

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

Appeal No. E/2016/2005 - EX[DB]

Date 07/03/2011

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

To :
M/S GRASIM INDUS LTD(CHEMICAL DIVISION)
B-36, BIRLAGRAM NAGDA (M.P)
456331
M/S GRASIM INDUS LTD(CHEMICAL DIVISION)

Appellant

Vs
Respondent

C.C.E. INDORE

I am directed to transmit herewith a certified copy of Final order No.248
passed by the Tribunal under Section 35-C(1)of Central Excises Act, 1944

2011 EX[DB] dated 25.02.2011


Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
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 4. Bar association. CESTAT. New Delhi
 5. Director Publications. Customs, Excise. I.P. Estate. New Delhi
 6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
 7. Company Law Institute of India Pvt Ltd., No.2(Old No. 36), Vaithyaram Street, T. Nagar, Chennai -17
 8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
 9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
 10. Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road,
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 11. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Harvana)
 12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070
 13. Office Copy
 14. Guard file
15. HON'BLE PRESIDENT


Assistant Registrar
(Excise Appeal Branch)

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

COURT NO. I

Excise Appeal Nos. 2016 of 2005

[Arising out of the Order-in-Original No. 25/Commr/CEX/IND/2005 dated 16/03/2005 passed by The Commissioner, Customs and Central Excise, Indore.]

For Approval and signature :

Hon'ble Shri Justice R.M.S. Khandeparkar, President

Hon'ble Shri Rakesh Kumar, Member (Technical)

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

M/s Grasim Industries Ltd.

Appellant

Versus

CCE, Indore

Respondent

Appearance

Shri B.L. Narasimhan, Advocate – for the appellant.

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

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

DATE OF HEARING : 15/07/2010.

DATE OF DECISION : 25/2/2011

FINAL Order No. 248 / 2012 Ex Dated : _____

Per. Rakesh Kumar :-

The facts leading to this appeal are in brief as under.

1.2 The appellant company have two factories at Nagda (M.P.) – a chemical division (hereinafter referred to as the Appellant unit) where various chemicals namely Caustic Soda^{lye}, Liquid Chlorine, etc. are manufactured which are chargeable to Central Excise Duty under Chapter 28 of the Central Excise Tariff and Fibre Division where the viscose⁶ fibre is manufactured. There is a factory of the appellant company at Kumara Pattanam, Harihar and beside this there are factories of the sister concerns – Birla^{M/s} Cellulosic, Kosamba and M/s Vikram Ispat at Alibagh. The dispute in this case is in respect of the value of the Caustic Soda lye cleared by the chemical division of the Appellant company at Nagda to their Fibre Division at Nagda and to their factory at Harihar and also to the factories of their sister companies at Kosamba and Alibagh. The period of dispute is from April 1998 to June 2000. During this period, as per the provisions of Rule 6 (b) of the Central Excise (Valuation) Rules, 1975 (hereinafter referred to as "Valuation Rules"), where the excisable goods are not sold by the assessee but are used or consumed by him or on his behalf^{for} of the production or manufacture of other articles, the value would be based on the value of comparable goods produced or manufactured by the assessee or by any other assessee, as adjusted after taking into consideration all the relevant factors, including the difference, if any, in the material

characteristics of the goods to be assessed and of the comparable goods and if the value of such captively consumed goods could not be determined in this manner, the same was to be determined on the basis of cost of production or manufacture including profit, if any, which the assessee would have normally earned on the sale of such goods. In this case, there is no dispute that the clearances of Caustic Soda lye by the chemical division of the appellant company at Nagda to their Fibre Division at Nagda, the factory of the appellant company at Harihar and to the factories of the sister companies at Kosamba and Alibagh are for captive consumption. According to Department, M/s Grasim Industries (Fibre Division) Nagda, M/s Grasim Industries, Harihar, M/s Birla Cellulosic, Kosamba and M/s Vikram Ispat, Alibagh are the related units of the Appellant i.e. M/s Grasim Industries, (Chemical Division), Nagda and since these related units were using the Caustic Soda lye received from the Appellant for captive consumption for use in the manufacture of other excisable goods, the assessable value of Caustic Soda lye should have been determined under Rule 6 (b) (i) of the Valuation Rules, 1975. In respect of clearances of Caustic Soda to Fibre Division of the appellant company at Nagda, the appellant unit, with the approval of the Jurisdictional Assistant Commissioner, were paying Central Excise Duty on the average price of the clearances of Caustic Soda lye to independent buyers during the previous month. However, in course of audit of the Central Excise records of the appellant unit in the year 2000, it was found that during April 1998 to June 2000 period, the assessable value of Caustic

