

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
REGIONAL BENCH**

Excise Appeal No. 309 of 2009

(Arising out of Order-in-Original No. CCE/Shillong/03/2009 dated 16/03/2009 passed by the Commissioner of Central Excise, Shillong)

M/s. Van Shah Fragrance Pvt. Ltd. **Appellant**
13th Miles, Tamluk Kuchi, G.S. Road,
Byrmihat, Meghalaya 793 101.

Vs.

Commissioner of Central Excise, Shillong **Respondent**
Morello Compound, M.G. Road, Shillong 793 001.

WITH

Excise Appeal No. 310 of 2009

(Arising out of Order-in-Original No. CCE/Shillong/03/2009 dated 16/03/2009 passed by the Commissioner of Central Excise, Shillong)

Shri Shiw Bhagwan Sharma **Appellant**
Fatasil Glass Factory Compound,
Guwahati-9.

Vs.

Commissioner of Central Excise, Shillong **Respondent**
Morello Compound, M.G. Road, Shillong 793 001.

AND

Excise Appeal No. 311 of 2009

(Arising out of Order-in-Original No. CCE/Shillong/03/2009 dated 16/03/2009 passed by the Commissioner of Central Excise, Shillong)

Shri Pawan Kumar Sharma **Appellant**
Fatasil Glass Factory Compound,
Guwahati-9.

Vs.

Commissioner of Central Excise, Shillong **Respondent**
Morello Compound, M.G. Road, Shillong 793 001.

Appearance:

Shri Devraj Sahu, Advocate, for the Appellants
Shri S. Mukhopadhyay, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

Date of Hearing: 28.07.2022
Date of Decision: 25.08.2022

FINAL ORDER NO.75497-75499/2022

PER: SANJIV SRIVASTAVA

These three appeals filed by the Appellants are directed against Order-in-Original No. CCE/Shillong/03/2009 dated 16/03/2009 of the Commissioner of Central Excise, Shillong. By the impugned order following is held:

"ORDER

4.1 Having regards to the above discussions and findings, I confirm the demand of Rs.2,14,11,650.00 (rupees two crores fourteen lakhs eleven thousands six hundred and fifty only) [Rs.2,11,75,964.00 as Cenvat duty and Rs.2,35,686.00 as Education Cess) and order for recovery of the differential amount of Rs. 1,91,71,111.00 (Rupees one crore ninety one lakh seventy one thousand one hundred eleven only) [Rs. 1,89,79,356.00 as Cenvat duty and Rs. 1,91,755.00 as Education Cess) for the year 2002-03 (for March 2003) to 2006-07 (upto January 2007) from M/s. Vansha Fragrances (Pvt.) Ltd. 13th Mile, Tamulikuchi, G.S. Road, Byrnihat, Meghalaya in terms of proviso to Section 11A of Central Excise Act, 1944.

4.2 I also order for appropriation of the amount of Rs.23,84,947.00 (Rupees twenty three lakhs eighty four thousand nine hundred forty seven only) [Central Excise Duty Rs.21,96,608.00, Education Cess Rs.43,931.00] and Interest Rs.1,44,408.00] which is paid by the said TR. 6 Challan No. 01/06-07 dated 26.02.07 for the period from March '06 bk W section 11 of the Central Excise Act, 1944.

4.3 I also order for recovery of interest in terms of Section 11AB of the Act ibid from the said factory.

4.4 I also impose a penalty of Rs.2,14,11,650.00 (rupees two cores fourteen lakhs eleven thousands six hundred and fifty only) on M/s. Vansha Fragrances (Pvt.) Ltd. 13th Mile, Tamulikuchi, G.S. Road, Byrnihat, Meghalaya under Section 11AC of the Act ibid.

4.5 I also impose a penalty of Rs. 2,00,000/- (Rupees Two Lakhs) only each on Shri Shiw Bhagwan Sharma S/o. Late Mohanlal Sharma, (ii) Shri Pawan Kumar Sharma S/o. Shri Shiw Bhagwan Sharma in terms of Rule 26 of Central Excise Rules 2002. However, I refrain from imposing any penalty on Smt Suzanne Langstieh."

2.1 Appellant 1 was manufacturing the Soya Products with the brand name "Gulab", but did not obtain registration from the Central Excise Authorities and did not pay the Central Excise Duty payable on such goods. On investigation it was found that the brand name "Gulab" was registered in the name of M/s. Vinita Soya Products, a partnership firm in which Shri S. B. Sharma as well as Shri P. K. Sharma were partners.

2.2 Revenue was of the view that Appellant 1, will not be eligible for the benefit of SSI Exemption under the Notifications 8/2002 dated 01/03/2002 as well as 8/2003 dated 1/3/2003, in as much as the assessee had manufactured and cleared Soya Products bearing the brand name of another person. After conclusion of investigation, Show Cause Notice dated 07/04/2008 was issued to the Appellant 1 as well as the two directors (Appellant 2 and Appellant 3) proposing the demand of Central Excise Duty for the disputed period, without the benefit of SSI Notification.

2.3 The show cause notice was adjudicated as per the impugned order referred in para 1, above.

2.4 Aggrieved appellants filed the appeals before CESTAT which were decided by the CESTAT as per its Order No E D/75189-75191/2019 dated 23.01.2019, holding as follows:

"8. The demand for Central Excise Duty confirmed in the impugned order has been seriously contested by the appellant only on the ground of time bar. It has been submitted on behalf of the appellant that they were under the bonafide belief that the goods manufactured by them were not liable to payment of duty, in view of the fact that the item Soya Bari did not find specific mention in the Tariff under Chapter 21. They have claimed that they became aware of the duty liability only with the issue of Notification No. 3/2006 dated 01/03/2006. In this connection,

we observe that the Chapter Note 9 to Chapter 21 (upto 28/2/2005) as well as chapter note 5 for the subsequent period make it clear that textured protein substances would be classifiable under 2108 of the tariff (upto 28/02/2005) and 2106 for the subsequent period. Accordingly, we are unable to accept the plea of the appellant that they were under the bonafide belief that the goods manufactured by them would not come under levy of Excise Duty. From record, it is seen that the appellant, who started manufacture of the products similar in 2003, did not approach the department with intimation of the same and did not take registration with the Jurisdictional Central Excise Authorities. Only in 2006, they appeared to have got in touch with the Central Excise Superintendent who issued clarification dated 28/02/2006 to the effect that they were not required to obtain Central Excise Registration. In these circumstances, we are of the view that the appellant cannot be absolved of the allegation of suppression. Consequently, we uphold the findings of the lower authority justifying the demand of Central Excise by invoking the extended period of time limit under Section 11A.

9. The other argument which is required to be considered is the submission that the appellant unit is situated in the North East Area where the benefit of exemption Notification No. 32/1999 dated 8/7/1999 was available to units set up in the area. However, it is not clear whether the appellant has claimed the benefit of such Notification before the Jurisdictional Authorities. Since, this is a conditional notification, the benefit of the same is required to be claimed and duly examined by the Jurisdictional Authorities before allowing the benefit. As such, we are unable to entertain these arguments at this stage.

10. The appellant has also pleaded that the penalties imposed on the assessee as well as the directors is exorbitant. The penalty imposable under the Provision of Section 11AC is equal to the total duty demanded under the provisions of Section 11A. There is no discretion involve in the levy of such penalty. We have upheld the finding of the Lower Authority justifying suppression, hence, the penalty under Section 11 AC cannot be waived.

11. In the facts and circumstances of the case, we are of the view that the penalties imposed on the two directors, merits reduction. Penalties imposed on Shri S. B. Sharma as well as Shri P. K. Sharma both directors are reduced from Rs. 2 lakh to Rs. 50,000/- (Fifty Thousand only) each.

12. In view of the above discussions, the impugned order is upheld, but for the above reduction in the penalties on the directors. The appeals are disposed off as above."

2.5 Aggrieved by the order of tribunal appellant 1 filed the Central Excise Appeal No 4/2019 before the Hon'ble High Court of Meghalaya. Hon'ble High Court vide its order dated 08.02.2022, disposed of the appeal stating as follows:

"5. The first issue that arises is as to whether such demand could have been made at all, particularly in respect of the period more than a year prior to the date of the demand. As noticed in the previous order, ordinarily a demand may be made to realise the duty for a period of one year from the date that the duty became payable; but an exception is carved out for a demand to be made for an earlier period if it is demonstrated by the department that the manufacturer intended to evade the duty.

6. According to the appellant, since the appellant was entitled to an exemption, in the sense that it would be reimbursed the excise duty that it had paid, in view of the existing Central Excise notifications, the question of intending to evade duty could not have arisen since the appellant would have been reimbursed the excise duty paid for the relevant product. On behalf of the department it is submitted that it may not be absolutely correct to say that the entire quantum of the excise duty would be reimbursed to the manufacturer and the scheme was modified from time to time. According to the department, the excise duty component would be reimbursed upon deducting the cenvat credit already claimed. The department also says that at a subsequent stage, the extent of exemption granted was that the amount reimbursed would be only to the extent of the excise duty on the value added to the product in the course of the manufacture.

7. More importantly, the department points out that not every manufacturer in Meghalaya would be entitled to the exemption by way of reimbursement or otherwise. In such context, several notifications published by the Central Excise authorities have been relied upon to demonstrate that the initial scheme was restricted to certain areas of Assam and Tripura and, later, designated places in Meghalaya were also included. According to the department, the manufacturing unit of the appellant is not located within any area designated by the applicable notification for the appellant to claim exemption by way of reimbursement.

8. This aspect of the matter was not taken into consideration, whether in the course of the order-in-original being passed or in the appellate order of the Tribunal. This is a question of fact on which there can be no two opinions and a physical verification is necessary to ascertain whether the manufacturing unit of the appellant falls within the area designated in the applicable notification for the appellant to be entitled to exemption by way of reimbursement.

9. The second aspect of the matter on which there is no discussion in the order of the Appellate Tribunal pertains to the disqualification of the appellant to be entitled to exemption on the ground that the appellant manufactured the product under the brand name of another. According to the appellant, it started manufacturing the soya chunks under the Gulab brand name with effect from December 1, 2006. The Appellate Tribunal has referred to the oral evidence of a regular customer of the appellant which appears to be a rather sweeping statement to the effect that the appellant has always been engaged in manufacturing soya chunks under the Gulab brand. The Appellate Tribunal placed great credence on such statement though there were no documents in support of the assertion nor any bill or voucher or the like relied upon by the department that would reveal that the appellant had manufactured soya chunks under the Gulab brand prior to December 1, 2006. The Appellate Tribunal also referred to the statements of two Sharma directors of the appellant, but such statements do not reveal the manufacture of the Gulab brand by the appellant prior to December 1, 2006.

