

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

Excise Miscellaneous Application No. 86007 of 2021

(On behalf of Appellant)

And

Excise Appeal No. 999 of 2012

(Arising out of Order-in-Original No. 27/COMMR(KAP/LTU/MUM/CX dated 30.03.2012 passed by the Commissioner of Central Excise & Service Tax, LTU, Mumbai)

M/s. Glenmark Generics Ltd.

Appellant

HDO-Corporate Building,
B.D. Sawant Marg, Chakala,
Off Western Express Highway,
Andheri (E), Mumbai 400 099.

Vs.

Commissioner of CE & ST, LTU, Mumbai

Respondent

29th floor, Centre-I, World Trade Centre,
Cuffe Parade, Mumbai 400 005.

WITH

Excise Appeal No. 85885 of 2013

And

Excise Cross Objection No. 91108 of 2013

(On behalf of Respondent)

(Arising out of Order-in-Appeal No. 124/BPS/LTU/MUM/2012 dated 14.11.2012 passed by the Commissioner of Central Excise & Service Tax (Appeals), LTU, Mumbai)

Commissioner of CE & ST, LTU, Mumbai

Appellant

29th floor, Centre-I, World Trade Centre,
Cuffe Parade, Mumbai 400 005.

Vs.

M/s. Glenmark Generics Ltd.

Respondent

HDO-Corporate Building,
B.D. Sawant Marg, Chakala,
Off Western Express Highway,
Andheri (E), Mumbai 400 099.

Appearance:

Shri Rajiv Patkar, Consultant, for the Assessee

Ms. Anuradha Parab, Assistant Commissioner, Authorised
Representative for the Revenue

CORAM:

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

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

Date of Hearing: 28.02.2022

Date of Decision: 17.03.2022

FINAL ORDER NO. A/85203-85204/2022

PER: SANJIV SRIVASTAVA

Appeal No E/999/2012 is directed against order in original No 27/COMMR (KAP)/ LTU/ MUM/Cs/2011 dated 30.03.2012 of Commissioner (Central Excise & Service Tax) LTU, Mumbai. By the impugned order, the Commissioner has held as follows:

"ORDER

| confirm the duty demand of Rs. 1,41,75,076/- (Rupees. One Crore Forty Lacs Seventy Five Thousand Seventy Six Only) and order it's recovery under proviso: Section 11A (1) of the Central Excise Act, 1944.

I order payment of interest at the appropriate rates under Section 11AB of the Central Excise Act, 1944.

I impose a penalty of Rs. 1,41,75,076/- (Rupees. One Crore Forty One Lakhs Seventy Five Thousand Seventy Six Only) under Section 11AC of the Central Excise Act, 1944."

1.2 Appeal No E/85885/2013 filed by Revenue is directed against order in appeal No 124/BPS/LTU/MUM/2012 dated 14.11.2012 of Commissioner (Appeals), Central Excise & Service Tax, LTU, Mumbai. By the impugned order, the Commissioner (Appeals) has held as follows:

"20. In view of the forgoing, I set aside the impugned order as same is not sustainable in law and I allow the subject appeal with all its consequential relief to the Appellant , as per law."

1.3 Since the issues involved in both the appeals are identical both are taken up together.

1.4 Appellant/Assessee have filed a miscellaneous application for the change of cause title. We allow the same in view of the decision of Hon'ble Bombay High Court.

2.1 Appellant/Assessee are engaged in manufacture of Organic Chemicals classifiable under Chapter 29 of First Schedule to Central Excise Tariff Act, 1985. The organic chemicals manufactured by the appellant/assessee are also known as "Active Pharmaceutical Ingredients (API)"and are used in

manufacture of medicaments classifiable under Chapter 30, *ibid*. They also are having license under Drug and Cosmetics Act, 1945.

2.2 Appellant/Assessee clear one of the API manufactured by them namely "Amiodarone Hydrochloride", in the domestic market claiming the benefit of exemption as per SI No 47A of the exemption Notification No 4/2006-CE dated 01.03.2006. Revenue objected to the same because in their view, appellant/assessee were not entitled to the benefit under the said entry, but they could have claimed the benefit of SI No 47B, by following the procedure as per the Condition No 2 prescribed by the said notification. Accordingly investigations were undertaken and a show cause notice dated 06.07.2010 was issued to the appellant/assessee asking them to show cause as to why:

- (i) The Central Excise Duty amounting to Rs. 1,41,75,076/- (BED Rs 1,37,84,234/- + Ed. Cess Rs 2,75,685/- + H Ed Cess Rs 1,15,157/-) for the period June 2005 to 17.01.2010, leviable on the clearances of said excisable goods i.e. Amiodarone Hydrochloride and not paid by them by suppressing the facts should not be recovered from them under proviso to Section 11A (1) of the Central Excise Act, 1944.*
- (ii) Interest at the applicable leviable rates on the Central Excise Duty not paid by them as mentioned at par (i) above should not be recovered from them under Section 11AB of the Central Excise Act, 1944.*
- (iii) Penalty should not be imposed upon them under Section 11AC of the Central Excise Act, 1944*

2.3 Certain periodic show cause notices for the subsequent period were issued to the appellant/assessee on the same issue.

2.4 The show cause notice dated 06.07.2010 was adjudicated as per the impugned order referred in para 1, above. Aggrieved appellant/assessee have filed this appeal stating following in their grounds of appeal:

- Issue is squarely covered by the decisions of this tribunal in case of

- Burroughs Wellcome (I) Ltd. [2007 (216) ELT 522 (T-Mum)];
- CIPLA Ltd [2007 (218) ELT 347 (T-Chennai)]
- Astrix Laboratories Ltd. [2009 (233) ELT 372 (T-Bang)];
- Hetero Drugs Ltd [2010 (262) ELT 490 (T-Bang)];
- The impugned order totally ignored the above cases relied by the appellant/assessee.
- **Commissioner has erred grossly while interpreting definition of "Drug" as contained in the Drug Price Control Order** stating that "drug includes bulk drug".
- No adjustment of duty has been made in the impugned order by taking note of the fact that appellant/assessee had at time clearance paid 5% or 8% or 10% of value of Product cleared without payment of duty. Therefore, duty even if was demanded, should have been adjusted with such reversal of amount which was Rs. 1, 05,60,561/-.
- **Invocation of larger period of demand is not tenable as all the facts were in the knowledge of the department, there records were** audited up to September, 2009, wherein the excise invoices made for the clearances of the Product for home consumption as well as for exportation were also inspected. From this inspection of records as well as examination of monthly ER 1 Returns, a conclusion could have been derived by the auditors as regard to exemption claimed by the appellant/assessee for the Product manufactured and cleared by them.
- **No Penalty and interest is payable.**

