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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/206 /2005-207 /2005 - EX[DB] Date 19/01/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S DELTA AROMATICS PVT LTD, ← 2. DR. SUSHIL KHANNA,
X-60-62,OKHLA INDUSTRIAL AREA,
PHASE-II, N.DELHI
M/S DELTA AROMATICS PVT LTD

Appellant
Vs
Respondent

C.C.E.DELHI-II

I am directed to transmit herewith a certified copy of **Final order No. 21-22/ 2010 EX[DB]** dated 15-1-2010 passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

Assistant Registrar
(Excise Appeal Branch)

Copy to :
1. Respondent
   C.C.E.DELHI -II
2. Adv. / Consult
   MR.V. LAXMIKUMARAN
   B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

3 C.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 Director Publications, Customs, Excise. I.P. Estate, New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033, No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37, Sector - 1, Noida - 201301, Gautam Budh Nagar, (UP)
11 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
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18. HON'BLE PRESIDENT

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. I

Excise Appeal No. 206-207 of 2005

[Arising out of the Order-in-Appeal No. 233-234-CE/D-II/2004 dated 29/10/2004 passed by The Commissioner of Central Excise (Appeals), New Delhi.]

For Approval and signature :

Hon'ble Justice R.M.S. Khandeparkar, President
Hon'ble Shri Rakesh Kumar, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:
3.	Whether their Lordships wish to see the fair copy of the order?	:
4.	Whether order is to be circulated to the Department Authorities?	:

1. M/s Delta Aromatics Pvt. Ltd.]
2. Dr. Sushil Khanna]

Appellant

Versus

CCE, New Delhi – II

Respondent

<u>Appearance</u>

Shri R.K. Hasija, Advocate – for the appellant.

Shri A. Khanna, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

<u>DATE OF HEARING : 08/10/2009.</u>
<u>DATE OF DECISION :</u> 15/1/2010

FINAL Oral Order No. 21-22/2010-EX Dated :