Soda in respect of clearances to the factories at Harihar, Kosamba and Alibagh was not based on the average value of the clearances to independent buyers during the previous month and that the duty had been paid on much lower value, which appeared to have been determined arbitrarily. On inquiry with the appellants it was learnt that for determining the assessable value of the clearances of Caustic Soda lye for captive consumption, the average price to independent buyers for the previous month had been adopted only in respect of clearances to the Fibre Division of the appellant company at Nagda and in respect of clearances of Caustic Soda lye to the factories at Harihar, Kosamba and Alibagh, the price adopted was the average price during the respective month at those places, which did not appear to be correct. The department was of the view when in respect of clearances of Caustic Soda lye for captive consumption, to the Fibre division at Nagda, the assessable value, ~~with~~ with the approval of the Assistant Commissioner, was being determined on the basis of the average price of sale to independent buyers during the previous month and the duty was being paid on this value only, there was no justification for the appellant to adopt lower assessable values in respect of clearances of Caustic Soda lye to the units at Harihar, Kosamba and Alibagh. It also appeared that the fact regarding adoption of lower assessable value in respect of clearance of Caustic Soda lye to the factories at Harihar, Kosamba and Alibagh was never disclosed by the appellant unit to the Department. It is on this

basis that a show cause notice dated 23rd April 2003 was issued to the appellant unit for –

(a) recovery of allegedly short paid duty amounting to Rs. 51,48,439/- alongwith interest on this duty at the applicable rate as per the provisions of Section 11AB of the Central Excise Act, 1944 in respect of clearances of Caustic Soda lye to the factories at Harihar, Kosamba and Alibagh during the period from April 1998 to 30th June 2000 ; and

(b) imposition of penalty on the appellant unit under Section 11AC of Central Excise Act, 1944 as well as under Rule 173Q of Central Excise Rules, 1944 for contravention of the provisions of Rule 9 (1) 173C, 173F of the Central Excise Rules.

1.3 The above show cause notice was adjudicated by the Commissioner vide order-in-original No. 25/COMMR/CEX/IND/2005 dated 16th March 2005 by which the entire duty demand, as made in the show cause notice, that is Rs. 51,48,439/-, was confirmed against the appellant unit alongwith interest under Section 11AB and beside this, penalty of equal amount was also imposed on the Appellant unit under Section 11AC of Central Excise Act.

1.4 It is against the above order of the Commissioner that the present appeal has been filed.

2. Heard both the sides.

2.1 Shri B.L. Narasimhan, Advocate, the learned Counsel for the appellant, pleaded that the appellant unit was clearing

Caustic Soda lye to their Staple Fibre Division at Nagda and other factories at Kosamba, Harihar and Alibagh, that in respect of clearances made to staple fibre division at Nagda, the appellant unit was paying duty on the basis of average selling price of Caustic Soda lye to independent buyers during the previous month and this practice was being followed with the approval of the Jurisdictional Assistant Commissioner since 1983-1984, that in respect of clearances of Caustic Soda lye for the units at Harihar, Kosamba and Alibagh, the appellant unit was discharging duty liability on the basis of price at which such Caustic Soda lye was being purchased by receiving units from other unrelated buyers, that is the average price of Caustic Soda lye at those places and not the average selling price of Caustic Soda lye to independent buyers by the appellant unit during the preceding month, that this practice was being followed by the appellant company since beginning and from time to time the necessary price declarations under Rule 173Q of the Central Excise Rules, 1944 had also been made, that in respect of clearances by the appellant unit of the Caustic Soda lye to the units at Harihar, Kosamba and Alibagh, the determination of value on the basis of purchase price of same goods by those units was the correct method as the value under Rule 6 (b) (i) can be based on the selling price of the comparable goods of other manufacturers also, that when the recipient units at Harihar, Kosamba and Alibagh were purchasing comparable goods from unrelated manufacturers, it would be appropriate to adopt the average purchase price of the comparable goods at Harihar, Kosamba and