2.5 Following the order in original of Commissioner, the show cause notices for the subsequent period were confirmed by the Additional Commissioner vide his order in original No 26/LTU/MUM/ADDL/MK/11 dated 29.11.2011. The order of the Additional Commissioner, was set aside by the Commissioner (Appeals) vide his order referred in para 1.2 above. Hence revenue has filed the appeal against the order of Commissioner (Appeals)

3.1 We have heard Shri Rajiv Patkar, Consultant for the Appellant i.e Assessee and Ms Anuradha Parab, Assistant Commissioner, Authorized Representative for the Revenue.

3.2 Arguing for the Appellant/Assessee learned Consultant referred to the Notification. No. 04/2006 CE dt 01.03.2006 at SI No 47 (A) and (B), and submitted that-

- The dispute is in relation to the applicability of the exemption under the said entries. The entry at SI No 47 (A) unconditionally exempts all the drugs as specified therein from whole of excise duty leviable thereon whereas entry at SI No 47 (B) exempts the "bulk drugs" as specified therein subject to condition that procedure as prescribed by the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2002 is followed.
- Appellant/Assessee has claimed the benefit of entry at SI No 47 (A), for clearing the Amiodarone Hydrochloride (CSH. 29310090) manufactured by them for home consumption without payment of duty, whereas the case of revenue is that they should have claimed the benefit of entry at SI No 47 (B) by following the procedure as prescribed.
- "Bulk drug" is not defined under the Central Excise Act, 1944 or any of the notifications issued in terms of this act, *ibid*. As per Drug Price Control Order, 1995, "*drug*" includes bulk drug and formulations. In view of this the exemption at SI No 47 (A) that is for the drugs should be admissible to bulk drugs also;
- This view has been held by the tribunal in series of cases referred in their appeal, specifically in case of Hetero Drugs Ltd [2010 (262) ELT 490 (T-Bang)];
- Commissioner (Appeals) has also relied upon the said decision of tribunal while allowing their appeal.
- Since the issue is squarely covered in their favour by the above referred decisions their appeal should be allowed and the appeal filed by revenue be dismissed.

3.3 Arguing for the Revenue, learned authorized representative submits that admittedly appellant/assessee have

manufactured and cleared the “bulk drugs”, which are specifically covered by the entry at SI No 47 (B). This fact is also borne out by the test reports of the samples and letters of the purchaser. Since appellant/assessee have failed to follow the procedure as prescribed for availing the benefit of exemption as per entry at SI No 47 (B), exemption under notification No 47 (B) should not be admissible to them. Accordingly the appeal filed by the appellant/assessee should be dismissed and that by the revenue be allowed.

4.1 We have considered the impugned orders along with the submissions made in appeals and during the course of arguments.

4.2 We are required to adjudicate upon the following issues in these appeals:

- a. Whether the benefit of exemption at SI No 47 (A) of the notification no 04/2006-CE dated 01.03.2006 has been correctly availed by the appellant/assessee.
- b. If the answer to ‘a’ is negative can the duty be demanded from them by invoking extended period of limitation.
- c. Whether the amount paid by them @ 5% or 8% or 10% of value of goods cleared claiming exemption from payment of duty should not have been adjusted against the demand made, by denying the exemption claimed.
- d. Whether the penalty could have been imposed on them under Section 11AC of the Central Excise Act, 1962.

4.3 In case of Hetero Drugs referred by the appellant/assessee all the entries in the notification, etc are referred to for the ease and convenience of reference we reproduce the relevant extracts from the said decision.

"2. The facts of the case are that appellants had cleared consignments of "Lopinavir" availing exemption under Notification No. 4/2006-C.E. in terms of the following entry Sl. No. 47A in the table to the said notification.

47	28,29,30 or 38	The following goods, namely : (A) Drugs or medicines including	Nil
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		<i>their salts and esters and diagnostic test kits, specified in List 3 or List 4 appended to the notification of the Government of India in the erstwhile Ministry of Finance (Department of Revenue), No. 21/2002-Customs, dated The 1st March, 2002(GSR. 118(E), dated The 1st March, 2002).</i>	
		<i>(B) Bulk drugs used in the manufacture of the drugs or medicines at (A) above.</i>	<i>Nil (2 condition)</i>

3. The exemption to bulk drugs of Sl. No. 47B is subject to the condition that the assessee follows the procedure laid down in the Central Excise (Removal of Goods at Concessional Rate of duty for Manufacture of Excisable Goods) Rules, 2001 (Central Excise Rules, 2001). The assessee had cleared consignment of "Lopinavir" without following the procedure prescribed under the above rules. The Commissioner (Appeals) found that "Lopinavir" figured in List 3 appended to Notification No. 21/2002-Customs dated 1-3-2002 and was therefore entitled to exemption provided under Sl. No. 47(A) of table to Notification No. 4/2006-C.E. In respect of drugs falling under Sl. No. 47(A), there was no requirement to follow the Central Excise Rules, 2001. He found that the appellants were prevented from following the procedure since the Asst. Commissioner having jurisdiction over the buyer of the consignments was denied the required certificate to procure the goods on the ground that such certificate was not required. In holding the view that bulk drugs figured under Sl. No. 47(A) could be allowed the benefit of the Notification unconditionally, he relied on the decisions of the Tribunal in the case of *M/s. Burroughs Wellcome (I) Ltd. v. CCE* [2007 (216) E.L.T. 522 (Tri. Mum.)] and *M/s. Cipla Ltd. v. CCE, Chennai* [2007 (218) E.L.T. 547 (Tri. Chennai)].

