



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

21

Appeal No. E/153 /1988-154 /1988 - EX[DB]

Date 29/10/2010

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

To :
GTC INDS. AND OTHERS
TOBACCO HOUSE VILA PARLE, BOMBAY-400056
GTC INDS. AND OTHERS

Appellant

Vs
Respondent

C.C.E. NEW DELHI

I am directed to transmit herewith a certified copy of Final order No. 749-750/
passed by the Tribunal under Section 35-C(1) of Central Excises Act, 1944

2010 EX[DB] dated 27-10-10

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent

C.C.E. NEW DELHI

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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 Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3

8 Company Law Institute of India Pvt Ltd., No.2 (Old No. 36), Vaithyaram Street, T. Nagar, Chennai - 17

9 M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017

10 Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005

11 Easy Service Tax Online Dot Com Pvt Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

12 LAWCRUX Advisors Pvt Ltd. LAW House, 1-8, Sector - 10, Faridabad 121003 (Harvana)

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16. M/S. NORTH EAST TOBACCO CO. LTD,
G.S. ROAD, GAUHATI, ASSAM

17. MS. NISHA BAGCHI, ADV.,
C-630, GROUND FLOOR,
NEW FRIENDS COLONY, N. DELHI

18. SH. MOHAN PARASARAN, (ASG)
R-20, G.K.-I, N. DELHI

Assistant Registrar
(Excise Appeal Branch)

-/-

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

COURT NO. II

Excise Appeal No. 153 of 1988

(Arising out of Order-in-Original No. 4/1987 dated 16.10.1987 passed by the
Director (Legislation & Adjudication), Customs & Central Excise, New Delhi)

GTC Industries Ltd.

Appellants

Vs.

CC, New Delhi

Respondent

Excise Appeal No. 154 of 1988

(Arising out of Order-in-Original No. 4/1987 dated 16.10.1987 passed by the
Director (Legislation & Adjudication), Customs & Central Excise, New Delhi)

North East Tobacco Co. Ltd.

Appellants

Vs.

CC, New Delhi

Respondent

Reserved on: 08/09/2010

Pronounced on: 27/10/2010

Appearance:

For Appellant:

Shri L.P. Asthana, Ms. Nisha Bagchi,
Shri Abhishek Jaja, Ms. Shuchi
Kakkar & Ms. Sujata, Advocates

For Respondent:

ASG Sri Mohan Parasaran with Shri Gaurav
Dhingra, Advocate

CORAM: HON'BLE MR. D.N. PANDA, JUDICIAL MEMBER
HON'BLE MR. RAKESH KUMAR, TECHNICAL MEMBER

Final Order No. 749-750 / 10-Ex

Per D.N. Panda:

Pursuant to the remand of the matter by Hon'ble Supreme Court in the case of Commissioner of Central Excise, New Delhi Vs. GTC Industries Ltd.,- 2008 (228) ELT 505 (SC), setting aside the order dated 21.3.2001 passed by the Tribunal, appeals of Golden Tobacco Industries Ltd. (hereinafter referred to as "GTC") in Appeal Case No. E/153/88-A and North East Tobacco Co. Ltd. (hereinafter referred to as "NETCO") in Appeal Case No. E/154/88-A were taken up for hearing and were heard analogous from time to time and both cases being intimately connected with each other and arising out of common cause are dealt by this common order for disposal.

DIRECTION OF APEX COURT

2. While remanding the matter, Hon'ble Supreme Court noticed that Tribunal in its order dated 21.3.2001 had not dealt the question of flow back nor had also taken note of finding recorded by the Collector of Central Excise on such issue, while there was an allegation of the same in the Show Cause Notice. Similarly, the finding on limitation recorded by the Tribunal was not satisfactory to the Apex Court for which a detailed finding by Tribunal was called for. With such observations, the Apex Court required the Tribunal to decide the matter afresh in accordance with law keeping in view the observations made by the order reported as above. While directing so, the Hon'ble Court also clearly expressed its opinion that nothing stated in the order shall be taken as expression of opinion on the merits of the dispute for which all contentions were left open.

BACK GROUND OF INVESTIGATION

3. The Appellant "NETCO" in Appeal Case No. E/154/88-A was manufacturing specified brands of cigarettes on behalf of the Appellant "GTC" in Appeal Case No. E/153/88-A under the control of the later and the goods so manufactured by NETCO were marketed by GTC. Such goods were subject to levy of duty on "Adjusted sales Price" determinable with reference to Maximum Retail Price (MRP) basis in terms of Notification No. 211/83-CE dated 4.8.83 up to 24.3.85 and under Notification No. 100/85-CE thereafter. Revenue noticed that during the period 11.2.85 to 16.9.85 both the Appellant Companies resorting to the mode of undervaluation, violated the provisions of Rules 93, 226 and 9(1) of Central Excise Rules, 1944 and evaded excise duty of Rs.43,25,130/- for which they both were held to be jointly liable under Excise Law. According to Revenue, such evasion was made wilfully and by mis-statement and suppression of material facts as well as by mis-declaration of the "adjusted sale price" in relation to manufacture of "Panama" brand cigarette of the respective description for which protection of revenue was warranted. So also there were materials before the Investigating Authority to allege that the sale price of cigarettes realised over and above the MRP had flown to GTC.

3.1. It was also noticed by investigation that deceptively similar brands of "Panama" Cigarettes were manufactured by the NETCO and adopting dubious method of embossing sale price on cigarette packets without being printed caused loss of Revenue through a premeditated scheme of marketing designed by GTC to satisfy their ill will. Sale price over and above the price mentioned on the price list submitted

to Department for the impugned period was collected by GTC from buyers through its conduits and that had flown to GTC. Adjusted sale price with reference to the respective notification were distorted. Although assessable value was determinable with reference to the MRP printed on the body of each packet of cigarette, appellants were realising higher sale price on sale of cigarettes of aforesaid description and duty was paid on lower sale value causing evasion of Revenue, mechanically embossing the maximum sale price on the cigarette packets in hardly visible manner without printing the same on such packets.

3.2. It came to the light of Investigation that the quality of "Panama Virginia (Special)" brand cigarette manufactured in different factories of GTC located at various places were same as that of the goods manufactured by NETCO under the brand name "Panama Virginia". Samples were drawn on 6.8.85 from the market in respect of "Panama" brand manufactured by NETCO and similar such brand manufactured by all connected concerns of GTC at its different factories located in various places. Chemical examination of these goods virtually showed in terms of report dated 17.9.1985 of Central Excise Laboratory, Kolkatta that there was no difference in the quality of the brands of all such goods. Accordingly, Revenue was of the opinion that there was no difference between two brands i.e. 'Panama Viriginia G' manufactured by NETCO and 'Panama Viriginia (Special) manufactured by GTC in its various factories. But there was only difference in the printing of the words 'Special' and the word 'G'.

3.3. It was further noticed by Investigation that in Shillong cigarettes of aforesaid brand were sold at different prices and market

enquiry from retailer showed that higher sale price was collected by GTC against the price embossed by cigarette packets. GTC was marketing the product manufactured by the NETCO and sale price over and above the price embossed on the packets were collected by that Appellant from the wholesale buyers and such higher sales proceeds after deduction of expenses were channelised/flowed back to GTC.

RESULT OF SEARCH

4. All these aforesaid reasons called for search to the premises of both the appellant companies on 17.9.85. While making search of the premises of the appellants, search was also made of different connected dealers/distributors in different parts of the country, Revenue came to know from the distribution network that the same was fully controlled by GTC and there was under valuation of the goods done through an ill-design to satisfy ill-will. Such design was aimed to collect excess sale price than the price embossed on the cigarette packets and lower amount of duty was paid on the embossed price resulting in evasion. Bank drafts were made by certain persons in fictitious names for remittance thereof to GTC deducting expenses incurred.

4.1 Investigation recorded statement from different persons connected with the trade and recovered documentary evidence from various quarters during search demonstrating aforesaid ill-design and the evidence so gathered were made known to the Appellants through the Show Cause Notices (SCN) on following allegations calling for their reply of appellants:

(a) NETCO manufactured "Panama Virginia" cigarettes of GTC brand on job charges for GTC marking maximum price on packets for retail sale as per GTC's instructions.

(b) NETCO availed benefit of exemption under Notifn. Nos. 211/83 CE dt.4.8.83 and 100/85 CE dt. 25.3.85, as amended, and paid duty at specific slab rate applicable to the adjusted sale prices based on the market price.

(c) NETCO manufactured GTC's "Panama Virginia" and embossed retail price of 20's packets as Rs. 1.60 – Rs. 1.80 whereas the deceptively similar brand "Panama Virginia" (Special) Packet of 20's manufactured at other units of GTC was marked with a retail sale price of Rs.2.60. Although the brands were identical in quality and appearance etc. and were sold without any distinction at Rs.2.60 to the retailers. The retailers sold the same to the consumers at still higher price, Rs.3.00.

(d) The goods manufactured by NETCO were marketed by GTC through their representatives; viz. M/s Smart Commercial (P) Ltd., Gauhati, M/s. Vishnu Commercial (P) Ltd., Gaya, M/s Patna Sales, Patna, M/s Sharp Commercial (P) Ltd., Patna, M/s Sagar (India), Muzaffarpur, M/s Golden Agency, Gaya and M/s Smart Commercial (P) Ltd., Calcutta reportedly termed as whole sale buyer of the said goods were selling the said goods to different dealers at the rates other than declared rate to Central Excise Department.

(e) The dealers were selling the said goods to the retailers through different salesmen appointed/employed by GTC in the north east region @ 2.60/-

(f) Higher sales price were collected from the retailers through the salesmen of the dealers and such money was transmitted to GTC deducting therefrom the expenditure incurred for the establishment like salary of the salesmen, transport, trunkcall, etc, keeping sale price of quantity of goods supplied calculated at the declared sale price. Dealers were submitting statement of expenditure to M/s Smart Commercial Co., Gauhati, i.e. The extra realisations were remitted either by cash through special messenger or by Demand Drafts/Cheques, in fictitious address and name.

(g) GTC was realising some amount, in the name of interest @ 27% on the amount outstanding dues from their whole sale buyers.

(h) The cigarettes in question were sold in retail at a higher price as a matter of routine and the retailers were left with no margin, if they were to sell cigarettes at the marked price. From 11.2.85 to 24.3.85 the declared adjusted sale price was Rs. 80 par M. as against the actual sale price of Rs. 125/-. Likewise, for the period of 25.3.85 to 16.9.85 the price declared was Rs. 90/- as against the actual sale price of Rs. 130/-

(i) GTC controlled the sales through its distributors, supplying the goods actually at price higher than those

shown in the invoices. GTC's sales-men sold the goods thereafter at higher rates to retailers without issuing any bills/memos and deposited the sale receipts with the distributors. The margin occurring on account of charging higher price was used for payment of salary and other expenditure of GTC's salesmen. This expenditure was controlled by GTC by calling expenditure statement and vouchers from the distributors.