Per. Rakesh Kumar :-

The facts giving rise to these two appeals are, in brief, as under :-

1.1 As per the facts narrated in the order-in-original No. 125/2004 dated 1/7/04 passed by Deputy Commissioner, Division VII, Nehru Place, New Delhi, the Central Excise Officers of the Jurisdictional Central Excise Division visited the appellant's factory situated at X-60-62, Okhla Industrial Area, Phase – II, New Delhi on 2/7/01. Dr. Sushil Khanna, Executive Director of the appellant company, was also present in the factory at the time of the officer's visit. The appellant's factory manufactured P&P medicines chargeable to Central Excise Duty under Chapter 30 of the Central Excise Tariff Act, 1985 and they were availing the benefit of exemption under SSI exemption Notification No. 9/99-CE dated 28/2/99. The appellant had taken over this factory on lease since 14/9/99 and had started manufacturing operations in the factory w.e.f. October, 99 and they had declared the clearances of excisable goods from this factory for the period from 1/4/99 to 13/9/99 as nil. As per Clause (V) of para '2' of the Notification No. 9/99-CE, where the specified goods are cleared by one or more manufacturers from a factory, the exemption under this notification shall apply to the aggregate value of the clearances mentioned against each of the serial numbers in the table in para 1 and not separately for each manufacturer and as per Clause (vi) of para 2 of the notification, the exemption under this notification is also subject to the condition that aggregate value of clearances of all excisable goods for home consumption by a manufacturer from one or more factories, or from a factory by one or more manufacturers, has not exceeded rupees three crores in the preceding financial year. However, the Central Excise officers found that as per the records of Jurisdictional Central Excise Range, prior to 14/9/99 during the financial year 1999-2000, three units namely M/s Oscar Healthcare Pvt. Ltd., (hereinafter referred to as OHPL), M/s Oscar Drugs Pvt. Ltd., (hereinafter referred to as ODPL) and M/s Oscar Laboratories Pvt. Ltd., (hereinafter referred to as OLPL) were manufacturing P&P medicines at X-60, X-61 and X-62 Okhla Industrial Area, Phase-II, New Delhi respectively and their combined clearances of excisable goods specified in Notification No. 9/99-CE were Rs. 7,40,81,698/- (Rupees Seven Crore Forty Lakh Eighty One Thousand Six Hundred Ninety Eight). In view of this, the officers were of the view that the appellant were not eligible for concessional rate of duty prescribed for various slabs under Notification No. 9/99-CE, as, if the clearances of the OHPL, ODPL and OLPL during the period from 1/4/99 to 13/9/99 are taken into account, the appellant had already crossed the threshold limit for concessional rate of duty and were liable to pay duty at the tariff rate of 16%. The officers were also of the view that the appellant while submitting their classification declaration, had not informed the department that prior to taking over this plant and machinery, from these premises and using same plant, OHPL, ODPL and OLPL were also manufacturing and clearing the P&P medicines. Inquiry with Dr. Sushil Khanna, Executive Director of the appellant company was made and, he, in his statements dated 2/7/01 and 13/2/02 stated that earlier the appellant company was having a factory at A-110, Okhla Industrial Area, Phase-II, New Delhi and was having Central Excise Registration, but there were no clearances from that factory and the licence was surrendered on 22/3/2000, that earlier at plot No. X-60, X-61, X-62, Okhla Industrial Area, Phase – II, New Delhi, three units OHPL, ODPL and OLPL respectively were operating but the same in August 1999 were amalgamated with M/s Shimal Investment and Trading Company, that after amalgamation, the plant and machinery alongwith the workers and staff of OHPL, ODPL and OLPL were taken on lease by the appellant company from M/s Shimal Investment and Trading Company, that he was a Director in OHPL, ODPL and OLPL as well as in M/s Shimal Investment & Trading Co., that prior to taking over of plant and machinery of OHPL, OLPL and ODPL, the appellant company had acquired the brand names of OHPL, ODPL and OLPL, that OHPL, ODPL and OLPL had surrendered their Central Excise licence, that on taking over the plant and machinery alongwith staff and workers of OHPL, ODPL and OLPL on lease, the appellant company applied for and obtained a fresh Central Excise Registration in September 1999 and commenced production of P&P medicines ~~of~~ under the same brands as those of OHPL, ODPL and OLPL from October 1999 onwards, that the total clearances of excisable goods from the factory of the appellant at X-60, X-61, X-62, Okhla Industrial Area, Phase-II, New Delhi from October 1999 to March 2000 were more than Rs. One crore, and that during the period from September 1999 to December 1999, there was no addition to the existing plant and machinery.

1.2 The Appellant company availed concessional rate of duty under Notification 9/99-CE in respect of their clearances during the period from October 1999 to 6/12/99 and since it appeared that the appellant company during this period were not eligible for concessional rate of duty under Notification No. 9/99-CE, a show cause notice dated 2/9/02 was issued to them as well as to Dr. Sushil Khanna, Executive Director of the appellant company, for denying the benefit of concessional rate of duty under Notification No. 9/99-CE dated 28/2/99 and recovery of short paid duty amounting to Rs. 4,78,108/- (Rupees Four Lakh Seventy Eight Thousand One Hundred Eight) for the period from October 1999 to 6th December 1999 alongwith interest on it at the applicable rate under Section 11AB and also for imposition of penalty on the appellant company under Section 11AC as well as under Rule 25 (1) of Central Excise Rules, 2001 and also for imposition of penalty on Dr. Sushil Khanna, Executive Director of the Appellant company under Rule 26 of the Central Excise Rules, 2001.

1.3 The Deputy Commissioner vide order-in-original No. 125/2004 dated 1/7/04, after hearing the appellants, confirmed the duty demand of Rs. 4,78,108/- alongwith interest on this duty at the applicable rate under Section 11AB and beside this, imposed penalty of Rs. 4,78,108/- on the appellant company under Section 11AC of the Central Excise Act, 1944 readwith Rule 25 (1) of Central Excise Rules, 2002 and penalty of Rs. 50,000/- on Dr. Sushil Khanna, Executive Director of the appellant company under Rule 26 of Central Excise Rules, 2002. The Deputy Commissioner confirmed the duty demand and imposed penalty under Section 11AC by holding that there was mis-statement and suppression of fact with intent to evade the payment of duty on the part of the appellant and hence the proviso to Section 11 A(1) of the Central Excise Act, 1944 as well as the penal provisions of Section 11AC were attracted.

