

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Excise Appeal No.458 of 2005

(Arising out of Order-in-Original No.11/MP/COMMR/2005 dated 11.07.2005 passed by Commissioner of Central Excise, Patna.)

M/s. ITC Limited

(ITC Limited, Basdeopur, P.O. Dist. Munger, Bihar-811202

(ITC Limited, Legal Department, 37, J.L. Nehru Road, Kolkata-700071.)

...Appellant

VERSUS

Commissioner of Central Excise, Patna

.....Respondent

(Central Revenue Building, Birchand Patel Path, Patna-800001, Bihar.)

APPEARANCE

Dr. Samir Chakraborty, Senior Advocate & Shri Abhijit Biswas, Advocate for the Appellant (s)

Shri S.S. Chattopadhyay, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE SHRI P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 75177/2022

DATE OF HEARING : 7 December 2021

DATE OF DECISION : 05 April 2022

P.K. CHOUDHARY :

This appeal is against an adjudication order dated July 11, 2005 passed by the Commissioner of Central Excise, Patna confirming a central excise duty demand of Rs. 28,56,907.88 against the Appellant under Section 11A of the Central Excise Act, 1944 (in short, "**the Act**") and imposing penalty of an equivalent amount under Rule 173Q of the Central Excise Rules, 1944 (hereinafter referred to as "**CER**") upon the Appellant in denovo proceedings undertaken as per the direction of the Tribunal in Order No. A-119/KOL/2004 dated 20.01.2004.

2. The facts in brief are:

- (i) The Appellant ("**ITC**"), a manufacturer of cigarettes, has one of its factories located at Munger, Bihar.
- (ii) In the said factory the Appellant draws cigarette sticks for the purpose of testing. The samples are drawn and sent for testing to the quality control laboratory situated within the factory premises to ensure consistency in quality. The samples are taken in the form of both loose cigarette sticks as well as cigarette packets. The tests are conducted on samples drawn from various stages of manufacture at intermediate stages in the manufacturing process and are in the form of sticks from the Cigarette Packaging Department. Remnants of samples after testing are returned to the manufacturing process.
- (iii) On July 27, 1990 the Appellant received a show cause notice dated July 25, 1990 issued by the Collector of Central Excise, Patna requiring the Appellant to show cause as to why duty of Rs.65,46,630.32 should not be demanded on removal of cigarette sticks and cigarette in packages ("**the samples**") for quality control tests within the factory of production during the period March, 1973 to April, 1990 and onwards and as to why penalty should not be imposed upon the Appellant under the specified provisions of the CER.
- (iv) On same grounds three other show cause notices, dated January 24, 1991, January 31, 1991 and February 18, 1991, were thereafter issued, each demanding central excise duty as in the case of first show cause notice and also proposing imposition of penalty upon the appellant as per the CER provisions stated therein.
- (v) The details of the four show cause notices (hereinafter referred to as "**SCN**") are as under:

	SHOW CAUSE NOTICE	PERIOD	AMOUNT
1.	SCN dated 25-July-1990	March 1973 to April 1990	Rs. 65,45,630.02

2.	SCN dated 30-January-1991	May 1990 to July 1990	Rs. 2,36,189.24
3.	SCN dated 24-January-1991	August 1990 to October 1990	Rs. 2,21,281.49
4.	SCN dated 18-February-1991	November 1990 to December 1990	Rs. 1,56,807.75
		TOTAL	Rs. 71,59,908.50

(vi) All the SCNs were adjudicated by orders dated 16.04.1991 of Collector of Central Excise, Patna and dated 24.10.1991 of the Additional Collector of Central Excise, Patna respectively.

(vii) Appeals preferred by ITC before CEGAT, Special Bench, Delhi against all the four adjudication orders were disposed of by a common Final Order No. 117 to 120/95-D dated March 23, 1995 by this Tribunal. While upholding the allegation of excisability of samples of cigarettes, the Tribunal remanded the matter for denovo adjudication of the cases in the light of the findings and observations contained in paras 12 and 13 of the order.

(viii) Appeal preferred by ITC against the Tribunal's order dated March 23, 1995 was rejected by the Supreme Court by its judgment dated December 10, 2002, reported in 2003 (151) ELT 246 (SC) [*ITC Ltd. Vs. Collector of Central Excise*].