(j) GTC's staff (Regional Managers etc.) controlled retail dealers who were not prepared to pay the extra amounts for passing on to the distributor. One such dealer was directed to accept only billed amount and leave the extra amount to be handed over to the distributor directly by the salesmen.

(k) The marked prices were deliberately kept lower than the real sale price with the sole object of evading Central Excise Duty. The benefit of higher price was ploughed back, directly or indirectly, to GTC.

(l) The minimum adjusted sale price should have been Rs.2.50 and Rs.2.60 per packet of 20s for the period 11.2.85 to 24.3.85 and 25.3.85 to 16.9.85 respectively and accordingly the duty evaded was Rs.43,25,130/-.

(m) NETCO who had undertaken the responsibility to pay proper duty as a manufacturer failed to ensure that declaration which formed the basis for assessment was correct. In declaring imaginary prices as per instructions of

GTC, NETCO acquiesced with malpractices of GTC and acted in complicity with GTC.

(n) NETCO declared its adjusted sale price in terms of price lists no.I/85 and 2/85 submitted to the Central Excise Department, though higher sale price was realized in respect of sale of the said goods. There was suppression of facts, mis-statement and mis-declaration to the Central Excise Department and duty was evaded for which extended period was invocable under relevant provisions of Section 11A of Central Excises and Salt Act, 1944.

(o) Extended period of limitation, i.e. 5 years was applicable as GTC resorted to suppression of facts and mis-statement in the matter of marking of correct price on packets for retail sale which was done by NETCO in complicity with GTC.

(p) The duty evaded was recoverable from NETCO or GTC under rule 9(2) of the Central Excise Rules read with Section 11A of the Central Excise and Salt Act, 1944 and the penalty leviable on each clearances under Rule 9(2), 210 and 226 of the Central Excise Rules.

4.2. The Appellants without furnishing reply to the show cause notice delayed the process of adjudication on some pretext or other like non-supply of documents, cross-examination not allowed and no return of unrelayed documents made.

ADJUDICATION

5. While the adjudicating authority allowed several opportunities to the appellants to file their reply to SCN as depicted in para 4 to 4.38 of the order-in-original, dilatory tactics was adopted by the appellants in the aforesaid manner to avoid adjudication. However, learned Adjudicating Authority granting opportunity of hearing completed the adjudication by an order dated 16.10.1987, framing following issues:-

- (1) Whether the cigarettes in question ("the goods" for short) were sold to consumers in accordance with the maximum price marked on packets for retail sale. If not, why and how?
- (2) Whether in terms of Notification No. 211/83 & 100/85 as amended the duty was leviable on the actual sale price charged by retailers or it could be levied only on the basis of maximum price marked on packets for retail sale irrespective of whatever was the actual sale price of the retailers?
- (3) Who is liable to pay differential duty if any?
- (4) How far NETCO was responsible for the acts of GTC so far as the duty liability and extended period of limitation of 5 years was concerned?
- (5) Whether in the circumstances any penalty is impossible and on whom?

5.1. Issue number No. I was dealt by the learned Adjudicating authority in para 5.15.1 to para 5.15.13 at page 74 to 87 of the order-in-original and second issue was dealt in para 5.16.1 to para 5.16.8 at page 87 to 98 thereof. Third issue was dealt in para 6.1 to 10.2 at pages 98-135 of O-I-O. Fourth issue was dealt in para 11 to 11.6 at pages 135 to 140 of O-I-O. Issue 5 was dealt in para 12 to

13 at page 140 to 142 of O-i-O. All issues were decided against appellants holding both appellants were liable to duty evaded.

FINDING IN ADJUDICATION ON FIRST ISSUE

6. While dealing with Issue No. 1 to find out whether the cigarettes were sold to consumers charging price higher than the MRP marked on the cigarette packets meant for retail sale if so what was the result thereof. Learned Adjudicating Authority noticed in para 5.15.1 at page 74 of the order-in-original that GTC sold the goods manufactured by NETCO through its distributors, appointing its salesman to operate between the distribution and retailers. They sold the goods at higher price and the higher price so realised were not recorded in the books of account. Statements recorded from different persons were examined in terms of para 5.15.2, 5.15.3, 5.15.4 of order-in-original. That established that the excess sale proceeds were sent to GTC through special messengers for which GTC did not given any receipt and that was not brought to accounts. Bank drafts were made to remit such excess price deducting expenses incurred and the source of bank draft and reference of banks came to light. Remittances were made through bank draft in the name of different persons and such money had flown to GTC. Similar such finding also appeared in para 5.15.6 at page 77 to page 87 under different paragraphs. The recorded statement examined by the Authority brought to record shows that there was realisation of excess sale price and the price marked on the packets were lower than the actual price realised from sale of cigarettes. Price was embossed on cigarette packets instead of the same being printed on the packets. Such practice was found to be dubious and that comes out from para

5.15.11 of the order-in-original at page 83. Correspondences gathered in the course of search were subject matter of examination under para 5.15.12 and that showed that there was realisation of the higher sale price which had flown back to GTC through unaccounted deals as above through its conduits. Examining the material facts with the evidence before the learned Adjudicating Authority, in para 5.15.13 at page 87, that Authority came to the conclusion that the cigarettes in question were not being sold to consumers at the price marked by embossing the same on packets for retail sale, but those were sold at much higher price, and duty, on such higher price realised was not paid. Thus there was evasion.

FINDING IN ADJUDICATION ON SECOND ISSUE

7. So far as the second issue relating to determination of basis of levy whether shall be on marked price or retail price, that was dealt by the Id. Adjudicating Authority in terms of para 5.16.1 to para 5.16.8 covered by page 87 to 98 of the order-in-original. Id. Authority noticed that the price embossed on the cigarette packets were not determinative since that was fictitious mark to realise higher sale price. He examined the concerned notification in respect of the basis of levy and also the evidence gathered by search party. Having sufficient material evidence before him as to realisation of the higher price and flowing back of such price to GTC, he came to the conclusion that the price realised by sale of cigarettes was basis to determine the adjusted sale price for applicability of rate of duty in stead of the embossed price on the packets to become basis of levy.

FINDING IN ADJUDICATION ON THIRD AND FOURTH ISSUE

8. So far as the issue No. 3 & 4 as to who is liable to pay the duty short-paid and whether the proceeding was time-barred, learned Authority dealt the same in para 6.1 to para 10.1 covered by pages 98 to 135 of the order-in-original. In para 6.8 of the order, Id. Authority considered defence plea that NETCO was not concerned with what was done by GTC and its gain were not taxable in the hands of NETCO. According to the Adjudicating Authority, discharge of duty liability was correlated with the role of the parties. A manufacturer who produced goods on his own account was responsible in that regard. But if he produces the goods on behalf of some other person his liability to pay duty cannot be separated from the liability of the main manufacturer i.e. the person on whose behalf the goods were manufactured by him.

8.1. Giving various examples as to determination of liability under different situations, Id. Adjudicating Authority came to conclusion in para 10 at page 133 of the order-in-original that NETCO had undertaken the responsibility for discharging duty liability on goods which it manufactured on behalf of GTC. NETCO was not an independent manufacturer. It was dependent upon GTC for raw material to be used in manufacture of cigarettes by it and for marking the retail sale price on packets which was claimed to be basis for levy. Role of GTC in deciding the marked price and thereafter managing sale as well as distribution of goods also contributed for determination of liability. Accordingly, he held that GTC cannot be absolved from the responsibility of ensuring that NETCO should discharge proper duty liability and until the duty so realisable is paid by NETCO

following prescribed procedure of Central Excise, GTC should also be liable.

8.2. The retail sale price having been marked by NETCO under instructions of GTC, duty was paid by NETCO on the adjusted sale price as worked out by GTC. When excess realisation of the sale price was established proving that the price marked on the packets was not genuine, GTC was mainly responsible for the evasion of duty. NETCO having paid the duty on the price embossed on the packets, GTC was liable for the excess sale proceeds realised. There was deliberate and wilfully designed scheme to evade duty for which the Id. Adjudicating Authority in terms of para 10.2 of order at page 135 to 140 of the order-in-original concluded that the *modus operandi* resulting with flow back of excess sale price realised over and above price marked on the cigarette packets, made GTC liable to pay duty on excess sale price realised.

8.3. It was held by learned Adjudicating Authority that the marked price not being genuine, there was suppression of the fact to result in loss of Revenue, evading duty liability for which proviso to Section 11A of Central Excise Act, 1944 was invocable against both GTC and NETCO on account of acts or commission on the part of GTC and collusion on the part of the NETCO. Accordingly the proceeding was held to be not time-barred. The differential duty became payable by NETCO who had undertaken to discharge full duty.

**FINDING IN ADJUDICATION
ON FIFTH ISSUE**

9. So far as the fifth issue of penalty is concerned, the Authority examined that aspect in para 12 & 13 of the order-in-original at page 140 to 143 and held that the duty liability was both on GTC as manufacturer *de-jura* and on NETCO as *defacto* manufacturer, since the latter manufactured the cigarettes in question for and on behalf of the former and duty was not paid on the excess sale price realised over and above the marked price, both are liable to penalty because of their role to evade duty. Thus, penalty of rupees one lakh each was accordingly imposed on both of them.

CONSEQUENCES OF ADJUDICATION

10. On the light of the findings as discussed in paragraphs 5.15.1 to 12.2 of the order of adjudication, learned Adjudicating Authority held:

- a) That differential duty of Rs. 43,25,130.00 (Rs. Forty three lakhs twenty five thousand and one hundred and thirty only) as per Annexure "a" to the show Cause Notice dated 24.2.1986 was confirmed and became payable by M/s North East Tobacco Co. Ltd. (NETCO) under rule 9(2) of the Central Excise Rules, 1944 read with proviso to Section 11A of the Central Excise and Salt Act, 1944.
- b) Penalty of Rs.1,00,000/- (Rupees one lakh) each was imposable on M/s North East tobacco Co. Ltd. (NETCO) and M/s Golden tobacco Industries (erstwhile M/s Golden Tobacco Co. – GTC) under Rule 9(2) of the Central Excise Rules, 1944.

ARGUMENT OF APPELLANTS

11.1 Both the appellants were represented by the learned Counsels Sri Asthana and Mrs. Nisha Bagchi. On the first issue framed by the learned Adjudicating Authority at page 73 of the order of adjudication, Mrs Bagchi submitted that the same issue was composed of three sub-issues. Those are exhibited by page 73-76 of the order of adjudication. She explained that the marketing distribution pattern in relation to goods of GTC was chain distribution comprising whole sellers and retailer. The names of distributors appear at page-74 of the order of adjudication. She submitted that GTC was appointing distributors and distributors were appointing whole sellers. The retailers were taking goods from the whole sellers. She drew attention to the relied upon documents (page 1 in a folder submitted in the course of hearing) where one Shri Lakshmipat Ghorawat was stated to have been appointed as whole seller by GTC was submitted to be not correct. According to her, that person, was proprietor of the business concern M/s Business Distribution Centre and that comes under the distributor of M/s Samrat Commercial Pvt. Ltd., who was a distributor. Her submission was that at no point of time, NETCO had appointed distributor or whole sellers or having any control over them. It was GTC that had appointed the distributors and distributors have chosen their whole sellers and retailers buy goods from whole sellers.