Alibagh, rather than the Appellant unit¹ selling price of the goods at Nagda to independent buyers, that in any case, the demand is time barred, as the department of aware of this practice, that this is clear from the letter dated 20th December 1995 addressed by the Range Superintendent to the appellant company wherein it was mentioned that the scrutiny of the sale invoices and price declarations of Caustic Soda lye reveals that the appellant are removing Caustic Soda lye to their sister concerns at Harihar and Alibagh at arbitrarily low price, whereas the same product is being removed to their local sister concern (Fibre division) at much higher rate on the basis of selling price of the sales to independent buyers during the previous month and the appellant were asked to explain the reasons for such difference in the assessable ^{value of the} goods cleared for captive consumption to different units, that from this letter of the department, it is clear that the prices of removal of Caustic Soda lye to the factories at Harihar, Kosamba and Alibagh had been declared to the department and the department was aware of the fact that the assessable value of Caustic Soda lye in respect of clearances to Harihar, Kosamba and Alibagh is lower than the assessable value adopted in respect of clearances to the fibre division at Nagda, that in addition to this, the appellant company had declared the prices of supply of Caustic Soda lye to their fibre division at Nagda and also to the factories at Harihar, Kosamba and Alibagh in the RT-12 returns filed for the months of April 1998, April 1999 and June 2000 and in these RT-12 returns though the invoices had not been enclosed alongwith the returns, invoices-wise worksheets showing the

quantity, value and duty involved of the clearances made on day-to-day basis has been enclosed, that in view of this, the appellant cannot be accused of suppression of relevant information with intent to avail to payment of duty and, therefore, neither the longer limitation period under proviso to Section 11A (1) would be available to the department nor penalty under Section 11AC would be attracted and that since the demand for the period from April 1998 to the June 2000 had been raised by issuing the show cause notice on 23rd April 2003, the same is totally time barred.

2.2 Shri A. Jain, the learned Departmental Representative, pleaded that during the period of dispute, as per the provisions of Rule 6 (b) (i) of the Valuation Rules, in respect of clearances for captive consumption the assessable value of the goods was to be determined on the basis of the price of the comparable goods manufactured by the assessee and only if the comparable goods are not manufactured by the assessee, the price of comparable goods manufactured by other units could be adopted, that in this case the chemical division of the appellant company had a number of sales of Caustic Soda lye to unconnected buyers and, therefore, in respect of the clearances of Caustic Soda lye to their fibre division at Nagda, the practice of determining assessable value on the basis of average sale price to independent buyers during the previous month had been rightly adopted, that having adopted this valuation practice for determining the assessable value of the clearances for captive consumption of Caustic Soda lye to fibre division at Nagda, there

was absolutely no justification for the appellant company to adopt a different and lower assessable value in respect of clearances of the same goods – Caustic Soda lye to the unit at Harihar, Alibagh and Kosamba, based on the purchase price at which the receiving units ^{were} purchasing the comparable goods from other buyers, that the practice adopted by the appellant is without the support of the law and contrary to the provisions of Rule 6 (b) (i) of the Valuation Rules, that self assessment procedure had been introduced since March 1994 and no price declarations were filed by the appellant during the period of dispute, that even if the wrong practice adopted by the appellant came to the notice of the department in 1995 and the Range Superintendent wrote a letter to the appellant company seeking their clarification, it is not known as to whether any clarification was given by the appellant, that in any case, during the period of dispute, no price declarations had been filed and there was no information from the assessee that in respect of their clearances of the Caustic Soda lye to the units at Harihar, Kosamba and Alibagh, they are adopting a lower assessable value based on the average purchase price of the Caustic Soda lye by the receiving units from other buyers, that the appellant, therefore, are guilty of suppression the relevant information and, hence, the longer limitation period under proviso to Section 11A (1) and the penal provisions of Section 11AC have been correctly invoked.