(ix) Meanwhile, the Commissioner commenced de-novo adjudication proceedings in terms of the Tribunal's order dated March 23, 1995 and, on April 10, 2002, passed a de-novo adjudication order, confirming a total duty demand of Rs. 25,48,599/- against ITC under Section 11A of the Act and imposing a penalty of Rs. 6 lakhs upon ITC under Rule 173Q of CER. The re-quantification of the duty amount was made on the basis of the effective rate of duty in terms of Notification No. 14/90 dated March 20, 1990.

(x) Appeal preferred by ITC against this de-novo adjudication order before the Tribunal was allowed by way of remand by Order No. A-119/KOL/2004 dated January 20, 2004. The matter was remanded to the Commissioner for re-adjudication in terms of observations of the Tribunal in the order dated 23.03.1995.

(xi) Pursuant to the order of the Tribunal dated 20.01.2004, the impugned adjudication order dated 11.07.2005 has been passed by the Commissioner. The Commissioner confirmed an increased duty demand of Rs. 28,56,907.88 under Section 11A of the Act. The penalty under Rule 173Q of CER was also increased to Rs. 28,56,907.88 from Rs. 6 lakhs as per the earlier adjudication order.

3. Dr. Samir Chakraborty, Ld. Senior Advocate appearing along with Mr. Abhijit Biswas, Advocate, submits on behalf of the Appellant as under:

(a) Assessment of cigarettes during the period March 1973 to February 1983 demanding Rs. 12,06,223/- was on ad valorem basis and all assessments were provisional. The finalization of assessments by the Order No. 2/2002 dated August 29, 2002 of the Deputy Commissioner of Central Excise, Bhagalpur Division referred to in para 26 of the impugned order, was set aside by this Tribunal by Order No. FO/A/75444-754454 dated May 12, 2016, passed in Appeal Nos. E/190-191/2005 and the matter was remanded to the adjudicating authority for de novo adjudication in terms of direction contained in the order. The said de novo adjudication is pending. Hence, the assessments for this period are still provisional. Therefore, the condition precedent for invoking Section 11A(1) is not satisfied. The demand for this period is thus premature and untenable, as held by the Supreme Court in CCE Vs. ITC Ltd., 2006 (203) ELT 532 (SC).

(b) The show cause notice dated July 25, 1990 in relation to the period March 1983 to June 1985 demanding Rs.2,05,474/- has been issued beyond even the maximum period of five years contained in the Proviso to Section 11A(1) of the Act. During this period the assessments for cigarettes cleared from the factory had to be finalized at the time of clearance itself, as cigarettes were assessed on the basis

of printed price on the packet, in terms of Notification No. 36/83-CE dated March 1, 1983 whereunder there was neither a requirement nor scope of provisional assessment in clearance of the cigarettes in packages, since the duty payable was and had to be finally determined on the respective dates of clearances during the period involved.

(c) During the period from July 1985 to February 1987 demanding Rs.2,14,297/- the assessments and levy of duty on cigarettes were as per Notification No. 36/83-CE dated March 1, 1983 upto September 1, 1985 and, thereafter, as per Notification No. 201/85-CE dated September 2, 1985. In terms of Notification No. 201/85-CE also the levy and realization of central excise duty on cigarettes packed in packages continued to be on the basis of "adjusted sale price", which was to be determined in the same manner as provided for in Notification No. 36/83-CE dated March 1, 1983. Hence, in respect of this period also the SCN was required to be issued within 6 months from the period involved. However the SCN was issued on July 25, 1990, long after the expiry of the said period and hence this demand is also barred by limitation.

(d) Since the issue as to excisability of the goods was ultimately settled by the Apex Court in the year 2002 and prior thereto there were different conflicting decisions of the Tribunal, two of them involving ITC itself, as held by the Apex Court in Jaiprakash Industries Ltd. Vs. CCE, 2002 (146) ELT 481 (SC) and Continental Foundation Jt. Venture Vs. CCE, 2007 (216) ELT 177 (SC), there cannot be any allegation of misdeclaration or suppression of material fact or fraudulent act on the part of the appellant with intent to evade payment of duty and the condition precedent for invoking the extended period of limitation is not satisfied. In fact, a decision of the jurisdictional Deputy Commissioner dated November 29, 2001 on the issue involving ITC was accepted by the Department, no appeal having been preferred therefrom. Hence, extended period cannot be invoked.