10. When a person claims a benefit under any government scheme and the authorities seek to deny the eligibility of such person to obtain such benefit, the onus is on the authorities to demonstrate why the person would not be entitled to the benefit. As noticed above, it has been the consistent stand of the appellant that it did not manufacture the Gulab brand soya chunks prior to December 1, 2006. It was, thus, incumbent on the department to deny the appellant exemption for the period prior to December 1, 2006 only upon cogent material being produced in such regard, whether by way of bills or vouchers or unimpeachable statements or otherwise.

11. The third issue that requires to be looked into and answered is related to the appellant being entitled to the exemption or not. The wording of the applicable notification exempts a manufacturing unit as an SSI till such time it attains a turnover of Rs.1 crore. In the present case, the initial turnover in 2003-04 was extremely low and same picked up only in 2004- 05. In the event the appellant was entitled to exemption as claimed, it requires to be ascertained when the appellant's manufacturing unit exceeded the turnover of Rs.1 crore for the excise duty to be claimed only thereafter.

12. The three key aspects of the matter have not been addressed in the order of the Appellate Tribunal dated January 23, 2019 in the appeal arising out of the order-in-original of March 16, 2009. These issues cannot be conveniently addressed in the present proceedings which are conducted on summary basis on affidavit evidence. Further, as to whether a person is entitled to an exemption or not based on the geographical location of the manufacturing unit, is essentially question of fact that has to be ascertained. 13. Accordingly, the order impugned dated January 23, 2019 is set aside and the matter is remanded to the Appellate Tribunal with a request to render the opinion on the three key aspects indicated herein and on any other issue that may be relevant for the purpose of adjudication. The Tribunal is also requested to pass its reasoned order within three months of the receipt of the authenticated copy of this order, particularly since the demand pertains to the period of 2003-04, 2004-05 and 2005-06."

2.6 Appellants 2 & 3 also filed the Central Excise Appeal No 3/2019 and 5/2019 before the Hon'ble High Court of Meghalaya. Hon'ble High Court vide its order dated 08.02.2022 held as follows:

"These matters are connected with Central Excise Appeal No.4 of 2019 and pertain to the penalty imposed on the directors of the company owning the manufacturing unit for perceived evasion of excise duty. By an order passed earlier today, the manufacturer's appeal has been allowed by setting aside the order impugned passed by the Appellate Tribunal on January 23, 2019 and remanding the matter for a fresh consideration on certain key issues that have been elaborately indicated in the order passed by this Court.

As a consequence, the orders of penalty imposed on the present appellants stand set aside and these matters are also remanded for a fresh consideration by the Appellate Tribunal upon answering the issues indicated in the order pertaining to Central Excise Appeal No.4 of 2019.

Central Excise Ap.No.3 of 2019 and MC (Central Excise Ap) No.2 of 2019 along with Central Excise Ap.No.5 of 2019 and MC (Central Excise Ap) No.4 of 2019 are disposed of."

2.7 As directed by the Hon'ble High Court, the three appeals were taken up for consideration, in respect of the three aspects highlighted by the Hon'ble High Court.

3.1 we have heard Shri Devraj Sahu, Ld. Advocate representing all the three appellants and Shri S Mukhopadhyay Assistant Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellants learned Counsel submitted as follows:

- *For that the Appellant's Unit is eligible to claim benefit of SSI exemption under Notification No. 8/2003-CE, dated 01.03.2003 as it fulfils all the conditions of SSI exemption. It is pertinent to mention here that the initial year's aggregate value of clearance (2002-03) is Rs. 14,00,251/- and 2nd year's (2003-04) Turnover is Rs. 4,79,35,216/- and the appellant unit is eligible to avail at full rate of exemption for the Financial Year 2003-04 upto the*

progressive clearance of Rs. 1.00 Crore and thereafter, the appellant will automatically switch over to normal clearance at normal rate of duty. This exemption under Notification has not been discussed in the impugned Final Order by the Hon'ble Tribunal which requires to be discussed allowing exemption to the appellants. Further, the Appellant has not manufactured "Soya Bari" using "Gulab Brand" prior to 1st December,2006. Hence, the appellant unit is eligible for claiming SSI exemption for the financial Year 2002-03, 2003-04 to the extent of maximum benefit of exemption allowed under the Notification No. 8/2003 CE, dated 01.03.2003 upto maximum of progressive clearance of Rs.1.00 Crore at Nil rate of duty in the financial year 2003-04. This aspect has not been considered by the Tribunal in its Final Order dated 01.03.2019 which required to be considered by the Hon'ble Tribunal.

- *For that the demand raised by the Ld. Commissioner, Central Excise, Shillong, invoking extended period of limitation and raising demand for the period from March, 2003 to January, 2007 is not sustainable in law. The impugned Order in-Original is liable to be set aside on the Grounds of limitation. It is submitted that in normal case, the demand is to be raised within One (1) Year from the due date of filing of Statutory Returns ER-I under Sec. 11A of the Central Excise Act, 1944 and extended period of limitation is applicable in case of wilful suppression of material facts intending to evade payment of Central Excise duty. In the present case, the manufacturing activity of the appellant was in the knowledge of the department on written intimation the department seeking clarification on dutiability of Soya Bari, by its letter dated 23rd August,2006. (Copy of the letter dated 23.08.2006 is enclosed as Ext. - J). The Range Superintendent in its reply issued a certificate dated 13.09.2006 that "Soya Nugget (Soya Chunk) falling under Central Excise Tariff Heading 23.04 and the product attracts "Nil" rate of duty and Central Excise Registration is not required. (Copy of the Department Certificate dated 13.09.2006 is marked as*

Ext.- K). In the present circumstances, the normal period of limitation to raise demand is one year from the due date of filing ER-I Return and invoking extended period of limitation is not sustainable in the present situation under Sec. 11A of the Central Excise Act, 1944.

The impugned Order confirmed demand invoking extended period of limitation is not sustainable in law. In the case of Continental Foundation [2007 (216) ELT 177 (S.C)], wherein the Hon'ble Apex Court has held as - From the above interpretation of Sec. 11A by the Apex Court, there is no suppression of facts caused by the appellants and invoking extended period of limitation is not sustainable in law and the present impugned Order-in-Original is liable to be set aside on the grounds of limitation.

- *For that the product "Soya Bari" with Brand name has been classified by the Department under CETH 2108. 99 from March, 2003 to February, 2005 attracting Central Excise Duty at 16 % Ad valorem, for non-branded "Soya Bari" is classified 2108.91 attracts "Nil" rate of duty. The product "Soya Bari" has been classified under 2106.10.00 under the revised 8-digit Tariff, the Tariff Rate of Duty - 16% Ad valorem, w.e.f 1st March, 2005 and on words. In the present case, the appellant has cleared unbranded goods prior to 1st December,2006. Hence, the duty on the unbranded goods so cleared shall be at Nil rate of duty therefore, no duty shall be charged on the appellants. The Goods "Soya Bari" has been classified by the department under CETH - 2106.10.00 attracting 16% Ad valorem w.e.f 1st of March 2005. However, the said demand is subjected to limitation u/s. 11A of the Central Excise Act, 1944 as applicability of extended period of limitation is applicable in the present case. There will be no demand of duty for the period from March, 2005 to November 2006 as the period is beyond limitation of one year.*
- *For that the Appellants discharged their Central Excise Duty liability w.e.f 1st March, 2006 from the date of enforcement of exemption Notification No. 3/2006-CE, dated 01.03.2006 at 8% Ad valorem till January, 2007. Vide Notification No. 3/2006-CE, dated 01.03.2006 (Ref.*

SI.No.28, CETH - 2106 – Rate of Duty -8 %, Condition - No.] The Appellants are entitled to refund of whole of the duty paid under North East Area based exemption Notification No. 32/1999-CE, dated 08.07.1999.

- *For that the Appellants unit is located in the exempted area covered under Notification No. 32/99-CE, dated 8th July, 1999. Hon'ble Supreme Court in the case of Union of India Vs. V.V.F Ltd. and Others reported in 2020 (372) ELT. 495 (S.C), wherein the Hon'ble Apex Court settled the law, referred Paragraph -16. The present case in hand the situation of dutiability and claiming refund under North East Area based Exemption is a complete revenue neutral situation and there cannot be any possibility of suppression of fact with mala fide intention intending to evade payment of duty by the appellant. It is a settled law that in case of revenue neutral situation, there cannot be any possibility of evasion of payment of duty by the appellant and the extended period of limitation cannot be invoked. The appellant relies on the ratio of the Apex Court as held in the case of Nirlon Ltd. Vs. Commissioner of Central Excise, Mumbai, reported in 2015 (320) ELT 22 (S.C), wherein the Hon'ble Apex Court has held at para 9 and 10 as - From the above interpretation of the provisions of Sec. 11A of Central Excise Act, 1944 by the Hon'ble Apex court, there is no mala fide intention in the present case intending to evade payment of duty and the demand from March, 2003 to 31st March, 2007 is beyond limitation and the demand is liable to be set aside in the ends of justice.*

- *For that that the goods "Soya Bari" was not specified under the 6 Digit Central Excise Tariff Act,1985 as there is no specific entry in Tariff in the First Schedule attracting duty for the product in question and not liable for payment of Central Excise Duty under the Central Excise Act,1944 and there is no contravention of the Central Excise Act or Rules made thereunder by the Appellants as alleged in the Show Cause Notice.*

According to Sec. 2 of the Central Excise Tariff Act, 1985, Duty specified in the Schedule to be levied. "The rate at

which duties of excise shall be levied under the Central Excise Act, 1944 (1 of 1944) are specified in the First Schedule and Second Schedule. Since, no rate has been specified for the product 'Soya Bari' in the First and Second Schedule to the Tariff Act, 1985 no duty is levied and as such, the impugned order-in-original is not maintainable in the eye of law and liable to be dropped for the ends of justice.

- *For that the department wrongly classified the product 'Soya Bari' under Chapter Sub-Heading 2108.99 which is not in accordance with the Rule of Interpretation of the Excise Tariff. As per rule 4 of the Rule of interpretation goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are more akin. As per Rule 6 "for legal purpose, the classification of goods in the sub-heading of a heading shall be determined according to the terms of those sub-headings and any related sub-heading Notes and, mutatis mutandis, to the above rules, on the understanding that only sub-headings at the same level are comparable. For the purposes of this rule, the relative Section and Chapter Notes also apply, unless the context otherwise requires." In the present circumstances the product 'Soya Bari' was not specifically classified in the First Schedule to Central Excise Tariff Act, 1985 upto 28.02.2006. Hence, no duty is payable by the Appellants classifying under a wrong Chapter Sub-Heading determined by the department which is not in accordance with Sec.2 of the Central Excise Tariff Act 1985.*
- *For that the department has committed an error in classifying the goods 'Soya Bari' on the basis of the classification mentioned in the Exemption Notification No.3/2006 CE. dated 01.03.2006 as shown at Sl. No. 29 - Texturised vegetable Product (Soya Bari) classified under Tariff Heading 2106 90 and demanding duty prior to the date of Notification is not tenable in the eye of law. It is submitted that issue of classification disputes is to be decided independently on the basis of words and language*

used in the relevant Tariff Entry and not in the description in the Notification. It is further submitted that an exemption notification is not an indicator to correct classification; it may be looked into, but cannot be made the basis for determining classification. While a statutory notification may be looked up to ascertain scope of an entry in the Tariff, it could not be used to determine or settle disputed classification of goods. The Appellants relies on the settled case as held in the case of -

- *SIEMENS Ltd. [1998 (100) ELT 239 (Tri)];*
- *Gujarat State Fertilizers Ltd., 1996 (83) ELT. 624 (Tri);*
- *Kishan Chemicals 1996 (86) ELT. 543 (Tri),*
- *Padmavathy Panel Boards Ltd. 2001 (132) ELT. 36 (Tri);*
- *Nirlon Synthetic Fibres & Chemicals [2001 (135) ELT. 1254 (Tri)]*

Under the present circumstances, confirmed demand on the basis of exemption Notification pertaining to its previous period is not sustainable in law. Hence, the demand confirmed in the impugned Order-in-Original dated 16.03.2009 is not tenable in law and is liable to be set aside in the ends of justice.

- *For that the impugned Show Cause is issued by the department on wrong classification of the product referring the Exemption Notification No. 03/2006-CE, dated 01.03.2006, holding 'Soya Bari' to be classified under 2106.10.00 under the description of "protein concentrates and textured protein substances" to be the proper classification effective from 01.03.2006, whereas the department raised demand from the commencement of production w.e.f March, 2003. The Ld. Commissioner, Central Excise confirmed the demand without applying her mind judiciously. The impugned Order-in Original dated 16.03.2009 is not maintainable in the eye of law and the demand liable to be set aside on the grounds of wrong classification of product. It is submitted that classification of goods is made on the basis of the Tariff Entry as*

obtaining at the relevant time. Any amendment to Tariff Entry subsequently cannot have the effect of unsettling the classification already made, unless the amendment is given retrospective affect either expressly or by necessary implication. A statement in the explanatory notes (not in the Bill itself or the Notes on Clause thereto) that the amendment was a clarificatory nature, cannot have the effect of making it retrospective. Hence, subsequent amendment of Tariff entry not to effect earlier classification and the demand raised by the department is not sustainable and the impugned Order in Original is liable to be set aside.

- *For that the department has classified the product 'Soya Bari' under the Tariff Entry 2108.99 for the period from March 2003 to February 2006 without considering the nature of the product. It is settled by the Apex Court in the case of Collector Vs. Krishna Carbon Paper Co., 1988 (37) ELT. 480 (SC), that where no definition of a Tariff Entry is provided in the statute itself, for ascertaining a correct meaning thereof, reference to dictionary meaning is not always a safe guide but it is apt to be a somewhat delusive. The correct guide is the trade meaning. The trade meaning is one which is prevalent in that particular trade where the goods is known or traded. If special type of goods is subject-matter of a fiscal entry, then that entry must be understood in the context of that particular trade, bearing in mind that particular word. Therefore, commercial parlance test is the best test for classification of the goods, when not artificially defined by law. It is further, held by the Apex Court and High Courts in a plethora of decisions that for the purposes of identifying a commodity, what is known as and understood in the business and commercial circle is much more relevant and not what is described in several dictionaries and encyclopaedia. Referred cases :*

- *Wood Paper Ltd., 1991 (53) ELT. 189 (Guj-DB);*
- *Gujarat Woollen Felt Mills, 1977 (1) ELT 24 (SC);*
- *Dunlop India Ltd. AIR 1977 SC 597 (SC); (*
- *Dowell's Electro Works, 1990 (45) ELT 96 (Tri);*

- *Advani Oerlikon Ltd. Vs. UOI 1981 (8) ELT.432 (Bom.).*
- *For that the department has classified the product 'Soya Bari' under Chapter Sub-heading 2108.99 arbitrarily and without any evidence on records and raising demand on wrong classification is bad in law and liable to be set aside. In this context, it is submitted that the excise authorities must have materials and evidence before them, on the basis whereof they can determine the classification of a particular product. It would not just and fair to decide the classification of the goods on presumption basis. The excise authorities are under a duty to take all material evidence into consideration before reaching the conclusion under which heading or sub-heading of the Tariff Schedule a particular product falls and it will be clearly in error if they ignore the relevant material. They are required to consider all aspects of the matter and should not be guided by a singular fact of capability of a particular product to fall under a particular entry. It is also pointed by a three-judge Bench of the Supreme Court in Duncans Agro Industries, 1998 (98) ELT. 302 (SC) the parties should have lead evidence, both oral and documentary, on certain precise questions of fact which have a bearing on the construction and application of the relevant items in the Tariff Schedule which the department has not complied with and as such, the impugned Order-in-original is not maintainable in law and liable to be set aside for the ends of justice.*
- *For that the goods in question is not covered in the Schedule to the Central Excise Tariff Act, 1985, no duty is payable by the notice and they cannot be brought under the Central Excise net. Hence, from the above facts and circumstances of the case, there is no violation of the provisions of the Central Excise Rules, 2002 or Central Excise Rules, 1944. The contention of the Id. Commissioner, Central Excise, Shillong, is not sustainable in the eye of law and the impugned Order in Original is liable to be set aside.*
- *For that the contention of the department as mentioned in paragraph 3 of the Show Cause Notice on carrying on*

production and clearance of "Soya Bari" under GULAB Brand by the Appellants from the commencement of Commercial production is a mere presumption having no concrete evidence and hence, not sustainable. In this context, it is submitted that the Appellants obtained the consent to use GULAB Brand from M/s. Vinita Soya Products, Guwahati on 1st December, 2006 and used to clear their product using GULAB Brand w.e.f 01.12.2006 and onwards as evident from letter of No objection Certificate dated 01.12.2006 which is in the department custody on resumption of documents and prior to 01.12.2006 the Appellants was selling unbranded goods in the market through whole seller dealers. It is further, submitted that the Product "Soya Bari" cannot be taxed under Chapter Sub-Heading 2108.99 as the said goods was not covered under the Chapter Sub-Heading 2108.99 upto 28th March 2006. Further, for the sake of argument, the Appellants was also eligible for SSI exemption for the Financial Year 2002-03 and 2003-04 as the aggregate value of clearance was less than 300 lakhs and clearing unbranded product. The Id. Commissioner, Central Excise, Shillong, failed to consider this aspect in her impugned Order-in-Original and uphold the allegations in her Order in Original. The impugned Order-in Original is not maintainable in the eye of law and liable to be set aside on this ground.

- *For that the duty demanded in the show cause notice is not payable by the Appellants for the period from March, 2003 to 28th February 2006 as the product was not covered under the Central Scoise Tariff which was subsequently included in the amended Tariff w.e.f 28th February,2006. Further, the Appellants has already discharged their duty liability for the period from 1st March, 2006 to February, 2007 by deposit of Rs. 21,96,608/- towards basic excise duty; Rs. 43,931/- towards Ed. Cess and paid interest for the said period Rs. 1,44,408/- by TR-6 No. 01/06-07 dated 26/02/2007 and TR-6 Challan No. 02/06-07 dated 30/03/2007 by depositing Rs. 95,574/- towards Basic Excise and Rs.*

1805/- towards Ed. Cess. Copy of the TR-6 Challan No. 01 /06-07 dated 26/02/2007 and TR-6 Challan No. 02/06-07 dated 30/03/2007 is enclosed and marked as Ext.- L for reference.

- For that the Appellants have no mala fide intention in payment of duty and to get their unit registered under the Central Excise Act, 1944. Since, the product processed by them is not covered under the Central Excise Tariff Act, 1985 the Appellants in no case has violated any of the provisions of central Excise Law. It is submitted that the Appellants voluntarily approached the department personally time and again and they were told by the department that their product is not coming under the Central Excise net and not dutiable. At last the appellant requested the department to issue a certificate to that effect and the department issued a certificate under C. No. I(30)5/Misc.Hansha/Byr-1/06 dated 13.09.2006 specifying that the product falling under Tariff Heading 23.04 and do not attract duty on this product and it is not required to obtain Central Excise Registration, Copy of the Certificate issued from the Range Office Byrnihat dated 13.09.2006 is enclosed and marked as Ext. - K for reference. Further, it is to mention here that the manufacturing premise is located under the Notified Area under N.E Exemption Notification No. 32/99 CE. dated 8th July, 1999 as amended by Notification No. 23/2000-CE, dated 29.03.2000 and is eligible for claiming exemption of the duty paid by way of refund for a period not exceeding 10 years and as such, there is no question of evasion of duty as alleged in the Show Cause Notice. The Appellants claimed their Refund under North East Area based exemption for the month of March, 2007 and April, 2007. Copy of the claim of Refund is Ext. - M for reference. The Ld. Commissioner, Central Excise, Shillong, has committed an error by upholding the allegations blindly and without applying her mind judiciously. Hence, the impugned Order-in-Original is liable to be set aside on this ground.
- For that the Appellants has already discharged their duty liability much before the issue of the Show Cause Notice.

The Appellants has also approached the department for registration of their unit. The department clarified that Registration is not required in the appellant's case as the product manufactured by them do not attract duty. From the above facts and in the circumstance of the case, the Appellants in no case have mala fide intention in evading duty. The allegation of the department intentionally evading duty is not sustainable in the eye of law. The contention of the Id. Commissioner, Central Excise, Shillong, is not sustainable in the eye of law and liable to be set aside.

- *For that no penalty u/s. 11AC of the Central Excise Act, 1944 is warranted in the instant case as there is no contravention of provisions of the Central Excise Act and Rules and no mala fide intention to evade duty in the instant case.*

3.3 Arguing for the revenue learned authorized representative re-iterated the findings recorded in the impugned order and submitted as follows:

- The appellant 1 had manufactured and cleared the goods bearing the brand name "Gulab" which was not owned by them. The investigation conducted by the department has established that the brand name was owned by M/s. Vinita Soya Products which is a partnership firm. The Appellant 1 is a Private Limited company and is distinct from the partnership firm, in which their directors are partners.
- even if the brand name is used by the appellant with the NOC from the owner of the brand name, it cannot be considered as use of brand name belonging to the appellant. Thus appellant1 will not be eligible to avail benefit of Notification No 8/2003-CE as amended from time to time. .
- Soya Bari, is very much covered within the Central Excise Tariff under Chapter 21. For the period when the tariff had six digit classification, the item was covered under CETH 2108.99. As per Chapter Note 9 to chapter 21 which inter alia includes "Protein concentrates and textured protein substance". The item Soya Bari is in the nature of textured

protein substance. For the period subsequent to 1/3/2005, when the tariff has eight digit classification, the same item is found under CETH 2106 1000.

- Thus appellant 1 could not have a bonafide belief that the items manufactured by them were not covered in the tariff, in view of the above.
- The Adjudicating Authority has recorded detailed findings on the question of classification of the goods manufactured as well as the rate of duty chargeable under Section 4A of the Central Excise Act, during the period of dispute.
- Appellant has claimed the benefit of the SSI only for the period 2002-2003 and 2003-2004.
- The impugned order merits has no interference.

4.1 We have considered the impugned order along with submissions made in the appeal and during the course of arguments, in light of CESTAT Order No E D/75189-75191/2019 dated 23.01.2019 (Refer para 2.4 above) and the decisions of Hon'ble High Court of Meghalaya dated 08.02.2022 (refer para 2.5 and 2.6 above).

4.2 Hon'ble High Court has vide its order, remanded the matter to the tribunal for consideration of three aspects framed by them in their order. From the facts of the case and the order of the Hon'ble High Court it is quite evident that the issue in respect of classification of the goods namely 'Soya Bari' has attained finality with the order of CESTAT dated 23.09.2019 and the only issues that need to be considered are the three aspects for which matter has been remanded. The three aspects that have been highlighted by the Hon'ble High Court are as follows:

- (i) Whether in facts and circumstances of the case the benefit of exemption Notification No 8/2002-CE and 8/2003-CE (as amended from time to time), will be admissible to the appellant 1 during the period 2002-03 and 2003-04.
- (ii) Since the SSI Exemption is granted for the turnover upto the value of Rs 1 crore, the time when the appellant crossed this turnover limit of one crore needs to be ascertained.

- (iii) Whether for the reason that the benefit of exemption under Notification No 32/1999-CE (as amended from time to time) will be admissible to the appellant 1, appellant can be said to have intention to evade payment of duty, to invoke extended period of limitation as per proviso to Section 11A (1) of the Central Excise Act, 1944.

4.3 For confirming the demands made against the appellant 1 and for imposition of penalties on all three appellant, Commissioner has in the impugned order recorded following findings:

"3.1.1 The said factory in turn has contested that they were not liable to pay any Central Excise duty as their products "Soya Bari" was not covered under Schedule to the Central Excise Tariff Act, 1985 till 28.02.06. They also disputed the allegation of using the brand name since March, 2003 i.e. inception of their factory and also that they are eligible for SSI benefit for the years 2002-03 and 2003-04 as the total turnover was less than 300 lakhs etc. The issues involved in this case are discussed in the following paragraphs: -

3.2 For demand of duty, the department has classified the impugned product under Sub heading No. 2108.99 till 28.02.2005 and under the new regime of 8 digit classification code under Sub-heading No. 21061000 w.e.f. 01.03.2005. The said assessee has contested these classifications on the pretext that the Sub-heading 2108.99 and/or 2106000 does not cover their products till the issue of exemption Notification No. 3/06 dated 01.03.06. They also made a reference to Chapter Note 10 of Chapter 21 of Central Excise Tariff Act, 1985. They contended that the Sub-heading 2108.99 is an exclusive entry for "edible preparations" and by dint of the said Chapter Note 10 it includes in it the goods such as "Sweetmeat, Namkeen, Bhujia" etc. and that their product "Soya Bari" does not fit into this sub-heading since it is not fit for direct human consumption as an edible product such as "Bhujia and Namkeen" etc. as is understood in common parlance. They also have referred to the rules of interpretation in support of their contention that the classification of their products under 2108.99 made by the

department is wrong and therefore they are not liable to pay any duty under that Sub-heading. I find that though the said assessee has referred to Chapter Note 10 which speaks only about the Sub-heading 2108.91 and 2108.99 but they have very consciously avoided Chapter Note 9 of the same Chapter 21 which reads as "Heading No. 21.08 inter alia includes (a) protein concentrates and textured protein substances ; (b).....(c).....upto (). Soya Bari is nothing but "protein concentrates" and/or "textured protein substance" as mentioned in the said Chapter Note 9 and therefore, is classifiable under 21.08 as "edible preparation, not elsewhere specified" and I find that it is appropriately classified under Sub heading No. 2108.99 as "other" attracting duty @ 16% Adv. I find that Chapter Note 9 as mentioned above unambiguously includes in it the impugned product, "Soya Bari." The rules of interpretation as referred to by the said assessee are therefore superfluous and not sustainable in law. When the Chapter Note very clearly includes in its ambit the same product very specifically, there can be no question raised on the same, since all the rules of interpretation etc. are satisfied. It is provided in Rule 5 of the Rules of interpretation that " for legal purpose, the classification of goods in the sub-heading of heading shall be determined according to the terms of those sub heading and any related Chapter Note and, mutatis mutandis, to the above rules, on the understanding that only sub-headings at the same level are comparable. For the purposes of this rule, the relative Section Notes also apply, unless the context otherwise requires." It is therefore very clear from this Rule of interpretation that the Chapter Note is the most vital ingredient for classifying some product under a particular sub-heading and when the Chapter Note 9 is very specific in the instant case, hence the classification as made by the Department is appropriately done and there can be no ambiguity regarding its classification.

3.2.1 On this issue of classification of the impugned product, "Soya Bari" I also find that the Hon'ble Tribunal Delhi in the case of Sonic Biochem Extraction (P) Ltd. vs Commissioner of Central Excise as reported in 2004(167)ELT 430 has also held inter alia in regard textured soya protein namely mealmaker,

soya chunks and protein rich soya granules claimed as processed products, that mere fact that the product after being boiled is garnished with spices and salt etc. will not take away its character of preparation in nature of instant food mixes and hence is classifiable under Heading 21.08 of Central Excise Tariff Act, 1985.

3.2.2 In view of the foregoing paragraphs, I find that the contention of the said factory that the impugned product "Soya Bari" cannot be classified under 21.08 is totally unfounded and not tenable, therefore, the duty at the prescribed rate of 16% is chargeable and since they have not paid the duty, it is recoverable from them in terms of Central Excise law and procedures. The case law referred to by them in this context have no bearing in the instant case in view of the above paragraphs. The case laws cited by them dwell altogether on different premises of circumstances and law. The case laws cited refer to the rules of interpretations and/or the dictionary meaning or the common trade name etc. I find that these are all being followed in true terms of their letter and spirit of the case laws cited by the Department. Therefore, it is not necessary to separately deal with the case laws cited and they have as such no bearing on the instant case, in view of the specific provisions in the chapter note (No. 9) itself as discussed in the foregoing paragraphs.

3.2.3 The said factory has also contested that the Department has classified their product only after the issuance of Notification 3/2006 on 01.03.2006 and that prior to issuance of this notification, "Soya Bari" was not classifiable under any sub-heading or heading in the Central Excise Tariff Act, 1985. I find that this Exemption Notification mentions "Soya Bari" in bracket after the phrase "textured vegetable protein" which also leads to the only conclusion that this phrase "textured vegetable protein" as mentioned in Chapter Note 9 of Chapter 21 of the erstwhile schedule to the Central Excise Tariff Act in force during the period till 28.02.2005 as well as in sub heading 21061000 as effective from 01.03.2005 also included in it the impugned goods "Soya Bari." The sub-heading 2106000 reads as "Protein concentrates and textured protein substances," which is the

same as in the said exemption Notification. The only difference is that the exemption notification bears an additional explanatory phrase "Soya Bari" within a bracket. This bracketed specification is meant only to specify it that the exemptions would be available only to "Soya Bari" and not to any other products/substances which may be classifiable under this sub-heading 21061000. The plea of the said factory that the said sub-heading included goods of the nature of instant food and/or the goods like "Namkeen", "Bhujia" etc. therefore, does not sustain. The contention of the factory for not paying the duty on the pretext that it was not classifiable in the Central Excise Tariff prior to 01.03.2006 is misplaced and not based on real fact of law for the time being in force. I find that the impugned product was classifiable under the sub-heading 2108.99 till 28.02.05 and under the sub-heading 21061000 w.e.f. 01.03.05.

3.3 Regarding the use of Brand Name, the said assessee has contended that they have used the brand name "Gulab Brand" w.e.f 01.12.2006 as is evident from the 'No objection certificate issued by M/s Vinita Soya Product, who is the owner of the brand name and that prior to this period, they have cleared their goods without any brand name to sell their product through whole sale dealers, whereas the allegation is that they have used the brand name since the commencement of their commercial production and clearance of the goods from March 2003. On the issue of brand name, I find that various personnel involved in the business with said assessee either as purchaser/ dealer or as business partner etc. have unambiguously expressed and admitted the use of brand name "Gulab Brand" for marketing of the products since March/2003 i.e. since commencement of their commercial production. Shri Narendra Kumar in his statement dated 30.11.2007 has inter alia admitted that they have purchased Gulab brand of Soya Bari from the said factory for exporting the same. He also stated that unbranded products were not exported and that they have exported only the Gulab brand of Soya Bari during the preceding four years. He of course clarified that there is no document including Bills of Export wherein this brand name is mentioned. Shri Shiw Bhagwan Sharma, Managing Partner of both M/s Vansha Industries and

M/s Vinita Soya Products in his statement dated 07.03.07 confirmed that the brand name "Gulab brand" belongs to M/s Vinita Soya Products. Shri Raju Pareek in his statement dated 26.02.2007 also confirmed that the said factory has been selling their products under the brand name Gulab brand. Shri Pawan Kumar Sharma in his statement dated 20.02.07 also has admitted that the said assessee has been using the brand name Gulab brand for marketing their products. He also confirmed that the brand name is registered in the name M/s Vinita Soya Products and that the said factory has been authorized to use the brand name free of cost. He also stated that though M/s Vansha Fragrances Pvt. Ltd. is having a separate legal entity, 2(two) Directors of the company are common to their partnership firm, M/s Vinita Soya Products. Moreover, they have one common trading firm in the name of Sharma and Sharma, located at Kayal Market, Fancy Bazar, Guwahati - 1 through which they sell the products of both the firms.

3.3.1 It is therefore apparent from the above statements that a common brand name i.e. "Gulab Brand" was used for marketing of the products manufactured by the said factory as well as manufactured by M/s Vinita Soya Products, who happens to be the brand name owner. It is also apparent that the same products bearing the same brand name were sold from the common marketing outlet as stated by Shri Pawan Kumar Sharma. It leaves no room for doubt that the goods manufactured at Vinita Soya Products and Vansha Fragrances were marketed under the same Brand name i.e. "Gulab Brand" from the same outlet of marketing and the goods reached to ultimate customers like Shri Narendra Kumar, who had confirmed to have exported only the Gutab Brand of the products purchased from the said factory for his export business since 2003 (four years preceding 2007 as stated by him in his statement dated 30.11.2007). Shri Narendra Kumar also has confirmed that only the branded Soya Bari bearing the brand name "Gulab Brand" were exported and they had purchased the goods for export from the said factory. It is, therefore, clear that the said factory had used the brand name Gulab Brand for marketing their products manufactured in their factory though

very consciously they have not maintained any record of use of the brand name during the earlier period. But I find that the statement of one Managing Partner of the said factory holds immense importance, moreover, the same statement being corroborated by other statements, it attains the status of evidence.

3.4 The said assessee has claimed that they are entitled for the benefit of SSI Exemption for the years 2002-03 and 2003-04 since they did not cross the threshold limit of three hundred lakhs and that since they cleared only the unbranded products. I find that during the material period, the Exemption Notification in force was Notification No. 8/02 dated 01.03.02 and Notification No. 8/03 dated 01.03.03 which extended the benefit commonly known as "SSI Exemption Benefit". But both the Notifications in unequivocal terms barred the benefit of this SSI Exemption Notification to any Industrial unit who used any brand name or trade name whether registered or not, belonging to another person for the specified goods. It has been discussed in detail in the foregoing paragraphs regarding use of brand name by the said factory during the material period with the inference that the said assessee used the brand name "Gulab Brand" for marketing their products which belongs to M/s Vinita Soya Products. And therefore it is a point of law that they were not entitled for the SSI Exemption benefit. It is also on record that the said assessee did cross the clearance value of Rs. 4.79 crores during 2003-04 and by the conditions of threshold limit of clearance value, as laid down in the SSI Exemption, they were not entitled for the benefit from the next year i.e. 2004-05. However, I find that since the assessee was not entitled for the benefit of the said SSI Exemption for using the brand name belonging to another person which is one of the conditions of the SSI Exemption Scheme under the said Exemption Notifications, therefore, discussions on other conditions of the SSI Exemption Scheme like the threshold limit etc becomes redundant.

3.5 The assessee have contended that they have discharged the duty liability by depositing the excise duty of Rs.22,92,182.00 along with Education Cess of Rs.45,736.00 and Interest of Rs. 1,44,408.00 and that they have no other liability towards

payment of Central Excise duty as no duty was payable during period till 28.02.06, as their products were not included in the Central Excise Tariff Act and for that they are eligible for SSI benefit. But in view of the discussions made in the paragraphs (supra), I am of the view that the classification as contained in the show cause notice is appropriate and they are not eligible for SSI Exemption benefit in view of the prevailing law in force during the relevant time. The said factory is, therefore, liable to pay the differential amount of Rs. 1,89,79,356.00 towards CENVAT duty and Rs. 1,91,755.00 towards Education Cess which is recoverable from them in terms of Proviso to Section 11A(1) of Central Excise Act, 1944. The amount so deposited by the said factory is also liable to be appropriated into the exchequer.

*3.6 Regarding the interest, I find that the interest in such cases of evasion of duty by way of manufacture and clearance of goods without payment of duty and without observing any legal formalities is mandatory and specific in nature. The said manufacturer has also admitted the fact of their liability to pay the interest and they have already paid certain amount towards payment of interest, which is liable to be appropriated towards the exchequer. But their stand of not paying the duty on the rest of the period involved in the instant case, as discussed (supra), carries an additional liability of paying the interest at the appropriate rate for the remaining period, for which they still have not paid any duty. Therefore, interest for the rest period also is leviable in terms of Section 11AB of the Act *ibid* and recoverable from them.*

3.7 Regarding invoking extended period of limitation under proviso to sub section (1) of Section 11A of Central Excise Act, 1944 and regarding imposition of penalty, the said factory has pleaded ignorance and shoulders the responsibility on the Department with the plea that they have approached the Department, who verbally instructed them that their products were not dutiable and that the department issued a certificate on 13.09.2006 certifying that their products under TSH 23.04 do not attract duty and therefore registration was not required. They adduced a copy of the certificate, as mentioned above. I find that the plea of the said factory is not sustainable in law, as

it is well settled that there is no estoppel against the taxing statute. Further, I find from the correspondences on record, namely, the letter dated 23.08.2006 from the said factory addressed to the Superintendent, Central Excise, Byrnihat, Meghalaya; the letter C No I (30) 5/ Misc/ Vansha/ Byr-!/06/776 dated 30.08.2006 from the Superintendent, Central Excise, Byrnihat Range -1, Meghalaya addressed to the said factory; the letter cum undertaking dated 04.09.2006 from the said factory to the Superintendent, Central Excise, Byrnihat Range -1, Meghalaya and the said Certificate C No I (30) 5/ Misc/ Vansha/ Byr-!/06/776 dated 13.09.2006, that the said factory has resorted to willful misstatement, suppression of facts and contravened the provisions of Central Excise Act, 1944 and the rules made thereunder with intent to evade payment of duty in as much as they suppressed the fact that they had given an undertaking before the Department vide their letter cum-undertaking dated 04.09.2006 before obtaining the any further said certificate dated 13.09.2006. The undertaking given by the said factory reads as, "However we do hereby undertake that in case of any further clarification over the Excise Tariff you or we find it falling under Central Excise and attracting duty, we would immediately deposit the duty amount, as soon as it comes to our knowledge."

3.7.1 In view of the above discussions and in view of the fact and circumstances of the case, it leads to the only conclusion that since their inception the said assessee has been resorting to willful misstatement, suppression of facts and contravened provisions of Central Excise Act, 1944 and the rules made thereunder with intent to evade payment of duty, as is evident from the fact on record during the course of this proceeding. It is also on record that their sister concern M/s Vinita Soya Products also adopted the same Modus Operandi and evaded Central Excise duty which is dealt with in a separate proceedings before a separate adjudicating authority.

3.7.2 Based on the facts and circumstances of the case, I find that the said assessee has been resorting to willful misstatement and suppression of facts by way of misclassification and wrong interpretation of law etc. with the sole intention of evading the

Central Excise duty. Therefore, I find that they are liable to penalty in terms of Section 11AC of the Act ibid. The said assessee in the instant case has failed miserably to adhere or respect the faith deposited on him/them in the statute and therefore, they have rendered themselves liable to penalty under Section 11AC of the Act ibid.

3.8 With regard to the proposal of imposition of personal penalty on S/Shri Pawan Kumar Sharma and Shiw Bhagwan Sharma and Smti Suzanne Langstieh, I find that they have been alleged to have dealt with the excisable goods with the intention to evade the duty and they have suppressed the material facts from the knowledge of the department. From the records of the case it is apparent that both S/Shri Pawan Kumar Sharma and Shiw Bhagwan Sharma had the knowledge that the goods they were dealing with were excisable goods and required to follow certain Central Excise procedures. Therefore, in view of their intent to evade duty of excise by resorting to mis-statement and suppression of facts, I find that both of them are liable to penalty as proposed in the instant case. However, in the case of Smti Suzanne Langstien, I find that she had no role to play in so far as the production and marketing of the excisable product. She was mere a signatory for certain formalities like land occupation etc. and therefore, I refrain from imposing any penalty on her.”

4.4 From the plain reading of the Notification No 8/2002-CE and 8/2003-CE, at para 4, reproduced below, it is evident that the benefit of exemption shall not be admissible in respect of the goods manufactured and cleared under the brand name owned by some other person:

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

.....

vii) the aggregate value of clearances of all excisable goods for home consumption by a manufacturer from one or more factories, or from a factory by one or more manufacturers, does not exceed rupees three hundred lakhs in the preceding financial year

4. The exemption contained in this notification shall not apply to specified goods bearing a brand name or trade name, whether registered or not, of another person, except in the following cases:

.....

Explanation,- For the purposes of this notification,-

(A) "brand name" or "trade name" means a brand name or a trade name, whether registered or not, that is to say, a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark with or without any indication of the identity of that person;

(B) where the specified goods manufactured by a manufacturer bear a brand name or trade name, whether registered or not, of another manufacturer or trader, such specified goods shall not, merely by reason of that fact, be deemed to have been manufactured by such other manufacturer or trader.

..."

4.5 Hon'ble High Court has in its order in para 9, have referred to this aspect and have directed the tribunal to arrive at the finding of fact, after taking into consideration the submission of the appellant that they started using the brand name, "Gulab" in respect of their goods only from 01.12.2006. Hon'ble High Court has stated that the finding rendered by the CESTAT in its order is not based on any documentary evidence such as invoice etc., but is based completely on statements made by the Directors of the company and some purchasers etc. Commissioner has in his order at para 3.3, 3.3.1 and 3.4 discussed this issue in considerable detail.

4.6 Undisputedly in para 3 and 4 of the Show Cause Notice dated 07.04.2008 following has been stated:

"3. Whereas it appears that since Inception of their commercial production w.e.f march 2003, the said factory has been carrying out their production and clearance under the

brand name "Gulab Brand" and from the documents so resumed, the production, clearance and value of clearance for the year 2002-03 (March 03), 2003-04, 2004-05, 2005-06 and 2006-07 (upto January 2007) [Detailed calculation in Annexure – A] are as herein below:

<i>YEAR</i>	<i>PRODUCTION (IN QTLS)</i>	<i>CLEARANCE (IN QTLS)</i>	<i>VALUE OF CLEARANCE</i>
<i>2002-03 (March 03)</i>	<i>770.60</i>	<i>770.60</i>	<i>Rs 14,00,251.00</i>
<i>2003-04</i>	<i>27,539.20</i>	<i>26,988.25</i>	<i>Rs 4,79,35,216.00</i>
<i>2004-05</i>	<i>21,908.20</i>	<i>22,407.55</i>	<i>Rs 5,05,90,351.00</i>
<i>2005-06</i>	<i>19,925.25</i>	<i>19,857.30</i>	<i>Rs 3,99,64,904.00</i>
<i>2006-07 (upto January 2007)</i>	<i>12,689.35</i>	<i>11,670.10</i>	<i>Rs 2,75,63,126.00</i>

4. Whereas it appears that the said factory cleared the goods under the brand name 'GULAB CRAND" bearing registration No 644446 dated 10.10.1994 under Trade Mark Act, registered in the name of M/s Vinita Soya Product and also the value of clearance of the said factory during the financial year 2003-04, 2004-05, 2005-06 exceeded Rs 3 crore, it appears that the said factory was not eligible for SSI exemption benefit under Notification No 8/2002-CE dated 01.03.2002 and Notification No 8/2003-CE dated 01.03.2003 and had contravened the provisions of Rules 4,5.6.8.9,11 and 12 of Central Excise Rules, 2002, in as much as they started production and cleared the goods in question, using the brand name of another person, without obtaining Central excise Registration and without payment of Central Excise Duty to the tune of Rs 2,11,75,964.00 and Education Cess Rs 2,35,686.00 total amount being Rs 2,14,11,650.00 (rupees two cores fourteen lakhs eleven thousands six hundred and fifty only) for the period March 03,

2003-04, 2004-05, 2005-06 and 2006-07 (upto January 2007) and also they have suppressed the material facts from the Central Excise Department."

4.7 From the facts as recorded in the Show Cause Notice and the adjudication order it is quite evident that the benefit of SSI exemption has been denied to the appellant not only for the reason that they were clearing the goods under the brand name "Gulab Brand" but also for the reason that they had crossed the maximum prescribed limit of Rs 3 crore for availing the said exemption in the year 2003-04. Further it is quite evident that the Appellant 1 is a Private Limited Company and the brand name used for the clearance of the said goods is registered in the name of partnership firm wherein the two Directors of the said unit are partners. **The Brand Name is registered in the name of partnership firm, M/s Vinita Soya Products since 10.10.1994.** In fact this fact itself is enough to hold that the appellant 1 was clearing the goods under the brand name of "Gulab Brand". However revenue has further adduced evidences by making the market enquiries and recording the evidences in the form of statement of the Directors of the Appellant 1 and purchaser of the goods. It is not just the statement but all the circumstantial evidences which have been taken into account by the adjudicating authority for concluding that the Appellant 1 had cleared the goods contrary to the provisions of the SSI Exemption Notification. Appellant has not produced any evidence either before the adjudicating authority or before us to establish to the contrary. In the case of D Bhoormull [1983 (13) ELT 1546 (SC)], Hon'ble Supreme Court has observed as follows:

"26. *Large scale smuggling of gold or other goods into India may pose a threat to the economic and fiscal interests and policies of the State. Such illicit trade is often carried on by organized international smugglers in the secrecy of the underworld. The more it is organized, the less are the chances of its detection, and greater the difficulty of proving the offences relating thereto. Laws have therefore been enacted in most countries, which mark a partial or wholesale departure in matters relating to smuggling, from the general principle of penal law, viz., that it is for the State or its Department to prove*

the offence against the accused or the defendant. Thus in England, Section 290(2) of the Customs and Excise Act, 1952 provides that where in any proceeding relating to Customs or Excise any question arises as to the place from which any goods have been brought or as to whether or not any duty has been paid or any goods have been lawfully imported etc., then the burden of proof shall lie upon the other party to the proceeding. In India Parliament inserted Section 178A by the Amending Act 10 of 1957, but it did not in its wisdom, go as far as Section 290(2) of the English Act. Section 178A in terms applies to "gold, gold manufacture, diamonds and other precious stones, cigarettes and cosmetics". With regard to these specified goods if seized under this Act in the reasonable belief that they are smuggled goods, the burden of proof that they are not such goods shall be on the person from whose possession, they are seized. But with regard to any other goods, the rule in sub-section (1) of Section 178A would not apply unless the Central Government had specifically applied the same by notification in the Official Gazette. It is common ground that at the material time, no such notification applying the Section to the categories of the goods in question had been issued. In respect of such goods the provisions of the Evidence Act and the Code of Criminal Procedure, do not, in terms, govern the onus of proof in proceeding under Section 167(8) of the Act. In conducting these penal proceedings, therefore, the Collector of Customs is to be guided by the basic canons of criminal jurisprudence and natural justice.

30. *It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167, to which Section 178A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, or universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable*

degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it-"all exactness is a fake". El Dorado of absolute Proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof often it is nothing more than a prudent man's estimate as to the probabilities of the case.

31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered to use the words of Lord Mansfield in *Blatch v. Archar* (1774) 1 Cowp. 63 at p. 65 "According to the Proof which it was in the power of one side to prove and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

32. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned : and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in 'Law of Evidence' (12th Edn. Article 320, page 291), the "presumption of innocence is, no doubt, *presumptio juris* : but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property," though the latter is only a presumption of fact. Thus the burden

on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice.

43. *If we may so with great respect, it is proper to read into the above observations more than what the context and the peculiar facts of that case demanded. While it is true that in criminal trials to which the Evidence Act, in terms, applies, this section is not intended to relieve the prosecution of the initial burden which lies on it to prove the positive facts of its own case, it can be said by way of generalisation that the effect of the material facts being exclusively or especially within the knowledge of the accused, is that it may, proportionately with the gravity or the relative triviality of the issues at stake, in some special type of case, lighten the burden of proof resting on the prosecution. For instance, once it is shown that the accused was travelling without a ticket; a prima facie case against him is proved. If he once had such a ticket and lost it, it will be for him to prove this fact within his special knowledge. Similarly, if a person is proved to be in recent possession of stolen goods, the prosecution will be deemed to have established the charge that he was either the thief or had received those stolen goods knowing them to be stolen. If his possession was innocent and lacked the requisite incriminating knowledge, then it will be for him to explain or establish those facts within his peculiar knowledge, failing which the prosecution will be entitled to take advantage of the presumption of fact arising against him, in discharging its burden of proof.*

44. *These fundamental principles, shorn of technicalities, as we have discussed earlier, apply only in a broad and pragmatic way to proceedings under Section 167(8) of the Act. The broad effect of the application of the basic principle underlying Section 106, Evidence Act to cases under Section 167(8) of the Act, is that the Department would be deemed to have discharged its burden*

if it adduces only so much evidence, circumstantial or direct, as is sufficient, to raise a presumption in its favour with regard to the existence of the fact sought to be proved. Amba Lal's case, (1961) 1 SCR 933 = 1983 E.L.T. 1321, was a case of no evidence. The only circumstantial evidence viz. the conduct of Amba Lal in making conflicting statements, could not be taken into account because he was never given an opportunity to explain the alleged discrepancies. The status of Amba Lal viz. that he was an immigrant from Pakistan and had come to India in 1947-before the customs barrier was raised-bringing along with him the goods in question, had greatly strengthened the initial presumption of innocence in his favour. Amba Lal's case thus stands on its own facts."

4.8 In the case of Ramchandra Rexins Pvt Ltd [2013 (295) ELT 116 (T-Bang)] following has been held:

7.2 *In a case of clandestine activity involving suppression of production and clandestine removal, it is not expected that such evasion has to be established by the Department in a mathematical precision. After all, a person indulging in clandestine activity takes sufficient precaution to hide/destroy the evidence. The evidence available shall be those left in spite of the best care taken by the persons involved in such clandestine activity. In such a situation, the entire facts and circumstances of the case have to be looked into and a decision has to be arrived at on the yardstick of 'preponderance of probability' and not on the yardstick of 'beyond reasonable doubt', as the decision is being rendered in quasi-judicial proceedings.*

4.9 Thus we conclude that on the first issue i.e. in respect of denial of the benefit of SSI Exemption, for the reason that Appellant 1, was manufacturing and clearing the goods under the brand name 'Gulab Brand", the impugned order cannot be faulted with.

4.10 Since the benefit of SSI Exemption cannot be extended to the appellant for the reasons stated in para 4.9, the question as to when they have crossed the exempted turnover limit of Rs 1 crore is of no significance. From the turnover as recorded in the para 4.6 above as per para 9 of the Show Cause Notice and as

per Annexure A to the Show Cause Notice, Appellants value of clearance during each year was much higher than Rs 1 crore.

4.11 Now coming to the issue of limitation for making the demand. Appellants have contended that they did not had any intention to evade the payment of duty. The crux of their submission is that what so ever duty they would have paid would be admissible to them in form of cash refund as per the notification No 32/1999-CE which is applicable them to them and the entire exercise is thus revenue neutral. They also submitted that they were under bonafide belief that the goods manufactured and cleared by them were correctly classifiable under the chapter heading 23.04, and attracted nil rate of duty. They have submitted a date sheet reproduced below which highlighted the major events calumniating in the issuance of Show Cause Notice to them.

Date	Description of events
March, 2003	Appellants set up manufacturing of Soya Bari " Soya Nuggets at Village - Tamulkuchi, 13 Mile, Gyrnihat, in Ri Bhoi District, Meghalaya.
08.07.1999	North East Area base exemption Notification No. 32/99-CE, issued allowing exemption of Central Excise duty by way of refund of duty paid through Account Current for a period of 10 years from the date of commencement of commercial production.
29.03.2000	Location of the Appellant's Unit was declared under the Area based North East Exemption by amendment Notification No. 23/2000-CE, dated 29.03.2000 covering under Byrnihat - Khanapara North East Scheme Area-II.
01.09.2003	The Appellant's Unit Registered in the Office of the Director of Industries as SSI Unit.
24.02.2005	The existing 6-digit Tariff Act, 1985 was revised into 8-digit Tariff. Vide Notification No. 6/2005-CE (NT), dated 24.02.2005. w.e.f 01.03.2005 - in chapter sub-heading 2106.10.00 - New entry - "Protein Concentrates and Textured protein substances" was inserted.

01.03.2006	Exemption Notification No. 3/2006-CE, dated 01.03.2006 was issued attracting Central Excise Duty @ 8% ad valorem. Classifying Soya bari under CETH 2106.10.00.
23.08.2006	The Appellant approached the superintendent of Central Excise, Byrnihat Range, seeking clarification on tariff Classification of Soya Chunk.
13.09.2006	The Superintendent of Central Excise, Byrnihat Range, clarified and classified Soya Bari under Tariff sub-heading 23.04 attracting Nil rate of Duty.
20.02.2007/ 23.02.2007 & 10.08.2007	The Anti-Evasion Unit of Central Excise, Guwahati, conducted investigation in premises of M/s. Vineeta Soya Products and Written Statements were recorded by the investigating officials.
07.04.2008	Notice to Show Cause was issued by the Commissioner of Central Excise, Shillong, demanding Central Excise Duty amounting to Rs. 2,14,11,650/- and proposed Penalty and interest. Vide C.No. V-CH-21/1/ADJ/2008/7094-100 dated 07.04.2008.
02.06.2008	Appellant submitted Defense Reply defending their case and requested the id. Adjudicating Authority to drop the Demand proceedings against them.

4.12 Counsel for the appellant has relied upon the following decisions in his support:

- i. Continental Foundation [2007 (216) ELT 177 (SC)]
- ii. VVF Ltd [2020 (372) ELT 495 (SC)]
- iii. Nirlon Ltd. [2015 (320) ELT 22 (SC)]

4.13 As per the Section 11 A (1) of Central Excise Act, 1944, the normal period for making the demand in respect of the duties short levied or short paid/ Not levied or not paid is one year. However in case where the short levy/ short payment or non levy/ nonpayment is on account of fraud, collusion or any willful misstatement or suppression of facts or contravention of

any of the provisions of Act or the rules made thereunder with intent to evade payment of duty, the demand as per proviso to this section can be made within five years. In the case of Continental Foundation referred above Hon'ble Apex Court has observed as follows:

"9.*We are not really concerned with the other issues as according to us on the challenge to the extended period of limitation ground alone the appellants are bound to succeed. Section 11A of the Act postulates suppression and, therefore, involves in essence mens rea.*

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

11.*Factual position goes to show the Revenue relied on the circular dated 23-5-1997 and dated 19-12-1997. The circular dated 6-1-1998 is the one on which appellant places reliance. Undisputedly, CEGAT in Continental Foundation Joint Venture case (supra) was held to be not correct in a subsequent larger Bench judgment. It is, therefore, clear that there was scope for entertaining doubt about the view to be taken. The Tribunal apparently has not considered these aspects correctly. Contrary to the factual position, the CEGAT has held that no plea was taken about there being no intention to evade payment of duty as the same was to be reimbursed by the buyer. In fact such a plea was clearly taken. The factual scenario clearly goes to show that there was scope for entertaining doubt, and taking a*

particular stand which rules out application of Section 11A of the Act.

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

4.13 In case of Nirlon Ltd., Hon'ble Apex Court has held as follows:

"9. *We have ourselves indicated that the two types of goods were different in nature. The question is about the intention, namely, whether it was done with bona fide belief or there was some mala fide intentions in doing so. It is here we agree with the contention of the learned Senior Counsel for the appellant, in the circumstances which are explained by him and recorded above. It is stated at the cost of repetition that when the entire exercise was revenue neutral, the appellant could not have achieved any purpose to evade the duty.*

10. *Therefore, it was not permissible for the respondent to invoke the proviso to Section 11A(1) of the Act and apply the extended period of limitation. In view thereof, we confirm the demand insofar as it pertains to show cause notice dated 25-2-2000. However, as far as show cause notice dated 3-3-2001 is concerned, the demand from February, 1996 till February, 2000 would be beyond limitation and that part of the demand is hereby set aside. Once we have found that there was no mala fide intention on the part of the appellant, we set aside the penalty as well."*

4.14 In case of VVF Ltd, Hon'ble Apex Court has observed followings:

"16.*Under the circumstances, the respective High Courts have committed a grave error in quashing and setting aside the subsequent notifications/industrial policies impugned before the respective High Courts on the ground that they are hit by the doctrine of promissory estoppel and that they are retrospective and not retroactive. Consequently, all these appeals are ALLOWED. The impugned Judgments and Orders passed by the respective High Courts, which are impugned in the present appeals, quashing and setting aside the subsequent notifications/industrial policies impugned in the respective writ petitions before the respective High Courts, are hereby quashed and set aside. Consequently, the original writ petitions filed by the respective original writ petitioners before the respective High Courts challenging the respective subsequent notifications/industrial policies stand dismissed and for the reasons stated hereinabove, the challenge to the respective subsequent notifications/industrial policies impugned before the respective High Courts FAIL. However, it is CLARIFIED that the present judgment shall not affect the amount of excise duty already refunded, meaning thereby, the cases in which the excise duty is already refunded prior to the subsequent notifications/industrial policies impugned before the respective High Court, they are not to be reopened. However, it is further CLARIFIED that the pending refund applications shall be decided as per the subsequent notifications/industrial policies which were impugned before the respective High Courts and they shall be decided in accordance with the law and on merits and as per the subsequent notifications/industrial policies impugned before the respective High Courts. All these appeals stand disposed of accordingly. NO COSTS."*

4.13 Now we take for consideration the above arguments. Commissioner has in the impugned order in para 3.7 considered the issue of limitation and have concluded that extended period of limitation can be invoked for making this demand. Appellants contention is that they were under the bonafide belief that their goods manufactured by them were classifiable under 23.04, and attracted Nil rate of duty till the issuance of Notification No 3/2006 classifying the said goods under 21061000 and attracting

the duty @ 8%. They relied on the certificate dated 13.09.2006, issued by the range superintendent stating as follows:

"TO WHOM IT MAY CONCERN

This is to certify that M/s Vansha Fragrances Pvt Ltd, 13th Mile, Tamulkuchi, Byrnihat, Fist Ri-Bhol, Meghalaya, **who manufactures Soya Nugget (Soya Chunk) falling under Central Excise Tariff Heading 23.04 as per their declaration**, is not a Registered Central Excise factory as the product attracts NIL rate of Central Excise Duty as per the tariff and as such is not required to obtain Central Excise Registration."

Commissioner has considered this certificate and has recorded his finding on the said certificate. It is interesting to note that Appellant 1 has approached the Range Superintendent vide his letter dated 23.08.2006, seeking clarification in respect of dutiability of their product, whereas it is their claim that their product become dutiable from 01.03.2006 when notification No 3/2006-CE dated 01.03.2006 was issued. It is their submission that they had voluntarily approached the department for payment of duty, from 01.03.2006. What was purpose for approaching range Superintendent on 23.08.2006 when in the understanding of the Appellant, the product was subjected to duty from 01.03.2006. Further it is observed that the Notification No 3/2006-CE has been issued under Section 5 of the Central Excise Act, 1944 which empowers government to grant exemption of the duty leviable which is excess of the rate specified by the notification. It is also interesting to note that appellant never approached the department seeking any clarification in respect of dutiability of their product though they had commenced commercial production and clearance from their factory in month of March 2003. Obviously the facts in respect of the production and clearance of the goods were never disclosed to the department till 23.08.2006 and appellants had suppressed the same from the department.

4.14 Appellants claim that they would be eligible for benefit of Notification No 32/1999-CE, applicable to the units located in specified area in the North Eastern States. Appellants never made such claim before any authority including the tribunal in

first round of litigation. The claim to this exemption notification has been made by the appellant before Hon'ble High Court. Notification No 32/1999-CE grants exemption by way of refund of the duty paid on the goods cleared by the units located in the specified areas of North Eastern States, subject to certain conditions and following the specified procedure. The relevant text of the said notification is reproduced below:

"In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and sub-section (3) of section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) other than -

- (i) goods falling under Chapter 24 of the said First Schedule, manufactured by any unit; and*
- (ii) goods manufactured by*
 - (a) Numaligarh Refineries Limited (NRL) or;*
 - (b) Bongaigaon Refinery and Petrochemicals Limited (BRPL) or;*
 - (c) Indian Oil Corporation, Guwahati or;*
 - (d) Assam Oil Division, Indian Oil Corporation, Digboi,*

and cleared from a unit located in the Growth Centre or Integrated Infrastructure Development Centre or Export Promotion Industrial Park or Industrial Estates or Industrial Area or Commercial Estate or Scheme Area, as the case may be, specified in Annexure appended to this notification, from so much of the duty of excise or additional duty of excise, as the case may be, leviable thereon under any of the said Acts as is equivalent to the amount of duty paid by the manufacturer of goods other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2001.

Provided that the exemption contained in this notification shall not be applicable to the goods falling under Chapter 24.

Provided that the exemption contained in this notification shall not be applicable to the goods manufactured and cleared from:

- (a) Numaligarh Refineries Limited (NRL) or;*
- (b) Bongaigaon Refinery and Petrochemicals Limited (BRPL) or;*
- (c) Indian Oil Corporation, Guwahati or;*
- (d) Assam Oil Division, Indian Oil Corporation, Digboi,*

1A. In cases where all the goods produced by a manufacturer are eligible for exemption under this notification, the exemption contained in this notification shall be available subject to the condition that, the manufacturer first utilizes whole of the CENVAT credit available to him on the last day of the month under consideration, for payment of duty on goods cleared during such month and pays only the balance amount in cash

2. The exemption contained in this notification shall be given effect to in the following manner, namely :-

(a) The manufacturer shall submit a statement of the duty paid from the said account current to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, by the 7th of the next month in which the duty has been paid other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2001.

(b) The Assistant Commissioner or Deputy Commissioner of Central Excise, as the case may be, after such verification, as may be deemed necessary, shall refund the amount of duty paid, other than the amount of duty paid by utilization of CENVAT credit under the CENVAT Credit Rules, 2001, during the month under consideration to the manufacturer by the 15th of the next month.

Provided that in cases, where the exemption contained in this notification is not applicable to some of the goods produced by a manufacturer, such refund shall not exceed the amount of duty paid less the amount of the CENVAT Credit availed of, in respect

of the duty paid on the inputs used in or in relation to the manufacture of goods cleared under this notification.

(c) If there is likely to be any delay in the verification, the Assistant Commissioner or Deputy Commissioner of Central Excise, as the case may be, shall refund the amount on provisional basis by the 15th of the next month to the month under consideration, and thereafter may adjust the amount of refund by such amount as may be necessary in the subsequent refunds admissible to the manufacturer.

2A. Notwithstanding anything contained in paragraph 2, -

(a) the manufacturer at his own option, may take credit of the amount of duty paid during the month under consideration, other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2002, in his account current, maintained in terms of Part V of the Excise Manual of Supplementary Instruction issued by the Central Board of Excise and Customs. Such amount credited in the account current may be utilised by the manufacture for payment of duty, in the manner specified under rule 8 of the Central Excise Rules, 2002, in subsequent months, and such payment should be deemed to be payment in cash;

Provided that where the exemption contained in this notification is not applicable to some of the goods produced by a manufacturer, the amount of such credit shall not exceed the amount of duty paid less the amount of the CENVAT Credit availed of, in respect of the duty paid on the inputs used in or in relation to the manufacture of goods cleared under this notification.;

(b) the credit of duty paid during the month under consideration, other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2002, may be taken by the manufacturer in his account current, by the seventh day of the month following the month under consideration;

(c) a manufacturer who intends to avail the option under clause (a), shall exercise his option in writing for availing such option before effecting the first clearance in any financial year and such option shall be effective from the date of exercise of the option

and shall not be withdrawn during the remaining part of the financial year;

Provided that, for the financial year 2003-04, a manufacturer can exercise his option on or before 30th day of September, 2003.

(d) the manufacturer shall submit a statement of the duty paid, other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2002, along with the refund amount which he has taken credit and the calculation particulars of such credit taken, to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, by the 7th day of the next month to the month under consideration;

(e) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, after such verification, as may be deemed necessary, shall determine the amount correctly refundable to the manufacturer and intimate the same to the manufacture by 15th day of the next month to the month under consideration. In case the credit taken by the manufacturer is in excess of the amount determined, the manufacturer shall, within five days from the receipt of the said intimation, reverse the said excess credit from the said account current maintained by him. In case, the credit taken by the manufacturer is less than the amount of refund determined, the manufacturer shall be eligible to take credit of the balance amount;

(f) in case the manufacturer fails to comply with the provisions of clause (a) to (e), he shall forfeit the option, to take credit of the amount of duty during the month under consideration, other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2002, in his account current on his own, as provided for in clauses (a) and (c);

(g) the amount of the credit availed irregularly or availed of in excess of the amount determined correctly refundable under clause (e) and not reversed by the manufacturer within the period specified in that clause, shall be recoverable as if it is a recovery of duty of excise erroneously refunded. In case such irregular or excess credit is utilised for payment of excise duty

on clearances of excisable goods, the said goods should be considered to have been cleared without payment of duty to the extent of utilisation of such irregular or excess credit.

Explanation. - For the purposes of this notification, duty paid, by utilisation of the amount credited in the account current, shall be taken as payment of duty by way other than utilisation of CENVAT credit under the CENVAT Credit Rules, 2002."

3. The exemption contained in this notification shall apply only to the following kind of units namely :-

(a) New industrial units which have commenced their commercial production on or after the 24th day of December, 1997.

(b) Industrial units existing before the 24th day of December, 1997 but which have undertaken substantial expansion by way of increase in installed capacity by not less than twenty five per cent on or after the 24th day of December, 1997.

4. The exemption contained in this notification shall apply to any of the said units for a period not exceeding ten years from the date of publication of this notification in the Official Gazette or from the date of commencement of commercial production whichever is later."

From the above referred notification it is quite clear that the said exemption notification is conditional exemption notification and also provides for the manner in which it is to be given effect to. The appellants have made the claim to the said notification, to argue that in terms of this notification they will be entitled to refund of the duty paid by them and hence the issue is completely revenue neutral and hence extended period of limitation cannot be invoked for making the demand from them. A larger bench of tribunal (five member bench) has in case of Jay Yushin [2000 (119) E.L.T. 718 (Tribunal - LB)] while rejecting the said argument has observed as follows:

"13. *In the light of the above discussion, we answer the reference as under:*

(a) Revenue neutrality being a question of fact, the same is to be established in the facts of each case and not merely by showing the availability of an alternate scheme;

(b) Where the scheme opted for by the assessee is found to have been misused (in contradistinction to mere deviation or failure to observe all the conditions) the existence of an alternate scheme would not be an acceptable defence;

(c) With particular reference to Modvat scheme (which has occasioned this reference) it has to be shown that the Revenue neutral situation comes about in relation to the credit available to the assessee himself and not by way of availability of credit to the buyer of the assessee's manufactured goods;

(d) We express our opinion in favour of the view taken in the case of M/s. International Auto Products (P) Ltd. (supra) and endorse the proposition that once an assessee has chosen to pay duty, he has to take all the consequences of payment of duty."

This decision was followed by the tribunal in the case of Autolite (India) Ltd [2002 (146) E.L.T. 345 (Tri. - Del.)], which has been upheld by the Hon'ble Apex Court as reported at [2003 (154) E.L.T. A169 (S.C.)]. Further in case of Kitply Industries Ltd. [2011 (267) ELT 289 (SC)], Hon'ble Supreme Court again took the note of this decision and observed as follows:

2. Our attention is drawn to the impugned judgment and order passed by CEGAT, West Regional Bench at Mumbai on 29-9-2000. By the said judgment, the two-judges Bench of the Tribunal, after referring to the Larger Bench decision in the case of Jay Yushin Ltd. v. Commissioner of Central Excise, New Delhi, 2000 (119) E.L.T. 718 held that the finding of the Commissioner that Revenue neutrality is not established by the appellants is factually incorrect and, therefore, the order of the Commissioner is required to be set aside. By the said order, the Tribunal held that since it is a case resulting in Revenue neutral situation, therefore, the extended period of limitation is not applicable and the entire demand is barred by limitation. Our attention is also drawn to the decision of the Larger Bench, a copy of which is annexed to the paper book. In the operative portion of the judgment, the Larger Bench of the Tribunal has answered the reference in the following manner :-

"(a) Revenue neutrality being a question of fact, the same is to be established in the facts of each case and not merely by showing the availability of an alternate scheme;

(b) Where the Scheme opted for by the assessee is found to have been misused (in contradistinction to mere deviation or failure to observe all the conditions) the existence of an alternate scheme would not be an acceptable defence :

(c) With particular reference to Modvat scheme (which has occasioned this reference) it has to be shown that the Revenue neutral situation comes about in relation to the credit available to the assessee himself and not by way of availability of credit to the buyer of the assessee's manufactured goods;

(d) We express our opinion in favour of the view taken in the case of M/s. International Auto Products (P) Ltd. and endorse the proposition that once an assessee has chosen to pay duty, he has to take all the consequences of payment of duty."

3. There are four areas laid down therein and it appears to us that the decision was rendered by the Tribunal only by reference to clause (c) thereof, whereas clauses (a), (b) and (d) do not appear to have been taken notice of or considered by the Division Bench of the Tribunal in the impugned judgment and order. A bare reading of the order of the Tribunal makes the position crystal clear that there is no proper discussion of all the factual issues arising for consideration.

Thus in respect of the case in hand we are not in position to agree to the arguments advanced by the appellant in respect of admissibility of exemption notification 32/1999-CE for pleading revenue neutrality. The para 16 of the Hon'ble Supreme Court decision in case of VVF referred by the Appellant do not support the argument advanced by the appellant vis a vis the revenue neutrality and hence cannot be accepted.

4.15 appellants have not been able to show any ground by which they could claim that they entertained a bonafide belief that goods manufactured and cleared by them were not subject to excise duty or attracted nil rate of duty or were exempt from payment of duty. It is settled law that the bonafide belief is not the blind belief and need to be established before that plea can

be taken. In case of Bharat Bijlee Ltd [2014 (314) E.L.T. 74 (Tri. - Mumbai)] tribunal has observed as follows:

*"5.15 The argument of the bona fide belief raised by the appellant does not seem to be convincing. If the appellant is claiming bona fide belief, it is for them to establish that they were entitled to hold such a belief based on interpretation of law as pronounced by any judicial fora. **In the case before us we do not find any reason for entertaining such a belief nor any judicial pronouncement to hold such belief has been cited before us. Bona fide belief is not blind belief. In the case of Andhra Pradesh Electricity Board [1984 (16) E.L.T. 579 (Tri.)], this Tribunal held that bona fide belief does not mean blind belief or a self-opinionated belief. It would imply a belief which has been reached after a sincere attempt to understand the issue and examining it reasonably. Similarly, in the case of Inter Scape [2006 (198) E.L.T. 275 (Tri.)] this Tribunal held that belief can be said to be bona fide only when it is formed after all reasonable consideration are taken into account. It is not the case of the appellant that they sought legal advice in the matter or were so advised by any one. On the contrary, we find that there are a number of judicial pronouncements which prohibited diversion of goods from one project to another and, therefore, the plea of bona fide belief does not sustain."***

Further in case of Bhushan Steel & Strips Ltd [2014 (310) ELT 918 (T-Mumbai)] tribunal again stated as follows:

"18.1 As regards the point that the appellant bonafidely believed that they were eligible for the benefit of the Cenvat credit, this contention is not tenable for the following reason. A belief can be said to be bona fide only when it is formed after all reasonable considerations are taken into account as held by this Tribunal in the case of Interscape v. Commissioner of Central Excise, Mumbai-I - 2006 (198) E.L.T. 275 (Tri.-Mum). In Winner Systems - 2005 (191) E.L.T. 1051 (Tri.-Mum), it was held that blind belief cannot be a substitute for bona fide belief. Applying the ratio of these decisions to the facts of the present case, as can be seen from the records, the appellant neither sought any

legal opinion nor any clarification was sought from the department as to the availability of credit on the furnace oil used in the manufacture of electricity, which was wheeled out to the factory. Therefore, the argument of bona fide belief raised by the appellant is only an argument of convenience and not based on any conviction, whatsoever. The ratio of the Larger Bench could not have been applied to the facts of the present case inasmuch as the said decision applied to LSHS used in the manufacture of steam, which in turn, was used in the manufacture of various dutiable goods as well as exempted goods as also for generation of electricity. It is the settled position of law that the ratio of a decision can be applied only if the facts are identical. Even if the facts vary slightly, the said ratio cannot be applied as held by the Hon'ble Apex Court in the case of Alnoori Tobacco Ltd. [(2004) 6 SCC 186 = 2004 (170) E.L.T. 135 (S.C.)] wherein it was held as follows :-

"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 discussions 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.

.....

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

Therefore, the argument of the appellant that in view of the bona fide belief, extended time could not have been invoked falls flat."

Without any evidence to show how the appellants claim bonafide belief in the matter to the effect the goods manufactured by them do not attract any excise duty, the argument made in this regard cannot be accepted. Thus in absence of any such bonafide belief, the appellants reliance on the decision of the Hon'ble Apex Court in case of Continental Foundation and Nirlon Ltd. is farfetched.

4.16 We have earlier observed that issue of classification was not even under challenge before the Hon'ble High Court and it could not have been in view of the express provision under Section 35 G & 35 L of the Central Excise Act, 1944 which provides as under:

Section 35G. Appeal to High Court. -

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

Section 35L. Appeal to the Supreme Court -

(1)An appeal shall lie to the Supreme Court from -

(a)

(b) any order passed before the establishment of the National Tax Tribunal by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.

(2) For the purposes of this Chapter, the determination of any question having a relation to the rate of duty shall include the determination of taxability or excisability of goods for the purpose of assessment.

Thus the order of tribunal in first round determining the classification of the goods and dutiability of the goods manufactured and cleared by the appellant has acquired finality. Even in para 11, reproduced earlier Hon'ble High Court has remanded the matter back to tribunal for consideration of the three aspects highlighted in their order.

4.17 Having considered the issue on all the three aspects, we do not find any merits in the arguments advanced by the appellants on the three issue. Having considered the issue in remand we conclude the three appeals with following orders:

5.1 The appeal filed by the appellant 1 is dismissed.

5.2 The appeals filed by the Appellant 2 and Appellant 3 are allowed to the extent of reducing the penalties from Rs 2 lakh imposed on each by the impugned order to Rs 50,000/- in view of the reduction granted by the tribunal in its earlier order dated 23.01.2019.

(Order pronounced in the open court on 25.08.2022)

Sd/
(Sanjiv Srivastava)
Member (Technical)

Sd/
(P. Dinesha)
Member (Judicial)

tvu