11.2 Mrs. Bagchi referred to page NO. 102-104 complied in a folder submitted in the course of hearing and submitted that those were relied upon documents for issue of show cause notice. She submitted that evidence recorded by the authorities at page 102-104 has no credence for the reason that they were not connected with GTC or NETCO. She further submitted that the statements recorded

during search and adjudication proceeding were under duress and compulsion for which those are neither admissible nor relevant. According to her such pleading was also made in the preliminary objection filed when show cause notice was issued.

11.3 She drew attention to page 92 and 93 of the compiled documents to show that the stereo type evidence was recorded without even being countersigned by the recording officer. She also submitted that page 94-95 shall not lend credence not being countersigned by the recording officer. She further referred to page 98-99 and 100 to show that no where the evidence recorded says that the GTC and NETCO were in picture. She took us to the issue in question submitting that the recorded statement may be exhibiting price of goods, without showing that those goods were either purchased from GTC or NETCO. This establishes that the statements so recorded do not give rise to any flow back.

11.4 She further submitted that the above referred pages showing statement recorded have no sanctity under the principles of evidence as well as law. This cannot be called as evidence under Section 14 of the Central Excise Act, 1944 to provide any basis for issue of show cause notice. Her principal grievance was that all that is referred under the aforesaid pages, are impeachable for no opportunity of cross-examination granted to the Appellant in spite of their prayer before the authorities.

11.5 Mrs. Bagchi argued that the allegations made in the show cause notice was relying upon statement recorded under duress. She referred to page 131 of the appeal folder and 132 thereof. She drew attention to page 134, 135, 137, 138, 142, 144 of appeal folder and submitted that the Appellants were crying from very beginning that

they were deprived of the process of natural justice and this was their preliminary objection all along. The Statements recorded under duress, coercion and threat do not lend support to the case of Revenue. Ld. ASG appearing for Revenue seriously objected to such plea of duress, threat and coercion submitting that authorities have authenticated the statements recorded fairly for which the allegations are baseless and there was no retraction of evidence forthwith made or attention of higher authority was invited if such allegation had substance. Therefore according to him such pleadings of appellants are devoid of merit.

11.6 Mrs. Bagchi drew attention to page 146 and submitted that Revenue required the Appellant to file affidavit in respect of statement of 15 persons appearing in that page. Cross examination was all along being prayed by the Appellant in respect of four persons appearing at page 141 of appeal folder. But that was not allowed. Statement was recorded by Revenue from those persons and used against the Appellant. Similarly she submitted that the statement was recorded from 10 retailers who had no existence nor cross examination allowed. She referred to page 150 and 151/209 and 208 of the appeal folder. Drawing attention to page 153/206, she further submitted that for denial of cross-examination, the proceeding has been vitiated. Drawing attention to page 159/2000, she also harped that cross examination is the only requirement of law to test creditability of the witness of Revenue. She further submitted that the un-relied upon documents were not at all returned by Revenue although they agreed to return the same through various correspondences. According to appellants when cross examination was paid a deaf ear, un-relied upon documents would have served

interest of justice had those been returned against specific prayers made. Such documents were not returned by Revenue. Instead, Revenue merely extended time for reply to show cause notice without granting opportunity of cross examination and without returning the un-relied upon documents.

11.7 She drew our attention to page 162 to submit that the authorities preconceived that the witnesses meant for cross examination would merely depose whatever they have already stated in their recorded statement. She drew attention to page 172 and submitted that the Appellant requested for review of the decision of Revenue as to their version that they shall not enter into further correspondence with appellants on the subject as appearing at page 169. Referring to page 174 and 175, she submitted that the authorities denied review of their decision. She draws attention to CWP No. 2036/86 available at page 183 to submit that the question of violation of natural justice was challenged by writ petition before Hon'ble High Court of Delhi along with the question of jurisdiction. But such a stand of appellants was demolished by learned. ASG Shri Mohan Parasaran appearing for Revenue ^{also} submitted that the writ petition was dismissed as withdrawn.

11.8 Ld. Counsel for Appellant drew attention to page 184 to say that the Appellants were repetitively insisting to return back un-relied upon documents to the Appellant. But Revenue did not allow such prayer. In the counter affidavit filed by Revenue in connection with CWP No. 2036/86, Mrs. Bagchi submitted that Revenue stated that appellant's prayer/request for returning of un-relied upon documents was not turned down.

11.9 Relying upon all the aforesaid materials, emphasis of the appellants was that natural justice has all along been denied. To support their contention, learned counsel drew attention to Ground No. (d) of appeal memo appearing at page 79/281 of the appeal folder where violation of natural justice was specifically pleaded before Tribunal. At this juncture, Ld. ASG submitted that natural justice question does not arise at this stage when Hon'ble Supreme Court has directed the Tribunal to decide on three specific issues i.e. (a) flow-back (b) limitation and (c) determination of liability. Such contention of Revenue was objected by the Appellant's Counsel submitting that natural justice goes to the root of the matter.

11.10 Learned Counsel for Appellant invited attention to page No. 83/276 to deal with the issue No. 1 framed by learned Adjudicating authority submitting that such issue comprised 3 sub issues appearing at page 80/276 and 279 of the appeal folder. She submitted that the question of natural justice is an essential ingredient to decide the issue of flow back. Any conclusion drawn violating principles of natural justice relying upon the documents gathered by Revenue against the Appellant without being tested by cross examination shall result in denial of justice. Drawing attention to page 91 to 104 of the compilation filed by the Appellant she submitted that documents inadmissible in evidence fail to establish their credence without cross examination being allowed.

11.11 Mrs. Bagchi invited attention to documents at page 102 to 104 of the compilation filed by the Appellant and submitted that these three documents show similar version in the answers to questions No. 5, 6 and 10 of the recorded statement. But the Officers of Revenue present during hearing before us along with Shri Apalak Das, Ld.

Asstt. Commissioner, from Gauhati discarded plea of appellant stating that the officer who recorded the statements appearing at page 102 and 104 does not disclose discrepancy. Ld. Counsel for the Appellant submitted that in view of the defects appearing at page 91 to 104 and such documents suffering from legal infirmity, in absence of counter signature of authorities as well as those documents not being tested by cross-examination that cannot be used against the Appellant. She drew our attention to page 64 of the compilation filed by the appellant and submitted that such document cannot be considered under law being inadmissible in evidence for defects. She invited attention to page 81/278 to deal with 14 katcha slips recovered from Shri Vinod Kumar, which were considered by the Revenue in framing charge against appellant. Similarly she challenged contents of pages 68 to 72 of compilation, which pertains to Vinod Kumar. Her submission was that those documents are inadmissible in evidence for no cross examination being allowed. Specifically she submitted that page 60 of the compilation does not *per se* establish charge against the appellant in respect of Panama Virginia.

11.12 Ld. Counsel Ms. Nisha Bagchi appearing for appellants invited attention to page 64-72 of the compilation filed in a separate folder by Appellant and submitted that the same were relied upon by the Revenue to frame charges against the appellant. She filed an uncertified English translation copy of the Hindi version document appearing at page 64-72 of the compilation and submitted that such documents cannot be basis for charge for following reasons:

- (1) Although there was a search conducted executing the warrant on Mr.Vinod Kumar, all pages were not attested by

the witnesses who were present in the course of search. The only page that was signed by witness is page No.67A.

- (2) Signature of Mr. Vinod Kumar that was collected by Revenue in the statement recorded at page 64, 65, 66 and 67 are mere initials, while a different signature appears in page 67A. Signature of Mr. Vinod Kumar is found to be different at pages 68 to 72. The date recorded at page 64 is 13.09.85 but not 17.9.85. 14 chits that were recovered in the course of search was subject matter of pages 68 to 72 and do not self explain the contents thereof for use against the appellants.
- (3) The price recorded in all the documents does not suggest that any extra sales price was realized by Sagar India with whom Mr. Vinod Kumar was working as Manager. The invoice price and the sale price do not throw any light as to realisation of any extra money. These chits also do not show any payment made to GTC.
- (4) Panama Cigarette was not found in stock at the time of search. No Panchnama was prepared by search party to conduct search on 17.9.85.

11.13 Mrs. Bagchi categorically submitted that when cross-examination of Mr. Vinod Kumar was called for to test the authenticity of the above said documents, Revenue did not not allow cross-examination. Several prayers were made by appellant before Revenue to allow cross-examination. But that was not granted. The figures appeared in chits without any reference or contexts do not provide any basis for charge. She referred to page 100/259 which is

a show cause notice and invited attention to Mr. Vinod Kumar's statement appearing therein. According to her, there was no price difference at all realised. She invited attention to page 73 to 76 of compilation and submitted that the statement recorded on 18.9.85 was not called for testing the material at page 64-72 of compilation. Accordingly she submitted that the statement of Mr. Vinod Kumar at page 73-76 leaving contradiction required cross-examination and to resolve the controversy, Revenue should have allowed cross examination. She drew attention to page 23 of compilation exhibiting bank drafts slips and submitted that even those slips do not carry name of GTC. Therefore materials at page 64 - 72 are without sanction of law for various legal infirmities as aforesaid and were not liable to be used against the appellant.

11.14 In the course of hearing, while examining page 64-72 of compilation we noticed that similar figures like Rs.39.30 relating to Panama cigarette appeared at page 65 of the compilation. It was also noticed that the figure 7 was written in that page which does not agree with the date appeared at page 64 but that figure agrees with some of the figures appearing under the signature subscribed. It was further noticed that similar figure like 901.02 appeared at page 68 and 70 of the compilation. We have also noticed that page No.68 and 70 carried same abbreviation like "O.K." It was further noticed from page 72 that there was an abbreviation like "ESP". All these practice of appellants questioned their intention.

11.15 While perusing the statement recorded from Mr. Vinod Kumar appearing at page 73 to 76 of the compilation, we noticed that Mr. Vinod Kumar has specifically spelt out the relation between GTC and NETCO stating the same to be that of holding company and

subsidiary company. We have found that in answer to question No.13, as to the commission received from GTC, in his answer, he says "I do not know". We have found from answer to question No.15 given by Mr. Vinod Kumar that his statement dated 17.9.85 related to price of cigarette. We have also found from answer to question No. 16 that he has stated that extra amounts were charged on the verbal instruction of M/s. Golden Tobacco Company Ltd. (GTC) and that was remitted in cash not being accounted for. He categorically stated that the extra amount charged was remitted to GTC. through special messenger. We have found in answer to question No.19 at page 76 of compilation that he has stated that he was submitting report to GTC, Kolkata. This brought GTC to the chain of evidence and its questionable modus operandi came to light.

11.16 Ld. Counsel for appellants submitted that Mr. Vinod Kumar knows Hindi. His statement at page 73-76 was recorded in English. Although that was read by Mr. Vinod Kumar, the English version was not his version. She drew attention to the observation of the Id. Commissioner in the adjudication order and submitted that nothing has been spelt out in that order against the appellant NETCO.

