

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

REGIONAL BENCH - COURT NO.I

Excise Appeal No.51664 of 2014

(Arising out of Order-in-Original No.01/Commr./LKO/Remission/2014 dated 16/01/2014 passed by Commissioner of Central Excise & Service Tax, Lucknow)

M/s K.P. Pan Products Pvt. Ltd.,
(C-524, Transport Nagar, Lucknow)

.....Appellant

VERSUS

Commissioner of Central Excise, LucknowRespondent

(7-A, Ashoka Marg, Lucknow)

APPEARANCE:

Shri Aditya Kumar, Advocate for the Appellant

Shri Santosh Kumar, Authorised Representative for the Respondent

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

FINAL ORDER NO.70109/2024

DATE OF HEARING : 09 November, 2023
DATE OF PRONOUNCEMENT : 05 March, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-In-Original No. 01/Commissioner/Lko/ Remission/2014 dated 16.01.2014 of the Commissioner, Central Excise & Service Tax Commissionerate, Lucknow. By the impugned order following has been held:

"Order

I disallow the remission of Central Excise Duty amounting Rs,2,07,09,677/- (Two crores seven lacs nine thousand six hundred and seventy seven) as requested by the party vide letter dated 14.02.2011."

2.1 Appellant is engaged in manufacture and clearance of Pan Masala and Pan Masala containing tobacco or "Gutkha" falling under sub-heading no 24039990 of the first schedule to the Central Excise Tariff Act, 1985. They were discharging Central Excise duty on the basis of capacity of production under Section 3A of the Central Excise Act read with Pan Masala Packing Machines Capacity Determination and Collection of Duty) Rules, 2008.

2.2 During the month of January there were 88 (Eighty Eight) Pouch Packing Machines available in the unit in which 83 (Eighty Three) machines were installed and 05 (Five) machines were in sealed/uninstalled condition. Appellant filed Form F-1 on 27.12.2010 in terms of Rule 6(1) in which 83 machines were declared as installed and paid the central excise duty amounting Rs. 12,84,00,000/-(Twelve crore eighty four lacs) vide GAR-7 dated 04.01.2011 in terms of Rule 7, accordingly the party filed Form F-2 on 10.01.2011 in terms of Rule 9.

2.3 A fire accident broke out on the top floor of the unit in the evening of 13.01.2011. After the accident, the unit remained closed till 18.01.2011. They party informed the department regarding closure of the unit due to fire accident vide their letter dated 14.01.2011 along with Form-I.

2.4 As per the direction of jurisdictional Assistant Commissioner, all the 83 (Eighty Three) installed Pouch Packing Machines were sealed/ uninstalled on 14.01.2011 at 20:00 hrs. Subsequently on the request made vide letter dated 17.01.2011 these machines were unsealed/ installed on 19.01.2011 at 00:30 hrs.

2.5 Appellant filed a remission claim vide letter dated 14.02.2011 along with a copy of report of fire officer dated 02.02.2011 requesting for remission of Central Excise Duty under Rule 21 of Central Excise Rules, 2002 amounting to Rs. 2,07,09,677/- (Two Crores Seven Lakhs Nine Thousand Six Hundred and Seventy Seven) on the ground that the manufacturing activities in the factory remained suspended on

account of natural causes resulting in loss of production of Gutkha for 05 days.

2.6 The remission claim has been disallowed by the impugned order.

2.7 Aggrieved appellant have filed this appeal

3.1 We have heard Shri Aditya Kumar Advocate for the appellant and Shri Santosh Kumar, Authorized Representative for the revenue through virtual mode.

3.2 Vide email dated 16th November 2023 counsel for appellant filed written submissions which have been taken on record. Arguing for the appellant learned counsel submits:

- the perversity inherent in the impugned order is manifest from finding the rendered by the adjudicating authority with respect to the second proviso to Rule 8 of the Rules, inasmuch as, the said proviso can only be pressed into service in a case where an installed packing machine is not used during the month.
- it is an admitted fact that on 14/01/2011 the departmental officers had sealed and uninstalled all the pouch packing machines that were available in the factory premises of the appellant. This proviso clearly supports the case of the appellant, inasmuch as, it is only an installed and operational packing machine that can be deemed to be engaged in manufacturing.
- Legal fiction of deemed production/manufacture on which the scheme of compounded levy operates is only for the express purpose mandated by statute and no further. Reliance is placed on the decision
 - Shakuntala, [1961 SCC OnLine SC 105 = AIR 1966 SC 719]
 - Moon Mills Ltd., reported in (1966) 2 SCR 393
 - Mancheri Puthusseri Ahmed [(1996) 6 SCC 185]
 - Vineeta Sharma_v. Rakesh Sharma, [(2020) 9 SCC 1].

- In the present case, where undisputedly, the pouch packing machines, which, at the relevant time, was the only factor relevant for production in terms of Rule 4 of the Rules were sealed and uninstalled, the legal fiction with respect to deemed manufacture cannot operate. Thus, it is beyond any cavil that, the appellant cannot be deemed to have been manufacturing notified goods during the period between 14/01/2011 and 18/01/2011 (both days inclusive).
- Rules provide for proportionate calculation of duty, Rule 7 of the Rules provides that the duty payable for a particular month is to be calculated with respect to the number of operating packing machines in the factory during the month. Thus, the said Rule also clarifies that duty is payable only with respect to operating packing machines.
- Duty was paid by the appellant in advance on 04/01/2011 for the month of January, 2011 in accordance with Rule 9 of the Rules. The fourth, fifth and the last provisos to Rule 9 clearly provide for calculation of pro rata duty on the basis of the total number of days in that month.
- Abatement of duty as provided for in rule 10 not applicable to the present case and rule 21 of the Central Excise Rules, 2002 is attracted in the present case, and loss of goods is nothing but loss of production capacity
- Rules are not a self-contained island which does not admit of the application of the parent statute or other subordinate legislation there under.
- Rule 18 of the expressly provides for the application of the Central Excise Act, 1944 and the Central Excise Rules, 2002. Accordingly, the application for remission of duty filed under Rule 21 of the Central Excise Rules, 2002 which specifically provides for remission of duty in case of loss of goods due to unavoidable accident.
- Appellant was working under compounded levy scheme as provided for under section 3A of the Central Excise Act, 1944. It is relevant to note that under the compounded

levy scheme central Excise duty is not paid on the actual manufacture or removal of goods but is rather paid on the basis of capacity of production in respect of notified goods. This being so, the expression contained in Rule 21 of the Central Excise Rules, 2002, "goods have been lost or destroyed by natural causes or unavoidable accident" would, in the context of compounded levy scheme or the Rules, necessarily have to be interpreted as loss of production capacity

- due to operation of the legal fiction regarding production and removal of goods which is based on the annual capacity of production which is determined with respect to the number of installed/operating packing machines, the loss of goods is equal to the loss of production capacity. It is humbly reiterated that in the compounded levy scheme even if finished goods had been destroyed the same would have no effect whatsoever, inasmuch as, the charging section (section 3A) and the Rules do not provide for assessment or collection of duty on the basis of actual manufacture or removal, which is the normal manner of collection of duty as provided for under section 3 of the Act.
- Thus if finished goods had been lost or destroyed during the fire incident, the same would have had no effect whatsoever on the remission application filed by the appellant, inasmuch as, due to the appellant operating under the compounded levy scheme, the regular manner of assessment and collection of duty would have no application.
- The loss of goods in the context of Rule 21 of the Central Excise Rules, 2002 can only be interpreted to mean loss of production capacity and as the appellant had lost production capacity for five days in the month of January, 2011.
- Rule 10 of the Rules with respect to abatement are ex facie inapplicable in the facts of the instant case, the only option

which remained was to prefer an application seeking remission under Rule 21 of the Central Excise Rules, 2002.