4. In the appeal before the Tribunal, the appellant revenue has taken the following grounds. It is submitted that "Lopinavir" is "bulk drug" and cannot be treated as "drug or medicines". The expression drug at Sl. No. 47(A) referred to finished

pharmaceutical products or formulations whereas 'bulk drugs' at Sl. No. 47(B) referred to bulk drugs which were used in the manufacture of drugs or medicines. The assessee had classified the item under Chapter 29 of the Central Excise Tariff which covered organic chemicals; and drugs were classifiable under Chapter 30 of the tariff. It is submitted that the impugned goods were bulk drugs as per the definition of the term in the notification and as per common parlance. Drugs falling under Sl. No. 47(A) were exempted unconditionally whereas bulk drugs at Sl. No. 47(B) were exempted subject to fulfilment of the condition No. 2 specified in the Notification. As per this condition if the bulk drugs were used elsewhere than in the factory of production, the procedure laid down in the rules had to be followed. In the instant case, the assessee had not followed the procedure prescribed in the rules. In allowing the appeal of the assessee, Commissioner (Appeals) had wrongly placed reliance on the decision of the Tribunal in M/s. Burroughs Wellcome (I) Ltd.(supra); the issue involved in that case was whether life saving drugs could also include bulk drugs.

5. Heard both sides.

6. We have carefully perused the case records and the submissions by both sides. The dispute involved in the subject case is whether "Lopinavir", an item figuring in List 3 appended to the Notification of the Govt. of India, erstwhile Ministry of Finance (Department of Revenue) No. 21/2002-Customs dated 1-3-2002 is entitled to the exemption in terms of the Sl. No. 47(A) of the Notification No. 4/2006-C.E. The impugned item was cleared as bulk drug without following the procedure prescribed in the rules. We find that there is no definition of bulk drugs in the Notification involved. As per the Drugs (Prices Control) Order, 1995, drugs also include bulk drugs. The item "Lopinavir" figures in List 3 of Notification No. 21/2002-Cus. Therefore we find that the impugned clearances of "Lopinavir" are entitled to exemption extended to goods at against Sl. No. 47(A). In terms of the Notification such clearances are entitled to exemption unconditionally.

7. We also find that the revenue has no case that the disputed consignments had not been utilized in further production of

medicines by the consignee. The assessee was forced to make clearances for further manufacture without the buyer producing the requisite certificate as the jurisdictional Asstt. Commissioner of the buyer firm had not granted the said certificate and had informed them that such certificate was not necessary. In the circumstances, the reliance of the assessee on the decision in the case of *M/s. Sundaram Fasteners Ltd. v. CCE* [1987 (29) E.L.T. 275 (Tri.-Delhi)] in respect of the claim for the benefit carries considerable force. In the said decision, it was held that the condition which was impossible to comply with because of the action of the revenue should be taken to have been dispensed with. We also note that there is substantial compliance with the requirement of the rules by the assessee.

8. The respondents have relied on the following case law :-

(a) Final Order Nos. 979 and 980/2008 dated 21-8-2008 - 2009 (233) E.L.T. 372 (Tri.) of the Bangalore Bench of the Tribunal in the case of *M/s. Astrix Laboratories Ltd. & others v. CCE, Hyderabad*.

(b) *M/s. Burroughs Wellcome (I) Ltd. v. CCE* [2007 (216) E.L.T. 522 (Tri.-Mum.)]

(c) *M/s. Cipla Ltd. v. CCE, Chennai* [2007 (218) E.L.T. 547 (Tri. Chennai)]

9. We observe that in the Final Order Nos. 979-980/2008, Bangalore Bench of the Tribunal, had decided a similar dispute involving interpretation of the Notification No. 4/2006-C.E. and its entries Sl. Nos. 47(A) and 47(B). The appellants therein had manufactured and cleared Nevirapine and Stavudine figuring at Sl. Nos. 117 and 118 respectively of List 3 appended to Notification No. 21/2002-Cus dated 1-3-2002. As the impugned goods had been bulk drugs, the appellants were required to follow certain conditions. As they had not followed the prescribed conditions, benefit in terms of Sl. No. 47(B) was denied. The Tribunal held that the items Nevirapine and Stavudine figured in List 3 appended to Notification No. 21/2002-Cus. The term 'drug' had to be considered to include bulk drug and formulation, as per the Drugs (Price Control) Rules, both items being bulk drugs were entitled to the benefit of the Notification.

10. In the *M/s. Burroughs Wellcome (I) Ltd. case*, the Tribunal interpreted the following entries at Sl. No. 43 of Notification No. 11/97 C.E.

Sl. No.	Chapter or Heading No. or sub-heading No.	Description of goods	Standard rate	Additional duty rate	Condition No.
43	28, 29, 30 or 38	The following goods (A) The life saving drugs or medicines (including diagnostic test kits) specified in List 2.	Nil	Nil	-
		(B) Bulk drugs used in the manufacture of life saving drugs or medicines at (A) above.	Nil	Nil	-
		(C) Other life saving drugs or medicines.	Nil	Nil	7

The appellants had claimed exemption under Sl. No. 43(B) for bulk drugs used in the manufacture of life saving drugs or medicines at Sl. No. 43(A). The life saving drugs under Sl. No. 43(A) were specified under List 2. The said list specified the

impugned drugs imported by the appellants therein. The Tribunal observed as follows :-

"12 However, in the instant case, we find that the phrase "life saving drugs" has not been defined either in the notification or in the Drugs (Prices Control) order. Moreover, "drugs" have been defined to include "bulk drugs". As such life saving drugs can also include "bulk drugs". Accordingly, we are of the view that even though the appellants had earlier claimed exemption for the impugned goods stating these to be bulk drugs, they cannot be precluded from claiming the exemption for life saving drugs in respect of the very same impugned goods....."

11. In M/s. Cipla Ltd. case (supra), the Tribunal was concerned with the scope of the exemption extended to goods figuring at Sl. No. 80 of the table to Notification No. 21/02-Cus, which was as follows :-

<i>Sl. No.</i>	<i>Chapter or Heading No. or sub-heading No.</i>	<i>Description of goods</i>	<i>Standard rate</i>	<i>Additional duty rate</i>	<i>Condition No.</i>
<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>6</i>
<i>80</i>	<i>28, 29 or 30</i>	<i>The following goods, namely (A) Drugs, medicines, diagnostic kits or equipment specified in List 3</i>	<i>5%</i>	<i>-</i>	<i>-</i>
		<i>(B) Bulk drugs used in the manufacture of drugs or medicines at (A) above.</i>	<i>5%</i>	<i>-</i>	<i>5</i>

The Tribunal observed that undisputedly bulk drugs imported by the appellants found mention in the List 3 referred to at Sl. No. 80(A). It was held that the impugned bulk drugs were liable to be considered as drugs mentioned at Sl. No. 80(A). It was

beyond doubt that "bulk drugs" were also 'drugs'. They were so defined under the Drugs (Prices Control) Order, 1995 also. The imported goods which were specified in List 3 must fall within the coverage of the 'drugs' specified in List 3 and consequently the benefit of Sl. No. 80(A) would be admissible to them."

4.4 We also note that in case of Hetero Drugs [2006 (205) ELT 932 (T-Chennai)] the benefit claimed in similar situation in terms of Notification No 21/2002-Cus, tribunal stated as follows:

"2. The original authority confirmed demand of total amount of duty of over Rs. 55 lakhs against the appellants under Section 28(1) of the Customs Act in respect of a medicinal item, viz. "Zidovudine" imported by them and cleared under two Bills of Entry, one of these Bills dated 6-7-04 and the other dated 30-7-04. Aggrieved by the order of that authority, the assessee preferred an appeal to the Commissioner (Appeals) and also filed therein an application for waiver of pre-deposit and stay of recovery in respect of the duty amount. The said application was disposed of on 12-1-06 without hearing the party. The appellate Commissioner's interim order dated 12-1-06 directed the assessee to pre-deposit 75% of the duty amount on or before 25-2-2006. That order also stated that, in the event of compliance, the appeal would be heard on 28-2-2006. Having found no report of compliance, Id. Commissioner (Appeals) took up the appeal for disposal on 27-2-2007, a day before the appointed date. In the circumstances, the party did not have an opportunity to be heard. Id. Commissioner (Appeals) passed a final order on 27-2-06 dismissing the assessee's appeal on the sole ground of non-compliance with Section 129E the Customs Act. It is submitted by Id. Counsel for the appellants, today, that the impugned order is grossly violative of the principles of natural justice inasmuch as the appeal and the stay application filed by the assessee were disposed of in undue haste without giving the appellants a reasonable opportunity of being heard. It is also submitted that, upon receipt of the interim order dated 12-1-2006, the assessee had filed an application with the Commissioner (Appeals) seeking modification of the said order, claiming strong prima facie case on merits. Id. Counsel submits that the contentions raised in the modification application were

*not duly considered by the appellate authority. We have heard Id. SDR with reference to the submissions made by Id. Counsel. After considering the submissions, we find that the short question to be considered by us at present is whether, before the lower appellate authority, the assessee had prima facie case. The demand of duty is on account of denial of the benefit of Customs Notification No. 21/02 to the assessee in respect of the item imported by them. This Notification, as it stood prior to 9-7-04 (the date on which the relevant entry in the Notification was amended) provided effective rate of duty as 5% for (A) Drugs or medicines specified in List 3 and (B) Bulk drugs used in the manufacture of the drugs or medicines at (A) above vide Sl. No. 80 in the table annexed to the Notification. Prior to 9-7-2004, the effective rate of CVD for bulk drugs was 'nil'. After the said date, by virtue of the amendment to the Notification, there was no rate prescribed for CV duty on bulk drugs. For the entire period, there was a condition attached to bulk drugs, which was to the effect that the procedure set out in the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996 should be followed by the importer. Admittedly, in this case, the appellants did not follow such procedure. However, it is the submission of Id. Counsel that the benefit of exemption which was otherwise available to bulk drugs in terms of Sl. No. 80(B) of the table annexed to the above Notification should not have been denied to the assessee on a procedural ground. In this connection, reliance is placed on *Thermax Private Limited v. CC* [1992 (61) E.L.T. 352 (S.C.)], wherein a default of the assessee in the matter of compliance with Chapter X Procedure was condoned and the benefit of Rule 192 of the Central Excise Rules, 1944 was allowed. Alternatively, it is submitted by the Counsel that, as 'bulk drugs' are also 'drugs' in terms of Clause 2(f) of the Drugs (Prices Control) Order, 1995, at least the benefit of entry at Sl. No. 80(A) should have been allowed to the appellants in respect of the imported item. In this connection, it is pointed out that it is not in dispute that the item imported specifically figured in list 3 and therefore was covered by Sl. No. 80(A) of the table annexed to the above Notification. We have heard Id. SDR also, on merits. It is submitted by Id. SDR that the exemption Notification should be*

strictly construed and therefore it was not open to the authorities to consider 'drugs' and 'bulk drugs' mentioned separately in the Notification, as one and the same goods. In this connection, Id. SDR claims support from the Supreme Court's judgment in Sarahhai M. Chemicals v. CCE, Vadodara [2005 (179) E.L.T. 3 (S.C.)], wherein an end-use condition prescribed in a Notification was enforced by the Apex Court.

3. After examining the records and considering the submissions, we find that the import documents present the goods in bulk quantities. This is not in dispute. Hence, in the conflict between (A) and (B) under Sl. No. 80 of the Notification, we think, we must prefer (B) covering "bulk drugs used in the manufacture of the items mentioned in (A)". For the goods so understood, there was a specific condition to be followed by the importer vide condition No. 5 mentioned in the Notification. This was a condition relating to the manufacturing process to be undertaken by the importer and has to be taken as analogous to the end-use condition considered by the Apex Court in Sarabhai case (supra). In this view of the matter and having regard to the need to interpret strictly the above entry in the exemption Notification, we take the view that the appellants were not eligible for the benefit of the Notification and they cannot claim prima facie case against the demand of basic Customs duty."

4.5 With above we take note of the findings recorded by the Commissioner in his order:

"11. I find that the assessee is availing the benefit of cenvat credit under Rule 3 of Cenvat Credit Rules 2002, have manufactured and cleared their product viz. Amiodarone Hydrochloride (CSH. 29310090) for home consumption without payment of duty by claiming the benefit of Notification 04/2006 did 01.03.2006 (Sr.No.47(A)] (Unconditional Exemption). I also find that the assessee has claimed that they are paying amount equivalent to amount of 5%, 8% or 10% of value of the clearance effected of final product which is fully exempted from payment of Central Excise duty in terms of rule 3(1) of the CENVAT Credit Rules, 2004., as they were not maintaining separate records for inputs used in the manufacture fully

exempted /dutiabale final product, as prescribed under Rule 6 of the CENVA T Credit Rules, 2004".