11.17 On the issue of flow back, learned Counsel Ms.Nisha Bagchi submitted that there was no flow back of funds from dealers at grass root to GTC Industries. She invited attention to para 5.15.06 of the order of adjudication to submit that demand draft which was alleged to be instrument of flow back of funds to GTC, do not at all relate to GTC for the very reason that none of the drafts were found to be in the name of GTC. Revenue has failed to establish the identity of maker of the Bank draft and recipient of such drafts. Apart from this, Revenue has not explained whether Swastik Enterprise and Manipur

distributor have made the Bank draft to transmit to GTC. Although books of accounts of these two parties were examined by Revenue, nothing has come out to mean that GTC was recipient of the bank draft. Similarly, she submitted that there was no evidence on record to show as to whether there was identifiable messenger to carry any money for GTC which was alleged to be unaccounted sale price. She submitted that although bank draft was in the name of Shri R.K. Jain, Vijay Kumar, and Pradeep Ghosh, existence of these payees were in doubt and that was not proved by Revenue. Revenue has not brought on record how they were connected with GTC. None of the persons were subjected to any examination or cross examination. Therefore, Revenue's allegation that unaccounted money was released to GTC through sale of cigarettes was failed to be established by Revenue.

11.18 According to Mrs. Bagchi, at page 78-80 of the order of adjudication, the allegation was that sales statement was sent to GTC. But that was without any proof of receipt of those statements by GTC or dispatch of those statements by dispatchers. She brought to our notice that page 14 to 21 of the compilation filed by the appellants show that those are relied by the Revenue to make allegation against the appellant without any basis. Those materials were not relevant and have no legs to stand against the appellant. Contents of such documents could not be established by Revenue. On an overall assessment of these documents including the statement of account referred to above as well as the bank counter foil, the learned adjudicating authority has come to an abrupt conclusion that there was flow back of funds from grass root level to GTC. But such allegation is without any evidence. She raised doubt about existence of all the three persons aforesaid submitting that Revenue could not

demonstrate by any evidence about any dealing by them with GTC. She also submitted that Shri S.C. Sarkar's statement at page 77 of the compilation filed by appellant does not bring any nexus with GTC. Placing paragraph 5.15.10 at page 82 of order of adjudication, she submitted that there was neither deliberate marking of lower price nor an attempt was made by the appellants to realize any excess price than that was meant for charging. Supporting such argument, Shri Asthana, learned counsel for appellants submitted that marking of price has no relevance in view of judgment of Hon'ble Supreme Court in the case of **ITC Ltd. Vs. CCE, New Delhi** - 2004 (171) ELT 433 (SC). The notified goods under package were subjected to price mentioned therein.

11.19 Such averments of appellants was opposed by Shri Parasaran, learned Additional Solicitor General for Revenue submitting that entire arguments of the appellant as aforesaid were made in the writ petition of the appellants filed before Hon'ble High Court of Delhi and Hon'ble High Court of Gauhati, which were lost by them. They are again making an attempt for reappraisal of evidence without submitting a reply to show cause notice to Revenue. Therefore, their submissions are devoid of merit.

11.20 Learned Counsel Shri Asthana reiterated that no opportunity of cross examination being granted, the proceeding has become fatal. In support of his submission, he relied on the judgment of Hon'ble High Court of Bombay in the case of **GTC Industries Limited vs. Union of India** - 1991 (56) E.L.T. 29 (Bom.). He submitted that appellant's contention is based on the ratio laid down by Hon'ble High Court of Calcutta in the case of **Rungta Sons Pvt. Ltd. & ors. vs. CC, Visakhapatnam** - 1986 (23) E.L.T. 14 (Cal.). He drew our

attention to the Apex Court judgment in the case of **Arya Abhusan Bhandar vs. Union of India - 2002 (143) E.L.T. 25 (S.C.)** and submitted that denial of cross examination is violation of natural justice and any order passed showing such a violation is liable to be set aside. He further draws our attention to the judgment of the Hon'ble Supreme Court in the case of **Swadeshi Polytex vs. CCE - 2000 (122) E.L.T. 641 (S.C.)** and submitted that opportunity of cross examination is necessity, if a matter is remanded when that was not allowed in the original proceeding. Secondly he submitted that un-relied upon documents not being returned back to the Appellant that has crippled the appellant to lead defence. He relied on the judgment of the Hon'ble High Court of Allahabad in the case of **Novamet Industries vs. Union of India - 2008 (227) E.L.T. 363 (All.)** for such submission. Thirdly he submitted that once it is held to be a case of flow back not being established, the appellants are squarely covered by the judgment of the Apex Court in the case of **I.T.C. Ltd. vs. CCE, New Delhi - 2004 (171) E.L.T. 433 (S.C.)**. His plank of argument was that a job worker is a manufacturer. For this, he relied on the Tribunal's decision in the case of **ITC Ltd. vs. CCE, Bangalore** reported in **1998 (104) E.L.T. 151 (Tri.)**. He also submitted that while deciding the matter, Tribunal should take note of the judgment of the Apex in the case of **Ujagar Prints vs. UOI - 1988 (38) E.L.T. 535 (S.C.)**. His further submission was that who shall be a "manufacturer" is judicially noticed in the case of **Empire Industries Ltd. & Ors. vs. Union of India & Ors.**, reported in **1985 (20) E.L.T. 179 (S.C.)** and relied on para 33 thereof.

11.21 So far as limitation is concerned, Shri Asthana, learned Counsel for appellant argued that GTC was in existence from 1955.

NETCO came into existence in the year 1974. This existence of NETCO was with a composition of share capital held by an extent of 51% by Assam Industrial Development Corporation Ltd. and 49% by GTC. He submitted that manufacturer of cigarette was under physical control and the appellants were subject to the Notifications No. 211/83-CE dated 04/08/83 and as amended from time to time as well as Notification No. 201/85 – CE dated 02/09/85. It was also his submission that when the package of the goods itself was well known to the Department prescribing the maximum sale price therein there cannot be any presumption that over and above such price, anything extra was realised to send to GTC through any circuit. He further brought to our notice that the sale price when quoted on the package itself that was the basis for the levy in terms of the Notification. When this is the intention of levy, Revenue has no scope to further inquire as to what was the sale price realised by the appellant. Realisation of sale price not being basis or event of levy, the marking of the sale price is of significance for law. Therefore, revenue should not construe the things for its own convenience. Finally, he submitted that entire operation of NETCO being within the knowledge of Revenue, there cannot be any allegation as to escapement of duty liability for which extended period of limitation can not be invoked. He also argued that when one of the share holder is a State Government Undertaking, no clandestine practice was adopted by the appellant. There was no liability at all incurred by any of the appellants and neither duty nor penalty was imposable for which appeals being merited may be allowed.

SUBMISSIONS OF REVENUE

12.1 Ld. ASG Shri Parasaran appearing on behalf of Revenue submitted that Hon'ble Supreme Court has required Tribunal to answer on following three issues :-

1. Whether there was flow back to GTC;
2. Whether the proceeding is within limitation; and
3. A finding to be recorded on the question of liability of the parties in respect of the job worked goods.

12.2 Sri Parasaran submitted that search proceeding related to the period 1.4.83 to 31.1.86. There was search conducted of various premises of GTC and its job workers throughout country on 17.9.85. Result of the search of the factory premises of GTC at Bombay and Baroda reached to finality and that was in favour of Revenue by order dated 3.3.1997 passed by Tribunal. A copy of the order is available at page 113 of the paper book (R-I) filed by Revenue. He submitted that Tribunal gave various findings in respect of the issues involved in respect adjudication relating to Bombay and Baroda factories of GTC including the issue relating to flow back. Such finding appears in para 14 at page 177 of the paper book. The order dated 3.3.1997 of Tribunal reached to finality because GTC lost Civil Appeals No. 5134-5135 of 1997 disposed on 12.09.1997.

12.3 Shri Parasaran learned ASG submitted that there was no violation of natural justice nor there was any retraction of statement recorded from different person which is patent from page 179 of the Paper Book. Various instances were noticed by the Tribunal to come to the conclusion that there was of flow back which appears in paras from 41 to para-57 of Tribunal's order dated 3.3.1997. Relying on para-59 of the Tribunal's order, Shri Parasaran submitted that

Tribunal categorically held that GTC had job workers and they were manufacturers. Deceptively, similar regular brand of cigarettes were manufactured by GTC as well as through its job workers. There was also conclusion by the Tribunal that additional amount representing the price difference was collected in cash or bank draft in the name of some persons and bank account operated by such persons to enjoy benefit of extra price. The sale proceed went to GTC deducting charges for services and that is established by para 59. Relying on the last sentence appearing at page 202 of the paper book he submitted that Tribunal held that GTC adopted illegal modus operandi of printing lower price on packets of certain brands while actual sale price realised was higher than the printed price for which invoking of extended period of limitation was held to be proper.

12.4 Sri Parasaran relied on para 51, 53, 55, 57, 58 and 59 of aforesaid order of Tribunal to submit that GTC had designed its illegal and masterminded operations in different parts of the country through different agencies and entities to cause evasion of Revenue through various conduits and that was established by search result. One Mr. Ghorawat who was witness in GTC's case in Bombay also appears in the present appeal of NETCO. Tribunal has found that the said witness has established material facts from the statement recorded from him in favour of Revenue.

12.5 Ld. ASG submitted that from pages 118, 120, 122, 123 of the paper book it can be appreciated that there were job workers in the Bombay and Baroda case and Tribunal has also noticed such fact. Existence of job workers was brought out in the show cause notice in respect of that jurisdiction and liability of job workers was fastened in that proceeding while making GTC liable.

12.6 The allegation of violation of natural justice granting no opportunity for cross-examination does not merit consideration in view of discarding of such a plea by the Tribunal in GTC's Bombay/Baroda case where similar methodology was followed by the appellants as that has been pleaded in NETCO's present appeal. This Bench of Tribunal while dealing with NETCO case earlier although had recorded in para-4 of its order about decision in Bombay/Baroda case of GTC which was affirmed by Hon'ble Supreme Court, the Bench failed to discuss any aspect of the matter further and granted relief for no rhyme or reason. When the plea of cross-examination was found to be dilatory tactics in Bombay/Baroda case, similar such plea in the present appeal of NETCO does not further allow the appellants to plead, since in that case such plea was discarded on similar facts and circumstances. Drawing attention to para 39 at page 172 of the Paper Book, Vol-I, the Id. ASG submitted that Tribunal's finding in Bombay/Baroda case was that GTC had declared lower maximum retail price and paid duty on such value while they collected higher amount by various means. Present appeal being of similar nature, GTC and NETCO are barred from raising further plea when they did not come out with clean hands.