1.4 On appeal to Commissioner (Appeals) against this order of the Deputy Commissioner, the CCE (Appeals) vide order-in-appeal No. 233-234/CE/D-II/2004 dated 29/10/94 upheld the Deputy Commissioner's order and dismissed both the appeals.

1.5 It is against this order that these two appeals have been filed.

2. Shri R.K. Hasija, Advocate, the learned Counsel for the appellant, made the following submissions :-

(i) The appellant initially had a factory at A-110, Okhla Industrial Area, Phase-II, New Delhi for which they had Central Excise Registration and the appellant were manufacturing Ayurvedic medicine in that factory which were fully exempt from Central Excise Duty. However, due to lack of demand of their products, the appellant stopped manufacturing activity in that factory since 13/2/98 and surrendered the Central Excise Registration on 22/3/2000. However, in order to revive their business, the appellant started manufacturing activity at X-60, X-61, X-62, Okhla Industrial Area, Phase-II, New Delhi by taking over the factories at these three plots from M/s Shimal Investment and Trading Company and they obtained a fresh Central Excise Registration on 10/9/99 for this factory. The appellant started commercial production at this new factory at X-60, X-61, X-62, Okhla Industrial Area, Phase-II, New Delhi from 4/10/99. Prior to commencement of manufacturing operations by the appellant at the factory located at X-60, X-61, X-62, Okhla Industrial Area, Phase-II, New Delhi, these premises were occupied by OHPL, ODPL and OLPL which amalgamated with M/s Shimal Investment and Trading Company w.e.f. 26/8/99 ,from whom the appellant took the plant and machinery on lease in September 1999. The appellant took these premises on lease basis till 30th June 2004 for lease rent of Rs. 51,00,000/- (Rupees Fifty One Lakh). On starting the manufacturing operations, the appellant filed a classification declaration under Rule 173B of Central Excise Rules, declaring various products being manufactured by them as well as their intention to avail SSI benefit under Notification No. 9/99-CE dated 28/2/99. The appellant were also regularly filing RT-12 returns to the Department and enclosing copies of invoices the goods sold. It is in this background that show cause notice dated 2/9/02 was issued to the appellant proposing to deny the benefit of concessional rate of duty under Notification No. 9/99-CE on the ground that the clearances made by the appellant from October 1999 onwards are to be clubbed with the clearances of OHPL, ODPL and OLPL during period from April 1999 to 13/9/99 and demanding differential duty from the appellant. The department's stand is incorrect as OHPL, ODPL and OLPL were three separate companies who were operating separately from the premises located at X-60, X-61, X-62, Okhla Industrial Area, Phase-II, New Delhi respectively and all of them amalgamated with M/s Shimal and subsequently closed their operations. Prior to taking over of their plant and machinery, OHPL, ODPL and OLPL had also surrendered their excise registrations with the department.

(ii) As per Clause V of para 2 of the notification, clearances made by one or more manufacturers from the same factory have to be taken into account for determining the aggregate value of clearances and as per Section 2 of Central Excise Act, the term 'factory' means premises including adjoining areas where excisable goods are manufactured or manufacturing operations in connection with excisable goods are carried out. The factory from which the appellant cleared the goods was X-60, X-61, X-62, Okhla Industrial Area, Phase-II, New Delhi whereas OHPL, ODPL and OLPL were clearing excisable goods from their respective factories located at X-60, X-61, X-62, Okhla Industrial Area, Phase-II, New Delhi. Therefore, this is not the case where more than one manufacturer were clearing excisable goods from the same factory, as by virtue of amalgamation of OHPL, ODPL and OLPL with M/s Shimal a new factory premises had come into existence in the premises at X-60, X-61, X-62, Okhla Industrial Area, Phase-II, New Delhi.

(iii) The factories of OHPL, ODPL and OLPL were separate and distinct factories and were different from the factory of the appellant and, therefore, there is no question of clubbing the clearances of the appellant with the clearances of OHPL, ODPL and OLPL.

(iv) The appellant, before commencing production, had applied for new registration with Central Excise Department and a registration certificate had been issued to them. If the factory of OHPL, ODPL and OLPL were the same as the factory of the appellant, there was no need for granting separate registration by the Central Excise Department to the appellant.