12. As per Notification 04/2006-C.E, dated 01.03.2006 at Sr. No.47 (A) & (B) drugs or medicines including their salts & esters, diagnostic test kits (falling under Chapters 28, 29, 30 or 38) and specified in List 3 or 4 appended to Notification 21/2002-Customs dated 01.03.2002 are unconditionally exempted from payment of central excise duty. Also bulk drugs used in the manufacture of such drugs/medicines are exempted from payment of duty if manufactured and used in the factory of production provided conditions are followed. In the instant case, they have cleared the impugned product outside their factory premises as bulk drug.

13. Further Bulk drugs and drugs, as per Drug Price Control Order 1995, are defined as under:

Section 2. Definitions in this Order, unless the context otherwise requires, -

"bulk drug" means any pharmaceutical, chemical, biological or plant product including its salts, esters, stereo-isomers and derivatives, conforming to pharmacopoeia or other standards specified in the Second Schedule to the Drugs and Cosmetics Act, 1940 (23 of 1940), and which is used as such or as an ingredient in any formulation;

"drug" Includes –

- i. all medicines for internal or external use of human beings or animals all substances intended to be used for, or in the diagnosis treatment, mitigation, or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects like mosquitoes;*
- ii. such substances, intended to affect the structure or any function of the human or animal body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals, as may be specified from time to time by the Government by notification in the official Gazette; and*
- iii. bulk drugs and formulations*

14. Thus it is seen from the above definitions that a drug includes bulk drugs used as such or as an ingredient in any formulation and also formulations intended to be used for, or in the diagnosis treatment, mitigation, or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects like mosquitoes. Thus drug is a medicine or substance or formulation or bulk drug capable of being used as such. In the instant case the aforesaid product, manufactured and cleared by the assessee is required to be processed further before it can be used in the form of drug or medicine by human beings. Thus the product is not a drug or medicine but only a bulk drug which is not capable of being used as such as medicine or substance or formulation. This fact has been confirmed by the sample drawn as per procedure laid down and after being tested by Chemical Examiner-Gr.1, C.Ex & Customs Laboratory Vadodara. The said officer, vide his office letter F.No.RCL/9/T.0/10 11 dtd 11.05.2010, has given his report as under:

"Amioadrone is bulk drug is mentioned in Customs Notfn 21/2002 dtd 01.03.2002

at S.No.80 of List No.3. The sample is in the form of powder. This cannot be consumed by human as such; it has to go through manufacture before human consumption."

15. To ensure the usage by the buyers of the said products, a letter was issued to M/s. Cadila Healthcare Ltd & M/s. Torrent Pharmaceutical Ltd by the Department to which M/s. Cadila Healthcare Ltd & M/s. Torrent Pharmaceutical Ltd have responded vide letters dated 27.05.2010 & 24.05.2010 respectively stating that the Amiodarone Hydrochloride is a bulk drug/API and used by them for manufacture of formulations. Thus the product in question is nothing but a bulk drug.

16. In the subject Notification at Sr.No.47(B) it is stated that Bulk drugs used in the manufacture of the drugs or medicines at Sr. No.47(A) are exempted provided procedure laid down in the Central Excise (Removal of Goods at Concessional rate of Duty for Manufacture of excisable Goods) Rules 2001 is followed where the use of such bulk drugs is elsewhere than in the factory of production. In the instant case, the assessee do not

use the subject product themselves but clear the same to their clients. So they should have followed procedure laid down in the Central Excise (Removal of Goods at Concessional rate of Duty for Manufacture of excisable Goods) Rules 2001. However while clearing the subject product to their clients they have not followed the applicable procedure as prescribed above. Thus they have failed to fulfill the condition No.2 laid down in the referred Notification

17. The assessee is clearing the aforesaid product under the guise of drug which in case would have been classified under Chapter 30 of CETA 1985 whereas they are clearing under CSH 29310090 which implies that the product is bulk drug. The compounds of headings 2930 & 2931 are organic compounds the molecules of which contain, in addition to atoms of hydrogen, oxygen or nitrogen, atoms of other non-metals or of metals (such as sulphur, arsenic, lead) directly linked to carbon atoms. Heading 2930 (Organo-sulphur compounds) and heading 2931 (other organo-inorganic compounds) do not include sulphonated or halogenated derivatives (including compound derivatives) which, apart from hydrogen, oxygen or nitrogen, only have directly linked to carbon the atoms of sulphur or of a halogen which give them their nature of sulphonated or halogenated derivatives (including compound derivatives)

18. It is observed that from the above facts that the product cleared by the assessee is a bulk drug, and not a drug or medicine, which is used to make the drug "Amiodarone". Hence the assessee should have cleared the aforesaid product under Sr. No,47(B) of the referred Notification and by following procedure laid down in the Central Excise (Removal of Goods at Concessional rate of Duty for Manufacture of excisable Goods) Rules 2001. By not following the prescribed procedure they have rendered themselves liable for payment of Central Excise duty at appropriate rates recoverable under Section 11A(1) of Central Excise Act 1944."

4.6 In view of the findings recorded in the impugned order which are not disputed by the appellant/assessee, there can be no denial of the fact that the goods cleared by the appellant/assessee are nothing but "*bulk drugs*", specifically

exempted at SI No 47 (B) of the Notification No 4/2006-CE subjected to following the procedure as specified by the condition No 2 appended to said notification. Admittedly procedure as per said condition no. 2 has not been followed by the appellant/assessee. When such procedure as specified by the notification has not been followed the benefit of the exemption at SI No 47 (B) is not admissible to the appellant.

4.7 We are not impressed by the arguments advanced by the appellant/assessee that they have correctly availed the exemption under SI 47 (A), by referring to definition as per Drug Price Control Order, defining *“drug” includes bulk drug and its formulation.* If this interpretation is agreed to entry at SI No 47 (B) will become redundant and it is settled position in law any interpretation which renders some entry in the fiscal/ taxing statute cannot be correct interpretation. *Generalis Specialibus non Derogant* means erstwhile special law is given superiority over later general law. This has been followed while making interpretations, in India and across the world. As per this Latin Maxim the intention of legislature for providing the specific entries, should be ascertained and honoured. Hence the specific entry in the notification will have to be given precedence over the general entry, not defined but by referring to the definition of general entry from some other statute. Further in case of Dileep Kumar & Co [2018 (361) E.L.T. 577 (S.C.)], a five judges bench Hon’ble Supreme Court has observed as follows:

"27. Now coming to the other aspect, as we presently discuss, even with regard to exemption clauses or exemption notifications issued under a taxing statute, this Court in some cases has taken the view that the ambiguity in an exemption notification should be construed in favour of the subject. In subsequent cases, this Court diluted the principle saying that mandatory requirements of exemption clause should be interpreted strictly and the directory conditions of such exemption notification can be condoned if there is sufficient compliance with the main requirements. This, however, did not in any manner tinker with the view that an ambiguous exemption clause should be interpreted favouring the revenue. Here again this Court applied different tests when considering

the ambiguity of the exemption notification which requires strict construction and after doing so at the stage of applying the notification, it came to the conclusion that one has to consider liberally.

38. We will now consider another Constitution Bench decision in Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal, (2011) 1 SCC 236 = 2010 (260) E.L.T. 3 (S.C.) [hereinafter referred as 'Hari Chand case' for brevity]. We need not refer to the facts of the case which gave rise to the questions for consideration before the Constitutional Bench. K.S. Radhakrishnan, J., who wrote the unanimous opinion for the Constitution Bench, framed the question, viz., whether manufacturer of a specified final product falling under Schedule to the Central Excise Tariff Act, 1985 is eligible to get the benefit of exemption of remission of Excise duty on specified intermediate goods as per the Central Government Notification dated 11-8-1994, if captively consumed for the manufacture of final product on the ground that the records kept by it at the recipient end would indicate its "intended use" and "substantial compliance" with procedure set out in Chapter 10 of the Central Excise Rules, 1944, for consideration? The Constitution Bench answering the said question concluded that a manufacturer qualified to seek exemption was required to comply with the preconditions for claiming exemption and therefore is not exempt or absolved from following the statutory requirements as contained in the Rules. The Constitution Bench then considered and reiterated the settled principles qua the test of construction of exemption clause, the mandatory requirements to be complied with and the distinction between the eligibility criteria with reference to the conditions which need to be strictly complied with and the conditions which need to be substantially complied with. The Constitution Bench followed the ratio in Hansraj Gordhandas case (supra), to reiterate the law on the aspect of interpretation of exemption clause in para 29 as follows -

"The law is well-settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption,

concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption."

39. The Constitution Bench then considered the doctrine of substantial compliance and "intended use". The relevant portions of the observations in paras 31 to 34 are in the following terms -

"31. Of course, some of the provisions of an exemption notification may be directory in nature and some are mandatory in nature. A distinction between the provisions of a statute which are of substantive character and were built in with certain specific objectives of policy, on the one hand, and those which are merely procedural and technical in their nature, on the other, must be kept clearly distinguished..."

Doctrine of substantial compliance and "intended use"

32. The doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably be expected of it, but failed or faulted in some minor or inconsequential aspects which cannot be described as the "essence" or the "substance" of the requirements. Like the concept of "reasonableness", the acceptance or otherwise of a plea of "substantial compliance" depends upon the facts and circumstances of each case and the purpose and object to be achieved and the context of the pre-requisites which are essential to achieve the object and purpose of the rule or the regulation. Such a defence cannot be pleaded if a clear statutory pre-requisite which effectuates the object and the purpose of the statute has not been met. Certainly, it means that the Court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was enacted and not a mirror image type of strict

compliance. Substantial compliance means "actual compliance in respect to the substance essential to every reasonable objective of the statute" and the Court should determine whether the statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objectives for which it was passed.

33. A fiscal statute generally seeks to preserve the need to comply strictly with regulatory requirements that are important, especially when a party seeks the benefits of an exemption clause that are important. Substantial compliance with an enactment is insisted, where mandatory and directory requirements are lumped together, for in such a case, if mandatory requirements are complied with, it will be proper to say that the enactment has been substantially complied with notwithstanding the non-compliance of directory requirements. In cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty. The doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or incorrectly written that an earnest effort at compliance should be accepted.

34. The test for determining the applicability of the substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether the requirements relate to the "substance" or "essence" of the statute, if so, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done but are given with a view to the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance. In other words, a mere attempted compliance may not be sufficient, but actual compliance with those factors which are considered as essential."

40. After considering the various authorities, some of which are adverted to above, we are compelled to observe how true it is to say that there exists unsatisfactory state of law in relation to interpretation of exemption clauses. Various Benches which decided the question of interpretation of taxing statute on one hand and exemption notification on the other, have broadly assumed (we are justified to say this) that the position is well-settled in the interpretation of a taxing statute : It is the law that any ambiguity in a taxing statute should enure to the benefit of the subject/assessee, but any ambiguity in the exemption clause of exemption notification must be conferred in favour of revenue - and such exemption should be allowed to be availed only to those subjects/assesses who demonstrate that a case for exemption squarely falls within the parameters enumerated in the notification and that the claimants satisfy all the conditions precedent for availing exemption. Presumably for this reason the Bench which decided *Surendra Cotton Oil Mills case* (supra) observed that there exists unsatisfactory state of law and the Bench which referred the matter initially, seriously doubted the conclusion in *Sun Export Case* (supra) that the ambiguity in an exemption notification should be interpreted in favour of the assessee.

41. After thoroughly examining the various precedents some of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that every taxing statute including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in a charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State.

43. There is abundant jurisprudential justification for this. In the Governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the Courts insist upon strict compliance before a State demands

and extracts money from its citizens towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee may warrant visualizing different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to pay tax, and whether the revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion. We may now consider the decisions which support our view.

44. In Hansraj Gordhandas case (supra), the Constitutional Bench unanimously pointed out that an exemption from taxation is to be allowed based wholly by the language of the notification and exemption cannot be gathered by necessary implication or by construction of words; in other words, one has to look to the language alone and the object and purpose for granting exemption is irrelevant and immaterial.

45. In Parle Exports case (supra), a Bench of two-Judges of this Court considered the question whether non-alcoholic beverage

base like Gold spot base, Limca base and Thumps Up base, were exempted from payment of duty under the Central Government notification of March, 1975. While considering the issue, this Court pointed out the strict interpretation to be followed in interpretation of a notification for exemption. These observations are made in para 17 of the judgment, which read as follows :

"How then should the Courts proceed? The expressions in the Schedule and in the notification for exemption should be understood by the language employed therein bearing in mind the context in which the expressions occur. The words used in the provision, imposing taxes or granting exemption should be understood in the same way in which these are understood in ordinary parlance in the area in which the law is in force or by the people who ordinarily deal with them. It is, however, necessary to bear in mind certain principles. The notification in this case was issued under Rule 8 of the Central Excise Rules and should be read along with the Act. The notification must be read as a whole in the context of the other relevant provisions. When a notification is issued in accordance with power conferred by the statute, it has statutory force and validity and, therefore, the exemption under the notification is as if it were contained in the Act itself. See in this connection the observations of this Court in Orient Weaving Mills (P) Ltd. v. Union of India, 1962 Supp 3 SCR 481 = AIR 1963 SC 98. See also Kailash Nath v. State of U.P., AIR 1957 SC 790. The principle is well-settled that when two views of a notification are possible, it should be construed in favour of the subject as notification is part of a fiscal enactment. But in this connection, it is well to remember the observations of the Judicial Committee in Coroline M. Armytage v. Frederick Wilkinson, (1878) 3 AC 355, that it is only, however, in the event of there being a real difficulty in ascertaining the meaning of a particular enactment that the question of strictness or of liberality of construction arises. The Judicial Committee reiterated in the said decision at page 369 of the report that in a taxing Act provisions enacting an exception to the general rule of taxation are to be construed strictly against those who invoke its benefit. While interpreting an exemption clause, liberal interpretation should be imparted to

the language thereof, provided no violence is done to the language employed. It must, however, be borne in mind that absurd results of construction should be avoided."

In the above passage, no doubt this Court observed that "when two views of a notification are possible, it should be construed in favour of the subject as notification is part of fiscal document". This observation may appear to support the view that ambiguity in a notification for exemption must be interpreted to benefit the subject/assessee. A careful reading of the entire para, as extracted hereinabove would, however, suggest that an exception to the general rule of tax has to be construed strictly against those who invoke for their benefit. This was explained in a subsequent decision in Wood Papers Ltd. case (supra). In para 6, it was observed as follows :

"... In Collector of Central Excise v. Parle Exports (P) Ltd., (1989) 1 SCC 345, this Court while accepting that exemption clause should be construed liberally applied rigorous test for determining if expensive items like Gold Spot base or Limca base of Thums Up base were covered in the expression food products and food preparations used in Item No. 68 of First Schedule of Central Excises and Salt Act and held 'that it should not be in consonance with spirit and the reason of law to give exemption for non-alcoholic beverage basis under the notification in question'. Rationale or ratio is same. Do not extend or widen the ambit at stage of applicability. But once that hurdle is crossed construe it liberally. Since the respondent did not fall in the first clause of the notification there was no question of giving the clause a liberal construction and hold that production of goods by respondent mentioned in the notification were entitled to benefit."

46. The above decision, which is also a decision of two-Judge Bench of this Court, for the first time took a view that liberal and strict construction of exemption provisions are to be invoked at different stages of interpreting it. The question whether a subject falls in the notification or in the exemption clause, has to be strictly construed. When once the ambiguity or doubt is resolved by interpreting the applicability of exemption clause strictly, the Court may construe the notification by giving full

play bestowing wider and liberal construction. The ratio of Parle Exports case (supra) deduced as follows :

"Do not extend or widen the ambit at stage of applicability. But once that hurdle is crossed, construe it liberally".

47. We do not find any strong and compelling reasons to differ, taking a contra view, from this. We respectfully record our concurrence to this view which has been subsequently, elaborated by the Constitution Bench in Hari Chand case (supra).

48. The next authority, which needs to be referred is the case in Mangalore Chemicals (supra). As we have already made reference to the same earlier, repetition of the same is not necessary. From the above decisions, the following position of law would, therefore, clear. Exemptions from taxation have tendency to increase the burden on the other unexempted class of taxpayers. A person claiming exemption, therefore, has to establish that his case squarely falls within the exemption notification, and while doing so, a notification should be construed against the subject in case of ambiguity.

49. The ratio in Mangalore Chemicals case (supra) was approved by a three-Judge Bench in Novopan India Ltd. v. Collector of Central Excise and Customs, 1994 Supp (3) SCC 606 = 1994 (73) E.L.T. 769 (S.C.). In this case, probably for the first time, the question was posed as to whether the benefit of an exemption notification should go to the subject/assessee when there is ambiguity. The three-Judge Bench, in the background of English and Indian cases, in para 16, unanimously held as follows :

"We are, however, of the opinion that, on principle, the decision of this Court in Mangalore Chemicals - and in Union of India v. Wood Papers, referred to therein - represents the correct view of law. The principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee - assuming that the said principle is good and sound - does not apply to the construction of an exception or an exempting provision, they have to be construed strictly. A person invoking an exception or an exemption provision to relieve him of the tax liability must

establish clearly that he is covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State...."

50. In Tata Iron & Steel Co. Ltd. v. State of Jharkhand, (2005) 4 SCC 272, which is another two-Judge Bench decision, this Court laid down that eligibility clause in relation to exemption notification must be given strict meaning and in para 44, it was further held -

"The principle that in the event a provision of fiscal statute is obscure such construction which favours the assessee may be adopted, would have no application to construction of an exemption notification, as in such a case it is for the assessee to show that he comes within the purview of exemption (See Novopan India Ltd. v. CCE and Customs)."

51. In Hari Chand case (supra), as already discussed, the question was whether a person claiming exemption is required to comply with the procedure strictly to avail the benefit. The question posed and decided was indeed different. The said decision, which we have already discussed supra, however, indicates that while construing an exemption notification, the Court has to distinguish the conditions which require strict compliance, the non-compliance of which would render the assessee ineligible to claim exemption and those which require substantial compliance to be entitled for exemption. We are pointing out this aspect to dispel any doubt about the legal position as explored in this decision. As already concluded in para 50 above, we may reiterate that we are only concerned in this case with a situation where there is ambiguity in an exemption notification or exemption clause, in which event the benefit of such ambiguity cannot be extended to the subject/assessee by applying the principle that an obscure and/or ambiguity or doubtful fiscal statute must receive a construction favouring the assessee. Both the situations are different and while considering an exemption notification, the distinction cannot be ignored.

52. To sum up, we answer the reference holding as under -

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show

that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."

Since the controversy in respect of interpretation of the exemption notification has now been settled by the Hon'ble Apex Court in this decision, relying on this decision there is no scope left for holding a view which is contrary to the principle laid down that notification needs to be construed strictly and ambiguities resolved in favour of the revenue. In view of the above we do not find any merits in the submissions made by the appellant/assessee on the merits of the case. Thus we conclude that questioned referred at "a" in para 4.2 above, is answered in favour of revenue.

4.7 Now coming to the question at "b" in para 4.2 above, Commissioner has in impugned order justified invoking the extended period by stating as follows:

"19. Next comes the question as to whether there can be a case for invoking the extended period to demand the tax. The assessee came out with strong arguments to state that there was no suppression on account of the fact that their records had been regularly audited by the Departmental audit teams. However I find that in the instant case there is every cause to state that facts have been suppressed. At no point of time the assessee had informed the Department that the subject product was used outside the factory of production. Pertinently, it is necessary to observe that under the present scheme of self assessment, where full faith is imposed on the assessee and records maintained by the assessee are accepted for tax purposes, it is very essential that the assessee also reciprocates the trust and comes clean on their activities. Besides, considering all the facts, the officers have very little scope to

know about the use of the item in question so as to arrive at any meaningful conclusion. Also, the assessee, as a corporate with resources at command, it is all the more expected that they will be fully aware of the Rules and procedures of Central Excise. The conclusion therefore would be that the act of assessee, would justify invoking the extended period to demand duty."

We do not find any justification in the impugned order for invoking the extended period, as Commissioner has not even recorded finding to effect, that the ingredient with intent to evade the payment of duty, for invoking the extended period of limitation is present in the case. The issue under consideration is purely of interpretation of two competing entries in the notification and the appellant/assessee has explained the reasons for the interpretation made by him for adopting a particular interpretation. The interpretation as adopted by the appellant/assessee was also affirmed by the tribunal in the cases as referred by the appellant/assessee. Just because the interpretation of the notification adopted by the appellant/assessee is not acceptable, it cannot be ground for invoking extended period of limitation.

4.8 Now we take up question at "c" in para 4.2. Appellant/Assessee have paid certain amounts while clearing the goods claiming exemption from duty, @ 5%, 8% or 10% of the value of goods as applicable. This amount which paid by the appellant/assessee was required to be paid by them in terms of Rule 6 of CENVAT Credit Rules, 2004 as they were not maintaining separate account for the goods cleared under exemption and on payment of duty. The fact that appellant/assessee has paid the said amount cannot be disputed, Commissioner has in his order only observed that the appellant/assessee was not able to provide any proof of such payment. In our view the observation made by the Commissioner are totally erroneous as all the amounts so paid or reversed from the CENVAT account are definitely reflected in the monthly returns filed by the appellant/assessee. We are of the view for the periods when the claim to complete exemption from payment of duty is denied the amounts so paid need to be

adjusted against the duty demanded denying the benefit of exemption claimed.

4.9 Now coming to issue of penalty imposed under Section 11AC, question at "d" in para 4.2. In case of Rajasthan Spinning and Weaving Mills [2008 () ELT 3 (SC)] Hon'ble Supreme Court has clearly laid down as follows:

"22. There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision the court noted the submission made on behalf of the revenue as follows :

"5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in section 11AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible under Section 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statutes mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The said clause referred to wilful action. According to learned counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should

not exceed a particular limit, that itself indicates scope for discretion but that is not the case here.”

23. The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides.”

Since we hold that conditions for invocation of extended period as per Section 11 A do not exist in the present case the penalty imposed in terms of the Section 11 AC thus cannot be sustained.

4.10 Thus in view of the discussions above we would summarize our findings in respect of these appeals as follows:

A. Appeal No E/999/2012:-

- a. Demand is maintainable on merits of the issue.
- b. Extended period of limitation cannot be invoked in facts and circumstances of this case, hence demand needs to be worked out for the normal limitation.
- c. Adjustment should be allowed for the amounts paid @ 5%, 8% or 10% of the value of goods cleared under exemption, for the period for which the benefit of exemption is denied and duty demand confirmed.
- d. Penalty under Section 11 AC is set aside.

B. Appeal No E/85885/2013 and Cross Objections E/Cross/91108/2013

- a. Demand is maintainable on merits of the issue and the order of Commissioner (Appeal) to that extent set aside.
- b. Adjustment should be allowed for the amounts paid @ 5%, 8% or 10% of the value of goods cleared under exemption, for the period for which the benefit of exemption is denied and duty demand confirmed.
- c. Penalty under Rule 26 of Central excise Rules, 2002 as imposed by the Additional Commissioner is set aside.

5.1 In result, the

- i. Miscellaneous application filed by the appellant/assessee for the change of cause title is allowed in view of the decision of the Hon'ble Bombay High Court.
- ii. Appeal No E/999/2012 filed by the appellant/assessee is partly allowed and matter is remanded back to original authority for re-computation of the demands as per our observations in para 4.10 above.
- iii. Appeal No E/85885/2013 filed by the Revenue is partly allowed and matter is remanded back to original authority for re-computation of the demands as per our observations in para 4.10 above.
- iv. Cross objections are disposed off.
- v. Since the matter is quite old, the Revenue authorities should finalize the issue in remand proceedings within three months of the receipt of this order.

(Order pronounced in the open court on 17.03.2022)

(Sanjiv Srivastava)
Member (Technical)

(P. Dinesha)
Member (Judicial)