12.7 The design of GTC in the case of Bombay/Baroda jurisdiction has established the case of evasion in view of appeal of GTC dismissed by Hon'ble Supreme Court against the order of Tribunal as aforesaid. That reached to finality. Therefore the operation that was carried out by GTC in similar manner in the other parts of the country need to be dealt in the light of dismissal order of Apex Court in the case of GTC. He referred to the order of Hon'ble Supreme Court passed on 12.9.97 in the case of GTC and submitted that when the

civil appeals were dismissed by the Hon'ble Court categorically stating that they did not find any merit in the appeals, it is established that GTC head office in Bombay and its factories located throughout country conducting operations through job worker was evasive and serious loss was caused to Revenue prejudicing its interest.

12.8 The show-cause notice was issued in the case of NETCO on 24.2.86. The dilatory tactics followed by GTC in Bombay/Baroda jurisdiction was also followed in the present appeal, pleading that copies of documents were not provided, non-relied documents were not returned back, cross-examinations were not allowed. There was deliberate delay caused by GTC and NETCO to find fault with adjudication at a late date with these pleas baselessly. When opportunity after opportunity was allowed to file final reply, the appellants seeking adjournment from time to time delayed adjudication and did not file final reply to show cause notice. The manner of grant of fair opportunity of hearing apparent from adjudication order, discards the allegation of violation of natural justice which is proved from different sub-paragraphs of order in original. When the appellant did not file replies to show-cause notice, cross-examination sought was uncalled for being premature and unwarranted in absence of explanation or defence led by reply to Show Cause Notice. Ld. Counsel who was appearing in NETCO and GTC's case made submission for cross-examination without filing reply to show cause notice to deprive Revenue to adjudicate the matter promptly. Cross-examination was uncalled for when the appellants choose to be silent to file reply to show cause notice. Attention to para 4.8 of the order in original was invited in this regard.

12.9 According to Shri Parasaran entire conduct of the appellant tested in terms of the observations made in para 4 of the order in original does not warrant to hold that there was violation of natural justice. The appellant had contacted the adjudicating authority for their documents soon after search on 17.9.85. They made request to provide copies of the documents. That was allowed by Revenue which is established by letter dated 20.3.09 available on record. Non-relied upon documents were taken by the appellant whenever they had approached. But such averment of Revenue was opposed by Sri Asthana, learned counsel for appellants stating that non-relied upon documents were never been given for which the appellants have informed the Authority by letter dated 23.11.85 which was annexed to the communication dated 24.3.09 produced by Id. ASG. According to Sri Asthana, when the proceedings were different, these documents produced by Revenue today do not come to their rescue. But such plea was repelled by Sri Parasaran on the ground that entire proceeding to different places arose out of common search and GTC has lost its credence by Tribunal's order dated 3.3.1997.

12.10 From the very beginning of the hearing, we were asking the appellant to produce the joint venture agreement if any between GTC and Assam Development Corporation. But they failed to produce the same. Also we were asking the appellant to produce the agreement between GTC and its job workers, GTC and Super Dealers. Nothing could be adduced by appellants except submitting copies of the following documents by appellants :

1. Trade mark certificate of GTC
2. License issued to NETCO by Government of India.

3. Copy of counter affidavit filed by GTC before Supreme Court.
4. Copy of order passed in ITC's job workers case CCE Delhi Vs. Assam Tobacco Co. Ltd.
5. Copy of the income tax order passed in writ petition No. 707 of 1995 M/s GTC Vs. Income Tax Appellate Tribunal & Others.

Since the documents came up at a later stage before us after hearing the appellants, we require Id. ASG to clarify whether these documents were before the authorities and whether those are additional documents and whether considerable by us, if such documents go to the root of the matter and having evidentiary value. Id. ASG's reply was that these documents do not come to rescue of appellants.

12.11 Ld. ASG Shri Parasaran supported his pleadings through decisions of higher Courts in the case of M/s Kanungo & Co. V. Collector Customs - 1973 (2) SCC438 submitting that denial of cross-examination has not made the entire proceeding fatal and that has also not resulted with violation of natural justice. According to Id. ASG, statements recorded under Section 14 of the Central Excise Act 1944 have lend credence to the case of Revenue being recorded in the course of judicial proceeding and all the judgments deciding the principles of law relating to cross examination come to rescue of Revenue. He brought out that there was search conducted on 17.9.85 and soon after that, a show-cause notice was issued on 13.10.85. The documents relied upon for issuance of that show cause notice formed part of the show cause notice dated 24.2.86 which was in addition to the show cause notice dated 13.10.85 due to power conferred on a different Authority for adjudication. When the Show Cause Notice was first issued on 13.10.85, non-relied upon

documents were supplied to the appellants. Therefore, the appellant's grievance that they could not defend in absence of non-relied upon documents has no substance. He discredited the arguments of the appellant submitting that they are not governed by judgment of ITC (supra) for the reason that there was no allegation of flow back in that case and that has been categorically found out by the Apex Court. Therefore once flow back is established, the appellant is out of the purview of the ITC judgment. He submitted that Para-36 of the judgment in this respect being relevant may be referred to.

12.12 Sri Parasaran relied on the statement recorded from Shri Vinod Kumar Kedia and submitted that he acted on behalf of the Sagar (I) to explain the modus operandi of flow back. All the abbreviations used in the statement were explained by him but Vinod Kumar failed to appear before the Authority for cross-examination. This is also finding in the Tribunal's order passed in Bombay/Baroda jurisdiction and exhibited by para-36 thereof. For such purpose he invited attention to Page No. 172 of the paper book. He further submitted that in his evidence, Shri Vinod Kumar stated that extra sales considerations were flowing back to GTC. This is directly in reply of question No. 16 put to him. In this respect, page 114 of the paper book was referred to. The same witness also explained such fact in the course of search as per English translation to the Hindi version appearing at page 105 filed in the course of hearing. Along with the paper book, the documents separately filed showed relevancy of the chits seized in the course of search to the offence committed. Page-111 of the Paper Book proved that abbreviations were used to explain the manner of flow back. Relying on page 33 to 35 of the Paper Book (R-2), Id. ASG submitted that these documents

brought relationship between the wholesale dealer and GTC. According to him, credential evidence as above proved that there was flow back and extra money was realised in respect of sale of impugned goods and that was passed on by Shri Ghorawat to GTC at the instance/instruction of Shri P.K. Chatterjee who was Manager of GTC. Relying on page 35 of the paper book (R-2), Id. ASG submitted that illegal operations were conducted by GTC through premeditated design. Similarly evidence gathered proved that Shri Singh, Accountant of Patna explained that there was flow back through notes appearing at page 128 and 129 of the Paper Book (R-2). Relying the evidence on record, Id. Adjudicating authority in page 77 to 87 (279 to 289) brought out the manner how flow back was made from different quarters to GTC.

12.13 With the aforesaid submissions and also relying on the decision of the Tribunal relating to Bombay/Baroda jurisdiction, Id. ASG submitted that case of the present appellant is full proof case of flow back since search was done to all the premises and material recovered proved the same. The proceeding having been culminated from the result of the common search, these appeals fail.

12.14 Id. ASG Shri Parasaran further argued that NETCO was manufacturing deceptively similar goods as that of GTC. He drew our attention to page 110 to 120 of the appeal folder to deal with page No. 25 to 29 of Revenue's paper Book (R-2) dealing with the chemical test report relating to goods manufactured by the GTC as well as NETCO showing that same goods were manufactured by both. According to Revenue, the joint venture of the GTC with the State Government of Assam gave birth to NETCO. But such an apparent format of business was not real because of exclusive control and dominance of GTC

through its active involvement beginning from manufacturing process till realisation of sale proceeds. Revenue has found out from the statement of Shri Paresh (Ref: Page. 232) that role of GTC was to control NETCO by all means and that was an established fact. Similar such control was in respect of all other activities. Shri Paresh was Sr. Accountant of GTC. He revealed various facts about the flow back of sale proceed of cigarette manufactured by NETCO to GTC. According to him what that is apparent through joint venture was not real. He placed para-10 appearing at page-133 of order-in-original to prove the flow back. He argued that learned adjudicating authority abbreviating GTC as 'A' and abbreviating NETCO as 'B' has exemplified situations to establish the flow back at page-108 of order-in-original. He submitted that 'B' which is NETCO was getting job charges of Rs. 3 per unit. Raw material was given by GTC and that was converted into finished goods by NETCO under exclusive control of GTC. It was admitted by both the parties that duty shall be borne by NETCO in respect of sale proceed worked out by GTC. In view of all these findings in relation to NETCO, Id. Adjudicating Authority in Para 10.2 at page 135 of order-in-original brought out the order of recovery of the duty liability that arose out of the transactions between GTC and NETCO through the pattern of flow back. The authority also held GTC is *de jure* manufacturer and the NETCO was *defecto* manufacturer.

12.15 Shri Parasaran supported his argument drawing our attention to the instructions of Shri Sinha who was an employee of GTC and also referring to the contents of post card written by Shri Goswami appeared at page 44 of paper Book (R-2). He submitted that English version of the contents of the postcard can be seen from

the compilation (A-5) filed by Revenue separately. Shri Sinha's details appeared at page-42 of (R-2). According to him, in view of all the evidence available on record, GTC cannot deny its liability even if NETCO is made liable by order of adjudication. This he says relying on para 10.2 of the order of adjudication depicting the order of recovery from both the two appellants.

12.16 Shri Parasaran argued on limitation issue submitting that the fraud, collusion and suppression made by both the appellants taking shelter of Notification NO. 211/83 dated 4.11.83 and No. 100/85 dated 22.3.85 brought the appellant to the purview of extended period of limitation. He referred to page 239 and page 249 of appeal folder where these two notifications appear. According to Revenue, the appellant is not entitled to the notification benefit. When the appellant had oblique motive and various circumstantial evidence proved their modus operandi of de-frauding Revenue to cause evasion of duty that brought the appellant to purview of proviso to Section 11A of Central Excise Act 1944. That clearly brought the appellant to the extended period following various decisions of the Apex Court. To cite a few, he referred to the following decisions :-

1. 1995 (84) SCC 50
2. 2007 (10) SCC 337
3. 2007 (10) SCC 344.

FINDINGS OF TRIBUNAL

13. Heard both sides from time to time, perused the records and recorded their detailed arguments aforesaid on the respective dates of hearing. Also we have perused the record as well as different documents to which our attention was drawn by both sides. Direction

of Apex Court being to examine the matter afresh keeping in view the observations made in the order reported in 2008 (228) ELT 505 (SC), we looked into various contentions of parties which were left open to them by Apex Court's order. Appellant raised issue of violation of natural justice, denial of cross-examination, manufacture of deceptively similar goods, no realisation of higher sales price, no flow back, proceeding barred by limitation and no liability of parties and no penalty. Revenue discarded pleadings of the appellants relying on Tribunal's order dated 03.03.1997 passed in respect of Bombay and Baroda factories of appellant (GTC) and held in favour of Revenue. Such order of Tribunal reached to finality being dismissed on merit in CA No. 5134 and 5135 of 1997 disposed on 12.09.1997. However we have addressed all the points raised by the appellants in following paragraphs.