(e) (i) During the period March 01, 1987 to December 31, 1990 the duties of excise on cigarettes were levied on the basis of the length of the cigarettes, in terms of Notification No. 34/87-CE dated March 1, 1987, as amended. The manner in which duties

were to be levied and realised as per the said notification (on length basis) left no scope for any provisional assessment of the cigarettes cleared. The clearances were, undisputedly, on final assessment basis.

(ii) The period from March 1987 to April, 1990 is covered by SCN dated July 25, 1990. The amount involved as per Annexure to the impugned order is Rs.11,09,538.52 for this period. Hence, except for the period January 1990 to April 1990, the demand for the balance period is barred by limitation.

(iii) The period from May 1990 to December, 1990 are covered by the other three SCNs dated 30.01.1991, 24.01.1991 and 18.02.1991 and the periods involved are May, 1990 to July, 1990, August 1990 to October 1990 and November 1990 to December 1990 respectively. The SCN dated 30.01.1991 the demand for the period May 1990 to June 1990 (out of the total period of May 1990 to July 1990) is barred by limitation the SCN having been issued beyond the period of 6 months from the relevant date as per the provisions of Section 11A(1) then prevailing. The demands covered by the SCNs dated 24.01.1991 and 18.02.1991 are however within the normal period of limitation.

(iv) Against the demand of confirmed by the impugned order, a sum of Rs.2,00,000/- has been deposited by ITC as per Order No. S-1/KOL/2002 dated 14.01.2003 of the Tribunal in earlier Appeal No. E/549/02 (ITC Ltd. Vs. CCE, Patna) filed against O-in-O No. 51/Denovo/Adjn/2002 dt. 10.04.02 passed by CCE, Patna, disposed of by way of remand by Tribunal's Order No. A-119/KOL/2004 dt. 20.01.2004, as predeposit.

(v) The penalty imposed upon the Appellant by the impugned order is illegal, invalid and bad in the undisputed facts and circumstances of the instant case. Reliance has been placed on:

(a) Commissioner of Central Excise Vs. Grasim Industries Ltd., 2005 (183) ELT 123 (SC), para 20

(b) Amrit Foods Ltd. Vs. CCE, 2005 (190) ELT 433 (SC)

(c) CCE&C Vs. Nakoda Textile Industries Ltd., 2009 (240) ELT 199 (Bom)

(d) CCE Vs. Max GB Ltd., 2008 (221) ELT 491 (P&H).

4. Mr. S.S. Chattopadhyay, Ld. Authorized Representative, submitted on behalf of the Department, reiterating the reasonings of the Commissioner in the impugned order, as under:

(i) The issue has been settled by the Apex Court's decision in ITC's own case reported in 2003 (151) ELT 246 (SC). The issue of removal of excisability of cigarette sticks & cigarette in packets (without wrapper) for quality control purpose within the factory of production has been decided in favour of the Department. Hence, on merit the order passed by the lower authority is sustainable.

(ii) The Appellant admitted their liability for the normal period as is evident from the submission of the Sr. Counsel of the Appellant. According to them the last two notices and part period of the other two notices are within the normal period of limitation. But the quantification of the same needs to be done by an authority.

(iii) One of the arguments of the Appellant is that the assessment of the relevant period from March 1973 to February 1983 is still provisional and in respect of the rest period there was no scope for provisional assessment. However, in paras 24 and 25 of the impugned order the Ld. Commissioner has held that the said issue has attained finality as per order of the Hon'ble Tribunal dated 23.03.1995. As such, there is no point to take up the issue again.

(iv) Again, bottom para of page 5 of the order of this Tribunal dated 23.03.1995 undisputedly shows that the assessment for the period from March 1973 to April 1990 was provisional as per the submission of the Ld. Sr. Counsel of the Appellant before the New Delhi Bench.

(v) In view of the above, the appeal filed by the Appellant may be dismissed.

5. We have heard Dr. Samir Chakraborty, Ld. Senior Advocate and Mr. S.S. Chattopadhyay, Ld. Authorized Representative on behalf of the parties through video conferencing and have perused the appeal records.

6. This Tribunal, in its Order No. 117-120/95-D dated 23.03.1995, after holding that cigarettes removed for testing within the factory were excisable and hence it would be permissible for the Department to recover the duty on all clearances of cigarettes by the appellant including those which were meant for the purposes of test within the factory while finalising “the provisional assessments for the relevant period”, it was further observed and held as under:

“On perusal of the records of the case, we find that whereas the demand for the recovery of duty on cigarettes removed during the period March 1973 to April 1990 for the purposes of test was issued under Section 11A of the Central Excise & Salt Act, 1944. The Collector rejected the appellant's contention that the demand for the recovery of duty for the period beyond 6 months was barred by limitation and confirmed the demand issued under Section 11A for the entire period on the ground that the assessments during the relevant period were provisional. As observed by us earlier when duty has been provisionally assessed, in terms of sub-section (3)(ii)(b(k) of Section 11A the ‘relevant date’ is the date of adjustment of duty after final assessment. Even though the Collector has observed that the assessments were provisional, it is not clear from the case records, whether the provisional assessments relating to the relevant period were finalised and if so, the date on which such final assessment was completed and whether the demand was issued after finalisation of the provisional assessments. We, therefore, hold that the Collector's order confirming the demand issued under Section 11A without stating whether the provisional assessments during the relevant period had been finalised and whether the demand issued after the date of finalisation of the provisional assessments, is not reasoned and shows non-application of mind. We also find that while confirming the demand in this case, the Collector failed to take into account the relevant notifications for working out the effective duty recoverable on the disputed cigarettes, whereas in other identical cases the demand

was raised on the basis of the effective rate having regard to the relevant exemption notification."

6.1 This Tribunal accordingly set aside the impugned order and remanded the matter for adjudication of the case in the light of the findings and observations made and in accordance with law after granting suitable opportunity of hearing to the Appellant.

6.2 The appeal against this order of this Tribunal dated 23.03.1995 preferred by the Appellant was rejected by the Hon'ble Supreme Court by its judgment dated 10.12.2002 [**ITC Ltd. Vs. Collector of Central Excise, Patna, 2003 (151) ELT 246 (SC)**].

7. Pursuant to the above order of this Tribunal, a denovo adjudication order dated 11.07.2005 was passed by the Commissioner, which was set aside and remanded by this Bench of this Tribunal by its Order No. A-119/KOL/2004 dated 20.01.2004 passed in Appeal No. E/549/02. In paragraph 4 of the order it was held and directed as follows:

"4. Since in this case, the order has been passed without finalisation of the provisional assessments as ordered by CEGAT in their order referred to above, we find that the Commissioner, without finalisation of the provisional assessment, has passed the impugned order. His reasoning carries no weight. In view of the above, we are constrained to remand the matter again to the Commissioner for re-adjudication in terms of the observations made by the CEGAT, New Delhi in their order referred to above. After setting aside the impugned order, appeal is thus decided by way of remand."

8. In paragraph 26 of the impugned order the Commissioner has observed as follows:

"26. I find that the Hon'ble CESTAT, vide their order no. A-119/Kol/04 dated 20.01.04, while remanding the case for denovo adjudication have directed that the case should be decided after finalisation of provisional assessment. I find that the various issues relating to valuation matters, which were under dispute between the assessee and the revenue, and for that reason the assessments were provisional, have been finalised by the jurisdictional Deputy Commissioner, Central Excise, Bhagalpur vide his Order-in-Original No.

02/BGP/02 dated 29.08.02. After the finalisation of the disputed issues, the duty liability has been worked out to be for Rs. 29,98,081.17. Out of the said amount, the assessee have already deposited an amount of Rs. 79,525.29, in compliance to the Adjudication Order No. Adjn/89/256 dated 06.03.89, and the outstanding amount, thus, comes to Rs. 29,18,555.88. Further a differential duty against cigarette sample for the period March 73 to February 83, amounting to Rs. 61,648/- has already been demanded vide Adjn. Order No. 02/BGP/02 dated 29.08.02, thus the demand of duty, recoverable vide this order comes to Rs. 28,56,907.88.

9. We find that the Order-in-Original No. 02/BGP/02 dated 29.08.02 passed by the Deputy Commissioner, Central Excise, Bhagalpur was affirmed by the Commissioner (Appeals), Central Excise, Patna by Order-in-Appeal No. 354/PAT/CEX/APPEAL/2004 dated 22.12.04, against which Appeal No. E/190-191/2005 was filed by the Appellant before this Tribunal. The period of dispute covered by the said appeal is from 01.03.73 to 28.02.83. By the Order No. FO/A/75444-75445/2016 dated 12.05.2016 [since reported in 2016 (5) TMI 991 – CESTAT KOLKATA] this Tribunal disposed of the appeals as under:

“4. Heard both sides and perused the case records. Both sides agree that due to multiplicities of adjudications and voluminous facts there appeals should be remanded back to the adjudicating authority in-charge of Munger factory to decide the issues of additions/deductions to arrive at the correct assessable value and quantification of duty. It is observed from the case records that issues of valuation dispute relating to bank charges, interest in excess of CSD, advertisement & sales promotion, below the line expenses (BTL) & interest on trading have been decided by jurisdictional adjudicating authorities at Bangalore, Parel, Saharanpur & Kidderpore factories in the light of ratio laid down by Apex Court. It is submitted by the advocate of the appellant that orders passed by the above adjudicating authorities have been accepted by the department on these deductions/additions and also the method of quantification. This fact can be verified by adjudicating authority of Munger factory and if what is stated by the learned advocate of the appellant is found to be true

then the same ratio laid by other jurisdictional adjudicating authorities has to be followed by AC/DC in-charge of Munger factory, including the method of quantification of differential duty.

5. In view of the above observations these appeals filed by the appellant are allowed by way of remand to the adjudicating authority. Needless to say that an opportunity of personal hearing should be extended to the appellant to explain their case before deciding the issues in remand proceedings. We may also make it clear that this bench has not made any observations on the merits of the case. The same has to be decided by the adjudicating authority on the basis of orders passed by adjudicating authorities at Bangalore, Parel, Saharanpur and Kidderpore factory and also the ratio laid by Apex Court on these deductions."

10. In that view of the matter the finding of the Commissioner that the subject assessments had been finalised on 29.08.02 does not survive. The said assessments continue to remain provisional. We have been given to understand that finalisation of the said provisional assessments in terms of the direction contained in the order dated 12.05.2016 of this Tribunal is still pending before the jurisdictional authority. In view of the above the contention of the Appellant that the demand for the period from 01.03.73 to 28.02.83 could not be decided prior to finalisation of the provisional assessments is completed as per the direction of this Tribunal in its order dated 12.05.2016 is sustainable. The demand for this period is premature as held by the Supreme Court in **CCE Vs. ITC Ltd., 2006 (203) ELT 532 (SC)**. In paragraph 17 of the judgment the Hon'ble Supreme Court observed as under:

"17. Section 11A of the Act provides for a penal provision. Before a penalty can be levied, the procedures laid down therein must be complied with. For construction of a penal provision, it is trite, the golden rule of literal interpretation should be applied. The difficulty which may be faced by the Revenue is of no consequence. The power under Section 11A of the Act can be invoked only when a duty has not been levied or paid or has been short levied or short paid. Such a proceeding can be initiated within six months from the relevant date which in terms of sub-section (3)(ii)(b) of Section 11A of the Act

(which is applicable in the instant case) in a case where duty of excise is provisionally assessed under the Act or the Rules made thereunder, the date of adjustment of duty after the final assessment thereof. A proceeding under Section 11A of the Act cannot, therefore, be initiated without completing the assessment proceedings.”

10.1 Hence the demand for the period from March 1973 to February 1983 confirmed by the impugned order is unsustainable, being premature and hence invalid and bad.

11. For the period from March 1983 to June 1985 we find that the cigarettes were cleared on the basis of “adjusted sale price” as per Notification No. 36/83-CE dated 1.3.1983 and thereafter for the period March 1987 upto February 1987 as per Notification No. 201/85-CE dated 2.9.1985 again on “adjusted sale price”. The said notifications are as follows:

(i) **Notification No. 36/83-CE dated 1.3.1983**

Effective rate of duty for Cigarettes - In exercise of the powers conferred by sub-rule (1) of rule 8 of the Central Excise Rules, 1944, read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), the Central Government hereby exempts cigarettes of the description specified in column (1) of the Table below and falling under sub-item II (2) of Item No.4 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944), from so much of the duty of excise leviable thereon under the said Acts, as is in excess of the amount calculated at the rate specified in the corresponding entry in Column (2) of the said Table.

THE TABLE

Description	Rate
Cigarettes (being cigarettes packed in packages) of which the adjusted sale price as per one thousand-	
(i) does not exceed rupees	

<i>fifty</i>	<i>Thirty five rupees per one thousand.</i>
<i>(ii) exceeds rupees fifty but does not exceed rupees sixty</i>	<i>Thirty five rupees per one thousand plus three rupees and fifty paise per one thousand for every increase of rupees five or fraction thereof in the adjusted sale price in excess of rupees fifty.</i>
<i>(iii) exceeds rupees sixty</i>	<i>Forty two rupees per one thousand plus three rupees and seventy five paise per one thousand for every increase of five rupees or fraction thereof in the adjusted sale price in excess of rupees sixty.</i>

Provided that the amount of duty so levied shall be apportioned in the ratio of 2.75: 1.00 between the duty leviable under the Central Excises and Salt Act, 1944 (1 of 1944) and the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), respectively.

Explanation - For the purpose of this notification –

(1) 'adjusted sale price', in relation to each cigarette contained in a package of cigarettes, means the unit price arrived at by dividing the sale price of such package by the number of cigarettes in such package:

Provided that -

(a) where such cigarettes are packed in packages containing the same number of cigarettes but the sale prices of such packages are different, the adjusted sale price in relation to each such cigarette shall be the unit price arrived at by dividing the highest of such sale prices by the number of cigarettes in such package, and

(b) where such cigarettes are packed containing different number of cigarettes, the unit price for each such package shall be determined by dividing the sale price of each such package by the number of cigarettes therein and the highest of such unit prices shall be the adjusted sale price in relation to each such cigarette;

(2) 'cigarettes packed in packages', means cigarettes which are packed for retail sale, in packages which –

(a) contain 10, 20, 50 or any higher number (being a multiple of 50) of cigarettes, and

(b) bear a declaration specifying the maximum sale price thereof as the amount specified in the declaration, plus local taxes only;

(3) 'sale price' in relation to a package of cigarettes means the maximum price (exclusive of local taxes only) at which such package may be sold in accordance with the declaration made on such package.

(ii) **Notification No. 201/85-CE dated 2.9.1985**

Slab rates of duty on cigarettes - In exercise of the powers conferred by sub-rule (1) of the rule 8 of the Central Excise Rules, 1944, read with sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), the Central Government hereby exempts cigarettes of the description specified in column (1) of the Table below and falling under sub-item II (2) of Item No. 4 of the First Schedule to the Central Excises and Salt Act, 1944 (I of 1944), from so much of the duty of excise leviable thereon under the said Acts as is in excess of the amount calculated at the rate specified in the corresponding in Column (2) of the said Table.

Provided that the amount of duty so levied shall be apportioned in the ratio of 2:1 between the duty leviable under the Central Excises and Salt Act, 1944 (I of 1944) and the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), respectively.

Description	Rate
Cigarettes (being cigarettes	

<i>packed in packages) of which the adjusted sale price per one thousand-</i> <i>(i) does not exceed rupees sixty</i> <i>(ii) exceeds rupees sixty but does not exceed rupees one hundred and seventy</i> <i>(iii) exceeds rupees one hundred and seventy but does not exceed rupees three hundred</i> <i>(iv) Exceeds rupees three hundred but does not exceed rupees five hundred and fifty</i> <i>(v) exceeds rupees five hundred and fifty</i>	<i>Forty two rupees per one thousand.</i> <i>One hundred and twenty five rupees per one thousand;</i> <i>Two hundred and twenty five per one thousand;</i> <i>Four hundred rupees per one thousand; and</i> <i>Six hundred rupees per one thousand.</i>
--	--

Explanation - For the purpose of this notification -

(1) "adjusted sale price", in relation to each cigarette contained in a package of cigarettes, means the unit price arrived at by dividing the sale price of such package by the number of cigarettes in such package:

Provided that where the cigarettes are packed in packages (whether or not containing the same number of cigarettes) but the sale prices of such packages in different packages as arrived at in accordance with the foregoing provision of this Explanation are not the same, the adjusted sale price in relation to each

cigarette in every such package shall be the highest of such prices;

(2) "cigarettes packed in packages", means cigarettes which are packed for retail sale, in packages which -

(a) contain 10 or 20 cigarettes, and

(b) bear a declaration specifying the maximum sale price thereof as the amount specified in the declaration, plus local taxes only;

(3) "sale price" in relation to a package of cigarettes means the maximum price (exclusive of local taxes only) at which such packages to be sold in accordance with the declaration made on such package."

12. From both the said notifications we find that, as noted by the Hon'ble Supreme Court in the case of **ITC Ltd. Vs. Commissioner of Central Excise, 2004 (171) ELT 433 (SC)**, for the first time they introduced the concept of levying excise duty with reference to the retail sale price of cigarettes instead of the wholesale price at which the manufacturer sold cigarettes at the time and place of their removal under Section 4 of the Central Excise Act. The retail sale price was defined in the said notifications as "the maximum price (exclusive of local taxes) at which the packet of cigarettes may be sold in accordance with the declaration made on such package by the manufacturers". The Appellant cleared cigarettes manufactured by it during this period after paying excise duty on the basis of Maximum Retail Price which was exclusive of local taxes printed by the Appellant on each cigarette packet. Hence, rightly pointed out on behalf of the Appellant, in the clearances in terms of the said notifications there was no scope of provisional assessment or the cigarettes being cleared under such provisional assessments. As appears from the Hon'ble Supreme Court's decision, dispute arose in respect of this period as to whether there was undervaluation of the cigarettes cleared in terms of the said two notifications and demands were raised towards short levy or short payment of central excise duty against the appellant in terms of Section 11A of the Central

Excise Act, which ultimately stood resolved by the abovestated decision of the Apex Court in **ITC Ltd. Vs. Commissioner of Central Excise (supra)**. The contention raised on behalf of the Revenue that the Appellant itself in its submission before this Tribunal in the appeals, resulting in order dated 23.03.1995 of the Tribunal, had contended that the assessment for the entire period from March 1973 to April 1990 was provisional through its Senior Counsel has no merit in view of the finding of this Tribunal in its order dated 23.03.1995, approved by the Apex Court.

13. In respect of the cigarettes cleared during the period from March 1, 1987 to December 27, 1990 duty of excise on cigarettes was leviable on the basis of length of cigarette in terms of Notification No. 34/87-CE dated 1.3.1987, the relevant part of which is as under:

“Effective rates of duty for cigarettes - In exercise of the powers conferred by Sub-rule (1) of rule 8 of the Central Excise Rules, 1944 with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), the Central Government hereby exempts cigarettes of the description specified in column (1) of the Table below and falling under sub-heading No. 2403.11 of the Schedule to the [Central Excise Tariff Act](#), 1985 (5 of 1986), from so much of the duty of excise leviable under the said Schedule and the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) as is in excess of the amount calculated at the rates specified in the corresponding entry in column (2) of the said Table:

Provided that the amount of duty so levied shall be apportioned in the ratio of 2:1 between the duty leviable under the said Schedule and the duty leviable under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), respectively.

TABLE

Description	Rate
(1)	(2)

CIGARETTES (BEING CIGARETTES PACKED IN APPROVED PACKAGES)	
I. Cigarettes, other than filter cigarettes, of length not exceeding 70 millimetres	One hundred and fifty rupees per one thousand cigarettes.
II. Filter cigarettes of length (including the length of the filter, the length of the filter being 11 millimetres or its actual length, whichever is more)- (a) not exceeding 70 millimetres (b) exceeding 70 millimetres but not exceeding 75 millimetres (c) exceeding 75 millimetres but not exceeding 85 millimetres (d) exceeding 85 millimetres but not exceeding 100 millimetres	Two hundred rupees per one thousand cigarettes. Three hundred rupees per one thousand cigarettes. Four hundred rupees per one thousand cigarettes. Six hundred rupees per one thousand cigarettes.

1. “Cigarettes packed in approved packages” means
cigarettes which are packed for retail sale, in packages which-

- (a) contain 10 or 20 cigarettes;
 - (b) bear a declaration specifying the length of the cigarettes;
- and
- (c) have surface designs approved by the Director (Audit) in
the Directorate of Inspection and Audit (Customs and Central
Excise):

.....”

14. The manner in which duties are to be levied and realised as per
the said notification leaves no scope for any provisional assessments
of the cigarettes cleared. We therefore agree with the contention of
the Appellant that the clearances of cigarettes during this period were
on final assessment basis only.

15. Therefore in respect of the entire period from July 1985 to December 1990 there was no scope of any provisional assessment in effecting clearance of cigarettes removed. All clearances during this period was on final assessment basis.

16. In the instant case at all material times cigarettes were under physical control system. All samples were drawn during the manufacturing process and moved to the laboratory situated within the premises of the bonded factory of ITC which is under the physical control of the Central Excise authorities since May 1979. The movement of cigarette samples to the laboratory inside the factory was undertaken as a part of regular process of the manufacturing cigarettes and there is no material disclosed that there was attempt on the part of the appellant to conceal such movement or concealment of any material fact with regard to the removal of samples of cigarettes. Moreover, there were decisions of the Tribunal during the material period that such samples of cigarettes were not dutiable goods [**Godfrey Philips India Ltd. Vs. Collector of Central Excise, 1999 (114) ELT 70 (T), ITC Ltd. Vs. CCE, Patna, 2001 (137) ELT 829 (T)**]. In such cases it has been held by the Supreme Court in, inter alia, **Jaiprakash Industries Ltd. Vs. CCE, 2002 (146) ELT 481 (SC)** and **Continental Foundation Jt. Venture Vs. CCE, 2007 (216) ELT 177 (SC)**, that there cannot be any allegation of misdeclaration or suppression of material fact or fraudulent act on the part of the appellant with an intent to evade payment of any central excise duty and the extended period of limitation of five years contained in the Proviso to Section 11A of the Act is inapplicable. The contrary finding of the Commissioner in the impugned order is therefore incorrect and unsustainable.

17. Hence the demand of duty in respect of cigarettes cleared for testing purposes for the period March 1, 1983 to December 27, 1990 is sustainable only in respect of normal period of 6 months as contained in Section 11A(1) of the Central Excise Act, 1944 during the

material period. The extended period of limitation contained in the Proviso to Section 11A(1) of the Act is inapplicable. Consequently, the demands beyond the period of 6 months from the respective dates of issuance of the SCNs in respect of cigarettes cleared during this period are barred by limitation and hence cannot be sustained. The quantification of duty demand for the normal period of six months during this period however, as rightly submitted by the learned AR, has to be by the jurisdictional original authority, who shall do so, along with determining the demand for the period from March 1973 to February 1983, if any, after finalisation of the provisional assessments for the said period in terms of the Order No. FO/A/75444-754454 dated 12.05.2016 passed by this Tribunal in Appeal No. E/190-191/2005 (supra).

18. In the facts and circumstances of the instant case as recorded hereinabove, respectfully following the decision of the Hon'ble Supreme Court in **Commissioner of Central Excise Vs. Grasim Industries Ltd., 2005 (183) ELT 123 (SC)**, we hold that no penalty is imposable upon the appellant in the instant case and the penalty imposed is therefore set aside. In paragraph 20 of the judgment the Hon'ble Supreme Court observed and held as under:

"20. However, by this Order, the Commissioner has also imposed penalty in a sum of Rs. 10,00,000/- under Rule 173Q of the Central Excise Rules. While the conclusions of the Commissioner that the Respondents were not entitled to the benefit of the Notification are correct, the fact still remains that the Tribunal has in a number of matters given an interpretation as understood by the Respondent. It therefore cannot be said that the Respondents could not have taken the view they did. It cannot be said that they could never have concluded that they were entitled to the benefit of the Notification. We therefore feel that this is a case where penalty should not be imposed. We therefore delete the imposition of penalty on the Respondents."

19. In view of the above observations and findings, the impugned order is set aside and the instant appeal is allowed by way of remand to the Adjudicating Authority, to be decided after taking into account the observations and findings contained hereinabove and upon extending an opportunity of personal hearing to the Appellant.

(Order pronounced in the open court on 05 April 2022.)

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

Sd/
(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

sm