- it is well settled by a large number of judicial pronouncements that a litigant cannot be remedied less.
- Department cannot be unjustly enriched at the expense of an assessee as has been held in the following cases:
 - Kanhaiya Lal Makund Lal Saraf, [1958 SCC OnLine SC 28 = AIR 1959 SC 135].
 - P. Rama Rao 1989 SCC OnLine Ori 341],
- Fire due to short circuit is nothing but an unavoidable accident in terms of rule 21 of the central excise rules. The report of the fire department dated 07/02/2011 nowhere mentions that the fire broke out due to gross negligence on the part of the appellant, as has been incorrectly observed by the Ld. Commissioner. On the other hand, it is specifically observed in the said report that the fire possibly broke out due to short circuit in the line going from the generator. Such fire accidents due to short circuit have been considered as unavoidable accident giving rise to claim for remission.
 - M. Kumar Udhyog (P) [2014 (306) ELT 19 (All.)]
 - Raltronics India Pvt. Ltd. [2017 (354) ELT 324 (All.)]
 - Hindustan Zinc reported in 2009 (233) ELT 61 (Raj.)
 - Lord Chloro Alkali Ltd. [2013 (293) ELT 68 (T)]
 - U.P. State Sugar Corporation Ltd. [2014 (302) ELT 249 (T)]
- Appeal be allowed.

3.3 Arguing for the revenue learned authorized representative reiterates the findings recorded in the impugned order.

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

4.2 For denying the remission of duty as claimed by the appellant Commissioner has in the impugned order held as follows:

"The party has taken plea that on 13.01. 2011, an accidental fire broke out in their factory premises and the fire brigade was called which doused the fire by throwing water etc. On account of fire in the factory, the stocks of betel nuts and Katha (Catechu) were burnt and production of the notified goods had not taken place for more than five (05) days and manufacturing activities in their factory remained suspended during the said 05 days on account of natural causes and they lost the production of gutkha as all the machines remained inoperative during the said period and they intimated the same to the Department Accordingly, the provisions of Rule 21 of the Central Excise Rules which provides for remission of duty in respect of goods lost or destroyed by natural causes or unavoidable accident, are applicable in their case.

Before going through the issue / would like to put the provision of Rule 21 of the Central Excise Rules, 2002; Which, is reproduced below:

"RULE 21. Remission of duty. –

Where it is shown to the satisfaction of the Commissioner that goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal, he may remit the duty payable on such goods, subject to such conditions as may be imposed by him by order In writing:

Provided that where such duty does not exceed ten thousand rupees, the provisions of this rule shall have effect as if for the expression "Commissioner" the expression "Superintendent of Central Excise" has been substituted

Provided further that where such duty exceeds ten thousand rupees but does not exceed one lakh rupees, the provisions of this rule shall have effect as if for the expression "Commissioner", the expression "Assistant

Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be" has been substituted

Provided also that where such duty exceeds one lakh rupees but does not exceed five lakh rupees, the provisions of this rule shall have effect as if for the expression "Commissioner", the expression "Joint Commissioner of Central Excise or Additional Commissioner of Central Excise, as the case may be" has been substituted.

Bare reading of above, the term "remission" means waiver of Central Excise duty legally payable. According to Rule 21 of the Central Excise Rules, 2002 remission of duty can be granted in the following cases

- a) Goods have been lost or destroyed by natural causes.*
- b) Goods have been lost or destroyed by unavoidable accident.*
- c) Goods are claimed by the manufacturer as unfit for consumption or for marketing.*

at any time before removal, subject to such conditions as may be imposed by the proper officer by order in writing

Thus according to Rule 21, the remission can be claimed only where, the goods have been lost or destroyed, by natural causes, or by the unavoidable accident. Now, it is beyond dispute that an accidental fire broke out on 13.01.2011 in the factory premises of the party and the fire brigade was called which doused the fire by throwing water etc. On account of fire in the factory, the stocks of betel nuts and Katha (Catechu) were burnt. The report dated 07.02.2011 of the Chief Fire Officer, Lucknow clearly states that the fire accident occurred on 13.01.2011 was due to carelessness/negligence. In this report, the Chief Fire Officer has nowhere stated that the party had made

any arrangements for such accident. Thus I find that the fire accident was a results of gross negligence of the party in respect of storage of final products/ raw materials, fire extinguishing efforts etc and such accident could have been averted if proper attention would have been paid by the party on above points in advance and hence the loss of production was not by natural causes or unavoidable accident etc

I have also taken the reference of the case M/s Jandial Shoe Factory v. CCE (2009) 239 ELT 203 (CESTAT SMB) and M/s Dharmapuri Coop Sugar Mills . CCE(2010) 253 ELT 303 (CESTAT) wherein the remission of duty was rejected as assessee was found to be negligent.

Also, it is pertinent to state that the Chief Fire Officer, Lucknow vide their report dated 07.02.2011 clearly states that raw materials viz. lime, tobacco, supari, perfume-II, perfume-I, cardamom machine and other capital goods were destroyed due to the said fire accident occurred on 13.01.2011. It doesn't talk about any of the finished goods destroyed or pouch packing machines damaged in the said fire accident. A.C., Central Excise Division-I, Lucknow has also clearly stated that no pouch packing machine was damaged in the accident (RUD-13). The said Rule 21 provides the remission for the finished goods not for raw material and/or capital goods Hence, the party does not qualify for the remission to be granted in terms of the above Rule 21 of Central Excise Rules 2002

Further, the claim of the party that the production of the notified goods had not taken place for more than five (05) days is not acceptable as the pouch packing machines were sealed and unsealed by the department on 14.01.2011 at 20:00 hrs. and 19.01.2013 at 00:30 hrs. respectively on the request of the party which is total 04 (four) days.

I have also gone through the Rule 8 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 which reads as under:

Rule 8 Alteration in number of operating packing machines.

In case of addition or installation or removal or uninstallation of a packing machine in the factory during the month, the number of operating packing machine for the month shall be taken as the maximum number of packing machines installed on any day during the month:

Provided that in case a manufacturer commences manufacturing of goods of a new retail sale price during the month on an existing machine it shall be deemed to be an addition in the number of operating packing machine for the month:

Provided further that in case of non-working of any installed packing machine during the month, for any reason whatsoever, the same shall be deemed to be operating packing machine for the month.

The aforesaid proviso of Rule 8 clearly states that in case of non-working of any installed packing machine during the month, for any reason whatsoever, the same shall be deemed to be operating packing machine for the month. Hence, in light of this proviso, all the 83 installed machines during the closure period were operative machines”.

4.3 We are concerned with the following issues:

- Whether the claim made by appellant for remission of duty as per Rule 21 of Central Excise Rules, 2002 maintainable.
- Whether the interpretation placed by the Commissioner on second proviso to rule 8 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008, tenable.
- Whether by rejecting the claim for remission the department is unjustly enriched.

Whether the claim made by appellant for remission of duty as per Rule 21 of Central Excise Rules, 2002 maintainable.

4.4 From perusal of Rule 21 of the Central Excise Rules, 2002 reproduced earlier (in the impugned order), it is quite evident that the said rule provides for remission of duty in respect of the finished goods lost or destroyed prior to clearance of the same from the factory of production. The wording of the rule is very clear and unambiguous. It is not the case of the appellant that any goods which were to be cleared on payment of duty subsequently have been destroyed in fire. But it is the case of appellant that on account of this fire accident that occurred in their factory they were unable to produce the goods during this period and hence there was loss of production capacity. In our view Rule 21 do not provide for such a situation. It is argument of the appellant that 2008 rules are not self contained and the provisions of Central Excise Rules,2002 would be applicable in their case.