(v) The Tribunal in the case of **CCE, Madurai vs. Ganesh Agro Pack (P) Ltd.** reported in **1996 (84) E.L.T. 471 (Tribunal)**, wherein the facts are similar to the facts of the present case, has held that the clearances of the respondent could not be clubbed with the clearances of the previous owners of the factory.

(vi) The question of clubbing the clearances under para 2 (V) of the Notification No. 9/99-CE would arise only if more than one manufacturer simultaneously cleared the excisable goods from the very same factory. In the present case this is not so.

(vii) The show cause notice for demanding the duty for the period from 15/10/99 to 6/12/99 had been issued on 2/9/02 by invoking extended period and alleging wilful mis-statement and suppression of facts. This is factually incorrect, as the fact that prior to taking over the plant and machinery by the appellant in September 1999 from the previous owners M/s OHPL, ODPL and OLPL/M/s Shimal, in the same factory premises, excisable goods were being manufactured by OHPL, ODPL and OLPL, was known to the department. When the appellant started manufacturing operations in October 1999 they had also filed a classification declaration declaring the details of the goods being manufactured by them and also declaring their intention to avail of the concessional rate of duty under Notification No. 9/99-CE. The appellant, in any case, were in no position to know the value of the clearances of the previous owners. In view of this, neither extended period is available to the Department nor the penal provision under Section 11AC are attracted and, as such, the entire demand is time barred.

3. Shri A. Khanna, the learned Departmental Representative reiterating the Commissioner (Appeals) findings, pleaded that –

(i) since this is a case where during the financial year 1999-2000, more than one manufacturer have made clearances from the same factories, the provisions of para 2 (V) of the Notification No. 9/99-CE are attracted and clearances of the appellant during the period from October 1999 to December 1999 have to be clubbed with the clearances of OHPL, ODPL and OLPL during the period from April 1999 to September 1999

(ii) Dr. Sushil Khanna, the Executive Director in the appellant company, was also the Director in OHPL, ODPL and OLPL, the three companies which amalgamated with M/s Shimal Investment and Trading Company in September 1999 and from whom the appellant company took over the factories of OHPL, ODPL and OLPL alongwith staff on lease and even the brand names of OHPL, ODPL and OLPL had been acquired by the appellant and in view of this ______, the benefit of concessional rates of duty under Notification No. 9/99-CE has been correctly denied by invoking para 2 (V) of the notification; and

(iii) Since the Appellant had deliberately mis-stated the clearances of finished excisable goods for the period from 1/4/99 to 13/9/99 as 'nil', in the classification declaration filed by them, and this was done with intention to evade the payment of duty, the proviso to Section 11 A(1) is attracted and, therefore, the show cause notice dated 2/9/02 for duty demand for the period from October 99 to 6/12/99 is within time and for the same reason, penalty under Section 11AC of the Central Excise Act, has been rightly imposed on the appellant company and penalty under Rule 26 of the Central Excise Rules 2001 has been rightly imposed on Shri Sushil Khanna, Executive Director of the Appellant company.

4. We have carefully considered the submissions from both the sides and perused the records.

4.1 The undisputed facts are that -

(a) the Appellant company in their factory premises at X-60, X-61, X-62, Okhla Industrial Area, Phase-II, New Delhi had started manufacture of P&P medicines in October 1999 and they had acquired the plant and machinery, alongwith workers and staff from M/s Shimal Investment & Trading, in September 1999 ;

(b) Earlier X-60, Okhla Industrial Area, Phase-II, X-61, Okhla Industrial Area, Phase-II and X-62, Okhla Industrial Area, Phase-II, were three separate factories named - OHPL, ODPL and OLPL respectively, manufacturing P&P medicines and having separate central excise registrations and these factories had been amalgamated in M/s Shimal Investment & Trading in September 1999 and immediately thereafter, the same were taken once alongwith plant and machinery, workers and staff by the Appellant company and even the brand names by used by OHPL, ODPL and OLPL was also acquired by the Appellant company;

(c) On acquisition of the three factories at X-60, 61 & 62, Okhla Industrial Area by the appellant, they applied for and obtained a new single central excise registration and OHPL, ODPL and OLPL surrendered their central excise registration;

(d) Dr. Sushil Khanna, the Executive Director in the Appellant company was also Director in OHPL, ODPL and OLPL ;

(e) The Appellant company were availing input duty credit and also the benefit of concessional rates of duty under Notification 9/99-CE (the SSI exemption for units availing Modvat credit) and for this purpose they had (i) filed a "classification declaration" on 13/9/09 wherein they declared that "we have not made any clearances from our factory till date"; and (ii) sent a letter dated 7/10/99 to the jurisdictional Deputy Commissioner mentioning the finished products being manufactured by them and also their intention to avail of the benefit of Notification No. 9/99-CE ;

(f) During financial year 1999-2000, during period from 1/4/99 to 13/9/99, when the factory of the Appellant was owned by and was being operated by OHPL, ODPL and OLPL, total clearances for home consumption of the goods specified in Notification No. 9/99-CE were about rupees 7.40 crores and these clearances of previous owners had not been mentioned by the Appellant in their classification declaration dated 13/9/99 and letter dated 7/10/99 to the Deputy Commissioner ; and

(g) Throughout the period of demand, the Appellant had been filing RT-12 returns which had been finalised without any objection.

4.2 Notification No. 9/99-CE, known as "SSI exemption for assessee availing Modvat scheme" prescribes concessional rate of "60% of normal rate of duty" for "first clearances upto aggregate value not exceeding Rs. 50,00,000/- made on or after 1st day of April in any financial year" and concessional rate of – "80% of normal rate of duty" for clearances upto an aggregate value not exceeding Rs. 50,00,000/- immediately following the first Rs. 50,00,000/- worth clearances in a financial year. For clearance beyond rupees one crore in a financial year, there is normal rate of duty. Para 2 of the notification specifies the conditions subject to which this exemption is available. Clause (V) of para 2 reads as under :-

> "when the specified goods are cleared by one or more manufacturers from a factory, the exemption shall apply to the aggregate value of clearances mentioned against each serial number in the table to the notification and not separately for each factory."

4.2.1 Though the word "factory" is not defined in this notification, the same, is defined in Section 2 (e) of the Central Excise Act, 1944, as "any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt, are manufactured or wherein as in any part of which, any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on."

4.3 The first point of dispute is as to whether or not the Appellant company is hit by Clause (V) of para 2 of the notification and accordingly whether or not it is eligible for the concession rates of duty. The second point of dispute is that if it is held to be ineligible for the exemption under Notification No. 9/99-CE, whether the show cause notice dated 2/9/02 for recovery of allegedly short paid duty during period from October 99 to 6/12/99 is within time or in other words whether the Appellant company can be said to be guilty of wilful mis-statement or suppression of facts with intent to evade the payment of duty so as to attract proviso to Section 11A (1).

5. As regards the first point of dispute, the relevant para 1 and 2 of the exemption notification No. 9/99-CE are reproduced below :-

"SSI Exemption for assessees availing Modvat scheme — Concessional rate of duty for goods of SSI Units having clearances not exceeding rupees three crores in the preceding financial year — Effective from 1-4-1999

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944) read with clause 119, clause 121 and clause 134 of the Finance Bill, 1999, which clauses have by virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act, 1931 (16 of 1931), the force of law, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts clearances, specified in column (2) of the Table below, (hereinafter referred to as the said Table) for home consumption, of excisable goods of the description specified in the Annexure appended to this notification (hereinafter referred to as the specified goods), from so much of the aggregate of -

(a) the duty of excise specified thereon in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); and

(b) the special duty of exercise specified thereon in the Second Schedule to the said Central Excise Tariff Act,

as is in excess of the amount calculated at the rate specified in the corresponding entry in column (3) of the said Table.

TABLE

S. No.	Clearances	Rate of duty
(1)	(2)	(3)
1.	First clearances upto an aggregate value not exceeding fifty lakh rupees made on or after the 1st day of April in any financial year.	Sixty per cent of normal rate of duty
2.	Clearances upto an aggregate value not exceeding fifty lakh rupees immediately following the clearances specified against S.No. 1 above during the financial year.	Eighty per cent of normal rate of duty
3.	All clearances of the specified goods which are used as inputs for further manufacture of any specified goods within the factory of production of the specified goods.	Nil

2. The exemption contained in this notification shall apply only subject to the following conditions, namely -

(i) a manufacturer who intends to avail the exemption under this notification shall exercise his option in writing for availing the exemption under this notification before effecting the first clearances of specified goods and such option shall be effective from the date of exercise of the option which shall not be withdrawn during the remaining part of the financial year.

(ii) while exercising the option under condition (i), the manufacturer shall inform in writing to the jurisdictional Assistant Commissioner of Central Excise with a copy to the Superintendent of Central Excise giving the following particulars, namely :-

(a) name and address of the manufacturer;
(b) location/locations of factory/factories;
(c) description of specified goods produced;
(d) date from which option under this notification has been exercised;
(e) aggregate value of clearances of specified goods (excluding the value of clearances referred to in para 3 of this notification) till the date of exercising the option.

(iii) where a manufacturer opts for availing the exemption under this notification in terms of condition (i) above, the clearances of specified goods already made during the financial year, prior to the exercise of such option, shall be taken into account for computing the aggregate value of clearances, as specified in the said Table.

Illustration I : A manufacturer who has been paying the normal duty on any goods during a financial year opts to avail of this exemption after making clearances having an aggregate value of rupees twenty lakhs. He is entitled under this notification to additional clearances of an aggregate value of rupees thirty lakhs at the concessional rate of 60% of normal duty and further clearances of an aggregate value of rupees fifty lakhs at the concessional rate of 80% of normal duty.

Illustration II : A manufacturer who has been paying the normal duty on any goods during a financial year opts to avail of this exemption after making clearances having an aggregate value of rupees seventy lakhs. He is entitled under this notification to additional clearances of an aggregate value of rupees thirty lakhs at the concessional rate of 80% of normal duty.

Illustration III : A manufacturer who has been availing of full exemption on any goods during a financial year under Notification No. 8/99-CE, dated the 28th February, 1999, opts to avail of this exemption after making clearances having an aggregate value of rupees twenty lakhs. He is entitled under this notification to additional clearances of an aggregate value of rupees thirty lakhs at the concessional rate of 60% of normal duty and further clearances of an aggregate value of rupees fifty lakhs at the concessional rate of 80% of normal duty.

Illustration IV : A manufacturer has availed of full exemption on any goods during a financial year upto an aggregate value of rupees fifty lakhs under Notification No. 8/99-CE, dated the 28th February, 1999.

He has subsequently availed of the concessional rate of duty of five per cent *ad valorem* on clearances having an aggregate value of rupees twenty lakhs under the same notification, when he opts to avail this exemption. He is entitled under this notification to additional clearances of an aggregate value of rupees thirty lakhs at the concessional rate of 80% of normal duty.

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

(v) where the specified goods are cleared by one or more manufacturers from a factory, the exemption shall apply to the aggregate value of clearances mentioned against each of the serial numbers in the said Table and not separately for each manufacturer;

(vi) the aggregate value of clearances of all excisable goods for home consumption by a manufacturer from one or more factories, or from a factory by one or more manufacturers, has not exceeded rupees three hundred lakhs in the preceding financial year."

From reading of this notification, it is clear that an SSI unit availing Modvat scheme is eligible for concessional rates of duty of "60% of the normal rate" for clearances of specified goods upto aggregate value not exceeding Rs. 50,00,000/- made on or after day of April of any financial year, and for the next Rs.

50,00,000/- worth clearances, the concessional rate of duty is "80% of the normal rate". Clearances beyond Rs. 1,00,00,000/- (Rupees One crore) attract the normal rate of duty. Para 2 of the notification enumerates the conditions subject to which the concessional rates mentioned in para 1 are available and condition (V) mentioned in para 2 is that where the specified goods are cleared from a factory by one or more manufacturers, the exemption shall apply only to the aggregate value of the clearances mentioned against each of the serial numbers and not separately for each manufacturer. Thus, if during a particular financial year from a particular factory, more than one manufacturers have cleared specified goods, the eligibility for the concessional rates, as mentioned in the table in the para 1, would be determined on the basis of the aggregate value of the clearances of all the manufacturers. There is nothing in the condition that different manufacturers must be using the factory during the same period. If a manufacturer A uses a factory and makes clearances during the period from April to June, manufacturer B uses the factory and make clearances during the period from July to August and thereafter in September the manufacturer C starts the using the factory and making the clearances, for determining the eligibility of the manufacturer C the clearances of manufacturer A and B will have to be clubbed with the clearances of C and, if, the clearances of manufacturers of A and B have crossed Rs. 1,00,00,000/-, the manufacturer C would not be eligible for concessional rate mentioned against serial No. 1 and 2 in the table in para 1. It has been pleaded that the factory of the appellant cannot be treated as the same factory as that of OHPL, ODPL and OLPL. The word "factory" though not defined in the exemption notification, has been defined in Section 2 (e) of the Central Excise Act, 1944 as any premises "including precincts, thereof, wherein or any part of which excisable goods other than sort or manufacture, or wherein or any part of which any manufacturing process connected with the production of these goods as being carried on or is ordinarily carried on." The factory of the appellant consists of the plant and machinery installed at the plot X-60, X-61, X-62, Okhla Industrial Area, Phase-II and for the entire plant and machinery at these three plots there is a common registration. Prior to taking over of this factory by the appellant, the plant and machinery at X-60, X-61, X-62 were under the control of OHPL, ODPL and OLPL. Since the earlier factories of OHPL, ODPL and OLPL at plot No. X-60, X-61, X-62 respectively are now part of the factory premises of the appellant manufacturer, clearances of the specified goods during April 1999 to September 1999 period from their respective factory premises at X-60, X-61, X-62 have to be treated as the clearances from the factory of the appellant. Since OHPL, ODPL and OLPL during the period from April 1999 to September 1999 had made clearances of specified goods from their respective factory premises which are now part of the factory premises of the appellant, the clearances of the appellant from September/October 1999 onwards have to be clubbed with the clearances of OHPL, ODPL and OLPL during April 1999 to September 1999 period for determining the eligibility of the appellant for the concessional rate of duty under Notification No. 9/99-CE. Since there is no dispute about the fact that during April 1999 13/9 – September 1999 period the clearances of OHPL, ODPL and OLPL were about Rs. 7.40 crores, the clearances of appellant from their factory, which started in October 1999, would not be eligible for concessional rate of duty.

6. Next comes the question as to whether the longer limitation period under proviso to Section 11 A(1) of the Central Excise Act is available to the Department. The department's allegation is that the appellant while filing the classification declaration have deliberately mis-stated the value of excisable goods for the period from 1/4/99 to 13/9/99, as they did not take into account the clearances of excisable goods made from the same factory by other manufacturers - OHPL, ODPL and OLPL during the same financial year. On going through the records, we find that while it is true that the appellant in their covering letter dated 13/9/99 forwarding the classification declaration have stated that "they have not made any clearances from their factory till date" and subsequently in their letter dated 7/10/99 to the Deputy Commissioner regarding their intention to avail of the exemption notification No. 9/99-CE they did not mention that from the same factory – i.e. X-60, X-61, X-62, Okhla Industrial Area, Phase-II, New Delhi, other manufacturers - OHPL, ODPL and OLPL had made clearances during the period from April 1999 to September 1999, the appellant as well as the predecessor units operating from the same factory i.e. OHPL, ODPL and OLPL were within the

jurisdiction of the same Central Excise Range and para 3 of the show cause notice itself states that, from the records available with Central Excise Range-VIII, it has been ascertained that prior to 13/9/99, OHPL, ODPL and OLPL were manufacturing P&P medicines, were operating from the premises X-60, X-61, X-62, Okhla Industrial Area, Phase-II, New Delhi and the value of their double clearances was Rs. 7,40,81,698/- (Rupees Seven Crore Forty Lakh Eighty One Thousand Six Hundred Ninety Eight).

> "3. Whereas, from the records available with Central Excise Range – VIII it has been ascertained that prior to 13.09.1999, the following units manufacturing P&P medicines, were operating from the premises X-60 – 62, Okhla Industrial Area, Phase – II, New Delhi.

Sl. No.	Name & Address of the Unit	Value of clearances of excisable goods (in Rs.)	Period
1.	M/s Oscar Health Care Pvt. Ltd. X-60, Okhla Industrial Area, Phase-II, New Delhi	6,65,11,692/-	01/04/99 to 31/08/99
2.	M/s Oscar Laboratories Pvt. Ltd. X-62, Okhla Industrial Area, Phase-II, New Delhi	75,70,004/-	01/04/99 to 31/08/99
3.	M/s Oscar Drugs Pvt. Ltd., X-61, Okhla Industrial Area, Phase-II, New Delhi	------	01/04/99 to 31/08/99
	Total	7,40,81,698/-	

The figures as mentioned above were also corroborated by the production & dispatch details submitted by the party in respect of the units mentioned at Sl. No. 1 to 3 above.

4. Whereas, all the above mentioned three units were registered with Central Excise Department for the manufacture of P&P medicines and surrendered their Central Excise Registration Certificates in September, 1999."

6.1 The para 3 & 4 of the show cause notice show that the Department, from the very beginning was aware of the fact that during April 1999 to 13/9/99 period, from the same premises i.e. X-60, X-61, X-62, Okhla Industrial Area, Phase-II, New Delhi, three predecessor units OHPL, ODPL and OLPL had made clearances of specified goods and the value of those clearances was Rs. 7,40,81,698/- and if those clearances are taken into account the appellant even from day one would not be eligible for concessional rate of duty under Notification No. 9/99-CE. The Department, however, still accepted the classification declaration filed by the appellant without raising any objection and thereafter even the monthly RG-12 returns showing the payment of duty by availing the concessional rate were also accepted. Even in the letter dated 7/10/99 forwarding the classification declaration, the appellant have only stated that they have not made any clearances so far and no statement regarding any clearances having been made by the predecessor units has been made. Hon'ble Supreme Court in the case of **Pushpam Pharmaceuticals Company vs. CCE, Bombay** reported in **1995 (78) E.L.T. 401 (S.C.)** has held that the "suppression of facts" in the Proviso of Section 11A (1) has to be interpreted strictly because of its use with the strong words like "fraud", "collusion" or "wilful misstatement" and mere omission to disclose the correct information is not suppression of facts unless it was deliberate to escape from payment of duty. Same view has been taken in the case of **Continental Foundation Jt. Venture vs. CCE, Chandigarh – I** reported in **2007 (216) E.L.T. 177 (S.C.)** whose para 10 is reproduced below :-

> "**10.** The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to evade the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct."

Same view has been taken by the Tribunal in the case of **CCE vs. Chemphar Drugs & Liniments** reported in **1989 (40) E.L.T. 276 (S.C.)**, wherein Hon'ble Supreme Court held that something positive other than mere inaction or failure on the part of manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required, before it is saddled with any liability, invoking longer limitation period. In the present case, even if, it is assumed that the appellant were aware of the manufacturing and clearance of specified goods during April 1999 to 13/9/99 period by OHPL, ODPL and OLPL, from the show cause notice itself it is very much clear that the department was also equally aware and also had in its record the precise figures regarding the value of clearances made by the predecessor units during April 1999 to 13/9/99 period, but still when the classification declaration claiming the exemption was under notification No. 9/99-CE was made by the appellant, no objection was raised. There is no allegation of collusion between the Departmental officers and the appellant. In view of these circumstances, we are of the view that circumstances do not justify invoking a longer limitation period under proviso to Section 11A (1) and therefore the duty demand raised by the show cause notice dated 2/9/02 for the period from 15/10/99 to 16/12/99 has to be held as time barred.

7. In view of the above discussion, while holding that during October 1999 – 6/12/99 period, the Appellant company was not eligible for duty exemption under Notification No. 9/99-CE, the duty demand is not sustainable being time barred, as the elements for invoking the proviso to Section 11A (1) are not present. For the same reason, neither penalty is imposable on the Appellant company under Section 11AC of the Central Excise Act, 1944, nor on its Director Dr. Sushil Kharma under Rule 26 of the Central Excise Rules, 2001.

8. In view of the above discussion, the impugned order is not sustainable. The same is set aside and the appeal is allowed.

(Pronounced in open court on 15/1/2018)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK