IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 75921 of 2014

(Arising out of Order-in-Original No. KOL/CUS/PORT/21/2014 dated 25.03.2014 passed by the Commissioner of Customs (Port), Kolkata.)

M/s. Texmaco Rail Engineering Limited
(Agarpara Works, Belgharia Kolkata-700056)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata
(15/1, Strand Road, Customs House, Kolkata-700 001.)

...Respondent

APPERANCE :

Mr. Pulak Saha and Mr. Bikash Gupta both Chartered Accountants for the Appellant
Mr. Faiz Ahmed, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR MEMBER (JUDICIAL)
HON'BLE MR. RAJEEV TANDON MEMBER (TECHNICAL)

FINAL ORDER NO. 75036/2024

DATE OF HEARING : 26.09.2023

DATE OF PRONOUNCEMENT :12th January, 2024

PER : RAJEEV TANDON :

The appellant is a manufacturer importer, who imports coupler set, graft gear and air break equipment classifiable under CTH 86073090 and CTH 86079990, used for the manufacture of railway wagons. During the period 7.06.2012 to 26.11.2012, the said goods, were imported by the appellant who states to have fed the correct tariff item number of the goods imported, onto the Customs EDI system, whereby the calculation of duty payable was automated by the system applying the prescribed rate of duty as available in its software. The Additional Duty of Customs (or Countervailing Duty- CVD duty) was therefore, paid by the appellant @ 6% ad valorem at the time of import, while the impugned goods during the material time, were statutorily leviable to 12% ad valorem rate of Additional Duty of Customs.

1.1. The issue concerns imports made under cover of thirty five self assessed Bills of Entry by the appellant. Duty so short paid, for an amount of Rs.3,86,63,232/-, was sought to be recovered vide Show Cause Notice No. DRI-F 718(II)02/Seize/PRU13-14 dated 23/05/13, in terms of Section 28(1) of the **Customs Act, 1962**[1]. Interest leviable on the short paid, duty amount was also demanded from the appellants under Section 28AA of the Customs Act. The Departments' case being, that the self-assessed duty, payable in terms of Section 17(1) of the Act was not in accordance with law and as it was not in conformity with applicable rate of Additional Duty leviable under Section 3(1) of the **Customs Tariff Act, 1975**[2], therefore, interest as applicable under Section 28AA of the Customs Act, alongwith the short paid duty was payable.

2. The Department points out that the effective rate of Central Excise Duty on goods falling under CTH 8607 was revised to 12% ad valorem vide Notification 18/2012 CE dated 17.03.2012. The Central Excise Duty leviable as additional duty of customs/countervailing duty under Section 3(1) of the Tariff Act, would therefore, accordingly be leviable. As per the revenue, the duty leviable on goods falling under CTH 8607 at the time of import into India effective since 17.03.2012 was as under:

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1. The Act.
2. The Tariff Act.

Duty of Customs (Head wise)	**Rate of duty leviable/payable**
Basic Customs Duty(BCD) *(Section 12-Customs Act, 1962)*	10%
Additional Duty of Customs/Countervailling Duty (CVD) *(Section 3-Customs Tariff Act, 1975)*	12%
Education Cess on Aggregate Customs Duty *(Finance Act, 2004)*	2%
Secondary & Higher Education Cess on Aggregate Customs Duty *(Finance Act, 2007)*	1%
Special Additional Duty *(Section 3A-Customs Tariff Act, 1975)*	4%

2.1. The department submits that Notification No. 18/2012 (C.E.) dated 17.03.2012 was rescinded on 30.05.2012 after the Finance Act, 2012 was assented to by the President of Bharat on 28.05.2012. Further, the tariff rate of Central Excise Duty on goods falling under CTH 8607 was 12% ad valorem w.e.f. 28.05.2012 as per Sl. No.73(b) of the Seventh Schedule of the Finance Act, 2012.

The relevant portion of the Seventh Schedule of the **Finance Act, 2012** reads as under:

"The seventh schedule

(See Section 141)

In the First Schedule to the Central Excise Tariff Act –

1……………….

2……………..

3……………

73. in Chapter 86 –

(a) for the entry in column (4) occurring against all the tariff items of heading 8601 to 8606 except 8604 0000, the entry 6% shall be substituted:

(b) in tariff item 8604 0000 and in all the tariff items of heading 8607, 8608 and in tariff item 8609 0000 for the entry in column (4), the entry "12%" shall be substituted."

3. Vide the impugned Order-in-Original, passed by the Ld. Commissioner of Customs (Port), Customs House, Kolkata, the Adjudicating Authority affirmed the aforesaid levy of duty under Section 28(1) of the Customs Act. The learned Commissioner further confirmed the demand for payment of interest, at applicable rate in terms of Section 28AA of the Act, as leviable on the escaped/short paid duty amount.

4. The appellants have challenged the aforesaid Order-in-Original, in appeal before this Tribunal. At the time of hearing of the Stay Petition filed in the matter, for stay of recovery of duty and interest during pendency of appeal filed on 23rd April, 2015, the appellants were directed to deposit Rs.3,86,63,232/-, within eight weeks, by way of pre-deposit under Section 129(E) of the Customs Act, whereupon balance dues adjudged would stand waived and recovery thereof stayed during the pendency of the appeal.

4.1. While the appellant at the time of filing of the appeal, contested both the demand for duty as well as interest leviable thereto; at the time of hearing on 26.09.2023, they pointed out that they were not contesting the payment of differential duty any longer, and would render pleadings only for the leviability of interest (confirmed on the short levied Additional Duty of Customs/CVD), under Section 28AA of the Customs Act. It is so also specifically stated, at more than one place in the written submissions filed by the appellant at the time of hearing of the appeal. Relevant part of their submissions reads as under:

"***Written Notes on Arguments***

×××××××

6. ***Issue Involved:***

The issue involved in the instant appeal is whether the learned Commissioner was right in confirming the demand of interest on the short levied CVD at the applicable rate (s) in terms of Section 28AA of the Customs Act.

7.8. ***Issue Involved:***

The appellant is not contesting the payment of differential duty at this stage. Hence the remaining issue involved in the instant case is whether the Appellant is liable to pay interest on the instant sought levy of Countervailing Duty(CVD), under Section 28AA of the Customs Act as confirmed by the learned Commissioner.

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*8. **Submission on Merit:***

8.3. The appellant submits that the only issue in the instant appeal is relating to leviability of interest in relation to amounts payable as duty other than basic customs duty."

Hence, having voluntarily given up the other question involved in the appeal pertaining to recovery of short levied duty (CVD), the only question for consideration remains leviability and recovery of interest on the of above referred short paid duty and shall therefore alone be considered in the following paras.

5. We have heard the appellant at considerable length on the subject, as regards their stand towards non-payment of interest on the short levied CVD/Additional Duty of Customs leviable under Section 3(1) of the Tariff Act. We have also heard the learned Authorized Representative for the revenue, who reiterates the Department's findings and supports the leviability of interest as confirmed vide the impugned order.

6. On merits of the case, the appellant invites reference to the charging section viz. Section 12 of the Act which reads as under:

The Customs Act, 1962

"12. Dutiable goods

(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975 (51 of 1975),] or any other law for the time being in force, on goods imported into, or exported from, India.

> *(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to government as they apply in respect of goods not belonging to Government."*

The appellant thereby emphasised that it is this provision in law which enables the prescription of the rate of duties as leviable, under the Tariff Act 1975 while it is Section 2 of the Tariff Act that provides for the rates at which duties of customs are to be levied under the Customs Act, as specified in the First or the Second Schedule, of the Tariff Act. The appellant, submits that Section 12 of the Customs Act, carries no reference to any specific provision of the Tariff Act, 1975, while Additional Duty/Special Additional Duty are leviable under section 3/section 3A of the Customs Tariff Act respectively, and therefore this duty is not relatable to the First or the Second Schedule of the CTA, as the rate of duty is prescribed in the said section itself. Sri Pulak Shah, the learned CA, drew similar analogy with reference to section 90 of the Finance Act 2000 levying surcharge of Customs. The appellant therefore, submitted that charging section for CVD/SAD/surcharge was not section 12 of the Customs Act, but the appropriate sections of Tariff Act. Reliance in support of the aforesaid proposition in law was also drawn by the appellant to the Hon'ble Supreme Court's decision in the case of **Hyderabad Industries Limited Vs. Union of India**[3]**,** wherein the Hon'ble Apex Court had held that additional duty (CVD) which is levied under Section 3(1) of the Tariff Act is independent of the Customs duty which is levied under Section 12 of the Customs Act.

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3. 1999 (5) TMI 29 SC.

6.1. With regard to the claim of interest**,** the appellant contended that for understanding the leviability of interest payable on the duty amount short paid, in respect of duty other than basic Customs Duty, reference to Section 3 and Section 3A as well as Section 9A of the Tariff Act is required to be read into. As we are presently concerned with Section 3 of the Tariff Act, the same as it stood at the material time, is reproduced for a comprehensive understanding of the legal provision and for ready reference.

Customs Tariff Act, 1975

> ***"SECTION 3. Levy of additional duty, equal to excise duty, sales tax, local taxes and other charges.-***
>
> *(1) Any article which is imported into India shall, in addition, be liable to a duty (hereinafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on the like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article :*
>
> *Provided that in case of any alcoholic liquor for human consumption imported into India, the Central Government may…………………………….*
>
> *Explanation.- In this sub-section, the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so*

produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty.

(2) For the purpose of calculating under sub-sections (1) and (3), the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962 (52 of 1962), be the aggregate of –

(i) The value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article under sub-section (2) of that section, as the case may be; and

(ii) Any duty of customs chargeable on that article under section 12 of the Customs Act, 1962 (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include –

(a) ………………………………………….

(b) ……………………………………………

(c) ………………………………………………

(d) ……………………………………………..

Provided…………………………………..

(a)…………….

(b)…………….

Explanation. - Where on any imported article………………………

(3) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or not] such additional duty as would counter-balance the excise duty leviable on any raw materials, components and ingredients of the same nature as, or similar to those, used in the production or manufacture of such article, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty representing such portion of the excise duty leviable on such raw materials, components and ingredients as, in either case, may be determined by rules made by the Central Government in this behalf.

(4) In making any rules for the purposes of sub-section (3), the Central Government shall have regard ……………………….

(5) If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1), or, as the case may be, sub-section (3) or not] such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges…………

(4) For the purpose of calculating under sub-section (5), the additional duty on any imported article, the value of the imported article shall, notwithstanding……………………………

(i)………………………………………………..

(ii)………………………………………………..

(a)…………………………………………

(b)………………………………………….

(c)………………………………………………

(d)……………………………………………….

(7) The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

(8) ***The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act.***

6.2. As the appellant in their arguments have also drawn comparisons to Section 3A (as then stood in 2004-05) and Section 9A of the Customs Tariff Act, the relevant portions of the two sections are recorded hereunder:

(i) Section 3A. Special Additional Duty-(SAD)* *

(1) Any article which is imported into India shall in addition be liable to a duty (hereinafter referred to in this section as the special additional duty), which shall be levied at a rate to be specified by the Central Government, by notification in the Official Gazette, having regard to the maximum sales tax, local tax or any other charges for the time being leviable on a like article on its sale or purchase in India.

*** Omitted w.e.f. 13.05.2005**

Provided that until such rate is specified by the Central Government, the special additional duty shall be levied and collected at the rate of eight per cent of the value of the article imported into India.

Explanation.-................................

(2) For the purpose of calculating under this section the special additional duty on any imported article shall, notwithstanding anything contained in Section 14 of the Customs Act, 1962 or Section 3 of this Act, be the aggregate of-

(i) the value of the imported article determined under sub-section (1) of Section 14 of the Customs Act, 1962 (52 of 1962) or the tariff value of such article fixed under sub-section (2) of that section, as the case may be;

(ii) any duty of customs chargeable on that article under Section 12 of the Customs Act, 1962 (52 of 1962), and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs but does not include-

(a) the safeguard duty referred to in Sections 8B and 8C;

(b) the countervailing duty referred to in Section 9;

(c) the anti-dumping duty referred to in Section 9A;

(d) the special additional duty referred to in sub-section (1); and

(iii) the additional duty of customs chargeable on that article under Section 3 of this Act.

(3) The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.

(4) ***The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to refunds and exemptions from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties levaible under that Act.***

(5) Nothing contained in this section shall apply to any article which is chargeable to additional duties levied under sub-section (1) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act 1957 (58 of 1957).

(ii) Section 9A. Anti-dumping duty on dumped articles-

(1) Where any article is exported (by an exporter or producer) from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

××××××××××

(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall,

as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act."

7. It is submitted by the appellant, that on a comparative study of the aforesaid provisions, it is evident that the provision relating to levy of interest has not been borrowed under Section 3 and Section 3A unlike Section 9A of the Customs Tariff Act, and therefore no interest can be levied on the demand pertaining to Additional Duty of Customs (in the nature of Countervailing Duty), leviable in terms of Section 3 of the Customs Tariff Act. Accordingly this is to imply that in terms of Section 28AA of the Customs Act, interest on delayed payment of duty is applicable only for Customs Duty leviable under Section 12 of the Customs Act, as Section 3 of the Customs Tariff Act pertaining to levy of Additional Duty of Customs did not borrow the provisions of the Customs Act, relating to interest. In support of their proposition, the learned Chartered Accountant, placed reliance on the decision of the Hon'ble Supreme Court in the case of **Khemka and Company (Agencies.) Pvt. Ltd. Vs. State of Maharashtra[4],** wherein the appellant contends that the Hon'ble Apex Court in the context of Central Sales Tax Act 1956, had held that penalty or interest is a statutory liability and is in addition to tax. There must therefore be a charging section, to create a liability. The liability has to be created first, thereafter the act needs to provide for assessment, followed by the enforcement provisions of the taxing statute. The fact that there is a

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4. 1975 (2) SCC 22

machinery provision for assessment, collection and enforcement of tax and penalty in the State Act does not automatically mean that the provision for penalty in the State Act can be considered as one for the Central Act as well. In support the appellants relied on the enunciation in para 28 of the said order, which reads as:

> *"28. ……………….. A penalty is a statutory liability. The Central Act contains specific provisions for penalty. Those are the only provisions for penalty available against the dealers under the Central Act. Each State Sales Tax Act contains provisions for penalties.*
>
> *These provisions in some cases are also for failure to submit return or failure to register. It is rightly said that those provisions cannot apply to dealers under the Central Act because the Central Act makes similar provisions. The Central Act is a self-contained code which by charging section creates liability for tax and which by other sections creates a liability for penalty and impose penalty. Section 9(2) of the Central Act creates the State authorities as agencies to carry out the assessment, reassessment, collection and enforcement of tax and penalty by a dealer under the Act."*

8. The appellant therefore contends that in view of the aforesaid decision of the Hon'ble Apex Court, it is appropriate to hold that penalty/interest is not a continuation of the assessment, proceedings and penalty/interest partakes the character of an additional tax. Emphasising on the need for a charging section to create a liability, they submit that while Section 3 of the Tariff Act does create a charge for Additional Duty, it however, does not provide for interest play. The fact that there is a machinery for assessment, collection and enforcement of tax and penalty under the Customs Act would not automatically mean that the same is replicated for levy and payment of penalty and interest under the Tariff Act. They further submitted that the meaning of penalty or interest under the Tariff Act cannot be enlarged by utilising the machinery provisions as provided under the Act.

9. Inviting attention to the Hon'ble Apex Court's decision in the case of **Collector of Central Excise, Ahmedabad V. Orient Fabrics Pvt. Ltd[5],** wherein the Hon'ble Court was essentially concerned with the question pertaining to the jurisdiction of the Central Excise authorities under that act and whether it was permissible to resort to penalty proceedings or forfeiture of goods for non-payment of Additional Duty in terms of Additional Duties of Excise (Goods of Special Importance) Act, 1957, by taking recourse to the provisions of the Central Excise Act and Rules made thereunder, it was argued that the breach of the provisions of the act, not being penal in nature and the penalty imposed by way of an additional tax, the constitutional mandate requires a clear authority of law for its imposition in terms of Article 265 of the Constitution.

10. Learned CA for the appellant, inviting reference to the Hon'ble Gujarat High Court's decision in **Collector of Central Excise Surat-I Vs. Ukai Pradesh Khand Udyog Mandali Ltd[6],** stated that the Hon'ble Court while dealing with the provisions of the Central Excise Act read with Sugar Export Promotion Act, 1958, had held that interest can be levied and charged on delayed payment of tax only if the statute

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5. 2003 (158) ELT 545 SC
6. 2011 (271) ELT 32 GUJ

that levies the tax makes a substantive provision in this behalf. Submitting that sub-Section 4 of Section 7 of Sugar Export Promotion Act, 1958, was akin to sub-Section (8) of Section 3 and sub-Section (4) of Section 3A of the Customs Tariff Act, 1975 they invited reference to para 17 of the order of the Hon'ble Gujarat High Court, which is extracted herein below:

> *"17. From the principles enunciated in the above referred decisions, it is apparent that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes substantive provision in this behalf. In the facts of the present case, as noted hereinabove, section 7 of the Sugar Export Promotion Act, 1958 does not make any provision for levy and charge of interest on the duty of excise payable under sub-section (1) thereof. In the circumstances, there being no substantive provision in the Act for levy of interest on late payment of tax, no interest thereon could be so levied based on the application of sub-section (4) of section 7 of the said Act. In the circumstances, the Tribunal was justified in holding that there being no provision for interest in the Act, there was no justification or warrant to confirm the interest, in the absence of any powers vested in the authorities under the Act."*

For ready reference the Section 7(4) of Sugar Export Promotion Act, 1958 is enumerated hereunder:

> *"(4) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duty, shall, so far as may be, apply in relation to*

the levy and collection of the duty of excise or any other sum referred to in this section as they apply in relation to the levy and collection of the duty on sugar or other sums of money payable to the Central Government under that Act or the rules made thereunder."

11. Drawing analogy from the aforesaid judicial pronouncements the principal contention of the appellant is, that in the absence of specific provision for levying of interest (or penalty) due on account of the delayed payment of tax, the same cannot be levied unless the statute makes a substantive provision for its realization. To support their contention, the appellant also drew support of the Hon'ble Bombay High Court's decision in the case of **Mahindra and Mahindra Ltd. (Automotive Sector) Union of India, the Settlement Commission, Additional Bench Customs and Central Excise, Mumbai, the Commissioner of Customs, (Import), Mumbai, the Additional Director, General, DG CIE, Mumbai[7],** with regard to the issue of leviability of interest and penalty in relation to amounts payable as duty other than Basic Customs Duty; wherein it was held that, no interest and penalty can be levied on the portion of payment pertaining to surcharge, CVD and SAD.

"26. Sub-section (6) of Section 3 and sub-Section (4) of Section 3A of the Customs Tariff Act, 1976 does not provide for any interest or penalty. Neither Section 90 of the Finance Act, 2000 provides for the same. Therefore, no interest and

7. 2022 (10) TMI 212 Bombay High Court

penalty can be levied on the portion of payment pertaining to surcharge, CVD and SAD. We must also note that sub-section (8) of Section 9A of the Customs Tariff Act, 1975, prior to the 2004 amendment, did not include interest and penalties. By Section 76 of Finance (No.2) Act, 2004, the words in sub-Section (8) of Section 9 of the Customs Tariff Act, 1975 "relating to non-levy, short levy, refunds and appeals" were replaced with "relating to, the date for determination of rate of duty, non-levy, short levy, refunds, interest, appeals, offences and penalties". No such amendment to include interest and penalty was inserted in sub-Section (6) of Section 3 or sub-Section (4) of Section 3A of the Customs Tariff Act, 1975. Therefore, the intention of the legislature was very clear that it wanted to include interest and penalties only with regard to anti-dumping duty on dumped articles and not for CVD, i.e., special additional duty. No such insertion or amendment was made in Section 90 of Finance Act, 2000 relating to surcharge. Therefore, interest and penalty cannot be levied on the portion of demand pertaining to surcharge under Section 90 of the Finance Act, 2000 or additional duty of customs under Section 3 or special additional duty of customs under the Customs Tariff Act, 1975."

12. Thus drawing a corollary, it has been argued by the appellant, that breach of provisions of Section 3 or then Section 3A (as now omitted), of the Tariff Act, as well as section 90 of the Finance Act, 2000, have not been made penal. It only provides for application of procedural provisions of the Customs Act. It is their case that for levy of penalty or interest on CVD or SAD or Surcharge, the same needs to be provided for explicitly. That being so, imposition of penalty or interest on additional duty of customs, special additional duty or surcharge, not being connected with the basic customs duty is without authority of law. In support, the appellant heavily relied on the honourable Bombay High Court's decision in the case of **Mahindra and Mahindra Ltd.**[7]**,** cited in para 11 above, quoting therein para 22 of the apex court's decision in the case of **Khemka and Company (Agencies.) Pvt. Ltd. Vs. State of Maharashtra**[4]. The following paras of the Hon'ble High Court judgment in Mahindra and Mahindra Ltd. case, from the appellants stand point, also need to be adverted to:

> *"22. In **M/s. Khemka and Company (Agencies.) Pvt. Ltd Vs. State of Maharashtra**[4]**....................***
>
> *The Court held that there must be specific provisions to create liability. Paragraphs 25 to 28 of **M/s. Khemka and Co. (Agencies) Pvt. Ltd.**[4] (supra) read as under:……………………..*
>
> > *25. Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act. Reference may be made to section 28 of the Indian Income-tax Act, 1922 where penalty is provided for concealment of income. Penalty is in addition to the amount of income-tax. This Court in **Jain Brothers & Ors. V. Union of India** said that penalty is not a continuation of assessment proceedings and that penalty partakes of the character of additional tax.*

26. The Federal Court in ***Chatturam & Ors. v. Commissioner of Income-tax,*** *Bihar said that liability does not depend on assessment. There must be a charging section to create liability. There must be, first a liability created by the Act. Second, the Act must provide for assessment. Third, the Act must provide for enforcement of the taxing provisions. The mere fact that there is machinery for assessment, collection and enforcement of tax and penalty in the State Act does not mean that the provision for penalty in the State Act is treated as penalty under the Central Act. The meaning of penalty under the Central Act cannot be enlarged by the provisions of machinery of the State Act incorporated for working out the Central Act.*

27. This Court in ***State of Tamil Nadu v. K.A. Ramudu Chettiar & Co.*** *said that the power to enhance assessment which was contained in the Madras Act of 1959 though such power was not available under the 1939 Act would be available in respect of assessment under the Central Act. Enhancement of assessment is in the process of assessment. It is a procedural power. The liability to tax is created by the statute. Therefore, when the power to assess is attracted a fortiori enhancement is within the power.*

28. For the foregoing reasons we are of opinion that the provision in the State Act imposing penalty for non-payment of income-tax within the prescribed time is not attracted to impose penalty on dealers under the Central Act in respect of tax and penalty payable under the Central Act……………

> *……………………………Therefore, penalty is not a continuation of assessment proceedings and penalty partakes of the character of additional tax. There must be a charging section to create liability. Section 3 and Section 3A of the Customs Tariff Act, 1975 are charging sections creating liability for CVD and SAD but does not provide for penalty. The mere fact the there is machinery for assessment, collection and enforcement of tax and penalty under the Customs Act, 1962 does not mean that the provision for penalty and interest in the Customs Act, 1962 is treated as applicable for penalty and interest under the Customs Tariff Act, 1975. The meaning of penalty or interest under the Customs Tariff Act, 1975 cannot be enlarged by the provisions of machinery of the Customs Act, 1962 incorporated for working out the Customs Tariff Act, 1975."*

13. Further, the Apex Court's decision in the case of **Orient Fabrics Ltd.**[5]**,** referred to in para 9 above was also discussed by the Hon'ble Bombay High Court in the **Mahindra and Mahindra Ltd. (Automotive Sector)**[7], case. Dwelling thereon the Hon'ble High Court observed as follows:

> *"23. In another matter before the Apex Court in **Collector of Central Excise, Ahmedabad V/s. Orient Fabrics Pvt. Ltd.**[5]**,** cited by Mr. Sridharan, the question that came up for consideration was as regards to jurisdiction of the authorities under the Central Excise Act, whether it is permissible to resort to penalty proceedings or forfeiture of goods for non-payment of additional duty in terms of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 by taking*

recourse to the provisions of the Central Excise Act and Rules framed thereunder. There also Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 was similar to the provisions of sub-section (6) of Section 3 and sub-section (4) of Section 3A of the Customs Tariff Act, 1975. While interpreting the provisions, the Court held that it is no longer res integra that when the breach of the provison of the act is penal in nature or a penalty is imposed by way of additional tax, the constitutional mandate requires a clear authority of law for imposition for the same. Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. The authority has to be specific, explicit and expressly provided. Paragraphs 5, 6, 7 and 8 of Orient Fabrics Pvt. Ltd. (Supra) read as under:

> *5. In order to appreciate the issue, it is relevant to set out the sub-section (3) of Section 3 of the Act, as applicable in this matter and which runs as under:*
>
> > ***"SECTION 3 : Levy and collection of additional duties:***
> >
> > *(1)……………………..*
> >
> > *(2)………………………..*
> >
> > *(3) The provisions of Central Excise and Salt Act, 1944 and the rules made thereunder including those relating to refund and exemptions from duty shall, so far as may be, apply in relation to the levy and collection of the additional duties as they apply in*

relation to the levy and collection of the duties of excise on the goods specified in sub-section (1)."

6. A perusal of the said provision shows that the breach of provision of the Act has not been made penal or an offence and no power has been given to confiscate the goods. It only provides for application of the procedural provisions of the Central Excise and Salt Act, 1944 and the Rules made thereunder. It is no longer res integra that when the breach of the provision of the Act is penal in nature or a penalty is imposed by way of additional tax, the constitutional mandate requires a clear authority of law for imposition for the same. Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law The authority has to be specific and explicit and expressly provided. The Act created liability for additional duty for excise, but created no liability for any penalty. That being so, the confiscation proceedings against the respondents were unwarranted and without authority of law.

7. The Parliament by reason of Section 63(a) of the Finance Act, 1994 (Act No. 32 of 1994) substituted sub-section (3) of Section 3 of the said Act, which now reads as under :

"3. Levy and collection of Additional Duties :

(1)…………………………………….

(2)………………………………..

(3) The provisions of the Central Excise Act, 1944 (I of 1994), and the rules made thereunder, including those relating to refunds, exemptions from duty, offences

and penalties, shall, so far as may be, apply in relation to the levy and collection of the additional duties as they apply in relation to the levy and collection of the duties of excise on the goods specified in sub-section (1)."

8. A comparison of the amended provisions with the unamended ones would clearly demonstrate that the words 'offences and penalties' have consciously been inserted therein. The cause of action for imposing the penalty and directions of confiscation arose in the present case in the year 1987. The amended Act, therefore, has no application to the facts of this case.

*24. The Delhi High Court in **Pioneer Silk Mills Pvt. Ltd. V/s. Union of India**[8]**,** relied upon by Mr. Sridharan, while dealing with similar provisions under the Central Excise and Salt Act, 1944 and the Rules made thereunder read with Additional Duties of Excise (Goods of Special Importance) Act, 1957, held that Act shall have specific provisions which creates a charge in the nature of penalty. The Court held that when penalty is additional tax, constitutional mandate requires a clear authority of law for imposition thereof. Paragraphs 32, 36, 37 and 39 of **Pioneer Silk Mills Pvt. Ltd.** (Supra) read as under:*

32. Considering the ratio of the decisions aforesaid we are of the opinion that there is no provision in the

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8. 1995 (80) E.L.T. 507 (Del.)

Additional Duties Act which creates a charge in the nature of penalty. We further find that the term "levy and collection" in Section 3(3) of the Additional Duties Act has a restricted meaning in view of the use of the words "including those relating to refund and exemptions from duty". Otherwise these words were rather unnecessary. In ***Orissa Cement V. State of Orissa,*** *the question before the Supreme Court was whether rebate provided in section 13 (8) of the Orissa Sales Tax Act was available to dealers if they paid the tax under the CST Act before due date of payment. The court said that rebate for payment of tax under the CST Act on the reasoning that the power to collect the tax assessed in the same manner as the tax on the sale and purchase of goods under the general sales tax law of the State would include within itself all concessions given under the State Act for payment within the prescribed period. The Supreme Court in Khemka's case observed respecting this case that the reason why rebate was allowed and penalty was disallowed was that rebate was a concessions whereas penalty was an imposition. The concession did not impose liability but penalty did. It, therefore, stood to reason that rebate was included within the procedural part of collection and enforcement of payment, and penalty like imposition of tax could not be included within the procedural part.*

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36. We are, thus, of the opinion that the argument that various sections falling in Chapter II of the Central Excises Act which has the heading "Levy and Collection" would all be construed as provisions for levy and collection of additional duty as well, is of no avail to the revenue and we reject this argument. In fact, as noted above, Chapter II contains no provision for levy of penalty.

37. <u>When penalty is additional tax, constitutional mandate requires a clear authority of law for imposition thereof. If long drawn arguments are needed to explain the Act by referential legislation, or legislation by incorporation levies penalty or not, it is better for the court to lean in favour of the taxpayer. There is no room for presumption in such a case</u>. The mere fact that all these years the Additional Duty Act has not been challenged on this ground is of no consequence if authority of law as mandated by the Constitution is lacking. We may also note in the passing that it was submitted before us that penalty so realized earlier has never been distributed among the States as part of act proceeds of the collection of the additional duties of excise under the Additional Duties Act. This statement, made at the Bar was not challenged. Since, however, this point was not raised in the writ petition and the revenue had no *opportunity to reply in its counter-affidavit, we leave the matter at that, Levy of penalty which is an additional tax has to be under the authority of law which should be clear, specific and explicit.*

Xxxxxxxxxxxxxxxxx

39. We have given our considerable thought to various arguments raised by the parties. We find there is no mandate in the Additional Duties Act for levy of penalty and the Central Excise Act and the Rules made there under cannot be imported in the Additional Duties Act for the purpose of levy of penalty. We have spent anxious moments as the interpretation we have put has grave consequences for the revenue as similar terminology as used in section 3(3) of the Additional Duties Act has been used in various Finance Acts and other enactments, but then Article 265 of the Constitution mandates that no tax shall be levied and collected except by authority of law. There being no such authority of law to levy penalty, we have to hold so.

(Emphasis Supplied)

This judgment, we are informed, was confirmed by the Apex Court. Therefore, when penalty is additional tax, constitutional mandate requires a clear authority of law for imposition thereof. Where the Act has to be explained by referential legislation or legislation by incorporation levies penalty or not, it is better for the Court to lean in favour of *the taxpayer. There is no room for presumption in such cases."*

14. To draw home his point of view, the learned CA, Shri Pulak Saha referred to certain provisions of the Customs Tariff Act 1975. The same are arranged at one place for ease of reference and understanding. Relevant portions thereof are as extracted herein:

<u>THE CUSTOMS TARIFF ACT- Statutory Provisions</u>

(i) Section 3 of the Customs Tariff Act:
(For Additional Duty of Customs or CVD):

(1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article.

Explanation.- In this section, the expression" the excise duty for the time being levaible on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India, or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, the highest duty.

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(5) <u>The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.</u>

*(6) The <u>provisions of the Customs Act, 1962 (52 of 1962), and the rules and regulations made thereunder, **including** those relating to drawbacks, refunds and exemption from duties, shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act.</u>*

(Emphasis Supplied)

(ii) Section 3A of the Customs Tariff Act:
(For Special Additional Duty- SAD):

(1) Any article which is imported into India shall in addition be liable to a duty (hereinafter referred to in this section as the Special Additional Duty), which shall be levied at a rate to be specified by the Central Government, by notification in the Official Gazette, having regard to the maximum sales tax, local tax or any other charges for the time being leviable on a like article on its sale or purchase in India:

Provided that until such rate is specified by the Central Government, the special additional duty shall be levied and collected at the rate of eight per cent of the value of the article imported into India.

Explanation………………….

(1)…………………….

(2)…………………….

(3) <u>The duty chargeable under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.</u>

*(4) <u>The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, **including** those relating to refunds and exemptions from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act.</u>*

××××××××

(Emphasis Supplied)

(iii) Section 9A of the Customs Tariff Act:
(For Anti- dumping duty on dumped articles-):

(1) Where any article is exported from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India as less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

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(8) The provisions of the Customs Act, 1962 (52 of 1962) and the date for determination of rate of duty, assessment, the rules and regulations made thereunder, relating to non-levy, short levy, refunds, interest and appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.*

(iv) Section 90 of the Finance Act, 2000:
(For- Surcharge of Customs):

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* ***As amended vide Finance (No.2) Act, 2009 w.e.f. 01.01.1995 (No. 2).***

(1) In the case of goods mentioned in the First Schedule to the Customs Tariff Act, or in that Schedule, as amended from time to time, there shall be levied and collected as surcharge of Customs, an amount, equal to ten per cent of the duty chargeable on such goods calculated at the rate specified in the said First Schedule, read with any notification for the time being in force, issued by the Central Government in relation to the duty so chargeable.

(2) Sub-section (1) shall cease to have effect after the 31st day of March, 2001, and upon such cesser, section 6 of the General Clauses Act, 1897 (10 of 1897) shall apply as if the said sub-section had been repealed by a Central Act.

(3) <u>The surcharge of Customs referred to in sub-section (1) shall be in addition to any duties of customs chargeable on such goods under the Customs Act or any other law for the time being in force.</u>

*(4) <u>The provisions of the Customs Act and the rules and regulations made thereunder, **including** those relating to refunds, drawbacks and exemptions from duties, shall, as far as may be, apply in relation to the levy and collection of surcharge of customs leviable under this section in respect of any goods under that Act or those rules and regulations, as the case may be.</u>*

(Emphasis Supplied)

15. The various provisions of Customs Act, 1962, as need to be referred to for the analysis of the subject matter or are referred to in judicial pronouncements (referred in earlier paras), are enumerated below:

<u>The CUSTOMS ACT– Statutory Provisions</u>

(i) <u>Section 12.- Dutiable goods-</u>

(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of Customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from, India.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.

(ii) Section 28*.- Notice for payment of duties, interest, etc.-

(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

*** Prior to its substitution by Finance Act, 2011 (Act No. 8 of 2011) dated 08.04.2011.**

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted:

Provided further that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable has not been paid, part paid or erroneously refunded is one crore rupees or less, a notice under this sub-section shall be served by the Commissioner of Customs or with his prior approval by any officer subordinate to him:

Provided also that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable thereon has not been paid, part paid or erroneously refunded is more than one crore rupees, no notice under this sub-section shall be served except with the prior approval of the Chief Commissioner of Customs.

Explanation.- Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.

(2) The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due

from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) For the purposes of sub-section (1), the expression "relevant date" means,-

(a) in case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of the goods;

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;

(c) in a case where duty or interest has been erroneously refunded date of refund;

(d) in any other case, the date of payment of duty or interest.

(iii) <u>Section 28AA-</u> <u>Interest on delayed payment of duty</u>

*"**28AA. Interest on delayed payment of duty***

(1) <u>Notwithstanding anything contained in any judgment</u>, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the <u>person, who is liable to pay duty in accordance with the provisions of Section 28, shall, in addition to such duty, be liable to pay interest</u>, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.

(2) Interest, at such rate not below ten per cent. and not exceeding thirty-six per cent. per annum, as the Central

Government may, by notification in the Official Gazette, fix, shall be paid by the person liable to pay duty in terms of Section 28 and such interest shall be calculated from the first day of the month succeeding the month in which the duty ought to have been paid or from the date of such erroneous refund, as the case may be, up to the date of payment of such duty.

(3) Notwithstanding anything contained in sub-section (1), no interest shall be payable where,-

(a) the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under Section 151A; and

(b) such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment."

(iv) <u>Section 28AB-</u> <u>Interest on delayed payment of duty in special cases-</u> (Rescinded)

(1) Where any duty has not been levied or has been short levied or erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts, the person who is liable to pay the duty as determined under sub-section (2) of section 28, ***shall, in addition to the duty, be liable to pay interest*** *(at such rate not below eighteen per cent and not exceeding thirty six per cent per annum, as is for the time being fixed by the Central Government, by Notification in the Official Gazette), from the first day of the month succeeding the month in which the duty ought to have been paid under this*

Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section (2) of section 28, till the date of payment of such duty.

(2) For the removal of doubts, it is hereby declared that the provisions of sub-section (1) shall not apply to cases where the duty became payable before the date on which the Finance (No.2) Bill, 1996 receives the assent of the Present.

Explanation 1- Where the duty determined to be payable is reduced by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, the interest shall be payable on such reduced amount of duty.

Explanation 2-Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, the interest shall Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, the interest shall be payable on such increased or further increased amount of duty.

16. The plea put forth on behalf of the appellant, essentially is that when a statute levies a tax, it does so by inserting a charging section by which a liability is created and then it provides the machinery to make the liability effective. The statute therefore, provides the machinery for the assessment of the liability fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaults. Provision is also made for charging of interest on delayed payments, etc. while the charging section which fixes the liability needs to be strictly construed the said rule is not extendable to the machinery provisions. Further, any provision for charging or levying of interest on delayed payment of tax have to be construed as substantive law and not adjectival law, as so held by the apex court in **J.K Synthetics Ltd. Vs. Commercial Taxes Officer**[9]**.**

17. The appellant made particular reference to the Hon'ble Bombay High Court's decision in the case of **Mahindra and Mahindra (Automotive Sector) Vs. UOI & Ors**[7]**,** and laid emphasis on the following paras of the said judgement. As the context herein demands, some of the said paras are recorded below:

> *"20. Section 28AB of the Customs Act, 1962 is a taxing provision which creates and fastens the liability on a party. The provision has to be strictly construed and will be governed by the language employed in the section. The Apex Court in the matter of **India Carbon Ltd. & Ors. V. State of Assam**[10]**,** relied upon by Mr. Sridharan, after quoting paragraph 16 of J.K. Synthetics Ltd. (Supra), held that the proposition that may be derived from J.K. Synthetics Ltd. (Supra) is interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf. The Court held that where there is no substantive provision requiring the payment of interest, the authorities cannot, for the purpose of collecting and enforcing payment of tax, charge interest thereon.*

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9. 1994 SCC (4) 276.
10. 1997 (6) SCC 479

21. It is petitioner's case, as noted earlier, that provision relating to interest and penalty are not borrowed under Finance Act, 2000 and under Section 3 and 3A of the Customs Tariff Act, 1975, and hence no interest and penalty can be levied on the portion of demand pertaining to surcharge, additional duty being countervailing duty (CVD) and special additional duty (SAD) being levied under Section 3 and Section 3A of the Customs Tariff Act, respectively. The total duty demand raised in the show cause notices consist of the demand of basic customs duty under Section 12 of the Customs Act, 1962, surcharge of customs duty under Section 90 of the Finance Act, 2000, additional duty of Customs equal to excise duty under Section 3 of the Customs Tariff Act, 1975 (CVD) and special additional duty of Customs under Section 3A of the Customs Tariff Act, 1975 (SAD).

It is also petitioner's case that Section 28AB of the Customs Act, 1962, interest on delayed payment of duty is applicable only for customs duty leviable under section 12 of the Customs Act, 1962. Section 90 of the Finance Act 2000 relating to surcharge, Section 3 of the Customs Tariff Act, 1975 relating to additional duty of customs and Section 3A of the Customs Tariff Act, 1975 relating to special additional duty of Customs do not borrow the provisions of Customs Act, 1962 relating to interest.

*22. In **M/s. Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra**[4]**,** that Mr. Sridharan relied upon, the question that the Court had to answer was whether the assessees under the Central States Tax Act, 1956 could be made liable for* *penalty under the provisions of the State Sales Tax Act. There petitioner contended that there is no provision in the Central Act for imposition of penalty for delay or default in payment of tax and, therefore, imposition of penalty under the provisions of the State Sales Tax Act for delay or default in payment of tax is illegal. The rival contention on behalf of the Revenue was that the provision for penalty for default in payment of tax as enacted in the State Sales Tax Act was applicable to the payment and collection of the tax under the Central Sales Tax Act and is incidental to and part of the process of such payment and collection. The Apex Court held that a penalty is a statutory liability and is in addition to tax and a liability under the Act. There must be a charging section to create liability. There must be, firstly a liability created by the Act, secondly, the Act must provide for assessment and thirdly, the Act must provide for enforcement of the taxing provisions. The Court held that there must be specific provision to create liability……………………"*

18. The appellant further submitted that interest can be levied and charged on delayed payment of tax only, if the statute that levies and charges the tax makes substantive provisions in this behalf**.** They invited reference to the apex court's decision in the case of **India Carbon Ltd. ETC. Vs. State of Assam**[10] wherein because of no substantive provision in the Central Sales Tax Act, levy of interest on delayed payment of Central Sales Tax under the provisions of Section 35A of the State Act, were held to be bad in law. The appellant therefore, submits that provisions contained in Section 28AA of the

Customs Act having not been borrowed in the legislation imposing levy of CVD, that is the Tariff Act and therefore, no interest can be demanded from them, even if it were to be argued that the appellant had derived financial benefit by not paying the correct duty as due, at the material time.

19. We have heard the rival submissions and perused the case records. For a comprehensive consideration of the arguments made by the appellants, it would be imperative to threadbare discuss and consider the cited judgments, examine the context, in which the Hon'ble Courts have delivered the same and need to deciphere and segregate the ratio from the orbiter dicta of the law propounded, vis-à-vis the prevailing statutory provisions that were considered by the courts, the language deployed therein as also the current provisions in the statute and the subject matter under Section 28AA of the Customs Act.

20. The case laws cited and discussed by the appellants in support of their contention are the following:

- **(i) Hyderabad Industries Limited Vs. Union of India[3]**
- **(ii) Khemka and Company (Agencies) Pvt. Ltd. Vs. State of Maharashtra and State of Mysore Vs. Guldaas Narrappa Thimmaiah Oil Mills[4]**
- **(iii) Collector of Central Excise, Ahmedabad Vs. Orient Fabrics Pvt. Ltd.[5]**
- **(iv) Collector of Central Excise Surat I.V. Ukai Pradesh Khand Udyog Mandali Ltd.[6]**
- **(v) Mahindra and Mahindra Ltd. (Automotive Sector) Union of India, the Settlement Commission,**

Additional bench Customs and Central Excise, Mumbai, the Commissioner of Customs, (Import), Mumbai. The Additional director, General, DG CIE, Mumbai[7]

(vi) The cited judgemnents inter alia refer to the following citations, that may also call for a consideration:

(a) Jain Brothers & Ors Vs. UOI Ors.[11]

(b) Chatturam & Ors Vs. Commissioner of Income Tax.[12]

(c) State of Tamil Nadu Vs. KA Ramudu Chettiar & Co.[13]

(d) Pioneer Silk Mills Pvt. Ltd Vs. UOI[8]

(e) Orissa Cement Vs. State of Orissa[14]

(f) JK Synthetics Ltd. Vs. Commercial Taxes Officer[9]

(g) India Carbon Ltd. & Ors Vs. State of Assam[10]

21. Since the appellants have essentially argued their case based on certain pronouncements of the superior courts, for a complete overarching appreciation of the issue at hand, each of these case laws need to be dwelt upon. We propose to do so later in our order, after having analysed the subject matter independent of the said enunciations.

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11. 1969 (11) TMI-1 SC
12. 1947 (4) TMI 8 Federal Court
13. 1973 (2) TMI-116 SC
14. 1970 (4) TMI 130 SC

22. At the foremost, it would be of interest to have a look at the evolution of Section 28AA of the Customs Act, as it has stood over period of time. Thus, the key portions as highlighted in bold are:

(i) **Customs Manual by R.K Jain (2007-2008) (35th- Edition)**

"SECTION 28AA. Interest on delayed payment of duty.-

(1) Subject to the provisions contained in section 28AB *where a person,* ***chargeable with the duty determined*** *under sub-section (2)* ***of section 28, fails to pay such duty within*** *three months from the date of such determination,* ***he shall pay****, in addition to the duty,* ***interest*** *[at such rate not below [ten per cent.] and not exceeding thirty six per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette], on such duty from the date immediately after the expiry of the said period of three months till the date of payment of such duty :*

Provided that where a person chargeable with duty determined under sub-section (2) of section 28 before the date on which the Finance Bill, 1995 receives the assent of the President, fails to pay such duty within three months from such date, then, such person shall be liable to pay interest under this section from the date immediately after three months from such date, till the date of payment of such duty.

Explanation 1.*- Where the duty determined to be payable is reduced by the Commissioner (Appeals), Appellate Tribunal [National Tax Tribunal] or, as the case may be, the court, the date of such determination shall be the date on which an amount of duty is first determined to be payable.*

***Explanation 2.**- Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), Appellate Tribunal [National Tax Tribunal] or, as the case may be, the court, the date of such determination shall be,-*

(a) For the amount of duty first determination to be payable, the date on which the duty is so determined;

(b) For the amount of increased duty, the date of order by which the increased amount of duty is first determined to be payable;

(c) For the amount of further increase of duty, the date of order on which the duty is so further increased.

(2) The provisions of sub-sections (1) shall not apply to cases where the duty or the interest becomes payable or ought to be paid on and after the date on which the Finance Bill, 2001 receives the assent of the President.

(ii) **Customs Manual by R.K Jain (2012-2013)(39th-Edition)**

(w.e.f. 08.04.2011)

"28AA. Interest on delayed payment of duty. –

*(1) **Notwithstanding** anything contained in **any judgement, decree, order or direction of any court, Appellate Tribunal or any authority or** in **any other provision of this Act** or the rules made thereunder, **the person who is liable to pay duty** in accordance **with the provisions of section 28, shall,** in addition to such duty, **be liable to pay interest**, if any, at the rate fixed under sub-section (2), **whether such payment is made voluntarily or** after **determination of the duty** under the section.*

(2) Interest at such rate not below ten per cent. And not exceeding thirty-six per cent, Per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid by the person liable to pay duty in terms of section 28 and such interest shall be calculated from the first day of the first day of the month succeeding the month in which the duty ought to have been paid or from the date of such erroneous refund, as the case may be, up to the late payment of such duty.

(3) Notwithstanding anything contained in sub-section (1), no interest shall be payable where,-

(a) the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under section 151A; and

(b) such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment.

23. As the provisions pertaining to liability and payment of interest are inextricably intertwined with that of demand for payment of duty/liability and to pay Customs duties as determined, it would be appropriate to reflect on the said provisions of law as well. Thus Section 28 of the Customs Act effective 08.04.2011 (i.e. for the material period) which read as under is recorded below:

"SECTION 28.- Recovery of duties not levied or short-levied or erroneously refunded.-

(1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any willful mis-statement or suppression of facts,-

(a) The proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(b) The person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,

(i) His own ascertainment of such duty; or

(ii) The duty ascertained by the proper officer, the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.

(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest.

(3) Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (2).

(4) Where any duty has not been levied or has been short-levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-

(a) Collusion; or

(b) Any willful mis-statement; or

(c) Suppression of facts, by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

(5) Where any duty has not been levied or has been short-levied or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has

been served under sub-section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to twenty-five per cent of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.

(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion-

(i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub-section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or

(ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable then, the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (5).

(7) In computing the period of one year referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.

(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice.

(9) The proper officer shall determine the amount of duty or interest under sub-section (8),-

(a) within six months from the date of notice, where it is possible to do so in respect of cases falling under clause (a) of sub-section (1);

(b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under sub-section (4).

(10) Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount or interest is specified separately.

(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of

assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section."

Explanation 1.- For the purposes of this section, "relevant date" means,-

(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be;

(c) in a case where duty or interest has been erroneously refunded, the date of refund;

(d) in any other case, the date of payment of duty or interest.

Explanation 2.- For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received."

24. It is settled law and oft repeated, that in a taxation statute every word used in the law is to be read into and nothing can be added or omitted to arrive at intended or assumed meaning to expand the prescription of law. Suffice to say that the law in taxation matters is to be read as it is and not what it ought to be, in the mind and understanding of the authority concerned. It would therefore be meaningful to analyze the legal postulates concerned with the subject matter and as to how the Courts have held onto comprehend the issue.

25. In the context it is imperative to understand *what is duty*.

Section **2(15)** of the Customs Act defines the words ***"duty"*** as*…………………..*

"means a duty of Customs leviable under this Act."

It may be noticed that in this definition the words "under this act", are equally important. It narrows the margin of the words **"duty"** to mean "a duty of customs".

This read with Section 12 of the Customs Act which defines Dutiable goods, brings about a subtle difference in the usage of the words "duties of customs".

26. Further, Section 12(1) of the Customs Act, the charging section under the Act is in the nature of an exclusion clause, as it starts with the words ***"Except as otherwise provided in this Act……….".*** It thus provides primacy to the provisions of the Customs Act 1962 or any other law, as regards the levy of the duties of Customs at rates, as are specified under the Customs Tariff Act 1975 or any other law. Section 12 of the Customs Act, concerning goods on which duty is required to be paid, is reproduced below for ease of reference:

"***12. Dutiable goods***

(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of Customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to government as they apply in respect of goods not belonging to Government.”

27. This subtle difference between the words “duty” and “duties” is quite pronounced and noticeable when discussed in the context of the other provisions of the statute. Further, for a better understanding of the law some of the other relevant provision of the Customs Act are being analyzed in this backdrop, hereunder- thus for instance:

(i) **Section 15(1),** of the Customs Act, concerned with relevant date for determination of the rate of duty and tariff valuation of imported goods, considers the word **“duty”** and does not use the term “duties” as can be seen from below:

(1) “(1) The rate of duty and tariff valuation if any applicable to imported gods shall be the rate and valuation in force………..

(a)…………..

(b)…………..

(c)…………….”

This is so because all other duties leviable on the imported goods be it in the nature of Additional Duty of Customs, Surcharge, Anti-dumping Duty, Safeguard Duty etc., as may be leviable are a direct consequence of the duty imposed under Section 12 of the Customs Act, (also known as Basic Customs Duty), or are assigned a specific rate of duty as may be so stated in the charging enactment thereof, the like of Customs Tariff Act- Schedule I for instance.

(ii) Similar, interpretation is inferenceable with reference to the word **“duty”** as used in **Section 16** of the Customs Act, (a provision for determining relevant date for levy of duty on export goods).

(iii) Also another important area concerned with leviablility of duty is exemption. It be noted that in **Section 25** of the Customs Act that provides for grant of exemption from duty, the power to grant exemption from the basic duty of customs, (Section 25 of the Customs Act) flows from this section, empowering the Central Government with powers to provide for such exemption from payment of duty, with or without conditions, as may be specified. In so far as other duties leviable on imported goods are concerned it may be noted, that **Section 3 of the Customs Tariff Act 1975** which provides for the leviability of Additional Duty of Customs on imported goods, or that on the raw-materials consumed in the manufacture of imported goods (a component of excise duty leviable on raw-material components and ingredients used in the production or manufacture of the same) [refer Section 3 sub-section (3)] or other duty for example to countervail the impact of the Sales Tax, VAT or other local taxes [Section 3 sub-section (5)] or the components of Integrated Tax [IGST- Section 3 sub-section (7)] or GST Cess [Section 3 sub-section (9)] etc., by way of sub-Section (12) of Section 3 of the Customs Tariff Act clearly makes out provision for granting exemption from the aforesaid duties thus, it read as:

> *"[(12). The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder,* ***including*** *those relating to* ***drawbacks, refunds and exemption from duties*** *shall, so far as may, be apply to the duty or tax or cess, other case may be,* ***chargeable under this section as they apply in relation to the duties leviable under that Act.]"***

28. In so far as the levy of Safeguard Duty under Section 8B (Safeguard Duty) or 8C (Product specific safeguard duty) or Section 9 (Countervailing Duty on subsidised articles) or 9A (Anti-dumping Duty) of the Customs Tariff Act are concerned there is no such mention of the words *"exemption"* in sub-section (9) of Section 8B, sub-section (5A) of Section 8C, sub-section (7A) of Section 9 as well as sub-section (8) of Section 9A of the Customs Tariff Act as the provisions relating to Safeguard Duty, Countervailing Duty or Anti-dumping Duty can in themselves be considered to be in the nature of complete code, providing for their regulatory mechanism within the framework of the Customs Tariff Act itself like assessment, appeals, offences etc.

29. An important aspect for consideration from leviability of duty standpoint is with regard to the refund of such duty wherever as may be applicable. Thus, it could be argued that Section 26 or Section 26A or Section 27 of the Customs Act deal with merely the duty imposed under the Customs Act Section 12. With regard to refund of other duties as leviable under the Customs Tariff Act say Section 3 (Additional Duty of Customs), Section 8B (Safeguard Duty) or Section 9A (Anti-dumping Duty) on such articles, the refund is enabled by virtue of the provisions contained in (erstwhile sub-section 8 or) the current sub-section (12) of Section 3, sub-section (9) of Section 8B or sub-section (8) of Section 9A respectively of the Tariff Act. Besides, Section 9AA of the Tariff Act provides for a specific consideration of the refund of anti-dumping in certain cases.

29.1. The purport of the premise stated in para above is to bring out the existential difference in law with regard to different kinds of duties leviable and the difference in the manner of their being dealt with under the Customs Laws in so far as refund thereof is concerned. Similar, inference emanates while considering other aspects in law as regards application of duty or tax or cess vis-à-vis penalty, fine or interest or other regulatory provisions of the statute.

30. In the backdrop of the aforesaid discussion it is now imperative to consider the provisions relating to leviability of interest under Section 28AA. For ready appreciation and a detailed analysis thereof, the provisions dealing with payment of interest under the Customs Act 1962 are reiterated and enumerated below (earlier referred to in para 15(iii)). Their reiteration herein is to help undertake a word by word, clause by clause or a phrase by phrase analysis of the same.

> ***"28AA. Interest on delayed payment of duty.***-
>
> *(1) Notwithstanding anything contained in any judgment, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of Section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-Section (2), whether such payment is made voluntarily or after determination of the duty under that section.*
>
> *(2) Interest, at such rate not below ten per cent. and not exceeding thirty-six per cent. per annum, as the Central Government may, be notification in the Official Gazette, fix, shall be paid by the person liable to pay duty in terms of Section 28 and such interest shall be calculated from the first day of the month succeeding the month in which the duty*

ought to have been paid or from the date of such erroneous refund, as the case may be, up to the date of payment of such duty.

(3) Notwithstanding anything contained in sub-Section (1), no interest shall be payable where,-

(a) the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under Section 151A; and

(b) such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment."

31. It is imperative to note that Section 28AA of the Customs Act is one of those uncommon provisions of law, that starts with a non-obstante clause, thereby giving primacy, prevalence and supreme importance to the provisions contained in the said section, so as to hold them as a determinant and a predominant provision in law. Exhuming the legislative intent therefrom would safely lead to the conclusion of the imperative nature of the levy of interest, in the given circumstances. Thus, sub-Section (1) of Section 28AA (whereunder the demand for interest in the present matter has been made out) makes the imposition of interest as automatic or as an appendage to a case where a duty liability has been fastened under the provisions of Section 28. Moreover, the fact of usage of the words "shall" and "in addition to such duty," in Section 28AA (1) emphatically indicates the applicability of interest, to a scenario where duty becomes payable thereto. The regulatory framework and the rate of interest etc. are dealt with in sub-

Section (2) of Section 28AA while sub-Section (3) of Section 28AA provides for a situation where no interest was payable. Thus, to appreciate the automatic or the mechanical application of interest, it would be foremost to state that the law itself fastens it on the incumbent by stating "is liable to pay duty in accordance with the provisions of Section 28" [refer Section 28AA (1)]. Also, it is important to note that the words "liable to pay duty" cannot be read in isolation of the remaining part of the phrase. It has to be read in conjunction with the rest of the sentence which reads *"……………. in accordance with the provisions of Section 28."* Thus it is quite clear as to what has been further borrowed for the realization of interest payable and applicability as an automatic route, are the structural elements of Section 28. Therefore, the very sub-section itself heralds both leviability and realization of the interest fastened onto the short paid duty. Moreover, there can be no disagreement over the fact that a non-obstante clause is added to a provision in order to uphold its enforceability over anything that may be held contrary thereto and assists the digging out and clarifying the legislative intent. Viewed in the context we do not find support to uphold the arguments of the appellant. As commonly understood, appending a non-obstante clause to a provision, gives it an over-riding impact and is co-extensive with the operative part, without in the least, cutting down upon the clear terms of the enactment. In the given context the language used in the statute (Section 3(8) of the Tariff Act) signifies it to be intended by the legislature by way of abundant caution and it would be for the Court/Tribunal to examine every word of the statute in its context and interpret it in its widest sense.

32. During the course of the arguments, a plea was taken on behalf of the appellants that the Customs duties to be levied upon the import of goods are as indicated in the Schedule I to the Tariff Act. In fact a careful conjoint reading of Section 12 of the Act and Section 2 of the Tariff Act would indicate that the rate at which "duties of customs", are to be levied could be at such rates as are specified in the Tariff Act be it the two schedules thereof or the various provisions of the act in themselves per se like Section 3 (Additional Duty of Customs) or Section 9A (Anti-Dumping Duty). It is not mandatory that it has to singularly be the schedules of the Tariff Act, that alone could prescribe the leviable rate of duty. The provisions of the Act (Section 12) are of such a wide amplitude that they provide for any other law also to so state and specify the leviable rate of Customs Duty imposed. Further, a narrow reading of the Tariff Act restricting rates of leviable duty as prescribed in the two schedules of the Tariff Act is completely uncalled for and does not flow from the plain words of law. It would be appropriate to state that disregarding Section 12 of the Act, Section 2 of the Tariff Act would fail to derive a complete wholesome meaning.

33. Section 3 of the Tariff Act to that extent is completely independent both of Section 2 of the Tariff Act as well as Section 12 of the Act. The only bearing that Section 3 of the Tariff Act however has with Section 12 of the Act is to the extent that Section 3- a provision of the Tariff Act, relates to Section 12 of the Act as the latter states that duties of customs may be as specified under the Customs Tariff Act. Moreover, the Customs Act does not qualify or restricts its scope to a specific inclusion of the Tariff Act i.e. either the main enactment or the two schedules of the Tariff Act. Furthermore Section 12 of the Act provides for prescribing the rate of customs duty leviable under the Tariff Act. No such proposition flows in respect of duties as are leviable under the Tariff Act like Section 3 or Section 9A ibid. Restricting the scope of prescribing the duty rates to the Schedules of the Tariff Act is nowhere provided for in law. It is important to read the provisions of the two laws in conjunction and not one to the exclusion of the other. As a matter of fact Section 2 of the Tariff Act cannot be read to the exclusion of the provisions of Section 12 of the Act. Section 12 of the Act cannot derive an effective meaning without a conjoint reading of the two enactments. So much for the relationship matrix amongst the said provisions of the two statutes in the context of the arguments made by the learned C.A. for the appellant, stating the obvious but aligning the scope of Section 12 of the Act to/vis-à-vis Section 2 of the Tariff Act to the two Schedules of the Tariff Act.

Table

34. Usage of Tax Specific Terminologies in various Sections of the Tariff Act

Sr. No.	Description	**Section 3(8)/[– 3(12)]**	**Section 8B(9)**	**Section 8C(5A)**	**Section 9(7A)**	**Section 9A(8)**
		(Additional Duty of Customs)	Safeguard Duty	(Product Specific Safeguard-imports from PRC)	Countervailing Duty	Anti Dumping Duty
1.	Drawbacks	✓	×	×	×	×
2.	Refunds	✓	✓	✓	✓	✓
3.	Exemption from Duties	✓	×	×	×	×
4.	Date of Determination Rate of Duty	×	✓	✓	✓	✓
5.	Assessment	×	✓	✓	✓	✓
6.	Non-levy of duty	×	✓	✓	✓	✓
7.	Short-levy of duty	×	✓	✓	✓	✓
8.	Interest	×	✓	✓	✓	✓
9.	Appeals	×	✓	✓	✓	✓
10	Offences and penalties	×	✓	✓	✓	✓

-A question that also begs answer is the fact of incorporation of exclusive and separate provisions in the Tariff Act, pertaining to refund of anti-dumping duty **(Section 9AA)**, simultaneous non-levy of both countervailing duty and anti-dumping duty **(Section 9B)** (this could have otherwise been done by way of incorporation of separate sub-sections to the effect) and appeals **(Section 9C)** (in the context of anti-dumping duty specifying the authority and related aspects). Despite the usage of the three realms of tax action viz. refunds, simultaneous non-levy and appeals, at least generically in the main sub-sections as referred to in the table supra and their being adopted in the Tariff Act, as it were in the Customs Act, goes in to establish the *ex abundanti cautela* incorporation of the said specific facets of the tax aspects into the different provisions and may not be understandable as in a limiting sense of the term. Further, the fact of non-specific, mention or inclusion of the term "assessment" in Section 3 of the Tariff Act would not mean to conclude the failure to undertake the assessment process of the additional duty leviable on such goods or raw materials, components and ingredients. Moreover, the quantum of drawback payable or the refund due can only be ascertained once the assessment process is undertaken. Also the fact of non-mention of the term "appeal", cannot be taken to imply that any dispute, if arises, with reference to such levies imposable by way of various sub-sections of Section 3, are out of the purview of the process of grievance redressal and quasi judicial proceedings. Thus the plea taken by the appellant in support of their argument for non-levy of interest on the short paid additional duty of customs is far from convincing and cannot be accepted.

The word -“*INCLUDING*”- a perspective

35. As per Justice R.P Sethi’s, treatise ***“The Supreme Court on Words and Phrases”***- Third edition the term “include” is described as:

> *The word “include” in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, “include” is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases be construed as comprehending, not only such things as they signify according to their natural import but also include. (Regional Director, Employees State Insurance Vs. High Land Coffee Works of P.F.X. Saldanha and Sons and another (1991) 3 SCC 617).*

36. The **Black’s Law Dictionary**- Seventh edition, for the term include has the following to take note of:

> “***include,*** *vb. To contain as a part of something. The participle* ***including*** *typically indicates a partial list < the plaintiff asserted five tort claims, including slander and libel>.”*

37. As per the apex court in **Ramala Sahkari Chini Mills Ltd., U.P. Vs. Commr. Central Excise, Meerut-I, Meerut, (SC),**[15] the word include in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension and not restriction.

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15. 2016 (7) SCC 585

38. It be noted that then Section 3(8) of the Customs Tariff Act does not use the words "*means and includes".* In fact the usage of this term would signify a restricted sense and hard and fast interpretation limited to the three aspects of drawbacks, refunds and exemption from duties and with no scope of assigning any other meaning to the said expression, as would flow from the limited usage of the words. Therefore, the word includes (including) (present participle), when used would enlarge the meaning of the expression defined, so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include.

39. The Hon'ble Apex Court in the case of **South Gujarat Roofing Tiles Manufacturers Association and Another Vs. State of Gujarat and Another**[16] quoted the landmark observation of Lord Watson in Dilworth Vs. Commissioner of Stamps viz.:

> *"………….When the word "include" is used, in interpretation clauses to enlarge the meaning of words or phrases in the statute, "these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include." Thus where "includes" has an extending force, it adds to words or phrases a meaning, which may not naturally belong to it……………."*

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16. 1976 (4) SCC 601

40. Reference in this regard can also be had to the decision of the Hon'ble Apex Court in the case of **P. Kasilingam and others Vs. P.S.G. College of Technology and others,**[17] where the Hon'ble Apex Court had reiterated this understanding of the term "includes". It was held therein "*The word "includes" when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include.*" Similar, ratio about the interpretation of terms "includes" also flows from the ruling of the Hon'ble Apex Court in the case of **C.I.T., Andhra Pradesh Vs. M/s. Taj Mahal Hotel, Secunderabad.**[18] The Hon'ble Court in the said case had to state, the following:

> *"The word "includes" is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute. When it is so used, those words and phrases must be construed a comprehending not only such things as they signify according to their nature and import but also those things, which the interpretation clause declares that they shall include."*

41. The Hon'ble Apex Court reiterated the proposition in understanding of the term "includes" in the case of **Narmada Bachao Andolan Vs. Union of India,**[19] as well as in the case of **Godfrey Phillips India Ltd. & Anr. Vs. State of U.P. & Ors.**[20]

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17. AIR. 1995 SC 1396
18. AIR 1972 SC 168
19. AIR 2005 SC 2994
20. AIR 2005 SC 1103

42. Justice G.P Singh in his treatise *"Principles of Statutory Interpretation"* (10th Edition 2006), noted that where the word defined, is declared to include such and such, the definition is prima facie extensive. It is therefore evident that the word includes when used in interpretation clauses generally enlarges the meaning of the word or phrase occurring in the body of the statute. For providing a restricted meaning the term ordinarily put into the statute would be *"means and includes".* Further, the expression "*including*" has been interpreted by courts to extend and widen this scope (Ref- **Delhi Judicial Service Association Tis Hazari Court, Delhi Vs. State of Gujarat & Ors.** AIR 1991 SCC (4) 406., **State of U.P. Vs. Raja Anand Brahma Shah**, AIR 1967 SC 661).

43. The Hon'ble Court in the case of **Customs and Excise Commissioners Vs. Savoy Hotel**[21] while construing the term *"Including Fruit Juice"* (Purchase Tax Act 1963 (c.9), Sch.1, Pt1, Group 35 (a)) observed that these words were required to be construed in the context of the word preceding them- *"manufactured beverages" (*and so would not include non-manufactured fruit juice). Adopting this interpretational approach, it evidently flows that the usage of the term including in Section 3(8) of the Tariff Act clearly indicates the adoption of not only the three specific provisions of drawbacks, refunds and exemption from duties, but all such statutory provisions as could be required to deal with the aspect of the levy of the Customs Duty under Section 3 of the Tariff Act.

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21. (1966) 1 W.L.R. 948

44. In the case of **R. Vs. Kershaw, 26 L.J.M.C. 19; R. vs. Hermann.**[22] The phrase "shall include" was considered by the Hon'ble Court as a phrase of extension and not of restrictive import. It may be noted that Section 3(8) of the Tariff Act makes use of both the words "shall" and "including". There is therefore no reason to not adopt a similar stance of giving extensive interpretation as held in the aforesaid case:

45. Further, in the case of **Reynolds Vs. Income Tax Commissioner for Trinidad and Tobago**[23] it was held that the term "*including*" has been used to enlarge the meaning of the preceding words. Under the circumstances the term "*including*" used in Section 3(8) of the Tariff Act is to be interpreted in an extensive manner, whereby all provisions of the Customs Act and Rules and Regulations thereunder, be considered as rendered applicable to the provisions of Section 3 of the Tariff Act.

46. In the case of **Commissioners Tax Udaipur Vs. Rajasthan Taxchem Ltd.**[24]**-** (a sales tax case), an issue arose in respect of Rajasthan Sales Tax Act, 1994, where Section 2(34) defines raw material as "goods used as an ingredient in the manufacture of other goods and *includes* preservatives, fuel and lubricant required for the purpose of manufacture." In this case, diesel was used as fuel for making electricity, which was used for making the end product, polyester yarn and fabric. The revenue contended that diesel was not a raw material

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22. 4 Q.B.D. 284
23. [1966] 1 W.L.R. 19.
24. 2007 (209) ELT 165 SC

at all for polyester yarn. The Supreme Court, despite the fact that diesel was used for the generators needed for production of the ultimate product, however held that the manufacturer purchased diesel as raw material and utilized the same.

46.1. The Supreme Court held that *"the word 'includes' gives a wider meaning to the words or phrases in the statute. It further held that "the word 'includes' is usually used in the interpretation clause in order to enlarge the meaning of the words in the Statute. When the word 'include' is used in the words or phrases, it must be construed as comprehending not only such things as they signify according to their nature and impact but also those things which the interpretation clause declares they shall include"* (para 23). The Supreme Court went at length to establish that the fuel is used in the manufacture of polyester yarn, though indirectly.

47. Likewise the inclusive definition of manufacture under the Central Excise Act in **Section 2(f)** of the **Central Excise Act,** 1944, does not precisely state what actually manufacture is and has left it to the Court's to decide. The definition however includes any process which is incidental or ancillary to the completion of the manufactured product and also includes any specific definition given in the chapter notes in the context of what could be considered deemingly necessary and justifiable. The fact that the other provisions of the Customs Act are not at a significant variance to Customs working, from that of drawbacks, refunds and exemptions from duties- which are equally material to the Customs enactment, we see no reason, not to consider the other aspects of Customs work like assessment, demand of duty, settlement, appeals, interest etc. to be also included therein with regard to levy of special additional duty under Section 3(3) of the Tariff Act.

Some Interpretations of the term- "*Including*"

48. A closer look at the provisions of law in Section 3(8) of the Tariff Act would reveal that the subject matter is the applicability of the provisions of the Customs laws, as the said section reads *"The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder including those relating to drawbacks, refunds and exemption from duties………..."* If the said phrase is broken down to its constituent subject and predicate, it could be stated as under:

Subject	**Predicate**
The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder	including those relating to drawbacks, refunds and exemption from duties.

49. With the aforesaid backdrop, we invite reference to the law as propounded in the case of **Joseph Vs. Philips (1934-AC-348)** by Lord Warrington of Clyffe upon an appeal from a judgement of the Court of Appeal of Ontario, concerned with the construction of the will of the testator, while allowing the appeal filed. To understand the issue at hand, the following facts of the case and the decision rendered may be referred to:-

> *" This is an appeal from a judgment of the Court of Appeal of Ontario, dated 3rd October 1932, allowing an appeal from the judgment of Orde, J. A., dated 18th September 1931. The appeal raises a short question on the construction of the will of the testator, Abe Lyons. "The will was dated 16th June 1928.*

The testator died on 26th July 1930, after an illness which began early in June. On 8th June 1930, he was moved to hospital, where he remained until his death. During that time he was mentally incapable of looking after his affairs. He was a member of the firm of Lyons and Marks, and spent most of his time travelling for the firm, only returning to town for week-ends. He lived alone in one room in Euclid Avenue, Toronto. The appellant, Kenneth Joseph was in the confidence of the testator, looking after his private financial affairs. He and the testator each had a key of a safety deposit box in their joint names at the Dominion Bank, in which securities of the testator were kept. The appellant opened this once a month for the purpose of detaching coupons and other purposes connected with the securities. He also, at the testator's request, procured a duplicate key of the drawer hereinafter mentioned in the desk in his room. Under these circumstances, the testator made his will. It was prepared by his solicitor on his instructions. The will is in paragraphs. Para. 1 contains the usual direction for payment of debts and so forth. Para. 2 contains a bequest of a specific legacy of a gold watch. Paras. 3 and 4 are in the following terms:-

> *"3. I bequeath my jewels, including my diamond bar pin and extra stone in safety deposit vault at Toronto General Trust Corporation to my niece, Leah Singer, wife of Israel Singer.*
>
> *4. I bequeath my personal effects in my room, including pictures, roll-top desk and chiffonier complete with their*

> *contents to my niece, Esther Phillips, wife of Nathan Phillips."*

Paragraph 5 contains special directions for the disposal of his interest in his firm's business and paras. 6 to 16 contain a number of pecuniary legacies and a residuary gift in favour of the appellants, who are also appointed executor and executrix. Among the pecuniary legacies were one of $5,000 to the respondent and to each of her children living at his death $500. The question arises with regard to the bequest of the personal effects contained in para 4 and in particular, as to the contents of the roll top desk. In the desk below the roll top there was a drawer. This is the drawer of which, as hereinbefore mentioned, the appellant Kenneth Joseph had a duplicate key. When the testator was taken ill in June 1930, there were in this drawer three pass books referring to his deposit accounts, two in the Bank of Montreal and one in the Dominion Bank for a total sum of $30,575'62, and nine promissory notes, all payable to order and not endorsed and all of apparently little or no value. Shortly after the removal of the testator to hospital appellant 1 in (as their Lordships believe) perfect good faith and as he thought, in the testator's interest arid on his behalf, removed the pass books and the promissory notes from the drawer and deposited them in the safety deposit box above referred to. Their Lordships attribute no blame to the appellant for his action, but for the purposes of their decision assume that it did not affect any right of the legatee, and proceed to deal with the case as if the books and notes had formed part of the contents of the *desk at the death of the testator. The desk also contained other things as to which no question has been raised.*

The question is whether the bequest on its true construction is only of things which can properly be treated as personal effects, that is to say, physical chattels, having some personal connexion with the testator such as articles of personal or domestic use or ornaments clothing furniture and so forth which would not include money or securities for money or whether in the actual contents it extends to the choses in action represented by the pass books and the promissory notes.

Their Lordships are of opinion that the former is the true construction. The bequest is one of personal effects and it cannot properly be said that by the mere direction to include the desk with its contents he intended so to enlarge the scope of the bequest as to include property not within the term "personal effects," and the inclusion of which would convert the bequest into a pecuniary legacy of over $30,000. Probably the testator regarded the pictures, the chiffonier and the desk as of a special description making it desirable ex abundanti cautela to mention them as being in his view, covered by the terms of the bequest, and considerable support is afforded to this view by the bequest in para 3. That is a bequest of jewels, including two particular jewels in a safety deposit vault and not in his own room. The use of the word "including in this paragraph clearly did not extend the bequest to anything not a jewel. The frame of the will, the separation of the specific gifts of chattels from the pecuniary legacies, points in the same direction.

> *If the above view, upon the construction is correct, the pass books and promissory notes not being within the description of personal chattels it becomes unnecessary to consider whether they were of such a nature that the bequest of them would have conferred on the legatee the right to the choses in action represented by them respectively."*

50. Viewed in the context of the aforesaid law laid down, it is amply clear that the subject- "*the provisions of the Customs Act and the rules and regulations thereunder"* is equally applicable to duty leviable under Section 3 of the Tariff Act, and the refence to drawbacks, refunds and exemption from duties therein is only by way of a special description making them ex abundanti cautela in the view of the legislators.

51. Further, a perusal of the Preamble or the Scope of Customs Tariff Act indicates the Tariff Act, to be *"An act to consolidate and amend the laws relating to Customs Duties,"* and in view of our discussions foregoing, interest applicability is an adjunct of deferred short paid/unpaid duty amount and merely worded differently because of its compensatory character. We are of the view that even the preamble of the law enshrines the incorporation of the interest element, wherever the context calls for, and refers to the terms duty. It is obvious that under no situation can interest be dissociated and held to be non-adjunct to duty. We thus are of the view that the reference to the words "drawbacks, refunds and exemption from duties" are merely illustrative and cannot be deemed to restrict and foreclose the applicability of rest of the provisions of the Customs laws to the ingredients of the Tariff Act.

52. The **Black's Law Dictionary,** 7^{th} edition at page 766 clarifies "The participle *including* typically indicates a partial list", Further from the case of **Nutter Vs. Accrington Local Board** *[(1879) 4QBD375, PP 384, 385 (CA)]* it is clear that when a word is defined to "apply to and include," it is understood as extensive. There are a plethora of judicial pronouncements to this settled proposition in law.

Likewise, the inclusive definition of a "District Judge " in Article 236(a) of the constitution has been very widely construed to include hierarchy of specialised civil Courts viz. Labour Courts and Industrial Courts that are not included in the definition, **State of Maharashtra Vs. Labour Law Practitioners Association.**[25]

53. The words *"including the power to punish for contempt of itself"* in Article 129 of the Constitution which declares the Hon'ble Supreme Court to be a Court of record, were held not to limit the inherent powers of the Apex Court as a Court of record to punish for contempt of itself and as also of the subordinate courts **(Delhi Judicial Service Association Vs. State of Gujarat.**[26]

54. The fact of term/word "include" being attributed an expansive meaning is clear from the following decision of the Hon'ble Apex Court in the case of **CIT, Andhra Pradesh Vs. Taj Mahal Hotel, Secunderabad.**[18]

> "In holding that sanitary and pipe line fittings in a building which is run as a hotel fall within the word "plant" in Section

25. AIR- 1998 SC 1233
26. AIR 1991 SC-2176

10(2)(vi-b) of the Income-tax Act, 1922, for grant of depreciation allowance, Grover J referred to the definition of "plant" in Section 10(5) of the Act and observed:

> The very fact that even books have been included shows that the meaning intended to be given to "plant' is wide. The word 'includes' is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute. When it is so used these words and phrases must be construed as comprehending not only such things as they signify according to their nature and import but also those things which the interpretation clause declares that they shall include".
>
> (Ref: Principles of Statutory Interpretation by GP Sigh- 15th ed: Page No. 143)

55. The Hon'ble Apex Court in the case of **State of Bombay & others Vs. The Hospital Mazdoor Sabha,**[27] while considering the scope of the definition of the term "industry" in Section 2(7) of the Industrial Disputes Act, 1947, dwelt into the object and scope of the act ibid, besides the various provisions thereof, and was of the view that the legislature deliberately used the terms of a wider import in its first clause and referring to several other industries in the second in an "*inclusive"* way, obviously denoting extension. It further held that in

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27. 1960 SCR (2) 866

construing a definition it was inappropriate to apply the maxim noscitur a sociis, so as to restrict the meaning and flow thereof. It further said the maxim was helpful in construing terms of wider import with that of a narrower import. The obiter as flows from the said decision is certainly a guide to the issue at hand in the present matter.

56. In the case of **Regional Director, Employees State Insurance Corporation Vs. High Land Coffee Works of PFX Saldanha and Sons and Another,**[28] while upholding the observations of the High Court, the hon'ble apex court had held the amendment brought to the definition of a seasonal factory in Section 2(12) of the ESI Act to include a factory which is engaged for a period not exceeding seven months in year, as enlarging and not restricting the statutory concept of a seasonal factory. Thereby it demonstrated the expanded and enlarged meaning and usage of the term "*includes*" with all the grammatical variations of the word.

57. Even in the context of the definition of word input in Rule 2(k) of the Cenvat Credit Rules, 2004, the Supreme Court in the case of **Ramala Sahkari Chini Mills Ltd., U.P. Vs. Commissioner of Central Excise, Meerut-I, Meerut,**[15] had held the usage of the word "include" was in its widest amplitude and as to enlarge the meaning of the word input by way of an extension, dismissing the plea for a narrow restrictive interpretation to the term.

Case Law Analysis on "*interest*" applicability in connection with duty as determined payable, under the Customs Act.

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28. 1991-SCR (3) 307

58. There are umpteen cases wherein the various Courts have repeatedly upheld the enforceability and the applicability of the interest element, be it with reference to a refund claim or a demand matter as may arise with reference to the additional duty of customs leviable under Section 3 of the Tariff Act. We would for records like to refer to some of such cases hereinbelow, as would also be suggestive of the counter narrative to, as championed by the appellant. Thus-

The Hon'ble Madras High Court in the case of **KSJ Metal Impex (P) Ltd. Vs. Under Secretary (Cus), M.F. (D.R.),**[29] directed payment of interest on the delayed refund. While the Hon'ble Court was also concerned in the matter, with the implication of CBEC circular No. 6/2008 dated 28.04.2008, that being not germane to the issue herein is not being dwelt upon. The Hon'ble Court inter alia was of the view that-

> "*The claim for refund is contingent on complying with the requirement as specified in the notification. The exemption from payment of special additional duty as payable under Section 3(5) of the **Customs** Tariff Act, 1975 is exempted under Section 25(1) of the **Customs** Act, 1962. Therefore, the refund of duty paid will have to be read in terms of Section 3(8) of the **Customs** Tariff Act, 1975 and not otherwise. Therefore, the provision that is applicable for refund is Section 27 of the **Customs** Act, 1962. If the refund is not made as specified, then the consequences will follow with regard to interest.*"

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29. 2013 (294) ELT 211 Mad.

58.1. The Hon'ble High Court not only quashed the relevant provision of the circular supra that sought to restrict and obliterate the claim of interest on belated refunds, granted in terms of notification 102/2007-Cus dated 14.09.2007. For sake of better appreciation the relevant clause 4.3 of the said circular, is reproduced hereunder:

<u>Circular No.6/2008-Cus dated 28.04.2008</u>

"*4. Time Limit*

4.1. In the Notification No. 102/2007-Cus dated 14.09.2007, no specific time limit has been prescribed……………..Taking into account various factors, it has been decided to permit importers to file claims under the above exemption upto a period of one year from the date of payment of duty. Necessary change in the notification is being made so as to incorporate a specific provision prescribing maximum time-limit……………………

4.2. ××××××

4.3. With the extension of time-limit and the requirement to file claims on a monthly basis, Board feels that the number of refund claims should be manageable for disposal within the normal period of three months. Further, ***in the absence of specific provision for payment of interest being made applicable under the said notification, the payment of interest does not arise for these claims.*** *However, Board directs that the field formations shall ensure disposal of all such refund claims under the said notification within the normal period not exceeding three months from the date of receipt."*

(Emphasis Supplied)

58.2. The Hon'ble Court therefore while quashing as aforesaid, further directed

> *"……………..and the pending refund application of the petitioner shall be considered by the respondents in the light of Section 27 and 27A of the Customs Act."*

It even stated that to hold that <u>no interest on delayed payment of interest is contemplated</u> under the notification as a ***"Misconception of the provisions of the Customs Act, 1962."***

and without the usage of the term and incorporation of the word *"interest"* in Section 3(8) (then) or 3(12) (now) granted the interest as leviable under Section 27A of the Customs Act.

59. Let us consider some other cases where interest was held payable by the Courts either on refund of duty of paid, or recovery of short paid duty, arising out of levy under Section 3 of the Tariff Act, i.e. CVD or Additional Duty of Customs or other provisions of the act ibid. While we have already elaborated upon the case of *KSJ Metal Impex Vs. Under Secretary (Cus.) MF (DR)*[29] where the Hon'ble High Court pointed out consequences of any default in refund would follow, in the case of **MM Enterprises Vs. Commissioner of Customs, Chennai IV,**[30] pertaining to a similar case of special additional duty leviable under Section 3 of the Tariff Act, the Hon'ble Court held that the respondent (Commissioner) was "***<u>duty bound</u>***" to pay interest in terms of Section 27A of the Act for the delayed refund payable under Section 27 of the Act.

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30. 2021 (376) E.L.T. – 503 Mad.

60. In the case of **SR Polyvinyl Ltd. Vs. Commissioner of Customs (ICD), TKD, New Delhi,**[31] the Hon'ble Delhi High Court dismissed the department's plea of denial of interest to a case of anti-dumping duty where the relevant notification imposing the said duty got to be quashed. The said refund of interest in the matter was permitted for the delay in sanction of refund by way of automatic application of interest provisions through Section 27A of the Customs Act, pari materia Section 11AB of the Central Excise Act as was considered in the case of *Ranbaxy Laboratories Vs. UOI* – 2011(10) SCC 292 and relied upon by the petitioners in the present matter.

61. In the case of **Micromax Informatics Ltd. Vs. UOI**[32] the Hon'ble Delhi High Court after elaborate analysis of the various provisions of law pertaining to levy of duty refund and interest and examining relevant notifications and circulars, was definitive about the fact that interest was leviable for delayed refund of SAD, in terms of Section 27A of the Act. This the Hon'ble Court held despite the arguments to the contrary and the stand of the revenue regarding non-applicability of interest. The following paras of the impugned judgment, extracted below, would be relevant for the purpose of present discussions:

> *"11 ……… SAD leviable under sub-section (5) of Section 3 of the Customs Act, when imported into India for subsequent sale, subject to the conditions in paragraph 2 of notification being*

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31. 2020 (371) ELT 283 Del.
32. 2018 (361) E.L.T. 968 Del.

fulfilled. Paragraph 3 of the said notification states that jurisdictional customs officer shall sanction refund on being satisfied that conditions referred to in paragraph 2 are fulfilled. It is not disputed that conditions mentioned in paragraph 2 of the notification in respect of 38 Bills of Entry are fulfilled. The orders passed by the jurisdictional customs officer, appellate authority and the Tribunal have attained finality. As a sequitur, it follows that SAD refundable was a duty paid by the petitioner under the Customs Act in respect of which exemption vide Notification No. 107/2007-Cus., dated 14th September, 2007 has been granted by the Central Government.

12. Section 27 relates to refund of duty or interest paid or borne by the assessee and the manner in which application is to be made for refund of duty and interest paid. Logically, Section 27 applies when an assessee applies and seeks refund of duty including SAD.

13. Section 27A states that duty directed to be refunded under sub-section 2 to 27, if not paid within three months from date of receipt of application under sub-section 1 to Section 27, interest would be paid by the authorities as per the rate specified. In other words, if the refund is paid within three months of date of receipt of application under sub-section 1 to Section 27, no interest is payable. Interest is payable on delayed refunds after three months post the application for refund till the date of refund. Section 27A therefore ensures prompt decisions and payment of refunds, when due and payable under sub-subsection 2 of Section 27 of the Act.

14. …..xxxxxxxx

15…………This decision also refers to drawback refunds and exemptions shall apply to SAD as far as may be. Thus, SAD levied under the Customs Tariff Act is a duty within the meaning of Section 27, and refunds under sub-section 2 to Section 27 A of the Customs Act when delayed beyond 3 months from date of application, interest would be payable in terms of and as per Section 27A of the ……………...Customs Act."

62. The Hon'ble Karnataka High Court in the case of **Commissioner of Central Excise, Bangalore Vs. Kenna Metal Widia (India) Ltd.,**[33] held that interest was leviable, whatever be the reason and irrespective of the fact of the assessee being at fault or not. In doing so it adopted the ratio of law as flowing in the following cases:

Union Vs. Rajasthan Spinning and Weaving Mills (2009 (238) ELT 3 SC)

Commissioner Vs. Presscom Products (2011 (268) ELT 344 Kar.)

63. It is also not as if this was a one off case. The said stance has been consistently adopted by the courts. Thus in the case of **Commissioner of Central Excise, Pune Vs. M/s. SKF India Ltd.**[34] the Hon'ble Court upheld the liability to pay interest, despite the fact that the liability to pay duty stemmed from the fact of issuance of

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33. 2010 (280) ELT 381 Kar.
34. 2009 (TIOL-82 SC)

supplementary invoices, raised on account of retrospective revision of prices. The apex court, reversing the stand of the High Court, noted the fact that the short payment of duty was "*though indeed completely unintended and without any element of deceit etc."* It observed that impliedly there was a short payment of duty at the time of clearance and therefore the liability to pay interest.

64. Thus, when and as held by various authorities interest provisions are held to apply automatically to cases of delayed refunds (despite non-inclusion of the term "interest" in Section 3(8) of the Tariff Act), it cannot be held otherwise for a case of delayed payment of duty- what is good for the goose has to be good for the gander.

65. It is an established legal principle of interpretation that while considering a statute it is important to gather the *mens sententai legis* of the legislature. Where the words used in a statute are clear and there is no obscurity or ambiguity the intention of the legislature is clearly conveyed and discernible, they need to be given their natural meaning and application. Thus, when Section 3(8) of the Tariff Act reads as the:

> *"Provisions of the Customs Act ………. including those relating to……… shall, so far as may be apply to duty or tax or cess …………, chargeable under this section, as they apply in relation to duties leviable under the Act."*,

there appears no ambiguity in law, and the law is required to be in interpreted in a plain and simple manner. Were the word/phrase "*including"* in Section 3(8) of the Tariff Act was to be omitted in usage of the language of the section, it could have been considered that the intent of legislature was to invite reference to Customs provisions only to the three specified areas of customs working, viz. drawbacks, refunds and exemption from duties. That, however not being the case, it automatically falls in place that all the provisions of the Customs Act and the rules and regulations are essentially dovetailed into, for consideration and applicability in the Customs Tariff Act, 1975 disregard of all ifs or buts. It is only the penal provisions that need a strict construction, while such is not the case with any machinery provision of a legislation. Thus the appellant is duty bound to pay the interest demanded, moreso when the demand for duty is as enshrined and in accordance with law and admittedly not disputed by the appellant.

66. It may be worthwhile to mention that in the case of *Commissioner of Central Excise Vs. SKF India Ltd.*[34] in Civil Appeal No.5190-91/2008, while upholding the adjudicating authority's order for payment of interest for delayed payment of duty (due to upward revision of prices), the hon'ble apex court had gone by the principle of "*consequences of failure*" to discharge the obligation in law, that can also be termed as automatic applicability of interest under Section 11AB of the Central Excise Act, to short paid duty ascertained under Section 11A of the act ibid. The provisions of the excise act being similar to the provisions of the customs act, there, therefore remains no dispute in the matter about the leviability and payment of interest on the short paid duty amount, as applicable.

67. Going, by the principle of liberal construction as applicable to cases of no ambiguity and especially so in taxation matters, not an iota of doubt would remain about the applicability of the provisions of the Customs Act, Rules and Regulations, to that of Section 3 of the Tariff

Act. That being the stated position, interest for delayed payment of duty under Section 28AA of Customs Act is certainly payable in the facts and circumstances of the present appeal. It may be relevant to point out to a well settled rule of construction, that to ascertain the legislative intent, all the constituent part of the legal provisions are *"to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose and object of the Act itself."* (Ref - **Popatlal Shah Vs. State of Madras**[35]**).** It was also held therein that the title and the preamble, for whatever their value might be as aids to construction of a statute, undoubtedly throw light on the intention and design of the legislature and indicate the scope and purpose of the legislation. Viewed in this context, it is abundantly clear from the title and scope of Section 28AA of the Act, that interest is applicable on duty levied under Section 3 of the Tariff Act, as it is held to be a duty of customs within the meaning of Section 2(15) of the Act and further reinforced by the non-obstante opening of the sub-section, that re-emphasised that interest is unquestionably leviable for the delayed payment of duty.

68. Under the circumstances, the case laws relied upon by the appellant are of no bearing to the present matter, for it is well known that precedents sub-silentio and without arguments are of no moment (in the factual matrix of the present appeal). What is binding upon us is the principle and the factual context of the case in which it was decided. Certainly obiter does not constitute a binding precedent for our

35. UOI & Ors.1953 (AIR) 274 SC

purpose. Quotability of law, applies to the ratio decidendi and statements that are not part of the ratio decidendi are distinguishable as obiter dicta and are not authoritative.

In our opinion, therefore Section 3 of the Tariff Act (including its sub-section 8) interpreted on its own language or along with Section 28AA of Act are not ambiguous. The mischief, if any ought to be suppressed with the aid of internal tools like the non-obstante phraseology or the text and the head note of the sections, besides giving the words used in law their ordinary meaning. The apex court in the case of **Doypack Systems (Pvt.) Ltd. Vs. UOI,**[36] observed that words used in the statute must prima facie, be given their ordinary meaning and where the grammatical construct is clear and manifest, without a doubt the said construction ought to prevail, but for strong and obvious reasons to the contrary. In the said case on the aspect of the term "*Includes*", it held that:

> *"It is well settled that the word includes' is an inclusive definition and expands the meaning."*

69. Despite non-incorporation of the word "interest", in sub-section 3(8) of the Tariff Act, adopting the various provisions of the Customs Act, the Hon'ble Delhi High Court in the case of **Principal Commissioner of Customs Vs. Riso India Pvt. Ltd.**[37] besides holding that the word "duty" as defined in Section 2(15) of the Customs Act was wide enough to cover all kinds of customs duties, categorically

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36. 1988 (36) ELT 201 SC
37. 2016 (333) ELT 33 Del.

held the applicability of the interest provisions to a case of delayed refund. It called for a "*collective reading*" of Section 3(8) of the Tariff Act and Section 27 and Section 27A of the Act, thereby concluding as under:

> *"20. In the context of the present case, Sections 27 and 27A of the Act form a statutory scheme for grant of refunds. Section 27A unambiguously states that where there is a delay in making the refund, interest would be payable on the amount of refund, in the manner stipulated under Section 27A of the Act. <u>A collective reading of Section 3(8) of the CTA and Sections 27 and 27A of the Act leads to the conclusion that the provisions in the Act concerning refunds and interest on delayed refunds, would equally apply to refund of SAD leviable under Section 3 of the CTA."</u>*
>
> *(Emphasis Supplied)*

70. That being so, it can safely be concluded that interest provisions for short paid duty in terms of Section 28AA of the Customs Act, shall equally apply to a case of determination of duty under Section 28 of the Customs Act, be it duty levied under Section 12 of Customs Act or Section 3(3) of the Tariff Act or any other provision thereof or any other law for the time being in force.

71. The Hon'ble Bombay High Court in the case of **UOI Vs. Valecha Engineering Limited,**[38] was concerned with the question of refund of

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38. 2010 (249) ELT-167 Bom.

interest paid voluntarily in a case where notice for short paid duty came for consideration before the Settlement Commission. It noted amongst others the following judgements in the matter.

- **India Carbon Ltd. & Ors. State of Assam,**[10]
- **Hyderabad Industries Ltd., Vs. Union of India,**[3]
- **J. K. Synthetics Ltd. Vs. Commercial Taxes Officer,**[9]
- **Pioneer Silk Mills Pvt. Ltd. Vs. Union of India,**[8]
- **Kamat Printers Pvt. Ltd. Vs. UOI**[39]

and thereafter held as under:-

> *"27………………………..Therefore, once it is held that duty is due, interest on the unpaid amount of duty becomes payable by operation of law under Section 28AB, Secondly…………"*
>
> (Emphasis Supplied)

71.1. The Court went on to analyse the meaning of the *expression* ***"provisions of the Customs Act,*** " while it had noted and discussed at length several of the judgements referred to by the appellant, in arriving at its decision, it would be pertinent to go through the following paras of the Hon'ble Courts order:-

> *"28. We may now proceed to consider the third proposition, whether provisions for interest under the Customs Act are not incorporated either under Section 3 or under Section 3A of the Customs Tariff Act. We may first refer to the relevant provisions of Section 3(1) and 3(6) which read as under:-*

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39. 2010 (251) ELT 177 Bom.

"**3. Levy of additional duty equal to excise duty. –** (1) Any article which is imported into India shall, in addition, be liable to a duty (hereinafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article.

Explanation. - In this section, the expression "the excise duty for the time being leviable on a like article if produced or manufactured in India" means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India, or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles to which the imported article belongs, and where such duty is leviable at different rates, highest duty.

3(6) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act."

The relevant provisions of Section 3A(4) reads as under :-

"3A(4) The provisions of the Customs Act, 1962 (52 of 1962), and the Rules and Regulations made thereunder, including those relating to refunds and exemptions from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act."

29. The question, therefore, would be what is the meaning of the expression 'provisions of the Customs Act, 1962 and the Rules and Regulations made thereunder should as far as may be apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act'. Section 3 of the Customs Tariff Act, 1975 came to be substituted with effect from 1st March, 2005. The relevant provision is Section 3A(4) reads as under :-

> "The provisions of the Customs Act, 1962 and the Rules and regulations made thereunder, including those relating to refunds and exemptions from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act."

Our attention was also invited to the provisions of Section 9(7A) inserted with effect from 18th April, 2006 which reads as under:-

> "Unless otherwise provided, the provisions of the Customs Act, 1962 (52 of 1962) and the rules and

> regulations made thereunder, relating to the date for determination of rate of duty, non-levy, short-levy, refunds, *interest*, appeals, offences and penalties shall as far as may be apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act."

30. It is sought to be contended that it is only after 18th April, 2006 that the Customs Tariff Act, 1975 provides for interest. It is in this context that this Court would have to consider the true import of the meaning of the expression that that provisions of the Customs Act, Rules and Regulations made thereunder as far as may be, apply to the duty charged under this Act. It is no doubt true that the provisions of Customs Tariff Act themselves do not provide for interest. However, we may gainfully refer to the expression "duty" under Section 2(15) of the Customs Act, which reads as under :-

"*"duty"* means a duty of customs leviable under this Act."

A reading thereof would indicate that the provisions of the Customs Act pertaining to duty would also apply duty payable under the Customs Tariff Act.

The law as now settled is that the charging Section for Customs Duty is Section 12 whereas the charging Section in so far as the Customs Tariff Act is Section 3. However, relevant for our discussion would be the Sections 3, 3A and *their relevant sub-sections. Would a construction of these provisions, result in holding that interest be treated as having been incorporated under the provisions of the Customs Tariff Act, 1975. The provision for interest as now settled is a part of the machinery provisions. It by itself is not penal in character, but is compensatory in nature. In other words it recompensates the State on failure to pay duty at the rate of interest as determined by the Board. Two constructions flow. One the rule of strict construction it being a taxing statute and the other not a strict construction if it be part of the machinery provisions.*

We may now refer to Section 28AA. Under Section 28AA interest becomes automatically payable on failure by the assesee to pay duty as assessed within the time as set out therein. Similarly, under Section 28AB on duty being ascertained as under Section 28 interest is payable by operation of law. In a case, therefore, where duty has been ascertained as due under the Customs Tariff Act, 1975 by the machinery under the provisions of the Customs Act if the provisions of Sections 3 and 3A are read in their proper context, then Section 28 would first be attracted. No interest will be payable under Section 28AB if the predicates of Section 28 are not satisfied. Therefore, in a case of non-payment of duty of the payment or erroneous refund even under the provisions of the Customs Tariff Act, 1975, Section 28 would be attracted and once duty is ascertained under Section 28 interest becomes payable under Section

28AB as the machinery provisions of the Customs Act are incorporated into the Customs Tariff Act and the provision for interest is part of the machinery provisions though at the same time Section 28AB is a substantive provision for payment for interest under the Customs Act. The rule of strict construction must be rejected. Interest is compensatory for failure to pay duty on the date due and payable. Therefore, once duty is determined considering the expression, the provisions of the Customs Act shall as far as may apply Section 28AB would be applicable. The amendment of the 18th April, 2006 only clarifies the position."

(Emphasis Supplied)

71.2. Further, the Hon'ble Court clearly made out a distinction between penalty and interest as far as their applicability was concerned and therefore goes on to state:

*" 31. In the case of **Orient Fabrics Pvt. Ltd.** (supra) the Court was specifically dealing with the issue of penal provisions like penalty and confiscation. **It did not deal with the issue of interest**. Interest in that context has not been held to be penal in character."*

(Emphasis Supplied)

Thus this decision of the Hon'ble High Court, evidently lays to rest the question of law and the dispute concerned in the present matter.

72. It may not be out of place to state that the Hon'ble Apex Court in the case of **Pioneer Silk Mills Ltd.** (supra), had the following to say for the liability to pay interest:

> "*18. Once, therefore, duty is ascertained then by operation of law, such person in addition shall be liable to pay interest at such rate as fixed by the Board. The concerned Officer, therefore, in the ordinary course would be bound once the duty is held to be liable on account of collusion, wilful misstatement*
>
> *or suppression of facts to call on the party to pay interest as fixed by the Board at the relevant time."*
>
> *(Emphasis Supplied)*

73. Furthermore, even the hon'ble Andhra Pradesh High Court in the case of **Commissioner of Customs, Vishakhapatnam Vs. Gayatri Timber Pvt. Ltd.**[40] not only upheld the orders of the lower authority directing payment of interest in respect of a refund claim of Special Additional Duty leviable under Section 3 of the Tariff Act, but also went into greater depths and analysis of the various provisions and the mandate of Section 27A of the Act to ascertain the relevant date for the commencement of the accrual of the interest ordered to be paid.

74. The Hon'ble Gujarat High Court in a recent judgement concerning refund of Special Additional Duty, extensively dwelt upon the aspect of and examined the applicability of interest payable on delayed refund of

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40. 2019 (367) ELT 772 AP.

Special Additional Duty leviable under Section 3 of the Tariff Act. Thus in the case of **New Kamal Vs. UOI,**[41] the Hon'ble High Court, reading into the provisions of Section 27A ordered the revenue to *"process the statutory interest as to be paid under Section 27A"* of the Act and pay the same within four weeks.

75. In the case of **Gateway Terminals India Pvt. Ltd. Vs. CC (Nhava Sheva-II), Mumbai**[42] the Tribunal upheld the interest leviable upon the amount of duty adjudged as short paid/not paid, irrespective of the mode of payment of such duty i.e. whether (debit through scrip or any other mode). It therefore called for payment of interest on the amount of duty either paid in cash or by way of debit in the scrip. The Tribunal after elaborate discussions and reference to several case laws was of the view that once duty is ascertained, then by operation of law such person in addition, shall be liable to pay interest at rates specified. It noted in para 4.7 of the order as under:

> *"4.7………………..In our view when short/non-payment is adjudged under Section 28, Section 28AA mandates the interest to appropriate rate on the quantum of short/non-payment adjudged independent of the fact that how the said amount is paid."*

76. It is not that the payment of interest has been ordered by judicial and/or quasi judicial bodies only with respect to cases of refund of Special Additional Duty leviable under Section 3 of the Tariff Act.

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41. 2020 (372) ELT 571 Guj.
42. 2019(369) ELT 1791 T

Examples of payment of interest even in exclusive cases of demand of duty leviable under Section 3 of the Tariff Act do galore, besides the fact that in a very large number of cases (nearly all) wherever interest on refund or demand of duty was held payable, there has invariably been a component of CVD (additional duty) in addition to the basic duty of customs.

77. The objective in pointing out various decisions as above is to counter the narrative of non-applicability of interest provisions to the law laid down under Section 3 of the Tariff Act. It belies logic to say that if interest is applicable to cases of refund, it would not be so for demand cases.

Interest and Penalty-

Two Varying Concepts- (A Brief Commentary)

78. As the appellant has relied upon several pronouncements of the higher judiciary, rendered in the context of affixing penal liabilities in support of their proposition, it is vital that imposition of penalty and affixation of interest are understood in their proper frame, background and objective.

79. The penalty provisions are generally understood to be an integral part of an assessment process and collection of duties of which the necessary adjuncts includes confiscation as well. Without penalty provisions, the tax imposition would lack teeth and become ineffective (Ref-Ashok Fashions Ltd. (2002 (1) TMI 65 Guj). In fact shorn of the power to impose penalty, the Courts have even held the reduction of the taxation provisions to a "*donation drive*." Certainly this is not the case with the obligation for payment of interest. Penalty and interest imposition can therefore not be equated. Interest is actually payable on grounds of equity and hence cannot be equated with penalty imposition. Payment of interest is in effect a necessary concomitant of delayed payment of duty. As has been of held by the courts that penalty is a statutory liability and is in addition to tax and a liability under the act, it is therefore understandably so that the courts have impressed upon the need for a specific creation of this liability by way of a specific inclusion like the generation of a charge for imposition of duty, as no tax can be collected without the authority of law. This nonetheless is not so, as far as interest is concerned. Also, interest has never been held by courts to be by way of an additional tax liability.

80. While it is too well known to reiterate, that penalty is an adjunct to tax assessed, it cannot be so stated for interest which is merely consequential to assessment under certain given circumstances. In fact penalty is in addition to tax and is a liability under the act, while such is not the case with interest which is characterized as compensatory in character. Indeed it has been held by Courts, that penalty is not a continuation of assessment proceedings and it partakes the character of additional tax **(Jain Brothers Vs. UOI – 1969 (3) SCC-311)** and for a liability to arise and be fastened upon it is imperative that there is a charging section as has since been held by courts. (Ref-<u>Federal Court in 26, Chatturam Vs. CIT, Bihar-1947 (15) ITR 302).</u> Such is not the legal position outlined by Courts in so far as the subject matter of levy and payment of interest is concerned.

81. Further, when undisputedly the courts have repeatedly held that there ought to be an enforcement plank for recovery of the tax levied and viewed in the narrow framework of restricting the scope of Section 3 of the Tariff Act to drawback, refund and exemption from duties- the question of enforcement of tax would beg a legal vacuum. This would obviously lead to a situation legally untenable, besides rendering the entire statutory provisions ineffective and worthless. Thus this unsound and flawed interpretation and meaning as assigned by the appellant to the provisions, would have the impact of disintegrating the statutory scope of the provision. We are of the opinion that the interpretation and arguments canvassed by the appellant are fraught with extreme risk leading to the collapse of the provisions themselves and therefore suspect and dubious and hence unacceptable, as far as Section 3 of the Tariff Act with all its appendages is concerned with. The fact of non-inclusion of even a single word pertaining to "*demand of duty,"* in sub-section 3(8) (now sub-section 3(12) in the context would even render inapplicability of Section 28 of the Customs Act, if the analogy as propounded by the learned CA is considered to be of sufficient merit and if the phrase "*The provisions of the Customs ……………………….including those relating to drawbacks, refunds and exemption from duties…………………..."* is read to mean and apply to only the said three aspects of Customs laws. Thus, as explained hereinabove, the enactment would be rendered as a futile and hollow proposition of law, if a parallel consideration as assigned to the interpretation of "penalty" is also assigned to the term "interest" and both are read in the same vein.

82. We are afraid that in the legal aspect and discussions concerning the present matter, the appellant's stand of adding the word "interest" suo moto as to be read alongside the word "penalty," in the Apex Court's ruling to the aspect of penalty imposition, cannot be subscribed to in law. The learned CA's attempt at first taking us into the sphere of penalty by way of judicial rulings and then interfacing the same to include "interest" as well, is imaginary and purely a creation of a thinking mind, professing his legal acumen and experience, but not as enshrined in law. Having taken the said stance, the appellant failed to show as to how they then go on to state that the machinery for assessment, collection and enforcement of tax, as in the Customs Act would double up for the Tariff Act as well, for even the basic words like assessment or non-levy are not mentioned in the relevant sub-section of Section 3 of the Tariff Act, unlike their inclusion in the relevant sub-section of Section 9A of the Tariff Act. Thus, to analyse Section 3 of the Tariff Act, by drawing an analogy to Section 9A ibid is not only irrelevant but also repugnant to law and can therefore not be put to such a study, being improper and even odious. The provisions relating to anti-dumping duty on dumped articles by way of Section 9A of the Tariff Act are far more comprehensive and elaborate than those pertaining to additional duty of customs or other duties specified under the Tariff Act like countervailing duty (Section 9) or safeguard duty (Section 8B) and this would not go in to interpret inapplicability of the basic tenets of Customs laws to the provisions pertaining either to countervailing duty or safeguard duty.

83. From a close, comprehensive and co-ordinated reading of the various sub-sections of Section 3 of the Tariff Act or the omitted Section 3A of the Tariff Act, and the plethora of rulings as discussed, it cannot be interpreted to state that the term "inclusive" used therein would imply "to the exclusion" of the rest of the provisions of the act or the rules and the regulations. In other words, if the appellants pleadings and reading of law is considered as the appropriate legal interpretation of the statutory provision, we are of the view that in the event of any short levy of Additional Duty of Customs there is no mechanism to realize and recover the same as in that circumstance, Section 28 of the Act is not rendered applicable by virtue of then sub-section (8) of Section 3 of the Tariff Act and now sub-section (12) of Section 3 ibid and as only provisions pertaining to Drawback (Chp. X, Section 74-76) Refund (Section 27 or 26A) and those relating to Exemption from Duties (Section 25) of the Customs Act alone are supposed to be rendered applicable. This would lead to a chaotic situation where the enforceable of recovery of short paid duty is tied down and prevented from legally enforcement action and would be completely dependent upon the willingness and the disposition of the assessee to make good the said "charge". Such a situation of "interpretative legal anarchy" is absolutely incomprehensible in law and the said interpretation is nothing short of an absurdity and a legal folly. The appellant themselves have advocated, that for tax levy, a charge is first created by insertion of a charging section in the statute book, followed by a mechanism/machinery to render the liability created effective and the mode for the recovery and collection of the tax, including penal provisions to cater to a situation of default or aberration. This is followed by other related mechanisms like levy of interest, grant of incentives etc. Thus, in the given context while the appellant has vehemently argued about the inapplicability of interest, they have then also failed to demonstrate the machinery adopted to make the realization of the tax feasible, by way of an assessment process, in the absence of non-adoption of the provisions of the Customs Act, but for those relating to drawbacks, refunds or exemption from duty, as argued by them. Thus in the first place, if that were to be the case no demand for duty leviable under Section 3 of the Tariff Act, could even be contemplated. The Hon'ble Apex Court in the case of **British Airways PLC Vs. UOI,**[43] had the following words by way of advice and caution to subordinate authorities:

> *" 8. While interpreting a statute the court should try to sustain its validity and give such meaning to the provisions which advance the object sought to be achieved by the enactment. The court cannot approach the enactment with a view to pick holes or to search for defects of drafting which make its working impossible. It is a cardinal principle of construction of a statute that effort should be made in construing the different provisions so that each provision will have its play and in the event of any conflict a harmonious construction should be given. The well-known principle of harmonious construction is that effect shall be given to all the provisions and for that any provision of the statute should be construed with reference to the other provisions so as to make it workable. A particular provision cannot be picked up and interpreted to defeat another provision made in that behalf under the statute. It is the duty of the court to make such construction of a statute which shall suppress the mischief and advance the remedy.*

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43. 2002 (139) ELT 6 SC

While interpreting a statute the courts are required to keep in mind the consequences which are likely to flow upon the intended interpretation. "

Imposition of Interest or Penalty – circumstances necessitating

84. Interest as stated earlier is compensatory, while under the taxation laws, "penalty" is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the statute. Penalty is penal in nature that is punishing or punitive in character **Consolidated Coffee Ltd. Vs. Agricultural Income Tax Officer, Madikeri and Otherss.**[44] Penalty imposed in adjudication proceedings is not by way of a fine, and is required to be backed by an appropriate statutory provision. "*Penal interest*" furthermore is clearly distinguishable from "*interest"* - the former being an extraordinary liability incurred by a debtor on account of his being a wrongdoer or a violator in law and for which creation of a specific charge for its imposition is essential. <u>Thus while liability to pay interest is founded on the doctrine of compensation, imposition of penalty is based on the doctrine of punitive action.</u> Penalty in common parlance can be understood to mean a legal punishment- be it in the form of a forfeiture, imprisonment or imposition of a monetary cost or charge and its meaning can be derived from the gathering wherein the word is actually put to use, whereas interest can be considered as a compensation fixed by the authority of law for use or detention of money, or for the loss of money by one entitled for its usage.

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44. (2001(1) SCC-278).

85. The Hon'ble Apex Court in the case of **Pratibha Processors and Ors. Vs. Union of India and Ors,**[45] while dealing with the import of words tax, interest and penalty observed as under:

> *"14. In fiscal statutes, the import of the words –- "tax", "interest", "penalty", etc. are well known they are different concepts. **Tax** is the amount payable as a result of the charging provision. It is a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. **Penalty** is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. **Interest** is compensatory in character and is imposed on an assessee who has withheld of any tax as and when it is due and payable. <u>The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date.</u> <u>Essentially, it is compensatory and different from penalty –- which is penal in character."</u>*

(Emphasis Supplied)

The Hon'ble Apex Court distinguishing the various concepts of tax interest and penalty observed that interest is chargeable for the delay in the clearance of the goods (as Pratibha Processors case was one concerning the case of warehouse goods, cleared subsequently) while it is often held that mens rea is one of the essential ingredients for

45. 1996 (11) SCC-101

invocation of penalty it certainly is not the least in the reckoning when concerned with the question of chargeability of interest and therefore to import the rulings of various Court's including that of the Apex Court delivered in the backdrop of considerations of penalty can certainly not be made reference point, when concerned with a case of levy of interest.

86. It would be notable to state what Hon'ble Chief Justice Ray had to quote in the context of tax, penalty and interest, holding tax and penalty and tax and interest as distinct and different concepts. (Ref- **Pioneer Silk Mills Pvt. Ltd. Vs. UOI**[8].

> *"22. The Chief Justice further observed as under:-*
>
> *The Income Tax Act, 1961 imposes penalty under Sections 270 and 271. These sections in the Income Tax Act provide for imposition of penalty on contumacious or fraudulent assesses. Penalty is in addition to income-tax, if any determined as payable by the assessee. <u>Tax and penalty like tax and interest are distinct and different concepts</u> under the Indian Income-tax Act. The word "assessment" could cover penalty proceedings if it is used to denote the whole procedure for imposing liability on the tax payer as happened in Abraham's case."*
>
> *(Emphasis Supplied)*

This case was also maintained by the Supreme Court [2002 (145) ELT A 74 (SC)].

87. As for interest, as it is not held and understood to be in the nature of additional tax, therefore it cannot be stated to be strictly falling into the ambit of Article 265 of the Constitution for enforcing its levy and collection, though it is undisputed that interest has its bearings with duty not paid and hence a dependent variable of such circumstances.

88. The Hon'ble Allahabad High Court as maintained by the Hon'ble Apex Court in the case of **Kamrup Industrial Gases Ltd. Vs. CEGAT, New Delhi,**[46] held that provision of the statute have to be so used to make it meaningful and the construction that would reduce the provision to "*useless lumber*" or a "*dead letter*" was not enshrined in law and repugnant to general principles of interpretation. In the context of a harmonized construction, the Hon'bel Court very specifically stated in the said case

> "*the provision of one section of the statute cannot be used to defeat those of another unless it is impossible to effect reconciliation between them*".

89. Thus, if the language of the statute in the then Section 3(8) of the Tariff Act or now Section 3(12) ibid are held to limit the scope of the provision to the arenas of drawbacks, refunds and exemptions from duties and not to include other measures required as for a smooth holistic working of a tax statute, for instance appeals or aspects concerned with assessment of goods, the said provision would be rendered as a partially meaningful and largely factual entity and therefore defeat the statutory intention itself.

90. To offset any argument concerning default in payment of duty, not on account and attributable to the appellant it would be appropriate to invite reference to the decision of the Hon'ble Apex Court in the case

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46. 2004 (172) ELT 454 Allahabad

of **Commissioner of Central Excise Vs. International Auto Ltd.**[47] wherein the Hon'ble Apex Court was pleased to hold that payment of duty made by the assessee, if with delay either by own ascertainment or as ascertained by the officer was not exempt from interest chargeable under Section 11AB of the Central Excise Act. It further held that interest was leviable for loss of revenue on any count. The Supreme Court went on to hold that payment of differential duty subsequently was indicative of the fact of interest being automatically leviable.

91. Further, the Apex Court in the case of **Steel Authority India Ltd. Vs. Commissioner of Central Excise Raipur** [48] observed that being a case of short levy, Section 11A read with Section 11AB ibid would be attracted and interest leviable from the relevant date as provided in Rule 8 read with Section 11AB. Noteworthy, to state that the provisions of the Central Excise Act, Section 11A and Section 11AB can be considered mutatis mutandis with the provisions of Section 28 and Section 28AA of the Customs Act. The Supreme Court in the said case stated that "*in short, therefore, the principle may be taken to be established that while levy of interest is a part of the adjective law, yet to levy interest there must be a substantive provision. Demand for interest can be made only if the legislature has specifically intended collection of interest."* This is so in the present context as well by virtue of Section 28AA of the Act.

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47. 2019 (366) ELT 769 SC
48. 2010 (250) ELT 3 SC

92. Likewise, the Hon'ble Supreme Court in the case of **Commissioner of Central Excise Vs. International Auto Ltd.**[46] had held that in view of the statutory provisions under Section 11A of the Central Excise Act, default in the payment of the duty either by virtue of own ascertainment or as ascertained by the Revenue Officer was not exempt from interest chargeable under Section 11AB.

93. We are thus of the view that the legislature having consciously incorporated the interest provision (Section 28AA) in the Customs Act, and as rendered applicable to the Tariff Act, the appellants are not justifiable in seeking to derive support from the judgments cited by them, as the rulings pronounced by the superior courts in the said cases would not be apposite for consideration of the question of interest which arises in the present case. This is so as the said judgments were delivered essentially in the context of penal provisions or with reference to issues concerned with settlement of case a variation/deviation from the applicability of routine structural legal process. Thus, those decisions would be irrelevant for deciding the issue in the present matter concerned with the liability to pay interest in terms of the statutory provision of the Customs Act as rendered applicable to the Tariff Act (Section 3).

94. An important case having a bearing in the present matter is that of **Union of India Vs. Valecha Engineering Ltd.**[38] (discussed in depth separately, elsewhere in this order). While the issue concerned therein was the refund of interest paid voluntarily and as directed by the Settlement Commission. In appeal the Hon'ble High Court however, held that the Settlement Commission was not having jurisdiction to direct refund of interest. It remanded the matter for directing interest either in terms of the bond or notification or Section 28AB of the Customs Act. To a specific question, as also raised at the time of hearing, as to whether the provisions of interest under the Customs Act were incorporated or not in the Tariff Act, the Hon'ble Court, in no uncertain terms held that the definition in the duty of the Customs Act indicates that the provisions of the Customs Act pertaining to duty are applicable to duty payable under the Tariff Act, and as interest provisions are compensatory and not penal, and are a re-compensation for the State on account of the failure to pay duty, interest under Section 28AB of the Act was payable when Section 28 was attracted and duty ascertain as due under the Tariff Act, by applying the machinery provision of the Customs Act. In short to state that once duty payable is ascertained, the relevant provisions of the Customs Act seeking payment of interest were applicable and therefore the Hon'ble Bombay High Court upheld the leviability of interest. It further went to state that the incorporation of Section 9(7A) of the Tariff Act with effect from 18.04.2006 was only clarificatory in nature. It may not be out of place to mention that the aforesaid decision of the division bench of the Hon'ble Bombay High Court did consider some of the cases as relied upon by the appellants:

- **India Carbon Ltd. & Ors. Vs. State of Assam,**[10]
- **Hyderabad Industries Ltd. Vs. Union of India,**[3]
- **J.K. Synthetics Ltd. Vs. Commercial Taxes Officer,**[9]
- **Pioneer Silk Mills Pvt. Ltd. Vs. Union of India,**[8]

95. The Hon'ble Supreme Court in the case of **Commissioner of Trade Tax Vs. M/s. Kanhoo Ram Thekedar,**[49] has taken the view that interest liability accrues automatically. In the case of **M/s. Kamat Printers Pvt. Ltd. Vs. Union of India**[39] the Bombay High Court had held that once duty is ascertained then by operation of law such person in addition, shall be liable to pay interest at such rate as applicable.

96. As for imposition of penalty it is however not automatic and has to be weighed in accordance with the legal stipulations. The Hon'ble Court in Valecha Engineering Ltd. case (supra) went on to great lengths in distinguishing the ratio of the law as propounded by the Apex Court in the Orient Fabrics Pvt. Ltd. case, which was primarily concerned with provisions pertaining to penalty and not interest. It would be worth reproducing the relevant extract of the decision of the Hon'ble Court as concerns aspects relevant to the present case:

> *"30………………..*
>
> *We may now refer to Section 28AA. Under <u>Section 28AA interest becomes automatically payable on failure by the assessee to pay duty as assessed within the time as set out therein</u>. Similarly, under Section 28AB on duty being ascertained as under Section 28 interest is payable by operation of law. In a case, therefore, where duty has been ascertained as due under the Customs Tariff Act, 1975 by the machinery under the provisions of the Customs Act if*

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49. 2005 (185) ELT 3 (S.C)

the provisions of Sections 3 and 3A are read in their proper context, then Section 28 would first be attracted. No interest will be payable under Section 28AB if the predicates of under Section 28 are not satisfied. Therefore, in a case of non-payment of duty of the payment or erroneous refund even under the provisions of the Customs Tariff Act, 1975, Section 28 would be attracted and once duty is ascertained under Section 28 interest becomes payable under Section 28AB as the machinery provisions of the Customs Act are incorporated into the Customs Tariff Act and the provision for interest is part of the machinery provisions though at the same time Section 28AB is a substantive provision for payment for interest under the Customs Act. The rule of strict construction must be rejected. Interest is compensatory for failure to pay duty on the date due and payable. Therefore, once duty is determined considering the expression, the provisions of the Customs Act shall as far as may apply Section 28AB would be applicable. The amendment of the 18th April, 2006 only clarifies the position. "

(Emphasis Supplied)

97. As even though a liability to pay tax is created, left to itself it is inconsequential, till the tax payable is ascertained by the assessing authority and with no inclusion of "*assessment*" in sub-section 8 of Section 3, the entire charge creation is rendered as a futile exercise. This obviously is therefore not the intent of law. In effect no tax can be said to be levied upon mere creation of a charge but till it is actually assessed and arrived at, for till then it is a mere "*liability to be assessed to tax*". The tax payable is charged in accordance with Section 3(3) of the Tariff Act, determined in accordance with Section 28 of the Act, of which a direct offshoot for the consequence of short payment of tax is the resultant action under Section 28AA, which requires no crutches to be propelled along, as it follows instantaneously and robotically upon a determination under Section 28 of the Act, and being predominant by virtue of *non-obstante* opening of the phrase, it has a sort of over-ruling effect overall other stipulations in law.

98. Further, it has often been held to be a duty of the court to press into action, the maxim *ut res magis valeat quam pereat* to arrive at a meaningful interpretation and to construe the enactment in a manner so as to implement rather than defeat the legislative intent and purpose. As it is the said maxim is put to operation when two meanings are sought to be derived at from the enactment interpreting the plain words used in the statute. Thus, adopting this principle and in view of the plethora of court orders referred in earlier paras permitting the interest outgo in respect of levy under Section 3 of the Tariff Act, interpretation as would carry forward the legislative intent, is required to be adopted. The mandate of the legislature is required to be interpreted to advance the purpose of the legislation, equally in all situations. Thus, reading down the law, as held by courts in several such rulings does not advance the case of the appellants.

99. Moreover, there can be no dispute, to the premise and as oft stated by apex court that where two reasonable constructions are possible, but one leads to an anomalous situation while the other advances the intention of the legislature, it is for courts to adopt the latter. **Indo-China Steam Navigation Co. Ltd. Vs. Jasjit Singh, Addl. Collector of Customs, Calcutta & Ors.** [1983 (13) ELT 1392 SC]. The dominant purpose in construing a statute is to ascertain the intention of the legislature as arises from the statute, considering it as a whole and in its context.

A Judgement – is an authority for what it decides

100. How should a judgement be read and understood:

It is common knowledge that a ratio of a decision has to be culled out from the facts of the particular case and a decision is an authority for what it decides and not what can be logically deduced. An exception to a normal provision in law, cannot be interpreted to frustrate the substantive provision and must be construed to so interpret that it does not obliterate the substantive enactment. The Hon'ble Apex Court in the case of **Commissioner of Customs (Port), Chennai Vs. Toyota Kirloskar Motor P. Ltd.[50],** had the following to say:

> "*30. The observations made by this Court in Essar Gujarat Limited (supra) in Paragraph 18 must be understood in the factual matrix involved therein. The ratio of a decision, as is well-known, must be culled out from the facts involved in a given case. A decision, as is well-known, is an authority for*

50. 2007 (213) ELT 4 (SC)

> *what it decides and not what can logically be deduced therefrom. Even in Essar Gujarat Limited (supra), a clear distinction has been made between …………………….."*

101. The Larger Bench of the Tribunal in the case of **Commissioner of Central Excise, Bhopal Vs. Rama Wood Craft (P) Ltd.[51],** had also expressed similar sentiments:

> *"P-3………….A judgment is an authority and can be regarded as a precedent only on point which was canvassed, debated and decided. Any observation or finding beyond the issue(s) raised can only be regarded as obiter dictum which may be binding only on parties to the proceeding but cannot be treated as a binding precedent."*

102. Any observation finding by a court of law beyond the issue specifically raised can only be regarded as obiter dictum which may be binding only on parties to the proceedings but can in no way be considered as a binding precedent. For seeking to adopt the ruling of a particular case, it has to be shown as to how the facts of the cited case fit into the factual position of the given issue. Thus as none of the cases relied upon by the appellant, are in the given factual matrix of this case and cater to the proposition befitting the present appeal, we do not find

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51. 2008 (225) ELT-348 T-LB

the cited cases by the appellant, to be of any help in deciding the present matter. (To be fair to the issue raised, a brief commentary on judgments relied upon by the appellant, are incorporated in the order for records, towards the end).

103. Circumstantial flexibility or even a single additional detail or a mild difference in facts, could make a world of difference and lead to different conclusions in two cases, however closely placed. As observed by the Hon'ble Apex Court in the case of **Collector of C. Ex., Calcutta Vs. Alnoori Tobocco Products,**[52] citing the words of Lord Denning:

> *"14. The Following words of Lord Denning in the matter of applying precedents have become locus classicus:*
>
> *Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."*
>
> *(Emphasis Supplied)*

103.1. Further, guiding the judicial and quasi judicial entities the apex court observed as follows:

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52. 2004 (170) ELT 135 (SC)

> *"11. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussion but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes…………….."*
>
> *(Emphasis Supplied)*

104. Hon'ble Justice Ramaswamy in the case of **UOI Vs. Dhanwanti Devi and Ors,**[53] delivering the judgment had the following words to state on behalf of his brother judges Hon'ble J. Saphir Ahmad and Hon'ble J. Pattanaik.

> *"7………………..It is not everything said by a Judge who giving judgment that constitutes a precedent. The only thing in a*

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53. 1996 (6) SCC 44

Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well settled theory of precedents, every decision contain three basic postulates – [i] findings of material facts, is the inference which the Judge draws from the direct, or perceptible facts, [ii] statements of the principles of law applicable to the legal problems disclosed by the facts; and [iii] judgment based on the combined effect of the above. <u>A decision is only an authority for what it actually decides.</u> What <u>is of the essence in decision</u> <u>is its ratio</u> <u>and not</u> every observation found therein <u>not what logically follows from the various observations made in the judgment</u>. Every judgment must be read as applicable to the particular facts proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding between the parties to it, but it, is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and *which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason and the precedent by long recognition may mature into rule of stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi.*

Therefore, in order to understand and appreciate the binding force of a decision is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law. Law cannot afford to be static and therefore, judges are to employ an intelligent in the use of precedents………………….”

(Emphasis Supplied)

104.1. We are therefore, afraid of ascribing any support to the pleadings of the learned Representative for the appellant.

105. In case were the viewpoint as canvassed by the appellant is taken to be a fact flowing from the law, it is then obvious that there could be no other aspect pertaining to the levy of Additional Duty of Customs and related thereto, as could arise or be agitated or even considered other than that for drawbacks, refunds and exemption from duties. This is particularly so, as no other provision of law (the Customs Act) are included, by way of a specific mention, borrowed into Section 3 of the Tariff Act. Thus in the first place, in expansion of the plea of the appellants, no appeal under the Customs Act could lie with regard to any dispute or a question of interpretation that arises and could be even taken up for consideration in so far as Section 3 of the Tariff Act is concerned as no such legal provision has been said to be borrowed in law under Section 3 of the Tariff Act. Likewise plethora of other provisions of the statute, be it a case of short levy or evasion of duty would also not come up for consideration as no demand provisions are allegedly borrowed thereinto. Similarly aspects related to offences and penalties, or even pertaining to advance rulings or settlement or even perhaps relating to import of goods as cases of baggage, ship stores etc. when read in the context of Section 3 of the Tariff Act would be rendered inapplicable, simply because of non-indication or specific inclusion of the said provisions in the sub-section (then sub-section 8 and now sub-section 12 of Section 3 of the Tariff Act). Merely restricting the applicability of the provisions of the Customs Act, and the rules and regulations thereunder to the three aspects of drawbacks, refunds and exemption from duties, the terms incorporated in the said sub-section does not hold any sway and therefore is certainly only by way of *ex-abundanti cautela.* The said interpretation rendering rest of the tenets of law as otiose and redundant, cannot therefore be adopted as it does not flow from the words made use of in the statute- "The provisions of the Customs Act, ………. including those relating to drawbacks, refunds and exemption from duties, shall so far as may be, apply to…………under this section as they apply in relation to the duties leviable under that Act.” Indeed, if that was the intent of law, it could simply be indicated as:

> The provisions of drawbacks, refunds and exemption from duties, so far as may be apply to the duty chargeable under this Section as they apply in relation to the duties leviable under the Customs Act, 1962.

106. Thus a restrictive and narrow interpretation of term "including" cannot be assigned and adopted in the given context. It belies logic to so do, as it defeats the very purpose of the statutory provisions including certain beneficial piece(s) of legislation which certainly is not and cannot be the intent of the legislation. For a moment, even for argument sake, the law, is understood to be the way the appellant pleads before us, it automatically dwells upon, that the word *"assessment"* as obtained in Section 9A (8) of the Tariff Act is missing and found wanting, as regards the material provisions of Section 3 of the Tariff Act. That by natural implication would therefore mean that even the basic postulate of *"assessment"* would fail as far as Section 3 ibid is concerned. Thereby to infer that even no assessment of such "leviable" additional duty of Customs can be undertaken, as the term assessment is not specifically included in the relevant provisions of Section 3 would not only be foolhardy but downright illegal and moronic. Under the circumstances the provisions of law would be rendered self-defeatist and for that reason alone the standpoint of the appellant cannot be sustained as interest recovery is inextricably linked with the demand for payment of duty, given the language of Section 28AA(1) of the Act.

As an aside

107. As an aside for academic purposes it need be pointed out that, it is commonly held by Courts that interest is compensatory in nature and can be taken to be a cost for the opportunity foregone. Therefore, a party that has enjoyed the benefit of funds- violative of the authority of law, then such funds would be required to be compensated alongwith interest, be it a case of recovery or refund. The High Court's under Article 226 and the Supreme Court under Article 136 of the Constitution have time and again exercised their powers to secure the ends of justice and awarded interest to either of the two sides to the lis. The Tribunal too under Rule 41 of the CESTAT Procedure Rules, 1982, can give such directions as may be necessary or expedient in relation to its orders to secure ends of justice. Therefore, unless the law provides by way of a specific embargo, nothing prevents this authority from directing the payment of interest- being compensatory in character.

Section 47 of The Customs Act, 1962

108. Considered from another angle, it also need be noted that while interest has been demanded under Section 28AA on the difference in duty amount paid belatedly and as determined from the appellants, the law mandates payment of interest in any case where duty payment was made beyond prescribed timelines. Thus while Section 46 of the Act provides for filing of Bill of Entry upon import of goods, Section 47(1) of the Act permits clearance of non-prohibited goods for home consumption and upon payment of duty as assessed thereon. Section 47(2) of the act ibid which was introduced in 1991, however provides for payment of interest, in case the importer failed to pay the duty within prescribed timelines (these timelines have been revised from time to time). This provision for payment of interest was a part of the statute even during the material time. In earlier paras it has been elaborately discussed that duty leviable under Section 3(3) of the Tariff Act is also a duty of Customs within the meaning of Section 2(15) of the Act. It cannot now, at least, therefore not be argued that the provisions concerned with filing of Bill of Entry, or the clearance of imported goods for home consumption upon payment of duty are/were rendered applicable to the provisions of the Tariff Act. If the said provisions are applicable to the present case (which in fact are), there can be no escape from payment of interest as applicable. For sake of greater clarity, Section 47 of the Customs Act as it stood at the relevant time is recorded below:-

> **"47. Clearance of goods for home consumption.-** [1] Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption.
>
> [(2)] where the importer fails to pay the import duty under sub-section (1) [within] [two days] excluding holidays from the date on which the bill of entry is returned to him for payment of duty, he shall pay interest [at such rate, not below [ten per cent.] and not exceeding thirty six per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette], on such duty till the date of payment of the said duty:-

> **[Provided** that the Central Government may, by notification in the official Gazette, specify the class or classes of importers who shall pay such duty electronically:
>
> **Provided** further that where the bill of entry is returned for payment of duty before the commencement of the Customs (Amendment) Act, 1991 and the importer has not paid such duty before such commencement, the date of return of such bill of entry to him shall be deemed to be the date of such commencement for the purpose of this section:]
>
> **[Provided** also that] if the Board is satisfied that it is necessary in the public interest so to do, it may, by order for reasons to be recorded, waive the whole or part of any interest payable under this section.] "

(Source:- The Customs Act-bare act 2013-14)

Further, this being a legal stipulation the applicability of this legal premise and concept laid out in Section 47 of the Act, now is not open to arguments as it were applicable with or without stating the obvious. For this reason alone as well, we are of the view that liability for payment of interest as accrues in law in the present matter is undisputable.

A short Discussion on- Case Laws counted upon in support of their proposition by the appellant:

(i) Hyderabad Industries Ltd. Vs. UOI[3]

109. The appellant has referred this decision for the proposition concerning leviability of additional duty of customs (CVD) under Section 3(1) of the Tariff Act and the fact that the same is independent of the duty leviable under Section 12 of the Act (Customs Act). There is absolutely no demur with this proposition or any reason to doubt the veracity of the statement. In fact it is Section 2 of the Tariff Act which has a bearing with Section 12 of the Act, as Section 2 specifically speaks of "duties of customs …………… levied under the Customs Act". The fact that section 3 levy is independent of all this is clear from the language made use of in the provisions contained in Section 3 of the Act itself. Even the manner of calculation of additional duty of Customs is provided for in the said section only.

While the judgement of the Hon'ble Court in this case was in the context of and dealt specifically the issue of leviability of additional duty (CVD) under Section 3(1) on import of asbestos fibre, and were in particular analysing the implication of the words "*if produced or manufactured in India*", as used in Section 3(1) of the Tariff Act, Justice Kripal had the following to say, on behalf of the other judges of the Constitution Bench.

> "*14. There are different types of customs duty levied under different acts or rules. Some of them are, (a) a duty of customs the duty in question, chargeable under Section 12 of the Customs Act, 1962: (b) namely, under Section 3(1) of the Customs Tariff Act; (c) additional duty levied on raw-materials, components and ingredients under Section 3(3) of the Customs Tariff Act; and (d) duty chargeable under Section 9A of the Customs Tariff Act, 1975. Customs Act, 1962 and the Customs Tariff Act, 1975 are two separate independent statutes. Merely because the incidence of tax under Section 3 of the Customs Tariff Act, 1975 arises on the import of the articles into India <u>it does not necessarily</u>*

> *mean that the Customs Tariff Act cannot provide for the charging of a duty which is independent of the customs duty leviable under the Customs Act.*"
>
> *(Emphasis Supplied)*

110. Nonetheless, even though the aforesaid observation of the Hon'ble Court was by way of an obiter from the Apex Court, since there is no compunction with the provision of leviability of the Additional Duty under Section 3(1) of the Tariff Act, nothing much remains to be analyzed and discussed in this regard.

(ii) Khemka and Company (Agencies) Pvt. Ltd. Vs. State of Maharashtra & State of Mysore Vs. Guldas Narasappa Thimmaiah Oil Mills[4].

111. In this case, the constitution bench of the apex court was concerned with the question of imposition of penalty under the provisions of State Sales Tax Act on an assessee under the Central Sales Tax Act. It may be at the outset for records indicated that the verdict in the said case was not a unanimous one but was a 3-2 split verdict. The Hon'ble Apex Court in the said case was concerned with the imposition of penalty- a statutory liability which is punitive in nature for an omission or a commission as stated in law.

The Hon'ble Chief Justice inter alia held as below (which forms part of the majority opinion):

> *"For the foregoing reasons we are of opinion that the provision in the State Act imposing penalty for non-payment of income tax (sic) within the prescribed time is not attracted to impose penalty on dealers under the Central Act in respect of tax and penalty payable under the Central Act. There is no lack of*

sanction for payment of tax. Any dealer who would not comply with the provisions for payment of tax would be subjected to recovery proceedings under Public Demands Recovery Act. A penalty is a statutory liability. The Central Act contains specific provisions for penalty. Those are the only provisions for penalty available against the dealers under the Central Act. Each State Sales Tax Act contains provisions for penalties.

These provisions in some cases are also for failure to submit return or failure to register. It is rightly said that those provisions cannot apply to dealers under the Central Act because the Central Act makes similar provisions. The Central Act is a self-contained code which by charging section creates liability for tax and which by other sections creates a liability for penalty and imposes penalty. Section 9(2) of the Central Act creates the State authorities as agencies to carry out the assessment, reassessment, collection and enforcement of tax and penalty payable by a dealer under the Act."

112. While accepting the appeal of Khemka & Co. (Agencies), it would be prudent to state the obvious, that the provisions pertaining to the Customs Act and the Tariff Act (Section 3), and those in respect of Central Sales Tax Act and the State Sales Tax Act referred to in the order viz Section 9 of the Central Sales Tax Act have no commonality of the purport of the law, the subject under consideration and the nature of the issue in appeal. Under the circumstances proposing to import the ratio thereof in the present case, does not fall through in place. Incidentally, taking note of the two diverse outcomes arrived at by the two brother judges on each side Justice Baig in his part of the order states as under :-

> *" I have had the advantage of going through the judgments of the learned Chief Justice and my learned brother Mathew, J. Even if I was of the opinion that the two views on an interpretation of Section 9(2) of the Central Act are equally well entertainable, as one could be on a mere reading of Section 9(2) of the Central act only. I would, with great respect, prefer of the view adopted by the learned Chief Justice on the principle that the assessee must get the benefit of such uncertainty. It, however, seems to me, on a careful consideration of the two possible views, that reasons for accepting the contentions on behalf of the assessee are quite compelling and decisive. I, therefore, proceed to state these shortly."*

113. There being no akinness in the impugned decision, vis-à-vis the issue at hand, it would not be appropriate to consider the obiter (also when considering the aspects of penalty) as a determinant for the decision in the present appeal, examining the question of leviability of interest on short paid additional duty of Customs. It need also to be clarified that while the learned CA for the appellant in his pleadings sought to draw support and incorporate the term interest while referring to the case of Khemka and Company, the question of interest was not the least under consideration in the said case of Khemka & Co. Penalty in effect is a sanction for non-payment (as also held by Hon'ble Chief Justice Ray in the *Khemka & Co.* case) and unlike interest is not compensatory in nature. Furthermore, the language and the context of the statute of the Customs Act and the Tariff Act are far removed from that of Section 9(2) of the State Sales Tax Act. Moreover, penalty and interest can by no stretch of legal interpretation be placed on par. By no extent of creativity, can penalty be taken as synonymous with interest as the two operate in different realms and are associated with altogether different objectives and purpose in law. There is no legal fiction, to the effect, to understand penalty and interest to be in sync. Thus in our respectful submission we do not find any support fanning out for the contention of the appellant, as no ratio in law is laid down by the said decision of the apex court in so far as imposition and levy of interest on delayed payment of duty is concerned.

114. Moreover, in the said case, the basic question concerned was in respect of imposition of penalty for delayed filling of return and not levy of interest for delayed payment of duty. Payment of duty is a statutory and a constitutional obligation and the filling of the return can in no way be held at the same pedestal as that for duty payment. Payment of duty or tax, wherever due, is paramount in law and there can be no escape therefrom without a statutory prescription and authority to so do.

115. The contextual framework in the Khemka's case also rests on premises, where no dispute arises as to the specific ingredients pertaining to assessment/reassessment/collection etc. and all such terminologies within their broad sphere of understanding are incorporated within Section 9 (2) of the Central Sales Tax Act, as assumed to be applicable by reason of Section 9(3) of the Central Sales Tax Act. (as it stood then). It may be noted that Section 3 of the Tariff Act, but for "drawback", "refund" and "exemption" carry no other aspects of a taxation statute by way of a specific inclusion. That would not *ipso facto* mean to rule out applicability of the various other ingredients of a tax act, moreso as the opening phrase of the said sub-section of the Tariff Act, clearly enacts therein the provisions of the Customs Act. It cannot also be held that in the absence of non-inclusion of other related framework in law including assessment and collection of tax, mere creation of a "charge" would result in its ultimate realization. Thus the meaning and interpretation canvassed by the appellant to our humble understanding cannot be said to be the one intended.

116. Also it is pertinent to point out that amongst the primary reason as ascertained by the Hon'ble apex court in arriving at it's decision in the said matter, was the fact of the Central Act, being held to be a "self-contained code" and the fact that the Central Act contained a specific provisions for penalty. Those being the only provisions for penalty against dealers under the Central Act, the Hon'ble Court had therefore held the inapplicability of the penal provisions of the State Act in respect of dealers under the Central Act. We are afraid that in the present matter no such situation arises. Therefore, the reliance on the Khemka & Co. case, placed by the appellant is not only misplaced but also misguided.

(iii) CCE & C, Surat-I Vs. Ukai Pradesh Sahakarikhand Udyog Mandli Ltd.[6]

117. The Hon'ble Gujarat High Court was no doubt in this case concerned with the question of interest payments on delayed payment of sugar cess under the Sugar Export Promotion Act of 1958. It is of relevance to note here that the subject payment of duty was in the context of Section 7 of the Sugar Export Promotion Act, which read as:

"[*7.] Levy of additional excise duty on sugar.-*

(1) Where sugar delivered by any owner falls short of the export quota fixed for it by any quantity (hereinafter referred to as the said quantity), there shall be levied and collected on so much of the sugar dispatched from the factory for consumption in India as is equal to the said quantity, a duty of excise at the rate of forty-five rupees and fifty-five naye paise per quintal.

(2) The duty of excise referred to in sub-section (1) shall be in addition to the duty of excise chargeable on sugar under any other law for the time being in force, and shall be paid by the owner to such authority as may be specified in the notice demanding the payment of duty and within such period not exceeding ninety days as may be specified in such notice.

(3) If any such owner does not pay the whole or any part of the duty payable by him within the period referred to in sub-section (2), he shall be liable to pay in respect of every period of thirty days or part thereof during which the default continues a penalty which may extend to ten per cent of the duty outstanding from time to time the penalty being adjudged in the same manner as the penalty to which person is liable under the rules made under Central Excise Act, 1944 (1 to 1944), is adjudged.

(4) The provisions of the Central Excise Act, 1944 (1 to 1944) and the rules made thereunder, including those relating to refunds and exemptions from duty, shall, so far as may be, apply in relation to the levy and collection of the

duty of excise or any other sum referred to in this section as they apply in relation to the levy and collection of the duty on sugar or other sums of money payable to the Central Government under that Act or the rules made thereunder."

A reading of sub-section (1) of Section 7 above, clearly shows that the subject additional duty leviable had a bearing with the deficit in quantity of the export quota assigned. The Hon'ble Gujarat High Court after elaborate discussions based on cited case laws stated as under:

"17. From the principles enunciated in the above referred decisions, it is apparent that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf. In the facts of the present case, as noted hereinabove, Section 7 of the Sugar Export Promotion Act, 1958 does not make any provision for levy and charge of interest on the duty of excise payable under sub-section (1) thereof. In the circumstances there being no substantive provision in the Act for levy of interest on late payment of tax, no interest thereon could be so levied based on the application of sub-section (4) of Section 7 of the said Act. In the circumstances, the Tribunal was justified in holding that there being no provision for interest in the Act, there was no justification or warrant to confirm the interest, in the absence of any powers vested in the authorities under the Act."

118. The said order was pronounced in the context of the Tribunal's decision in the appellants (Shri Ukai Pradesh Sahkari Khand Udyog

Mandli Ltd.) own case decided by the Tribunal in 2009 (247) ELT 184 Tribunal, which follows the decision of the apex court in the case of ***Star India Pvt. Ltd. 2006 (1) STR 73 SC****.* It be noted that the context of the judgment of the hon'ble Supreme Court in *Star India Pvt. Ltd*. was entirely different as ascertainable from the following paras of the Tribunal's orders.

> "*5. The subject matter of the present appeal arises out of the refusal of the Tribunal to accede to the appellant's arguments that they were liable to pay interest on the amount which it was required to pay by reason of the 2002 amendment, only in terms of the validation section, i.e., after the expiry of 30 days from the date on which the Finance Act, 2002 received the assent of the president. The ground on which the Tribunal rejected the appellant's prayer was that the Tribunal had by its order in main appeal (which is the subject matter of C.A. No. 5072/2004) held that the appellant was liable qua broadcaster even before the amendment was brought about by the Finance Act, 2002.*
>
> *10. Besides, if the liability has been created under the amended section by virtue of sub-section (2) of Section 148 of the Finance Act, 2002, it must be given effect to wholly. The section expressly makes the assessee liable under the amended provision to pay the tax within the period of 30 days from the date of the Presidential Assent to the Finance Bill, 2002. It is admitted that the Finance Bill, 2002 was assented to on 11.05.2002 by the President. In the circumstances, the appellant was entitled to a period of*

thirty days thereafter to make payment of the tax. Needless to say, if it did not make payment within thirty days from the 11.05.2002, it would be liable to pay interest at the rate specified after that date.”

119. Since, this case relies heavily upon certain decisions of the Courts as already discussed in earlier paras, there is therefore nothing much to elaborate on this particular case, being an outcome of interpretation borrowed from other matters. However, it need to be brought on record, that the provisions of the Sugar Export Promotion Act (SEPA) referred to above, do not contain any non-obstante clause 8 (unlike the provisions of Section 28AA of the Customs Act), whereby to give the said provision an over-riding effect and ensure their primacy over other provisions of the statute. In effect in Section 28AA of the Act, the statute gives the said provision a platform even higher than a judicial pronouncement which ordinarily is not the case.

120. It is however imperative to note the huge chasm in the provisions of law, invoking the interest provisions in the context of Ukai Pradesh Sahakari Khand Udyog Mandli Ltd. (enabled by sub-section(4) of Section 7 of the Sugar Export Promotion Act) vis-à-vis the present appeal (enabled by Section 3(8) the Tariff Act read with Section 28AA. Section 28AA not only starts with a non-obstante clause, creating a legal fiction as to the primacy of the provision levying interest, besides also stipulates the spontaneous and mechanical applicability of interest upon any duty required to be paid in terms of Section 28 of the Act.

121. For reasons as discussed, we are of the view that no benefit arises out of the Gujarat High Court’s decision in favour of the appellant.

(iv) Mahindra and Mahindra Ltd. (Auto Sector) Vs. UOI. The Settlement Commission (Additional Bench, Customs and Central Excise, Mumbai, the Additional Director, DG, CEI, Mumbai[7].

122. The impugned decision is particularly in the context of "Settlement" of a case, therefore foremost it cannot be considered to be laying out a legal principle applicable to usual and non-exceptional circumstances. The settlement of a case is a shift from the ordinary contextual application of law. The texture and flavour of legal application are vastly different in a settlement than in ordinary course of legal functioning. Settlement can be considered as a compromise, as a sort of amnesty or an agreement or a deal, a pact entered into in the given framework of law provided. The only characteristic thereof in the Customs enactment being, it is enabled through the aegis of the authority as specified under the statute. It be pertinent to mention that the settlement of cases provisions under the Act (Section 127A-127N) are a complete and comprehensive code in themselves, as it sets out its own process and procedure providing from the basics thereof viz. as to eligibility of cases, the creation of the authority, the fee payable, the contours scope and the framework of the said arbitration process, specifying the extent of flexibility available to the authority, the consequence of such a ruling etc.

123. Being a shift from the usual process of adjudication, appeal etc. as enshrined in law, any ruling by a higher forum on a decision of the Settlement Commission would certainly have its total applicability to scenarios as existant in the said order under challenge. However, adopting the law propounded on a compromise, in a spirit of conciliation and by way of an exceptional process (though laid out in law), extending its applicability to all normal scenarios is fraught with grave risk including travesty of legal jurisprudence. For this reason, alone we feel that the ruling of the Hon'ble Bombay High Court shall have no bearing, implication and applicability to the present issue at hand.

124. Furthermore, this decision of the Bombay High Court in the matter has been arrived at based upon several case laws that have been discussed elsewhere in this order namely-

- *Collector of C. Ex., Ahmedabad Verses Orient Fabrics Pvt. Ltd. – 2003 (11) TMI 75- Supreme Court.*
- *Hyderabad Industries Ltd. Versus Union of India – 1999 (5) TMI 29 –Supreme Court.*
- *India Carbon Ltd. Versus State of Assam (and other appeals) – 1997 (7) TMI 566- Supreme Court.*
- *Khemka & Co. (Agencies) Pvt. Ltd. Versus State of Maharashtra & State of Mysore Versus Guldas Narasappa Thimmaiah Oil Mills – 1975 (2) TMI 91-Supreme Court.*
- *Jain Brothers And Others Versus Union of India And Others-1969 (11)TMI 1-Supreme Court.*
- *CCE. & C., SURAT-I Versus UKAI PRADESH SAHAKARI KHAND UDYOG MANDLI LTD. -2010 (12) TMI 996-GUJARAT HIGH COURT.*
- *UNION OF INDIA Versus VALECHA ENGINEERING LIMITED-2009 (8) TMI 451 –HIGH COURT OF BOMBAY.*
- *MAHINDRA & MAHINDRA LTD. Versus UNION OF INDIA – 2008 (9) TMI 382- HIGH COURT OF JUDICATURE AT BOMBAY.*

- *PIONEER SILK MILLS PVT. LTD. Versus UNION OF INDIA- 1991 (9) TMI 93- HIGH COURT OF DELHI.*

Moreover, despite holding

"*In the absence of specific provision relating to levy of interest in the respective legislative, interest cannot be recovered by taking recourse to machinery relating to recovery of duty.",*

the most interesting finding in the order is with reference to non-determination of duty under Section 28(2) of the Act and *therefore the inapplicability of Section 28AB of the Customs Act.*

125. This case following the earlier enunciation of the Apex Court and other judicial foras observed that when a statute levies tax it did so by inserting a charging section by which a liability is created and then proceeding to provide the machinery to make the liability effective. There is a machinery to realize the liability fixed, providing for collection of tax including penal provisions which meant for action in case of defaults. It pointed out that provision for charging of interest on delayed payments etc., are also provided for and that the rule of strict construction as applicable for the charging section is not extended to the machinery provisions as can be construed like any other statute. It held Section 28AB of the Customs Act to be as a "taxing provision" which creates and fastens liability on the assessee and therefore required to be strictly construed and governed by the language employed in the section. Further, as stated above, in the said case a vital ingredient for pronouncing the order by the Hon'ble Bombay High Court was the reason that there was no determination of duties under Section 28(2) of the Customs Act and therefore Section 28AB of the Customs Act was inapplicable.

(v) Indian Carbon Ltd. Vs. State of Assam[10]

126. The question concerned in this case was, whether Section 9(2) of the State Sales Tax Act, was concerned with the payment of interest as well.

127. The Hon'ble Court observed that Section 9(2) of the Central Sales Tax Act makes applicable to the assessment, reassessment, collection and enforcement of state sales tax the provisions relating to offences and penalties contained in the Central Sales Tax Act, as if the Central Sales Tax Act, was a State Sales Tax Act. It held that Section 9(2) made no reference to interest (in the first part) and there being no substantive provision, therefore it did not oblige the assessee to pay interest on delayed payment of Central Sales Tax. In view thereof it dismissed the plea for payment of interest.

128. It may be noted that Section 9(2) supra clearly enables assessment, reassessment, collection of duty etc. If the law were to be read in the said sense, in respect of Section 3 of the Tariff Act, a serious question would be cast upon the assessment under the Customs Act of the said liability to be taxed, for and because of the non-usage of the very terms pertaining to assessment. This interpretation would make the said provisions of law a fallacy and therefore the argument canvassed, in our respectful submission, originating in the backdrop of the penal provisions and applying them to a case and subject matter of interest payment, flowing from a legal enactment not pari materia, would be an incorrect and a misleading notion, based on an invalid/erroneous reasoning. We therefore are convinced of the inapplicability of the ratio of law in the India Carbon Ltd. case in facilitating the determination of the question involved in the present appeal.

(vi) Birla Cement Works & JK Synthetics Ltd.,[54]

129. As for the case of **Birla Cement Works & JK Synthetics Ltd.,[54]** Commercial Taxes Officer and State of Rajasthan, the said case, no doubt is concerned with payment of interest on the additional sales tax which was required to be paid for inclusion of freight amount in calculating the sales price, however the questions involved there were altogether different. The actual question concerned in the case besides payment of interest on the additional sales tax required to be paid, was whether in view of the unamended provisions of the law the appellant could be considered to owe a debt on the relevant date. The writ petition was however allowed but it was in the context of the peculiar and specific arguments, raised in the matter and so as not to make the relevant sections nugatory [clause (b) of Section 11B read with Section 11(2)].

(vii) Jain Brothers and others Vs. UOI,[11]

130. As for the case of **Jain Brothers and others Vs. UOI,[11]** the Hon'ble Court was concerned with imposition of penalty for non-compliance of notice. It was held therein that the same could be done only after assessments were completed. As already discussed at length regarding the fundamental difference between interest and penalty, it is

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54. 1994 (5) TMI 233 SC

asserted that the ratio of law in this case has no bearing to the legal question involved in the present matter, being completely irrelevant and unconnected to the facto-legal issues of the appeal.

(viii) Collector of Central Excise, Ahmedabad Vs. Orient Fabrics Pvt. Ltd.[5].

131. Like in the Khemka and Company (Agencies)[4] case, or the case of *Pioneer Silk Mills Pvt. Ltd. Vs. UOI* (1995 (80) ELT-507 Del.), the Hon'ble Court in the case of Orient Fabrics Pvt. Ltd., relied upon by the appellants, was concerned with the question of resorting to penalty proceedings (for non-payment of additional duty in terms of Additional Duties of Excise (Goods of Special Importance) Act, 1957) and resultant forfeiture of goods. The exact question as framed by the Hon'ble Court in the matter, is as under:

> "*The short question that arises for our consideration in these appeals, which arises from the judgments and orders dated 10.02.1997 and 26.03.1996, as regards jurisdiction of the authorities under the Central Excise Act, whether it is permissible to resort to penalty proceedings or forfeiture of goods for non-payment of additional duty in terms of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (for short 'the Act') by taking recourse to the provisions of the Central Excise Act and Rules framed thereunder.*"

Further, the deliverance of the ratio of the Supreme Court's decision in the aforesaid case rested on the following premise:

> "*20. The matter may be considered from another angle. The Parliament by reason of the Amending Act 32 of 1994*

> *consciously brought in the expression offences and penalties in sub-section (3) of Section 3 of the Act. The mischief rule, if applied, would clearly show that such amendment was brought with a view to remedy the defect contained in the unamended provisions of sub-section (3) of Section 3 of the Act. Offences having regard to the provisions contained in Article 20 of the Constitution of India cannot be given a retrospective effect. In that view of the matter too sub-section (3) of Section 3 of the Act as amended cannot be said to have any application at all."*

132. The Tribunal relying upon the decision in the case of Pioneer Silk Mills Pvt. Ltd. referred supra had held in the Orient Fabrics Pvt. Ltd. case, that the confiscation provisions cannot be applied thereto. It be noted that question herein, once again, was of a penal consequence- be it by way of forfeiture of goods or imposition of penalty- that would flow by way of non-payment or short payment of duty or any other infringement in law attracting punitive action and had no bearing with the leviability of interest on payment of Additional Duty of Customs leviable in terms of Section 3 of the Tariff Act. As discussed earlier at length, imposition of penalty and/or the levy of interest for short paid/not paid duty amount are two different aspects of matter and cannot be considered at the same threshold.

133. As the wide difference in aspects of "interest" and "penalty" have been extensively dwelt upon in earlier paras, there is no gainsaying reiterating the same in the context of the *Orient Fabrics Pvt. Ltd*. case, except to state that as the two connotations serve different objectives, the law concerning penalty cannot be equated and adopted to situations of interest applicability.

134. Thus, while the said case concerns the levy of penalty and the Hon'ble Court had occasion to examine the issue from considerations of penalty, the decision does not come in support of the issue at hand, where penalty is not the question involved. Simply speaking penalty has been held to be a deterrent against the commission of breach of that duty, and is a means to enforce the payment of tax.- (Ref- **Khemka and Company (Agencies) Pvt. Ltd. Vs. State of Maharashtra and State of Mysore Vs. Guldas Narasappa Thimmaiah Oil Mills**- 1975 (2) TMI-91 SC). Unless, it is shown that "levy of interest," is by way of an "additional tax", rulings of the Court delivered in the context of penalty cannot be applied ipso facto to environments and issues relating to imposition of interest. The context in the present matter being compensatory and not punitive action.

We therefore fail to derive any support from this ruling of the Hon'ble Court in favour of the appellant's contention.

135. Before, we conclude, it may appropriate to cite a ruling of the co-ordinate bench of this Tribunal delivered in the given context of issue herein:

The Tribunal in the case of **Atul Kaushik Vs. Commissioner of Customs (Export), New Delhi[55],** had held that Section 3(8) of the Tariff Act had clearly borrowed all provisions of the Customs Act for

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55. 2015 (330) E.L.T. 417- T

making them applicable to CVD. The aforesaid decision of the Tribunal was rendered after taking cognizance of several decisions of the Hon'ble Apex Court and the Hon'ble High Court (Delhi), and more importantly after dwelling upon the following cases, some of which have been relied upon by the appellants.

- **Khemka & Company Pvt. Ltd. Vs. State of Maharashtra[4],**
- **Pioneer Silk Mills Pvt. Ltd.[8],**
- **India Carbon Ltd. Vs. State of Assam[11],**

Relevant para of this decision of the Tribunal in *Atul Kaushik's* case is extracted below :-

> *"16. The appellants have also contended that penalty, interest and confiscation cannot be invoked in respect of evasion of countervailing duty (levied under Section 3 of the Customs Tariff Act, 1975) on the ground that the provisions relating to these aspects have not been borrowed into Section 3 of the Customs Tariff Act, 1975. In support of the principle that the penalty cannot be levied in the absence of penalty provision having been borrowed in a particular enactment, the appellants cited the judgments in the case of Khemka & Co. (supra) and Pioneer Silk Mills Pvt. Ltd. (supra). We are in agreement with this proposition and therefore we refrain from discussing the said judgments. The appellants also cited the judgement in the case of Supreme Woollen Mills Ltd. (supra), Silkone International (supra) and several others to advance the proposition that penalty provisions of Customs Act were not applicable to the cases of non-payment of anti-dumping duty and that the*

same principle is applicable with regard to leviability of interest [India Carbon Ltd. (supra) and V.V.S. Sugar (supra)]. We have perused these judgments. Many of them dealt with Anti-dumping duty/Special Additional Duty (SAD) leviable under various sections (but not Section 3) of Customs Tariff Act, 1975 and in those sections of the Customs Tariff Act, 1975 or in the said Act itself, during the relevant period, there was no provision to apply to the Anti-dumping duty/SAD the provisions of Customs Act, 1962 and the rules and regulations made thereunder including those relating to interest, penalty, confiscation. In the case of Pioneer Silk Mills (supra), the duty involved was the one levied under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and its Section 3(3) only borrowed the provisions relating to levy and collection from the Central Excise Act, 1944 and in view of that it was held that the provisions relating to confiscation and penalty could not be applied with regard to the duties collected under the said Act of 1957. None of these judgments actually deal with the CVD levied under Section 3 of the Customs Tariff Act, 1975. The impugned countervailing duty was levied under Section 3 of Customs Tariff Act, 1975. Sub-section (8) of Section 3 of the said Act even during the relevant period stipulated as under :-

> *"S. 3(8) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption*

> *from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under That Act."*

It is evident from Section 3(8) of the Customs Tariff Act, 1975 quoted above that all the provisions of Customs Act, 1962 and the rules and regulations made thereunder have been clearly borrowed into the said Section 3 to apply to the impugned CVD and so it is obvious that the provisions relating to fine, penalty and interest contained in Customs Act, 1962 are expressly made applicable with regard to the impugned countervailing duty. We must, however, fairly mention that in case of Torrent Pharma Ltd. Vs. CCE, Surat, CESTAT set aside penalty for evasion of Anti-dumping duty, CVD and SAD (para 16 of the judgement) on the ground that penal provisions of Customs Act, 1962 had not been borrowed in the respective sections of Customs Tariff Act, 1975 under which these duties were levied, but this decision of CESTAT regarding CVD suffered from the fatal internal contraction inasmuch as CESTAT itself in para 14 of the said judgment had expressly taken note of the fact that vide Section 3(8) of the Customs Tariff Act, 1975, the provisions of Customs Act, 1962 and the rules and regulations made thereunder had been made applicable to CVD charged (under Section 3 of Customs Tariff Act, 1975). In the light of this analysis, we hold that this contention of the appellant is legally not sustainable."

Conclusion

136. We find that, as discussed herein, the circumstances of the cases cited by the appellants are different and distinguishable, therefore we are of the view that their ratio cannot be applied to the issue herein.

137. We note that in view of Section 3 of the Tariff Act read with Section 12 of the Customs Act, the special additional duty is to be construed as Customs Duty and therefore in view of the provisions of the law, all the provisions of the Customs Act and Rules/Regulations made thereunder are squarely applicable to the issue at hand. Further, it is common knowledge that taxation does not concern principles of equity. If the appellants have failed in discharge of their statutory obligations or have been deficient thereto, consequences, advantages and disadvantages thereof shall follow. It is not open for the appellants to have the best of both ends.

138. For reasons foregoing and our discussions aforesaid, and following the law as laid down by the Courts as discussed hereinbove, we find no infirmity in the order of the lower authority under challenge, as the same is in accordance with law. The appeal filed by the appellants is therefore liable to be dismissed. We order accordingly and dismiss the appeal filed and uphold the impugned order under appeal.

(Pronounced in the open court on…12.01.2024.)

Sd/-
(R.Muralidhar)
Member (Judicial)

Sd/-

(Rajeev Tandon)
Member (Technical)

K.M