4.4 Admittedly appellant has was operating under the Compounded Levy Scheme as provided by the section 3A of the Central Excise Act, 1944 read with Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008. It has been held by Hon'ble Supreme court in the case of Hans Steel Rolling Mill [2011-TIOL-30-SC-CX] that the scheme of Compounded levy scheme is totally a different and self contained scheme. Importing the provisions of any other scheme of taxation would only lead to catastrophic results. The observations made by the Hon'ble Supreme Court are reproduced below:

"12.On going through the records it is clearly established that the appellants are availing the facilities under the Compound Levy Scheme, which they themselves, opted for and filed declarations furnishing details about annual capacity of production and duty payable on such capacity of production. It has to be taken into consideration that the compounded

levy scheme for collection of duty based on annual capacity of production under Section 3 of the Act and Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 is a separate scheme from the normal scheme for collection of central excise duty on goods manufactured in the country. Under the same, Rule 96P of the Rules stipulate the method of payment and Rule 96P contains detailed provision regarding time and manner of payment and it also contains provisions relating to payment of interest and penalty in event of delay in payment or non-payment of dues. Thus, this is a comprehensive scheme in itself and general provisions in the Act and Rules are excluded.

13. The judgments of this court in the cases of Commissioner of C. EX & Customs v. Venus Castings (P) Ltd as reported in 2000 (117) ELT 273 (SC) = 2002-TIOL-113-SC-CX and, Union of India v. Supreme Steels and General Mills as reported in 2001 (133) ELT 513 (SC), has clearly laid down the principle that the, compound levy scheme is a separate scheme altogether and an assessee opting for the scheme is bound by the terms of that particular scheme. It is settled matter now that Section 11A of the Act has no application for recovery under different schemes.

14. In the case of Collector of Central Excise, Jaipur V. Raghuvar (India) Ltd as reported in 2000 (118) ELT 311 (SC),= 2002-TIOL-711-SC-CX- LB this court has categorically stated that Section 11A of the Act is not an omnibus provision which stipulates limitation for every kind of action to be taken under the Act or Rules. An example can be drawn with the Modvat Scheme, because even in that particular scheme, Section 11A of the Act had no application with regard to time limit in the administration of that scheme.

15. We are in agreement with the finding and decision arrived at by the Tribunal that the importing of elements of one scheme of tax administration to a different scheme of tax administration would be wholly inappropriate as it would

disturb the smooth functioning of that unique scheme. The time limit prescribed for one scheme could be completely unwarranted for another scheme and time limit prescribed under Section 11A of the Act is no exception."

4.5 In case of Shree Bhagwati Steel Rolling Mills [2015 (326) E.L.T. 209 (S.C.)] Hon'ble Supreme Court again held as follows:

"30. On merits, the matter is no longer res integra. A Constitution Bench decision of this Court in VVS Sugars v. Government of A.P., 1999 (4) SCC 192, has held, following two earlier judgments of this Court, as follows :-

"This Court in India Carbon Ltd. v. State of Assam [(1997) 6 SCC 479] has held, after analysing the Constitution Bench judgment in J.K. Synthetics Ltd. v. CTO [(1994) 4 SCC 276] that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf. There being no substantive provision in the Act for the levy of interest on arrears of tax that applied to purchases of sugarcane made subsequent to the date of commencement of the amending Act, no interest thereon could be so levied, based on the application of the said Rule 45 or otherwise."

31. Applying the Constitution Bench decision stated above, it will have to be declared that since Section 3A which provides for a separate scheme for availing facilities under a compound levy scheme does not itself provide for the levying of interest, Rules 96ZO, 96ZP and 96ZQ cannot do so and therefore, on this ground the appellant in Shree Bhagwati Steel Rolling Mills has to succeed. On this ground alone therefore, the impugned judgment is set aside. That none of the other provisions of the Central Excise Act can come to the aid of the Revenue in cases like these has been laid down by this Court in Hans Steel Rolling Mill v. CCE, (2011) 3 SCC 748 = 2011 (265) E.L.T. 321 (S.C.) as follows:

13"

4.6 Hon'ble Madras High Court has in case of Kalai Magal Alloy Steel Pvt. Ltd [2014 (303) ELT 44 (Mad)] (this decision has been affirmed by the Hon'ble Supreme Court as reported at [2015 (321) ELT A52 (SC)] held as follows

"8. The first issue to be considered, is as to whether Section 11A of the Act has any application to the case on hand, in the light of the fact that the assessee has availed the benefit of a specially compounded levy scheme as envisaged under Rule 96ZP of the Rules. Learned Counsel for the assessee would submit that the show cause notices have been issued under Section 11A of the Act. A reading of the show cause notices issued, would make it clear that the demand has been made under Rule 96ZP of the Central Excise Rules, 1944 read with Section 11A of the Central Excise Act, 1944. Similarly, the penalty has also been demanded under Rule 96ZP(3) of the Rules. Therefore, it would be factually incorrect to contend that the notices issued to the assessee, were under Section 11A of the Act. In fact, this very issue as raised by the assessee herein, came up for consideration before the Hon'ble Supreme Court in the case of Hans Steel Rolling Mill (supra). The question before the Apex Court was whether the provisions of time-limit that are contained in Section 11A of the Central Excise Act, 1944, are applicable to the recovery of amounts due under the compounded levy scheme for Hot-Re-rolling Mills, under the Annual Capacity Determination Rules, 1997, because otherwise, it is a separate scheme for collection of Central Excise Duty for the goods manufactured in the country. The Hon'ble Supreme Court held that the appellant therein is availing facilities under the compounded levy scheme (as that of the case on hand) under Rule 96ZP of the Rules. It has been further held that the appellant therein opted for and filed declarations furnishing details about the annual capacity of production and duty payable on such capacity of production. The Supreme Court pointed out that it has to be taken into consideration that the compounded levy scheme for collection of duty based on

annual capacity production under Section 3 of the Act and Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997, is a separate scheme from the normal scheme for collection of central excise duty on goods manufactured in the country and under the same Rules, Rule 96P stipulates the method of payment of duty and it contains a provision regarding time and manner of payment and it also contains provisions regarding the payment of interest and penalty in the event of delay in payment or non-payment of the dues and this being a comprehensive scheme in itself, the general provisions in the Act and Rules are excluded. The Hon'ble Apex Court took note of its earlier decision in the case of Collector of Central Excise, Jaipur v. Raghuvar (India) Ltd. reported in 2000 (118) E.L.T. 311, wherein, it was held that Section 11A of the Act is not an omnibus provision, which stipulates limitation for every kind of action to be taken under the Act and Rules, and an example was cited with regard to the Modvat Scheme and was further held that even in that particular scheme, Section 11A of the Act had no application with regard to the time-limit in the administration of that scheme. The Hon'ble Supreme Court further took note of the decision in the case of Commissioner of Central Excise & Customs v. Venus Castings (P) Ltd. (supra) and held that it has squarely laid down the principle that compounded levy scheme is a separate scheme altogether and the assessee opting for the scheme, is bound by the terms of that particular scheme and Section 11A of the Act has no application for recovery under the different schemes."

4.7 Taking note of the above decisions, Hon'ble Madras High Court has in case of Arun Smelters Ltd [2016-TIOL-2203-HC-Mad] held as follows:

39. *Though Mr.K.Jayachandran, learned counsel for the appellant submitted that sub-Rule (3) of Rule 96ZO(II) of the Central Excise Rules, 1944, opens with a notwithstanding clause and therefore, arrears of duty, payable between*

01.09.1997 to 31.03.2000, can be paid through cenvat credit, earned after 31.03.2000 and that payment through personal ledger account, is not specifically provided for, in sub-rule (3) of rule 96ZO(II) of the Central Excise Rules, if the manufacturer desires to pay a sum of Rs.5,00,000/- per month, in two equal installments, the first installment latest by the 15th day of each month, and the second installment latest by the last day of each month, and the amounts so paid shall be deemed to be full and final discharge of his duty liability for the period from the 1st day of September, 1997 to the 31st day of March, 1998, or any other financial year, as the case may be, subject to the condition contained therein, this Court is not inclined to accept the said contentions, for the reason that the duty payable during the period September, 1998 and also for the period, from October, 1998 to February, 1999, ought to have been paid, within the specific dates, mentioned in Rule 96ZO of the Central Excise Rules, 1944 and failure of which, entails penalty. Of course, by virtue of the judgment, penalty alone has been struck down. When the time for payment, the manner therefor, are specifically provided in the rules, the same has to be done, as per the scheme and not otherwise. If the statutory provision enacted by the Legislature prescribes a particular mode, it has to be done not only in that manner alone and it cannot be done in any manner. The principle that where a power is given to do a certain thing in a certain way, things must be done in that way and not otherwise and that the other method of performance is necessarily precluded, is not only well settled, but squarely applies to this case also in construing the scope of compounded levy scheme. Therefore, neither the assessee nor the department can act in variance with the terms of the compounded levy scheme.

40. The Hon'ble Supreme Court in State of Jharkhand v. Ambay Cements reported in 2005 (1) CTC 223 = 2004-TIOL-89-SC-CT, at Paragraph 27, held as follows:

"27. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation and where a statute is penal in character, it must be strictly construed and followed."

41.

42. Now let us consider the decisions relied on by the learned counsel appearing for both the parties. The main thrust of the appellant is on the decision of the Punjab and Haryana High Court in Commissioner of Central Excise, Ludhiana v. Punjab Casting Pvt. Ltd., reported in 2014 (306) ELT 612 (P & H), wherein, the respondent therein was engaged in the manufacture of non-alloy steel ingots. The assessee debited the Cenvat Credit Account of inputs for discharging their liability of payment of excise duty for the period under the Compounded Levy Scheme. The appellant therein contended that the respondent therein could not have made use of Cenvat Credit Account and the duty had to be paid only through Personal Ledger Account and finding fault with the procedure in payment of duty, the Adjudicating Authority i.e., the Joint Commissioner, Customs & Central Excise confirmed the demand and also imposed interest. He disallowed the duty discharged through Cenvat account. Penalty of equal amount was also confirmed. When the correctness of the same was tested by the respondent therein, the appellate authority confirmed the decision, excluding the levy of interest, and imposition of penalty. In the second appeal, decisions stated supra, were reversed. Thus, being aggrieved, the Commissioner of Central Excise, Luthiana, went on appeal to Punjab and Haryana High Court. Though

the Department contended that when strict compliance of rules was to be made by the respondents therein, in discharging their duty liability and payment was to be made only through PLA, it has been conceded that there is neither evasion of duty nor any loss in availing the cenvat credit. After extracting the finding of the Tribunal, the Punjab and Haryana High Court, in Punjab Casting Pvt. Ltd., 's case (cited supra), at Paragraph 10, held as follows:

"10. It is evident from these findings that both the appellate authorities had found no fault with the mode of payment of excise duty by the respondents. Cenvat account of the respondents had sufficient credit and they discharged their duty liability through the same instead of making payment through PLA; there is neither loss to the revenue nor there is evasion of duty."

43. Though Mr.K.Jayachandran, the learned counsel for the appellant has contended that when the revenue has not chosen to file an appeal against the abovesaid judgment, as there was no revenue loss and that the said decision can be made applicable to the facts of the instant case, we are not inclined to accept the said contention for the reason that in the above reported judgment, there is no occasion for the Punjab and Haryana High Court to consider the decision of the Hon'ble Supreme Court in Hans Steel Rolling Mill v. Commissioner of Central Excise, Chandigarh reported in 2011 (265) ELT 321 (SC) = 2011-TIOL-30-SC-CX. The Hon'ble Apex Court, after going through the scheme and the material on record, at Paragraphs 12 to 14, held as follows:

"12. ...

13.

14."

*44. When the judgment of the **Hon'ble Supreme Court has declared that the compounded levy scheme as a comprehensive scheme and also categorically held that***

the general provisions of the Act and the Rules, are excluded, and further held that the assessee opting for the scheme, is bound by the terms of that particular scheme, reliance made on the decision of the Punjab and Haryana High Court in *Punjab Casting Pvt. Ltd., 's case (cited supra)*, is not tenable, as the law of the land is binding on us.

4.8 Appellant has argued that if they are not allowed to avail the benefit of Rule 21 of the Central Excise Rules, 2002, then they will be rendered remedy less. This could not be correct in view of the various judicial pronouncements. However we do not find any merits in the said argument. It is settled principle of interpretation of statute that court or tribunal should interpret the word as used in law without any addition or deletion from the same. A five judges bench of Hon'ble Supreme Court has in the case of *Dilip Kumar & Co [2019 (361) ELT 577 (SC)]* held as follows:

"19. The well-settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In Kanai Lal Sur v. Paramnidhi Sadhukhan, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

20. In applying rule of plain meaning any hardship and inconvenience cannot be the basis to alter the meaning to the language employed by the legislation. This is especially so in fiscal statutes and penal statutes. Nevertheless, if the plain language results in absurdity, the Court is entitled to determine the meaning of the word in the context in which

it is used keeping in view the legislative purpose [Assistant Commissioner, Gadag Sub-Division, Gadag v. Mathapathi Basavannekwa, 1995 (6) SCC 355]. Not only that, if the plain construction leads to anomaly and absurdity, the Court having regard to the hardship and consequences that flow from such a provision can even explain the true intention of the legislation. Having observed general principles applicable to statutory interpretation, it is now time to consider rules of interpretation with respect to taxation.

21. *In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocent might become victims of discretionary decision-making. Insofar as taxation statutes are concerned, Article 265 of the Constitution [265. Taxes not to be imposed save by authority of law - No tax shall be levied or collected except by authority of law.] prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because State cannot at their whims and fancies burden the citizens without authority of law. In other words, when competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the Legislature.*

22. *At the outset, we must clarify the position of 'plain meaning rule or clear and unambiguous rule' with respect of tax law. 'The plain meaning rule' suggests that when the language in the statute is plain and unambiguous, the Court has to read and understand the plain language as such, and there is no scope for any interpretation. This salutary maxim flows from the phrase "cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio". Following such maxim, the Courts sometimes have made strict*

interpretation subordinate to the plain meaning rule [Mangalore Chemicals case (Infra para 37).], though strict interpretation is used in the precise sense. To say that strict interpretation involves plain reading of the statute and to say that one has to utilize strict interpretation in the event of ambiguity is self-contradictory.

23. Next, we may consider the meaning and scope of 'strict interpretation', as evolved in Indian law and how the higher Courts have made a distinction while interpreting a taxation statute on one hand and tax exemption notification on the other. In Black's Law Dictionary (10th Edn.) 'strict interpretation' is described as under :

Strict interpretation. (16c) 1. An interpretation according to the narrowest, most literal meaning of the words without regard for context and other permissible meanings. 2. An interpretation according to what the interpreter narrowly believes to have been the specific intentions or understandings of the text's authors or ratifiers, and no more. - Also termed (in senses 1 & 2) strict construction, literal interpretation; literal construction; restricted interpretation; interpretatio stricta; interpretatio restricta; interpretatio verbalis. 3. The philosophy underlying strict interpretation of statutes. - Also termed as close interpretation; interpretatio restrictive.

See strict constructionism under constructionism. Cf. large interpretation; liberal interpretation (2).

"Strict construction of a statute is that which refuses to expand the law by implications or equitable considerations, but confines its operation to cases which are clearly within the letter of the statute, as well as within its spirit or reason, not so as to defeat the manifest purpose of the legislature, but so as to resolve all reasonable doubts against the applicability of the statute to the particular case." William M. Lile et al., Brief Making and the use of Law

Books 343 (Roger W. Cooley & Charles Lesly Ames eds., 3d ed. 1914).

"Strict interpretation is an equivocal expression, for it means either literal or narrow. When a provision is ambiguous, one of its meaning may be wider than the other, and the strict (i.e., narrow) sense is not necessarily the strict (i.e., literal) sense." John Salmond, Jurisprudence 171 n. (t) (Glanville L. Williams ed., 10th ed. 1947).

24. As contended by Ms. Pinky Anand, Learned Additional Solicitor General, the principle of literal interpretation and the principle of strict interpretation are sometimes used interchangeably. This principle, however, may not be sustainable in all contexts and situations. There is certainly scope to sustain an argument that all cases of literal interpretation would involve strict rule of interpretation, but strict rule may not necessarily involve the former, especially in the area of taxation. The decision of this Court in *Punjab Land Development and Reclamation Corporation Ltd., Chandigarh v. Presiding Officer, Labour Court Chandigarh and Ors.*, (1990) 3 SCC 682, made the said distinction, and explained the literal rule-

"The literal rules of construction require the wording of the Act to be construed according to its literal and grammatical meaning whatever the result may be. Unless otherwise provided, the same word must normally be construed throughout the Act in the same sense, and in the case of old statutes regard must be had to its contemporary meaning if there has been no change with the passage of time."

That strict interpretation does not encompass strict - literalism into its fold. It may be relevant to note that simply juxtaposing 'strict interpretation' with literal rule' would result in ignoring an important aspect that is 'apparent legislative intent'. We are alive to the fact that there may be overlapping in some cases between the aforesaid two rules. With certainty, we can observe that, 'strict interpretation'

does not encompass such literalism, which lead to absurdity and go against the legislative intent. As noted above, if literalism is at the far end of the spectrum, wherein it accepts no implications or inferences, then 'strict interpretation' can be implied to accept some form of essential inferences which literal rule may not accept.

25. We are not suggesting that literal rule de hors the strict interpretation nor one should ignore to ascertain the interplay between 'strict interpretation' and 'literal interpretation'. We may reiterate at the cost of repetition that strict interpretation of a statute certainly involves literal or plain meaning test. The other tools of interpretation, namely contextual or purposive interpretation cannot be applied nor any resort be made to look to other supporting material, especially in taxation statutes. Indeed, it is well-settled that in a taxation statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification. Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption. Furthermore, nothing has to be read into nor should anything be implied other than essential inferences while considering a taxation statute.

26. Justice G.P. Singh, in his treatise 'Principles of Statutory Interpretation' (14th ed. 2016 p.-879) after referring to Re, Micklethwait, (1885) 11 Ex 452; Partington v. A.G., (1869) LR 4 HL 100; Rajasthan Rajya Sahakari Spinning & Ginning Mills Federation Ltd. v. Deputy CIT, Jaipur, (2014) 11 SCC 672, State Bank of Travancore v. Commissioner of Income Tax, (1986) 2 SCC 11 and Cape Brandy Syndicate v. IRC, (1921) 1 KB 64, summed up the law in the following manner -

"A taxing statute is to be strictly construed. The well-established rule in the familiar words of LORD

WENSLEYDALE, reaffirmed by LORD HALSBURY AND LORD SIMONDS, means : 'The subject is not to be taxed without clear words for that purpose : and also that every Act of Parliament must be read according to the natural construction of its words. In a classic passage LORD CAIRNS stated the principle thus : "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute. VISCOUNT SIMON quoted with approval a passage from ROWLATT, J. expressing the principle in the following words : "In a taxing Act one has to look merely at what is clearly said. This is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

It was further observed :

"In all tax matters one has to interpret the taxation statute strictly. Simply because one class of legal entities is given a benefit which is specifically stated in the Act, does not mean that the benefit can be extended to legal entities not referred to in the Act as there is no equity in matters of taxation...."

Yet again, it was observed :

"It may thus be taken as a maxim of tax law, which although not to be overstressed ought not to be forgotten that, "the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him", [Russel v. Scott, (1948) 2 All ER 1]. The proper course in

construing revenue Acts is to give a fair and reasonable construction to their language without leaning to one side or the other but keeping in mind that no tax can be imposed without words clearly showing an intention to lay the burden and that equitable construction of the words is not permissible [Ormond Investment Co. v. Betts, (1928) AC 143]. Considerations of hardship, injustice or anomalies do not play any useful role in construing taxing statutes unless there be some real ambiguity [Mapp v. Oram, (1969) 3 All ER 215]. It has also been said that if taxing provision is "so wanting in clarity that no meaning is reasonably clear, the Courts will be unable to regard it as of any effect [IRC v. Ross and Coutler, (1948) 1 All ER 616]."

Further elaborating on this aspect, the Learned author stated as follows :

"Therefore, if the words used are ambiguous and reasonable open to two interpretations benefit of interpretation is given to the subject [Express Mill v. Municipal Committee, Wardha, AIR 1958 SC 341]. If the Legislature fails to express itself clearly and the taxpayer escapes by not being brought within the letter of the law, no question of unjustness as such arises [CIT v. Jalgaon Electric Supply Co., AIR 1960 SC 1182]. But equitable considerations are not relevant in construing a taxing statute, [CIT, W.B. v. Central India Industries, AIR 1972 SC 397], and similarly logic or reason cannot be of much avail in interpreting a taxing statute [Azam Jha v. Expenditure Tax Officer, Hyderabad, AIR 1972 SC 2319]. It is well-settled that in the field of taxation, hardship or equity has no role to play in determining eligibility to tax and it is for the Legislature to determine the same [Kapil Mohan v. Commr. of Income Tax, Delhi, AIR 1999 SC 573]. Similarly, hardship or equity is not relevant in interpreting provisions imposing stamp duty, which is a tax, and the Court should not concern itself with the intention of the Legislature when the language

expressing such intention is plain and unambiguous [State of Madhya Pradesh v. Rakesh Kohli & Anr., (2012) 6 SCC 312]. But just as reliance upon equity does not avail an assessee, so it does not avail the Revenue."

The passages extracted above, were quoted with approval by this Court in at least two decisions being Commissioner of Income Tax v. Kasturi Sons Ltd., (1999) 3 SCC 346 and State of West Bengal v. Kesoram Industries Limited, (2004) 10 SCC 201 [hereinafter referred as 'Kesoram Industries case' for brevity]. In the later decision, a Bench of seven-Judges, after citing the above passage from Justice G.P. Singh's treatise, summed up the following principles applicable to the interpretation of a taxing statute :

"(i) In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed : it cannot imply anything which is not expressed : it cannot import provisions in the statute so as to supply any deficiency : (ii) Before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section; and (iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and there is nothing unjust in a taxpayer escaping if the letter of the law fails to catch him on account of Legislature's failure to express itself clearly".

Whether the interpretation placed by the Commissioner on second proviso to rule 8 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008, tenable.

4.9 In terms of the rule of Pan Masala Packaging Machines (Capacity Determination and Collection of Duty) Rules, 2008, abatement is provided for the period during which the machines/unit was not producing the goods. Section 3A (1) and (3) of the

Central Excise Act, 1944 and Rule 10 of 2008 rules read as follows:

"3A Power of Central Government to charge excise duty on the basis of capacity of production in respect of notified goods:

- (1) *Notwithstanding anything contained in section 3, where the Central Government, having regard to the nature of the process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, is of the opinion that it is necessary to safeguard the interest of revenue, specify, by notification in the Official Gazette, such goods as notified goods and there shall be levied and collected duty of excise on such goods in accordance with the provisions of this section.*
- (2) *.....*
- (3) *The duty of excise on notified goods shall be levied, at such rate, on the unit or production or, as the case may be on such factor relevant to the production, as the Central Government may by notification in the Official Gazette, specify, and collected in such manner as may be prescribed.*

Provided that where a factory producing notified goods did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfils such conditions as may be prescribed.

Pan Masala Packaging Machines (Capacity Determination and Collection of Duty) Rules, 2008:

Rule 10. Abatement in case of non-production of goods.-

In case a factory did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in

respect of such period provided the manufacturer of such goods files an intimation to this effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the Superintendent of Central Excise, at least three working days prior to the commencement of said period, who on receipt of such intimation shall direct for sealing of all the packing machines available in the factory for the said period under the physical supervision of Superintendent of Central Excise, in the manner that these cannot be operated during the said period:

Provided that during such period, no manufacturing activity, whatsoever, in respect of notified goods shall be undertaken and no removal of notified goods shall be effected by the manufacturer except that notified goods already produced before the commencement of said period may be removed within first two days of the said period:

Provided further that when the manufacturer intends to restart his production of notified goods, he shall inform to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, of the date from which he would restart production, whereupon the seal fixed on packing machines would be opened under the physical supervision of Superintendent of Central Excise."

4.10 In case of Thakkar Tobacco Products P. Ltd.[2016 (332) E.L.T. 785 (Guj.)], Hon'ble Gujarat High Court has observed as follows:

"6. Before advertng to the merits of the rival contentions, reference may be made to certain statutory provisions. Section 3A of the Act makes provision for "Power of Central Government to charge excise duty on the basis of capacity of production in respect of notified goods". Sub-section (3) thereof provides that the duty of Excise on notified goods shall be levied, at such rate, on the unit of production or, as

the case may be, on such factor relevant to the production, as the Central Government may, by notification in the Official Gazette, specify, and collected in such manner as may be prescribed. The proviso thereto provides that where a factory producing notified goods does not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfils such conditions as may be prescribed. Thus, sub-rule (3) provides for the rate of duty and the manner in which such duty is to be collected and the proviso thereto provides for abatement of duty on a proportionate basis if the factory producing notified goods does not produce notified goods for a continuous period of fifteen days or more. Therefore, the proviso limits the collection of duty to the extent specified therein.

7. In exercise of powers conferred by sub-sections (2) and (3) of Section 3A of the Act, the Central Government has framed rules called the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008. Rule 7 of the PMPM Rules provides for calculation of duty payable and lays down that duty payable for a particular month shall be calculated by application of the appropriate rate of duty specified in the notification of the Government of India dated 1st July, 2008 to the number of operating packing machines in the factory during the month. Under Rule 9 of the PMPM Rules, the monthly duty payable on the notified goods is required to be paid by the 5th day of the same month. Therefore, the duty is payable in advance before the goods are actually manufactured. Thus, under the PMPM Rules, the assessee is required to calculate the duty payable each month in terms of the notification of the Government and pay the duty payable for each month on the 5th day of that month. However, when the factory does not produce notified goods for a continuous period of fifteen days or more, Rule 10 of the PMPM Rules

provides for abatement of duty for the period during which the factory was not producing such notified goods.

8. The controversy involved in the present case centers around the interpretation of Rule 10 of the PMPM Rules, which reads thus :

.....

9. The facts of the case are required to be examined in the light of the above statutory provisions. From the facts noted hereinabove, it is apparent that the assessee did not produce the notified goods during a continuous period of fifteen days in the month of March and accordingly claimed that it was entitled to abatement of duty on a proportionate basis for the period when the factory was not producing notified goods and accordingly adjusted duty to that extent from the duty payable in the month of April. The contention of the Revenue is that abatement amounts to refund and, therefore, the procedure for availing refund as laid down under Section 11B of the Act is required to be followed. In this regard, it may be noted that the expression "abatement" has not been defined anywhere in the Act or in the PMPM Rules. Therefore, the popular or dictionary meaning of the said expression is required to be looked into. In Black's Law Dictionary, the term "abatement" has been defined as a reduction, a decrease, or a diminution; the suspension or cessation, in whole or in part, of a continuing charge, such as rent. In the context of tax, abatement has been stated to be diminution or decrease in the amount of tax imposed. In the New Oxford Dictionary of English, "abatement" has been defined as the ending, reduction or lessening of something. In the Dictionary of English Language, "abatement" has been defined as an amount abated, a deduction from the full amount of tax. On the other hand, "refund" has been defined as to pay back "money" to give or to put back. Tax abatement is ordinarily known as reduction of or exemption from tax by a

Government for a specific period. A tax incentive is also stated to be a form of tax abatement. Thus, the ordinary meaning of abatement is reduction, diminution and, therefore, when an assessee is entitled to abatement of duty, he is entitled to reduction of duty to that extent and not refund thereof as is sought to be contended on behalf of the Revenue. It would have been a different matter if the rules prescribed for the manner in which abatement has to be granted. However, in the absence of any rule in this regard or any specific provision providing for the mode of availing abatement, the course of action adopted by the respondent-assessee cannot be said to be in violation of any rule or any provision of the Act. As can be seen on a plain reading of Rule 10 of the PMPM Rules, the same merely provides that in case of factory which has not produced the notified goods during a continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period. The abatement, however, is subject to the condition stipulated in Rule 10, namely that, the manufacturer of such goods is required to file an intimation to that effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise as the case may be, with a copy to the Superintendent of Central Excise, at least three working days prior to the commencement of such period, who on receipt of such information, is required to direct sealing of all the packing machines available in the factory for the said period under the physical supervision of Superintendent of Central Excise, in the manner that these cannot be operated during the said period. Thus, subject to the fulfilment of such conditions, Rule 10 of the PMPM Rules provides that the duty calculated on a proportionate basis shall be abated.”

4.11 The 2008 Rules have been considered by the Hon’ble Allahabad High Court in case of Trimurti Fragrances Pvt. Ltd [2019 (370) E.L.T. 257 (All.)] and following has been held:

22. *The sole issue under consideration is as to giving benefit of abatement for non-production, whether the assessee could on their own calculate Excise duty and set off the same against the duty payable in the next month. The argument of the Department relying upon Rule 9 of the PMPM Rules, 2008 claiming that the monthly duty on notified goods is to be paid by 5th day of the month and the assessee cannot simpliciter claim set off without first depositing the same had been repelled by the Gujarat High Court in the case of Thakker Tobacco (supra) holding that Rule 10 of the PMPM Rules, 2008 envisages a situation and provides for abatement of excise duty calculated on proportionate basis, in case where factory does not produces notified goods during continuous period of 15 days or more.*

23. *Moreover, the statute, that is proviso to sub-section (2) of Section 3A itself provides for abatement where a factory producing notified goods did not produce the same during any continuous period of 15 days or more, the duty calculated on the proportionate basis shall be abated in respect of such period, if the manufacturer of such goods fulfills such condition as may be prescribed. In the present case as the assessee having complied the statutory requirement, is entitled to the benefit claimed by him.*

24. *The judgment in case of Thakker Tobacco (supra) having been accepted by the C.B.D.T. in its circular dated 16-2-2018, the controversy does not remain any longer as the matter is not res integra any more.*

4.12 In view of the above decisions it is quite evident that in case non production of the specified goods for the continuous period of more than fifteen days, the appellant assessee could claim abatement on proportionate basis for the period during which there was no production. In any case this benefit can be extended only if the period of closure was continuously for fifteen days or more. It is not the case of appellant that, their

unit was not operational continuously for fifteen days or more. Second Proviso to Rule 8, needs to be considered in terms of sub section (3) to Section 3A and Rule 10 of the 2008 Rules. This proviso states that in case any installed packing machine is not producing, for whatsoever reason then the same shall be deemed to be operating packing machine. This legal fiction provides for calculation of the duty to be paid in terms of Rule 9. Rule 10 provides for the abatement of duty for the period of closure for whatsoever reason. In fact as per the submission of the appellant the unit was non operational for five days. Hence the benefit of abatement could not have been allowed. Section 3A (3) itself provides for the closure of the unit for fifteen days or more for allowing the abatement on proportionate basis. Any closure which is less than fifteen days is not recognized as closure by the statute, for the reason as stated in Sub Section (1) of Section 3A of the Central Excise Act, 1944 – these goods are evasion prone. The submissions made by the appellant relying on various case laws with regards to the legal fiction etc., cannot carry forward the case of the appellant in view of the statutory provisions as per the Central Excise Act, 1944 and the Rules.

4.13 As we do not find Rule 21 of the Central Excise Rules, 2002 to be not applicable to the present case we are not pronouncing on various decision relied upon by the Appellant with regards to "*natural cause or unavoidable accident.*"

Whether by rejecting the claim for remission the department is unjustly enriched.

4.14 Reliance has been placed by the Appellant on the decision of Hon'ble Supreme Court in the case of Kanhaiya Lal Mukund Lal Saraf, to argue that the revenue cannot be unjustly enriched at the expense of assessee. However we note that the said decision has been held to be not a good law by a nine judges bench of Hon'ble Supreme Court in the case of Mafatlal Industries [1997 (89) ELT 247 (SC)]. By majority Hon'ble Apex Court held as follows:

WAS KANHAIYALAL CORRECTLY DECIDED AND IF NOT, IN WHAT RESPECTS ?

67. *The first question that has to be answered herein is whether Kanhaiyalal has been rightly decided insofar as it says (1) that where the taxes are paid under a mistake of law, the person paying it is entitled to recover the same from the State on establishing a mistake and that this consequence flows from Section 72 of the Contract Act; (2) that it is open to an assessee to claim refund of tax paid by him under orders which have become final - or to reopen the orders which have become final in his own case - on the basis of discovery of a mistake of law based upon the decision of a court in the case of another assessee, regardless of the time-lapse involved and regardless of the fact that the relevant enactment does not provide for such refund or reopening; (3) whether equitable considerations have no place in situations where Section 72 of the Contract Act is applicable; and (4) whether the spending away of the taxes collected by the State is not a good defence to a claim for refund of taxes collected contrary to law.*

68. *Re.: (I):*

To such a situation, Proposition No. 3 enunciated in Kamala Mills becomes applicable, viz., where a statute creates a special right or a liability and also provides the procedure for the determination of the right or liability by the Tribunals constituted in that behalf and provides further that all questions about the said right and liability shall be determined by the Tribunals so constituted, the resort to civil court is not available - except to the limited extent pointed out therein. Central Excise Act specifically provides for refund. It expressly declares that no refund shall be made except in accordance therewith. The Jurisdiction of a civil court is expressly barred - vide sub-section (5) of Section 11B, prior to its amendment in 1991, and sub-section (3) of Section 11B, as amended in 1991. It is

relevant to notice that the Act provides for more than one appeal against the orders made under Section 11B/Rule 11. Since 1981, an appeal is provided to this Court also from the orders of the Tribunal. While Tribunal is not a departmental organ, this court is a civil court. In this view of the matter and the express and additional bar and exclusivity contained in Rule 11/Section 11B, at all points of time, it must be held that any and every ground including the violation of the principles of natural justice and infraction of fundamental principles of judicial procedure can be urged in these appeals, obviating the necessity of a suit or a writ petition in matters relating to refund. Once the constitutionality of the provisions of the Act including the provisions relating to refund is beyond question, they constitute "law" within the meaning of Article 265 of the Constitution. It follows that any action taken under and in accordance with the said provisions would be an action taken under the "authority of law", within the meaning of Article 265.

In the face of the express provision which expressly declares that no claim for refund of any duty shall be entertained except in accordance with the said provision, it is not permissible to resort to Section 72 of the Contract Act to do precisely that which is expressly prohibited by the said provisions. In other words, it is not permissible to claim refund by invoking Section 72 as a separate and independent remedy when such a course is expressly barred by the provisions in the Act, viz., Rule 11 and Section 11B. For this reason, a suit for refund would also not lie. Taking any other view would amount to nullifying the provisions in Rule 11/Section 11B, which, it needs no emphasis, cannot be done. It, therefore, follows that any and every claim for refund of excise duty can be made only under and in accordance with Rule 11 or Section 11B, as the case may be, in the forums provided by the Act. No suit can be filed for refund of duty invoking Section 72 of the Contract Act.

So far as the jurisdiction of the High Court under Article 226 - or for that matter, the jurisdiction of this court under Article 32 - is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.

69. Section 72 contains a rule of equity and once it is a rule of equity, it necessarily follows that equitable considerations are relevant in applying the said rule - an aspect which we shall deal with a little later. Thus, whether the right to refund of taxes paid under an unconstitutional provision of law is treated as a constitutional right flowing from Article 265 or as a statutory right/equitable right affirmed by Section 72 of the Contract Act, the result is the same - there is no automatic or unconditional right to refund.

70. Re: (II):

71. Re.: (III):

72.

73.

*74. Re: (IV): **We are also of the respectful opinion that Kanhaiyalal is not right in saying that the defence of spending away the amount of tax collected under an unconstitutional law is not a good defence to a claim for refund.** We think it is, subject to this rider : where the petitioner-plaintiff alleges and establishes that he has not passed on the burden of the duty to others, his claim for refund may not be refused. In other words, if he is not able to allege and establish that he has not passed on the burden to others, his claim for refund will be rejected whether such a claim is made in a suit or a writ petition. It*

is a case of balancing public interest vis-a-vis private interest. Where the petitioner-plaintiff has not himself suffered any loss or prejudice (having passed on the burden of the duty to others), there is no justice or equity in refunding the tax (collected without the authority of law) to him merely because he paid it to the State. It would be a windfall to him. As against it, by refusing refund, the monies would continue to be with the State and available for public purposes. The money really belongs to a third party - neither to the petitioner/plaintiff nor to the State - and to such third party it must go. But where it cannot be so done, it is better that it is retained by the State. By any standard of reasonableness, it is difficult to prefer the petitioner-plaintiff over the State. Taxes are necessary for running the State and for various public purposes and this is the view taken in all jurisdictions. It has also been emphasised by this Court In D. Cawasji wherein Mathew, J. not only pointed out the irrational and unjust consequences flowing from the holding in Bhailal Bhai and Aluminium Industries but also pointed out the adverse impact on public interest resulting from the holding that expending the taxes collected by the State is not a valid defence. (see Paras 39 and 40). This would not be a case of unjust enrichment of the State, as suggested by the petitioners-appellants. The very idea of "unjust enrichment" is inappropriate in the case of the State, which is in position of parens patriae, as held in Charan Lal Sahu v. Union of India [1990 (1) S.C.C. 613 at 649]. And even if such a concept is tenable, even then, it should be noticed that the State is not being enriched at the expense of the petitioner-plaintiff but at someone else's expense who is not the petitioner-plaintiff. As rightly explained by Saikia, J. in Mahabir Kishore & Ors. v. State of Madhya Pradesh [1989 (43) E.L.T. 205 (SC) = 1989 (3) S.C.R. 596], "the principle of unjust enrichment requires - first that the defendant has been 'enriched' by the receipt of a 'benefit'; secondly, that this enrichment is 'at the expense

of the plaintiff'; and thirdly, that the retention of the enrichment be just. This justifies restitution." We agree with the holding in Air Canada (quoting Professor George C. Palmer) that in such a case, "it seems preferable to leave the enrichment with the tax authority instead of putting the judicial machinery in motion for the propose of shifting the same enrichment to the tax-payer". The Canadian Supreme Court has further emphasised - and, in our opinion, rightly - the "fiscal chaos that would result if the general rule favoured recovery, particularly where the long standing taxation measure is involved". In this connection, the majority decision refers to what happened in United States. In United States v. Butler [(1936) 80 L. Ed. 477] the Agricultural Adjustment Act was held unconstitutional, the result of which was refund of almost one billion dollars collected under the said statute. In such a situation, it is pointed out, the Congress passed an Act which provided that no refunds shall be allowed unless the claimant establishes that he himself bore the burden of tax. Similar provision was also made in another enactment, viz., Section 424 of the Revenue Act, 1928, the validity of which has been upheld by the United States Supreme Court in Jefferson (supra).

75. In this connection, Sri K. Parasaran has rightly emphasised the distinction between the constitutional values obtaining in countries like United States of America, Canada and Australia - or for that matter, United Kingdom - and the values obtaining under our Constitution. Unlike the economically neutral - if not pro-capitalist - Constitutions governing those countries, the Indian Constitution has set before itself the goal of "Justice, Social, Economic and Political" - a total re-structuring of our society - the goal being what is set out in Part IV of the Constitution and, in particular, in Articles 38 and 39. Indeed, the aforesaid words in the preamble constitute the motto of our Constitution, if we can call it one. Article 38 enjoins upon

the State to "strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life". Article 39 lays down the principles of policy to be followed by the State. It says that the State shall, in particular, direct its policy towards securing "(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; and (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment". Refunding the duty paid by a manufacturer/assessee in situations where he himself has not suffered any loss or prejudice (i.e., where he has passed on the burden to others) is no economic justice; it is the very negation of economic justice. By doing so, the State would be conferring an unearned and unjustifiable windfall upon the manufacturing community thereby contributing to concentration of wealth in a small class of persons which may not be consistent with the common good. The preamble and the aforesaid articles do demand that where a duty cannot be refunded to the real persons who have bore the burden, for one or the other reason, it is but appropriate that the said amounts are retained by the State for being used for public good (See Amar Nath Om Prakash). Indeed, even in an economically neutral Constitution, like that of United States of America, such a course has been adapted by the State and upheld by the Courts. It would be rather curious - nay, ridiculous - if such a course were held to be bad under our Constitution which speaks of economic and distributive justice, opposes concentration of wealth in a few hands and when the Forty-Second (Amendment) Act describes our Republic as a Socialist Republic.

76. It is true that some of the concepts now affirmed by us, e.g., effect of passing on and the relevance of our Constitutional values in the matter of judging the legitimacy

of a claim for refund were not presented to the Bench which decided Kanhaiyalal but that can be no ground for not entertaining or accepting those concepts. As observed by Thomas Jefferson, as far back as 1816, "laws and institutions must go hand-in-hand with the progress of the human mind.... as new discoveries are made, new truths are discovered and manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the time.....". The very same thought was expressed by Krishna Iyer, J. in State of Karnataka v. Ranganath Reddy [1978 (1) S.C.R. 641] with particular reference to our Constitutional philosophy and values:

"Constitutional problems cannot be studied in a socio-economic vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process of the new equity-loaded legality.... It is right that the rule of law enshrined in our Constitution must and does reckon with the roaring current of change which shifts our social values and shrivels of feudal roots, invades our lives and fashions our destiny."

The learned Judge quoted Granville Austin, saying:

"The Judiciary was to be the arm of the social revolution upholding the quality that Indians had longed for in colonial days.... the courts were also idealised because, as guardians of the Constitution, they would be the expression of a new law created by Indians for Indians,"

77. That "the material resources of the community" are not confined to public resources but include all resources, natural and man-made, public and private owned" is repeatedly affirmed by this Court. [See Ranganatha Reddy, Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal [1983 (1) S.C.R. 1000] and State of Tamil Nadu etc. etc. v. L. Abu Kavur Bai & Ors. etc. [1984 (1) S.C.R. 725]. We are of the considered opinion that Sri Parasaran is right in saying that the philosophy and the core values of our

Constitution must be kept in mind while understanding and applying the provisions of Article 265 of the Constitution of India and Section 72 of the Contract Act (containing as it does an equitable principle) - for that matter, in construing any other provision of the Constitution and the laws. Accordingly, we hold that even looked at from the constitutional angle, the right to refund of tax paid under an unconstitutional provision of law is not an absolute or an unconditional right. Similar is the position even if Article 265 can be invoked - we have held, it cannot be - for claiming refund of taxes collected by misinterpretation or misapplication of a provision of law, rules, notifications or regulation.

99. The discussion in the judgment yields the following propositions. We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment:

(viii) The decision of this Court in *Sales Tax Officer, Benaras v. Kanhaiyalal Mukundlal Saraf* [1959 S.C.R. 1350] must be held to have been wrongly decided insofar as it lays down or is understood to have laid down propositions contrary to the propositions enunciated in (i) to (vii) above. It must equally be held that the subsequent decisions of this Court following and applying the said propositions in *Kanhaiyalal* have also been wrongly decided to the above extent. This declaration - or the law laid down in propositions (i) to (vii) above - shall not however entitle the State to recover the taxes/duties already refunded and in respect whereof no proceedings are pending before any Authority/Tribunal or Court as on

this date. All pending matters shall, however, be governed by the law declared herein notwithstanding that the tax or duty has been refunded pending those proceedings, whether under the orders of an Authority, Tribunal or Court or otherwise."

Thus argument of unjust enrichment of the state has been considered and rejected by the Hon'ble Supreme Court as per the above stated decision. Kanhaiya Lal case has been held to be not stating the correct position in law hence reliance placed by the counsel of appellant on this decision, is totally misplaced. The decision of Hon'ble Orissa High Court placing reliance on the said decision of Hon'ble Apex Court cannot also be pressed, because the said decision has been rendered before the decision of the decision in case of Mafatlal Industries, and has been held to be wrongly decided.

4.15 In view of discussions as above we do not find any merits in this appeal.

5.1 Appeal is dismissed.

(Pronounced in open court on-05 March, 2024)

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

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp