v. I.R.C., 1969 (1) WLR 1241 held :-*

"The doctrine laid down in Salomon's case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the Courts cannot see. But that is not true. The Courts can, and often do, draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the Courts should follow suit...."

17. *Since then, the doctrine of lifting of the corporate veil has been firmly established in a series of cases. The corporate veil could be lifted when it is found that the corporate personality was used as a mask for evasion of tax where transactions were found to be a sham or collusive or where the corporate personality was employed to circumvent statutory liability or to evade the tax liability. In such a situation, the veil could be lifted to find out the real culprits hiding behind it. It was held that even though there are no statutory provisions, the circumstances so existing in the particular case warrants the lifting of the corporate veil to realize the tax from the Directors or partners as the case may be as has been held*

in Telco & Ors. v. State of Bihar - AIR 1965 SC 40 (paras 24 & 27); CIT v. Shree Minakshi Mills Ltd., Madurai - AIR 1967 SC 819 (para 8); New Horizon Ltd. & Another v. Union of India and Others (1995) 1 SCC 478; Delhi Development Authority v. Skipper Construction Co. P. Ltd. (1996) 4 SCC 622 (paras 24 to 28); Calcutta Chromotype Ltd. v. Collector of Central Excise, Kolkata - AIR 1998 SC 1631 = 1998 (99) E.L.T. 202 (S.C.) (paras 12, 14); Shubhra Mukharjee & Another v. Bharat Cooking Coal Ltd. & Another - (2003) 3 SCC 312; Kapila Hingorani v. State of Bihar - JT 2003 (5) SC 1 (paras 25, 26, 27); Vodafone International Holding B.V. v. Union of India and Others - JT 2012 (1) SC 410 (paras 167 & 168).

18. *In Shri Ram Shyam Shukla and Others v. Asstt. Collector, Collection, Trade Tax, 2004 NTN (25) 768 this Court held that where circumstances so warranted, persons responsible for illegal acts and who were found to evade tax, the corporate veil could be lifted to recover the dues from the persons responsible for such illegal acts. The Court held :-*

"4. We do not agree. The legal principle that a company is a distinct legal entity separate from its directors and shareholders (vide Soloman v. Soloman & Co. Ltd., 1897 A.C. 22 H.L.) was evolved to encourage business and industry since many businessmen feared to start a new business or venture because if the said business/venture failed (due to competition, recession, etc.) even their personal assets could be attached and sold for the recovery in respect of the dues against the company. Hence his principle was created so as to encourage businessmen to take risks and set up industries and businesses and it has played a historical role in helping industrialization. This principle was not made to help tax evaders. As held by the Supreme Court in

Delhi Development Authority v. Skipper Co. (P) Ltd. - AIR 1996 SC 2005 (vide para 28) :-

The concept of corporate entity was evolved to encourage and promote trade and commerce, but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the Court would ignore the corporate character and will look at the reality behind the corporate veil.

5. The principle of lifting the veil of corporate personality has been upheld in Subhra Mukharjee & Another v. Bharat Cooking Coal Ltd. & Another (2003) 3 SCC 312; Calcutta Chromotype Ltd. v. Collector of Central Excise, Kolkata - AIR 1998 SC 1631; New Horizon Ltd. & Another v. Union of India and Others - 1995 (1) SCC 478; C.I.T. v. Meenakshi Mills Ltd., Madurai - AIR 1967 SC 819; Telco & Ors. v. State of Bihar - AIR 1965 SC 40; Juggilal Kamlapat v. CIT, AIR 1969 SC 932."

4.15 In case of British Scaffolding India Pvt. Ltd. [2014 (313) ELT 87 (Tri.-Del.)] Delhi Bench has held as follows:-

7. *SSI Exemption is subject to conditions specified in it. One condition for this exemption notification is that where a manufacturer clears specified goods from one or more factories, the Exemption in his case shall apply for the total value of clearances mentioned against each of the serial numbers in the said table and not separately for each factory. Another condition of the Notification is that the aggregate value of clearances of all excisable goods for home consumption by a manufacturer from one or more factories during the preceding financial year does not exceed a particular threshold limit, as mentioned in the*

Notification. Thus, when a manufacturer has four factories located at different locations, and the SSI Exemption Notification prescribes nil rate of duty for first clearances of specified goods worth Rs. 50 lakhs in a financial year, each of these factories would not be separately eligible for full duty exemption in respect of its first clearances worth Rs. 50 lakhs in a financial year and for the purpose of this exemption, it is aggregate value of clearance of all the factories put together which would be considered. Similarly, eligibility for SSI Exemption during a particular financial year, shall be determined on the basis of aggregate value of clearances of all excisable goods for home consumption during the preceding financial year made from all the factories of the manufacturer and if the aggregate value exceeds the threshold limit, none of the units would be eligible for SSI Exemption even if the value of clearances for home consumption of all excisable goods made by each individual unit during the preceding financial year is well within the threshold limit for SSI exemption. It may happen that a manufacture may have several factories located in different states falling under the jurisdiction of different Commissioners of Central Excise. If each of these factories was availing the SSI Exemption separately and if it is found that for a particular financial year, the aggregate value of their clearances of all excisable goods during the preceding financial year had exceeded the threshold limit for SSI Exemption, none of these units would be eligible for SSI Exemption during that year. In such a situation, duty can be demanded by the Jurisdictional Central Excise Authorities separately from each unit and the question of identifying the main unit and dummy units and demanding duty only from main unit does not arise, as in the scheme of collection of Central Excise duty, as laid down in the Central Excise Act, 1944 and the rules made thereunder, the collection of duty is manufacturing unit wise and if a manufacturer has two or

more factories located at separate locations, each unit is required to obtain separate Central Excise registration and is assessed to duty separately by the jurisdictional central excise officers. If there is short payment of duty by different units of a manufacturer on account of wrong availment of SSI Exemption, separate duty demands would have to be confirmed by the respective central excise officers having jurisdiction over the unit. If, however, the C.B.E. & C. appoints a common adjudicating authority, that common adjudicating authority can pass an adjudication order demanding duty from the units located in different commissionerates. The question of identifying the main unit and the dummy unit and demanding duty only from the main unit arises only in that situation when on investigation, only one unit is found to be actually functioning and other units are found to be just non-functional fake units established just to show bogus production and clearances in their name.

7.1 *However in most of the cases, the fact of common ownership of different units by a person is not so obvious and may be carefully camouflaged. For example - if there is a manufacturing unit of a proprietorship concern of a person 'X', there is a second manufacturing unit owned by a partnership concern 'A' with 'X' and his wife 'Y' as partners, there is a third manufacturing unit owned by a private limited company 'B' with shareholding by 'X', his son 'Z' and the partnership concern 'A' and there is a fourth manufacturing unit owned by another private limited company 'C' with shareholding by 'A', 'B' and another son Z₂ of 'X' and if these four units owned by 'X', 'A', 'B' and 'C' are each availing of SSI Exemption, a question arises as to whether they are to be treated as separate entities or units owned by the same person, for the purpose of SSI Exemption.*

7.1.1 *While a company is a legal person entirely distinct from its shareholders, in terms of Apex Court's Judgment in case of Income Tax Commissioner, Madras v. Meenakshi Mills, Madurai, reported in AIR 1967 Supreme Court 819, in certain exceptional cases, the court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade and that the court has powers to disregard the corporate entity if it is used for tax evasion or to circumvent the tax obligation. Same view has been taken by the Apex Court in cases of :-*

(a) Calcutta Chromotype v. Collector of Central Excise, reported in 1998 (99) E.L.T. 202 (S.C.) = (1998) 3, SCC-681;

(b) Subra Mikharjee & another v. Bharat Cooking Coal Ltd., reported in (2000) 3 SCC-312; and

(c) Delhi Development Authority v. Skipp Construction Co. (P) Ltd., reported in (1996) 4 SCC-622.

The Apex Court in the case of Associated Rubber Industry Ltd., reported in 1986 (157) ITR-77 (S.C.), relying upon its earlier judgment in case of Medowell & Co. Ltd. v. CTO, reported in 1985 154 ITR-148, 161 (S.C.) has held that even if companies are distinct legal entities having separate existence, this is not the end of the matter and it is the duty of the Court in every case, where ingenuity is expended, to get behind the smokescreen and discover the true state of affairs. Thus, the principle of lifting the corporate veil for discovering the true state of affairs behind the veil of the corporate entity is a well settled legal principle. It is this principle which has to be applied for determining as to whether two or more manufacturing units owned by separate partnership firms, private limited companies and/or public limited companies are to be

treated as the units of the same manufacture. On this point, the Apex Court in case of CCE, Delhi v. Modi Alkalies & Chemicals Ltd., reported in 2004 (171) E.L.T. 155 (S.C.), has held that when on lifting the corporate veil it is found that only one person/company has extraordinary interest and pervasive control over the financial matters and management of other companies, irrespective of the latter having separate sales tax, income tax and central excise registration, their clearances have to be clubbed for determining their eligibility for the SSI Exemption Notification No. 1/93-C.E. In this regard, Para 87 of the judgment is reproduced below :-

"Whether there is inter-dependence and whether another unit is, in fact, a dummy has to be adjudicated on the facts of each case. There cannot be any generalization or rule of universal application. Two basic features which prima facie show interdependence are pervasive financial control and management control. In the present case facts clearly show financial control. Undisputedly, the share capital of each of the three companies was Rs. 200/-. Though it was claimed that financial assistance was availed from the financial companies, it is on record that the unsecured loans advanced by MACL to the three companies were substantially heavy amounts as on 1-4-1998. NGCPL received an amount of Rs. 1.55 crores. About 14 lakhs appeared to have been paid after the issue of show cause notice. Loans advanced to NGCPL was about Rs. 52 lakhs while to SCGCPL it was about Rs. 65 lakhs. The finding of the Commissioner that the financial assistance from the financial institutions were availed with the aid and assistance of MACL has not been seriously disputed. Apart from that, the cylinders were brought on lease by MACL from another

concern and were sub-leased to the three companies. The cylinders bore the name of MACL. If the three companies had separate standing as contended it could not be explained why they could not get the cylinders directly from the lessors on lease basis and the need for introducing MACL as the lessee and then the three companies becoming sub-lessees. As noted by the Commissioner, entire receipts were paid as lease amount to MACL. Here again, the under-valuation aspect assumes importance. While the supply by MACL to three companies was Rs. 0.50 per unit, the sale price by the three companies was Rs. 5 per unit. It is on record that accounts were kept by common staff and marketing was done under the supervision of a person who belongs to the same group of concerns. The amounts have been collected by an employee of MACL. The so-called Directors of the companies were undisputedly employees of MACL. Almost the entire financial resources were made by MACL. The financial position clearly shows that MACL had more than ordinary interest in the financial arrangements for companies. The statements of the employees/Directors show that the whole show was controlled, both on financial and management aspects by MACL. If these are not sufficient to show inter-dependence probably nothing better would show the same. The factors which have weighed with CEGAT like registration of three companies under the sales tax and income tax authorities have to be considered in the background of factual position noted above. When the corporate veil is lifted what comes into focus is only the shadow and not any substance about the existence of the three companies independently. The Circular No. 6/92, dated 29-5-1992 has no relevance because it related

to Notification No. 175/86-C.E., dated 1-3-1986 and did not relate to Notification No. 1/93. The extended period of limitation was clearly applicable on the facts of the case, as suppression of material features and factors has been clearly established. If in reality the three companies are front companies then the price per unit to be assessed in the hands of MACL is Rs. 5 and not Rs. 0.50 as disclosed. The question whether there was manufacture or not was not in issue before the Commissioner. The plea that there was no manufacture has also to be rejected in view of the fact that exemption was claimed by the three companies as manufacturers to avail the benefit of Central Excise Notification No. 1/93.

Same view has been expressed by the Apex Court in its judgment in case of Supreme Washers Pvt. Ltd. (Supra).

7.1.2 *The Board's Circular No. 6/92, dated 29-5-1992 clarifying that limited companies, whether public limited or private limited are separate entities and each such limited company is a manufacturer by itself and would be entitled for SSI Exemption separately, has not considered the principle of lifting of corporate veil in the cases where different corporate entities appear to be just colorable devices for tax evasion, and hence this circular is not in accordance with the provisions of law. In accordance with Apex Court's Judgment in case of CCE v. Ratan Melting & Wire Industries, reported in 2008 (231) E.L.T. 22 (S.C.) = 2008 (12) S.T.R. 416 (S.C.), a circular which is contrary to the statutory provisions, has no existence in law. Though in case of Supreme Washers Pvt. Ltd. (supra), after upholding the principle of lifting of corporate veil the Apex Court taking note of the Board's Circular No. 6/92, dated 29-5-1992, had remanded the matter to the Tribunal for examining the applicability of this circular, since this circular being contrary to the law laid down by the Apex*

Court in the case of Income Tax Commissioner, Madras v. Meenakshi Mills, Madurai (supra), M/s. Calcutta Chromotype v. CCE (supra), Delhi Development Authority v. Skippe Construction Co. (P) Ltd. (supra), Associated Rubber Industry Ltd. (supra) and CCE v. Modi Alkalies & Chemicals Ltd. (supra), has no existence in law, the Appellant's plea for decision of this matter on the basis of Board's Circular No. 6/92-C.E. is not acceptable.

7.1.3 *Thus, if there is evidence on record to prove that a particular person, whether natural or juristic, has comprehensive financial and management control over several entities and is the actual beneficiary of their activities, the clearances of the factories owned by these entities are to be clubbed for the purpose of determining their eligibility for SSI Exemption by treating them as the units of only one manufacturer, even if those units are owned by different public limited companies, private limited companies or partnership firms. If on clubbing their clearances during the preceding financial year, the aggregate value of the clearances is found to be exceeding the threshold limit for SSI Exemption, the SSI Exemption would have to be denied to each of them and if each of them is a functioning unit and not a non-functional dummy unit, the duty can be demanded separately from each unit.*

7.1.4 *However, if there is only one unit which is functioning unit and other units are just dummy units, not actually engaged in manufacturing activities, duty would have to be demanded only from the existing unit by treating the other units as dummy units, and clubbing the clearances made in the name of those dummy units with the clearances of the main unit and for this purpose, there is no need to invoke the provision regarding clubbing in the SSI Exemption Notification."*

This decision has been affirmed by Hon'ble supreme Court reported as 2016 (335) ELT A163 SC).

4.16 In the case of Global Yarn Spinners [2007 (214) ELT 401 (Tri-Chennai)] following has been held:-

7. *On the basis of 'relationship' found between M/s. Goodwill and M/s. RRT under Section 4(4)(c)/4(3)(b), there is a demand of duty of over Rs. 24.70 lakhs on the former for the period of dispute. Learned counsel for the appellants argued that there was no evidence of mutuality of business interest between M/s. Goodwill and M/s. RRT and therefore the latter was not to be held to be 'related' to the former in terms of Section 4(4)(c)/Section 4(3)(b). Learned SDR countered by reiterating the relevant findings of the Commissioner (Appeals). She also referred to the relevant provisions of Companies Act to show that M/s. RRT were related to M/s. Goodwill in terms of Section 4(3)(b)(ii) of the Central Excise Act. She argued that, on the facts of the case, the corporate veil required to be lifted to expose the relation between the two companies. In this connection, reliance was placed on the Supreme Court's judgment in Calcutta Chromotype Ltd. v. Collector - 1998 (99) E.L.T. 202 (S.C.) and Commissioner v. ITEC (P) Ltd. - 2002 (145) E.L.T. 280 (S.C.). After considering the rival arguments, we agree with learned SDR that the constitution of M/s. Goodwill and that of M/s. RRT indicated that S/Shri R. Rajendran, R. Balakrishnan, R. Thiruvassagam (all sons of the Chairman of M/s. Goodwill) and Smt. Leelavathi (wife of the Managing Director of M/s. Goodwill) together held all the shares in M/s. RRT and about 45% of the shares in M/s. Goodwill. They were Directors of both the companies. The Managing Director of M/s. Goodwill is the brother of the Chairman of the company. The Chairman's wife, three sons and three daughters-in-law and the Managing Director's wife are the other Directors of the company. As rightly held by learned Commissioner (Appeals), on these facts, one would be justified in lifting the corporate veil to see the ground realities. This exercise was neatly done by the lower appellate authority in the light of the Apex Court's ruling in Calcutta Chromotype (supra) and it was held that M/s. RRT were related to M/s. Goodwill in terms of Section 4(4)(c)/Section 4(3)(b) of*

the Central Excise Act. We are in full agreement with this decision of the Commissioner (Appeals). We also note that M/s. Global have conceded similar 'relation' between them and M/s. RRT."

This decision of the Tribunal has been affirmed by the Hon'ble Supreme Court as reported at 2016 (338) ELT A291 (SC).

4.17 In view of the discussions as above we do not find any merits in the submissions of the appellant in respect of the clubbing of the clearances. The impugned order holding that the clearances for the period 2014-15 are to be clubbed as appellants has clearly and being aware that their value of clearance has crossed the exemption limit as provided by the notification no 8/2003-CE had crossed the exemption limit created the dummy unit to continue operating within the exemption limit. Appellants have cleverly made a scheme for suppressing the value of clearances with intent to evade payment of duty for which they are also liable for penal action. Accordingly, penalty imposed on Appellant-I under rule 25 (1) of the central Excise Rules, 2002 read Section 11AC is justified in view of the decision of the Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills [2009 (238) ELT 3 (SC)].

4.17 In our view as the demand of duty is upheld the demand for interest follows as natural corollary. In the case of Padmashri V.V. Patil SSK Ltd. [2007 (215) ELT 23 (Bom)] Hon'ble Bombay High Court has held as follows:-

10. So far as interest Under Section 11AB is concerned, on reference to text of Section 11AB, it is evident that there is no discretion regarding the rate of interest. Language of Section 11AB(1) is clear. The interest has to be at the rate not below 10% and not exceeding 36% p.a. The actual rate of interest applicable from time to time by fluctuations between 10% to 36% is as determined by the Central Government by notification in the official gazette from time to time. There would be discretion, if at all the same is incorporated in such notification in the gazette by which

rates of interest chargeable Under Section 11AB are declared.

The second aspect would be whether there is any discretion not to charge the interest Under Section 11AB at all and we are afraid, language of Section 11AB is unambiguous. The person, who is liable to pay duty short levied / short paid / non levied / unpaid etc., is liable to pay interest at the rate as may be determined by the Central Government from time to time. This is evident from the opening part of Sub-section (1) of Section 11, which runs thus:

Where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person, who is liable to pay duty as determined under Sub-section (2) or has paid the duty Excise under Sub-section (2B) of Section 11A, shall in addition to the duty be liable to pay interest at such rate....

The terminal part in the quotation above, which is couched with the words "shall" and "be liable" clearly indicates that there is no option. As discussed earlier, this is a civil liability of the assessee, who has retained the amount of public exchequer with himself and which ought to have gone in the Page 1612 pockets of the Central Government much earlier. Upon reading Section 11AB together with Sections 11A and 11AA, we are of firm view that interest on the duty evaded is payable and the same is compulsory and even though the evasion of duty is not mala fide or intentional."

4.18 As appellant-II and appellant-III were the persons responsible for planning for evasion of duty, penalties imposable under Rule 26 of the Central Excise Rules 2002. We take note of the fact that penalty equivalent to the duty evaded has been imposed on the partnership firm in which appellant-II and appellant-III are partners. In our view, penalty on appellant-II may be reduced to Rs.50,000/- only and on appellant-III it

reduced to Rs.75,000/-. With above modification impugned order is upheld.

5.1 Appeal of appellant-I is dismissed and the appeals by appellant-II and appellant-III are partly allowed to the extent of reducing penalties imposed on them as indicated in para-4.18.

(Pronounced in open court on-15 February, 2024)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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