14. Record reveals that NETCO was a Joint venture promoted by Assam Industrial Development Corporatar (an undertaking of the Govt. of Assam) and GTC with 51% and 49% stake holding respectively by them. But both the appellants failed to produce the joint venture agreement and agreement between the Parties for our examination. Relationship between NETCO and GTC not only remained in dark before Adjudicating Authority but also remained in dark before us. This is patent from Para 5.5 of Order-in-Original at Page 65. The appellant suppressed their terms of understanding without adducing above evidence.

LEGALITY OF SEARCH

15. Legality of search was challenged by Appellants under technicality of no signature on each page of Panchnama. Panchnama for the search was prepared by the officers of Excise Department in

the presence of witnesses who attested the same along with the person against whom authorisation was issued or his authorised representative present. There was no complaint about illegality of search made by appellants forthwith or infirmity thereof was challenged before Court. The search and seizure operations were authorised by competent authority and competency of the Authority remained unchallenged. Pursuant to authorization, search was conducted. Authorities had reasonable belief that the appellants were manufacturing deceptively similar cigarettes without any difference in quality between the original/regular brand manufactured by GTC in its factories and in different parts of the country through its job workers and such deceptively similar cigarettes resembling with the original/regular brands. There was undervaluation of "adjusted sale price" of cigarettes of deceptively similar cigarettes which was determinable with reference to the Maximum Retail Price (MRP) mentioned in the cigarette packets. Such MRP without being printed on the cigarette packets as required by law was embossed. The MRP embossed on cigarette packets were hardly visible. Taking advantage of such situation the appellants were realising sale price from brand loyal consumers over and above the MRP declared on the cigarette packets since consumers were unaware of the dubious practice adopted by appellants. In the circumstances, there existed grounds upon which the belief of contravention of the provisions Act was entertained by the Search Officials. In the course of search it was found that the appellants had in their possession, custody and control various incriminating documents demonstrating their questionable conduct. When there existed some material upon which belief warranting search could be formed, Courts are not concerned with the

propriety of the belief or sufficiency of the material. The circumstances were so eloquent that they themselves presented oblique motive of the Appellants. Thus search was unassailable and statements recorded in the course of search were in accordance with law.

**SUPPRESSION OF MATERIAL FACTS
AND DECEPTIVELY SIMILAR GOODS
MANUFACTURED PROVED UNDER-
VALUATION FOR WHICH ADJUDICATION
NOT BARRED BY LIMITATION**

16. Search of different factory premises and other premises of GTC located at different places and its job workers located at different places including premises of NETCO was made on 17.09.1985 as per Para 2(4) at Page 68 Order-in-Original. That resulted in discovery of incriminating documents exhibiting manner of loss of revenue cause by appellants through their oblique motive of undervaluation of certain brands of cigarettes manufactured by NETCO under control of GTC. It also came to light that deceptively similar cigarettes of same brand as that was manufactured by GTC were manufactured by NETCO without any quality difference. That was proved by Revenue though chemical examiner's report dated 17.9.1985 against sample dated 6.8.85 taken. That remained uncontroverted and proved the allegation of descriptively similar goods manufactured.

16.1. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom. It is also well settled that misrepresentation itself amounts to fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on

falsehood. Of course, innocent misrepresentation may give reason to claim relief against fraud.

16.2. An act of fraud on Revenue is the most solemn always viewed seriously. "Fraud" and collusion vitiate even proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It has been held by Apex Court in the case of Commissioner of Customs, Kandla V. Essar Oil Ltd - 2004 (172) ELT433 (SC) that "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the deceived. Undue advantage obtained by the deceiver, will almost always call loss or detriment to the deceived. Similarly a "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See *S.P. Changalvaraya Naidu v. Jagannath* [1994 (1) SCC 1]).

16.3. Adjudication was done following due process of law on the basis of evidence establishing loss of revenue caused by the Appellants undervaluing "adjusted sale price" determinable with reference to MRP. When chemical examination report dated 17.09.1985 established that there was no difference in quality between the "deceptively similar" brand of cigarettes manufactured by NETCO and regular/original brands of cigarettes manufactured by GTC in its different factories and at different places through its job workers

that established undervaluation of goods so manufactured by NETCO. Also that proved evasive practice and suppression of material facts in price lists submitted for approval by Excise Authorities. That brought them to the purview of proviso to section 11A of Central Excise Act, 1944 for invocation of extended period. So also the MRP on cigarettes being embossed in barely visible manner proving conduct of the appellants contumacious. When all these practices surfaced through investigation that established fraud and that has unravelled all. Revenue's stand has been fortified from the ratio laid down by Apex Court judgment in the case of UOI Vs. Jain Shudh Vanaspati Ltd. - 1996 (86) ELT 460 (SC). Except the baseless plea that non-relied upon documents were not supplied and no cross examination was allowed, the appellants failed to show that adjudication suffered from any legal infirmity.

16.4. Adjudication was done in all fairness taking into account totality of facts and circumstance of the case without basing on any sole consideration. Revenue was required to be restored of the loss of revenue caused by undue gain made by the appellants following Apex Court judgment in the case of S P Chengalavaraya Naidu V. Jagannath - AIR 1994 SC 853. It has been held by the Apex Court in the case of Ram Preeti Yadav V. UP Board of High School and Intermediate Education - AIR 2003 SC 4268 that no court in this land will allow a person to keep an advantage which he obtained by fraud. When the material evidence established fraud against Revenue white collar crimes committed under absolute secrecy shall not be exonerated from penal consequence of law following Apex Court judgment in the case of K. I. Pavunny V. AC, Cochin - 1997 (90) ELT 241 (SC). It is cardinal principle of law which is enshrined in Section

17 of Limitation Act that fraud nullifies every thing, the adjudication was not time barred following Apex Court judgment in the case of CC. V. Candid Enterprise – 2001 (130) 404 (SC). When deliberate breach of law was made by appellants suppressing the value of “adjusted sale price” determinable with reference to MRP declared and nothing was demonstrated that the Authority below merely acted on imagination while the adjudication was based on cogent evidence, the plea of time bar becomes unsustainable. Duty liability under law is bound to be fastened including penalty that shall be leviable.

In the leading English case i.e. *Derry and Ors. v. Peek* 1886-90 All ER 1 (All ER p. 22 B-C) what constitutes “fraud” was described thus: “fraud” is proved when it is shown that a false representation has been made i) knowingly, or ii) without belief in its truth, or iii) recklessly, careless whether it be considered by Apex Court in true or false”. This aspect of the matter has been dealt in *Roshan Deen v. Preeti Lal* [2002 (1) SCC 100] *Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education* [2003 (8) SCC 311], *Ram Chandra Singh's case* (supra) and *Ashok Leyland Ltd. v. State of T.N. and Another* [2004 3 SCC 1]. Suppression of a material amounts to fraud on the court - see: *Gowrishankar v. Joshi Amha Shankar Family Trust*, [1996 (3) SCC 310] and *S.P. Chengalvaraya Naidu's case* AIR-1994 SC-853.

**UTILITY AND RELEVANCY ATTRIBUTABLE
TO CONSCIOUS POSSESSION PROVING
REALISATION OF HIGHER SALES PRICE
AND FLOW BACK THEREOF**

17. It is quite common that materials gainful and useful to possessor thereof are consciously possessed by him. He knows utility

thereof and that remains in his special knowledge being concealed in his mind till discovery by investigation. Statements recorded by Revenue u/s 14 of the Central Excise Act, 1944 in the course of judicial proceeding in respect of materials recovered were not retracted proved worth of the same for the investigation. There was no disclaimer of the materials recovered in the course of search and statements recorded on the basis of such materials from deponents proved proximity and intimate connection thereof with the trade of appellants and persons connected thereto. The statements remained in tact without any retraction. Relevancy thereof was implicit from possession and utility thereof proved from contents. That lent support to the case of Revenue bringing out nexus and live link with the appellants as well as to their trade. Excess sale price realised was proved from cogent evidence gathered and the seized materials explained remittance of such price through the conduits in the shape of bank drafts. The evidence self spoke ill design of GTC in respect of marketing net work to realise higher MRP through conduits. Entries appearing in the recovered chits explained the deal and persons connected thereto. The statements recorded by Revenue on the incriminating materials recovered were neither under undue influence nor under duress. Malafide of the appellants came to light and that established undue gain made by them at the cost of revenue. The materials recovered established exclusive control exercised by GTC in the marketing network over the cigarettes manufactured by NETCO and such materials could not be proved to be unworthy being consciously possessed not being alien to the trade. Nothing could be shown to us to prove that the appellants did not make any gain out of the transactions covered by the impugned materials recovered during

investigation. The chain of evidence led by Revenue demonstrated that the materials were instrumental to make undue gain of excess sale price and versions of witnesses corroborated such gain. The gains so made were routed through conduits in the shape of bank drafts. The bank draft slips and chits recovered in the course of search were testimony of the oblique motive of appellants to realise sale price over and above MRP declared. Series of bank drafts were made in the name of fictitious persons to transmit the ill gain to GTC. Active role of GTC in such activities were well established by series of evidence as has been discussed by the learned Adjudicating Authority in his order. It is well known, that it is very difficult for Revenue, to prove every link, in respect of the commission of the offence under the Act by direct evidence. The whole process of evasion consisted different links. The links aided and abetted each other through remote control by GTC. Probability of guilt intention became undeniable and no materials were produced on behalf of the appellant to discharge such burden. The nature of proof available on record established the charge for the offence brought out by Show Cause Notice. Requisite guilty knowledge was established by circumstantial evidence as well as totality of facts and circumstances. Evidence gathered by Revenue was enough to raise a presumption of relevancy and utility of incriminating materials exhibiting guilt intention of the appellants who were involved in evasion of duty possessing and explaining contents of materials.

17.1 Entire adjudication proceeded with the conception given to Revenue by GTC that NETCO was its job worker manufacturing cigarettes out of raw materials supplied by GTC. The goods manufactured by NETCO were under control of GTC and GTC was

taking back entire product for marketing. The marketing net work was under exclusive control and domain of GTC. Cigarettes being subjected to levy of duty in terms of guideline of Notification No. 211/93-CE dated 4.8.83 and No. 100/85-CE dated 25.3.85 as amended, declaration of price printed on packets was mandate of such levy. Such declared price was determinative of "Adjusted sales price" for levy. But instead of printing the price, that was embossed on cigarette packets which was not acceptable to law. Sale prices were realized through market net work over and above the embossed price in terms of cogent and credible evidence gathered by Revenue from the persons intimately connected with the trade and that was successfully proved by learned ASG before us drawing attention to evidence in the Paper Book of Revenue. Revenue successively repelled arguments of Appellants tracing the nexus and inviting attention of Tribunals to order dated 3.3.97 in the case of GTC which reached to finality by dismissal of Civil Appeal filed by GTC as aforesaid.

BASIS OF LEVY

18. Learned Adjudicating Authority in Para -5.16.1 at Page 87 of Order-in-Original to Para 5.16.8 at Page 98 thereof dealt the manner how the appellants violated norms of the Notifications and contravened the law causing evasion of duty. That clearly showed conduct of the appellants. There was no iota of evidence to discard the allegation of control of GTC over market network and realization of sale price over and above that was embossed on the cigarette packets by NETCO which was a Joint venture partner. Such realizations were unaccounted and channelised to

GTC through its conduits. That was established by Revenue through series of evidence in Para 5.15.1 to 5.15.4 at Page 74 to 77 of the impugned order bringing out the methodology followed by GTC in this regard. The benefit of such higher sale price went to GTC as has been described by learned Adjudicating Authority in terms of Para 5.15.6 at Page 77 to Para 5.15.3 at Page 86-87 of Order-in Original. Evidence led by Appellants to discard such allegation in show cause proved to be unworthy due to probability of realization of higher price as has been argued by learned ASG. Although the appellant tried to assail the allegations in show cause notice filing certain statements of few retailers, they failed to produce them and demolished their own stand. This comes out from Para 5.6 at Page 66 of Order-in-Original. Various statements recorded by Investigation brought inextricable link of goods with higher sale price realised through various conduits and bank evidence gathered proved routing of such price through different channels proving flow back to GTC. Exclusive control of GTC on the marketing of goods was sufficient enough to view that it was beneficiary of result of realisation of higher sales price and assessable value was determinable with reference to sale price realised.

NATURAL JUSTICE

19. Law is settled beyond doubt that the strict principles of the Evidence Act do not apply to an assessment proceeding. The materials gathered against the assessee were disclosed through show cause notice and were utilised against the assessee in assessment. The assessees were expected to meet such adverse material and thereby save themselves from any adverse assessment. This in fact is

a well-accepted rule of natural justice. The AO as a quasi-judicial Tribunal has not acted beyond such a principle as demonstrated by his reasoned and speaking order. The appellant on some pretext or other went on seeking time on baseless pleas to avoid consequence of adjudication. Such conduct of appellants is patent when they preferred to file reply to show cause notice after completion of adjudication. Adjudication was completed on 16.10.87 and order in original served on 30.10.1987. But the appellants filed reply to show cause notice on 27.10.1987.

19.1. Adjudicating Authority in terms of Para 4.1 to 4.38 at Page 25 to 42 of Order-in-Original dealt the manner how the appellants went on delaying adjudication on one plea or other. His finding clearly shows that all relied upon documents were supplied to the appellants. But the appellant failed to show the extent to which non-relied upon documents prejudiced their interest. They simply asked for such non-relied upon documents to cause delay to adjudication. Entire plea for such documents were vague, indefinite and on irrelevant grounds as well as baseless. In absence of sound reason, plea for supply for non-relied upon documents was liable to be discarded following the ratio laid down by Apex Court in Kanwar Natwar Singh Vs. Director of Enforcement & Anr. 2010-TIOL-78-SC-FEMA. There was no violation of natural justice. Fair play of Revenue is established by the narrated facts in aforesaid paragraphs and by the findings recorded by Adjudication order through a reasoned and speaking order. Duty of adequate disclosure is also patent from the speaking order passed by learned Adjudicating Authority and also from terms of show cause notice. We are constrained to

take note of the fact that it is on account of continuous unreasonable requests on the part of appellants, the Adjudicating Authority could not complete adjudication expeditiously.

**EVIDENCIARY VALUE OF
STATEMENT RECORDED**

20. Following the ratio laid down in the case *Veera Ibrahim v. State of Maharashtra*, 1983 (13) E.L.T 1590 (SC) = AIR 1976 SC 1167, the statements of the witnesses recorded who were not formally accused of any offence were not being hit by Constitutional guarantee, were admissible in evidence when those were recorded under Section 14 of Central Excise Act, 1944 in the course of judicial proceeding. That unambiguously explained modus operandi of appellants without ruling out their association with the deposition. The versions in the statements directly related to the governance of the business of the appellants and such nexus proved by chain of evidence gathered by Revenue. If any person associated with a trade or goods explains about the same unambiguously, his statement is reliable being creditworthy. That was based on cogent evidence but not on any assumption or suspicion. Revenue has successfully contradicted pleading of appellants. Involvement of appellant in evasion of duty adopting premeditated design realizing higher sale price than the price embossed on the cigarette packets was established. In extricable links of versions in the recorded statement failed to dissociate the appellants from the grave of offence. Accordingly the materials recovered in the course of search and statements recorded by Revenue lead to irresistible conclusion that unfair practice was adopted by the appellants for their unjust enrichment at the cost of revenue. The concepts of probability, and

the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. In view of the above the statements used in adjudication does not appear to have made the same arbitrary or capricious nor vitiates the same.

CROSS EXAMINATIN

21. No doubt reliance and testimony of a witness calls for cross-examination. The evidence in adjudication proceeding need not be like the one in criminal cases. Findings should be on the basis of preponderance of probability. The Adjudicating Authority in para 4.45 of Order in Original at page 51 to 56 stated reasons why cross examination plea was found to be dilatory tactics. The witnesses were not innocent, but were found to be well conversant with appellants' trade who established their close association with the appellants and goods traded. They were also found to be uninfluenced by Revenue and statements were recorded in al fairness. Reference may be made to the decision in the case of *Rup Chand Jain v. Collector of Customs (Preventive), Calcutta*, reported in 1996 (88) E.L.T. 335 (Cal.) and *Santhanam v. Collector of C. Excise & Customs, Madurai-2*, reported in 1995 (79) E.L.T. 564 (Mad.). The appellants without filing reply to Show Cause Notice, merely raising flimsy pleas asked for cross-examination of deponents. That was premature. Challenge to the impugned order was made on the ground that the same was based on the statements of witnesses which were not been subjected to test by way of cross-examination of the deponent. A statement recorded by Customs Officers under Section 108 of the Customs Act being

admissible in evidence as held in *CCE v. Duncan Agro Industries*, reported in 2000 (120) E.L.T. 280 (S.C.), the court has to test whether the inculpatory portions were made voluntarily or whether it is vitiated on account of any of the premises envisaged in Section 24 of the Evidence Act. Nothing could be demonstrated to impeach the statements recorded.

21.1. Though it cannot be denied that the right of cross-examination in any quasi-judicial proceeding is a valuable right given to the noticee as these proceedings may have adverse consequences, at the same time under certain circumstances, this right of cross-examination can be taken away. Hon'ble High Court of Bombay while dealing with the similar issue in the case of *Gyan Chand Sant Lal Jain v. UOI*, reported in 2001 (136) E.L.T. 9 (Bom.) and taking into consideration the applicability of concept of principles of natural justice in that regard quoted para 76 of Halsbury's Law of England, Vol. I (4th Edition) which reads thus:-

"Natural justice does not impose on administrative and domestic tribunals a duty to observe all the technical rules of evidence applicable to proceedings before courts of law. Members of tribunals may be entitled to draw on their specialized or local knowledge of the type of, issue before them in order to supplement as well as evaluate evidence to find facts by inquisitorial methods, and inspections and to obtain information from other persons; but it will generally be a denial of justice to fail to disclose to a party specific material relevant to the decision if he is thereby deprived of any opportunity of comment on it." [Emphasis supplied]

The Hon'ble High Court observed thus:-

"In other words, it seems to be a fairly settled position in law that it is not necessary that persons whose statements have been previously recorded must be examined in the presence of the party against whom

such previous statements are intended to be used. The rules of natural justice do require that their previous statements must be made available to the party against whom they were intended to be used and such party must be given a fair opportunity to explain the same or comment on them. What would amount to fair opportunity would depend upon the facts and circumstances of each case...."[Emphasis supplied]

21.2. The Apex Court in *Surjeet Singh Chhabra v. UOI*, reported in 1997 (89) E.L.T. 646 (S.C.) held that Customs officials are not police officers and admission made before them though retracted binds the deponent. In view of voluntary statements recorded and such statements not retracted did not warrant cross examination when other circumstantial provided reliable basis corroborating the statements. When nothing surfaced that the witnesses had any enmity with appellants, those were not liable to be discarded nor required to be put to cross examination. Relying upon the decision of the Apex Court in *Surjeet Singh Chhabra* case (supra) this Tribunal in *Jagdish Shanker Trivedi v. Commissioner of Customs, Kanpur* - 2006 (194) E.L.T 290 (Tri.-Del.) held that admission made by an assessee binds him and, therefore, failure to give him the opportunity to cross-examine the witnesses was not violative of principles of natural justice. It was specifically held that "principles of natural justice do not require that in matters like this, persons who had given information should be allowed to be cross-examined by the co-noticees on the statements made before the customs authorities. If cross-examination is to be allowed as a matter of right then in all cases of conspiracy and joint dealings between the co-noticees in the commission of the offences in connection with the contraband goods, they can bring about a situation of failure of natural justice by a joint strategic efforts such co-noticees by each one refusing to be cross-examined by

resorting to Article 20(3) of the Constitution and simultaneously claiming cross-examination of the other co-noticees." It is not a matter of right for any assessee to contend that the statements of witnesses should be discarded.

21.3. Bearing in mind the law laid down by the Apex Court and prayer for cross examination being premature without filing reply to SCN, there was no substance in the contention of the appellants about violation of principles of natural justice. Appellant's prayer for cross-examination was devoid of merit when ample evidence on record demonstrated dubious practice adopted by them causing loss of Revenue. The deponents by their versions corroborated deals of realisation of higher sales price. It is well-settled that the effect of an alleged admission depends upon the circumstances in which it was made. An admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. This is so because an admission by a party is substantive evidence of the fact admitted, and admissions duly proved are admissible evidence irrespective whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. An admission, if clearly and unequivocally made, is the best evidence against the party making it and though not conclusive, shifts the onus on to the maker on the principle that "what a party himself admits to be true may reasonably be presumed to be so and until the presumption was rebutted the fact admitted must be taken to be established.

PREPONDERANCE OF PROBABILITY

22. Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it-"all exactness is a fake". El Dorado of absolute Proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof often it is nothing more than a prudent man's estimate as to the probabilities of the case. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered to use the words of Lord Mansfield in *Blatch v. Archer* (1774) 1 Cowp. 63 at p. 65 "According to the Proof which it was in the power of one side to prove and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

22.1. Realisation of sale price over and above the price marked on cigarette packets was without sanction of law. Secrecy and stealth being covering guards of ill designed act of appellants, it is normally hardship for Revenue to unravel every link of the process. However Revenue could successfully place cogent evidence to discard innocence of appellants proving their malafide. Many facts relating to the ill design remained in the special or peculiar knowledge of the persons concerned in that. Adjudicating Authority simply did not

adjudicate the matter on any sole consideration, but several considerations, governing facts and attendant circumstances were basis of the adjudication. Echoing evidence, series of factors and several circumstances were determinative. Conduct of the appellants also contributed for the conclusion of the learned Adjudicating Authority against the appellants.

STANDARD OF PROOF

23. The standard of proof in a civil case is preponderance of probabilities. In a civil case there is no burden cast on any party similar to the one in a criminal proceeding. Following the ratio laid down in CIT V. Durga Prasad More 82 ITR 540, 546-47 (SC) it may be said that Science has not yet invented any instrument to test the reliability of the evidence placed before a Court or a Tribunal. Therefore, the courts and Tribunals have to judge the evidence before them by applying the test of human probabilities. Human minds may differ as to reliability of a piece of evidence. But in that sphere the decision of the final fact finding Authority is made conclusive by law. The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. A fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the

existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The Adjudicating Authority has not departed from such well accepted norm which is patent from his order and completed adjudication basing on several factors.

MISDECLARATION

24. No justification in respect of declaration of low MRP in "deceptively similar brands" was placed before us while on chemical test, those were found identical in quality to the "Regular brands". No stock record was produced to show that regular brand and other brand cigarettes were accounted for differently beginning from the manufacturing stage till clearance. So also no evidence was produced before us to know periodical inventory of two different brand of cigarettes whether was taken to prove from records. Similarly no stock record relating to use of different raw materials for different brands were produced. Simply a bald plea was made submitting that the regular brands and other brands are different goods. The appellant also could not produce any chemical test report from any laboratory showing the contents were used in regular and other brands manufactured by the appellants before adjudicating authority. There was no literature shown to us to distinguish the goods. In absence of any such basic evidence, Revenue's contention as to manufacture of deceptively similar goods cannot be ruled out. Accordingly, the appellants exposed themselves to the charge of manufacture of goods bearing brand names deceptively similar to their regular brand name, but identical in quality to the goods being sold under regular brand names, only with intention to evade the duty. There cannot be any other motive for such practice as no

businessman selling the goods manufactured by them or got manufactured through a job-worker, under his well established brand name will registered a new brand name very similar to the regular brand name only to sell identical goods under such similar brand name and that too at much lower price. This is against the normal bonafide business practice and is nothing but a strategy to hoodwink department for evasion of duty by mis-declaring the MRP with reference to which the rate of duty was to be determined.

CITATIONS MADE BY PARTIES

25. Ld. Counsel for appellants relied on the judgment of **GTC Industries Ltd. Vs. Union of India** – 1991 (56) ELT 29 (Bom.) in support of his argument for opportunity of cross-examination. There is no quarrel that cross examination is an accepted principle of natural justice. But the prayer of the appellant for cross examination was without filing reply to SCN, which we have indicated aforesaid bringing out that the appellant filed reply to SCN only after the adjudication was completed. We have also gone through the decision cited by Shri Asthana in the case of Rungtasons Pvt. Ltd. – 1986 (23) ELT 14 (Cal.), Arya Abhushan Bhandar - 2002 (143) ELT 25 (SC) and Swadeshi Polytex- 2000 (122) ELT 641 (SC). We are in full agreement with the ratio laid down to follow natural justice granting cross examination. We have stated aforesaid that there was adequate evidence to appreciate case of Revenue, weighing heavier in their favour and against the appellants as discussed by the Id. Adjudicating authority in detail and stated by us in the preceding paragraphs. When the appellants failed to come out with clean hands filing a reply to SCN, the stage for cross examination had not reached

for consideration of the learned Adjudicating Authority and to appreciate justification thereof. Once the manner how a deposition is faulty is pointed out either by denial or by other evidence to discard the deposition, an authority seizing over the matter does not get opportunity to consider prayer for cross examination. When we noticed that there were overwhelming evidence against the appellants and there were governing facts supporting the same by attendant circumstances and corroborated by the evidence in the paper book of Revenue as well as finding of the Tribunal earlier made on 3.3.1997 which was relied upon by Id. ASG, we were convinced that Id. Adjudicating authority had not based his decision only on the depositions alone but on several factors and considerations. Therefore grievance of the appellant that denial of cross examination has made the adjudication proceeding fatal is unsustainable.

26. We have considered the citation of Revenue in the case Surjeet Singh Chhabra – 1997 (1) SCC 508 in support of argument of learned ASG that the confessional statements are reliable when the Excise authorities were not Police officers. We agree with the proposition. Shri Parasaran also relied on the decision of Apex Court in the case of C. Sampat Kumar Vs. Enforcement Officer, Enforcement Directorate – 1997 -(8) SCC 358 in support of his contention that the statements not being extracted under compulsion and remaining un-retracted shall be safely relied. We do agree that in all fairness a statement recorded fairly without any pressure or duress is admissible in evidence.

26.1 Sri Parasaran further relied on the decision of Apex Court in the case of M/s Kanungo & Co. Vs. Collector of Customs and Others – 1973 (2) SCC 438 to argue that the Excise authorities made out full proof case of evasion of duty and they have discharged the burden of proof for which no cross examination was required. We have already stated that deceptively similar brand cigarettes were identical in quality with ^{that} of the cigarettes sold under regular brands and those were manufactured and marketed with such low MRP. That gave rise to adjudication. Such practice was proved by chemical examination report laid by Revenue and exposed to Appellants through the SCN. The chemical examination report remains uncontroverted. Also his reliance was on the proposition that the witnesses who corroborated the case of Revenue should not be produced for examination when the appellants failed to file reply to SCN. We do appreciate from para-12 of the judgement of Apex Court that the principles of natural justice do not require in matters like this the persons who have given deposition bringing direct nexus of the appellants to their modus operandi should be examined in the presence of the appellants or should be allowed to be cross examined by them on the statements made before the Excise Authorities.

26.2 Materials on record showed that there was no breach of natural justice. The SCN clearly depicted all the materials on which Excise authorities had relied to call for reply of appellants. When opportunity was given to reply on the specific charges levelled by the SCN, without filing a reply to that, the appellants have no right to insist for cross examination since the adjudicating authority was all along deprived to come to a conclusion whether cross examination was warranted. To say so, we rely on para-12 of judgement of Apex

Court in Kanungo & Co. We are satisfied that the declaration filed before the authorities were full proof of suppression of fact, when all connected evidence proved realisation of higher MRP. Accordingly, the Excise authorities having discharged their burden of proof, the appellants had no right to call for cross examination on flimsy plea.

27. Shri Parasaran took us to the judgement of Collector of Customs Vs. D. Bhoormall - 1974 (2 SCC) 544 to submit that there was concealment of facts by the appellant who followed dubious practice, proved by various circumstantial evidence and direct evidence of mis-declaration coupled with chemical reports brings the appellant to the fold of penal consequence of law. We do appreciate that the manner how evasion occurs remains within the special knowledge of the evader and that is concealed in his mind till extracted by investigation through deposition. Following para-41 of the judgement, we appreciate that the circumstantial evidence in the present appeal suggested that the inference that the goods were marketed under the ill designed scheme of realisation of higher sale price through exclusive control over marketing network. Series of evidence gathered by Revenue brought the appellant to the fold of law.

27.1 Shri Parasaran also relied on the judgement of Apex Court in the case of New Horizons Ltd. & Ar. Vs. Union of India & Others 1995 (1) SCC 478 to argue that the Courts can always see through corporate veil to ascertain the true nature of the company. Doctrine of lifting veil, piercing the veil, peeping or seeing through the veil is invoked when the corporate personality is found to be opposed to justice, convenience or interest of Revenue. We do agree with him

that Courts come to rescue of Revenue where subterfuge to it is caused inside corporate veil. We have already stated that neither the joint venture agreement nor the understanding of job work agreements were produced before adjudicating authority, so also there was failure to produce before us. Revenue was entitled to bring the law into motion against the appellants when they failed to produce their joint venture agreement. We have noticed that GTC was controlling NETCO beginning from manufacture till marketing of the goods. Such finding alone was enough to hold that GTC had gained at the cost of Revenue controlling the MRP and realised sale proceeds over and above the MRP declared.

DETERMINATION OF LIABILITY

28. We have gone through the decision of the Apex Court in the case of Empire Industries Ltd. – 1985 (20) ELT 179 (SC) as well as the judgement in Ujjagar Prints – 1988 (38) ELT 535 (SC). We do appreciate that manufacture is the event of levy and ownership of goods does not decide taxability under Central Excise Act, 1944. Learned counsel's argument on behalf of the appellant that the duty liability was in respect of goods manufactured by NETCO has considerable force.

29. Ld. ASG in support of his contention that GTC & NETCO are liable ^{relied} on the decision of the Tribunal delivered on 3.3.97. According to him, GTC shall also liable when the similar appeal of the GTC was dismissed in ^{terms} of the Tribunal's order ^{above}. We appreciate that it is left open to the department to find out the mode of recovery of liability in accordance with law. But determination of liability

depends on the event of levy which is manufacture following Apex Court's decision in Expire Industry (supra). The event of levy being manufacture, liability shall be determined accordingly.

30. We have found that the manufacturing activity was carried by NETCO. The goods manufactured were marketed by GTC. The event of levy being manufacture, loss of Revenue was attributable to the activity of manufacture and NETCO was liable to duty imposed by adjudication order. When ownership of goods is not material for the purpose of levy, following the Apex Court's decision Empire Industries Ltd. – 1985 (20) ELT 179 (SC) we hold that the duty liability shall be of the job worker i.e. NETCO which had manufactured the cigarettes.

LIMITATION

31. As regards limitation, since NETCO is a joint venture of Assam Industrial Development Corporation (51%) and the Appellant i.e. GTC (49%) it is difficult to accept the Appellant's plea that NETCO being only a job worker was not aware of the wrong doing of GTC. More so, even in spite of being asked repeatedly, neither GTC nor NETCO have produced the copy of their joint venture agreement before us. We therefore hold that longer limitation period under provisions of Section 11A (1) would be available to the Department for denial of short-paid duty from NETCO.

PENALTY

32. Having noticed that both the appellants had pre-meditated design through the joint venture approach to undervalue the goods resulting in loss of Revenue and been intimately connected with such

loss causing evasion of Revenue, levy of penalty on both of them was justified.

COCLUSION

33. In view of our aforesaid observations and findings, we hold as under:

- (1).** There were goods with deceptively similar brand manufactured by NETCO and the same was marketed by GTC by declaring MRP on the packets much lower than the MRP of the regular brands. The MRP on the packets of "deceptively similar brand" was embossed instead of being printed as per the mandate of the law. The embossed MRP was barely visible.
- (2).** In respect of the above-mentioned "deceptively similar brands", there was realisation of sale price over and above the declared MRP, embossed on the packets.
- (3).** There was flow back of the funds arising out of realisation of higher sale price from the distributors to GTC.
- (4).** There was deliberate mis-declaration of MRP with reference to which the rate of excise duty was to be determined and this had been done as part of well thought plan to evade duty.
- (5).** The liability for duty shall be attributable to NETCO which was a job worker according to conception of both sides and longer limitation period under provision of Section 11A(1) of the Central Excise Act,

1944 would be available to the Department for demand of short-paid duty.

(6). For contravention of law, imposition of penalty was justified.

(7). Levy of duty was justified in the fitness of circumstances of the case for contravention of the provisions of law.

34. Consequently, both appeals are dismissed except modifying the order of adjudication holding that NETCO shall be liable to duty imposed by adjudication order

(Pronounced in the open court on... 27/10/2016)

(D N PANDA)
JUDICIAL MEMBER

(RAKESH KUMAR)
TECHNICAL MEMBER

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