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

4. The allegation against the Appellant unit is that during the period of dispute it was supplying Caustic Soda lye to M/s Grasim Industries Ltd. (staple fibre division), Nagda, M/s Birla Cellulosic, Kosamba; M/s Grasim Industries Ltd., Harihar and M/s Vikram Ispat, Alibagh which fall under the category of related persons and the goods received by these related persons, instead of being sold, were being consumed in manufacture of other goods and, therefore, the assessable value of Caustic Soda lye clear to these units was required to be determined under Rule 6 (b) (i) of the Erstwhile Valuation Rules, 1975 and that while in respect of clearances to M/s Grasim Industries Ltd., staple fibre division, Nagda, the appellant unit was paying duty, with the permission of Jurisdictional Assistant Commissioner, on the assessable value determined on the basis of average price of sales of Caustic Soda lye to independent buyers during the previous months, in respect of clearances of same Caustic Soda lye to M/s Birla Cellulosic, Kosamba, M/s Grasim Industries Ltd., Harihar and M/s Vikram Ispat, Alibagh duty was being paid on a much lower value determined on the basis of purchase price of Caustic Soda lye by these units from other buyers. According to the department in respect of clearances of Caustic Soda lye to M/s Birla Cellulosic, Kosamba, M/s Grasim Industries Ltd., Harihar and M/s Vikram Ispat, Alibagh, the duty should have been paid on the average price of clearances of Caustic Soda lye to independent buyers during the previous month i.e. on the value on which duty was being paid in respect of clearances to Fibre division, Nagda. It is

on this basis only that this duty demand has been confirmed against the appellant and penalty has been imposed under Section 11AC. Thus, the first point of dispute is as to whether payment of duty by the appellant in respect of clearances of Caustic Soda lye to M/s Grasim Industries Ltd., Harihar, M/s Birla Cellulosic, Kosamba and M/s Vikram Ispat, Alibagh on the value determined on the basis of the average purchase price of Caustic Soda lye by these units from other buyers was correct and permitted under the provisions of Section 4 of the Central Excise Act, 1944 readwith Central Excise Valuation Rules, 1975.

5. As per the provisions of clause (a) of Sub-Section (1) of Section 4 of the Central Excise Act, 1944, as it stood during the period of dispute, the assessable value of the excisable goods attracting duty at ad-valorem rate was deemed to be the "normal price" of the goods, that is to say, the price at which such goods are ordinarily sold by the assessee to the buyers in course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale. As per the provisions of the proviso (i) and (ia) to Section 4 (1) (a), this normal price could be different for different classes of buyers and where such goods are ordinarily sold by the assessee at different prices at different places of removal, each such price, subject to the existence of other circumstances specified in Clause (a) shall be deemed to be the normal price of such goods in relation to such places of removal. As per proviso (iii) to Section 4 (1) (a), where the entire

sales of the assessee are to or through a related person, as defined in Section 4 (4) (c) of the Central Excise Act, the normal price shall be deemed ^{to be} the price at which such goods are ordinarily sold by the such person in course of wholesale trade at the time of removal to buyers who are not related person. As per the Clause (b) of Section 4 (1), where the normal price of such goods is not ascertainable for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof shall be determined in such manner as may be prescribed. Central Excise (Valuation) Rules, 1975 framed by the Central Government under Section 37 of the Central Excise Act, 1944 provided for determination of the assessable value in the cases covered under Section 4 (1) (b) of the Act. Rule 4 of the Valuation Rules 1975 provides that the value of the excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of removal of goods under assessment, if necessary, subject to such adjustment on account of difference in the dates of delivery of such goods and of the excisable goods under the assessment, as may appear reasonable to the proper officer. This rule, obviously, would apply where at the time of removal of the goods, say for captive consumption or for distribution as free trade samples, their price is not known for the reason that there are no sales to independent buyers at that time and in such cases, the price of the goods was to be determined on the basis of price at which such goods have been sold at any other time nearest to the time of removal of the goods under assessment after making the

necessary adjustments, if any, required. This rule would also be applicable when the clearances were for depot from where the goods were to be sold and at the time of removal of the goods from the factory, there were no sales at the depot for some reason and the depot sale price of the goods at the time of removal was not known and in such a situation this rule permitted determination of assessable value on the basis of the depot price of such goods at any other time nearest to the time of removal of the goods under assessment after making adjustments, if any, required.

5.1 Rule 5 provided for determination of assessable value in a situation where the price is not the sole consideration for the sale.

5.2 Rule 6 was applicable if the value of the excisable goods under assessment could not be determined under Rule 4 or Rule 5 and the goods are either sold by the assessee in retail or the goods cleared are not sold by the assessee but are used for captive consumption for manufacture of other articles or the entire sales are to or through related persons and the value cannot be determined under third proviso to Section 4 (1) (a). Thus, Rule 6 can be applied only when the assessable value cannot be determined under Rule 4 or Rule 5 and if the assessable value could be determined under Rule 4 or 5, there would be no justification for invoking Rule 6. In this case, from the records it is clear that the Appellant unit, in addition to the clearances of Caustic Soda lye to their fibre division at Nagda and

to the factories of M/s Birla Cellulosic, Kosamba, M/s Grasim Industries Ltd., Harihar, M/s Vikram Ispat, Alibagh, was having clearances of Caustic Soda lye to independent buyers also and it is for this reason only that the Jurisdictional Assistant Commissioner vide his letter dated 9/1/97 had allowed the Appellant unit to clear Caustic Soda lye to its fibre division at Nagda at the average sale price to independent buyers for the previous month. If this is treated as the price determined under Rule 4 of the Valuation Rules, 1975, the same price would apply in respect of clearances to the units of M/s Grasim Industries, Harihar, M/s Birla Cellulosic, Kosamba and M/s Vikram Ispat, Alibagh. Rule 6 of the Valuation Rules, as such, has no application to this case and hence the appellant's plea that Rule 6 (b) (i) permits the determination of the assessable value on the basis of price of the comparable goods of any other assessee is without any basis. In view of this, ^{there is} absolutely no justification for determination of assessable value in respect of clearances of Caustic Soda lye to M/s Birla Cellulosic, Kosamba, M/s Grasim Industries Ltd., Harihar and M/s Vikram Ispat, Alibagh on the basis of average purchase price of Caustic Soda lye by these units. We, therefore, uphold the Commissioner's finding that there is the short payment of duty by the appellant unit in respect of clearances of Caustic Soda lye to M/s Birla Cellulosic, Kosamba, M/s Grasim Industries Ltd., Harihar and M/s Vikram Ispat, Alibagh.

6. Next comes the question of limitation. The appellant's contention is that while the duty demand is for the period from April 1998 to June 2000 the show cause notice had been issued on 23rd April 2003 and since there is no ground for alleging wilful misstatement or suppression of facts on the part of the appellant with intent to evade the payment of duty, the normal limitation period is not applicable and the entire duty demand is time barred. In support of this plea, the appellant has furnished the following evidence.

(i) Letter No. P.DECL/M Cell/05/220/ dated 20th December 1995 of Superintendent, Central Excise, Range I, Nagda addressed to M/s Grasim Industries Ltd. Caustic Soda Iye division, Nagda (ii) RT-12 returns for the months of April 1998, April 1999 and April 2000 alongwith list of invoices regarding clearances of Caustic Soda Iye which give the details of the clearances to their fibre division at Nagda and also to the factories of M/s Birla Cellulosic, Kosamba, M/s Grasim Industries, Harihar and M/s Vikram Ispat, Alibagh.

6.1 Coming to the letter dated 20th December 1995 of Superintendent, Central Excise, Range I, Nagda to the appellant company, the same is reproduced below :-

"Office of the Superintendent, Central Excise, Range I,

Nagda

**letter No. P.DECL/M Cell/05/220/ dated 20th
December 1995**

To,

**M/s Grasim Ind. Ltd.
(Caustic Soda Membrane Cell Divn.)
Birlagrum Nagda.**

Dear Sirs,

**Subject : Discrepancy in determination of assessable
value
Of Caustic Soda lye**

Scrutiny of relevant sales invoices and price declarations of Caustic Soda Lye reveals that you are removing Caustic Soda Lye to your sister concern at Harihar, Kumarpatnam & Dharmatar at an exorbitantly low price, whereas the same product is being removed to your local sister concern at much higher value on the basis of average price of outside sales. It is not understood as to how you are adopting different practice of sale to your sister concerns.

Therefore in view of above you are requested to submit the costing data of Caustic Soda lye for all months of year 1995-96 alongwith the Govt. audit report for the year 1994-95. You are further advised to calculate the differential duty on all such supplies made during the year and pay the duty accordingly under intimation to undersigned.

Yours faithfully,

**Sd/-
Superintendent,
Central Excise, R-I,
Nagda."**

6.1.1 From the perusal of this letter, it is clear that price declaration, as well as the sales invoices of Caustic Soda lye _____ in respect of the clearances to the fibre division at Nagda, and to the factories at Harihar and Alibagh had been furnished to the department and from the scrutiny of those invoices, and the price declarations, the department came to know that the assessable value of Caustic Soda lye in respect of clearances to the factories at Harihar and Alibagh is much less

than the assessable value in respect of the clearance to the fibre division at Nagda.

6.2 From the perusal of RT-12 return for the month April 1999 submitted by the appellant, we find that alongwith the RT-12 return, a list of the invoices giving details of the clearances of the Caustic Soda lye to various customers – rate per M.T., quantity and total value had been enclosed and this list also includes the details in respect of clearances of Caustic Soda lye to the appellant fibre division at Nagda, and to the factories of M/s Grasim Industries Ltd., Harihar, M/s Vikram Ispat, Alibagh and M/s Birla Cellulosic, Kosamba. In view of this, the department's allegation with the appellant have suppressed the relevant facts from the department is not sustainable.

6.3 Hon'ble Supreme Court in the case of **Continental Foundation Jt. Venture vs. CCE, Chandigarh – I** reported in **2007 (216) E.L.T. 177 (S.C.)** with regard to scope of the term "suppression" used in proviso to Section 11A (1) of the Central Excise Act, 1944 has held thus :-

"10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts, unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have

done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct."

6.3.1 In para 12 of the above judgment, the Hon'ble Supreme Court has observed as under :-

"12. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word 'wilful', preceding the words "mis-statement or suppression of facts", which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty.' Therefore, there cannot be suppression or mis-statement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Mis-statement of fact must be wilful.

6.4 The Hon'ble Supreme Court in the case of **CCE vs. Chemphar Drugs & Liniments** reported in **1989 (40) E.L.T. 276 (S.C.)** has held that something positive other than mere inaction or failure on the part of manufacture or producer or conscious and deliberate withholding of information when the manufacturer knew otherwise, is required before he is saddled with the liability invoking longer limitation period.

6.5 On the basis of the above criteria prescribed by the Apex Court for invoking the extended limitation period under proviso to Section 11A (1) of Central Excise Act, 1944, we find that in view of the facts disclosed above, there is hardly any ground for invoking the extended period.

7. In view of the above discussion, we hold that while on merit, the duty demand would be sustainable, extended period for recovery of short paid duty under proviso to Section 11A (1) of Central Excise Act is not available to the department and as such the entire duty demand is time barred. In view of this the impugned order confirming the duty demand and imposing penalty under Section 11AC is not sustainable and the same is set aside. The appeal is allowed.

(Order pronounced in the open court on 25/2/2011)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK